THE QUESTIONNAIRE / SLOVENIAN NATIONAL REPORT

Topic: The Environmental Law and Property Guarantee

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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?*

Slovenian constitution is the starting point for the regulatory regime of the property in general. Its Art. 67 foresees that it is the legislator that defines what exactly the property is, how it is defined, how the property can be obtained and what the benefits of the property are. At the same time the said article defines that property is limited with its commercial, social and ecological function. It is therefore for the legislator to define the actual contend of the "property" and this is not done by the Constitution itself. According to the civil law property, can be obtain not only on real things but also on rights, especially private law rights. On the other hand, there are things that are excluded from the property.
This is especially true for things that are defined as public good, which might be natural public goods or constructed public goods. Natural resources are not subjects of public rights; they are public goods.
Therefore, if natural resources are part of certain spot, which is in private property, the owner is not entitled to use that natural resource without a permission i.e. the concession, and this is part of the constitutional limitation of the property rights due to the ecological reasons.
Natural resources are also not owned by the state, but they are public good. Slovenia used to have a system, where natural resources are owned by the state, however the system was abandoned shortly after 1993. Nowadays natural resources are part of the public goods; the state is guardian and economic beneficiary. This is not true only for wild animals, which are in the ownership of the state.
Private property can be used in the defence of the environmental protection, however the state might use the expropriation and therefore this is only a theoretical option. Expropriation can be made in public interests. However it is presumed that public interest condition is fulfilled in case it is the law which defines the goal of the public interest. In another words, if the legislator defines certain goal and whereby that goal can be obtain by way that is detrimental to the environment, this can still be possible despite the private ownership.

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 expropriation is regulated in the Spatial management act[1]. According to its Art. 93 it is possible to expropriate the owner also in cases of public commercial infrastructure. That means that in the case of renewable energy infrastructure that condition would be fulfilled. It would be enough that there are official plans for the public infrastructure, in the level of the state or local location plans. Once such plans are adopted, the public interest is to be presumed.
The procedure for the expropriation can be initiated by the state or by the local communities (municipalities). Authority, competent to decide in the expropriation matters, is the Ministry for the environment and its administrative units.
Slovene legal system used to have a different approach, where courts where competent to hear such cases. It has now been several years since this issues are not in the competence of courts but of the executive authorities. Courts are only competent in cases where either party would like to annul the final decision by executive authorities.

3) *Concerning regulatory restrictions to use property: does your legal system distinguish between allowable restrictions and allowable restrictions with compensation?[2] 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?*

A regulatory restrictions to use property are possible. The general rule is that restrictions, even those in the public interests, are to be compensated. However, in such cases the state would rather buy certain land for purposes of state interest (like for instance roads motorways, etc.) or to expropriate as the last resort. In cases where infrastructure is needed and buying off land or the expropriation, are not proportional, state or municipalities can agree with the owner to use the property (they conclude contracts on use). It is also possible that courts define necessary restrictions of the property like inevitably allowance to use private property. The *Law of property code*[3] defines that appropriate reimbursement shall be paid to the owner.
On the other hand, certain valuable natural resources can be specially protected. *Law on nature conservation*[4] defines specially protected areas (SPA) and those areas can have a special regime, whereby the use of private property can be restricted. In this cases the owners are not entitled to compensation, but the whole area would usually gain public finances for different purposes. That way regulatory restrictions would be outwaite; with the state financial investment in these areas.

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;* Preventing environmental damage would constitute a legitimate obligation headed toward the owner of the property and would outwait the private interest. According to the *Environmental protection act*[5] this is not specifically listed and regulated, however it is defined that for

