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LIMITS OF ENVIRONMENTAL LIABILITY
The Impact of Union Law on Hungarian Regulation

Ph.D. thesis

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„When civilized man destroys in blind vandalism the natural habitat surrounding and sustaining him, he threatens himself with ecological ruin. Once he begins to feel this economically, he will probably realize his mistakes, but by then it may be too late.”¹

1. A brief summary of the research target

The research target of the thesis was set to take an organised, however not fully detailed overview of the institutions of environmental liability. Within this context, a particular viewpoint meant that the EU Directives represented significant milestones in the evolution of the liability for environmental damages. Obviously, the Directives had their effect on the Hungarian regulation. One of the basic targets of the research therefore focused on the continuity of the EU and Hungarian regulations on liability for environmental damages, and the compliance of the Hungarian legislation with the requirements of the EU regulations.

The thesis aims to explore only the system of the liability relations, as each component of this wide spectrum deserves a research by itself. Beyond the investigated liability relations, in a number of cases, the issue of the protection of the environmental interests naturally arises. The analysis of the liability relations and the detailed exploration of the case laws of the various fields exceed the range limitations of the dissertation, therefore general outlines are provided. The primary aim is to take a systematic overview of environmental liability, and to investigate its structure.

2. A short description of the performed research tasks, the method of gathering information, the exploration and usage of the sources

The aim of the environmental law is to protect the environment, with taking into account the aspects of sustainable development, through the wide scope of prohibitions,

¹ LORENZ, KONRAD: *Civilized Man's Eight Deadly Sins*. Harcourt Brace Jovanovich, 1974. 20.

limits and possibilities. The recognition of environmental damages is steadily growing alongside our scientific potential; accordingly the law regulates the behaviour of the users of the environment in a constantly changing setting. Therefore, the task of the environmental law is to formulate standards with the appropriate flexibility and fill these with adequate contents. Conclusions about the efficacy and suitability of the standards are drawn on the basis of their analysis, the exploration of the borders and limits of their possible interpretations, moreover on the investigation of their actual adoption in practice and their applicability.

The primary source of the research was the text of the laws, and of other official documents. If the foreign language documents had their official and public translation, I tried to use these. Taking into consideration the unfortunate inaccuracies of the officially accepted Hungarian translations, I relied mostly on the English and sometimes on the German versions.

In the course of referencing the legal bases and official documents, the Hungarian titles are represented, if the originals have their title officially translated or known Hungarian versions exist. For easy look-up those which have no translated titles, are referenced in their original language.

In interpreting the legislation, mainly the grammatical and target focused views are expressed. With regard to the various environmental standards hemmed in by other branches of law, the logical and systematic interpretation provides important data, as well as the historical approach. Nevertheless this meant a secondary aspect in comparison with the teleological explanation. Throughout the thesis, the investigation was performed in view of the enforcement of the environmental interests, being the primary target area.

Apart from this, the analysis of standards required the utilisation of a wide bibliographical base that was not limited to the research area, i.e. environmental liability, but it also covered related fields, such as EU, civil, penal and administrative liabilities. As regards the investigated issues, I attempted to explore the different standpoints of a number of authors in depth. Beyond the summarisation of the possibly contrary opinions, I tried to draw my own conclusions supported by original arguments,

and besides the various viewpoints of other authors I took into consideration the aims of the legislations, the regulatory environment and the practical requirements.

According to the subtitle of the thesis, the main focus of the research is the effect of European Union law on Hungarian law. Therefore, during the systematic overview of the general liability institutions included in the scope of the research, which meant mainly the critical investigation of the Hungarian provisions, I came upon a number of conceptual and taxonomical errors. The analysis of the Hungarian environmental liability standards included the compliance investigation with Union law, in which area many discrepancies were observed. The comparison revealed that some of these were the result of inappropriate adoptions, and others appearing as Hungarian peculiarities originated from the freedom provided by Union law.

In the interests of clarity, and for the illustration of practical problems, I tried to present numerous cases and practical examples during the description of standards and the critical study. Due to the relatively low number of cases, the applicable case-law of the Court of Justice of the European Union has been fully processed, whereas to illustrate the Hungarian situations only some exemplary cases are introduced.

3. Brief summary of the scientific results

Below the essential elements that look decisive are highlighted, which determined the whole orientation of the thesis:

1. From the 1960's on, environmental law started a rocketing development: due to the general feeling of global threats, society needed a growing number of possibly similar regulations covering all aspects of the environment. For a long time, the regulation was uneven: it was sector-oriented, moreover it primarily sought to handle the already occurred negative effects. In the nineties, the volume of regulations were growing, and with the newly appearing conceptual funding it became more organised, and the executive organisations became stronger. Following the year 2000, an integrated approach aiming at prevention surfaced both in the Hungarian and Union law while complying with the concept

of sustainable development, nevertheless the process of the appropriate execution is not yet over.

