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LEGITIMATE EXPECTATIONS VERSUS PUBLIC INTERESTS IN HUNGARIAN CONTEXT

The protection of legitimate expectations as a general principle of the legal system is not known in Hungary. However, some other constitutional propositions play a similar role like the protection of "acquired rights" and "legal certainty". Although during the 1990s, the Constitutional Court developed a sophisticated concept of the rules of law, after 2010, when a conservative government coalition gained a two-thirds majority, the whole constitutional system was transformed. Since then, the level of the protection of individual rights, including the legitimate expectations, on behalf of the elusive concept of public interest, has declined. The institutional system of constitutional justice has proved to be weak to resist these trends. The study describes how the protection of legitimate expectations was developed and elucidates the very recent tendencies. The final conclusion of the author is that the Hungarian case can be a deterrent example showing what not to do.

INTRODUCTION

Today, when the protection of legitimate expectations is a well-admitted principle of the European Union law with growing case-law and doctrinal background, it might be surprising that this principle does not occur in any Hungarian constitutional or administrative law manual or textbook. It cannot be said that the principle has been developed by the high courts, either. The protection of legitimate expectations (*bizalomvédelem*) as a normative concept is accepted or used neither in the case law of the Constitutional Court, nor in the jurisprudence of ordinary courts proceeding administrative cases; it is solely referred before high courts to as a principle of the EU law. It is cited almost exclusively as a tenet of the European Law which does not have

an equivalent doctrine in the national legal system. However, it cannot be said that the principle described in this concept, is not present in the Hungarian public law at all. The principles and requirements of the "acquired rights" or "legal certainty" have similar characteristics. Nevertheless, it would be wrong to say that the difference is only in the applied legal terminology, and the Hungarian public law uses the same doctrine of the European Union law and the Anglo-Saxon countries by another name.

In this article, first, I will shortly analyse how are (or how are not) defined the concepts of legitimate expectations and public interests by domestic law in Hungary. Then I will describe the system of protection of legitimate expectations or their proxies in the public law. As we will see, the primary field of legal protection is in this country the constitutional law, rather than the administrative law. The last chapter deals with the decline of the level of legal protection of legitimate expectations in the recent years which can be instructive for all who deeply concern with the delicate balance between the values of the protection of legitimate expectations and the promotion of public interest.

CONCEPTUALIZING THE PROTECTION OF LEGITIMATE EXPECTATIONS AND PUBLIC INTEREST

Basically, legitimate expectations may be pinned to certain behaviour of public authorities in individual cases. Once an administrative act as a legally final decision was taken, all stakeholders may legitimately expect its effect and compliance. Actually, an individual decision can be understood as a special promise to the private parties of the particular case that the administrative act relating to them will be implemented. And, as time goes by, the protection of this kind of expectation may become even stronger. Legitimate expectations can also be protected against administrative acts having a retroactive effect,[1] because they would impose an unjustified burden on private interests. Certainly, citizens cannot be expected to respect non-existing rules, so it would be unfair to impose burdens retroactively on them with an ex post facto decision.

Citizens' expectations can also extend to the implementation of the published public policy in general.[2] In this case, public trust is not put in an individual decision, but rather, in a whole series of earlier administrative acts, or, in the case of ap-

[1] However, some scholars separate the protection of legitimate expectations from the non-retroactivity principle. See e.g. *Stott D. and Felix A.* Principles of Administrative Law, London–Sydney, 1997, p. 276.

[2] *Cane P.* An Introduction to Administrative Law, Oxford, Clarendon Press, 1997. 11, 145. "Legitimate expectations means that any individual who, as a result of governmental conduct, holds certain expectations concerning future governmental activity, can require those expectations to be fulfilled unless there are compelling public interest reasons for not doing so". *Thomas R.* Legitimate Expectations and Proportionality in Administrative Law, Oxford-Portland, Hart Publishing, 2000, p. xv.

propriate behaviour of public authorities until the relevant public policy is changed or withdrawn.

Finally, the domain of legitimate interests might be even wider, requiring predictable and stable legal circumstances in general terms. Legal certainty, which is an indispensable element of the rule of law, guarantees that the existing legal regulation can only be changed in a rational way, providing enough preparation time for stakeholders.

Whichever approach is discussed, the protection of legitimate expectations as such is not recognized as a principle by the Hungarian public law. Nevertheless, there are some legal guarantees and institutions which provide certain kind of protection for legitimate interests of private parties, even vis-á-vis the pubic interests represented by state authorities.

