Recent Preventive Measures To Drunken Driving In The Netherlands

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Abstract
In the last fifteen years four measures to reduce (in)directly the number of cases of drunken driving were introduced in the Netherlands. These measures are: the Law of administrative enforcement of traffic regulations, the administrative withdrawal of the driver’s license, the administrative confiscation of the vehicles and the educational measure alcohol and traffic. This paper deals with the legal status of these measures in light of requirements of international law. It appears that the legal status of these measures is largely dependant on a categorization as a ‘criminal charge’ or ‘no criminal charge’ on the base of three criteria: the legal classification of the measure in national law, the very nature of the measure and the nature and degree of the penalty.

Introduction
As in many other modern countries the excessive abuse of alcohol in traffic in the Netherlands is a distinctive social problem. About 15% of all serious traffic accidents are linked to drunken driving. In recent years new measures have emerged in the Dutch policy towards prevention of drunken driving. Measures like administrative withdrawal of the driver’s license, the administrative confiscation of the vehicle and the educational measure alcohol and traffic. These new measures seem the result of a changing paradigm in the prevention of drunken driving. The traditional judicial sanctions imposed in criminal cases have very moderate effects in terms of prevention and lay a heavy burden on the capacity of the criminal justice system. Therefore the new idea is that government administrations themselves should be able to respond more directly to drunken driving outside the courtrooms.

An important legal issue in this changing paradigm is whether these new administrative measures have sufficient justification in light of national and international legal requirements. Especially the presumption of innocence and the right of admission to an impartial judge seems to be concurrent to the assumption that government institutions may order administrative sanctions without investigation and authorisation of any impartial judicial authority.

Background
Drunken driving in the Netherlands until the 1990’s was normally sanctioned through penal sanctions on authority of a criminal judge. Dependant on the seriousness of the offence, the drunken driver could be sanctioned by a fine (with a maximum of € 4.500), an (un)conditional imprisonment sanction (with a maximum of three months) and a disqualification from driving for a certain period (with a maximum of five years). Despite these criminal sanctions the level of recidivism of drunken driving did not decline. It seemed as if the presumed deterrent effect of these sanctions was very moderate. Further research learned that prevention of drunken driving was far more influenced by the perceived risk of being caught and the perceived risk of arrest. This gradually led to a shift in direction in the prevention policy of drunken driving outside the familiar criminal boundaries. Besides, it became apparent that the workload of traffic offences on the criminal justice system became unbearable. All this gradually led to a
shift in focus towards the prevention of drunken driving. On the one hand the criminal sanctions remained but on the other hand the focus was also concentrated on preventive administrative sanctions.

First of all, the minor traffic offences were decriminalized in 1990. Since then, all traffic offences that do no result in any damage to persons or goods are sanctioned by the administration under the new Law of administrative enforcement of traffic regulations. This administrative enforcement means that the police is entitled to impose a fine on their own authority in cases were a minor traffic offence is detected. The height of the fine is foreseen by law and not open to moderation. Appeal to the fine is possible at the local public prosecutor and to his decision there is only appeal at the district court judge and in some cases also appeal at the Court of Justice. Leave for appeal at the district court judge and the Court of Justice is only granted after the driver has provided for security for the fine. Although this administrative enforcement does not concern drunken driving directly as it (still) is not considered to be a minor traffic offence, the indirect effect of this law is that the criminal justice system is relieved of a huge amount of petty traffic offences. Moreover, this law was the first sign of an alternative orientation on administrative law enforcement instead of the classic criminal approach. This new orientation also led to three other administrative measures in the prevention of drunken driving. These three measures can be imposed in cases where the blood-alcohol level of the driver is higher than 1,3 (570 g/l) or the drunken driver simply refuses to cooperate with the investigation to his blood-alcohol level.

The first measure is the administrative withdrawal of the drivers’ license. This measure was rediscovered in the beginning of the 1990’s. It may be imposed on the authority of the Dutch Minister of Traffic and Waterworks following an investigation into the ability and suitability to drive motor vehicles. This investigation may include physical as well as a psychological research on the drivers person(ality) and his social background. During this investigation the drivers’ license can be withdrawn. The investigation may be the basis for a definite withdrawal of the drivers’ license.

