TOPIC 2013: Environmental pollution: is Criminal Law a good instrument?

Last year at the successful conference in Washington DC (November 11 – November 15) we discussed at the US Patent and Trade Office: “Violation of copyrights and other intellectual property rights, especially through the use of internet”.

This year we will focus on a subject which has been on our minds since 2011: pollution.

It will give the study commission the possibility to examine if our legal penal systems are able to cope with all aspects of the many forms of pollution that not only exist in our own countries but also all over the world. There are forms of transborder pollution and export of (radioactive) waste. Is criminal law the best option to handle the problems involved, or should we look more into the instruments given by international law, private law or administrative law?

Is global warming a problem? Do we have to worry or is it perhaps best to leave it to organisations as Greenpeace or the Club of Rome.
Questionnaire.

Question 1.

Has your country special legislation for:
1.1. the violation of laws concerning environment in general?
1.2. Are there special rules for criminal investigation?
1.3. If no, is there any such legislation under consideration?

Environmental legislation has been highly developed in Israel in the last six (6) decades.

It uses diversity of legislative instruments: dozens of laws, secondary legislation, regulations, administrative orders, and bylaws.

This legislation deals with the protection of nature (air, water, and soil), the abatement and prevention of environmental nuisances (air, noise, water, and marine pollution), and the safe treatment of contaminants and pollutants (hazardous materials, radiation, and solid and liquid waste).

Alongside with that, other forms of legislation are meant to provide a framework for controlling the use of resources and promoting sustainable development (for instance- the Planning and Building Law and the Licensing of Businesses Law).

The whole environmental legislation is a part of the criminal law. Nevertheless, it has civil and administrative aspects of the law as well.
Question 2.
2.1. Do the laws which deal with environment include specific punitive measures?
2.2. What are the possible sentences? Could you give an example?

There are various ways of enforcement, either by individuals as private complaints and civil actions, or by the state, as criminal and administrative enforcement.

The laws dealing with environment include punitive measures as imprisonment, fines and administrative financial sanctions.

Unlike imprison and fine sentences within the criminal procedure, in which evidence are required to prove beyond reasonable doubt, administrative financial sanctions are much quicker to impose, though must be based and on evidence, reasoned, and based on Rules of Natural Justice.
Question 3.

3.1. Is “restitution “ possible.
Is it for instance possible that the sentence is suspended in that sense that the sentence will be executed only if the offender does not fulfill certain conditions; for example a condition to repair all damages and take measures to prevent new damages in the future.

3.2. Is it possible in your country that the Public Prosecutor decides to impose a fine instead of taking the case to Court (out of Court settlement).

3.3. Is it possible for the Public Prosecutor to take coersive measures?, i.e. measures the public prosecutor may take in criminal proceedings( like temporarily closing of a factory)

3.1

"Restitution" in environmental law in Israel is reflected in a clause included in each one of the environmental laws, stating that when a person commits an offense in consequence of which he obtained a benefit or profit, for himself or for another, the court may impose on him, in addition to any other penalty, a fine in the amount of the benefit or profit obtained.

3.2

A public prosecutor does not have the authority of imposing a fine instead of taking the case to court.

Nevertheless, as mentioned in question 2, few administrative bodies may impose an administrative financial sanctions on the violator.

Several laws include a clause, stating that once there is a reasonable ground to assume that a violation was being made, the violator may be given a notice of an intention he would be imposed an administrative financial sanction. After the violator is being given the right to submit written arguments, a decision is being made whether to impose a financial sanction and its amount.
Other than a general tort claim, there are 2 other instruments in which a citizen may act, as follow:

- **A private criminal complaint** - One may submit a private criminal complaint.

- Filing environmental lawsuits on behalf of himself or nonprofit organizations of which he is a member, in cases of environmental pollution or nuisances, according to the law of *Prevention of Environmental Nuisances (Civil Action), 1992*.

These may include air, marine and water pollution, solid waste, hazardous substances and radioactive pollution, and environmental nuisances which may threaten human health or cause major distress.

The law places three types of legal remedies at the disposal of the citizen: restraining orders, prevention of recurrence orders, and corrective orders. In addition, the law provides standing for environmental groups (in practice, there is only one environmental group active in this field called *Israel Union for Environmental Defence*).
Question 4.

Has your country set up one or more specialised agencies to investigate and identify violation of environmental laws?

The Ministry of Environmental Protection is the main agency to investigate and identify violation of environmental laws.

Moreover, a relatively new legislation, **Local Authorities Law (Environmental Enforcement - Authorities of Inspectors), 2008**, grants local authorities far-reaching authority in the enforcement of a wide range of environmental law. The main aim of this law is to delegate authority to local authority inspectors who will be empowered with police authority to carry out inspection, investigation and searches to prevent or discover offenses.

The income derived from the imposition of fines will be paid to the local authorities themselves, thus serving as an incentive for intensifying their efforts to enforce environmental laws within their jurisdictions.
Question 5.

