IAJ - Third study commission questionnaire

YALTA/ UKRAIN OCTOBER 5 - OCTOBER 10 2013

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

Last year at the succesfull 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.

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Answers to the questionnaire from the Portuguese Association of Judges (ASJP)

Question 1.

Has your country special legislation for :
1.1. the violation of laws concerning environment in general?

The Portuguese legal system has a Law of Environment since the end of the 80s (Law 11/87 de April 1987), which defines the bases of environment politics and establishes the overall principals regarding the definition and consequences of violation of laws concerning environment in general, but does not regulate directly these issues.
1.1.1. It is the Penal Code that provide, in particular, crimes against the environment.

The Law on the Environment mentions yet the possibility of being created crime types against the environment in special legislation (outside of the Penal Code), which has residual nature. This happens, v.g. when it comes to the matter of fishing in interior waters, dealt in Lei 7/2008 de 15/02 (art. 30º) together with bases XVII e XXII of Lei 2097 de 6.6.1959 and the articles 44º, 61º, 65º e 67º, of Decreto 44 623 de 10.10.1962.

Also, the Hunting Law (Lei 173/99 de 21/09 changed by the Decreto-lei 159/2008 de 8 de agosto - artigos 28º a 33º), which refers to crimes against the environment, specially crimes against the preservation of animal wildlife and huntable species (articles 30º and 6º).

1.1.2. – The Portuguese Law has yet a Board of Environmental Contraventions since 2006 (Lei 50/2006 de 29 de Agosto, last changed in 2009), which establishes principals and general rules, namely regarding responsability of the individual and legal persons, general limits of fines, applicable aaccessory sanctions, cautionary measures and processing of administrative offenses.

The specific environmental administrative offenses are dispersed amongst various sectoral legislation: v.g. the legal board concerning environmental noise (Dec-lei 146/2006 de 31/7 and DL 9/2007, 17/01); the General Waste Management Regulation(??) approved by Dec-lei 73/2011 de 17 de Junho; the General Pollution Prevention and Control Regulation approved by Dec-lei 173/2008 de 26 de Agosto and the General Air Quality Assessment and Managing Regulation approved by Dec-lei 102/2010 23/09, Water Law (Lei 58/2005, 29/12) and the Legal status of the use of water resources approved by Dec-lei 226-A/2007, 31/05, Legal Status of National Ecologic Reserve approved by Dec-lei 166/2008, 22/08,

1.2. Are there special rules for criminal investigation?

There are no special procedural rules concerning the investigation of crimes against the environment, nor are there organic units specially devoted to these investigations.

1.3. If no, is there any such legislation under consideration?

Not to our knowledge, there is not. However, there have been public statements issued by Public Prosecutors which point towards the need of the creation of units within the Public Prosecutors DA, dedicated to the
investigation of crimes and administrative violations against the environment.

Question 2.

2.1. Do the laws which deal with environment include specific punitive measures?

Yes.
The Board Law of Contraventions (Lei nº 50/2006, 29/08, recently amended by Law 89/2009) the Base Law of the Environment (see above) and various separate laws provide for penalties that may be imposed by administrative authorities together with the fine, which is the principal penalty of contraventions. Such penalties include:
- Prohibition of the exercise professions or activities,
- Deprivation of the right to benefits or allowances;
- Closure of establishment;
- Termination or suspension of licenses, permits or authorizations, the loss of tax benefits, among others.

Besides these penalties, some sectoral laws – such as Water law (Lei 58/2005 29 de dezembro) - assign to the administrative authority to establish a penalty payment until the offender complies with is determined.

2.2. What are the possible sentences? Could you give an example?

The main penalties are common, including those applicable to legal persons.

Special reference must be made of accessory penalties and the general principle of removal of the causes of the violation and the obligation to restore the prior situation.

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.

Yes.
The Penal Code establishes, generally, the suspension of the prison sentence on condition the fulfillment of conditions by the defendant. This suspended
sentence shall also apply in cases of crimes against the environment and can be imposed on the defendant the obligation to restore the situation that existed before or to pay compensation especially if replacement is not possible, in addition to the obligation to work to minimize damage and compensate the losses caused (art. 48º da LBA).

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)?

Yes, that is possible. The Penal Code provides, in general, alternatives to prosecution and trial, which apply to crimes against the environment expected in the Penal Code.

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

No, in the Portuguese penal procedure the Public Prosecutor may not take any coercive measures in criminal procedures. Only a judge can decide that, but the Portuguese legislation doesn’t provide for that kind of preventive measure especially to crimes against the environment.

Question 4.

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

No and there are no actual plans to set up a specialised agency, as far as we know. The investigation of administrative offenses is made by the administrative authority in each sector and the criminal investigation is under the direction of the MP with the collaboration of those entities.

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:

Yes. Portugal signed most of the International Treaties regarding Environmental Protection, namely as a member of the EU.
5.2.

*Has your country ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (March 22, 1989)

Yes, it has been ratified by Portugal on the 26th of January 1994 and entered into force on the 11th of May 1994.

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

No.

* 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); Convenção Internacional para a Prevenção da Poluição por Navios – Marpol 73/78)

Yes. Portugal acceded to the Convention (MARPOL 73/78) by Government Decree No 25/87 of July 10, and his amendments by subsequent diplomas.

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 (OESO) and third countries which are party to the Basel Convention (Act 7.15.2006; amendig acts 6.25.2009, 4.20 . 2009 and 1.1.2010); Have you had any experience with this system?

No, I don’t.

Question 6.

6.1. Could your country be more active in the field?
We have no elements that provides an answer that would cover the various sectors concerned and consider the multitude of factors that can determine a higher or lower activity internationally, including economic and strategic weight that my country may have ther.

In any case, it is primarily a political issue

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

We are not aware of specific situations such pressure. However, is widespread belief that economic considerations pointed condition the initiative and adherence to government policies, measures and concrete actions to protect the environment.

Question 7.

7.1. Could you as Judge be more active in the field?

We don´t think so. The need to ensure a fair and effective image of impartiality of the courts in all disputes not seem compatible with a greater involvement of judges in active defense of the environment or other public goods even if they are recognized importance.

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?

No. See the previous answer.

7.3. Do you think that you have enough instruments and qualifications to handle these type of violations in Court?

Yes, generally. When dossiers become more specific we will study the matter further and make use of expert witnesses, the same way we do about other specific matters.

7.4. Is it considered to be a specialisation to handle these cases in Court?

No.
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?

Yes. The importance of environment justifies providing ways to restore the situation that existed or compensate the damage at the expense of the polluter even when the legal position or sheet of this change. One possible solution is the creation of venture funds supported by economic or respective obligation to carry insurance, at least in cases where the risk created by the activity performed is greater.

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

No, I have no further comments.

Lisboa, setember 2th 2013