The situation is much the same with the concept of "public interest". Although the institutional system of the protection of public interest is well-established in Hungary,[3] the concept is very elusive and abstract. Practically, public interest is represented by the policy- and law-making authorities, so it is, on most general level, what the law says. It can be said that this is a pragmatic view and the existence and the nature of public interest depend on the context and circumstances of each case. The protection of legitimate expectations and the promotion of public interests may conflict with each other in many situations, and they may embody opposing interests and efforts.

It is sure, nevertheless, that the pragmatic approach can be well justified in a country only if the principle and practice of separation of powers exist, and all exercise of public power is effectively checked and counterbalanced. But it is not the case if public authorities are not enforced to justify their decisions and announcements and they can freely determine that what kind of interests should be regarded as "public".

FORMS OF THE PROTECTION OF LEGITIMATE EXPECTATIONS IN HUNGARIAN PUBLIC LAW

The claim for the protection of legitimate expectations may arise in various fields of law and in different ways.

First, if we examine the individual administrative procedures, the level of the protection of legitimate expectations is low. According to the ruling approach of Hungarian administrative law, legitimate expectations do not have any special role until the case is ultimately decided. Moreover, the principle of *reformatio in*

[3] For example, the public prosecutor's offices have a special function of protecting public interest, and they are empowered to bring a case to court or to initiate other (e.g. disciplinary) procedures in order to promote or defend public interest.

peius prevails, even if the client has appealed. By this principle, the administrative authority of second instance is not bound by the decision of the public authority delivered in first instance, because "the administrative authorities represent the public interest". Although legitimate interests can be taken into account in judicial review procedure, it is not a standard requirement; the court decides whether it gives weight to them or not.

There is a very special institution in Hungarian administrative law where legitimate expectations of private clients have a stronger legal protection. The Law on the General Rules of Administrative Proceedings and Services of 2004 allows the administrative authority of the first instance to enter into an administrative agreement with the client if it is a suitable solution for both the public and the concerned private interests.[4] In other words, such contracts can be concluded in cases where the private parties have a particular interest in stable legal or administrative circumstances for a long term. If the administrative agency fails to comply with its obligations, the private party may turn to court.

As to the judicial case-law, remarkably, although Hungarian courts know the principle of the protection of legitimate expectations, they do not refer to its standard form in administrative law cases, except when the EU law is directly applied, or, concerned in other ways (e.g. in preliminary ruling cases).[5] The outlines of the protection of legitimate expectations appear in the administrative case-law, even if not explicitly, but, following the jurisprudence of the Constitutional Court, in the doctrinal frameworks of legal certainty and acquired rights.

Legitimate expectations can be taken into attention in individual cases when the competent authority has a discretionary power in deciding the case and in those cases when the law allows exemptions from legal rules in order to prevent the harsh results of their strict application. In these cases, the decision of the administrative authority must comprise the criteria and facts employed in the decision-making.[6]

In theory, legitimate expectations can be connected to officially announced public policies, or the permanent practice of administrative authorities as well. Yet, the existing doctrines of Hungarian administrative law do not favor the protection of such kinds of expectations. The ruling approach requires only the formal legality of administrative acts for their legal validity, while the concept of procedural fairness

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[4] Act No. CXL of 2004. Art. 76-77.

[5] The fact that "the principles of legal certainty and protection of legitimate expectations form part of the Community legal order', means that 'these principles must be respected [*not only*] by the Community institutions, but also by Member States in the exercise of the powers conferred on them by Community directives". See Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt, Case C-201/08. Para. 43.

[6] Act No. CXL of 2004, Art. 72, Sect. (1), Para. ec).

has remained undeveloped. The principle of the protection of legitimate expectations does not play any role in the case of the so-called "legally binding" administrative acts. In these cases the execution of law is entirely automatic, since the relevant legal regulation contains if-then commands for administrative authorities excluding any autonomy in decision-making.

In the course of the judicial review of administrative acts, the courts review the protection of legitimate expectations only if it was explicitly determined by law as a criterion of consideration beforehand. Probably, it would be regarded as an unreasonable and unjustified judicial interference in public administration if the court annulled the decisions of administrative authorities referring only to such a general concept as the protection of legitimate expectations.

