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The ECHR, ICCPR and EU-Charter as beacons in environmental prosecution and adjudication

Finnish report by

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1/ The right to be tried within a reasonable time

By the Finnish Constitution, everybody has the right to timely/expedient hearing in Court[1]. In spite of that, slow justice is a recognized problem in the Finnish judicial system. With explicit reference to the ECHR Art. 6, the Finnish Code of Judicial Procedure was amended in 2009, making it possible for a Court to declare a criminal case urgent[2]. However, this has done little to shorten overall run-through time in court.

1.1. What usually triggers, in your country, the opening of a file on an environmental offence at the public prosecutor's office? The reception of a notice of violation recording the offence? Other triggers?

As a court case, the matter will commence with the presumed offender being notified by the competent authority. Before that, the offended party or an administrative authority will have reported the offence to the police. After police investigation, the case is presented to the prosecutor who then decides on whether to bring charges or not.

1.2. What is on average the time required in your country in criminal proceedings to go from a citation to a first instance judgment and to an appeal judgment?

According to data collected by the Statistical Bureau[3], the mean run-through time in Finnish first-instance Courts for criminal cases resolved by one judge was 3,8 months and for cases resolved by three judges 7,1 months in 2012. The former would be the normal case, and the latter complicated cases. Correspondingly, the time between Court sentence and the offence was 12 and 26 months, respectively.

[1]Finnish Constitution (731/1999), sec. 21.
[2]Code of Judicial Procedure 4/1734, Chapter 19, amendment 363/2009.
[3]Finnish Statistical Bureau, Criminal case judgments of the first-instance courts 2012, available as http://www.stat.fi/til/koikrr/2012/koikrr_2012_2013-05-29_tau_002_fi.html

Adding the time expense in the Appeals Court (about 12 mo) and, as the case may be, in the Supreme Court (12 mo), the overall Court time can easily be 2-3 years.

1.3. What procedural steps can take time?

Most time-consuming is the preliminary criminal investigation: in the investigation the police is trying to find out what has happened (emissions and other causes), what the effect on human health or property or the environment was and who may be legally responsible. This may require wide expert reports, which takes time. More specialization for environmental crime in the police and prosecutors office would be useful. Also the lack of resources is a problem.

Criminal investigation is a joint effort of several authorities, and organizing administrative and criminal investigation steps can be difficult. In some instances, clarifying who was affected by the crime (e.g. in cases concerning pollution of waters: fishermen, inhabitants, cottage owners) may involve a large number of potential claimants.

In environmental crimes, it may take a considerable time before the supervisory environmental authority reports the crime to the police for criminal investigation. The environmental authorities often try to rectify the misdeed by using administrative measures.

1.4. Are you aware of difficulties with this guarantee?

One problem is that environmental crimes may be reported to the police or environmental authorities rather late. Also the capacity of the police to perform criminal investigation in environmental cases varies. Difficulties have been recognized and tackled by extensive cooperation between different authorities.

1.5. What are the legal consequences of undue delay in your legal system?

A private person may be compensated for undue delay in court proceedings. The compensation sum is 1 500 euro/year of delay. The total sum may be raised by 2 000 euro if the matter is of special importance to the party. The maximum compensation is 10 000 euros[4]. However, when the legal procedure has been slow, in the worst case no penalty is imposed or the penalty may be commuted5.

[4]Act of compensation for delayed Court proceedings, 362/2009.
[5]*E.g.* Finnish Supreme Court 2011:28 and 2016:45

2/ The right to a fair trial as including the right to respect of judgments / implementation of judgments

2.1. What do you know about the implementation of judgments in your country? Are punitive sanctions (prison sentences, fines, other) implemented? Are remedial sanctions (reinstatement of the environment, compensatory action, other) implemented? Who is in charge? What goes well, wrong?

Under the Penal Code, an offender found guilty of environmental crime or of causing damage to human health or property can be sentenced to prison or a fine, or, in the case of a legal person as a perpetrator, a corporate fine. In the case of damage to human health or property, the offender will also be ordered to compensate the offended party. Sentences are implemented effectively.

