The Rhine pollution by industrial discharges: new dimensions of the good neighbour doctrine?*

> 'The rule that you are to love your neighbour becomes in law "You must not injure your neighbour"'
> Lord Atkin, 1932

I. Introduction. The Change from the International to the National Law Approach in Environmental Liability

Last year's Sandoz-spill has drawn attention in a dramatic way to the dangers of the pollution of the Rhine by industrial waste. One should not lose out of sight though, the accidental character of the discharge, whereas the real dangers of pollution lie in the continuous use of this river (one of the largest in the world and of vital importance to some 40 million people) as an open sewer. The figures are alarming: During the 1973 - 1975 period at the point where the Rhine flows into The Netherlands before reaching the North Sea, the river carried an per year average of 47 tons of mercury, 400 tons of arsenic, 130 tons of cadmium, 1,600 tons of lead, 1,500 tons of copper, 1,200 tons of zinc, 2,600 tons of chromium, and 12 million tons of chlorides.[1] In 1979 the discharge of the last chemical (NaCl) reached a peak of 22 million tons, 40% of which was coming from the Potassium Mines in the Alsace, France. At the moment the situation has improved in regard to a number of dangerous chemicals, but on the whole is far from satisfactory. The disposal today of NaCl, for instance, is still impressive: the Potassium Mines alone still discharge 15,000 tons per day, into a river which is of great importance for the supply of drinking water and the irrigation of the fields, especially in The Netherlands.

The use of the Rhine by the industries became a growing concern of the riparian states after World War II. In this stage the role of law was specifically in the field of international law, through inter-state consultations. This has led to the formation of the International Rhine Commission, and also the Commission for the Protection of the Rhine against pollution (Berne, 1963). [376] After a preparation of over 25 years, the riparian states finally signed the Bonn Convention on the protection of the Rhine against pollution by chlorides, 1976 (the Bonn Salt Treaty). However, by that time there was little hope left that a solution would be found via treaties and rules of international law, where the economic interests and political opposition (Alsace!) were evident. At that point a number of leading

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* *Rechtstheorie, Beiheft 12*, 1991, p. 375-381 (Proceedings IVR Conference, Kobe, Japan).

[1] These data are taken from Alexander Kiss, The protection of the Rhine Against Pollution, 25 *Natural Resources J.*, p. 613, at 614 (1985); H.U. Jessurun d'Oliviera, 29 *Ars Aequi* 1980, p. 788.

scholars lost patience and pleaded for other legal solutions, primarily by an action in private law before a civil court, holding polluting companies liable in tort for the damage sustained by individual citizens.[2] They probably realized the length of the new road taken, and the uncertainties and legal intricacies ahead, which proved only too true, if we look back now. The principal case, started before the District Court of Rotterdam against the French Potassium Mines in 1974, is entering its 13th year now, and is waiting for the decision of the Dutch Supreme Court (Hoge Raad). There seems to be no alternative, however.

In this paper I will look into this change in legal approach of the problem of pollution of the Rhine, and will focus on the interaction of norms of international law and domestic private (tort) law. Thus the good neighbour comes into sight. In the end I will try to draw Japanese law into the picture, where to my impression, a comparable development is taking place.

II. Liability for Rhine Pollution in the Courts: the French Potassium Mines Case

In 1974 three market nursery firms in the Western part of The Netherlands started a lawsuit against the Mines de Potasse d'Alsace SA, of Mulhouse, France, and claimed compensation of the damage suffered as a result of the salt discharge by the Mines.[3] The salinated Rhinewater was used by the firms for irrigation of their crops. The question of the jurisdiction of the Rotterdam [377] District Court was brought before the European Court, which gave an affirmative answer. In an interesting interlocutory decision of 1979 the court accepted the view that principles of international law should be applied as being a part of Dutch private law, citing Sir Lauterpacht:

> 'There is nothing in the interests protected by international law which is fundamentally different from those protected by municipal and private law … Between individuals, autonomous groups, and States there is a legal difference of degree only'.

Thus 'the general principles of law recognized by civilized nations' are accepted by the court in applying domestic tort law. The principle picked by the

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[2] Compare d'Oliviera and Kiss (note 1); Johan G. Lammers, New international legal developments concerning the pollution of the Rhine, 27 *Neth. Internat. L.R.*, p. 171, at 192 (1980); Alfred Rest, Responsibility and liability for transboundary air pollution damage, in: *Transboundary Air Pollution*, Flinterman/Kwiatkowska/Lammers (eds.), Dordrecht 1986, p. 299, at 330.

