

**EUFJE Conference 2019 Helsinki, 13-14 September 2019 The role of science in
environmental adjudication Questionnaire**

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Questions 1) Mandate of the court to review techno-scientific matters

- a)** In what forms do judges gather scientific advice (e.g. party-appointed experts, court-appointed experts, in-house experts, expert judges (legal adjudicators having a formal training in a certain scientific field), and/or expert assessors (scientific experts sitting with judges during the deliberation without the right to vote)? What is the task of these actors?

All in all, in Spain the environmental judicial matters are not extremely different from the rest of the areas. Nevertheless, we could notice it used to be a technical matter that in some specific points need a more technological approach so in the judgments the role of the experts plays a more intensive role. As a consequence the judicial files contain a lot of technological reports and the role of the legal expert is more relevant. But Spain is very far to other European countries such as Sweden Environmental Courts where the experts are integrated in the Courts.

- b)** What forms of scientific references are acceptable as bases for making persuasive scientific findings (E.g. expert evidence, standards issued by competent international or national organizations, regulatory trends of other states, etc.)?

The general rule is that judicial power, regulated by constitutional law, is guaranteed full independence and freedom of judgment. There is a singularity in this matter because of the environmental crimes use to be configured as "blank criminal laws" (in Spanish language "leyes penales en blanco"). The blank laws are a type of criminal laws that provide the penalty for a criminal offense, while the offense itself is defined in another law or regulation. As a result, if a Criminal Judge needs to apply them, he should know very well the administrative regulations and, furthermore, he should find out something more grave in the administrative infringement to become it a criminal offense.

- c)** Can a higher court (e.g. appeal court, Supreme Court) in your jurisdiction investigate scientific questions, and/or review the scientific findings of lower courts? If so, to what extent?

One more time, it is necessary to distinguish between administrative and criminal courts. The judicial review is wider and my more complete in administrative cases, but in criminal matters rule the double jeopardy principle. Therefore, with a few exceptions, only the accused person could appeal against the sentence not the Prosecutors.

- d)** How would you handle evidence derived from geospatial (GIS) technologies (such as satellite images, aerial photography, drones, etc.) (see for instance the use of geospatial intelligence in the Bialowieza case, C-441/17 R)? In what type of cases and in what ways do you utilize them? How can they promote compliance monitoring and a more effective enforcement.

It is quite impossible use these legal instruments or injunctive relief in administrative cases. On the other hand it is possible in Criminal cases but it depends on the entity of the crime. As a matter of fact to use these tolls in criminal cases is quite complicate because the immense majority are misdemeanors not serious crime, it would be with nuclear weapons or very dangerous material but, as far as I know my colleagues are not using them, and they only could bring into play them for very sensitive matters. For a long time, the Spanish Criminal Procedural Act, has lacked a regulation in relation to investigative acts that have been originated as a consequence of the appearance of modern technologies, and this has created not few procedural new problems. The legal reform undertaken by the Act 13/2015, dated October 5th, aims at solving this situation of lack of sufficient legislation but these type of legal instrument only use to be used with criminal gangs, human being traffic, drugs dealing and so on...

2) When do you gather expert advice?

- a) How do you distinguish between technical/scientific questions and legal questions in fact-intensive disputes, where science and law are closely interlinked in the underlying legal rules and concepts?
As matter of fact, it is not an easy question; I personally believe that you should determine on a case-by-case basis. Their respective weightings depend on the nature of the environmental issue required in each particular matter.
- b) Are there any types of cases and/or questions where gathering scientific evidence is mandatory under domestic law?
As far I concern, we have not mandatory evidences in the Spanish legal system.
- c) To what extent are judges allowed to investigate the scientific dimensions of cases *ex officio*?

Once again we should distinguish between administrative cases and criminal cases. According to the article 33.2 of Law 29/1998 of 13 July governing Administrative Jurisdiction, Administrative Courts could intervene in some specific situations in the case. The Criminal Judge could not intervene in the case at all. Therefore, *points out that the system of administrative justice offers special remedies such as review and reconsideration. On the whole, at this concrete point, the Spanish system is a little bit closer to the German system (which permits that the Court could intervene ex officio) than to the French system (where the Court depends on the terms of the legal claim, "iudex iudicare debet iusta allegata et probata partium").*

3) Rules of expert appointment

- a) What are the selection criteria of experts in your jurisdiction (e.g. having requisite training, being impartial, independent from the party, being enrolled on government-issued lists, etc.)?
I shall try to summarize but t is complex issue, there are official lists of independent experts, but also the parties could appoint their particular experts. It is very important to realize that in Spain (as in Portugal or Latvia), we have "actio popularis" so in environmental matters could participate in the proceedings not only the Prosecutor and the victims (parte civile) also could intervene NGOs and people who shows an special interest.
- b) Whether and on what basis can a party challenge the appointment of a party- appointed/court-appointed/in-house expert?
According to the Spanish legal system, the parties are complete free in order to appointment a legal expert. As we see it, this activity is a part of the right to full access of any evidence.
- c) To what extent and in what ways do judges in your jurisdiction exercise control over the scientific fact-finding process (e.g. by defining precisely the scope of factual controversy needed to be addressed by experts)?

