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THE IMPORTANCE OF THE INTERUNIVERSITY COMMISSION'S DRAFT DECREE ON ENVIRONMENTAL POLICY TO NATURE CONSERVATION AND AGRICULTURE IN THE FLEMISH REGION[1]

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1. INTRODUCTION

1.1. The Interuniversity Commission for the Restatement of Environmental Law in the Flemish Region (ICRE)

On 05/07/1989, the Flemish Government decided to set up an Interuniversity Commission for the Restatement of Environmental Law in the Flemish Region (further: ICRE). The task of the ICRE was to "compile a draft Proposed Outline Decree relating to environmental protection, and to make the necessary recommendations to improve the effectiveness of environmental protection law". Inter alia, the ICRE was to endeavour to achieve the "rationalisation and simplification of environmental legislation" as well as a "more efficient use of suitable environmental policy instruments such as quality objectives, the control of sources of pollution, levies and other economic measures, safety and sanitation measures, the integration of environmental aspects in other essential areas, and environmental policy planning".

The ICRE commenced its activities on 01/11/1989. At this moment, the draft of the ICRE has been entirely completed. On 20/02/1995 the Chairman of the ICRE, Prof. Dr. Hubert Bocken, has transmitted the "draft Decree on Environmental Policy"[3] (further: ICRE-draft) to the Minister for the Environment.

1.2. The draft Decree on Environmental Policy (ICRE-draft)

The ICRE-draft is in the first instance an attempt at achieving a comprehensive *codification of Flemish law of environmental protection*. The object is to achieve a systematic body of law comprising all the rules in this area of the law, on the basis of a clear notion of the objectives and instruments of environmental policy.

Environmental law, which, in Flanders as in other countries, has experienced a great expansion during the past few decades, has not been constructed in a systematic manner, but has tended to develop on a haphazard basis. In many cases, new legislation represented a response to some concrete incident or to obligations incurred under international or European law. There was seldom any question of tackling the various issues in a global and co-ordinated manner. This is why environmental law developed on an extremely sectoral basis. Only in recent years some initiatives for a more comprehensive approach can be noticed, f.i. the integration of different sectoral permit-systems in a more integrated one. The absence of any uniformity in the rules concerning the organisation of the decision-making process and its enforcement made sectoral environmental law unnecessarily complicated. Moreover, there was but a limited input from lawyers in the development of early environmental legislation, as a result of which many legal problems of a technical nature arose.

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[1] Report for the CEDR-Congress "Rural law, nature conservation and restoration" in Strasbourg, Palais de l'Europe, 19-20 October 1995.

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[3] INTERUNIVERSITAIRE COMMISSIE TOT HERZIENING VAN HET MILIEURECHT IN HET VLAAMSE GEWEST, *Voorontwerp Decreet Milieubeleid*, Brugge, Die Keure, 1995, 1255 p.

The ICRE-draft therefore attempts to give to environmental law that *internal co-ordination* which it has hitherto lacked. Only about 25 per cent of the provisions of the ICRE-draft would be applied on a sectoral basis. This internal unification of environmental law manifests itself inter alia in the wording of the general objectives principles, as well as in the general rules and the overall application of specific environmental policy instruments which were developed in the course of recent years. A great deal of attention was also given to the harmonisation of the legal underpinning of environmental policy. The main areas in which this has been done are procedures for decision-making by means of regulations or decisions, the supervision and enforcement of environmental legislation, and the rectification of environmental damage.

From a substantive point of view, the ICRE has sought *to make environmental law more effective and give it greater authority, without losing sight of its impact on the economy and its social acceptability*. In this respect also, the general principles and the systematic application of specific environmental policy instruments, as well as the emphasis on a policy based on quality, occupy a very important place.

