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A tartalomból – Contents

Paweł A. BLAJER*

The constitutional aspect of regulations limiting agricultural land transactions in Poland**

Abstract

The article aims to analyse the constitutional aspects of the regulation on land transactions in Poland. After the general introduction, it scrutinises the notion of agricultural real estate and the self-farming obligation. In the end, it concludes by shedding light on the constitutional law problems arising from the regulation in force. Moreover, the article gives an in-depth analysis on the current Polish land transaction regime.
Keywords: Poland, regulation of land transactions, constitutional law, agricultural land.

1. Introduction

Since 30 April 2016, there have been in force in Poland specific rules for trading in agricultural real estate and agricultural holdings,[1] the basic shape of which has not changed since then, despite some significant corrections made in 2019.[2] The Polish model of rationing the agricultural real estate transactions is currently defined primarily by the provisions of the Act of 11 April 2003 on shaping the agricultural system[3] (ASAS), as amended in 2016, as well as the Act of 19 October 1991 on the management of agricultural real estate of the State Treasury[4] and the Civil Code.[5]

The introduction of the aforementioned regulations triggered a lively discussion in the Polish literature,[6] and the solutions adopted in 2016 became the subject of

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[1] Introduced into the Polish legal order by the Act of 14 April 2016 on the suspension of the sale of properties of the Agricultural Property Stock of the State Treasury and on the amendment of certain acts (Journal of Laws of 2018, 868)

[2] Pursuant to the Act of 26 April 2019 amending the Act on shaping the agricultural system and certain other acts (Journal of Laws 2019, 1080), which entered into force on 26 June 2019.

[3] Journal of Laws 2019, 1362.

[4] Journal of Laws of 2020, 2243.

[5] Journal of Laws of 2020, 1740.

[6] Among the very many studies relating to the issue at hand, the following publications by authors specializing in agricultural law should be mentioned: Bender 2019, Bieluk 2016, Bieluk 2018, Blajer 2016, Blajer 2019a, Blajer 2019b, Blajer 2019c, Blajer 2021, Czechowski & Niewiadomski 2017, Czechowski 2018, Litwiniuk 2017, Litwiniuk 2019, Litwiniuk 2021, Łobos-

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analyses in many contexts.[7] One of them is the constitutional aspect of the current model of agricultural real estate transactions in Poland. This issue has even been devoted to a separate monograph.[8] This question is all the more important because several of the most significant regulations of the ASAS became the subject of two applications of the Polish Ombudsman in 2016 to declare the selected provisions of the ASAS inconsistent with the Constitution of the Republic of Poland, i.e. the application of 11 July 2016 and the application of 12 August 2016. This case, heard under the joint reference K 36/16, is still pending despite the passage of more than five years from the receipt of the relevant applications.

In the aforementioned documents, the Ombudsman devoted much attention to the issue of constitutionality of the solutions introduced in 2016, stressing their inconsistency with the fundamental constitutional principles of the Republic of Poland. Also in the literature, numerous arguments are raised in favour of the unconstitutionality of the Polish model of agricultural real estate transactions in its current form. Therefore the aim of this article is to present the most important issues raised in the current discussion on the compatibility of regulations limiting the trade in agricultural land with the Constitution of the Republic of Poland in a wider international forum. The modest framework of the article does not allow a comprehensive discussion of this extensive and complicated problem. Therefore, out of necessity, further considerations will be limited to two fundamental issues, causing the biggest doubts both in the constitutional aspect and in the practice of functioning of the Polish model of trading in real estate[9]. The first of them is the notion of agricultural real estate itself as a concept determining the scope of application of special regulations of the ASAS; the second one is the issue of 5-year-long obligation to run an agricultural farm as a result of acquiring agricultural real estate. Both these issues allow at the same time to indicate the most important fields of conflict between the agricultural law regulations and the fundamental systemic principles resulting from the Constitution of the Republic of Poland, as well as to determine the hitherto approach of the Polish Constitutional Tribunal to solving these conflicts, with the reservation that the jurisprudence of the Constitutional Tribunal analyzed in this paper has been shaped on the basis of the legal status binding before 2016.

Kotowska & Stanko 2020, Łobos-Kotowska 2021, Marciniuk 2017, Michałowski 2020, Suchoń 2017, Suchoń 2019, Truszkiewicz 2016, Truszkiewicz 2019.

[7] The aforementioned solutions have been analysed, among others, in the context of their impact on the regulations of traditional civil law (e.g. Pisuliński 2016, Swaczyna 2017), civil procedure (e.g. Gniewek 2017, Szereda 2016), commercial law, including in particular commercial company law (e.g. Bieluk 2021, Bieluk 2019, Łobos-Kotowska 2018, Grykiel 2016), and food law (e.g. Wojciechowski 2021).

[8] Bidziński, Chmaj & Ulijasz 2017.

[9] It should be emphasized that the solutions adopted in the ASAS are currently among the most significant from the point of view of the practice of real estate trade in Poland. This can be confirmed both by the number of practical commentaries to this Act published after 2016. (Bieluk 2016, Łobos-Kotowska & Stańko 2019, Czech 2020, Blajer & Gonet 2020), as well as the number of conferences organized at that time, both strictly scientific in nature and aimed at real estate practitioners (e.g. Zombory 2021).

On the other hand, it should be emphasized that issues related to the compatibility of Polish regulations on agricultural real estate transactions with the European Union law remain outside the scope of the considerations carried out in this paper. Devoting attention to this complicated and multifaceted issue, widely analyzed in Polish literature,[10] would significantly exceed the framework of this study.

2. The notion of agricultural real estate within the meaning of the ASAS in the constitutional aspect

In accordance with the justification of the project of the Act on suspending the sale of real estate from the Agricultural Property Stock of the State Treasury, by virtue of which, in 2016, the current model of public rationing of the agricultural real estate trade in Poland was introduced, it was pointed out that agricultural real estate is the most important and indispensable means of food production, and at the same time, due to the ongoing progress of civilization, intensive urbanization processes and climate changes, the resources of agricultural real estate are constantly decreasing or undergo total devastation. In view of the above, agricultural real estates, as 'non-monetizable public property', should be subject to detailed legal regulations of a protective nature. These regulations, establishing the principles and mode of agricultural real estate circulation, should allow for proper distribution of agricultural real estate. These ideas, in turn, have been reflected in the preamble of the amended ASAS, according to which its provisions should serve to ensure appropriate management of agricultural land in the Republic of Poland in order to ensure food security for the citizens and to support sustainable agriculture, which is carried out in compliance with environmental protection requirements and fosters the development of rural areas. Moreover, the aim of ASAS in its present form should be to strengthen the protection and development of family farms which, in accordance with Article 23 of the Constitution of the Republic of Poland, constitute the basis of the agricultural system of the Republic of Poland.[11]

Granting such an important meaning to agricultural real estate in Poland, resulting in creation of a completely separate model of trade in this category of real estate, should entail precise definition of this object at the level of the ASAS. However, the issue of legal individualization of agricultural real estate in the current legal state raises very significant doubts.

[10] E.g. Wojciechowski 2020, Włodarczyk 2019.

[11] The content of ASAS, however, did not reflect other motives for introducing specific regulations concerning agricultural real estate transactions, which mainly included the fact that on 1st May 2016 the period of 12 years of Poland's membership in the European Union expired and, as a result, the protection period concerning the purchase of Polish agricultural land by foreigners, as specified in paragraph 4.2 of Annex XII to the Act of Accession of the Republic of Poland to the European Union, signed in Athens on 16th April 2003. Therefore, according to the author of the project, the lack of introduction of specific regulations would lead to a situation in which foreigners would be in possession of the majority of agricultural real estate in Poland, and the legal regulations would not impose the obligation to conduct agricultural production on these areas, which in turn would harm the food security of Poland and Polish farmers who, according to statistics, have the lowest incomes among farmers from European Union countries.

The definition of agricultural real estate, as a subject of separate legal regulation, has been included in art. 2.1 of ASAS, according to which 'agricultural real estate' should be understood as agricultural real estate within the meaning of the Civil Code, excluding real estates located in areas designated in spatial development plans for purposes other than agricultural. In Polish agrarian literature it is assumed that classifying a given property as agricultural real estate is a two-stage process; firstly, it has to be established whether the given property is agricultural real estate according to the Polish Civil Code and the next stage is to check whether the area where the given property is located is covered by a spatial development plan and in case of a positive answer – what are its provisions with regard to the given property.[12] Already at this point it should be stressed that in order to qualify the given real estate as agricultural from the point of view of the above definition neither its area nor the fact that it is located within the administrative borders of a town is of any significance.

