The Environmental Law and Property Guarantee – Hungary

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Some preliminary remarks

Constitutional background – right to environment, right to property

Right to environment as a human right has been a part of the Hungarian Constitution since 1989, the first reference had been introduced in 1976 in the environmental act. This first provision had never been referred to in cases. There were two articles relevant in this respect in the 1989 Consitution:

- Art. 18 on the right to 'healthy' environment as such, and
- Art. 70/D related to the protection of public health, within which environmental protection may be taken as a perfect tool or guarantee of such right.

The Constitutional Court in several decisions discussed the details of the right to environment – which details I do not present now, they were touched upon some years ago. What is still relevant here is the argument of the relationship of environmental protection and property rights.

As a first consequence of the above described constitutional setting, there was no need to turn towards indirect human right provisions, such as Art. 8 of the European Convention or Protocol 1 of the same Convention. We have a specific environmental right – the above mentioned two articles in most of the cases proved to be satisfactory. Also these two provisions could be discussed jointly, no real distinction has been made between them. Right to environment has been taken by the Constitutional Court as a fundamental right, the proper implementation of which is the institutional responsibility of the state, the details of which should also be provided by the state. The minimum requirement is not to step backwards.

A characteristic example of the case-law of the Court, from the point of view of environment vis-á-vis other constitutional rights is the decision (106/2007. (XII. 20.) AB határozat) on the act on national physical planning, which required the use of a necessity/proportionality test. This means that if one wishes to limit the right to environment, this may only be substantiated by the necessity to protect an equally important constitutional right – such as national defence or public health, etc. -, which clearly call for this limitation. Thus any such decision must be well founded, considering all possible aspects, which may lead to the conclusion that there are no other means for the protection for an equally important diverse fundamental right. Environmental protection may in theory be limited, under similar conditions, but in the case law of the Court, up till now there were no single example, which could support the superiority of property rights over environmental right.

But while the right to environment may be limited in very exceptional cases according to the Court, the right to property may better be limited. There are many decision in the

case-law of the Constitutional Court, which allow the limitation of property rights due to overriding public interest (such as in the decision 64/1993. (XII. 22.) AB határozat). This judgment and other decisions emphasized that the right to property might entail different public and private law limitations and the public authorities also have the right to interfere if needed.

There are other decisions of the Court, which discuss the unequal equilibrium of environmental and property rights, meaning here that the obligations in connection with the property may have a better chance than the limitation of environmental rights. Consequently, environmental interests may easily serve as grounds for limitations of property rights, but environmental rights may not be limited in order to protect property rights. (See, for example the decision 50/2007. (VII. 10.) AB határozat). Environmental restrictions are relatively broad constitutional requirements and may be taken as sources of necessary restrictions over property rights (see, e.g. decision 33/2006. (VII. 13.) AB határozat).

The Constitution has been replaced by the Fundamental Law in 2011. Many of the provisions of this Law (which is in fact a constitution) refer to environmental rights and also to property rights. Without going into the details, we may mention the preamble ('Credo') which contains references to future generations, national heritage and human dignity together. Also the so called 'Fundamental' part of the Law, mostly Art. P) refers again to the same, plus contains the general duty of the state and everybody to safeguard these interests. From the chapter of human rights of the Law we may refer to the following elements:

- Art. XIII. covers the right to property, and within this more importantly the general social responsibility of property;
- Art. XX. is mostly similar to former Art. 70/D, thus environmental protection is taken as a tool for protecting public health, while
- Art. XXI resembles us to the former Art. 18, so it is a stand-alone environmental right.

The Fundamental Law has already been amended sometimes since 2011, unfortunately mostly in order to satisfy direct political interests. Probably the most fascinating amendment is the 'fourth amendment' – there were also some additional minor ones which do not count – which by the force of Law repeal all the previous decisions of the Constitutional Court. The theoretical reason is that they have all been founded on the previous constitution, which is outdated and which have been replaced by the present one. The former constitution is always referred to as a socialist constitution which may not be harmonised with the contemporary political era. The fact is that there are many decisions which do not fit into the current regulatory policy. Of course, this amendment has a negative consequence also on all those decisions of the Court, the legal basis of which actually has not been changed after 2011 – which is the case, for example, with the right to environment and its relationship with property rights.