2. The development of the concept of environmental liability *mutatis mutandis* represents a similar cycle to that of environmental law. During the organising period of environmental law, the liability institutions existed sporadically without comprehensive concepts and relationships. By the preparation of adequate conceptual foundations, first the liability institutions became general, then the process of systematising started. An integrated and coherent environmental liability law is still need to be created.
3. According to the general standpoint of natural science, the situation of our environment puts the appropriate course of action to be taken into the unavoidable category. Therefore, like it or not, actions with the interest of protection of the environment enjoy advantages, or at least they ought to. From my point of view, legislation should convey this attitude on all possible levels, thus setting a good example to society and giving rhythm to the changes. The task of law is the regulation of life conditions by means of determining the order of society. Nevertheless, while defining the morally acceptable and desirable rules of conduct, it cannot be satisfied with practising this value creating function, by solely following it, but possibly shaping it as well. As far as the protection of the environment is concerned, legislation is mostly *ex post*, as the application of liability rules are also subsequent, but in a significant number of cases this can be made reversible with anticipation, and it is desirable as well in some cases. One indispensable element of these rules is its coercive and sanctioning function,² i.e. its liability part.
4. The assessment of environmental law as a separate branch of law is debated, which separateness would increase the significance of the matter. Environmental rules meet the criteria of a qualitatively separate group of statutory instruments which have a defined structure, however to comply with the concept of integration, environmental law strives to install the concept of protected interest

² BAKÁCS TIBOR (1992): *Magyar környezetjog*. Budapest, Springer Hungarica 1992. 13.

into other branches of law. This means at the same time the specific method of environmental law, as well as the pursuit of at least partly winding-up the separation of this group of special laws. The criteria of specificity is not clearly established with regard to environmental law, since the protection of the environment many times needs such measures to be taken that conform to laws aiming at the protection of other objects of law. The concept of sustainable development contains the protection of the environment as a primary aspect, though not exclusively, but complying with the integrated approach.

5. While investigating the organisational placement of environmental liability, it is concluded that this area of regulation can be found among the executionally-oriented sectorial standards that may be identified as the specific provisions of environmental law, among its general provisions, and integrated within other institutions of various branches of law. Bearing in mind the aim of the research, instead of the liability rules of the various legislations showing great diversity and changeability, the thesis focuses on the general, comprehensive, integrating, and legally cross-border rules of environmental liability.
6. The wide or narrow interpretation of the concept of the environment are both burdensome. The differentiated approach suggested by the thesis may offer some help in the interpretation of the concept, and in providing proof in practice.
7. In defining the core concept of environmental damage, one cannot start from solely the general concept of damage (e.g. meaning also handicap due to some behaviour, or loss). The general concept of damage is subjective, namely it either positively or negatively judges the result of conduct from the side of the suffering party, thus the theory is defined as having a negative effect. In the case of environmental damage, there is no appropriately objective viewpoint to judge the harmful conduct, the environment itself is the suffering party, the result can be either negative or positive to its different parts, however in summary it is difficult to be judged, as the effects do not annul each other. If the issue is approached from an anthropocentric instead of an environmental angle, we may find the same situation as regards mankind, while pushing the harmful effect from one element i.e. the suffering party to the other. Due to the above investigated grounds, it is clear that the environmental damage

is of a special type, having unique characteristics, the definition as well as its regulation are both different.

8. In the theoretical investigation of the phenomena of liability, the conclusions are summarised so that when discussing environmental liability, the thesis deals with conducts causing environmental damage or conducts capable of causing such harm, and having regard to this, there is legislation which penalises the person held liable for such conduct.
9. The personal relationships in environmental liability are irregular: with regard to public interest, the scope of parties concerned is very wide. While overviewing the system of relationships a number of legislative hiatus can be identified, which is hardly acceptable considering the significance of environmental interest. It may be handled by both legal and non-legal liability institutions.
10. The law of the European Union plays a significant role in the development of environmental law. Its tools are the regulation at a conceptual level, through a series of steps of harmonisation of laws according to the step-by-step principle, and setting uniform objectives with the relative freedom of the method of execution.
11. To examine the liability system of the EU, Article 11 of the Treaty on the Functioning of the European Union (TFEU) presents the theoretical ground, namely the principle of integration, according to which the environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities. Based on these, the Union's liability system is outlined, while searching particulars relevant to environmental liability.
12. Focusing on the Union's regulation of environmental liability, the historical development curve may easily be followed. In the beginning, liability was only a necessary instrument appearing in the standards. At the second step, the Union established qualitative requirements, when it required effective, proportionate and dissuasive penalties, however Member States had freedom in their development. The third generation of liability rules were present as separate standards, containing definite specifications as for the liability regulations to be established by Member States. As far as the prevention and remedying of

environmental damages are concerned, Directive 2004/35/EC on environmental liability is of an administrative character, while Directive 2008/99/EC is on the protection of the environment through criminal law.

