

EUFJE Conference 2016

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

Bucharest, 18 and 19 November 2016

Danish report to questionnaire

1/ The right to be tried within a reasonable time

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?

Answer: Criminal prosecution regarding offences of environmental law in Denmark is in almost all cases initiated by a notification of the environmental authority (in most cases the Municipality is the environmental authority) to the prosecutor. Since criminal prosecution for the environmental authority in most cases is not the first, but the last choice, the notification of the prosecutor will in many cases happen long time after the offence has been discovered by the environmental authority – in some cases it takes years before the prosecutor is notified.

When the prosecutor is notified on the environmental offence, the prosecutor then decides if he finds that the case based on the evidences presented by the environmental authority shall be brought before a criminal court. In this assessment, the prosecutor often needs to check whether the administrative law principles has been followed by the authority and in some cases also to check whether the interpretation of the environmental legislation presented by the authority is right. Insufficient evidences as well as procedural error made by the administrative authority causes often delay and implies that the prosecutor in many cases must decide not bring the matter before a criminal court.

Thus the time spending in prosecution of environmental crimes consist of 4 phases from the offence has been discovered by the environmental authority:

Phase 1: From the offense is discovered by the authority to the prosecutor is notified

Phase 2: The review of the prosecutor

Phase 3: Criminal prosecution initiated before a Danish court

Phase 4: Time spending before the court until final judgement

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?

Answer: There is no statistic on time spending in criminal proceedings regarding environmental crimes before Danish courts but based on discussions with administration, lawyers and prosecutor the impression is that the time spending in the different phases mentioned above is:

Phase 1: From the offense is discovered by the authority to the prosecutor is notified: 3 month to 2-3 years

Phase 2: The review of the prosecutor: 3 month to 2 years (normally)
Phase 3: Criminal prosecution initiated before a Danish court: 6 – 18 month
Phase 4: Time spending before the court until final judgement: 3 – 9 month
Phase 5: In case of appeal: 1 – 2 year

1.3. What procedural steps can take time?

Answer: See answer to question 1.2

1.4. Are you aware of difficulties with this guarantee?

Answer: The guarantee laid down in ECHR art. 6 are fully recognized by the Danish court, meaning that in case of significant delay, the penalty is substantially reduced and in some cases imply that the court found that no penalty can be given.

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

Answer: See answer to question 1.4. This can be illustrated by the Western High Court ruling from 2015 (UfR 2014.2536 V) which concerned an animal farmer who in year 2004-2008 has extended a number of animals with about 60 % before approval to the extension of the animal farm was given by the authority in 2009 and upheld by the Nature and Environmental Appeal Board in 2011 without further condition. In case of no delay, the penalty would in this case have been a fine about 125.000 Euro and confiscation of 500.000 Euro. Because of the delay and the fact that the operation of the environmental farm didn't cause harm to the environment, the fine was reduced to 14.000 Euro and confiscation rejected. Same position was taken by the Western High Court a half year later in an almost similar case where criminal prosecution was initiated 4 years after the prosecutor was notified (MAD 2014.400 V). And in this with particular reference to EHCR case *Paulet v. U.K.* from 2014 arguing that the legislative requirement of confiscation in this case violates the proportional test.

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?

Answer: Punitive sanctions are used in most of the criminal prosecutions of environmental offences if the environmental offence has not been brought to an end before the court is ruling.

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?

Answer: Yes, criminal courts have the power to impose remedial sanctions but only on request of the prosecutor – not ex officio. In cases on environmental crimes, remedial sanctions have not been reported in published case law.

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?

Answer: Yes, it is possible for NGOs to be part in cases on prosecution of environmental offences, provided that the NGO has a civil claim on compensation for environmental damage, and provided this is accepted by the prosecutor as well as the judge. To my knowledge this has however only happen in two case from Western High Court (MAD 1996.352 V and MAD 1997.857 V) which both concerned unlawful pollution of a river causing massive death of fish and in which the Danish Anglers Association was granted compensation for restocking. Since then, no further criminal cases involving NGOs have been reported.

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, ...)