The Constitutional Court immediately began to interpret these provisions, just two months after their adoption (13/2013. (VI. 17.) AB határozat). The Court clearly underlines that there is still a chance to utilize the essence of all those decisions, the actual content of which is comparable with the provisions of the current Fundamental

Law. Thus in a certain case, the Court may refer to principles and arguments of its earlier decisions, but it is always dependent upon the particular context of the exact case. Thus the Court does not want to accept that all the previous results are annulled, as the continuity and relationship with the new legal environment must be provided for. The case of the right to environment is one of the best examples.

Civil law background

In the past 4 years almost all major legal regulations have been amended substantially or have been replaced by a new regulation. This is also the case of the Civil Code. The new Civil Code – Act V. of 2013 – has entered into force in March 2014. Book Five of the Code covers property issues. These provisions have not been changed substantially as compared with the previous civil code. The basis of property issues today is Art. 5:13. §, referring both to the full and exclusive competence of the owner and to the possible limitations of ownership rights at the same time. These likely limitations mean the respect of the rights of others on the one hand and other possible legally designed restrictions on the other hand.

The Code stipulates in Art. 5:14. § as general rule:

- that every material object which may be subject of possession may also belong to a property,
- the provisions of material objects accordingly cover money and securities and
- natural forces which may be utilized as material objects, while
- animals may also be taken as objects of property, within the limits of other legal provisions, focusing on the specific nature of animals.

The Code regulates the property rights of immovable in a way (Art. 5:17.) that it covers the airspace over the soil and the ground/soil below the ground-level, but it may not cover the natural resources and mineral resources.

The part on property also contains the protection of the right of possession against disturbances according to 5:5. § and 5:21. §, while 5:23. § regulates the so-called neighbourhood rights, forbidding unnecessary disturbances of neighbours.

Environmental legislation

The environmental act (Act LIII. of 1995) could also cover the major provisions related to liability together with some rules which help in the implementation of liability rules. These are:

- the presumption of joint and several liability of the polluter and of the landowner. The landowner may escape from liability if he/she designates the effective user (polluter) and proves without doubt that the latter is solely responsible;
- the same presumption applies in theory for mobile polluting sources, but this has never been used in practice;
- there is a joint and several liability rule which applies for the joint companies, where the company and its founders share the liability in connection with environmental obligations or debts;

- a special provision applies to the real estates – durable environmental damage must be entered into the land register on the basis of the decision of the authorities or of the court.

Answers to the questionnaire

1) *What are, according to your country's legal system, potential objects of "property" (real things, private law rights, public law rights, a business, a market share etc)? To what extent is it possible to obtain property / ownership on natural resources? Has private property been used in defence of environmental protection?*

use

The major framework has been given above under preliminary remarks above. If we take, for example, the application of the rights of possession and neighbourhood – nuisance and trespass in other terms -, then it is clear from judicial practice that these are extensively used in the field of environmental protection. Usually it is the environmental damage or disturbance itself which actually defines the geographical and personal scope of any such liability measure. The practical benefit of such traditional civil law provisions is that they do not require the infringement of specific environmental provisions, such as the reference that the pollution must be over the standards in order to form the legal basis of a claim, but simply the balance of private interests shall be taken into consideration. This means that the party whose property rights are potentially infringed, at the same time when he/she seeks for the protection of private (property) interests, may also cover indirectly the wider scope of environmental interests. And in many cases this indirect environmental interest is the essence of the case. If the damage is caused by environmental pollution, the court does not always require a full scientific evidence with all the technical details to prove potential liability, but may simply refer to the locally accepted standards of living. If these standards are in danger, the protection of property rights may apply. This may also mean that the protection of property rights may not necessarily apply in case of pollution over the standard, if the balance of interests does not support the specific claim, simply because the local living conditions are unfortunately unpleasant in the given circumstances.

2) *How does your legal system construe expropriation (definition, preconditions, and legal effects) in particular in matters relating to the environment or of environmental friendly investments (like renewable energy infrastructure)?*

The Fundamental Law in its Art. XIII. Par. 2 refers to the major conditions of expropriation, which otherwise is regulated in Act CXXIII of 2007. Real estate may only be expropriated exceptionally on the basis of a public interest and it must be followed by a full and immediate compensation. There is an exhaustive list of possible ground in Art. 2, from among them there are some environmental interests, while Art. 4 provides some more details:

...

j) heritage protection (archaeological site, national monument or national memorial site),

k) nature conservation (if the current activity on the site may not be harmonized with the nature conservation interest and this may lead to the destruction of the area, or if it is

necessary to reinstate the conservation status, also in case of habitat reconstruction operations),
l) water management and water utility reasons (such as safety operations – in case of drought, flood or inland inundation -, public utility water supply or sewage treatment operations, etc.)
m) sustainable forestry, shielding forest or public interest forest development,
...
p) environmental protection (such as the remediation of durable environmental degradation, waste management site development or recultivation, or green area development in urban areas) ...

