SWEDEN

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The ECHR as a beacon in environmental prosecution and adjudication

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Questionnaire

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Introduction
There are five Land and Environment Courts and one Land and Environment Court of Appeal in Sweden. The Land and Environment Court of Appeal hears appeals from all Sweden. The environmental courts handle for instance cases concerning environment impact assessments, permits and supervision decisions according to the Environmental Code. They also handle cases concerning administrative sanctions. Cases concerning environmental crime however, are not handled by these courts but by the general courts.

The Land and Environment Court of Appeal also constitutes a department of the Svea Court of Appeal (which is part of the general court organization). Cases concerning environmental crime in Svea Court of Appeal are handled by the department that also constitutes the Land and Environment Court of Appeal. This department only handles criminal cases from a part of Sweden. The legal judges – but not the technical judges - that are part of the Land and Environment Court of Appeal do thus participate in environmental crime cases.

1/ The right to be tried within a reasonable time
(ECHR art. 6.1, ICCPR art.14.3 c, EU-charter art. 47 (2))

1.1 According to provisions in the Environmental Code supervisory authorities are obliged to report infringements to the police or public prosecution authorities where there are grounds for suspicion that an environmental offence has been committed (Ch. 29 sec. 2). A notice of violation sent by a supervisory authority is the most common way in which the opening of a file on an environmental offence is triggered. It is less common for such a file to be opened due to a report being made by a member of the public (but it does occur).

1.2 As regards the criminal cases being handled by the courts (district courts as well as courts of appeal) the Government sets a time limit demanding that 75 percent of the cases shall be handled within a maximum period of five months (with the exception of prioritized cases, e.g. cases where the accused is held in custody). According to last year´s report the district courts live up to this time limit, but the courts of appeal do not (7,1 months according to the statistics of 2015).

1.3 The investigation phase is often too long in the largest and most complicated cases. This is often due to lack of resources within the police. Delay may also be caused by the fact that there are few defence counsellors specialized in environmental criminal law and thus the ones who do are very busy. This can e.g. lead to a situation where an interrogation cannot be conducted for months.

1.4 See the answer to question 1.2.

1.5 If a suspect has not been remanded in custody or received notice of prosecution within a stated period of time (related to the seriousness of the crime) no sanction can be imposed. If, in other cases, a long time has elapsed since the crime this will be considered when determining the appropriate punishment. If it would be manifestly unreasonable to impose a sanction the court shall grant exemption from sanction. If undue delay has occurred the Parliamentary Ombudsmen (JO) may take a decision to criticize the responsible authority/court. JO is appointed by the Swedish parliament to ensure that public authorities and their staff comply with the laws and other statutes governing their actions.

Case law examples: -

2/ The right to a fair trial as including the right to respect of judgements/implementation of judgements (ECHR art. 6.1, ICCPR art. 14.1, EU-charter art. 47(2)

2.1 Punitive sanctions are implemented. Remedial sanctions (e.g. reinstatement of the environment, compensatory action etc.) are not part of criminal proceedings, however damages can be imposed.

2.2 No.

2.3 NGO:s do not play any particular role in the prosecution of environmental offences. Representatives of an NGO may of course report suspicions of crime and be witnesses but they may only be a civil party in a criminal proceeding if they (or rather a member) are victims of crime. They would not be regarded as representatives of the environment being a victim of crime and can thus not obtain damages on behalf of the environment. However they may alert the supervisory authorities and demand the authorities to take action. In that context they can request remedial action.

Case law examples:-

3/ The right to be presumed innocent (ECHR art. 6.2, ICCPR art. 14.4, EU-charter art. 48.1)

3.1 The basic principles of evidence (apart from the fundamental requirements according to ECHR) are free submission of evidence and free evaluation of evidence. The principle of free submission of evidence means that as a rule all types of evidence are allowed and thus that the means of proof are free. However evidence obtained in an undue manner may not be allowed (in

order to comply with the principles of fair trial). In environmental crime cases the most often used means of evidence are expert witnesses and technical/chemical analysis reports.

Prosecutors experience a higher demand for technical evidence in environmental crime cases than in other cases. This seems to be the case even in situations where the legal requirement is limited to a need to prove that e.g. a discharge has contained a certain hazardous substance as such – not the exact percentage of it. It is also a difficulty that the supervisory authorities do not have the means or the time to collect samples and have them analysed. Sending samples to the national forensic institute may take too much time and sometimes be too expensive

3.2 A prosecutor should only prosecute if he or she can expect a conviction. The situation regarding environmental crime may be illustrated by statistics: Person-based clearance rate for environmental cases is 3 percent (2015). Person-based clearance means that a person suspected of the offence has been tied to the offence through an indictment, the issuance of a summary sanction order, or the issuance of a waiver of prosecution. The person-based clearance rate for criminal cases in general is 18 percent. However a large number of environmental crime cases are not dealt with through a criminal charge against a certain person but rather through a case of corporate fines against a company. When counting those cases as well the clearance rate is closer to that of criminal cases in general.