[3] District Court Rotterdam 8 Jan. 1979, in: *Ned. Jur.* 113 (interlocutory judgment), *Bier BV, Firma Strik and Valstar BV - Mines de Potasse d'Alsace SA*; *Ars Aequi* 1980, (note 1), p. 788; summary in English, in: *Neth. Yearbook of Internat. Law*, vol. XI (1980), p. 326; compare also Rest, 5 *Environm. Policy & Law* (1979), p. 85. District Court Rotterdam 16 Dec. 1983, *Ned. Jur.* 1984, 341 (final judgment); 33 *Ars Aequi* (1984), p. 153, note d'Oliviera; Rest, 4 *Umwelt- und Planungsrecht* (1984), p. 148; *idem,* 35 *Österr. Z. öffentl. Recht und Völkerrecht* (1985), p. 225, at 251. Both decisions are also extensively discussed by Soussan Nassr-Esfahani/Manfred Wencksteirn, Der Rheinversalzungsprozess, in: 49 *Rabelsz.* (1985), p. 741. For a survey, see also J.M. van Dunné, Die Anwendung des internationalen und nationalen Umweltrechts bei den Prozessen um die Einleitungen der französischen Kaligruben, in: *Internationale Arbeitsgemeinschaft der Wasserwerke im Rheineinzugsgebiet - IAWR, 11. Arbeitstagung*, 20 - 23 Okt. 1987, Noordwijk aan Zee, Amsterdam, 1987, p. 129.

court is that of *sic utere tuo ut alienum non laedas*, one should act in such way that other persons or goods will not be harmed. This principle, applied before in international arbitration cases like the American/Canadian *Trail Smelter* case (1941, air pollution) and the French/Spanish *Lac Lanoux* case (1957, water pollution), is described by Oppenheim-Lauterpacht, also cited by the court, in the following way:

> 'The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in the same principle. The maxim, *sic utere tuo ut alienum non laedas*, is applicable to relations of States no less than to those of individuals; it underlies a substantial part of the law of tort in English law and the corresponding branches of other systems of law; it is one of those general principles of law recognised by civilised States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute' (*International Law*, Vol. I, 8th ed. 1955, p. 346).

In the final decision of the Rotterdam Court of 1983 this point of view is stressed again; some more cases are discussed by the court in this context, among which the decision of the Tribunal Administratif de Strasbourg of 1983 on the salt waste discharges of the Mines. Again Oppenheim-Lauterpacht is cited, on the use of water of a river:

> 'It is a rule of International Law that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its territory to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part' (o.c, p. 474).

Finally the court awards damages to the nursery firms, based on the measures taken to desalinate the river water for irrigation purposes, thereby taking into account the proportion of salination which is caused by the Mines. The use of international law principles in tort law by the Rotterdam Court has stirred a discussion in academic circles, and has met with some criticism.[4] Speculation about the creation of a new rule of law for environmental liability was tempered by the decision of the The Hague Court of Appeal in this case, of September 1986, which did away with the application of international [378] law in one sentence.[5] The lower court's decision was upheld, however, on the alternative grounds formulated by the District Court, which were based on domestic tort law. The outcome therefore, is the same (appeal before the Hoge Raad, the Dutch Supreme Court, is pending).[6] A crucial statement of the Appeal Court is the following:

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[4] Compare e.g. d'Oliviera (note 1 and 3); Rest 1985 (note 3) and 1986 (note 2).

[5] Court of Appeal The Hague, 10 Sept. 1986, in: *Tijdschr. v. Milieu Aansprakelijkheid/Environm. Liability Law Q.* 1 (1987), p. 15, English text p. 23, note Van der Meer. For a discussion of this case, see the article of the present author in the same review, *TMA/ELLQ* 2 (1988), p. 33, De Franse Kalimijnen-zaak en milieu-aansprakelijkheid. Een tussenbalans (summary in English p. 43).

[6] In the mean time the Dutch Supreme Court has rendered a decision in the case, Hoge Raad 23 September, 1988, *RvdW* nr 150, *TMA/ELLQ* 1 (1989), p. 12, note Van Dunné, with

> 'It must be noted that both the Mines and the nurserymen are entitled in principle to their commercial interests in the Rhine, respectively to make use of the Rhine water, but thereby the Mines as a user situated upstream must take into account the interests of users situated down stream, such as the nurserymen. If they do this to an insufficient extent, they behave in conflict with the care befitting to them in respect of the nurserymen. This is the case if by continuously discharging large amounts of salt into the Rhine, the Mines inflict foreseeable, continuous and significant damage on the nurserymen, and are not prepared to defray the loss which includes the cost of measures to limit the damage in so far as these can be reasonably charged to its account' (6.2).[7]