The definition of agricultural real estate at the level of the Polish civil code is provided in article 46^1 of this legal act. In accordance with its content agricultural real estate is real estate which is – or may be – used for conducting manufacturing activity in agriculture within the scope of plant and animal production, not excluding horticultural, fruit and fish production. From the wording of this provision it can be concluded that the agricultural real estate within the meaning of the Civil Code is the real estate which is actually used for carrying out productive activity in agriculture but also the real estate which can be used in the future for such activity.[13] In this context productive activity in agriculture should be treated as a kind of qualified agricultural activity assuming existence of purposeful and organised human activity aimed at production in the field of agriculture.[14] On the other hand, the literature stresses that the basic criterion for distinguishing agricultural real estate is only physical and chemical (agronomic) properties of the top soil layer allowing to obtain agricultural products after applying appropriate agrotechnical procedures. Thus, it is about agronomic features of the ground from which it results that obtaining agricultural products on it is physically possible.[15]

It is also argued in the literature that from the definition of the agricultural real estate in the Civil Code it follows that the real estate loses its agricultural character at the moment of the actual development of the land making its further use for agricultural activities impossible.[16] In other words, when assessing the possibility of using for agricultural purposes one should take into account whether with the use of current technology it can be incorporated in the process of agricultural production.[17] The prerequisite of the use of land for agricultural purposes (actual and potential) should be assessed objectively. Its subjective perception by the owner or purchaser of the real estate is irrelevant.

[12] Wojciechowski 2019, 164.
[13] Łobos-Kotowska & Stańko 2019.
[14] Judgment of the Supreme Court of 14 November 2001, II CKN 440/01, OSNC 2002/7–8.
[15] Lichorowicz 2001, 88
[16] Truszkiewicz 2007, 150.
[17] Wojciechowski 2019, 157.

In accordance with the view expressed in the literature, if the real estate is not currently used for agricultural purposes, it should be examined whether by way of recultivation procedures it is possible to obtain a state in which it will be fit for agricultural activity. The criterion of reasonable expenditure should be applied in this context. It has to be examined whether, if the real estate was adapted for agricultural use, the economic results achieved would justify the expenditure incurred. In simple terms, the planned income which could be generated by the agricultural activity using the real estate is compared with the costs of recultivation measures. When costs exceed revenues, the outlays cannot be considered reasonable. Therefore, if with the application of appropriate agrotechnical procedures, according to the criterion of reasonable outlays, the land can be adapted to agricultural activity, it should be regarded as agricultural real estate (within the meaning of Article 2.1 of the ASAS in conjunction with Article 46^1 of the Civil Code). If these prerequisites are not met, such land does not constitute agricultural real property and is not subject to the provisions of the ASAS.[18]

In connection with the above – mentioned doctrine statements, attention should also be drawn to very restrictive theses arising from the case law of Polish courts. Pursuant to the decision of the Supreme Court of 28 January 1999, III CKN 140/98, LEX No 50652, the decisive factor for recognising the real estate as agricultural is the purpose of the real estate, and not the way the real estate is actually used. The purpose of real estate does not change when it is excluded from agricultural use, even for a longer period of time, either as a result of legal actions (lease, tenancy, lending) or certain facts (machinery storage, separation of playgrounds), provided that in both cases the real estate does not permanently lose its agricultural characteristics. It also does not lose them when they can be restored by means of applied procedures, e.g. recultivation. Thus, according to the Supreme Court, the real estate which for years served the needs of industrial production may have agricultural character – *"subjected to recultivation procedures, it may be restored to its original purpose, or at least it may be used for industrial-agricultural purposes."* An even more radical view was expressed in the ruling of the Administrative Court in Poznań of 8 December 2011. IV SA/Po 558/11, LEX No 1154873 in which the said court stated that even in a situation where for a longer period of time the real estate was developed in a different manner and used for commercial, service or production purposes not related to agricultural production – as long as there is a potential possibility of using it to conduct production activities in agriculture with respect to plant and animal production – it cannot be denied its agricultural character.

The above quoted views, significantly broadening the scope of the notion of agricultural real estate in the light of the Civil Code, should be considered as prevailing both in the theory and practice of trade. However, it should be noted that they are also subject to justified and well-argued criticism in literature. First of all, it is argued that the character of the given real estate in the context of the definition included in Article 46^1 of the Civil Code should be verified each time by examining whether under specific circumstances (location, configuration, previous permanent manner of development) the given real estate may constitute an agricultural farm.

[18] Czech 2020.

A negative result of this examination does not allow for qualification of the given land real estate as agricultural.[19] Consequently, according to this standpoint it should be assumed that in obvious cases the real estate – even if it includes agricultural land within the meaning of the provisions on land cadastre – is not an agricultural real estate if its specific features, such as area, shape, configuration of the terrain or the hitherto manner of development support this conclusion.[20]

The last of the quoted theses raises the question about the legal meaning of qualifying the given real estate as agricultural within the meaning of the provisions relating to the land cadastre – in particular, the provision of § 9 of the Regulation of the Minister of Labour and Technology Development dated 27 July 2021 on land and building[21] cadastre. Also in this respect, there is no uniform position in the judicature and the doctrine of law. On the one hand, currently the prevailing view seems to be that the gain or loss of the agricultural character of the real estate is not determined by the entry (or its change) in the land cadastre, because the data contained in this register are only informative. Consequently, reliance on the data entered in the land cadastre may in practice lead to erroneous conclusions as to the classification of the given real estate as agricultural real estate (within the meaning of Article 46[1] of the Civil Code and Article 2.1 of the ASAS).[22] A similar perspective is also sometimes adopted by judicature, e.g. the Supreme Administrative Court in the judgment of 12 December 2017, I OSK 1174/17, LEX nr 2430459, stated that the registration data are of informational and technical nature and refer to a specific registration plot. The cadastre only records the legal statuses resulting from specific official documents, and thus the statuses determined in another mode or by other authorized adjudicating bodies. For citizens and state bodies only the data regarding the land description (its location, boundaries, type of use, etc.) has binding force. The cadastre does not resolve any disputes concerning the land and buildings, and the registration authorities are not entitled to verify the documents on the basis of which they make changes to the register. This view was also reflected in the content of a fundamental document for the practice of trade in agricultural real estate in Poland, i.e. the Joint Position of the Ministry of Agriculture and Rural Development, National Support Centre for Agriculture and National Council of Notaries dated 27 February 2020 regarding the practical application of the ASAS. In accordance with the content of this document, data from the cadastre may be helpful in qualifying the real estate as agricultural. As such, they cannot be conclusive.

On the other hand, relatively recent jurisprudence has presented the view that in order to determine that the real estate has agricultural character – because it may be used for conducting production activity in agriculture in the scope of plant and animal production – the types of land use revealed in the land cadastre are absolutely decisive (Judgment of the Supreme Administrative Court of 12 March 2020 II OSK 1279/18, LEX nr 3020156).

[19] Wierzbowski 2005, 96.
[20] Truszkiewicz 2016, 148.
[21] Journal of Laws of 2021, 1390.
[22] Wojciechowski 2019, 157; Czech 2020; Lobos-Kotowska & Stanko 2019.

Finally, significant doubts arise in the Polish literature and jurisdiction over the issue of the so-called mixed real estates i.e. real estates which apart from the land suitable for agricultural use also include land which has another type of use. This problem results from the fact that the definition of agricultural real estate in Article 46^1 of the Civil Code is adjusted only to the situation when the whole real estate can be developed in a uniform manner. In this respect it is possible to adopt two different solutions:

(1) Determining the dominant (leading) function of the real estate. Supporters of this solution draw attention to the necessity of a functional approach to assessing the nature of the real estate, stressing at the same time that there is no sense in applying ASAS to a real estate comprising land, for example, designated as agricultural land, which does not and cannot have a major impact on the agricultural use of the real estate. Analogically one should assess real estates in which the area of agricultural land is relatively large compared with the remaining part of the real estate, but it cannot influence the use of the entire real estate due to the dominant (leading) function of the remaining part, e.g. locating on it a production plant, conducting mining activity, etc. Consequently, if after establishing the dominant function of the real estate it turns out that this function is not agricultural, the whole real estate cannot be classified as agricultural.[23]

(2) Treating the whole real estate as agricultural. This solution is supported in particular by some theses contained in the justification of the verdict of the Supreme Court of 5 September 2012, IV CSK 93/12, in which the Supreme Court emphasized that with regard to real estate of heterogeneous nature it is possible to take the view that: a/ it is not included in the ASAS regulation irrespective of the extent to which it is intended for other purposes; b/ the aforementioned statutory requirements are met by real estate the main purpose of which is to carry out production activity in agriculture; c/ the real property falls under its regulation if it is not used in its entirety and intended for purposes other than agricultural. In the opinion of the Court, the second position was based on the assessment of the character of the real estate in relation to the leading or essential use of the real estate and the intended use covered by the spatial development plan, also taking into account the purpose of the ASAS. The leading, or principal, use of the real estate would be considered to be when the area of the real estate is predominantly agricultural and the part related to other activities is not significant, which determines that the whole property is covered by the ASAS. However, the nature of these prerequisites may be evaluated, which could cause doubts and difficulties in the application of the ASAS. Thus the Court decided in favour of the third of the abovementioned positions, as it corresponds to the highest degree to the principle of certainty of trade, and its decision had a decisive influence on the current practice of trade, often leading to completely irrational results.