13. The structure of environmental liability is similar in Union and Hungarian law. Both are based on the extensive use of principles, which are defined in fundamental documents, then interpreted in judicial practice. The absence of declaring the integration principle and its practical application are important differences in the Hungarian law. There are variations in the contents of the principles, including the principles of liability and the polluter pays principle in the restrictive interpretation of the Hungarian law.
14. We investigated among the regulations of the Basic Law the issue of judging environmental rights as basic that could have direct effect of liability as well. Hungarian law has room for improvement in the recognition of the fundamental aspect, however on the whole it still represents a more developed viewpoint in this respect than Union law. The protection, maintenance and safeguarding of natural resources and cultural values, as well as their definition as underlying obligations are welcomed, and the declaration of the polluter pays principle is of importance because of guarantee considerations.
15. The General Basis of liability of the Law on Environmental Protection declares the general liability of the users of the environment. The number of concepts in the law and the complexity of its structure is typically Hungarian. The interpretation of the complicated conceptual network presents a continuous difficulty for the practice. The influence of the Union law is clearly to be identified by the analysis of the related parts of the Hungarian law, and it may be directly attributable to the adoption of ELD into the Hungarian legislation.
16. At the conceptual level, the above modification however does not point to the direction of simplification, that is to the extension of liability: in some cases it means the narrowing of the range of liability e.g. at the definition of the subject and forms of liability, in other cases it strengthened the liability e.g. in case of environmental damages. To sum it up, there are consistency problems identified in the conceptual structure of the Hungarian law on the protection of the environment.

17. In the wording of the law, there are a number of contradictions and inaccuracies, without aiming to give an exhaustive list, e.g. the range of costs charged to the user of the environment, the extension of the limitation on activities, the secondary liability and defence possibilities of the owner and proprietor of the real estate. This is not to be attributed basically to the influence of Union law, but rather to the indiscriminateness of the Hungarian structure, that is further topped with the modification of the harmonisation, as a whole narrowing the scope of liability.
18. While investigating the civil law rules of environmental liability, it is stated that so far no binding norm in the Union has been established, and is not expected in the near future, nevertheless the influence of ELD is to be spotted in this field as well.
19. The Hungarian Civil Code however contains rules relating to environmental liability, it does not make use of the whole range of its possibilities. The thesis investigates the new Civil Code's liability rules that may be applied to environmental issues, thus further widening the range of alternatives, at the same time by exploring the conceptual background supporting the consistency of laws. Still, the argument is mostly theoretical, taken into account the low number of legal cases.
20. The criminal aspect of environmental liability in the Union legislation is analysed via the Directive on the protection of the environment through criminal law. The thesis looks at the development of this Directive, the problems arising at the time of its approval, and meeting the requirements of international laws. Several possible hot spots were discovered such as uncertain concepts like the issue of the different Member State jurists' interpretation of the concept of significant damage, or the lack of a uniform sanctioning system.
21. The chapter on the Hungarian criminal law shows a more complex picture. The creation of the new Criminal Code in 2012 reshaped the criminal regulation of the protection of the environment as it organised into a new chapter the growing number of offences. In view of this, we analyse on the one hand the compliance with the Directives outlined in the chapter on Community law, on the other hand the novelties of the new law. It can be concluded that the number of criminal

offences has grown, but as regards their contents, the law intends to make them more precise, transparent and clear. The fact that environmental criminal law is consolidated into a separate chapter is by all means a notable achievement.