III. The Sic Utere Principle in International Law and Private Law Compared. The Good Neighbour Doctrine Revisited

An analysis of the Appeal Court's view leads to the conclusion that the rule of Dutch tort law thus formulated is hard to distinguish from the *sic utere* principle of international law for inter-state acts, which was directly applied by the Rotterdam Court. This is hardly surprising if one realizes that the international principle is based on the same principles applied in the domestic law of the states, as was illustrated before by the Oppenheim-Lauterpacht citation.[8] Are we dealing here with what the Germans would [379] call an 'Etikettenschwindel' (labeling swindling)? Such a conclusion may be satisfactory for the pragmatist, for our purposes, the reflection on the norms in force in this domain of the law, further analysis is requested. In that course, it is my intention to demonstrate that the *sic utere* principle of international and national (tort) law is rooted in the so-called *good neighbour* doctrine in tort law. In English law this doctrine goes back to the famous statement of Lord Atkin in *Donoghue v. Stevenson* of 1932, as the founding father of the duty of care in tort:

> 'there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances … The rule that you are to love your neighbour becomes in law 'You must not injure your neighbour'; and the lawyer's question 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law, is my

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English translation, p. 29. In this decision of the Hoge Raad the Appeal Court's decision was upheld, see further note 10.

[7] The Appeal Court's approach actually is in line with the scarce case law on pollution from the turn of the century, compare the author's article cited in note 5. As early as 1915 the Hoge Raad ruled that the upstream user of river water is bound to use the water in such way that it will not become unusable for the downstream user of the water, *Voorste Stream I*. The instrument of the weighing of interests of the parties in pollution cases, is taken over from the law of nuisance. In 1943, *Voorste Stream VI*, the Hoge Raad introduced the phrase that the polluter, a city polluting the stream with waste water, should take the harmful consequences of the waste disposal for the riparian owners 'for her account'. It was agreed by the court that the city, having no financial means for the installation of a purification plant and only taking restricted measures which were not effective, acted reasonably in doing so from the perspective of municipal interests. However, not paying the damage inflicted still constituted a tort. The case law described, is relatively unknown; it was not discussed by counsel in the pleadings, nor cited by the Appeal Court.

[8] In this sense also Van der Meer, in the first comment on the case (note 5).

> neighbour? The answer seems to be - persons who are so closely or directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.

This doctrine, sometimes described as the 'New Testament doctrine', has its counterpart in Dutch law in the 1919 decision of the Hoge Raad *Lindenbaum - Cohen*, whereby a societal duty of care in regard to other persons or goods was introduced. In the case law that followed, with a peak in the last decades, the highest court took the view that one should take care for another person's well-being, by taking into account his shortcomings and failings in his social behaviour. In all kinds of traffic situations one should foresee failures made by other participants, and act accordingly, by warning, taking measures to prevent or reduce the danger and the possibility of damage caused thereby. Thus in society one is one's brother's keeper, from the point of view of law. Translated into the legal jargon, one may conclude that in cases of the infringement of traffic and safety norms the Dutch case law holds that the liability in tort is a *pseudo-strict liability*. Is this the situation in general tort law, in environmental liability cases the common approach of the lower courts, including some courts of appeal, in The Netherlands is even *strict liability* or liability without fault.[9] Thus the act of polluting the environment *per se* is constituting a tort in regard to individuals who have sustained damage thereby.[10] [380]

These observations on the principles of national tort law may lead to the conclusion that the *sic utere* or *good neighbour* principle is well established in Dutch law, and can be seen as s source for the same principle in international law indeed. The cases, usually in international arbitration, in which the principle was applied in transboundary pollution disputes are not abundant, however. Nor can it be said that *sic utere* is a source of inspiration in concluding treaties to fight transboundary pollution, or, even more important, in the execution of existing treaties and agreements. In this light the reproach that the resource sought in private law litigation in international pollution cases is out of place and that trust should be placed in the course of international law, is not very convincing. Leaving aside, again, the pragmatic view on this matter, the jurisprudent will note that in private law litigation the same work, with the same tools is being done, which could have been taken up by the international law brethren. In that respect, the wailing of polluting companies (like the Potassium Mines) that the whole matter should be left

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[9] For a discussion of this development in tort law and in environmental law, see respectively, J.M. van Dunné, *Verbintenissenrecht in ontwikkeling*, Suppl. 1986, Deventer, 1986, p. 44; idem, De rechtspraak inzake milieu-aansprakelijkheid uit onrechtmatige daad: van schuldbeginsel naar risicobeginsel, in: *TMA/ELLQ* 1 (1987), p. 3, (English summary, p. 9).