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[1] *Offcial Journal of the RS, Nr. 110/02, 8/03 - popr., 58/03 - ZZK-1, 33/07 - ZPNačrt, 108/09 - ZGO-1C and 80/10 - ZUPUDPP).*
[2] *Sometimes called indirect or regulatory expropriation, or - such as in Germany - determination of property content requiring compensation.*
[3] *Official Journal of the RS, Nr. 87-4360/2002, RS 91-3303/2013, RS 17-540/2014.*
[4] *Offcial Journal of the RS, Nr. 56-2655/1999, RS 31-1/2000, RS 119-5832/2002, RS 41-1693/2004, RS 61-2567/2006, RS 32-1223/2008, RS 8-254/2010.*
[5] *Offcial Journal of the RS, Nr. 41-1694/2004, RS 17-629/2006, RS 20-745/2006, RS 49-2089/2006, RS 66-2856/2006, RS 33-1761/2007, RS 57-2416/2008, RS 70-3026/2008, RS 108-4888/2009, RS 48-2011/2012, RS 57-2415/2012, RS 92-3337/2013*

the purpose to prevent environmental damage, all necessary duties has to be undertaken to prevent the event detrimental to the environment.

- *to prevent traditional damage;* According to Art. 7 of the *Obligation code*[6] rights from obligation relationship are limited with the rights of third persons and according to Art. 10 it is necessary to sustain from the activities, which might cause damage to other people. This are two general principles that forbids causing damage to third parties; However if the potential damage is higher than restriction of property, it is legal to restrict the use of the private property in order 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.);* The appearance of the property is generally not an issue that would be regulated by law. There is one exception in Art. 133 of the *Spatial planning act* which foresees that private rights can be limited in case of renovations; if renovation is financed with public finance, municipalities can limit the use of the immovable. Compensation shall also be provided. With respect to the appearance in general, as for instance waste deposited on private property, the Slovenian law has no specific rule. There is also no rule on aesthetic appearance of the property. However, if the waste were to be considered as a waste disposal spot, than the owner of the property would need to have the environmental permit. In the latter case, the owner will have to fulfil all the necessary conditions for waste disposal site.
- *to limit activities/property due to the special protected area, like Natura 2000;* The property can be limited in special protected areas; not so much the property but more the use of the property. For instance; farmer will be limited in using of the farming land with the time limits, like moving of lawn; it is usual scheduled to the time without cubs, fertilizers cannot be used, the same is valid for spraying with herbicides etc. As mentioned above, there is no compensation provided for this kind of restrictions in use of the property.
- *of public health/safety reasons.* Public health and safety reasons are always reasons in public interest due to which the state can adopt measures also in limiting and restricting the use of property.

To what extent can private individual invoke these sorts of powers – eg actio popularis)?

Actio popularis is regulated in Slovenian law; in cases where the health and safety of the individual is at stake, anybody can demand protection. Rights of public and safety reasons are to be directly protected by courts; *Actio popularis* is defined in Art. 133 of the *Obligation code*. Possible claims are: claim to abandon dangerous activities, claim for damages and claim to take the appropriate preventive or improvement measures. However, if public authorities issued a permission or licence to perform certain activities only to so-called *anormal* damage can be demanded. *Anormal* damage is to be assessed case by case and it is damage that is not generally common in certain environment; it is above general limits. This does not excluded claims for prevention such a damage or its reduction. Actio popularis is to be used against private individuals, investors, etc. It is not anticipated for claims against the state and the public authorities. In such cases action for annulment for states decision or action is more suitable under Slovenian law.

In which above cases compensation is foreseen by law? In general, every restriction of the private property is subject to compensation as I noted above. Only in cases of special protective areas, like national, regional and environmental parks is this not a case.

[6] *Official Journal of the RS, Nr. 97/07.*

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)?*

At least according to the law, wasted rights are respected. However, it is true that Slovene Constitutional court adopted a different solution in the case of social rights. Because Slovenia was faced with the financial crises, Slovenian Government decided to balanced public expenses with the public incomes. A special law was adopted for this reason[7] and that law touched upon quite a number of social rights. In addition, mandatory retirement, social financial transfers etc. The Constitutional court decided that severe economic financial circumstances in the country justify restrictions of wasted rights.[8] The Court added that restrictions shall be proportional and that there should be certain time limit for adoption to the restricted wasted right.

The same is also true for subsidising green electricity. In 2014, the new *Energy act*[9] was adopted and that law gives power to the Government to change the level for subsidies for green electricity in accordance with the circumstances on the market, public, finances, etc.