There is a prioritization of actions. First, the responsible organ must try to purchase the estate, next to limit the property rights and only if it is not satisfactory, expropriation may come.

Finally, as the other side of the coin, there are also some limitations to expropriation, due to environmental reasons, which usually mean the agreement of some specific – forestry, nature conservation – authorities.

3) *Concerning regulatory restrictions to use property: does your legal system distinguish between allowable restrictions and allowable restrictions with compensation?*[1] *What are the criteria of distinction between the two kinds (weight of public interest, proportionality, etc)? Are these criteria sector-specific enriched, such as in nature protection from intensive agriculture, prevention of pollution from industrial installations, removal of water extraction rights, prevention of climate gas emissions etc?*[2]

There are several regulations related to the use of property and the problems of compensation. Sometimes the restrictions do not engage compensation, sometimes it is a must. There are no general framework provisions, but everything is designed on a sector-specific basis. There are some examples below:

- The Act CXXXIV. of 2013 on some public services in Art. 3 allows to use temporarily the vehicles, necessary for waste management services in emergency situations. This entails compensation.
- The Act CCIX of 2011 on water utility service covers the rights of servitude on land, necessary for the water supply, mostly in connection with the use of pipelines. This may not serve as the basis for compensation.
- The Act CXXVIII of 2011 on natural and industrial disasters (catastrophes) also contains some obligations, for example companies may be subjected to a direct state supervision (see, for example the red-mud disaster). This may entail compensation if there is an exact damage.
- The Act XXXVII of 2009 on forestry and forest management usually does not require compensation in case of limitations due to nature conservation or water management reasons.

[1] *Sometimes called indirect or regulatory expropriation, or - such as in Germany - determination of property content requiring compensation.*
[2] *Could you indicate case(s) that can be later on, at the meeting, compared.*

- The Act LXIV of 20101 on cultural heritage does not allow compensation for limitations or obligations which do not go over the actual needs of conservation.
- There are several obligations and restrictions, regulated in Act LXXVIII of 1997 on the protection of built environment (actually act on physical planning and building), mostly connected with the needs of implementing the local physical planning obligations. As a general rule, compensation is needed – for example if there is a limitation related to construction, due to the changes of local planning, etc. No compensation is needed if the limitations are necessary in order to prevent damage from nature conservation endangerments, etc.
- The Act LV of 1996 regulates hunting and the protection of games. On the one hand there are compensation measures connected with games – damages caused by animals – and on the other hand limitations due to the needs of game management.
- The nature conservation act (Act LIII. of 1996) regulates compensation and also subsidies. Compensation may cover the actual damages in case of limiting economic activities due to nature conservation interest, but there are some cases where no compensation is given – for example in nature conservation areas for limitations in order to avoid damage to nature or if a subsidy is used instead of a compensation, etc. There are specific regulations on the compensation of damages caused by protected species, with several conditions.
- The Act XCIII of 1995 on the appropriate level of nature protection generally allows compensation only if the limitations make the use of the given land impossible or if they mean significant restrictions.
- There are several compensatory problems, regulated in the Act LVII of 1995 on water management. For example, if the available water quantity is reduced due to natural reasons or other unavoidable reasons, the different water uses may be restricted without compensation. In case of public interest water management operations and installations the compensation is possible.
- The environmental act – Act LIII of 1995 – regulates in general terms the preventive and restorative obligations in connection with environmental interest, which usually entails compensation.
- The Act XLVIII on mining also covers several conditions of compensation due to mining operations and also as a consequence of limiting such operations, for example as a consequence of pipelines, etc.