22. In connection with the Directive, we express our scepticism as to all the situations are covered by the Hungarian law, thus not taking into account what the Directive originally targeted. For example, the offence ‘the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants’ is not fully transferred to the national law.
23. A new preclusion of decriminalisation defined by the Criminal Code is the authorisation by law, the interpretation of which may let us draw in the conceptual range the specific authoritative acts on environmental protection, which goes beyond environmental authorisations based on law.
24. In the investigation of criminal legislation the thesis deals with the measures applicable against legal persons, it establishes its compliance with Union law, and at the same time it projects further possibilities of the research field.
25. The chapter analysing the administrative rules of environmental liability has a Union law subchapter, the backbone of which is ELD. Apart from the detailed presentation and analysis, the Court’s practice is also investigated, with its critical assessment. The specifics missing from the Directive leave considerable discretion to Member States as regards interpretation, due to which it is doubtful that this would lead to uniform practice.
26. Following the general description of the liability system of the Hungarian administrative law, the rules equivalent to ELD found in the Hungarian environmental law under the title administrative liability are discussed. Problems of the transposition are looked at, such as the definition of the conditions for exemption. Moreover, among the specifically appearing regulations in the Hungarian law, some may be questionable, e.g. the calculation rules of transfer

of costs to users of the environment with relation to measures carried out by authorities, which is incorrect from my point of view, or the question of succession in respect of the population liable for cost-bearing.

27. In the next part of the subchapter on the Hungarian law, the other forms of administrative liability are analysed, briefly touching upon the administrative fines and offences occurring in environmental law. The topicality of the latter themes is justified by their re-regulation, their description is presented in broad outlines only.

28. Overall, it may be argued that environmental liability in Hungarian law is considerably fragmented, besides it has an uncertain dogmatic background. The standards are in general terms meet the Union requirements, but at a number of places it needs clarification. The legal subject to be protected can be different in each branches of law, resulting in that the same breach of law may fall under different judgement, thus disturbing the lay sense of justice. The enforcement is uncertain, cumbersome, hard to mobilise, the adopters are often out-of-date and demotivated. The adoption of the not uniform, not transparent standards is therefore not appropriate.

4. The actual and possible utilisation of the scientific results

The investigations made during the research and the research results may promote the inner development of this area of law. The exploration of the theoretical background of the research area can prove useful at creating the foundations of the related legal practice. The compliance of the Hungarian law with Union law, and the results at its own coherence may serve as guidance for the legislation and legal practice.

The findings go beyond the theme of the thesis, they may be useful information for environmental and liability law, as well as for issues in the Hungarian and Union law. Besides the rethinking of specific liability regulations, the structural analysis of liability can give ammunition to the rethinking of the legislative structure as well.

The range of damages in the environment is very wide, and the subjects concerned are also. The thesis showing the complexity of regulation and its problems intends to explore all the possible forms of liability, with the interest of the environment and mankind while aiding the enforcement of law at the same time. The institutions of liability have a guarantee aspect, but do not offer a real solution to the problems. Law is not the sole and most important instrument to protect the environment. We must however seek the solution by whatever means available, because ‘The environment can survive without humans, but humans cannot survive without the environment.’³

5. Related Publications

Csapó Orsolya: A környezet fogalma az elméletben és a jogszabályokban. In: Pogácsás Anett (szerk.): *Quaerendo et Creando: Ünnepi kötet Tattay Levente 70. születésnapja alkalmából*. Budapest: Szent István Társulat, 2014. pp. 83-99.

Csapó Orsolya: Felelősség, biztonság? A környezeti károk megelőzése és felszámolása tekintetében a környezeti felelősségről szóló 2004/35/EK irányelvről. In: Csehi Zoltán -

³ KRÄMER, LUDWIG

Koltay András - Landi Balázs - Pogácsás Anett (szerk.): (L)ex cathedra et praxis. Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából. Budapest, Pázmány Press, 2014. pp. 61-78.

Csapó Orsolya: A környezetvédelmi felelősségi rendszer kialakulóban lévő elemei az Európai Unióban. In: Nagy Dénes - Zilahy Gyula (szerk.): III. Országos Környezetgazdaságtani Phd Konferencia. 300 p. Budapest: Papyrus Book, 2009. pp. 255-268.

Bándi Gyula - Csapó Orsolya - Kovács-Végh Luca - Stágel Bence - Szilágyi Szilvia: Az Európai Bíróság környezetjogi ítélezési gyakorlata: a másodlagos jog intézményeinek fejlődése és az esetjog. Budapest: Szent István Társulat, 2008. 285 p.

Bándi Gyula - Csapó Orsolya - Kovács-Végh Luca - Stágel Bence - Szilágyi Szilvia: The environmental jurisprudence of the European Court of Justice: the development of instruments of environmental law and the judicial practice. Budapest: Szent István Társulat, 2008. 279 p.

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Csapó Orsolya - Harangozó Gábor - Kiszela Gergő: Kötelező és önkéntes környezeti tájékoztatás, különös tekintettel a szennyezés-kibocsátásokra: Kutatási jelentés. Budapest: EMLA Környezeti Management és Jog Egyesület, 2004. 120 p.