Second, the in 1996 introduced measure alcohol and traffic may be imposed on the authority of the Dutch Minister of Traffic and Waterworks in cases where the blood alcohol-level of the driver is higher than 1,3 (570 g/l) or the drunken driver simply refuses to cooperate with the investigation to his blood-alcohol level. This measure is a training course for drunken drivers about the risks of their lifestyle and traffic behaviour. The course normally takes three days and one evaluating meeting and a part of the costs of the course have to be paid for by the driver (€ 227). The sanction on refusal to participate in this course is the withdrawal of the drivers’ license. This sanction may not be imposed if the absence during this course is the result of sudden medical treatment in a hospital.1

Third, in cases where the blood-alcohol level of the driver is higher than 1,3 (570 g/l) or the drunken driver simply refuses to cooperate with the investigation to his blood-alcohol level the measure of the administrative confiscation of the drivers vehicle may be imposed. This confiscation is also possible when the driver is caught for the third time in five years on suspicion of drunken driving. This measure is ordered on authority of the Dutch Pocurators-General, the highest council of the Dutch public prosecuting service.

**Legal status of preventive measures**

In general sanctions in the public domain can be divided into two categories: administrative sanctions and criminal sanctions. A major difference between these sanctions is the implementing authority. Administrative sanctions are imposed by government agencies and criminal sanctions by an independent and impartial criminal judge. In imposing criminal
sanctions the criminal judge is bound to the legal requirements of the European Convention on Human Rights (ECHR). Especially the article 6 ECHR-requirements like the right to remain silent, the presumption of innocence and the right to trial within a reasonable time have to be respected during trial-proceedings that lead to criminal sanctions. All these basic requirements derive from the general concept that a person who is confronted with a criminal charge is entitled to a fair trial. In this concept ‘criminal charge’ is not restricted to accusations in indictments in a purely criminal context but it may also comprise other sanctioning activities outside a criminal context. Ruling cases of the European Court of Justice (ECJ) have shown that also in cases of administrative sanctions with a punitive character the requirements of the (article 6) ECHR have to be met. So, what does this mean for the procedural requirements of the before mentioned four preventive administrative measures in Dutch traffic law? Are they to be considered as a ‘criminal charge’ and is therefore the person that is sanctioned entitled to the basic rights of article 6 ECHR?

Under the Law of administrative enforcement of traffic regulations appeal to the district court judge and restricted appeal to the Court of Justice is only possible after the driver has provided for security for the fine. In general the height of the security is the same as the height of the fine imposed by the police. If the driver lacks the necessary financial means, it is possible to demand a security of at least € 70.3 More than once the issue has risen whether this obligation to provide for security is acceptable and justified in light of the requirements of article 6 ECHR. As the fine imposed by the police is a penalty for a small traffic offence the nature of this sanction seems clear. It is meant as a punitive sanction and therefore it falls in the category ‘criminal charge’. This means that the system of demanded security in advance before a judge may investigate the fine and the underlying circumstances seems concurrent to requirements of article 6 ECHR. Especially the presumption of innocence and the right of admission to an impartial judge are at stake. There seems to be some legal tension when a driver is obliged to provide for security in advance when this same driver is presumed innocent. Also, it appears that the admission to an impartial judge is hindered by a system of security in advance. Until now this system of demanded security has not been regarded as unjustified in light of these requirements by national courts. It should be noted however that the ECJ has not given its opinion in this matter as the first case concerning this system of demanded security in advance still has to be brought to their attention.

The measure alcohol and traffic can also be costly for the driver who has to participate in the threeday-course. Nevertheless, the required contribution of € 227, the main objective of this compulsory course seems quite different from the fines ordered on the basis of the Law of administrative enforcement of traffic regulations. The measure alcohol and traffic lacks any punitive intention and is entirely meant to promote the knowledge and social skills of drunken drivers. Presumably this is the reason for the fact that national courts consider this measure not to be a ‘criminal charge’. Furthermore, the imposition of this measure is not necessarily the consequence of a criminal prosecution or verdict but merely a consequence of the presumption of the administration that the driver is physically or mentally unfit to drive a motor vehicle. In ascertaining whether there is a ‘criminal charge’ the ECJ has regard to three criteria: the legal classification of the measure in national law, the very nature of the measure and the nature and degree of the penalty. According to these criteria the measure alcohol and traffic is governed by administrative law provisions and has an educational character in that it appears to be aimed at raising the awareness of dangers of driving under the influence of alcohol. As to the nature of this measure, the Court notes that the relevant statutory and secondary rules do not presuppose any finding of guilt. Although the application of these rules may be triggered off by the result of an alcohol test taken by the police, its application is totally independent of any criminal proceedings. This is not altered by the fact that the costs of this measure are to be born by the driver. In these circumstances it is the Courts opinion
that article 6 ECHR is not applicable.\textsuperscript{6}