As a consequence, the legal definition of agricultural real estate contained in the ASAS can be precise only in those cases where the whole area of a given real estate is covered by a spatial development plan, i.e. it is possible to go to the second step in the process of legal identification of real estate for the purpose of specific regulation of trading in agricultural land.

[23] Truszkiewicz 2017, 58–59.; Marciniuk 2017, 101; Wojciechowski 2019, 157.

However, it should be stressed that currently this possibility concerns only about 1/3 of the area of the Republic of Poland, because only such a modest area of Poland is covered by the local spatial development plans. Moreover, in a particular case the designation of a given real estate in the spatial development plan may also cause doubts regarding its agricultural qualification. This results from the fact that often the content of the plan is not unambiguous and its provisions provide e.g. next to the basic non-agricultural designation, for an agricultural designation as an admissible or supplementary designation.[24]

Summing up the comments made so far, it should be stated that in the vast majority of practical cases the open and extremely broad nature of the definition of agricultural real estate provided in the ASAS gives rise to considerable doubts as to whether a given piece of real estate, in particular undeveloped real estate, has agricultural character within the meaning of the ASAS; it is not clear what criteria should be taken into account when determining its character. As a result, there is uncertainty as to whether or not a given piece of land should be subject to the separate and strict rules for trade in agricultural real estate laid down in the ASAS. The sanction for incorrectly determining the nature of the real estate is the invalidity of its acquisition or the possibility of its expropriation (art. 9 ASAS).

The mentioned way of defining the agricultural real estate in article 2.1 of the ASAS raises significant doubts as to the compliance of this provision with the Constitution of the Republic of Poland. In accordance with the established line of jurisprudence of the Constitutional Tribunal, the principle of a democratic legal state, as expressed in Article 2 of the Constitution of the Republic of Poland, requires the legislator to observe the principles of correct (decent, reliable) legislation. This injunction is functionally connected with the principles of legal certainty and security, as well as with the protection of the citizens' confidence in the state and the law created by it (Judgement of the Constitutional Tribunal of 24 February 2003, ref. K 28/02). On the other hand, the principles of correct legislation include, first of all, the principle of determinacy of the law, which requires that the law be made consistently, clearly and comprehensibly for the citizens (Judgment of the Constitutional Tribunal of 16 June 2015, ref. K 25/12). The requirement of determinacy of legal regulation, thus finding its constitutional basis in the principle of a democratic legal state, applies to all regulations (directly or indirectly) shaping the legal position of a citizen (so Constitutional Tribunal in the justification of the Judgment of 18 March 2010, ref. K 8/08). The abovementioned principle of legal certainty prohibits the adoption of unpredictable norms, whereby the application of regulations containing vague premises, unclear and ambiguous, which do not allow a citizen to foresee the legal consequences of his actions, may also come as a surprise to an individual (Constitutional Tribunal Judgment of 14 June 2000, ref. P 3/00).

[24] It should be emphasized that according to the view prevailing in the practice of trade, issuance of the so-called decision on land development conditions for a given land, which, pursuant to Article 4.2 of the Act of 27 March 2003 on spatial planning and development (Journal of Laws of 2021, 741.), is a surrogate of the local zoning plan in areas not covered by it, does not result in the loss of the agricultural character of the real estate. Truszkiewicz 2016, 141.

On the other hand, the precision of a provision, which is related to its clarity, means the possibility to decode unambiguous legal norms from it, as well as their consequences, with the help of the rules of interpretation adopted on the grounds of a given legal culture. It should also manifest itself in the concreteness of the obligations imposed and rights granted, so that their content is obvious and allows for their enforcement (Judgment of the Constitutional Tribunal of 18 March 2010, case K 8/08).

It should also be noted that in the light of the existing jurisprudence of the Constitutional Tribunal, three assumptions are important in order to assess the compliance of the formulation of a specific provision of law with the requirements of correct legislation. Firstly, any provision restricting constitutional freedoms or rights should be formulated in a manner that makes it possible to unequivocally determine who is subject to the restriction and in what situation. Secondly, such a provision should be sufficiently precise to ensure its uniform interpretation and application. Thirdly, such a provision should be formulated in such a manner that its scope of application encompasses only those situations in which a rational lawmaker actually intended to introduce a regulation limiting the exercise of constitutional freedoms and rights (e.g. Judgment of the Constitutional Tribunal of 18 March 2010, ref. K 8/08). The current wording of the definition of agricultural real estate in Article 2.1 of the ASAS causes significant doubts as to the satisfaction of the above mentioned premises and may also be questioned from the point of view of the principle resulting from Article 31.3 of the Constitution of the Republic of Poland, according to which limitations to the use of constitutional freedoms and rights may be established only by means of a statute. The meaning of this principle was explained by the Constitutional Tribunal in the Judgment of 12 January 2000 (ref. P 11/98), in which it stated that *"making the admissibility of limitations of rights and freedoms dependent on their establishment 'only by statute' is more than a mere reminder of the general principle of the exclusivity of statutes for the regulation of the legal situation of individuals, which constitutes a classic element of the idea of the rule of law. It is also a formulation of the requirement of adequate specificity of statutory regulation. Since limitations on constitutional freedoms and rights may be established only by statute, this implies an obligation of completeness of the statutory regulation, which must independently determine all the basic elements of the limitation of a given right and freedom, so that already on the basis of a reading of the provisions of the statute it is possible to determine the complete outline (contour) of this limitation. It is inadmissible, however, to adopt blanket regulations in a statute, leaving the executive authorities (...) the freedom to prescribe the final shape of such limitations, and in particular to determine the scope of such limitations."*

3. The obligation of running a farm following the acquisition of agricultural real estate in the constitutional aspect

As mentioned above, determining the agricultural character of a given real estate being the subject of trade has a significant practical meaning. This is because such real estate is subject to a special legal regime provided for in the ASAS. In a necessary simplification, the assumptions of the Polish model of trade in agricultural real estate can be presented – *de lege lata* – as follows:

(1) Agricultural real estate with an area of at least 1 ha may be acquired on the basis of any legal event, i.e. based on a legal action, court ruling, administrative decision or by force of law (with few exceptions – e.g. inheritance) by any acquirer (e.g. both natural and legal persons, regardless of whether they are involved in agricultural activity) – only after obtaining consent of the General Director of the National Agricultural Support Centre (NASC) – i.e. a specialised government agency. This consent is an administrative decision of discretionary nature, issued on the basis of vague premises set out in Article 2a.4 of the ASAS. The lack of prior consent to acquire agricultural real estate renders the acquisition invalid. Only a few categories of purchasers are exempt from the obligation to obtain consent, including in particular so-called individual farmers (assumed to be professional farmers – Article 6 of the ASAS), relatives of the vendor, religious legal persons and certain public law entities (State Treasury, local government units). However, if the purchaser of agricultural real estate is such a privileged entity, the NASC's rights of civilistic nature may sometimes take place, i.e. pre-emption right or the so-called right to purchase, enabling the NACS to take over the real estate for the benefit of the State Treasury.

(2) Agricultural property with an area of at least 0.30 ha but not larger than 9,999 square meters may be purchased by any purchaser without the need to obtain prior consent of the Director General of the NASC. In such a case, however, NASC rights arise and should be regarded as a rule, i.e. the pre-emption right (when acquisition is made under a sales contract) or the so-called right to purchase (when acquisition is made under any other legal event). Failure to take into account the aforementioned rights of NASC also results in the invalidity of the acquisition. The pre-emption right or right to purchase of the NASC does not come into play only in exceptional cases, in particular when the purchaser is a close relative of the seller or an individual farmer, but only when the buyer resides in the municipality where the purchased real estate is located or in a municipality bordering on this municipality.

(3) As a rule, an agricultural real estate with an area of less than 0.30 ha may be acquired by anyone and without any restrictions. This solution is of great practical significance, in fact it resulted in the fact that in Poland after 2016 there was no complete paralysis of the real estate trade in cities without local spatial development plans; as indicated above, agricultural real estate within the meaning of the ASAS may also be real estate located even in the city centre.[25]

The constitutional aspect of the above mentioned regulations, although undoubtedly interesting and complicated, will not be the subject of further analysis; it has in fact been devoted to it quite a lot of attention in the literature[26]. *De lege lata,* much greater doubts arise, both in practice and in the context of compliance with the Constitution of the Republic of Poland, from two obligations of fundamental importance imposed on each purchaser of agricultural real estate with an area of at least 0,30 ha, i.e.: an obligation to run an agricultural farm of which the purchased agricultural real estate became part for a period of at least 5 years from the day on which the real estate is purchased and, in the case of a natural person, to run the farm personally (Article 2b.1. of the ASAS) and a prohibition to dispose of the purchased

[25] More widely: Blajer 2019b.