Remedial sanctions are administrative measures levied on an offender in order to restore damage or ensure compliance with administrative orders, e.g. an order to cease unlawful operation. The measure can be an order to cease operation, to take measures to control or prohibit damage, or an order to restore conditions. The order may be strengthened by a penalty fine or a threat of the authority or the injured party taking the necessary measures at the offender´s expense. As in other administrative matters, appeals are made to the Vaasa Administrative Court, and in the last instance, to the Supreme Administrative Court.

2.2. Can criminal courts also impose remedial sanctions in your country? If so, can they do so *ex officio* or only on request by the prosecution or a civil party?

No, criminal proceedings and administrative proceedings are separate. See 2.1

2.3 Worldwide NGO’s play a significant role in the prosecution of environmental offences. Can they be a civil party in criminal proceedings under the law of your country? Do they have an easy access to criminal proceedings or are there severe conditions to meet? Can they obtain damages? Can they request remedial action?

NGO's are acknowledged as parties in administrative proceedings, where they may request remedial action. E.g. in a recent judgment concerning unlawful hunting of wolves, SAC (2007:74) judged that two local or regional NGO's promoting nature protection and, hence, the protection of wolves, must be admitted as a party. In a criminal case, NGO's have until recently had standing only if the unlawful action affected e.g property held by the organization.

3/ The right to be presumed innocent

3.1. What are the basic principles of evidence in the criminal law of your country? Are the means of proof free or restricted? What evidence is most often used in environmental cases? What type of evidence creates troubles (too costly, too difficult to obtain, too easily mismanaged by environmental inspectorates, …)

In a criminal investigation, the suspected offender shall be presumed not guilty. In all criminal proceedings, the defendant is deemed innocent until proven otherwise. In environmental crime, criminal liability arises from the risk of harmful effects, *e.g.* the acknowledged risk that an emission may pollute the environment.

The burden of proof lies solely on the prosecutor. There are no restrictions as to the kind of evidence accepted and the Court is free to consider the significance of the evidence provided (monitoring protocols of supervising authorities, reports on samples, photographs, etc.). In environmental cases, evidence is given by the parties, witnesses and experts heard in Court and by written expert statements on technical matters provided by the parties. There is a problem with costs, especially in obtaining expert statements in biological and technical matters. Finding out the extent of the benefit obtained from the crime causes most trouble in criminal investigation (e.g. inspecting the accountancy is time and resource consuming).

3.2 How do you see the impact of the principle of innocence on the prosecution policy? Do you feel it has an overly restrictive impact, in general, for some type of cases?

The right to be presumed innocent is not an obstacle in environmental crime, where investigation to a large part relies on scientific evidence and technical investigation. In some cases involving "aggravated degradation of the environment"6, the burden of proof may be inversed when the restitution of the benefit gained by committing the crime is at stake.

3.3. How do you see the impact of the principle on the assessment of facts and guilt (intentional /negligence) in the conviction decision ? Do you feel it has an overly restrictive impact, in general, for some type of cases ?

The principle does not significantly restrict the assessment of guilt in environmental crime. The threshold for criminal liability is aggravated negligence, whereas intent is not required.

3.4. How do you see the impact of the principle on the sanctioning decision? Do you feel it has an overly restrictive impact for some type of sanctions? *Please illustrate your*

[6]Finnish Criminal Code (39/1889), ch. 48 sec 2, as amended.

answer with case-law examples.

Sanctions for environmental crime are, in practice, a fine or probational imprisonment or a corporate fine.

An oil spill (about 300 m^3 of oil) from an oil refinery caused pollution of the ground and of the sea area by the installation. A corporate fine of 500 000 euros was imposed. (Finnish Supreme Court 2008:33; see also SC 2002:39)

In extreme and rare cases also imprisonment has been sentenced.

4/ The privilege against self-incrimination

4.1. Does the environmental law in your country make (an extensive) use of self-monitoring and -reporting obligations? Does it provide in inspection rights to ask for information, sanctioned when not complied with?

By the Criminal Investigation Act, the suspect has the right not to contribute to the clarification of the offence in which he or she is suspected.

