

Property rights vs. nature conservation: a never-ending battle?

Lecture at the International Conference
20 years of Habitats Directive: European Wildlife's Best Hope?
Antwerp, 12-13 December 2012

Gerd Winter
Research Unit for European Environmental Law (FEU)
University of Bremen

Overview

- Focus on land use/ property in land
- Attempt to develop generalisable approach including ECHR, ChFR and (selected) MS constitutions

Natura 2000 encroachments on agriculture

- Measures guided by protection objectives
 - Toleration of intrusion (eg tourist path)
 - Prevention of certain landuses (eg pesticides use)
 - Obligation to active management (eg water supply regulation)
- Effects
 - (1) Minor reduction of full exploitation
 - (2) Severe and intolerable burden (eg permanent negative economic balance of farming)
 - (3) Taking of land parcel (eg for erection of tourist center)

Legal framing by laws, site regulation and case law

3 categories of encroachment on land property

- Normal restrictions => test of public interest and proportionality=> shaping management plan, discretionary financial assistance, often contractual arrangement
- Severe restrictions => duty to compensate loss, amount flexible
- Expropriation => duty to fully compensate lost value

Reflected in general property guarantee

- Normal use regulation => legal basis, public interest, proportionality
- Severe restrictions: variety of conceptions
 - Europe (pro public interest)
 - ‚De facto expropriation‘ (ECtHR) => compensation
 - ‚Indirect expropriation‘ (ECJ) => undeveloped doctrine
 - International investment arbitration: ‚regulatory expropriation‘ (pro property interest)
 - MS level (differences among MS)
 - NL: ‚functional loss of property uses‘ to be compensated (constitution)
 - D: ‚Determination of property content‘ (BVerfG) => compensation, if required by proportionality principle, not because trespassing of a line
- (Direct) expropriation => legal basis, public interest, necessity, compensation

Concise categorisation but down to earth struggles: examples

- Suppression of all agriculture in Natura 2000 core protection zone => must authority take the property and compensate in full? If not: does land-owner have a right of purchase by authority? Are uses for other purposes remaining, is measure just unproportional?
- Prevention of chemical fertilizers and pesticides, restriction of grass and tree cutting, non-cultivation stripes causing smaller yield => to be tolerated? To be compensated as indirect expropriation?
- Withdrawal of authorisation for exploitation of minerals => expropriation? compensation? Even if based on phasing out scheme?
- Prohibition of new exploitation of productive potential (minerals, irrigation) => normal regulation? De facto expropriation?

Need of material criteria: some property theory

- Content of property: Wide-spread de-facto-ism. „Any economic value possessed is a person’s property“. Focus on checking interventions.
- Inquiry into the property content. 4 considerations
 - Immanent social bond of property: to be reframed in ecological terms: Agriculture bound in natural cycles
 - Biodiverse situation => duty to preserve (Situationsgebundenheit)
 - Deteriorated situation => duty to restore
 - Human basis of property protection => to differentiate between farm-scale and industrialised agriculture; reflecting human basis of property guarantee
 - Labour theory of property: protectable is invested labour and capital (redemption time), but not mere expectations/opportunity costs; no property in public grants or non-used permits
 - Political construction of property: no pre-societal ‚natural right‘ but politically convened => power of democratically legitimated institutions to define property content (~ approach of BVerfG of determination of property content)

Need of material criteria: some property theory

- Criteria for use regulation
 - Broad discretion for regulation by legitimated public decision-making: range from restrictive measures to financial assistance
 - Public interest: the more valuable the affected nature is the stricter can intervention be (relation with Situationsgebundenheit)
 - Suggestion to abandon category of de facto or indirect expropriation: misuse especially in investment vs state litigation (ICSID, NAFTA) => yardstick to be property content plus public interest and proportionality of regulation
 - Explore alternative options of making farming and nature protection compatible; against reductionism in compensation => advice, public works, limited exceptions, financial assistance to turn to biological agriculture
 - Possibility of phasing out of property positions (BVerfG: removal of rights as part of historical legal reorientation; ECtHR: Fedin)
 - Regulation aiming at restoration within and outside Natura 2000 sites

Procedural aspects: seeking legal protection

- Challenging EU legal acts
 - Bird and Habitat Directives
 - No access to Court of EU because farmers not directly affected; need for implementing measures
 - Decision on including sites in EU list
 - No access to Court of EU farmers not directly affected; need for implementing measures (Sahlstedt) => critique in view of Art. 4 (5) Dir 92/43
 - Insofar as constitutionality check is possible:
 - Applicable property guarantee: Art. 17 ChFR, ECHR, MS constitutional traditions
 - Directives prioritise nature protection, disregard property interests => overriding public interest, compensation by MS

Procedural aspects: seeking legal protection

- Challenging MS legal acts
 - Identification of sites by MS
 - No standing of farmers because internal measure (BVerwG); critique in view of Draggagi doctrine (measures to safeguard ecological interest)
 - Establishment and implementation of protection regulation
 - Standing according to MS standing rules
 - Checking of regulation
 - Insofar as determined by Directives: Art. 17 ChFR
 - Discretionary margin: Art. 17, 52 ChFR plus national constitutions
 - Problem of implicit checking of selection of sites and/or Directives
 - Problem of past damage if regulation found to be unlawful
 - ECtHR, ECJ => doctrinally undeveloped
 - BVerfG => to be regulated by legislation. BGH => judge-made right to compensation for 'expropriating intervention'

Conclusion:

never ending story? No: better start a new story

Further reading:

- Michel Pâques (ed.) Natura 2000 et le droit de propriété. Natura 2000 and property rights. Bruxelles, Bruylant, 2005