[26] Bidzinski, Chmaj & Ulijasz 2017, 43.

real estate or let it be held by other persons within the same 5-year period (Article 2b.2. of the ASAS). These obligations may be repealed only following a consent of NASC, as provided for in Article 2b.3 of the ASAS – in cases justified by an important interest of the acquirer of agricultural real estate or in public interest, as well as they do not apply at all in situations listed in detail in Article 2b.4. of the ASAS, e.g. where agricultural real estate was acquired as a result of an inheritance or a division of an inheritance or is located within administrative borders of a city and has an area of less than 1 ha. These regulations can be undoubtedly regarded as the core of the current model of agricultural real estate trade in Poland considering extremely severe sanctions imposed for non-compliance with the abovementioned obligations in the form of invalidity of the transfer of the agricultural real estate to a third party in case of violation of the obligation specified in Article 2b.2 of the ASAS or expropriation – in case of violation of the obligation specified in Article 2b.1 of the ASAS[27].

The fundamental interpretation problem related to the content of art. 2b.1 of the ASAS is the issue of proper determination of the scope of 'the obligation to run an agricultural farm' imposed on the purchaser of agricultural real estate. The definition of the notion of 'running an agricultural farm personally', contained in art. 6.2 of the ASAS, according to which a natural person is deemed to run an agricultural farm personally if he/she works in this farm and takes all decisions concerning agricultural activity in this farm, provides little guidance in this respect. The content of this definition has been relativized only to natural persons, while the obligation of running an agricultural farm has universal character, i.e. it refers also to other categories of purchasers of agricultural real estates – e.g. legal persons.

In the agrarian literature it is noticed that the obligation to run an agricultural farm which includes the purchased real estate and in case of a natural person – the obligation to run such farm personally, should be understood in the categories of the obligation to run an agricultural activity.[28] Pursuant to art. 2.3 of the ASAS, running an agricultural activity should be understood as running productive activity in agriculture within the scope of plant or animal production, including horticultural, fruit and fish production.[29] On the other hand, it should be stressed that the legislator refers to the notion of running an agricultural farm, which in the Polish tradition has a slightly different meaning. While the criterion of running an agricultural activity emphasizes only the features and attributes of the conducted activity, the criterion of running an agricultural farm takes into account, first of all, running the management of an agricultural farm, administering it.[30] The meaning of this notion is best expressed by the formulation according to which it means exercising the occupation of a farmer in an agricultural farm and thus managing it.[31]

[27] Blajer 2021, 35.
[28] Łobos-Kotowska & Stańko 2019.
[29] The fact that the agricultural activity is to have the character of a qualified 'productive' activity is of significance, which means that, e.g. keeping the land only in good agricultural condition by setting it aside does not constitute conducting an agricultural activity within the meaning of the ASAS.
[30] Blajer 2009, 225.
[31] Blahuta, Piątowski & Policzkiewicz 1967, 99.

Consequently, it should be acknowledged that in accordance with the content of Article 2b.1 of the ASAS a purchaser of agricultural real estate who is a natural person should for five years perform the occupation of a farmer in an agricultural farm, i.e. work in it and take all decisions concerning management of productive activity in agriculture in the field of plant or animal production, including horticultural, fruit and fish production.[32] This statement, however, does not allow to determine what would constitute running an agricultural farm by a purchaser being an organizational unit (e.g. legal person), although formally this obligation refers also to this category of purchasers. In the ASAS there are no indications what would mean 'carrying out the occupation of farmer' by legal persons.

The difficulty in defining precisely the scope of the obligation to run an agricultural farm acquires particular significance in the context of the direction of interpretation dominant in the practice of trade, assuming that, as a matter of principle, each case of purchasing an agricultural real estate, as defined by the ASAS, with the area of at least 0,30 ha – as a result of which the purchaser becomes the owner of an agricultural real estate with the total area of at least 1 ha – generates on his/her side the 'obligation to run an agricultural farm.' According to NASC, this obligation arises also in the case where the purchaser of agricultural real estate is already the owner of agricultural real estate with a total area of at least 1 ha and the agricultural real estate purchased by him has an area of at least 0,30 ha. The obligation to run an agricultural holding also arises if the purchaser of the agricultural real estate has not had anything to do with agriculture so far. All that matters is that following the acquisition he is – or becomes – the owner of an agricultural real estate or several agricultural real estates with a total area of at least 1 ha.

Practical consequences of these regulations assume particular importance in the context of sanctions for failure to start or cessation of running an agricultural farm or, in the case of a natural person, personally running an agricultural farm which the acquired agricultural real estate became part of – within the 5-year period referred to in Article 2b.1 of the ASAS. In the light of Article 9.3 of the aforementioned legal act, the NASC may in such a situation apply to court for acquisition of the property by the State Treasury against payment of a price corresponding to its market value. Failure to comply with such a vaguely worded obligation, the contents of which can in fact be subject to very free interpretation by the NASC (in particular with respect to legal persons), therefore exposes the purchaser to the loss of the purchased real estate or at least to lengthy and costly court proceedings the outcome of which remains difficult to predict.

[32] This is also the direction in which she interprets the relationship between the concept of 'running an agricultural farm' and 'the concept of running an agricultural activity' Suchoń 2019, 105, although the author further adds that running an agricultural activity or a farm does not have to be connected with the sale of agricultural products (it does not have to have the character of an economic activity). However, this does not change the fact that production of agricultural products remains an inherent feature of 'running an agricultural farm' within the meaning of the ASAS.

Further doubts arise with regard to the meaning of the obligations laid down in Article 2b of the ASAS for family trade in agricultural real estate. According to the prevailing interpretation – relatives of the seller who have purchased agricultural real estate from the seller are fully subject to the obligations laid down in Article 2b.1 and 2 of the ASAS which means that these persons – within the five-year period following the purchase – may further sell the purchased agricultural real estate only with the approval of NASC referred to in Article 2b.3 of the ASAS or to entities and in situations specified in Article 2b.4 of the ASAS. Acceptance of this interpretation leads to very significant practical effects. This is because each acquisition (e.g. as a donation) by a close relative of an agricultural real estate of at least 0,30 ha, where this person is already the owner of an agricultural real estate of at least 1 ha, or where, as a result of the acquisition, he becomes the owner of a real estate of such an area, can result in the application of the sanction described in Art. 9.3 of the ASAS. In more graphic terms, a division of a farm made by a farmer between his children under the above described conditions may lead to the farm being taken over by NASC acting on behalf of the State Treasury and, consequently, to the loss of family property. It is worth emphasizing again that the legal basis for such consequences are the provisions of the act whose fundamental goal is to strengthen the protection and development of family farms which constitute the basis of the agricultural system of the Republic of Poland.

The last aspect of the interpretation of Article 2b of the ASAS prevailing in practice which deserves to be presented here is the view that both obligations stemming from it are maintained if the real estate loses its agricultural character during the 5-year period following the acquisition. In other words, despite the subsequent entry into force of the local spatial development plan in which the real estate was designed for purposes other than agricultural, the acquirer of agricultural real estate is still bound by the general obligation to run the agricultural farm of which the acquired real estate is a part under the threat of losing its ownership (Article 9.3 of the ASAS) as well as the prohibition to transfer the real estate to third parties. Therefore these obligations continue to exist despite the fact that the competent public administration body has decided that the real estate is no longer needed for agricultural purposes. Moreover, the interpretation of Article 2b of the ASAS prevailing in the practice of trade aims at preserving the restrictions resulting from this provision also with regard to the real estate separated from the purchased agricultural real estate of an area smaller than 0,30 ha, i.e. real estate to which, in accordance with the explicit wording of Article 1a of the ASAS, the provisions of this Act do not apply. The justification of this thesis is sought in the assumption that actions of a strictly technical nature (e.g. geodetic division of real estate) should not lead to negation of the obligation to run an agricultural farm resulting from Article 2b.1 of the ASAS.[33] However, in literature there is also no lack of opinions that both aspects outlined above of the dominant direction of interpreting art. 2b of the ASAS put a question mark on the security of legal transactions in Poland. In fact, they force market participants to make extremely detailed arrangements concerning the legal and factual state of a given real estate. From a practical point of view, determination of the legal regime to which a given real estate is subject *de lege lata* starts not with indication of its current designation in the local

[33] Blajer 2019b, 123–124.

spatial development plan or determination of its area, but with indication of the date on which the real estate was purchased. If 5 years have not passed since this date, a series of further determinations aiming at determining whether the purchaser is burdened with the obligations resulting from Article 2b of the ASAS, including e.g. the date when the local spatial development plan came into force or the history of geodetic divisions of the property, follow. It is easy to point out that establishing the above described circumstances may turn out to be extremely difficult or even impossible in many situations. There is also a serious risk of a mere omission of one of the listed circumstances, each of which may be decisive in determining whether the current owner of the real estate is burdened with orders and prohibitions resulting from Article 2b of the ASAS.[34]