In general, Judges usually comply with criteria of the Experts (lex artis) but when they should chose between two different criteria of different expert they are free to give more prominence one criterion over other. But sometimes the Judge could not accept the single criterion of the unique expert, if he or she understands that this criterion is unreasonable or illogical.

4) Evidentiary issues: standard and burden of proof

- a) What is the applicable standard of proof for environmental cases in administrative, civil and criminal law (e.g. preponderance of the evidence, beyond reasonable doubt, etc.)? Is it set in domestic law, or are judges free to adjust the standard as they deem fit?
In criminal matters obviously the burden of the proof falls upon accusations as a consequence of the principle of presumption of innocence ("the burden of proof is on the one who declares, not on one who denies"). In civil and administrative matters it is a little bit more complicate. In Spain the rules governing the burden of proving a fact are intimately related to the rules governing the burden of alleging a fact. As a general rule, the party who has the burden of pleading also has the burden of proof. Although, the burden of proof in principle rests on the plaintiff, the duty to ascertain and evaluate all the relevant facts is shared between the parties, we call this the principle of the proximity to proof. In Administrative cases, as an exception and in some particular cases, the Court could intervene requiring evidences ex officio.
- b) What are the rules of allocating the burden of proof in science-intensive cases (maybe give one or two examples to indicate what is meant by science- intensive cases)?

In some cases, in Spain we have the reversal of the burden of proof for a lot of cases, for instance, the consumer or when an employer is demanding for sexual harassment of a worker, in tort lawsuits have a lower burden of proof, namely "preponderance of evidence", this point it is very useful in environmental matters. So far, I have no information about the burden of proof in science-intensive cases, I reckon there are not special rules related to this topic.

5) Rules of evaluating expert evidence: standard (intensity) of review

a) How do you choose between two competing or conflicting pieces of expert evidence?

First and foremost, experts should be chosen using strictly objective criteria, to ensure the maximum professionalism, independence and impartiality. The second point, it is the high level of professional knowledge and skills required for their current position. Hence, we choose the evidence regarding the impartiality and capacity of the expert who has prepared the information.

b) Could you review the scientific assessments and justifications made by a competent domestic authority (by conducting a *de novo* review of the evidence)? Or is your judicial review deferential towards the scientific claims of domestic authorities?

The issue is different depending on the type of case. In administrative cases the review is more detailed. The Higher Court could have a different view of the evidences and it is easier than in criminal cases. Even though the Administrative Court can review the whole court decision, but more usually a review will involve scrutiny of one specific aspect. There is not any problem this point is related to a scientific claim. Furthermore we should differentiate between judicial review and appellation because they are two diverse legal institutions.

c) What is the applicable standard of review to scrutinize the scientific assessments of domestic authorities (e.g. scrutinizing 'manifest errors', or the reasonableness/consistency/coherence of their scientific conclusions, or interrogating the scientific validity and factual correctness of the evidence, or reviewing the procedural aspects of science-based decision-making process at hand)?

As far as I concern, there two levels. On the first hand, a Judge is a layman in these terms and he could not replace the expert's criteria by his own criterion. Nevertheless, obviously he could not listen to experts if the consequences of the their report are illogical or absurd, and he could moderate the consequences if the conclusions are not reasonable but in this case he must provide new-fangled legal ammunitions based on the grounds.

6) The role of science and technology in the courtroom - an overall assessment

a) To what extent do you consider the difficulties of scientific fact-finding to be a defining challenge in environmental adjudication compared to other difficulties?

The judicial review into whether the science is "certain" or "uncertain" about one point of the judgment is something very sensitive. This legal inquiry into the existence of uncertainty is not as easy a question for a High court to answer as it might seem, given that the determination of certainty involves both reaching a certain level of scientific understanding and making normative judgments about the nature of science. On the other hand, e should distinguish between appellation administrative court and judicial review. In the second case the High Court only should foresee the legality of the proceeding but in the other case The High Court could refuse the point of view of the judge of first instance.

b) Do you consider the domestic rules of expert involvement to be appropriate to secure judicial control/monopoly over deciding environmental disputes? Or do you think judges should exercise greater control over the scientific fact-finding process?