In addition to substantive environmental objectives, the ICRE has also taken into account the *legal quality* of the applicable environmental law.
Where possible, the ICRE-draft has sought to ensure legal certainty and predictability. In this respect also, it is important that the discretion in policy making enjoyed by the administration is guided by substantive criteria. Higher standards of legal protection are sought by involving, where possible, the interested parties in the decision-making process by means of co-determination procedures, and by providing them with possibilities of appeal.
This does not take away the fact that the ICRE has sought to take account of the options which have already been expressed in existing environmental legislation. One of the major concerns of the ICRE in this respect is to harmonise Flemish environmental law with the European and international environmental law. In so doing, an attempt is made to make full use of the increased legislative powers of the Flemish region in the area of environmental policy, whilst remaining fully mindful of the limitations which remain in this field, more particularly in the area of product policy.

1.3.The ICRE-draft and the Flemish environmental legislation

The ICRE was pleased to note that at least some of its proposals are capable of standing the test of social, political and legal assessment, and could form the basis for an improvement in environmental law.
The former Minister presented a number of its sub-proposals to the appropriate advisory councils, as well as to the Flemish Government, although in a somewhat adjusted form. It is a positive result that, at this time, *the Flemish Council has already approved four Decrees which were inspired by the proposals made by the ICRE regarding environmental covenants, waste, soil sanitation and general provisions on environmental policy (including principles and objectives, environmental policy planning and environmental quality standards)*[4]. However, for the moment it's unclear of the new Minister will go further in the same direction.
Although the ICRE-draft forms an entity, the ICRE fully approved the policy of the former Minister, which consisted in dealing with subproposals individually. The ICRE has, however, recommended that, once the legislator has completed its work in the shape of a number of individual environmental decrees, an attempt be made to restore the coherence of the entire structure. This will be possible by giving the Government the task of co-ordinating the new Decrees.

2.THE IMPORTANCE OF THE ICRE-DRAFT TO NATURE CONSERVATION AND AGRICULTURE

[4] Decreet van 20 april 1994 tot wijziging van het decreet van 2 juli 1981 betreffende het beheer van afvalstoffen, *B.S.*, 29 april 1994; Decreet van 15 juni 1994 betreffende de milieubeleidsovereenkomsten, *B.S.*, 8 juli 1994; Decreet van 22 februari 1995 betreffende de bodemsanering, *B.S.*, 29 april 1995; Decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid, *B.S.*, 3 juni 1995; Decreet van 19 april 1995 tot aanvulling van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid met een titel bedrijfsinterne milieuzorg, *B.S.*, 4 juli 1995.

2.1.In general

Anyone comparing the original plan of the activities of the ICRE with the table of contents of the ICRE-draft will notice a number of differences. One of the most important of these differences already emerges from the title. Instead of a "draft Proposed Outline Decree on Environmental Protection", the instrument in question became a "draft Proposed Decree on Environmental Policy".
There are several reasons for this modification. In the first place, it proved necessary to draw up a number of detailed texts, which would have made it inappropriate to refer to this instrument as "outline legislation". In addition, the scope of the original subject-matter, i.e. environmental protection, proved to be too narrow. More particularly account was taken of the relationship between measures combating environmental pollution and other areas of environmental policy, such as nature conservation, the protection of natural beauty and the management of natural resources. Nevertheless, the ICRE did not go so far as to cover the substance of all aspects of environmental policy. *The main part of the ICRE-draft relates to environmental health, since this was the ICRE's main task*. This is why *the broadening of the scope of the ICRE's activities from environmental protection to cover environmental policy manifested itself especially in the general provisions of the ICRE-draft.* These were conceived in such a way that they provided a centre of gravity around which other areas of a more extensive environmental code could be built. In addition, *the provisions concerning the decision-making process and the policy on water and soil were worded in such a way as to enable an integrated approach to be adopted in the implementing decisions which exceeds the area of pollution*.

Concerning nature and landscape conservation, particular mention should be made of the provisions of the ICRE-draft related to *the definitions, the objectives of environmental policy, the environmental policy planning and the environmental quality standards. These provisions are, although in a somewhat adjusted form, incorporated in the Decree of 5 June 1995 on Environmental Policy*. But also other provisions of the ICRE-draft, f.i. those related to *soil protection and soil sanitation* are relevant to nature and landscape conservation and agriculture.