The above presented obligations of the purchaser of agricultural real estate, determined by provisions of the ASAS, should now be analyzed from the constitutional point of view. There is no doubt that as regards the wording of these obligations one can repeat many objections formulated already in relation to the definition of agricultural real estate contained in Article 2.1 of the ASAS. It seems justified to conclude that it does not meet the principle of correct (decent, reliable) legislation, which is one of the manifestations of the principle of a legal state (Article 2 of the Constitution). The content of the obligations imposed on the purchaser of agricultural real estate, through the use of a number of undefined and unclear phrases, such as 'running an agricultural farm which the acquired real estate became part of' was not formulated in a precise and clear manner, allowing for a number of different interpretations[35]. This circumstance directly influences the legal certainty and predictability of the state authorities' actions, conditioning the rational forecasting of the market participants' actions, and in accordance with the above quoted view expressed by the Constitutional Tribunal in the Judgment of 14 June 2000, ref. P 3/00, the principle of legal security prohibits the adoption of unforeseeable norms. Moreover, as indicated above, in the opinion of the Tribunal (Judgment of 12 January 2000, ref. P/11/98) it is unacceptable to adopt blanket regulations in a statute, leaving the executive authorities free to prescribe the final shape of such limitations, and in particular to determine the scope of such limitations. These statements assume particular significance in the context of the dominant practical interpretation of Article 2b.1 and 2 of the ASAS. It should be stressed that the basic results of this line of interpretation cannot be reconciled with the results of interpretation carried out on the

[34] As an aside to the above considerations, it should be noted that the burden of making the above determinations falls particularly heavily on the notaries, as part of their duty to refuse to carry out an unlawful act, as well as to some extent on the courts keeping land registers (ground books), due to the relatively broad scope of cognition of these courts in Polish law, including the validity of a legal act which is the basis for registration. It is in this context that the interpretation of legal norms arising from Article 2b of the ASAS, which dominates the practice of trading, is perceived as a significant threat both to the notary public *par excellance,* as well as to the Polish ground books system, i.e. two pillars of the real estate trading in Poland. As a consequence, the provisions of Article 2b of the ASAS actually lead to reevaluation of the model of trading in real estate (not only agricultural) functioning in Poland so far and to the search for alternative ways of securing the parties to the transaction. See: Blajer 2021, 47–48.

[35]Bender 2019, 44, Blajer 2019a, 53; Blajer, 2019b, 120.

basis of traditional methods, i.e. linguistic, systemic and functional, and the only argument in its favour is the alleged (not resulting from the text of the legal act) will of the legislator.[36] Consequently, it seems reasonable to conclude that these provisions violate the principle of correct legislation derived from Article 2 of the Constitution – the clause of a state of law – as well as the principle of loyalty, understood as the citizen's trust in the state and the law created by it.

The regulations contained in Article 2b of the ASAS can also be examined from the perspective of the principle of property protection and inheritance rights (Article 21 of the Constitution of the Republic of Poland) and the principle of protecting the freedom of economic activity (Article 22 of the Constitution of the Republic of Poland). The analysed provisions of the ASAS directly restrict the aforementioned constitutional rights and civil liberties: they oblige to exercise the ownership in a specific way and restrict the right to dispose of it (on sanction of losing the ownership), as well as oblige to conduct a specific type of economic activity on the acquired land. At first glance, the constitutional justification of these limitations could be constituted by the principle expressed in Article 23 of the Constitution of the Republic of Poland, according to which a family farm is the basis of the agricultural system of the state. On the other hand, however, the same provision stresses that this principle does not violate the provisions of Article 21 and Article 22 of the Constitution. In other words, Article 23 of the Constitution does not formulate any subjective rights, and therefore, it cannot *per se* limit the rights and freedoms set out in Article 21 and 22 of the Constitution, as well as – in the opinion of the Constitutional Tribunal expressed in the Judgment of 31 January 2001, ref. P 4/99 – other constitutional principles, including in particular the principle of equality and the principle of protection of acquired rights.[37]

It also seems justified to question the proportionality and adequacy of limitations resulting from Article 2b of the ASAS. First of all, it should be stressed that it seems highly disproportionate to impose the obligation to run an agricultural farm on every purchaser of an 'agricultural real estate' within the meaning of the Act (as long as he already owns an agricultural real estate with an area of at least 1 ha or as a result of the acquisition becomes the owner of a real estate with such an area) – and thus also on a purchaser who has not had any connection with agriculture so far, as well as on a purchaser of a real estate which is agricultural only from a formal point of view; this is the above-cited problem of the overly broad definition in Art. 2.1 of the ASAS. This obligation could be justified only insofar as it would refer to a subsequent owner of an actually existing farm, forcing him to continuation of agricultural use of the land. If the currently dominant direction of interpretation is accepted, the aim the legislator wanted to achieve is not understandable. In particular, it does not seem rational to assume that actually every purchaser of real estate, which in fact has never been a part of a farm or used for agricultural purposes, would suddenly have to undertake agricultural activity on it – especially since, as indicated above, it is not entirely clear what this obligation would consist in at all. In such situations where the given real estate is agricultural only 'formally' (in name only) and in reality has nothing to do with farming, the obligation of its purchaser to use it in a specific way for many years and

[36] Blajer 2019b, 120.
[37] Bidziński, Chmaj & Ulijasz 2017, 52.

without real possibility of release from this obligation and on top of that sanctioned by deprivation of property – this accumulation of restrictions on the right to property is so far-reaching that the right vested in the purchaser transforms into an onerous obligation to such an extent that one may speak of a violation of its very essence. Moreover, it seems that this regulation should also be examined from the point of view of its compliance with Article 65 of the Polish Constitution, which guarantees everyone the freedom to choose and pursue a profession and to choose their place of work.

Introduction of a sanction for breach of the obligation to run an agricultural farm also seems to be constitutionally doubtful; as indicated above, it is the possibility of the NASC to apply to court for acquisition of the property by the State Treasury – against payment of a price corresponding to its market value (Article 9.3 of the ASAS) – i.e. the so-called expropriation sanction. However, in accordance with Article 21.2 of the Constitution of the Republic of Poland, expropriation is permitted only when it is carried out for public purposes and in return for fair compensation. However, it is difficult to indicate a public purpose justifying expropriation in the case of application of the sanction provided for in Article 9.3 of the ASAS. Moreover, there is a significant doubt as to whether payment to the expropriated party of a 'price corresponding to the market value' of the expropriated property actually means 'fair compensation' referred to in Article 21.2 of the Polish Constitution. Some authors even compare the expropriation sanction provided for in the ASAS to forfeiture of property as a criminal measure.[38]

In literature it was also noticed that the analyzed regulation is in contradiction with constitutional assumptions, the realization of which should serve the process of shaping the agricultural system (art. 23 of the Constitution of the Republic of Poland). It determines *de facto* individual, not family, way of running an agricultural farm under pain of subsequent expropriation.[39] This view is justified by highly unsuccessful definitions of a family farm and an individual farmer (art. 5 and art. 6 of the ASAS), depriving – paradoxically and contrary to its name – a family farm of its family character.[40]

4. Summary

Conclusions resulting from the above discussion of the constitutional aspect of two key institutions of the ASAS make it impossible to fully accept the current model of trade in agricultural real estate in Poland. Unfortunately, one has to agree with the view that the analysed regulations violate the principle of correct legislation, weakening the trust of citizens in the state and legal security and raise doubts in the context of compliance with the principle of protection of property rights and economic freedom.[41] To present the problem in more specific terms: these regulations limit the freedom to take up and pursue professional activity and the right to choose the way of running an agricultural farm, including the choice of the way of using agricultural real estate.

[38] Bidziński, Chmaj & Ulijasz 2017, 65.
[39] Litwiniuk 2019, 64.
[40] Blajer 2021, 42.
[41] Bidziński, Chmaj & Ulijasz 2017, 194.

Consequently, they lead to the lack of possibility to dispose of and freely exercise the ownership right, first of all by introducing a severe expropriation sanction in case of infringement of the obligation to personally run an agricultural farm. In Polish literature there are even opinions that the adopted solutions result in the fact that the ownership right to agricultural real estate and other property rights related to these objects become institutions of ostensible character.[42]

The hitherto considerations concerning the constitutional aspect of the ASAS provisions determining the shape of the definition of agricultural real estate and obligations of its purchaser allow to formulate a general assessment as to the reasons for the weakness of regulations within the scope of the model of trade in agricultural real estate in Poland. These regulations are created in a hurry, under clear pressure of time, which excludes a deeper constitutional and systemic analysis. Unfortunately, Polish lawmakers also make little use of the results of comparative research, despite the fact that they often formally declare being inspired by the experiences of other countries which introduce a separate regime for trading in agricultural real estate.

[42] Bidziński, Chmaj & Ulijasz 2017, 198.

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Martin Milán CSIRSZKI*
The Early Stage of US Antitrust and Trade Regulation in the Agricultural Sector**

Abstract

The article aims to analyse the legal history of antitrust and trade regulation provisions exclusively applying to the agricultural sector in the United States of America. Through the analysis of legal history, the article attempts to explore whether the agricultural sector and agricultural producers have always been in a privileged situation with regard to competition policy and regulation, and if they have, what the main impetus was for adopting agriculture-specific antitrust and trade regulation provisions. Within the study, first, I examine the historical antecedents of the Sherman Act. Second, I turn my attention to the first agricultural antitrust exemption under antitrust laws, namely, to Section 6 of the Clayton Act. Third, I present the historical aspects of the „Magna Charta" of agricultural cooperative marketing, the Capper-Volstead Act, then, fourth, I briefly map further federal trade regulation laws which regulate agricultural markets. In the end, I conclude.
Keywords: antitrust, trade regulation, United States, agricultural sector, historical development.