Monitoring of operations, of emissions into the environment and of the effects of emissions are duties of the operator. The operator is also obliged to report monitoring data to the authorities and to provide other parties with access to the data. The monitoring obligation is part of the environmental permit, and the monitoring provisions are subject to appeal. Supervising authorities have a right to ask for necessary information from the operator.

On the basis of monitoring results, supervising authorities may conclude that operation has been in breach of permit conditions or in breach of law. If criminal proceedings are opened, they will rest on data provided by the operator.

4.2 If so, are you aware of prosecution difficulties caused by the privilege against self-incrimination? Is it easy to draw the boundaries between evidence that can be used and evidence that cannot be used because of this privilege? Please illustrate your answer by case-law.

The idea that this kind of self-incrimination (above under 4.1) would be contrary to provisions of the ECHR would undermine the system of monitoring of polluting activities in Finland. As far as we understand, the ECHR should not be seen as an obstacle to this kind of monitoring, even if it would e.g. create documents pointing out illegal environmental consequences. The Convention, however, does not allow the police or prosecutor to force the suspect to reveal any information, which could be used against him in a criminal case. Of course, this kind of infor-

mation will be collected by other means, even by using coercive measures.

5/ The protection against double jeopardy

5.1. Are criminal courts in your country confronted with double jeopardy when dealing with environmental offences? If so, what is the typical case-set: a combination with administrative fines, with penalties from other policy areas such for instance as agricultural policies?

In Finland, administrative fines can only be imposed under the Act on Environmental Protection in Maritime Transport. By this Act, the discharge of oil into Finnish territorial waters or economic zone is prohibited. For a violation of the prohibition, a monetary penalty (oil discharge fee) shall be imposed, unless the discharge is deemed minor in amount and impact. However, for an oil spill in the economic zone from foreign ships in transit, a fee shall be imposed only if the discharge causes considerable damage or risk of damage to Finland's shoreline or to the interests pertaining thereto, or to the natural resources in Finland's territorial sea or within Finland's exclusive economic zone. The oil discharge fee shall be imposed on a natural person or a legal person, who is the owner (party liable for payment) at the time of the offence. The oil discharge fee cannot be imposed on the owner, if he or she can prove that a manager, operator or bareboat charterer has been operating the ship in the owner's stead.

The oil discharge fee is imposed by the Border Guard. Within the Border Guard, the decision is made by the Commander or the Deputy Commander of the Coast Guard, or the Head of the Operational Office. The party liable for payment is entitled to appeal the decision regarding the oil discharge fee in the maritime court operating within the Helsinki District Court.

In order to exclude double jeopardy, the oil discharge fee is subsidiary to general criminal sanctions. An oil discharge fee cannot be imposed on a person who has received a legally valid sanction for the oil discharge incident in question. The authority that has imposed the oil discharge fee shall, upon application, waive the fee, if the person upon whom the oil discharge fee has been imposed is subsequently subject to a sanction for the same oil discharge incident.

5.2. Are there discussions with regard to the scope of the guarantee? Areas of doubt, vagueness? What, for instance, about EU-regulations regarding extensive farming and mandatory cuts in the income support to farmers when infringing the cross-compliance conditions? *Please provide a case from your country to discuss this guarantee.*

There are many other instances where authorities may use sanctions or administrative coercion on operators. E.g. agricultural subsidies may be withheld if the

farmer does not comply with environmental regulations.

Administrative compliance measures such as these have been regarded as double jeopardy when, in criminal proceedings, the court orders a penalty for the same offence:

A farmer had kept cattle in excess of permit regulations, disposed of manure and waste water unlawfully and neglected the proper care of his livestock. Because of this, agricultural subsidies to the farm had been cut by the authorities and the farmer had been ordered to comply with regulations under a 30 000 euro penalty fee. The First Instance Court found the farmer guilty and sentenced him to 50 days of prison on probation and to forfeit benefits of 30 000 euro to the State. The Court of Appeal judged that, as the penalty fee had been imposed for partly the same offence, he could not be punished (ne bis in idem). For offences committed after the penalty fee was imposed, the Appeals Court maintained and raised the sentence of imprisonment to 60 days on probation. (Turku Court of Appeal R 13/1088, 22.10.2014)