2.2.The definition of "the environment"

The subject-matter of environmental policy is the protection and control of the human environment, i.e. the physical environment. Environmental law provides a legal framework for environmental policy, on the one hand by forming a basis for the environmental policy pursued by the authorities, and on the other hand by creating a range of instruments for this policy. In addition, environmental law seeks to organise the decision-making process in such a way that those interests which have a role to play in environmental policy are assessed in an impartial manner, although this process is obviously dependent on the political decisions taken and the policy laid down. In addition, the legislation provides the necessary legal "infrastructure" as regards the maintenance of the environment and repairing any damage caused to it. This does not prevent other general rules from such areas as civil law, criminal law and public law from being relevant, insofar as they supplement environmental law or make it operational.

The ICRE-draft seeks to protect both "humans and the environment", so one of the more important concepts defined in art. 1.1.2 is that of "the environment". This concept is defined in a very broad manner. *In addition to the abiotic components (i.e. the atmosphere, soil and water) and the biotic components (i.e. the flora, fauna and non-human organisms), the ecosystems, landscapes and the climate are also expressly mentioned*. The latter three elements amount to more than interrelations between the biotic and the abiotic components.

2.3.The objectives and principles of the environmental policy

-The objectives

When formulating the objectives of environmental policy in art. 1.2.1(1), the ICRE was inspired by, inter alia, the "general principles concerning natural resources and environmental interference" (these are the so-called Brundtland principles, named after the Norwegian Chairwoman of the World Commission for the Environment and Development, set up in 1983 by the United Nations).

The environmental policy to be pursued has four objectives.

The first objective is "environmental management": "to manage the environment by means of the sustainable use of natural resources and by protecting man and the environment against extraction". Environmental management must be aimed at ensuring that future generations are able to use those natural resources which the generations of the 20th century have used. This entails that environmental management seeks to achieve the sustainable use and utilisation of natural resources.

The oldest and best known aspect of environmental policy, i.e. "environmental health", seeks to protect the main elements of the environment, i.e. the air, soil and water, against pollution, and thus to protect humans and other living organisms against the adverse consequences thereof. In positive terms, environmental health concerns itself with the care of the quality of the air, soil and water.

Thr third objective of environmental policy is "nature conservation": "*to conserve nature and promote biodiversity, more particularly by maintaining, restoring and developing natural habitats and ecosystems, and by protecting wildlife, in particular such species of wildlife as are threatened, vulnerable, rare or endemic*". This term is preferred to that of "nature protection". To conserve involves more than merely giving protection. It concerns the conservation of the essential natural processes in space and in time, of the natural ecosystems and of the natural diversity of the biosphere. The terminology used here corresponds to that of Directive 92/43/EEC of the Council of 21/05/1992 on the conservation of natural habitats and on the wild flora and fauna, and is based on the Convention on Biological Diversity of 05/06/1992, as well as the Nature Policy Plan applied in the Netherlands.

Closely related to the previous objective of environmental policy is the aim of "landscape care": "*to protect landscapes and promote scenic diversity, in particular by maintaining, restoring and developing landscapes having esthetic, ecological or historical value*". Landscape care - being a notion which, unlike the term "landscape conservation", has become a familiar concept in Flanders[5] - implies a global and comprehensive approach. Ecologically valuable landscapes will include various habitats. In addition to the ecological resources, the value of a landscape in terms of its cultural history or its esthetic properties can also constitute a reason to protect it. By an analogy with the term "biological diversity", there is now the notion of "landscape diversity", which is a concept which opposes the uniformisation, harmonisation and levelling out of the landscape.

-The principles

Article 1.2.1(2) and (3) contain the principles of the environmental policy to be pursued.

