THIRD STUDY COMMISSION QUESTIONNAIRE.

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ENVIRONMENTAL POLLUTION : IS CRIMINAL LAW A GOOD INSTRUMENT? A FURTHER EVALUATION.

Answers from the Portuguese Association (ASJP)

Question 1.
As a result of the questionnaire of last year:

Could you further elaborate on the functions of specialised agencies set up to investigate and identify violation of environmental laws, if these agencies exist in your country.

A. – These agencies don’t exist in Portugal and there are no actual plans to set up a specialised agency, as far as I know. The administrative authority in each sector makes the investigation of administrative offenses and the criminal investigation is under the direction of the prosecutors (MP) with the collaboration of those entities.

1.1. If not, do you think it would be useful to create these sorts of agencies?

A. I am not sure of the benefits that the creation of specialized agencies in our country would bring. I am not certain that the number and complexity of the questions raised justify the establishment of one or more specialized structures (that would work towards the identification and investigation of environment protection law in its various domains), not only due to the costs associated with the generation of a new structure, but also from a point of view of efficiency.
Question 2.

2.1. Could you elaborate on the cooperation between Police, Customs and Prosecution when it comes to violation of environmental laws.

A. - As said before, the administrative authority in each sector makes the investigation of administrative offenses. The criminal investigations, on the other hand, are lead by the local units of the Prosecution Services, with the collaboration of administrative entities in their respective sector that have criminal police functions, such as the Inspeção Geral do Ambiente (IGAMAOT - Government’s General Environmental Inspection).

The Public Prosecutor does not have audit powers over these public administration services. However, it frequently acts, initiating criminal procedures, based on interventions by administrative inspection organs; so it’s essential for each prosecutor to maintain a dialogue with these organs. Recently – 24/02/2014 – the Chief Prosecutor (Portuguese acronym: PGR) and the IGAMAOT have signed a protocol to improve the articulation between both entities regarding environmental penal procedures and administrative offenses.

2.2. What are the possibilities in your country with regard to :

a. import/export of protected animals?;
b. import/export of skins of animals?;
c. import/export of ivory of elephants, rhino, walrus?
d. import/export of other parts of mammals, birds, reptiles?

As EU member, the COUNCIL REGULATION (EC) No 338/97 on the protection of species of wild fauna and flora and COMMISSION REGULATION (EC) No. 865/2006 of 4 May 2006, for its implementation, are directly applicable to Portugal.

Portugal has also approved the Ordinance (Decreto-lei) 211/2009 September 3rd, which shall undertake an update of the legal system in order to implement CITES in the light of the mentioned EU regulations on this matter, thereby redefining national entities that hold the competences of administrative and scientific authority as well as the supervisory authority of CITES.

Question 3.
A number of countries see – speaking in general terms - a decline of nature.

3.1. Is this true for your country?
A. - Yes, it is.

3.2. Do you have specific areas where this decline is visible? For instance the deforestation of the tropical rainforests in a number of countries? The decline of water resources? Competition between water resources for recreational use as opposed to agricultural use?
A. – Yes. Firstly, the deforestation caused by numerous yearly forest fires have destroyed thousands of hectares of forest (see numbers on http://tinyurl.com/mbfnj6a ).

The building of hydroelectric dams is controversial because it represents endangerment to some local ecosystems, as it happens with road infrastructures such as bridges, tunnels and highways. Additionally, despite economic recession, an increase in unsustainable consumption of oil and its derivatives has been verified over the years.

Furthermore, toxic waste incineration worries some local populations due to air quality and fauna and flora protection issues.

As far as water resources are concerned, pluviosity levels have been able to assure stable and sufficient water resources in a short and medium term. However, ONGs warn the Government and overall population that Portugal does not properly
apply structural politics for efficient and sustainable use of these resources in agriculture, industries and private use: although there is a National Programme for Efficient Use of Water, several millions of litters are wasted every year.

3.3 In some places, the use of water for agriculture and the building of structures on certain land may threaten the extinction of some small fish, birds or other creatures. In your country, are laws used to protect animal rights over the rights of humans?

A. Portugal has a complex system of classified areas (structured by the Ordinance (Decreto-Lei) n.º 142/2008, July 24th), which includes Natura 2000 Classified Areas, National Network of Protected Areas (RNAP) and further classified areas originated by international agreements made by the Portuguese government.

Many of these classified areas are especially protective of animal species, preventing its extinction, even if it implies sacrifice of economic activities.

3.4. Do you feel that criminal law could or should be an effective instrument to safeguard nature? Is civil law sufficient? If not, why not?

A. – I think civil law is an important but not sufficient instrument. The criminal law is necessary to protect and safeguard nature from serious attacks.