4) *What public interests are considered legitimate to impose obligations (active & passive; to do or not to do something) regarding the use of property in cases:*
   - *to prevent environmental damage;*
   - *to prevent traditional damage;*
   - *to improve the appearance of the property (i.e. to remove own waste; or to renovate the building façade in the towns, or to isolate buildings for energy efficiency, etc.);*
   - *to limit activities/property due to the special protected area, like Natura 2000*
   - *of public health/safety reasons.*

   To what extent can private individual invoke these sorts of powers – eg actio popularis)?
   In which above cases compensation is foreseen by law?

There are many general conditions in the acts listed under the previous question and also in further implementing regulations, which usually cover different obligations and restrictions, deriving from the individual decisions of the authorities. These typically mean the prevention or restoration of a damage, or reinstatement of the previous environmental status. All those examples, listed in the question itself, have their own specific provisions, both in connection with the conditions and also in terms of possible compensation.

Actio popularis – actually a limited type of it – is regulated by the environmental act, in Art. 99 in a way that NGOs may sue the polluter or operator, requiring the court to halt the polluting or any unlawful activity and also to oblige the operator to take preventive actions.

5) *Is there a category of (possibly: gradual) dissolution of vested rights without requirement of compensation (example of stepping out of nuclear power)? Can for instance the economic (financial) difficulties of public finances be a reason for dissolution of compensation or vested rights (for instance, lowering or even abandoning wasted financial rights) like subsidizing green electricity)?*

Up till now I do not know of any case like this, but very likely the experiences of the 'Plantanol' judgment may apply in such cases, if there is any.

6) *How can a property holder defend his interests (through the ordinary courts/constitutional court)? What principles will the courts use when checking the compatibility with the property guarantee?*

The available general options are open for the proprietor in case of an individual decision. Usually the decisions on the compensation by the authority may directly be sued, without the need to appeal within the public administration system, while the obligatory decision itself goes on the normal procedural path – first appeal within the public administration and then the possibility of turning to the court. Courts are using the proportionality test.

There is also a limited chance to challenge the legality of norms. Unfortunately the right to turn to the Constitutional Court –or in case of local government regulations to the Curia – has been seriously restricted in 2011. Up till the end of 2011 all legal norms could be challenged by any party (with or without an interest), but today it is substantially limited. It is the ombudsman who may challenge the constitutionality of a legal regulation without any limitations or the chief prosecutor in connection with the protection of fundamental rights, but the individual claims are only possible under certain conditions.

The legal basis today is the Act CLI. of 2011 on the Constitutional Court. Two options are available here:

- the general court may recognize during the discussion of a civil or administrative case that the given legal regulation is infringing the Fundamental Law and may itself turn to the Constitutional Court (Art. 25);
- the private person or a legal entity may turn to the Constitutional Court only if there is a direct infringement of a basic right, provided by the Fundamental Law. Usually

in this case the party should first try to go through the ordinary steps of the procedure of finding a remedy, but it is also possible to use this option if no access to justice opportunity is available.

7) *Is secondary legal protection (i.e. the right to compensation) dependent on the exhaustion of primary legal protection (i.e. a motion to annul the action)?*

There is no such general condition in Hungarian law. One may also accept the necessity of restriction, while still wants to get compensation.

8) *Can one be responsible for the environmental damage only (solely) due to the fact of ownership of the property (i.e. for instance, the owner of the land where the waste is illegally deposited by the third (unknown) person)?*

As it has been described in the preliminary remarks above, there is a presumption of liability related to the landowner, who may escape from liability under certain conditions. In case of waste, deposited on land, either legally or illegally, the landowner is obliged to take care for the proper treatment, if the one who is responsible remains unknown. The same applies for water pollution – practically groundwater pollution. The landowner may be obliged to take the necessary steps for assessing the factual situation and make plans of action, but he/she may prove (actually the proof is not necessary, the probability is enough) that there is no responsibility on his/her side.

9) *Does the state permit (like IPPC permit, operation permit etc) exclude the holder from the liability towards third persons (in case of damage cause by undertakings)?*

The simplest answer is: this may not happen. Third party liability is regulated by civil law and there are many judgments of Hungarian courts which always underline that the permit or authorization may not influence the protection of rights – for example property rights, personal integrity rights, human dignity or the right to get compensation in case of a damage – under civil law regime. These judgments usually emphasize that the two legal interests – the one, regulated by public law and the other, regulated by civil law – are not necessarily identical. An activity may be authorized, but still may impair the rights of neighbours, if the different interests are carefully balanced and evaluated.