1. Introduction

The United States has always played a pioneering role in competition policy. Not only general rules applying to all economic sectors but also sector-specific provisions were adopted to govern competition. The United States was the first jurisdiction to pass an agriculture-specific exemption under antitrust laws in connection with the prohibition of anti-competitive agreements, as well as it was a frontrunner to regulate markets from a sectoral perspective.

The article aims to shed light on and analyse those federal laws which have been of paramount importance to the agricultural sector. The scrutiny covers both antitrust and trade regulation acts in order that a full picture of US competition regulation could be established regarding the agricultural sector.

I start the analysis with the first modern antitrust statute, the Sherman Act. I aim to find those historical aspects of this law which are related to agriculture. Second, I turn my attention to the Clayton Act which was the first piece of legislation exempting certain agricultural entities under antitrust law.

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Third, I present the historical background of the Capper-Volstead Act which is called the 'Magna Charta' of agricultural cooperative marketing. Fourth, I briefly examine other trade regulations laws which apply to the agricultural sector: the Unfair Trade Practices Affecting Producers of Agricultural Products Act, the Packers and Stockyards Act and the Perishable Agricultural Commodities Act.

Through the analysis of legal history, the article aims to explore whether the agricultural sector and agricultural producers have always been in a privileged situation with regard to competition policy and regulation, and if they have, what the main impetus was for adopting agriculture-specific antitrust and trade regulation provisions.

2. Sherman Act

The modern origins of antitrust date back to the end of the 19th century, when the Sherman Act was passed in the United States of America. The Sherman Act was signed into law by President Benjamin Harrison on 2 July 1890 and was the first federal law to address anti-competitive practices as we know them today.

The word 'antitrust' itself derives from the fact that the primary form of the creation of monopoly was the legal institution 'trust', a specific construct of common law jurisdictions. Nevertheless, *Wayne D. Collins* notes that the era's state and federal antitrust legislation was aimed not against large firms but the combinations of competitors, and *"[r]egardless of their technical legal form, these combinations came at the time to be called trusts."*[1]

The Sherman Act came into public consciousness as a reaction against the trust created by S.C.T. Dodd in 1882. Dodd was an attorney for Rockefeller's Standard Oil Company, who sought to create through the trust a close association of oil refiners able to influence prices and supply in the marketplace while avoiding state taxes and corporate regulation. Although many economists at the time opposed the creation of a federal antitrust statute, saying that it would adversely affect rising real wages and falling prices, the camp of opponents refused to give up their belief in fair competition. However, the question of how to achieve undistorted and fair competition remained unresolved on their side. In agriculture, for example, technological progress has made it impossible for individual producers and small businesses to keep pace with their larger competitors. The populist tendency of the last third of the 1800s, often identified with the Granger movement that emerged in the decade following the American Civil War, accelerated the emergence of antitrust.[2] The mastermind behind the Granger movement was Oliver Hudson Kelley, an employee of the Department of Agriculture, who founded the organisation known as 'The Patrons of Husbandry' in 1867. The organisation was made up of local units called 'Granges'. Most adherents were attracted to the movement by the need to take action against the monopoly of railway companies and grain elevators (often owned by the railway companies), which charged farmers exorbitant fees for handling and transporting grain and other agricultural products.[3]

[1] Collins 2013, 2280.
[2] Phillips Sawyer 2019, 2.
[3] See: The Editors of Encyclopaedia Britannica: *Granger movement – American Farm Coalition*.

With regard to the latter problem, it is worth mentioning and briefly outlining the case that reached the US Supreme Court. In *Munn v. Illinois*, in one of the so-called Granger cases, the Supreme Court ruled that, within the limits of the powers inherent in its sovereignty, the government may regulate the conduct of its citizens towards each other and, where the public good so requires, the manner in which individual citizens should use their property. In order to clarify this *ratio decidendi*, declared in principle, the facts of the case may be summarised as follows. The Illinois state legislation, influenced by the Granger movement, set maximum rates that grain elevators could charge for storage and transportation.[4] After Munn & Scott was fined under this legislative act, and the Illinois Supreme Court upheld the ruling, the company appealed to the United States Supreme Court, arguing that the Illinois regulation violated the United States Constitution because it unconstitutionally restricted the right holder's exercise of his property rights, thus infringing the right to property. This argument was rejected by the Supreme Court, and the essence of the ruling was that the states' regulatory power extends to the relations of private corporations when they affect the public interest. Since the granaries were also intended for use in the public interest, charges imposed by them could be regulated by the State.[5] This holding highlights and confirms the possibility for states to take action by means of certain legal instruments in order to ensure fair competition, even though this means – by definition – the imposition of property restrictions on certain entities, determining how they should operate in the market.

Although the administration emphasised that the Sherman Act was necessary because of the Standard Oil Trust's unscrupulous and – in many cases – unlawful trading practices,[6] as well as the exploitation of the agricultural sector by industry,[7] some authors argued that it was wrong to use the vulnerability of agricultural sector as an impetus for antitrust legislation,[8] given that agriculture is not a sector that is exclusively exposed to industry, and the facts show that the practices of railroad companies stabilised and increased the income of farmers.[9] There are authors who see Sherman's personal motives behind the passage of the Act. It was Russell A. Alger who helped Benjamin Harrison get the Republican Party nomination for president, which Sherman resented, so Sherman targeted Alger's trust, 'Diamond Match'. This was done by means of the Antitrust Act of 1890.

[4] The General Assembly of Illinois – An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State (approved April 25, 1871), Section 15: *"The maximum charge of storage and handling of grain, including the cost of receiving and delivering, shall be for the first thirty days or part thereof two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one per cent per bushel."*

[5] Munn v. Illinois, 94 U.S. 113 (1876) – US Supreme Court decision.

[6] Thorelli 1955, 92.

[7] Letwin 1965, 67–68.

[8] Bradley Jr. 1990, 739.

[9] Stigler 1985, 1–12.

It is also argued that Sherman – the most influential member of the Senate's Committee on Finance – directly supported a tariff policy of high tariffs, which is in inextricable contrast to his efforts to limit trusts.[10] In view of these considerations, it is believed that there were more personal motivations behind Sherman Antitrust Act.

However, it is better to choose a middle way and not to overemphasise the power of a personal motif. If Sherman's individual 'desire for revenge' had been the sole basis for the Act's adoption, Congress would not have voted for it. In any case, the exploited agricultural sector in general, including the Granger movement and the vulnerable agricultural producers, played a decisive role on the road to the passage of the Sherman Act. With the Standard Oil Company having been in a monopolistic position and causing resentment because of governmental manifestations combined with the belief in free competition, which dominated the views of all parties, led to the submission and passage of the Sherman Act. The extent to which Sherman's personal motivation played a role in this is irrelevant, as the Act could not have been passed without the then current anti-competitive and distortive trade practices that preceded it and the public outcry against them. As can be seen from the brief memento, the need to protect farmers was an important starting point for the adoption of Sherman Act, which is known as the first modern antitrust law. Equally important is the principle enunciated in *Munn v. Illinois*, which had agricultural relevance and which provided case-law justification for competition rules and a solid basis for the creation of federal antitrust laws in the United States.

In connection with the Sherman Act and the goals of antitrust, we must mention one of the most, if not the most, influential antitrust lawyers in the United States, namely Robert Bork, a leading figure of the Chicago School. A major breakthrough and a totally different approach towards antitrust legislation was brought by his article titled *Legislative Intent and the Policy of the Sherman Act*.[11] In this scholarly writing, Bork examined the controversies about the Sherman Act, and he concluded the following: *"My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction.*"[12]

The die has been cast: it was that moment which brought to light the goal of consumer welfare in antitrust policy. Bork's extremism lies in the fact that he thought of consumer welfare as the one and only objective antitrust legislation and enforcement should follow. *"In Bork's critique, it seemed an antitrust law driven by anything but consumer welfare was the law of the libertine, degenerate and debauched. Economic analysis was now righteous and self-restrained. As such, Bork managed to embed the culture war into one's method of interpreting the Sherman Act."*[13] Although increased debates surrounded his views from the 1960s to the 1980s,[14] opposing voices have already calmed down.

[10] Bradley Jr. 1990, 739–740.
[11] Bork 1966, 7–48.
[12] Bork 1966, 7.
[13] Wu 2018.
[14] Orbach 2010, 133–164.