Environmental legislation is rich in provisions concerning use of administrative coercion. A supervisory authority may, in order to rectify a violation or negligence, prohibit a party that violates an Act or a decree or regulation from continuing or repeating a procedure contrary to a provision or regulation; order a party that violates an Act or a decree or regulation based on it to fulfil its duty in some other way; order a party to restore the environment to what it was before or to eliminate the harm to the environment caused by the violation; order an operator to conduct an investigation on a scale sufficient to establish the environmental impact of operations if there is justified cause to suspect that they are causing pollution contrary to an Act.

By administrative order, a conditional fine may be ordered by the supervising authority to ensure compliance with an order, e.g. to cease unlawful operation. By way of an example: ”Unless it is obviously unnecessary, an authority may intensify the effect of a prohibition or order that it has issued by conditional imposition of a fine, of having an omission corrected at the expense of the defaulting party, or of suspending operations.”[7]

However, the duty to pay a conditional fine is not a punishment, which could be regarded as a violation of the ban on double jeopardy. In its precedent SAC 2016:96 the Supreme Administrative Court declared that using of a conditional fine, including an order of a conditional fine and, if the violation if not rectified, obligation to pay the fine, is not intended to be a criminal sanction. Its purpose is to make sure that the violation is rectified so that the previous state of the environment is restored. Therefore, the notice of a conditional fine and an order to pay the fine because the obligation to restore the environment had been neglected was not against of the prohibition of ne bis in idem, even though the operator had also been punished on the basis of the same violation. The Court referred to Protocol 7

[7]Finnish Environment Protection Act, Sec. 184

Art. 4 para 1 of the ECHR and to case law of the EctHR.

6/ The right to proportional penalties

6.1. Have you noticed, in your practice, environmental cases where the penalties inflicted were too severe?

Environmental penalties are commonly considered to be lenient. A typical punishment is a fine, but in rare, severe cases also imprisonment has been inflicted. In addition, e.g. for environmental crime, a corporate fine of, at the least, 850 and, at the most, 850 000 euros may be ordered.

A concrete manufacturing plant had dumped waste concrete on the ground in breach of the permit provision that waste concrete should be dumped in a water proof basin. As a consequence, the level of chromium in ground water had risen. The area was used for municipal water supply and the nearest pumping well was only 300 metres away. The Court of First Instance as well as the Court of Appeal found that the plant had polluted the soil and ground water and violated the conditions of the company's environmental permit. Five employees of the company were sentenced to pay fines of 4 000, 2 760, 3 180, 13 800 and 2 240 euros and the company to pay a corporate fine of 15 000 euros. (Turku Court of Appeal R 12/988, 17.6.2013)

A gravel pit company had extracted gravel in excess of permit provisions and neglected to close and remediate the pit although obliged to do so by Court order. The responsible operator was sentenced to 60 days of prison on probation and the company to pay a company fine of 15 000 euro. The company was found guilty of unlawfully extracting some 120 000 m^3 of gravel, but illegal benefits were not forfeited because of the large amount of gravel required for the remediation of the pit. (Etelä-Pohjanmaa Court of First Instance R 11/2072, 15.3.2012, Vaasa Court of Appeal R 12/481, 22.5.2013)

6.2. If so, could you elaborate and tell why you felt the penalty was too severe?

In a case, the offender had committed an environmental crime by operating a one man´s company. He had been sentenced with a fine and also a corporate fine was inflicted on his company (where he was the sole owner). The Court was the opinion that the total punishment was too severe.

6.3. At the level of the Council of Europe, Recommendation No. R (92) 17 of the Committee of Ministers to member states concerning consistency in sentencing states, in its point B.7.a: "*As a matter of principle, every fine should be within the means of the offender on whom it is imposed*." Do you consider that proportionality in punishment

requires to have consideration for the extent to which the penalty hurts the offender, implying, for instance, that for identical offences a firm with healthy finances should be punished with quite higher fines than an individual with a low income? What is the punishing practice in this regard in your country?