5.1. Has your country signed and ratified Agreements, Treaties or other forms of international cooperation regarding protecting environment? To mention a few:


*The Hong Kong International Convention for the safe and environmentally sound recycling of ships 2009;

* The UN Treaty on the Law of the Sea; (Monetgo Bay, November 16/1994)

See f.i. articles 207 etc on the pollution of the marine world;

* The international Convention for the prevention of Pollution from ships 1973 (Marpol and its annexes);

5.3. The European Union (EU) has set up a system for the supervision and control of shipments of waste within its borders and with the countries of the European Free Trade Organisation (EFTA), the organisation for Economic Cooperation and Development (OECSO) and third countries which are party to the Basel Convention (Act 7.15.2006; amending acts 6.25.2009, 4.20.2009 and 1.1.2010); Have you had any experience with this system?

Israel has ratified almost every major international environmental agreement. Israel also ensures that its national legislation is compatible with its international obligations. To date, Israel has signed, ratified, or acceded 19 environmentally-related Conventions, as well as several Amendments and Protocols to those Conventions.

The Conventions and Protocols are the following:

- International Convention for the Regulation of Whaling, 1946
- Oil Pollution Convention (OILPOL), 1954
- International Union of New Plant Varieties (UPOV), 1961
- Convention on Wetlands of International Importance (Ramsar Convention), 1971
- Convention concerning Protection against Hazards of Poisoning Arising from Benzene (Benzene Convention), 1971
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund), 1971
- World Heritage Convention, 1972
- International Convention for the Prevention of Pollution from Ships (Marpol), 1973
- Convention on International Trade of Endangered Species (CITES), 1973
- Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona), 1976
- Convention on Migratory Species (CMS), 1979
- Vienna Convention for the Protection of the Ozone Layer, 1985
- International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), 1990
- Convention on Biological Diversity (CBD), 1992
- International Convention on the Civil Liability for Oil Pollution Damage (CLC), 1992
- United Nations Convention to Combat Desertification (UNCCD), 1994
- UN Framework Convention on Climate Change (UNFCCC), 1994
- Kiev Protocol on Pollutant Release and Transfer Registers, 2009
Question 6.

6.1. Could your country be more active in the field?

6.2. Is there pressure from companies or governmental organisations to be more lenient when environment is concerned based on economical reasons (or f.i. employment)?

6.3.

Israel is very active in the field, although it reflects better in legal aspects, including ratification of international treaties and conventions, rather than in the general public.

From the legal point of view, there is still work to be done in constitutional related matters regarding the environment, and some more thinking about efficient enforcement.

I believe that this, along with raising the public's awareness, will bring Israel to even better achievements in this matter.

Economic reasons usually stand as opposed to environmental issues. With that being said, I believe that our legislation provides incentives for obeying the law, even though there is still work to be done on this matter.
Question 7.

7.1. Could you as Judge be more active in the field?
7.2. Are you as an individual active in the protection of the environment (f.i. by being member of a society which has a goal to protect the environment?) Does that raise questions in the Court were you are working?
7.3. Do you think that you have enough instruments and qualifications to handle these type of violations in Court?
7.4. Is it considered to be a specialisation to handle these cases in Court?

7.1 + 7.2

As a judge in Israel, I am not allowed to participate in that kind of activity, for judges perform a "professional sector".

Nevertheless, my contribution to the matter is within my part as a judge in in environmental-related cases.

That is the place to mention, that there are already two judges in Israel, who prior to their tenure use to hold key positions in environmental-oriented ngo's.

7.3

I think I have enough instruments and specifications to handle these types of violation in court. Legislation is highly developed, covers various kinds of environmental matters, various ways of enforcement in many several branches of the law.

7.4

Within criminal law or general civil law (tort claims) or administrative law, it is not considered to be a specialization to handle cases like this.
Nevertheless, a special tribunal was established in order to deal with the control and protection of Israel's water sources, according to a relatively old law - Water Law, 1959. That is considered to be a specialization.
Question 8.

8.1. Do you think there should rules to govern the situation in which a pollution is discovered long after the company involved has disappeared or changed ownership?

When it comes to private companies, a specific regulation is meant to deal with the private companies’ responsibilities on that matter.

For example, A new law was enacted lately for the Prevention of Hazards from Asbestos and harmful Dust. According to the law, a production plant which was responsible for asbestos contamination in a large area will be responsible for half the costs of the project led by the Ministry of Environmental Protection.

This law, among many others, is based on the "polluters pays" principle.

Here is the place to mention the Maintenance of Cleanliness Law, 1984, which establishes a Cleanliness Maintenance Fund, whose sources include fees and fines imposed under various environmental laws, to finance a broad range of environmental activities. It also provides for the appointment of voluntary inspectors and Cleanliness Trustees, empowered by the environmental protection minister to report on littering offenses.

However, the state is the one responsible for pollution caused by a governmental company's activity.

Question 9.
9.1. Is there any other comment on the subject that you would like to make?

N/A
The Presidency of the Third Study Commission looks forward to receive your answers not later than the beginning of September 2013. That will give us time to present the answers in a proper way.

On behalf of the commission,

Frans G. Bauduin, president of commission III.
Amsterdam, April 2013.