In Hungary, the protection of legitimate expectations has the most considerable significance in constitutional law. As a matter of fact, the relevant constitutional principles have a general scope in the whole legal system, so they must be followed in the field of administrative law as well. The relevant jurisprudence is built on the principle of rule of law. As the Constitutional Court formulated, the interpretation of this principle is the task of the Court, which determines the underlying principles gradually, from case to case.[7] The Court declared that legal certainty is an essential component of the principle of rule of law. The scope of legal certainty means that public authorities must exist

– within their organisational frameworks, and
– in the operational order determined by law,
– in a way predictable for the citizens.[8]

The prohibition of retroactive (*ex post facto*) legislation is another requirement of the principle of legal certainty. It means that the law cannot sanction (cannot determine legal consequence for) any legal action that was committed, or legal relationships that existed before its enactment.[9]

In another landmark decision, the Constitutional Court declared that the principle of legal certainty requires the whole legal system to be clear, unambiguous and predictable.[10] This principle has been associated with the requirements that procedural guarantees have to be established for the stability of the existing legal relationships, the full compliance of the procedural rules and that public authorities must operate

[7] Decision of the Constitutional Court No. 9/1992. (I. 30.), ABH 1992. 65.

[8] Decision of the Constitutional Court No. 56/1991. (XI. 8.) of the Constitutional Court, ABH 1991. 456.

[9] Decision of the Constitutional Court No. 25/1992. (IV. 30.), ABH 1992, 131, 131.

[10] Decision of the Constitutional Court No. 9/1992. (I.30.), ABH 1992. 65.

in a foreseeable and effective way.[11] The Court said also that the requirement of legal certainty imposes the duty on the law-maker to introduce a new legislation leaving due time for the concerned persons to prepare for the application of the law.[12]

One of the first corollary principles of the legal certainty was the concept of the so-called "acquired rights". The concept of acquired rights emerged mainly in the domain of social policy, concerning the legal entitlements for particular social services, provided by law. The legal certainty requires, among others, the protection of the acquired rights, a "constitutional limitation of the changeability of the long-term legal relations, originating in the past".[13] However, this principle does not establish an absolute rule or protection.[14] The rights and entitlements provided by law may be reduced or even abolished, if it is needed for attaining a legitimate aim, provided that the underlying public interest exceeds the importance of the protection of acquired rights.[15]

THE DECLINE OF THE LEVEL OF PROTECTION OF LEGITIMATE EXPECTATIONS SINCE 2010

However, the whole construction of the acquired rights, for which the legitimate expectations and interests are the core functions, has been destroyed by a wide-ranging social and economic legislation since 2010, without the legal opportunity of the Constitutional Court to review the constitutionality of the new laws. In that year the general elections brought about an overwhelming victory of the former opposition parties, and a new conservative government coalition, based on a two-thirds (i.e. constitution-making) parliamentary majority, was formed. The government had the opportunity to transform the whole constitutional system as well as to engage in comprehensive reforms.[16] Since

[11] See for example the Decisions of the Constitutional Court No.: 46/2003. (X. 16.), ABH 2003, 488; 62/2003. (XII. 15.), ABH 2003, 647; 2/2007 (I.24.), ABH 2007, 65.

[12] Decision of the Constitutional Court No. 28/1992. (IV. 30.), ABH 1992, 155, 157.

[13] Decision of the Constitutional Court No. 11/1992. (III. 5.), ABH 1992, 81.

[14] Decisions of the Constitutional Court No. 515/B/1997., ABH 1998, 976, 977.; 1011/B/1999., ABH 2001, 1365, 1370.; 495/B/2001., ABH 2003, 1382, 1390.

[15] Decisions of the Constitutional Court No. 43/1995. (VI. 30.), ABH 1995, 188, 192-193. and 62/1993. (XI. 29.), ABH 1993, 364, 367.; 16/1996. (V. 3.), ABH 1996, 61, 64., 142/2010. (VII. 14.); 3062/2012. (VII. 26.).

[16] For a more detailed description of this process in English, see *Kovács K. and Tóth G. A.* Hungary's Constitutional Transformation, 7 European Constitutional Law Review, 2011, p. 183–203; *Jakab A. and Sonnevend P.* Continuity with Deficiencies: The New Basic Law of Hungary, 1 European Constitutional

then, almost all formerly developed principles have been changed radically, and the level of protection of legitimate interests has been dramatically reduced.

The decline of the protection of legitimate interests can be exemplified by some recent legal changes. In 2010 the Parliament enacted a law that imposed a 98 per cent tax on the extreme severance payment with retroactive effect. After that the retroactive taxation was declared unconstitutional as it violates the principle of the rule of law,[17] the government majority deprived the Constitutional Court from reviewing the constitutionality of public finance laws. Since then the Court has not been able to review and annul the budgetary laws, the acts on taxes, duties, pensions, customs or any kind of financial contributions to the state, except some extraordinary cases.