Discussion

The ECJ uses three criteria to distinguish between administrative measures that do and those that do not constitute a ‘criminal charge’. That leaves open the possibility that preventive administrative measures in traffic law may fall in the category ‘criminal charge’ or ‘no criminal charge’. In the case Malige vs. France\textsuperscript{7} the French system of penalty points that ultimately led to withdrawal of the drivers license was considered to be a ‘criminal charge’, whereas the Belgium measure of withdrawal of the drivers license after a case of drunken driving that led to a traffic accident was considered to be ‘no criminal charge’.\textsuperscript{8} The objective of the Belgium withdrawal of the drivers license – “a preventive measure designed to take a dangerous driver off the roads for a specific period of time”\textsuperscript{9} - very much resembles the main purpose of the Dutch administrative withdrawal of the drivers license. Therefore, it seems reasonable to assume that the criteria of the ECJ constitute it to be ‘no criminal charge’ and that the requirements of (article 6 of) the ECHR are not directly applicable. The same approach seems appropriate to the administrative confiscation of the drivers’ vehicle. Here also, the main objective is the road safety and elements of intended punitive nature are not pursued. However, some differences as compared to the administrative withdrawal of the drivers’ license can be distinguished. First of all, the general opinion in the Netherlands is that a drivers license is a document granted by the government in return for specific qualifications: that the future driver is capable of driving motor vehicles and will be no direct threat to public road safety. When these qualifications cease to exist the drivers’ license as any other government license may be withdrawn. This argument does not apply for the confiscation of the drivers’ vehicle as the ownership of the vehicle lies in private hands. A second difference is that the withdrawal of the drivers license is undertaken under the authority of the Minister of Traffic and Waterworks who is directly responsible to the parliament for the enforcement by means of this measure. The confiscation of the drivers’ vehicle is a measure installed by the highest ranks of the public prosecutor service and the use and control of this measure is more indirectly as this service can only be held accountable for its actions via the Dutch Minister of Justice. Critics even have suggested that this measure could be seen as (somewhat) illegal as it is common legal practise that sanctions that can invade the private life of citizens should be implemented only on authority of the Dutch legislator: so after consultation of the government and the national parliament. Both differences could have relevance to the categorization of the confiscation of the drivers’ motor vehicle in terms of ‘criminal charge’. My guess is that the invasion of the private life of the driver by confiscation makes it more of a punitive measure than the withdrawal of the drivers’ license. That means that this measure can be regarded sooner as a ‘criminal charge’. Still reservation has to be made, as cases in which these specific Dutch measures were implemented have not yet led to rulings of the ECJ.

Conclusion

In the last fifteen years four measures to reduce (in)directly the number of cases of drunken driving were introduced in the Netherlands. These measures are: the Law of administrative enforcement of traffic regulations, the administrative withdrawal of the driver’s license, the administrative confiscation of motor vehicles and the educational measure alcohol and traffic. The legal status of these measures differs according to requirements of international law. It appears that the legal status of these measures is largely dependant on a categorization as a ‘criminal charge’ or ‘no criminal charge’ on the base of three criteria: the legal classification of the measure in national law, the very nature of the measure and the nature and degree of the penalty. Fines under the Law of administrative enforcement of traffic regulations are considered to be ‘criminal charges’ and the educational measure alcohol and traffic is considered to be ‘no criminal charge’. It seems fair to assume that the administrative
withdrawal of the drivers' license falls also in the category ‘no criminal charge’. This appears to be less clear for the administrative confiscation of motor vehicles.

References
3. HR (High Court 31 January 1995, NJ 1995, 598.
7. ECJ 23 September 1988, Reports 1998-VII (Malige vs. France)