As Hovenkamp says: *"Few people dispute that antitrust's core mission is protecting consumers' right to the low prices, innovation, and diverse production that competition promises."*[15] And the paradigm of consumer welfare has been adopted not only by US antitrust enforcement authorities, but also it has penetrated into the discourse on the goals of EU competition law.[16] The days of a more economic approach have come to the world of US antitrust law and, with some delay, that of EU competition law.[17] The more economic approach is connected to the notion of consumer welfare through the fact that consumer welfare is borrowed from the vocabulary of economics, and its measurement is based on consumer surplus. However, it is unclear that consumer welfare only includes the maximisation of consumers' surplus, or it also aims to include the maximisation of producers' surplus. According to *Hovenkamp*, Robert *"Bork did not use the term 'consumer welfare' in the same way that most people use it today. For Bork, 'consumer welfare' referred to the sum of the welfare, or surplus, enjoyed by both consumers and producers. […] A large part of the welfare that emerges from Bork's model accrues to producers rather than consumers."*[18] Nevertheless, one thing is certain: the aim of introducing the concept to antitrust law has not resulted in the expected outcomes with regard to legal certainty and clarity.[19]

This short outlook on the legislative intent of the Sherman Act in the interpretation of Robert Bork is necessary because it has implications beyond itself, and it started a revolution in US antitrust law. It makes a difference whether one considers consumer welfare as the sole objective of competition law or whether one also formulates other objectives competition law should achieve. The narrow interpretation of antitrust law which only contributes to the generating of consumer surplus has serious side effects on such a sensitive topic as competition in agri-food markets. It determines not only the depth and extent of intervention but also the roles one expects the agricultural sector to play. A commitment to a narrow interpretation of antitrust law has far-reaching implications for agricultural society as a whole, resulting in the exclusion of social concerns from competition policy which may bring about harmful outcomes for the agricultural sector.

3. Clayton Act

Although the adoption of the Sherman Act was seen as a major breakthrough, events in the late 19th and early 20th centuries proved that it did not provide adequate protection against distortions and restrictions of competition. This period also saw the so-called *Merger Movement*, during which corporate empires were created in spite of the Sherman Act, by using other legal constructions instead of trusts.

[15] Hovenkamp 2008, 1–2.
[16] See for example: Pera & Auricchio 2005; Lovdahl Gormsen 2007; Akman 2009; Chirita 2010; Zäch & Künzler 2010, 61–86; Kaplow 2012, 3–26; Negrinotti 2012, 295–337; Daskalova 2015; Coates & Middelschulte 2019; Marty 2020.
[17] Witt 2016.
[18] Hovenkamp 2019, 1.
[19] Daskalova 2015.

As early as 1899, the seriousness of the problem was felt, and the *Civic Federation of Chicago* convened and held a conference to address the problem of trusts. Here, some already expressed their fear for agricultural regions, as the *Merger Movement* had created companies with market power that could raise the price of manufactured goods while lowering the price of raw materials.[20] The need for a new law was already mooted by John Bates Clark, which was very similar to the provisions of the Clayton Act passed fifteen years later.[21]

One of the notable differences between the Sherman Act and the Clayton Act is that while the former does not, the latter contains a direct provision for the agricultural sector. The Sherman Act did not differentiate between sectors, and there was a widespread public perception that the first federal antitrust law was in part enacted with the intention of cracking down on large agricultural cooperatives. On the other hand, it was also suggested that the Sherman Act's provisions could be interpreted as meaning that mutual assistance between local farmers managing small farms violate the Act. Around the 1890s, there were already about a thousand agricultural cooperatives in the United States, which brought together producers and sought to coordinate their activities in order to reduce the vulnerability of farmers and improve their bargaining position against their buyers.[22] They were, however, covered by the Sherman Act in the same way as any other undertaking engaged in any other activity.

There are authors in the literature who describe the Sherman Act as simply bad law,[23] and given that many see it as a response to the defencelessness of agricultural sector and yet it does not contain specific rules for certain sectors with different needs, such as agriculture, there may be some basis for negative opinions. And if not bad, it can certainly be described as an oversimplified legislative product. The Clayton Act of 1914 attempted to change this by seeking to place a differentiated emphasis on sectors where there was a specific need to do so. The Sherman Act was not repealed by the Clayton Act, the latter merely supplemented and strengthened the former. There are authors who have seen the Clayton Act as an excellent attempt to increase the strength of the Sherman Act,[24] and one can agree that the Clayton Act's provisions, a quarter of a century later, can be thought of as an improvement. Approached from the other direction, one could not necessarily have expected more from the Sherman Act, for it lacked background experience which legislation could gain from case law in the decades that followed.

The Clayton Act declares that *"[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor,* agricultural, or horticultural organizations*, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.*"[25]

[20] Martin 1959, 6.
[21] Martin 1959, 7.
[22] Varney 2010, 1.
[23] Bradley Jr. 1990, 741.
[24] Nagel 1930, 323.
[25] 15 U.S. Code § 17 – Antitrust laws not applicable to labor organizations.

Prior to the adoption of Section 6 of the Clayton Act, the position of agricultural cooperatives was not unambiguous in case law. Some state courts drew parallels between cartels and agricultural cooperatives by applying antitrust provisions to them; there were other much more tolerant courts.[26]

One of the most striking examples of questionable judicial application of antitrust laws was the Ford v. Chicago Milk Shippers' Association ruling, in which the Illinois Supreme Court held that the cooperative had influenced milk prices in a way that had restricted competition, and both the cooperative itself and its members had achieved this goal in parallel to the detriment of retailers.[27] The case can be summarised as follows. Dairy farmers in Chicago formed a cooperative marketing association to determine prices that farmers would receive for milk and other dairy products. A milk trader entered into a purchase agreement with the cooperative but subsequently refused to pay the purchase price. When the cooperative brought an action to enforce payment, the trader relied on an 1891 Illinois state law that allowed buyers *"who signed a contract to buy goods from a participant in a combination that violated the law could refuse to pay for the goods."* The Illinois Supreme Court, without reference to the Sherman Act, ruled in favour of the dealer, holding that the cooperative was formed for the purpose of fixing prices and influencing and limiting the amount of milk that could be marketed. It is unlawful for the cooperative to pursue these objectives. Although the cooperative sought to argue that the cooperative itself and its members are a single legal entity, making it incapable that the cooperative conspired with itself to restrict competition, the Illinois Supreme Court broke the unity between the cooperative and its members.[28]

In general, in the early cases dating back to before the adoption of state cooperative laws, state courts ruled predominantly against cooperatives. This trend was later reversed and cooperatives were considered as specific market actors. Not only was it realised that the vulnerability of farmers to market conditions could be alleviated through cooperatives, but also that their operation had to be balanced with antitrust law. This could not be done other than by exempting them from the scope *rationae personae* of antitrust law, thus placing them in a privileged position. However, this finding was realised almost 25 years after the passage of the Sherman Act. This realisation may certainly be described as a first resolution of the conflicts between agricultural law and competition law, which set in motion the trend in competition law that has continued to this day: treating agricultural sector specially in relation to competition-related provisions.

After the adoption of Section 6 of the Clayton Act, the development of agricultural cooperatives began, but two problems remained unresolved. On one hand, cooperatives covered by the exemption could not issue capital stock, since the exemption applied only to agricultural cooperatives without it. However, capital stock would have been essential to balance the power of middle-class producers.

[26] Sagers & Cartensen 2007, 97.
[27] Beach 2007, 245.
[28] Frederick 2002, 68.

On the other hand, the question arose as to what was meant by the expression of 'lawfully carrying out the cooperative's legitimate objects'. To resolve these problems, the Capper-Volstead Act was passed in 1922.[29]

4. Capper-Volstead Act

The Capper-Volstead Act imposes conditions on agricultural cooperatives which, if met by cooperatives, result that they are not completely subjected to the antitrust regime. Whereas Section 6 of the Clayton Act contains a mere provision on the issue—a general declaration that certain agricultural cooperatives are exempt from the scope of antitrust law, the Capper-Volstead Act establishes a complex regime.[30] Originally, the Clayton Act did not include agricultural cooperatives in the list of its exceptions, intended to give priority only to trade unions, but subsequently involved agricultural cooperatives among the exceptions. This raised the problem of how to interpret the expression 'lawfully carrying out the cooperative's legitimate objects'.[31]

The overall purpose of the Capper-Volstead Act is to enable farmers to compete more effectively and market their products more efficiently.[32] Although in public consciousness the Act bears the names of its two most prominent proponents, its original title is as follows: An Act to authorize association of producers of agricultural products. The Act can be divided into two distinct parts: the first sets out the conditions under which a cooperative may be covered by the Act, and the second describes the procedure to be followed in the event a cooperative would commit an antitrust violation. The immunity granted by the Act is limited. Farmers can be held liable under antitrust law, if they abuse the tools available to them.

The Act's core provision is that *"[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."*[33] Simply put, it means that agricultural producers can combine forces and will not fall under the prohibition of anti-competitive agreements included in Section 1 of the Sherman Act.