I consider a big mistake that judges exercise greater control over the scientific fact-finding process. As I see it, judges should respect the "lex artis" of professionals in other issues. I agree with the Swedish idea to implement Environmental Courts forming body made up of Judges and independent experts.

c) Do you consider the limits of curial supervision of fact-intensive cases are appropriate for providing effective judicial protection and promoting uniform application of EU law?

From my point of view, there are two different legal institutions that we are confusing, I have the impression that we are mistaking means for ends. Maybe I am wrong but I do not understand the question, but I deem that we very careful about lumping categories.

d) Do you think it is necessary and if so, in what ways, to improve the scientific engagement of judges (E.g. would you improve the procedural rules of scientific fact-finding, enhance the scientific competence of the judges through training and capacity building, or develop new legal tests to review contradicting scientific evidence, etc.)?

As far as I concern, I completely agree with this idea. Furthermore, I strongly believe in the specialization of environmental judges, environment is a very specific and technical matter which demand a high level of technical knowledge. Moreover, the need to bring together expertise and make efficient use of the limited available resources is related to the new role of Environment in our society. In addition, Environmental matter is a international and complex issue the specialization would improve European cooperation and can add particular value to the single actions of the different Judges of Member States.

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3) Case study

How would you delineate applicable questions of law and science in the following cases, what types of expert evidence would be gathered, and how would they be evaluated?

Choose one of the following cases, according to your field of expertise:

- a) The case brought before you is about a proposed artificial groundwater production plant that might impact a nearby Natura 2000 -site, whose conservation values are contingent on groundwater levels, thus being of concern when authorizing artificial groundwater undertaking outside the protected area. The Natura 2000 site has e.g. the region's largest sinkhole that has wetland at the bottom of it, and is thus connected with the groundwater formations. It also has coniferous forests or glaciofluvial eskers, and the site is generally described as having calcareous fens and springfens (all listed as Natura 2000 habitats). Up until now the plant has gained the required approvals. The groundwater model used in the proposed undertaking's plans modeled the water currents in the ground. As typical of such models, it was more uncertain in the rims of the area than in its centre. Coincidentally, these rims of the area also included especially sensitive and small wetland formation. The administrative authority, in its statement of reasons, discussed the role of the precautionary principle and scientific uncertainty, noting that neither formed as such a reason to not allow the venture. They only obliged the administration to establish such permit conditions that they adequately curbed the harmful impact. However, an environmental NGO brings a claim against the permit arguing that the permit should not have been granted at all. They claim that since the scientific assessments presented before the administrative authority did not remove all justified scientific uncertainty on the undertaking's consequences, and since there are thus relevant risk of detrimental impact to the Natura 2000 -site, the plan should not be allowed to proceed.

As I see it, the precautionary principle demands not only a scientific approach; we should study the problem under other considerations. Bearing in mind that the integration of evidence, interpreted in this more rigorous way, with practical experience becomes a challenge, and the risk is that practical experience will have no real place as evidence in evidence-based. We can ignore that is a place with the maximum of protection possible. There is a margin of appreciation. Equally problematic would be the accurate response that, in view of their apparent incompatibility with practical experience and the risks pointed out by NGOs, evidence-based sustainability studies, in their different varieties, have to be combined. In my particular opinion, followed by my experience, is not to argue against evidence-based sustainability studies. It is to argue for a way of adapting them so that they can relate in a meaningful way to a more global approach.

Sometimes the scientific studies are focalizing only in one point, therefore it would be necessary make a more comprehensive analysis to obtain the right overlook.

- b) The case brought before you is a case of illegal trade in birds protected under the EU CITES regulation Annex A (e.g. Red kite /Egyptian Vulture). Trade activities with respect to these birds are prohibited. There is an exception when one can prove that a specimen has been bred and born in captivity.

These birds can obtain a CITES-passport, which makes them marketable.

Through forgery of rings and breeder's declarations, the defendants obtained CITES-certificates for "captive-born and bred species" which allowed them to commercialise the birds in spite of the general prohibition to trade EU CITES Regulation Annex A species. A bird protection NGO becomes a party to the criminal proceedings and claims moral damages because of the loss of the birds. Would this be evaluated by an expert? If not, how would the court estimate the amount of the compensation?

This type of trade appears to be highly artificial and there are indications pointing to the possibility of fraud in law and a clear abuse of law. In Spain, the fact of forgery of rings is a specific crime, because we consider the rings an official document. Also the perpetrator is committing a fraud and an environmental crime. Eventually, we punish each offense separately.