A recent example is the judgment of the Debreceni Ítélőtábla (Pf.II.20.242/2011/5.) – a regional high level court below the Curia – in connection with the depreciation of a real estate due to industrial activities in the neighbourhood, causing air pollution and noise. According to the court, the damage is proven, as "an operation having a permit of the public authority should also take care for not causing unnecessary disturbance in the neighbouring properties."

10) *Are there cases (courts or administrative) that take into account Art. 8 of the ECHR (Right to private life) or Art. 1 of the first protocol of the ECHR? (For instance, where state intervention to limit the property without the compensation would be objected based on above article)?*

In the part on preliminary remarks the summary of the Hungarian situation related to the implementation of the right to environment provisions of the Constitution (today Fundamental Law) has been presented. Thus, these provisions of the Convention are not in use in terms of environmental rights. According to my knowledge, there are no such property rights cases, which resemble us to the core issue of the question.

11) *How does your national legal system deal with situations where indirect or direct expropriation may be caused by EU legal acts or their implementation?*

There is not distinction made in terms of EU law implementation and domestic law, consequently there is no specific solution for this situation.

12) *Are there cases where national courts have referred questions to the ECJ concerning property issues in environmental law?*

Not up till today.

Two cases:

1) *A factory, situated near a town, has been operating for decades. People are slowly realizing that statistically the inhabitants in the city and in the vicinity do not live average age and the cancer is more frequently present among them, also the frequent cause of the deaths. They have no direct proofs that the factory could be responsible, although it is rather clear that the soil around the factory is poisoned and that the heavy metals found in the vegetable could be linked to the factory. However, credible proofs are missing.*

   What could be the obligation of the state?
   Could the inhabitants rely on the public remedies procedure?
   If the state wants to revoke the operation permit, could the factory claim any sort of property guarantee?

The environmental act of 1995 introduced the environmental review process – similar to the IPPC - in case of ongoing activities. The environmental authority may oblige the operator to undertake the review, if certain conditions are met – for example, if there are signs of a significant pollution as in the current imaginary case. The review may cover the whole operation of may only be partial, according to the decision of the authority. The review shall also focus on the corrective measures to be taken to improve the environmental conditions. The outcome is an environmental operational permit, the refusal of which simply means the end of the operation. Of course, there are specific similar obligations available, mostly in the field of water protection. If the operation is not able to meet the standards or requirements or if there is a likelihood of significant damage, this all mean that the operation may not be legally sustained, thus there is no room for any property guarantee.

2) *How this case would be solved in your legal system: a waste disposal site is located not far away from a place with app. 150 individual houses. Inhabitants assert that they smell bad odour and they would like to sell their property, but, of course, there are no potential buyers. Their property is worth less. The waste disposal site is equipped with the necessary permits.*

Are the inhabitants in the surrounding entitled to compensation (perhaps to annual revenue)? Do they have to annul the operation permit first?

There are several cases of compensation or of non pecuniary damage due to environmental pollution. We already mentioned the judgement (Debreceni Ítélőtábla Pf.II.20.242/2011/5. szám), where it became clear that the noise and the particulate pollution deriving from an authorized activity could cause the deterioration of living conditions and also had an effect on the original agricultural activities (vineyards) and as a consequence the value of the real estates in the neighbourhood is depreciated. The court accepted the claim and obliged the operator to pay compensation for the devaluation and not material damage for the changes of living standards.

Similar non material damage was the outcome of several other judgments, also due to the deterioration of living conditions (e.g. Fővárosi Ítélőtábla, 6.Pf.21.995/2009/3.) The operator of a local road is liable for the environmental damage due to the traffic of heavy vehicles (Fővárosi Ítélőtábla, 5.Pf.21.390/2010/3.), unless he/she names the liable persons. Among the different reasons of compensation, there is also the lack of mitigating measures, which could have taken place.

The defendant had a permit for industrial activities, contrary to the conditions of physical planning. The operation had been enlarged, causing significant noise pollution, ending in the depreciation of the value of the houses in the neighbourhood (Komárom-Esztergom Megyei Bíróság, 9.P.20.338/2007/9. szám). The court underlined that even an authorized activity may cause unnecessary disturbance of the neighbours and may establish the claim for compensation. Here we should not forget that the Hungarian private law regulations use the no-fault liability standard for activities dangerous to the environment. The defendant had the chance to built such a noisy plant at a greater distance from the housing area, thus they may not refer to any escape clauses.