Question 4.

4.1. Do in your country the responsible authorities develop incentives to report pollution on a voluntary basis?

4.2. If yes, how do they develop these incentives?

A. – Citizens can report on violations of environmental laws – including air pollution reports – on a direct telephone line and in a specific website operated by one of the Portuguese polices (GNR). These reports on environmental law violations have increased in number from 2012 to 2013.

4.3. Do you think that there are possibilities left unused? What is your personal idea?

A. - I have not a precise idea about this particular theme.
4.4. Could you elaborate on the possibilities to enlarge the possibilities of restitution instead of punishment?

A. – It seems attractive the restitution instead of punishment as far as alternative measures in criminal process are concerned.

Question 5.

We all know that our world is full of forms of legal pollution (air pollution, water pollution, huge masses of plastic in the oceans).

5.1. Can the Judiciary be more active in their verdicts to urge the politicians to really have interest in solving the existing problems.

A. - I think judiciary cannot substitute the political power and its responsibilities. However, the judiciary (including Public Prosecutors) have the responsibility to investigate, pursuit and judge with increasing rigour those in a political office who commit crimes by not fulfilling their duties in the domain of the execution of environmental policies, endangering the nature.

5.2. Could organizations as Greenpeace or World Wildlife Fund be more active? Do activists from such environmental organizations as Greenpeace go too far? Should they be punished if their activities harm or endanger people?

A. – It is not of my knowledge any details of the activities lead by those organizations, but I think the last question can only be answered in one way: if their activities harm or endanger people in a criminal manner, they must be punished like any other citizen.

Question 6.

The International Court of Justice (ICJ) in The Hague (Holland) gave a decision in March this year which forbids Japan to hunt whales in the Southern seas. (see the activities of the The Sea Shepard). Still, Iceland and Norway will
continue to hunt whales. Will there be more whales for Iceland and Norway to
hunt if Japan is forbidden to hunt? Who wins in such a situation?

6.1. Do you think that more countries should address the ICJ in order to
settle disputes arising with regard to environment?
A. I am not familiar enough with the ICJ decision, nor with the international
dulings on whale hunting, neither with the intervention of the ICJ in past situation,
therefore I do not feel qualified to provide a reasoned opinion on these subject.

Question 7.
What are your ideas about finding a balance between the economic
interests and environmental harm that can be a result of an economic activity.

7.1. Do you, for instance, think that criminal law could have as a form of
punishment the obligation to the industry to work on the “cradle to cradle
“principle? That means that all the raw materials used to make a product have
to be rescued at the end of the lifetime of such a product.
A. Yes. I think it is a good principle since it is applied in major economic
activities, such as Automobile industry and International Trade and can also be used
in other activities.
I believe it is good that a criminal court can determine that a defendant must
proceed according to the “cradle to cradle” principle in some concrete situations, as
long as technically possible and established in criminal law.

Question 8.
8.1. If one country spends large amounts of its wealth on cleaning the air,
but other countries continue to pollute the air in the course of economic activity,
is the first country foolish since air goes all around the world?
A. – The cleaner country may be called foolish, but what else can be done? It
seems that we are advancing internationally towards a time when all countries
contribute to decrease the air pollution; also those more responsible for polluting should tend to be the ones more endowed to financially supporting the cleaning process and damage repairs, as well as diminishing their pollution levels.

8.2 If environmental pollution is truly a world-wide problem rather than a local problem, what kinds of incentives could be created to encourage all countries to resist the tendency to prefer economic activity over environmental constraints? Is the criminal law more or less effective than other incentives?

A. - I don’t believe the criminal law is a significant instrument in the resolution of this sort of problems between states or international organizations and entities.

Especially in the domain of International Affairs (even more than on internal matters), the criminal law solutions should be the last resort to protect the legal interests when they are threatened or violated.

Regardless of the efficiency issues, there are still the possibility of representative trials and convictions, as is typical of symbolic criminal law, which always imply a certain amount of injustice towards the chosen “scapegoats”.

8.3 Cleaning and protecting the environment is not free, it is expensive. Who should bear the cost? Why?

A. See answer above (8.1).

Question 9

9.1. Is there any other comment on the subject you would like to make.

A. - None

9.2. What are your “outside of the box thinking “ideas?

A. - Any way of solving serious and effectively the problems brought on the environment by large scale economic activities requires agreements from the concerned countries. The international organizations devoted to this themes can move
the more responsible (and, simultaneously, more resourceful) countries into solving these problems.

9.3. Do you feel a personal responsibility to guard the nature in the world for the coming generations.

A. Yes, in my personal life scale.

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