The level of the protection of legitimate expectations was also dramatically reduced in the field of civil service law. An amendment of the Law on the Legal Status of Civil Servants[18] introduced in 2010 a new rule that civil servants can be dismissed without any explanation. It was a radical change of the regulatory environment, since the previous regulation was based on the so-called "closed civil service system", that is, on a career system with the well-accepted aim to preserve the skilled and trained civil servants providing secure jobs and promotion for them. Although the Constitutional Court declared the new law unconstitutional, and ordered that all dismissals have to be explained,[19] it did not prove to be an effective protection of legitimate expectations for job security, because a prompt new law established the "loss of confidence" of the employer as a legitimate reason for dismissal.

Two years ago, a new legislation abolished the early and privileged pension scheme of some groups of public employees, like policemen and firemen. According to the traditional pension system, public employees who did hazardous or risky work were entitled to retire after a shorter period of service than other employees. These earlier privileges have been abolished without any prior consultation or compensation, igno-

Law Review, 2013, p. 102–138; *Bánkuti M., Halmai G. and Scheppele K. L.,* Disabling the Constitution, 23 Journal of Democracy, 2012, p. 138–146; *Pogány I.* The Crisis of Democracy in East Central Europe: The 'New Constitutionalism' in Hungary, 19 European Public Law, 2013, p. 341–367; *Müller J.-W.* The Hungarian Tragedy, 58 Dissent, 2011, p. 5–11; *Bánkuti M., Halmai G. and Scheppele K. L.* From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions. In: *Tóth G. A.* (ed.), Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law. Budapest–New York, Central European University Press, 2012, p. 237–268. For an apologetic presentation of the new Fundamental Law, see *Csink L., Schanda B. and Varga Zs. A.* (eds.), The Basic Law of Hungary. A First Commentary. Dublin–Budapest, Clarus Press, National Institute of Public Administration, 2012.

[17] Decision of the Constitutional Court No. 903/B/1990. ABH 1990, 250-251.

[18] Act No. CLXXIV of 2010 on the amendment of the Act on the Legal Status of Civil Servants (Act No. XXIII of 1990).

[19] Decision of the Constitutional Court No. 111/B/2011.

ring the life strategies of the concerned people built on these traditional advantages.

In Hungary, after 1998, certain part of the employees' mandatory pension contributions were paid to several private pension funds for completing the state-run pension system.[20] In 2010, the Parliament adopted a law to divert the private pension contributions to the state budget, and later, the state took over the assets of private pension funds (confiscating their members' savings), ignoring the legitimate expectations of the members of these funds to provide an additional source for their retirement years.[21]

In 2011, the retirement age of judges was substantially reduced (from 70 to 62) without any transition period.[22] This measure was explained by the government's intention to establish uniform age limits for retirement for all public employees. In November 2012, the European Court of Justice declared that Hungary failed to fulfil her obligations as entrenched in the Treaty on the Functioning of the European Union by radically lowering the age-limit for compulsory retirement of judges, because – among others – this measure illegitimately violated the "well-founded expectation" of the judges "that they would be able to remain in office" until the age limit set by law earlier.[23] Nevertheless, no judge has been reinstated in his/her original position.

These examples could be continued. The central government, based on its parliamentary majority, and in the absence of the constitutional review of public finance laws, started to extend its political and economic control to many spheres of market economy and social life. The state has monopolized some spheres of economic activities or institutions, abolishing long-term contracts and establishing new public concessions. The untrammelled power of taxation has widely been used to impose extraordinary and special taxes on certain economic actors and spheres, like in the bank or telecommunication sector. The frequent and unpredictable changes in the regulation have ignored the previously established and entrenched relationships, and made the previous investments and personal policies meaningless and superfluous. All these measures have eroded both the investors' and the citizens' trust in public institutions. The declared political aim was to redistribute wealth and resources and change social and economic elites.

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[20] According to this system, the private pension funds would have paid 30 per cent of the total pension of their members, while the 70 per cent would have been covered by the state. These funds had about three million members, and collected almost three trillion HUF (about 10 per cent of the Hungarian GDP).

[21] For more details see *Szente Z.* Breaking and making constitutional rules. The constitutional effects of the world economic and financial crisis in Hungary. In: *Xenophon Contiades* (ed.), Global financial Crisis and the Constitution. London, Ashgate, 2013, p. 245–262.