[10] As was mentioned before, the Dutch Supreme Court in its decision of 23 September 1988 upheld the Appeal Court's decision. The Hoge Raad ruled that there is 'a reasonable expectation on the part of the downstream user of the river water that the river will not be extremely polluted by extensive discharges'. Again, there is a striking resemblance to the *sic utere* rule. An intriguing aspect of the decision, a land mark decision in the field of transboundary pollution, is that in the case at hand the pollution was not 'extreme', nor were the discharges 'extensive'; the contribution to the local salination at the site of the Plaintiffs' nursery firms is only 14.5 - 17%, and 8.8% respectively, due to the influence of seawater in the Dutch coastal areas. The Hoge Raad's decision is in the traditional French style: brief, without giving arguments or the citation of precedents.

to inter-state diplomacy and consultation, based on sound rules of international law, can be done away with as the shedding of crocodile tears.[11] When a solution is sought in the sphere of private law, one is working at the level of the roots of the norms which should govern international wrongs. With the growing irrelevance of state borders in social and commercial behaviour, the good neighbour will find his neighbour who needs his care not just close by, but also at a farther distance. Living at the sources of a river, this may mean a neighbour at the estuary, some 1,200 km away. Little imagination is needed for that insight, since that same river is being used as a means for transportation from the stone age till our time. Therefore, foreseeability galore. A cynical note here is, that it has been calculated that the pollution of the Rhine with harmful materials equals $^1/_6$ of the total of the goods transported on the Rhine by boat.

An interesting aspect of the approach of the civil court from a jurisprudential point of view is that the basis for liability in tort is not sought in the infringement of rights of the defendants, e.g. property rights. This classic legal construction is left aside and replaced by the use of norms of conduct, [381] labeled as a duty of care. The role of value judgments hereby, based on the values accepted in society, is evident. There is no room to elaborate this theme, reference is made to an earlier study of the author.[12]

IV. Environmental Liability in Japanese Law

The above observation that the environmental liability issue in private and public law is based on societal values regarding the use of natural resources and the conservation of the environment, leads us to the intriguing question which solutions are found under Japanese law. Due to the high degree of industrialization, which has led to environmental disasters already in the Sixties and early Seventies, and on the other hand the reception of Western private law (namely the German Civil Code), a comparison of law is quite interesting.[13] Four leading cases have brought a revolutionary change of tort law by the introduction of strict liability, albeit in the old formulation of negligence of article 709 Jap. Civil Code: *Itai-Itai*, *Niigata*,

[11] This issue was also decided by the Hoge Raad in its recent decision. The court, following the extensive submissions of its attorney-general Franx, rejected the Potassium Mines' plea that issue was subjected to rules of international law, more specifically the Bonn Salt Treaty, and that a Dutch court was bound by the said Treaty. The Supreme Court held that the Treaty is only binding upon the concluding States, and not upon individual citizens of those States in their relation to others. Thus, the court indicates that cross-border pollution is not a matter to be left to interstate treaty-law or public international law in general. The civil law approach, therefore, finds strong support in the present case.

[12] J.M. van Dunné, The role of personal values in legal reasoning (paper IVR-conference Helsinki 1983), in: *Vernunft und Erfahrung im Rechtsdenken der Gegenwart*, Torstein Eckhoff/Lawrence M. Friedman/Jyrki Uusitalo (eds.), Berlin 1986 (*Rechtstheorie*, Beiheft 10), p. 13; idem, Cultural values and legal reasoning in property cases, in: *Reason in Law. Proceedings of the Conference Held in Bologna*, 12 - 15 December 1984, Volume 3, Carla Faralli/Enrico Pattaro (eds.), Milano 1988, p. 147.

[13] The author's source for Japanese environmental law mainly was: Julian Gresser, Koichiro Fujikura and Akio Morishama, *Environmental Law in Japan*, Cambridge/Mass. 1981.

Kumamoto, and *Yokkaichi* cases.[14] The legislature followed the case law closely with the drafting of additional chapters on 'Compensation for damages' in the Air pollution and Water pollution Control Laws in 1972, based on strict liability for acts injurious to health. The last mentioned case has led to the Law for the Compensation of Pollution-Related Health Injury in 1973, which tempered the need for an overall statute on environmental liability and compensation, which incidentally, proved to be highly controversial in the political arena. It should be noted that matters of causation and proof in this approach by the Japanese courts and legislature are no real difficulties anymore, as they are under traditional tort law. To a large extent the same can be said of Dutch law.[15]

Coming to a conclusion, to my impression, based on a superficial knowledge of Japanese law, there is much in common in the Dutch and Japanese judicial approach to environmental liability. In the latter jurisdiction the good neighbour principle is implicitly used as an instrument for tort liability, apparently only in cases of physical harm. Further study of the subject could, also from a jurisprudential point of view, yield interesting results.

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[14] Compare for these cases, known as 'the Big Four', also Frank K. Upham, Litigation and Moral Consciousness in Japan. An Interpretative Analysis of Four Japanese Pollution Suits, in: *Law and Society* 1976, p. 579.

[15] Reference is made to the author's articles cited in notes 5 and 9.