

INTERNATIONAL ENVIRONMENTAL LAW AND HUNGARY

GYULA BÁNDI

university professor (PPKE JÁK)

Jean Monnet Professor of EU Environmental Law

Not being a specialist in international law, but examining environmental law from a public law and European law perspective, as the host of this distinguished conference for the memory of Alexandre Kiss, my focus is also the point of view of a public lawyer. There are two questions, which I would like to examine today, first, the general problem of implementing international conventions, and their impact of the development of domestic law, second, the question of the right to environment.

Before going into the details of the two selected issues, a preliminary issue is to look at the general situation of Hungary as a member of international environmental conventions. Hungary is a member of several international environmental agreements, from among which altogether many – approx. 60 – has been enacted till the end of 2008, according to the electronic register of such documents. These are in most of the cases multilateral conventions, while there are also several bilateral ones, mostly with neighbouring countries, which are not necessarily environmental agreements, but cover environmental elements, too, and which are not counted. The latest element in this list is the amendment related to Aarhus Convention (Act XIX of 2008) and as an empowerment to adopt the full text, the Stockholm Convention on Persistent Organic Pollutants (Act V of 2008). Luckily, most of the important international environmental conventions are covered in this list, as the Cartagena Protocol, Kyoto Protocol, CITES Convention, Aarhus Convention, Convention of Biological Diversity, Basel Convention, Helsinki Convention, Espoo Convention and others.

In some cases, Hungary could even play a leading role, the best known is the Basel Convention, which had been initiated by Switzerland and Hungary together, also we had a strong role in the preparations of the Aarhus Convention, but in most of the cases our intervention was far less direct.

The impact of international conventions on the Hungarian legal system in the past 14 years, after the signing of the accession agreement with the EC, could be coupled with the direct impact of Community law, due to the fact that several conventions,

agreements form a part of '*acquis communautaire*'. Of course, this is not always a formal and direct impact. The Kyoto Protocol is a good example for the mixed character of the international cooperation under the EC. Hungary was a member of the whole climate change system on her own, thus we could receive our country shares directly in the first round, and not through the Community system – simply because at the time of the first allocation period, we were not EC members. Anyhow, the Community system still remains the basis for the procedure of allocating emission rights within Hungary, and all the other procedural obligations of running the system, as a consequence of our membership, the EC obligations became applicable also in Hungary.

1. International law and its implementation from a public law approach

As a preliminary remark, one should know that the Hungarian system of enacting international conventions is a dualistic system, thus the specific agreements are not only ratified, but have to be enacted, have to be adopted as part of domestic law in order to be effective and to be implementable. The details of the procedure related to the adoption and promulgation, enactment of international conventions is regulated in Act L of 2005. Interestingly, the adoption of the above act is the direct consequence of a Constitutional Court Decision. It was the 7/2005. (III. 31.) decision of the Court, which obliged the Parliament to revise throughouly the original regulation of 1982 related to international conventions, as it was not in harmony with the Constitution and also not in harmony with the situation of the rule of law state. The deadline for changes given to the Parliament by the Court was the end of 2005.

The Court in its decision referred to Art. 7 of the Constitution which stipulates to transform the international customary law and the general legal principles into the Hungarian legal system, while also provides for the harmony of international legal obligations and domestic law. It is the Constitutional Court which has the exclusive right to decide whether the transposition of international obligations have been undertaken fully in accordance of the Par. 1 of Art. 7 of the Hungarian Constitution. According to this provision the Court has the right to control both the conventions under negotiations in order to be concluded and the conventions which have already been promulgated, enacted. The opinion of the Court in this respect is obligatory. Within this framework the Court also emphasized its duty to control that the domestic legal regulations are in harmony with our international obligations or is there a chance that the legislator missed to meet its obligation to regulate something along the lines with the international commitments.

Beside the above decision, the Hungarian Constitutional Court dealt with other legislative issues related to international conventions several times, in connection with the procedure and duties of enactment of these documents.

The 30/2005. (VII. 14.) Decision found that the fact that the annexes of the 1944 Chicago Civil Aviation Convention have not been promulgated was unconstitutional. The Convention itself was enacted in 1971, but without the annexes, while the texts were referred to in domestic relations. The judgment points to the fact that according to the Art. 7 of the Constitution the harmonization of international and domestic law may

only be achieved through the promulgation of the Convention. The partial proclamation and enactment does not meet this requirement. The annexes of a convention form an essential part of the document – similar to Community law or domestic law – thus the missing promulgation may also result in the same level of unconstitutional situation as if the text of the convention were missing.