Answer: The Danish courts fully recognize the presumption of innocence despite of the trouble this creates for the environmental authority and the prosecutor. The means of proof are free. A general problem regarding evidence is caused by mismanagement of the environmental inspectors which in some cases doesn't make the required monitoring or other documentation of the environmental impact of the offence committed.

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?

Answer: In my opinion the principle is fundamental for our legal order and shall not be weakened in environmental cases of any kind.

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 ?

Answer: Danish courts require strong evidence to conclude intentional implying that in almost all environmental cases concluding guilt, the guilt is negligence and if supported by further evidence gross negligence. In my opinion the Danish courts apply a proper balance.

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?

Answer: The presumption of innocence is in environmental crime cases mainly reflected in the matter of guilty or not guilty. However, in cases where the guilt is considered proven the presumption indirectly can effect the assessment of negligence and because of this be reflected in the sanction. I don't think that presumption of innocent have an overly restrictive impact on sanctions.

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?

Answer: Yes, the Danish Environmental Protection Act (section 72), the Contaminated Soil Act (section 40) and the Animal Farming act (section 29 and section 53(2)) have an extensive use of self-monitoring requirements. On the other hand the prohibition of self-incrimination is implemented in the Parliamentary Act 2004/442 on the application of the rule of law in administrative inspection and control section 10 which fully implement the prohibition of self-incrimination under ECHR. In order to address the conflict between self-monitoring requirement and the prohibition of self-incrimination, the Environmental Protection Act section 70a and 70b. According to these provisions, there are no self-monitoring obligations in case this conflict with self-incrimination but in such cases the authority can make the monitoring on the expenses of the polluter (the supposed offender). The same system is established in the Contaminated Soil Act (section 73a and 73b) and the Animal Farming act (section 50 and 51).

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.

Answer: The privilege against self-incrimination has to my knowledge not created obstacles for the prosecutor.

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?

Answer: The only environmental case on double jeopardy reported is a case regarding cross compliance under the EU Regulation 1783/2003 on cross compliance and the case concerned animal welfare (UfR 2009.277 H). The allegation of the farmer was that since the violation of the legislation on animal welfare was subject to criminal sanctions and to administrative sanction under the regulation 1782/2003 requiring the farmer partly (or fully) to pay back the agricultural aid given under the EU Agricultural Policy, this was double jeopardy in conflict with ECHR art. 7. The majority of the Supreme Court (4 judges) rejected the claim arguing that the obligation to pay back was a civil obligation and therefore not within the scope of ECHR art. 7. However, one judge found that the administrative sanction to pay back does have a such a close connection to the crime committed and the sanction of this crime, that it fall under ECHR art. 7 and therefore concluded that the administrative sanction was invalid. Since the Supreme Court ruling in 2009, there are not reported other cases on the matter.

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?

Answer: The implication of the guarantee in ECHR art. 7 regarding sanction is to my knowledge subject to some pleading cases in which a preliminary request from a Danish court to the CJEU can be expected.

6/ The right to proportional penalties

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

Answer: No.

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

Answer: See answer to 6.1.

6.3. At the level of the Council of Europe, Recommendation No. R (92) 17 of the Committee of Ministers of 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?

Answer: The economic capacity of the offender has in some cases influence, but the fact that the fine will bring the offender to bankruptcy is not in itself a defense.

7/ The right to respect for private and family life

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?

Answer: The case law from the ECHR court regarding the application of ECHR art. 8 in environmental cases are reported and supplemented by a Danish summery in the Danish Legal Environmental Magazine (MAD) every year and this case law has also been subject for theoretical discussion in legal theory. However, until now there has been no environmental cases before a Danish Court in which a party has claimed that EHCR art. 8 was violated. Se until now, this has only been a theoretical discussion since the matter seems solved by the Danish Environmental Protection Act.

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

Answer: Yes, provided that the conclusion could not be reach based in Danish Environmental legislation.

8/ The right to life

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

Answer: No

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

Answer: ?

9/ The right to environmental protection

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

Answer: No, not in itself since the legal implication of the right to environmental protection laid down in the EU-Charter must be considered reflected in the legislation adopted by the EU because the principle leaves a wide discretion for legislator. It is therefore the legislation adopted by EU and by the Danish Parliament which have impact on environmental adjudication.

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?

Answer: No I don't agree and there is no support in Danish case law for the statement.

