The application of the core EC environmental principles by national courts: SPAIN

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1.- Preliminary, methodological remarks.-

So far, the issue of how, if any, do Spanish courts apply core EC environmental principles has not been the subject of specific legal research or publication, nor is it a question raising too much doctrinal concern.

On the other hand, it is almost impossible to « scan » accurately the whole realm of all courts decisions, taking into consideration the high number of cases and courts. The Supreme Court alone renders more than 12.000 cases every year. The cases rendered by other (lower) courts are not reported in full.

Concerning the complex Spanish system of courts, it should be mentioned that there are five different territorial layers, combined with five jurisdictional tracks, which are competent to deal with a claim on the ground of its subject-matter : the civil/commercial courts, and the criminal, administrative, labour and military ones. Besides these "ordinary" courts there is also the «constitutional » jurisdiction (constitutional court), which is separate from the regular track and is concentrated in one « central » constitutional court.

The jurisdictional track which is more likely to be confronted with environmental principles is the administrative one. Civil and (to a minor extent) Criminal courts may also play some role in this field. The constitutional court may eventually be confronted with such principles.

Consequently, this paper represents the result of a personal research, which has been conducted through the most usual reports and electronic databases. This latter method, however, is insufficient most times, since retrieval engines are based on the main statutory provisions and concepts. References to « principles » in *obiter dicta* are almost irretrievable. There is then a risk to miss some decisions.

2.- EC environmental principles applied in jurisdictional environmental adjudication.

It is important to remark that no judicial decision has been found where a given « EC Environmental principle » has been explicitly referred to as such, or with a direct reference to the Treaty, nor do usually courts elaborate on principles from the « Community » perspective. There are, however, some references to those principles.

(A) The « Polluters Pays » Principle

References to this principle may be found in some decisions. However, rather that referring to it as a « EC » principle, there is a somehow vague and imprecise reference. Another interesting feature is that this principle is never used alone as a conclusive

argument to settle a dispute (see point 3 of this paper), but as a additional force for supporting the court´s understanding of the dispute.

i) A good example of this use of the principle is the *Constitutional Court judgement, of 30 November, 2000*[1] .

In this case, the central government challenged a regional statute from Baleares, which established an environmental tax, on the ground that the Region lacked constitutional powers to enact such a legislation (tax matters are overall reserved to the central parliament). It is noteworthy to say that it is not a real « environmental » adjudication, but a « constitutional » issue, involving the allocation of powers between the state and the regions. However, the constitutional court made an explicit reference to the « polluter pays » principle (in the fifth section of the judgement) as an additional support of his main argument, in the sense that the statute was unconstitutional.

According to the court, for a tax to be a real « environmental » one, it has to encourage a certain « environmentally friendly » behaviour, or to discourage activities that are harmful to the environment : the « polluter » should pay. However, when a tax is designed as a « flat » tax, when it is only used as a mean to collect money for the public budget, and the person who is subject to it can not avoid it, the tax loses its « environmental » spirit. That was the case in the Balearic tax, which was levied on companies just because they were running polluting activities, independent of their actual « environmental » impact or amount of pollution. In that case, the taxpayer was not really confronted with the choice between polluting more or less, or to change its behaviour in an environmental way, but rather with the dilemma of running its installations or closing them. In that situation, the « polluter pays » principle would disappear and would be replaced by a kind of « the owner pays » principle.

On the other hand, references to the *Polluter pays* principle are likely to be frequent in court arguments, because it is somehow enshrined in the Spanish constitution : article 45 establishes that environmental statutes may impose on law-breakers the duty to restore the impairment of the environment,aswell as the obligation of paying for the actual damages produced. Consequently, the courts may be citing the principle, without referring to the EC Treaty, but grounding it either on the controlling statute or on the Constitution itself. Another example of implicit reference to this principle may be found in the civil litigation for damages, where the courts may be more inclined to cite this principles as incorporated in the Spanish law of civil damages (civil code, section 1902 *et seq.*) than in EC Law.

(B) The principle of Prevention/Precaution

In recent years, the principle of precaution/prevention has been repeatedly invoked before Spanish administrative courts (in a more or less open manner) in the litigation involving the construction, installation and operation of telephone aerials and antennas. This issue has triggered a considerable public attention and there has been a strong reaction on the side on citizens groups and some local bodies, confronted with the interest of telecommunications operators.

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[1] Decision n. 289/2000. See the website of the Spanish constitutional court : http://www.tribunalconstitucional.es

Usually, that litigation involves the following steps : (a) the telephone company applies for a municipal permit to build or install an infrastructure for telephone waves (aerials, antennas, etc). This structure is to be built on the roof of a private building (apartments building, industries), on the company´s own premises, or on public spaces ; (b) the city council denies granting such a permit, on the ground that there is no scientific certainty on the lack of dangers of those types of structures in general for the vicinity , or because not enough studies have been carried out.; (c) in other cases, the file is controlled by a municipal ordinance, which prevents such a construction, or imposes strong restrictions on those infrastructures : a two-year validity of the permit, a minimum distance to residential slots, and so on ; (d) the company appeals the administrative decision before the competent court, either claiming that the administrative decision is « ultra vires » or that the municipal ordinance is illegal, on the ground that it is too stringent or disproportionate.