In the 8/2005. (III. 31.) decision the Constitutional Court emphasized that one of the major conditions of implementing the international conventions is that they should not have a retrospective effect. In the given case the Parliament, while enacting in 2004 an international convention related to air cargo transport, claimed that one of the paragraphs has a retrospective effect – going back to the original adoption time, that is 1965. The given convention is a self-executing convention, providing direct obligations and rights to private persons, and may directly be referred to in case of legal disputes. The Court underlined that even in case of international conventions the basic Constitutional requirements shall similarly be used, namely that the legislative actions should all be based on Art. 2 of the Constitution, which contains such general requirements, as the prohibition of the retrospective effect, the need to provide enough time for implementation, also the requirement to have clear, understandable wording of the norm. This also applies to retrospective effect, thus it is unconstitutional if the legislative regulation claims that the new requirement shall also be used within already existing legal relations.

2. Understanding the right to environment provisions

As a different comparative problem of international and Hungarian law, we may examine the emergence of the right to environment as a human right, on the one hand through the judgments of the European Court of Human Rights and on the other hand from the point of view of domestic law, through the provisions of the Hungarian Constitution and the judgments of the Constitutional Court. It makes the comparison even more interesting, that both Courts had their first major decisions in the same year, 1994.

After some early attempts of the European Commission of Human Rights in the early 80s (see, e.g. *Arrondale v. UK* 7889/77), the European Court of Human Rights had its first landmark decision related to the indirect adoption of a right to environment approach, using Art. 8 of the European Convention of Human Rights, in *Lopez Ostra v. Spain* (9 December, 1994) case. This case was followed by several others, such as the *Fadeyeva v. Russia* (55723/00, June 9, 2005) – or the *Moreno Gomez v. Spain* (4143/02, February 16, 2005), etc. cases. I do not want to go into the detailed study of these decisions, as my task here is only to refer the connection of the European and Hungarian judgments.

In *Fadeyeva* case one may read as a kind of summary of the previous judgments:

“70. Thus, in order to fall under Article 8, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the applicant’s private sphere, and, second, that a level of severity was attained.

[...]

134. The Court concludes that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Article 8."

In *Moreno Gómez v. Spain* case the margin of analogy is even greater:

"53. Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home (see *Hatton and Others v. the United Kingdom* cited above, § 96).

[...]

57. The present case does not concern interference by public authorities with the right to respect for the home, but their failure to take action to put a stop to third-party breaches of the right relied on by the applicant.

[...]

62. In these circumstances, the Court finds that the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for her home and her private life, in breach of Article 8 of the Convention."

The greatest difference between the case-law of the European Human Rights Court and the same of the Hungarian Constitutional Court is that while there is no explicit right to environment in the European Convention, there is such a right in the Hungarian Constitution.

Even the first environmental act – Act II of 1976 – contained a right to environment provision, referring to the right of citizens to live in an environment, 'worthy of human beings'. The 1989 amendment of the Constitution in its Art. 18, among the general provisions, refers to a broad definition of such a right: "The Hungarian Republic recognizes and implements the right of everyone for a healthy environment." Beside this broad and modern understanding of the right to environment, there is also a narrower concept within the human rights' chapter of the Constitution. This is the Art. 70/D §, which refers to the need to protect the environment, meaning here an instrument to achieve the physical and spiritual human health in Hungary. These two types of provisions are usually examined together.

Thus the starting point in Europe at large and in Hungary is different, but as we may clearly understand from the judgments of the Constitutional Court, the conclusions are mostly similar.

The cornerstone judgment in this field is the 28/1994. (V. 20.) decision of the Constitutional Court, the essence of which have been repeated many times, while

there has not been many substantial additional element in other decisions during the past 14 years. Thus while the European Court moved forward to cover nuisances and amenities, without having a direct legal basis, the Hungarian Court did not move ahead that much. On the other hand, the Hungarian Court could create a much wider approach, but it is due to the wording of the Constitution, directly covering the right to environment.

Here we list some of the major elements of the Hungarian system:

- the right to environment is a fundamental right, but not a subjective, personal right;
- this right refers to the duty of the state to protect the environment, but the level of protection may only be determined in a negative way – the state may not go below the originally guaranteed level;
- thus the right means the need to develop the legal and institutional system, requiring the state to develop the guarantees of such right;
- subjective and procedural rights may be used to support the implementation of the right to environment;
- the protected subject is not the individual person, but ‘mankind’ or ‘nature’;
- prevention has a priority over other measure, such as liability;
- the right may only be limited in a proportionate way, and only based on the need to be compared with the protection of other fundamental rights.

At the end of this short survey, there is a chart, comparing the major elements of interpretation of the two courts:

ECHR	HCC
There is no direct legal basis	There is a legal basis in the Constitution
The duty of the state is the major point of reference in both cases	The duty of the state is the major point of reference in both cases
This duty covers the failure to take action	The content of the duty is not defined, but among others may also cover the failure
The subject is the individual human being or family	The subject directly is the individual, but in the background may also be mankind or nature
The content of the protection is broad – nuisances, amenities	The content is not really defined, but it may be relatively broad as prevention is mentioned as a first priority
Actual interference to the private sphere is needed	The basis are general, broad legality, constitutional issues, actual interference is not a requirement to be implemented
The practice of the state may also be the legal basis	Mostly legislative issues are taken into consideration, there has not been a reference to the practice of the state