3.3 Environmental crime cases differ from other types of criminal cases as they often contain components of scientific and/or technical nature. This call for certain competence and experience in the field of environmental law. In lack of such competence the principle of innocence may be more frequently applied in environmental crime cases than in regular criminal cases. Statistics in Sweden show that the number of dismissed environmental crime cases is 30-35 percent while the amount of dismissed cases as regards “ordinary” crime is 5-10 percent. The application of the principle of innocence affects both the evaluation of whether a crime against the environment has in fact at all taken place, and the assessment of guilt (mainly negligence). Both these aspects may be affected by the extent of competence held by the court and result in an application of the principle of innocence that is more extensive than in other cases.

3.4 Sanctions in the field of environmental crime can generally be described as mild. The predominant sanction is a fine. More severe sanctions have only been applied in very few cases. There may be a number of reasons behind this but the principle of innocence cannot be claimed to be one of them.

Case law examples:

Another aspect of the right to be presumed innocent that sometimes becomes an issue when someone applies for permit, may be illustrated by a statutory provision in the Environmental Code that states that :

> A permit, approval or exemption may be refused to anyone who did not discharge his obligations under a previous permit, approval or exemption. The same shall apply to anyone who has previously omitted to apply for necessary permit, approval or exemption. Where such omission has occurred, a permit, approval or exemption may also be refused if the applicant or anyone who, by

> reason of the ownership structure or the division of responsibilities, is closely associated with the applicant´s activities, is or was similarly associated with the activity in which the omission occurred (Ch. 16 sec. 6).

This provision came into force in 1999, but has only rarely been applied. In one case concerning a major biogas plant that was planned to be constructed in the suburbs of Stockholm local residents opposed issuing of a permit and claimed that the applicant company had run similar plants in other places, violating the permits of these plants in such a way that severe problems with odour had occurred. In another case the neighbours to a quarry claimed that a permit should be refused, since the company had earlier run the same quarry without all necessary permits. Neither of the two cases had been subject to prosecution.

In both cases the Land and Environment Court of Appeal found that a permit should not be refused as a result of the application of the above mentioned regulation. In the case of the biogas plant a permit was however refused for other reasons – the localization close to a large number of inhabitants was not good enough considering the risk of odour. The quarry got a permit.

4/The privilege against self-incrimination (ECHR art. 6.1, ICCPR art. 14.3, EU-charter art. 47)

4.1 Yes, there is an extensive use of self-monitoring and reporting. There is e.g. a legal requirement for anyone holding a permit for environmentally hazardous activities to annually report to the supervisory authority. According to provisions in the Environmental Code a supervisory authority may order a person who pursues an activity or takes a measure that is governed by provisions of the Code to submit any information and documents to the authority that are necessary for the purposes of supervision. Persons who pursue activities or take measures that are liable to cause detriment to human health or affect the environment must also carry out any investigations of the activity and its effects that are necessary for the purposes of supervision.

4.2 As a large number of environmental crimes are disclosed through reports made by the operators themselves this is clearly an issue. It does not however, to our knowledge, seem to have been subject of any explicit legal scrutiny expressed in a judgement in an environmental crime case.

A parliamentary committee reviewing the Environmental Code looked at this issue in 2004 and concluded that there may rarely occur situations where forcing someone to supply information would be in conflict with the privilege against self-incrimination. There exists no particular provision solving this situation but the ECHR is of course generally applicable and part of Swedish law.

Please illustrate your answer by case-law
In a case from the Swedish Supreme Administrative Court (case RÅ 1996 ref. 97) the court, among other things, had to consider these issues in relation to coercive measures carried out by tax authorities in order to obtain documents with information from a tax paying company. The company claimed that its rights according to Art. 6 in ECHR had been violated. The court found that authorized search for certain documents, which had been authorized by a competent authority, was on an equality with a police search based on a legal decision and not in conflict with ECHR. The court however underlined that a person who

has refused to hand over a document, which contains for him or her compromising information, must not be punished or forced in order to be made to actively contribute to the handing over of that document.