In most of these cases, the question of the risks of the aerials is usually at stake, which triggers a more or less implicit reference to the precautionary/preventive action principle. In order to provide just some examples, the following court decisions may be cited :

1) Supreme court decisions (administrative chamber) : June, 18, 2001 : *Telefónica v. City Council of Barcelona.*

2) Regional High Courts decisions :

   i) Castilla y León : decision of February 8, 2001, *Telefónica v. City Council of Santa Marta de Tormes*[2].

   ii) Madrid : decision of April 9, 2002, *Retevisión v. City Council of Manzanares el Real*, and decision of February 28, 2002, *Telefónica v. City Council of Chinchón.*

   iii) Valencia : decision of March 17, 2003, *Telefónica v. City Council of Albaterra.*

Summing up, the most important features of this litigation are as follows:

a) there is always a more or less clear claim that aerials and antennas might be dangerous, and this fact should have a weight in the administrative agency decision ;

(b) courts usually understand that local councils can not impose an absolute ban on those infrastructures ;

(c) in some cases, the court upholds the denial of the permit by the local council, because the company has no produced a conclusive evidence that the planned infrastructure is completely safe for the neighbours. A perfect example of this doctrine is the decision of the Regional High Court of Castilla y León of February the 8th, 2001 (see supra), which was rendered before the promulgation of the national regulation on telecommunications mentioned below (see letter d). By that time, there was no national legislation regulating the general precautions in the matter. In that context, the court found that there were serious suspicions that this activity could be dangerous for the public at large, and that the city council enjoyed discretion to impose on the company

[2] This decision has deserved a doctrinal comment, from the principle of precaution. See. A. Fortes, « Licencia de instalación de una torre para soporte de antenas de telefonía móvil : la aplicación del principio de precaución ante los riesgos para el medio ambiente y la salud y seguridad de las personas », in the environmental review : *Gestión Ambiental*, December 2001, pp. 74-78.

the duty to produce a thorough evidence that the infrastructure was not that dangerous. The decision is also important because it refused to control agency discretion in the assessment of the evidence produced by the applicant ;

(d) sometimes, however, the courts find that the restrictions and limitations imposed on companies by city council are too stringent, without any further elaboration ;

(e) the whole legal framework of this litigation has been dramatically altered in 2001, when the central government approved a new regulatory scheme on this issues : Royal Decree of September the 28th, 2001. Currently, most courts find that the legal questions concerning these health hazards problem have been settled down by this piece of national legislation. Consequently, any further restriction or limitation imposed unilaterally on telecommunications companies by city council (for instance, minimum distances) will be found unlawful by the courts, if they don´t follow that nationwide legislation. In exceptional cases, a local council can impose such conditions, provided that the body produced conclusive arguments, based on the specific circumstances of a given town.

With the new regulation, telecommunication operators must be granted the permits, as far as they comply with that piece of legislation. It seems that the burden of evidence has been shifted to administrative agencies, if they decide to impose more stringent standards (a side effect of the BATNEEC principle ?).

It is noteworthy to mention that litigants and courts do not usually refer openly to the precautionary principle as an « EC Law » principles. However they refer frequently in the same litigation to EC telecommunications directives (such as Directive 96/19) and other technical and environmental materials and studies. For instance, the Valencia High Court decision (see supra) refers to the Recommendations of the Council (Health matters) of July the 12th, 1999, and the Andalucia High Court decision of October 22, 2002 refers to a report made by the Health Council of the Nederlands of 2001 as an additional support that the risks of standard telephone stations is low.

C) Rectification at Source, Producer or extended responsibility, regional variations, scientific base, and the 'integration' principle.

In the case of these principles, it has not been possible to find reported cases which refer expressly to them in judgements.

3.Environmental principles enshrined in Spanish legislation

It is possible to find a role for EC environmental principle in an *indirect way*, so to say, when any such a principle has been enshrined in a EC Directive or regulation. Especially in the case of EC Directives, the Spanish statutes and administrative regulations that transpose those norms into the Spanish legal system also mention in the explanatory memorandum (*exposición de motivos*) that the Spanish rule is based or informed by a given EC principle. Consequently, some Spanish environmental statutes also mention explicitly those environmental principles, either in specific articles, or in their explanatory memorandum. An example of such an approach is constituted by the statutes on waste, or the IPPC statute of 2002.

Once the Spanish regulation has been promulgated and becomes the *law of the land*, the principle on which it is supposed to be based may be invoked under a Spanish court. Of

course, the Spanish court will interpret and, eventually, apply the *Spanish* principle (embodied in the Spanish regulation), while in reality it will be applying the EC one.

4. Conclusions: a critical assessment of the present situation

In general, EC Environmental principles play a little role in the operation of Spanish courts, at least at first sight. What I mean is that, usually, a Spanish court will be reluctant to apply « directly » any of the indents of art. 174 of the EC Treaty, or art. 6 itself. Several reasons explain that situation :

(a) Those provisions are regarded to be primarily designed to bind the normative activity of the EC ; EC Treaty principles (art. 6 and 174) are not considered to be *the law of the land* in the sense that EC Treaty principles are mainly addressed to policy-makers and legislators ;

(b) EC Treaty principles are little known or used as grounds for arguments, outside or disconnected from national statutes and regulations;

(c) the Spanish legal tradition is one of continental, « roman » law. Although judicial precedents are also the law of the land, the process by which they become binding is more complex and cumbersome than in a Common law country, and in any case they are subordinate to any form of written law. Usually, that legal context determines dramatically the decision-making process of judges and courts. In general, a Spanish judge or court will be reluctant to use an environmental principle as the exclusive or main ground for their reasonings, outside or in disconnection with a relevant statutory provision.

(d) Anyway, environmental principles are regularly used by courts in *obiter dicta*, or as an additional support for a judicial reasoning or statutory construction, in order to affirm or uphold a given interpretation of the controlling statute, or to accept or reject a legal claim ;

(e) Unfortunately, when EC environmental principles are invoked or applied by courts, they do not usually expressly refer to them as « EC principles », or « art.174 ECTreaty principles », but just as « principles », or as a principle enshrined in a national statute or administrative regulation, or in international law.