The principles which are laid down in Article 1.2.1(2), and which are now commonly accepted, have been largely derived from Article 130 R(2) of the EC Treaty, as amended by the Single European Act and the Maastricht Treaty. We are dealing here more particularly with *the principle of starting from a high level of protection, the principle of preventive action, the preference for rectification of damage at the source, the pollutor pays principle, and the precautionary principle*. The latter principle has a key role to play in the pursuance of a preventative environmental policy. It entails that there is no need to await a consensus of scientific opinion in order to tackle certain potential threats to the environment - it is sufficient to have serious indications to that effect. Although it is obvious that, in practice, environmental policy takes into account its social and economic implications, these four principles have been supplemented by the express statement that *the policy pursued must take the social and economic consequences into account*. Also *the standstill principle* is included. Frequent use is made of this principle in the European directives. It must be viewed in the light of the current state of the

[5] As in Germany: "Landschaftspflege".

environment. In view of the fact that this current state of the environment is poor, an attempt must be made at least to halt any further decline in standards.

Article 1.2.1(3) mentions the *integration principle*. This principle entails, inter alia, that the objectives and principles of environmental policy must also be given an essential role to play in the other areas of policy.

2.4.The environmental policy planning

The notion of integrated environmental planning has assumed a highly prominent profile in recent years, first in the Netherlands, followed more recently by the other Western European countries, and, as far as Belgium is concerned, also in Flanders and in Wallonia.

The text which was drafted by the ICRE has been very much inspired by the Netherlands model. Other sources of inspiration were the US. Taking account of, inter alia, the practical results which have hitherto been experienced in this field, a system of rules has been devised which takes into account the specific characteristics of the institutional context of Belgium and of Flanders.

A fundamental assumption which underlies this section is that the decision-making process must be based on comprehensive policy planning. The envisaged planning process consists of three stages and three levels.

Every two years, a scientific environmental report is drawn up at the level of the Flemish region which examines the existing state of the environment. In addition, it makes an assessment of the policy which has been applied up to that point, and contains projections concerning future trends in the state of the environment. This environmental report can be described as a form of *informative planning.*

On the basis of the environmental reports, an environmental policy plan is drawn up every five years, which contains the principal policy items which the Region wishes to carry out over the forthcoming five-year period. In so doing, it replaces those sectoral plans which have applied up to this point at the level of the Flemish Region, to wit the General Water Cleaning Programme and the Waste Policy Plan. The plan seeks to cover the entire field of environmental policy and *must take full account of the objectives and principles of the environmental policy*. The regional environmental policy plan, which is a *strategic plan*, is and prepared by the administrative organs responsible for the environment in accordance with the open planning principle, and following such exercises in consultation and negotiation as have been officially confirmed by the Flemish Government, and is finally adopted by the Flemish government. In part, the environmental policy plan is intended merely as a set of guidelines for the authorities; in part it is intended to binding on the authorities. Only in exceptional circumstances may the authorities depart from the binding provisions of the plan. The plan also contains provisions aimed at achieving co-ordination with land use plans. The environmental policy plan must also include an examination of the implications of the envisaged environmental policy for town and country planning, and, where it appears that the regional land use plans need to be adjusted, the latter must be subjected to the review procedure.

The environmental policy plan is given concrete expression every year in the shape of an annual environmental programme which is of an operational character. The annual environmental plan shall be adopted by the Flemish Government, and shall be linked to the procedure for determining the budget for the coming year.

The provinces and municipalities may also adopt environmental policy plans and annual environmental programmes. This has not as yet been made compulsory. The Flemish Government may, however, give financial support to the drawing up of such plans and programmes; in addition, they may, following an appropriate assessment and after a certain time has elapsed, make them compulsory.

2.5.The environmental quality standards

The section on environmental quality standards has also to a considerable extent been inspired by the Netherlands model. However, account was also taken of legal systems and of the relevant European legislation and case law.