5/The protection against double jeopardy (7th ECHR-protocol art. 4, ICCPR art. 14.7, EU-charter art. 50)

5.1 To our knowledge – rarely. Before a reform in 2007 environmental sanction charges could be imposed along with criminal sanctions. That situation has since then – to our knowledge – not occurred. There are some provisions in the Environmental Code that secures that double jeopardy in relation to sanction charges vs. criminal sanctions does not occur, i.e. that no penalty shall be imposed if the act which constitutes an offence is covered by provisions on environmental sanction charges. As regards administrative fines the Environmental Code states that in the case of failure to comply with an injunction issued subject to a penalty of a fine, no penalty shall be imposed pursuant to the provisions on penalty in the Code for an offence to which the injunction relates.

5.2 There has been a lot of discussion regarding the principle of ne bis in idem in recent years. Mainly concerning tax crime and administrative sanctions in that area, but not in relation to environmental offences.

In Sweden there are no explicit provisions preventing that a farmer who infringes a cross-compliance condition and thus gets his or her income support cut will also be subject to penalty according to environmental criminal provisions. The cut of the income support will generally (by the farmers) be regarded as a much more severe "punishment" than a penalty. To our knowledge the issue of *ne bis in idem* in this context has not really been discussed.

Please provide a case from your country to discuss this guarantee
The Swedish Supreme Court ruled in 2004 (case NJA 2004 s. 840) that the ban against double jeopardy was applicable on the relation between environmental sanctions charges and penalties. The determining factor when deciding if a decision on sanction charges prohibits a court from also trying a criminal case would, according to the Supreme Court, is if the offence is the same in both cases. The Supreme Court found that a decision on environmental sanction charges did not prevent later prosecution in a criminal case, as environmental sanction charges are based on strict responsibility and do not require intent or negligence. Thus there was no formal obstacle against environmental sanction charges and penalties being applied on the same objective circumstances.

However since that case the practice of the Supreme Court on double jeopardy has developed further and there is reason to believe that the 2004 case described above would not lead to the same result today. The situation has been affected by the ruling of the CJEU in case C-617/10, as a result of a request by a Swedish district court for a preliminary ruling concerning the interpretation of the ne bis in idem principle in European Union law. That case concerned the relationship between tax surcharges and criminal charges for a tax offence. The court found that the ne bis in idem principle in art. 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty

is not criminal in nature (a matter which is for the national court to determine). This ruling by the CJEU later resulted in a new ruling by the Swedish Supreme Court (case NJA 2013 s. 520) in which the court found that the right not to be charged twice for the same offence was to be applied to the Swedish tax system (tax surcharges and tax crime penalties). The court thus dismissed a prosecution on tax crime since the defendant had already been charged with tax surcharges concerning the same allegedly false information given to the tax authorities on which the prosecution was based.

6/The right to proportional penalties (EU-charter art. 49.3)

6.1 No.

6.2 –

6.3 As concerns determination of corporate fines finances shall as a rule not matter. Special consideration should be given to the maximum penalty for the crime (range), the risk of damage/detriment, the extent of the crime and its relation to the business activity. Even though finances are not to be formally considered they can´t be completely disregarded when deciding on a well-balanced sanction.

In order for a sanction to be effective and dissuasive it is important that it isn´t profitable to break the rules. Therefore a company´s financial situation, in our opinion, should be regarded when determining the size of the fine. If a crime is repeated this should also affect the severity of the fine (as is the case for individuals). This would require keeping a special record of offenders subject to corporate fines.

As regards individuals fines will normally be imposed as so called day fines. That means that a person´s income, fortune, support obligations as well as the financial situation in general will affect the amount of the fine.

7/The right to respect for private and family life (ECHR art. 8, ICCPR art. 17, EU-charter art. 7)

7.1 Not explicitly, but this fundamental right is, as pointed out in the background, part of environmental law. Both in the material provisions but also through the procedural provisions such as the definition of ”public concerned”.

7.2 –

8/The right to life (ECHR art. 2, ICCPR art. 6, EU-charter art. 2.1)

The right to life is not discussed as such in the environmental adjudication in Sweden, but it is of course a basis for the environmental legislation as a whole. Many of the activities for which a permit is mandatory according to the Environmental Code are potentially hazardous to health and could in worst case involve a threat to human life. Examples are major dams for water regulation, industrial plants with discharges of

carcinogenic compounds or plants for storage of large quantities of hazardous chemicals. The environmental impact assessment process and the permit process aims at assessing and reducing the risks of such activities. A permit cannot be issued if the risk is unacceptable, but still there is always a small risk remaining. The question is what risk that is acceptable.

9/ The right to environmental protection (EU-charter art. 37)

9.1 Isn´t this right the foundation on which modern environmental law is built?

9.2 It may serve as an important component in establishing the choice and level of sanctions but it cannot put aside basic human rights (the right to be presumed innocent etc.). Environmental principles like the precautionary principle may however have impact on the evaluation of negligence in a criminal case.