> According to the Criminal Code, ch. 9 sec. 6, the amount of the corporate fine shall be determined in accordance with the nature and extent of the omission or the participation of the management ..., and the financial standing of the corporation.... When evaluating the financial standing of the corporation, consideration shall be taken of the size and solvency of the corporation, as well as the earnings and the other essential indicators of the financial standing of the corporation

7/ The right to respect for private and family live

7.1. Have you noticed an impact of the right to respect for private of family life on the environmental adjudication in your country? If yes, could you please provide examples form the case-law illustrating this influence?

> The case law of the ECtHR concerning article 8 of the Convention is well-known to Finnish courts. The ban on unreasonable harm (excessive nuisance) has, in spite of its roots in private neighbourhood law, been included in the Environmental Protection Act and its permit system. This means that an environmental permit may not be issued if the operation of the plant would cause neighbours intolerable nuisance, such as unreasonable noise. Therefore, it is largely considered unnecessary to refer to Art. 8 of the ECHR in Finnish case-law.
>
> There are, however, some exceptions to this rule, probably based on explicit claims of the appealing parties. One example is SAC 2013:163: The case was about noise caused by military forces´ shootings with heavy weapons in Santahamina island which is situated close to densely populated city areas in Helsinki. The Supreme Administrative Court quoted Art. 8 of the Convention and referred to cases López Ostra v. Spain (1994) and Moreno Gómez v. Spain (2005) as examples of the relevant case-law. However, the Court concluded that on the basis of its decision in the case, a fair balance between private and public interests was achieved. The Court *i.a*. ordered that an environmental permit for certain activities in the military area had to be applied for.

7.2. Would you be willing to use this right in support of environmental adjudication and, if so, in which type of cases?

> In principle yes, but considering the national environmental legislation it is hard to

see where it could add any value. It is hard to imagine a case where the result would be different if the Court would apply Art. 8 of the ECHR. Of course, it can be a concurring reason which could support in finding the right solution on the basis of national legislation. It could be used in pollution control cases, both permit and and administrative coercion cases, where concrete nuisance type harm is inflicted to neighbours in a wide sense.

8/ The right to life

8.1. Have you noticed an impact of the right to life on the environmental adjudication in your country? If yes, could you please provide examples form the case-law illustrating this influence?

We do not know of any such case. In principle, it could be possible to reason a decision with help of right to life in cases of extremely hazardous activities, such as emissions of highly toxic substance or radiation.

8.2. Would you be willing to use this right in support of environmental adjudication and, if so, in which type of cases?

See above. National pollution control legislation banning e.g. hazards to health will lead to same conclusions.

9/ The right to environmental protection

9.1. Do you consider this right to have impact on environmental adjudication?

By the Finnish Constitution (sec. 20), protection of the environment is everybody's duty. The administration is obliged to safeguard a healthy environment and the means for citizen's to influence decisions concerning the environment.

This provision rather seldom enters into Courts´ reasoning. In practice, it has most often been mentioned as a factor supporting NGOs´ *locus standi* in situations where explicit rules have been missing (e.g. wolf killing permits under the previous Hunting Act). Substantive environmental legislation is normally written so as to fulfill the demands of this constitutional clause. It should be noted that sec. 20 does not guarantee a healthy environment in the sense that everyone would have a claim for a pollution-free environment. However, it is a signal by the legislator that environmental concerns have a high priority side by side with rights guaranteed by the Constitution. It is also a constitutional task for lawmakers to strive for a good environment and to widen opportunities to have an influence of decision-making concerning the environment.

9.2. Do you agree with the proposition that, in environmental adjudication, it is only fit to impact on the sanctioning policy, meaning choice and level of sanctions inflicted?

No, we think that sanctions should be subsidiary in relation to legal-administrative means of control. Only effective preventive means of control can guarantee the quality of the environment. They must be supplemented as efficient systems of administrative coercion, enabling supervisory authorities to order e.g. rectification of a violation or restoration of the damaged environment. Penal sanctions are, obviously, necessary as *ultima ratio*.

The provision in the Constitution obliging citizens and Society to protect the environment should be the basis of legislation in the field of environmental protection.