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?*

A property holder can use legal remedies in private interests and can demand from courts to rule on his rights; in case he demands that towards private party regular (civil) courts will have jurisdiction and in case he files claim towards the state the administrative court is to be competent. Once legal remedies are exhausted on this two courts, the property holder has a right to file a constitutional complain if there is a constitutional right at stake. The Constitutional court will take the social and ecological limitation of the property into account. In any event, there is general rule that any limitation or any harm that is caused to the property is subjected to compensation.

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)?*

Annulment of the decisions or actions are not necessary precondition for secondary legal protection; however, it will be much easier for the property holder to claim his right to damages in case the annulment is already judged upon. Usually, claimant are filling claims for compensation at the same time with the annulment claims. The same court (administrative) is competent.

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)?*

The answer here is positive. One can be responsible for environmental damage only because he owns the property. According to Art. 157.a of the *Environmental protection act* the owner of the property shall bear the costs for the restitution (restitutio integrum) of the land in question, in case the polluter cannot be find or cannot be identified. So far, the courts did not find this solution contrary to the Constitution of the RS or to Art. 8 of the ECHR.

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[7] *Fiscal Balance Act, Offcial Journal of the RS, Nr. 40/12, 96/12 - ZPIZ-2, 104/12 - ZIPRS1314, 105/12, 25/13 - odl. US, 46/13 - ZIPRS1314-A, 56/13 - ZŠtip-1, 63/13 - ZOsn-I, 63/13 - ZJAKRS-A, 99/13 - ZUPJS-C, 99/13 - ZSVarPre-C, 101/13 - ZIPRS1415 in 101/13 - ZDavNepr)*

[8] *U-I-13/13, dated, 14.11.2013.*

[9] *Offcial journal of the RS, Nr. 17/14.*

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 permits issued by the state, in general, do not exclude a holder of such a permit for the liability toward third persons. This is not the approach that Slovenia would accepted. Even more, in certain cases investors are not allowed to start with constructions, if the building permit is not final. That means that no court remedies are possible any more. The finality obtained in administrative process is not enough. If the investor would like to start with the constructions despite that, he will have to bear consequences in case the court will annul such state permit (Art. 3 of the *Construction act*).[10]

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)?*
To my knowledge, there is no such court or administrative case so far.

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 no different approach. At the end of the day, this are still acts by the state and Slovenia law does not foresee any different approach or solutions. Individuals are still entitled to compensation or compensatory measures.

12) *Are there cases where national courts have referred questions to the ECJ concerning property issues in environmental law?*
I am not aware of such cases.

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?
The state shall check the procedure and the best available technics in the factory. There are possibilities for the state bodies (inspectors) to investigate and to search for proofs. In case they find the necessary proofs, they can impose measures (*restitutio integrum, ban the production)*. However, the state inspector will not demand the factory to compensate damages to individuals. That has to be claimed by individuals alone.

Could the inhabitants rely on the public remedies procedure?

[10] *Zakon o graditvi objektov (Uradni list RS, št. 102/04 - uradno prečiščeno besedilo, 14/05 - popr., 92/05 - ZJC-B, 93/05 - ZVMS, 111/05 - odl. US, 126/07, 108/09, 61/10 - ZRud-1, 20/11 - odl. US, 57/12, 101/13 - ZDavNepr in 110/13).*

Yes, public remedies procedure will be essential for inhabitants, since it will be unlikely to obtain the necessary proofs themselves. Courts, used in private law remedies procedures, are not bound by decision and by findings of the public authorities (executive authorities) but usually they follow them and take them in to account.

If the state wants to revoke the operation permit, could the factory claim any sort of property guarantee?
If the states revokes the operation permit from the reason of noncompliance, there is no right for the operator arising out of the property guaranty. However, if the operation permit is revoked from any ground which is in the sphere of the state and where by the operator is not liable for the revocation, than the operator is entitled for compensation.

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?
Inhabitants can use *actio popularis* and demand from the operator to improve a waste disposals site with necessary measures to reduce the bad odour and if this does not help, they are also entitled to damages. If it is the state the one who issued permit for the disposal site and the smell which is totally inappropriate (there is no smell limits set in Slovenian legal order; and the case can be regarded as “a-normal”), the inhabitants can claim to abandon site and to restore the land in question. The fact that property worth less is also a reason for a compensation.