[22] Act No. CLXII of 2011.

[23] European Commission v. Hungary, Case C-286/12, Judgment of 6 November 2012, Para. 67.

CONCLUSION

In fact, the recent constitutional and political changes have dramatically reduced the quality of the rule of law and destroyed the principle of legal certainty.[24] All these developments have undermined the principle of the protection of legitimate expectations in the past few years in Hungary. So in the current discourse on the principle of the protection of legitimate expectations, the recent developments of the Hungarian legal system can be deterrent examples of what not to do.

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[24] See for example *Tóth G. A.* (ed.). Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law. Budapest–New York, Central University Press, 2012; *Kovács K. and Tóth G. A.,* Ibid.

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TEISĖTŲ LŪKESČIŲ IR VIEŠŲJŲ INTERESŲ SANKIRTA VENGRIJOJE

Santrauka

Teisėtų lūkesčių principo apsauga yra gerai žinomas Europos Sąjungos teisės principas, įtvirtintas vis labiau plėtojamoje teismų praktikoje ir doktrinoje. Tačiau dėl to, kad šis principas dažnai pasitelkiamas privačių ar individualių teisių ir interesų gynybai, jis gali konfliktuoti su valstybių narių viešaisiais interesais. Esant tokiai situacijai, jų santykis tampa vis svarbesnis ir gali sukelti politinių bei teisinių (reguliacinių) padarinių.

Teisėtų lūkesčių apsauga kaip bendras teisinės sistemos principas neturi atitinkamos doktrinos nacionalinėje teisinėje sistemoje. Vengrijos teismuose jis beveik išimtinai cituojamas kaip Europos teisės principas. Tačiau kai kuriais atvejais konstitucinėje jurisprudencijoje jis atlieka tą patį vaidmenį kaip ir „įgytų teisių" bei „teisinio aiškumo" apsauga.

Šiame straipsnyje analizuojama, kaip teisėtų lūkesčių ir viešojo intereso koncepcijos apibrėžiamos (ar neapibrėžiamos) nacionalinėje Vengrijos teisėje. Vėliau apibūdinama teisėtų lūkesčių ir susijusių nuostatų apsaugos sistema viešojoje teisėje. Paskutiniame skyriuje apibūdinamas teisėtų lūkesčių apsaugos mažėjimas pastaraisiais metais.

Straipsnyje išskiriami trys teisėtų lūkesčių koncepcijos lygmenys, apibūdinantys šį principą kaip reikalavimą:

– tam tikro viešosios valdžios institucijų elgesio individualiais atvejais;

– paskelbtos bendro pobūdžio viešosios politikos įgyvendinimo ir

– esamo teisinio reguliavimo palaikymo, išskyrus atvejus, kai jis keičiamas racionaliai, sudarant tinkamas galimybes pasiruošti reformų adresatams.

Vengrijos kontekste pagrindinė teisėtų lūkesčių apsaugos sritis yra konstitucinė teisė, o ne administracinė teisė. Kalbant apie teismų praktiką, galima pastebėti, kad nors Vengrijos teismai pripažįsta teisėtų lūkesčių apsaugos principą, jie paprastai jo nenurodo administracinėse bylose, išskyrus tuos atvejus, kai tiesiogiai taikoma ES teisė ar klausimas kitaip yra su ja susijęs.

Praėjusio amžiaus devintąjį dešimtmetį Konstitucinis Teismas išplėtojo sudėtingą teisinės valstybės principo doktriną, kurioje apibrėžė teisinio aiškumo, teisės aktų negaliojimo atgal (*ex post facto*) ir vadinamųjų „įgytų teisių" koncepcijas.

Nepaisant šių sudėtingų teisinių doktrinų, po 2010 metų, kai konservatyvi koalicija gavo dviejų trečiųjų daugumą parlamente, visa konstitucinė sistema buvo pakeista. Nuo tada individualių teisių apsaugos lygis, įskaitant teisėtus lūkesčius, sumažėjo neapibrėžto viešojo intereso koncepcijos naudai. Paaiškėjo, kad konstitucinės justicijos institucinė sistema buvo per silpna atsilaikyti prieš šias tendencijas. Straipsnyje aprašoma, kaip buvo išplėtotas teisėtų lūkesčių principas, ir paaiškinamos pačios naujausios tendencijos. Galutinė autoriaus išvada – Vengrijos atvejis gali būti pavyzdys to, ko nereikėtų daryti.