The Flemish Government must draw up a comprehensive range of environmental quality standards, which state the quality requirements which must be met by the various components of the environment, such as the soil, the water, and the air. Environmental quality standards stipulate the maximum permissible amount of polluting substances which may be contained by the air, the water or the soil; these are the physical-chemical parameters. *They may, however, also identify those natural or other elements which the environment must contain in order to protect the ecosystems and promote biodiversity; these are the ecological parameters.*

2.6.The protection of the soil

The first threat to the soil, which, in the definition of the ICRE-draft, includes the ground water, is that of pollution. The term "pollution" is defined as "the presence, caused by human activity, of polluting substances in the atmosphere, soil or water which has an adverse effect, or is capable of having an adverse effect, on man or on the environment". Because of the revision of the Manure Decree which has been under preparation for some time now in the relevant circles, the problems presented by manure fall outside the scope of the ICRE's responsibility. Accordingly, the title "Protection of the Soil" does not lay
down any rules on this subject. Other threats to the soil are, inter alia, erosion, condensation and extraction. They are caused mainly by unsuitable methods of cultivation or of agriculture, by deforestation or by the removal of vegetation, water or soil.

There are many ways of producing an adverse effect on the soil which appear to cause irreparable damage, or damage which can only be rectified by incurring very high costs. Hence the growing realisation of the necessity of a preventive policy. In this part of the ICRE-draft, a legal framework is created in order to be able to tackle preventively various activities which are capable of polluting, removing or affecting the soil, including the ground water. Here, the specific objective is to make, or keep, the soil suitable for as many purposes as possible. In order to realise this objective, provision is made in this part of the ICRE-draft for a wide range of instruments. In the first place, the Flemish Government may draw up basic quality standards for certain areas. It designates those areas which require special protection, and lays down *special environmental quality standards for designated protected areas or designated categories of soils.*

The ICRE opted for a combination of measures aimed at the effects of pollution and measures aimed at the sources of pollution. The environmental quality standards already illustrate the first-named approach. The best possible illustration of the proposed combination is the possibility of designating protected areas. These should make it possible to take action aimed at the particular area in question. There are in addition provisions which create a framework for the rule-making process aimed at specific sources causing the soil to be polluted, extracted or affected. User standards may regulate the use of those products which are capable of polluting or affecting the soil. In relation to dangerous substances, it was necessary, in accordance with the applicable EEC directives in this field, to lay down far-reaching restrictions. A distinction is drawn between grey list substances and black list substances. Rules are proposed in relation to the release of waste water onto or into the soil.

It is also laid down that the Flemish Government may adopt general rules concerning the use of the soil in order to protect the latter against erosion, condensation or any other adverse consequences. These could relate to the choice of cultivation made, crop rotation, implantation of vegetation, methods of working the soil, or, possible, the fallowing of the soil.

There is a chapter which has been devoted to ground water extraction and the artificial supplementing of ground water. Guarantees in relation to vulnerable areas have been built into the system. Protected areas may be created for the purpose of ground water extraction. In certain cases it will be necessary to proceed to expropriation.

Finally, provision is made for rules governing liability for any damage and disruption of the environment caused by ground water extraction. The system chose was to create a non-rebuttable presumption under which major

ground water collection operations carried out on a ground water table are deemed to be at the origin of the damage of which it is provied that it was caused by a lowering of the ground water table. There are, however, a number of grounds for exemption from this liability.

3.CONCLUSIONS

The past two days I attended the Congress "Habitats 2000", a congress earlier in this so-called Nature Week. One of the conclusions of that congress was that *the only way to maintain biodiversity is to integrate biodiversity in the other policies, f.i. those related to physical planning, economy, agriculture, infrastructure and so on*. In this respect, the ICRE-draft and the Flemish Decree of 5 June 1995 can be a good example how to establish general principles and an integrated environmental planning aiming at this integration. In particular, the integration principle together with the integrated environmental planning imply: 1° that the policy concerning pollution has to take full account of the objectives of nature conservation and landscape care (this is the first level of integration: integration of nature and landscape conservation in the general environmental policy); and 2° that other areas of policy have to take full account of the objectives of nature conservation and landscape care (this is the second level of integration: integration of nature and landscape conservation in the other policies).