For being exempt, however, agricultural cooperatives shall fulfil certain criteria. The conditions to be met can be summarised as follows: (1) only those who are engaged in the production of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, may be members of a cooperative or an association; (2) they may act together in associations, corporate or otherwise, with or

[29] Baumer, Masson & Masson 1986, 190–191.
[30] See its critique: Peters 1963, 73–104. Peters (1963, 103) concludes: *"The law relative to agricultural cooperatives can be succinctly described by one word – uncertainty. Agricultural cooperatives are in the anomalous situation of not knowing what is right or wrong. As a consequence, they are faced with a continual threat of costly criminal and civil prosecutions. It is undesirable public policy to place any societal group in a position where it must risk extensive litigation in order to determine its rights."*
[31] Lemon 1970, 443–444.
[32] Varney 2010, 3.
[33] 7 U.S. Code § 291 – Authorization of associations; powers.

without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce; (3) such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; (4) such associations are operated for the mutual benefit of the members thereof, as such producers; (5) no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum; (6) the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.[34] As can be seen, the Capper-Volstead Act establishes an extensive set of conditions. The two sub-conditions set out in point 5 are in an alternative relationship to each other, so it is sufficient to satisfy only one of them.

The first part, which establishes exact criteria to be followed by agricultural cooperatives, is complemented with complex procedural rules in the second part of the Act.[35]

5. Other federal laws

Beyond the Capper-Volstead Act, the Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968 is worth mentioning. The latter was, among others, adopted because of addressing a gap in the Capper-Volstead Act. In some sectors farmers are not able to cooperate. A prime example of this is poultry growers. *"They provide housing for the chickens that the integrator owns. The integrator, also, provides the feed, medicine, etc. Hence, such growers cannot engage in collective action as a farm cooperative because they are hired only to grow the poultry belonging to others and, probably, because the owners of the birds do not qualify as 'farmers' under Capper-Volstead this would also void the exemption."*[36]

The Unfair Trade Practices Affecting Producers of Agricultural Products Act enumerates prohibited practices related to the collective action of agricultural producers.[37]

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[34] 7 U.S. Code § 291 – Authorization of associations; powers.

[35] 7 U.S. Code § 292 – Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure.

[36] Carstensen 2019, 7.

[37] See 7 U.S. Code § 2303 – Prohibited practices: *"It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices: (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or (b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or (c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or (d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or (e) To make false reports about the finances, management, or activities of associations of producers or handlers; or (f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter."*

Enabling agricultural producers to cooperate with one another for strengthening their bargaining power, as well as ensuring antitrust exemption for these cooperatives are two pillars of great importance to agri-food markets. The Act provides protection for producers against the retaliation of their buyers. Retaliation is a common occurence in the business relationship between agricultural producers and their buyers with (relative) market power.

One of the most important milestones in the history of US competition regulation on agri-food markets is the passage of the Packers and Stockyards Act. It does not only provide for an exception (a derogation) under (from) general antitrust rules like Section 6 of Clayton Act and the Capper-Volstead Act, but also establishes a completely special regime for handling sector-specific anomalies in the market of live animals.

During the Act's debate, the expression 'food dictator' was mentioned several times by Congressmen and a parallel was made between dictators and food dictators. It was claimed that having a dictator as head of government is as inadvisable as having a food dictator on top of the food system.[38]

The journey to the adoption of the Packers and Stockyards Act, which was passed on 15 August 1921 and amended on 14 August 1935 to also cover live poultry dealers and handlers,[39] started with the Federal Trade Commission (hereinafter referred to as FTC) and the Department of Agriculture (hereinafter referred to as DoA) receiving appropriations for conducting research on *"whether there was reason to believe that the production, preparation, storage distribution and sale of foodstuffs were subject to control or manipulation."*[40] Based on the inquiry,[41] it was found that the five largest meat-packing companies had conspired to control *"the purchases of livestock, the preparation of meat and meat products and the distribution thereof in this country and abroad."*[42] The most important finding of the FTC report is reproduced here in full: *"Five corporations – Armour & Co., Swift & Co., Morris & Co., Wilson & Co., Inc., and the Cudahy Packing Co. – hereafter referred to as the 'Big Five' or 'The Packers,' together with their subsidiaries and affiliated companies, not only have a monopolistic control over the American meat industry, but have secured control, similar in purpose if not yet in extent, over the principal substitutes for meat, such as eggs, cheese, and vegetable-oil products, and are rapidly extending their power to cover fish and nearly every kind of foodstuff."*[43]

The FTC report also posited that the Big Five used, in an unfair and illegal way, their powers *"to manipulate live-stock markets, restrict interstate and international supplies of foods, control the prices of dressed meats and other foods, defraud both the producers of food and consumers, crush effective competition, secure special privileges from railroads, stockyard companies, and municipalities, and profiteer."*[44]

[38] Rosales 2004, 1497–1498.
[39] Toulmin 1949, 215.
[40] Colver 1919, 170.
[41] See Federal Trade Commission 1919.
[42] Flavin 1958, 161.
[43] Federal Trade Commission 1919, 31.
[44] Federal Trade Commission 1919, 32–33.

Another key source of trade regulation is the Perishable Agricultural Commodities Act of 1930. Its section titled 'Unfair conduct' consists of practices which, on one hand, are similar to general unfair competition conducts applying to all sectors,[45] and which, on the other hand, can be regarded as the consequence of superior bargaining power on the side of the buyer. To mention some examples for the latter: failing or refusing truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or failing, without reasonable cause, to perform any specification or

[45] See 7 U.S. Code § 499b – Unfair conduct: *"It shall be unlawful in or in connection with any transaction in interstate or foreign commerce: (1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce. (2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer. (3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce. (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter. (5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated – (A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or (B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant; and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation. (6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced. (7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce."*

duty, express or implied, arising out of any undertaking in connection with any such transaction.[46]

6. Conclusion

The analysis shows us that the first 25 years of US antitrust law – from 1890 to 1914 – lacked the legal means to distuingish agricultural producers from other market participants. It resulted that agricultural cooperatives established for the sake of mutual assistance were often held liable for antitrust violations. The situation reversed as a consequence of the adoption of Section 6 of the Clayton Act, and eight years later, that of the Capper-Volstead Act. These laws have since then meant the 'Magna Charta' of agricultural producers who can combine forces within cooperatives to market their produce. The legal solution for privileging the agricultural sector was realised through exempting agricultural cooperatives from the prohibition of anti-competitive agreements. However, the exemption does not mean that antitrust would not apply to these market actors at all; it reflects a limited alleviation for them.

A higher level of protection provided for agricultural producers in the competitive process is not only ensured through antitrust laws but also trade regulation provisions, such as the Packers and Stockyards Act applying to the sector of live animals, the Perishable Agricultural Commodities Act applying to the sector of fruit and vegetables, as well as the Unfair Trade Practices Affecting Producers of Agricultural Products Act applying to all agricultural sectors.

In conclusion, it is clear from the scrutiny that the beginnings of antitrust were not in favour of the agricultural sector despite of the fact that the vulnerability of farmers played a not negligible role on the road to modern antitrust. After a quarter of a century, however, the privileged position of agricultural producers (and cooperatives) was established in US competition policy. This direction has been maintained since then, and it has also served as an example for other jurisdictions which built up their competition regime later than the United States.

The impetus for adopting sector-specific rules applying to agriculture is twofold. On one hand, the rules aim to increase the bargaining power of farmers through enabling them to combine forces against their buyers, and, on the other hand, the provisions attempt to provide additional protection to agricultural producers against unfair business conducts which are not covered by conventional antitrust.

[46] 7 U.S. Code § 499b, 4.

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Ilona GÖRGÉNYI *

Environmental human rights and the protection of the environment through criminal law in the light of recent developments**

Abstract

In the history of the right to a safe, clean, healthy and sustainable environment and its recognition, 2021 marked a milestone. To admit a new generation of human rights, in the UN, the Human Rights Council dealt with the matter of human rights and the environment. Considering the resolution 48/13, it can make the progressive legal accepts stronger at international level. Within the Council of Europe framework, an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment was drafted to admit a new generation of human rights, which is an integral part of Recommendation 2211 (2021). Furthermore also in 2021, the European Commission prepared a Proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC. The drafted Directive is a part of the EU new legislative initiatives.

Keywords: connection between human rights and a healthy environment, environmental human rights, initiatives in the field of the right to a safe, clean, healthy and sustainable environment, proposal for replacing Directive 2008/99/EC.

1. Introduction

Several countries recognize and protect the right to a healthy environment through their constitutions, national laws or ratification of international instruments. In Hungary, the right to a healthy environment was also protected in the Constitution (18. §).[1] According to Article XXI (1) of the Hungarian Fundamental Law, *"Hungary recognizes and enforces the right of everyone to a healthy environment."* It has already been declared in the 'Establishment' part of the Basic Law that agricultural land, forests and water resources, biodiversity, especially native plant and animal species, and cultural values are the common heritage of the nation, whose protection, maintenance and preserving for the next generation is the responsibility of the state and everyone [Article P of the Fundamental Law of Hungary].[2]

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[1] The Constitution was in force until 31 December 2011.

[2] Fundamental Law Hungary is effective from January 1, 2012.

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One of the key objectives of the Decision of the European Parliament and of the Council on the General Environment Action Program of the European Union for the period up to 2030 is: *"A healthy environment underpins the well-being of all people and is an environment in which biodiversity is conserved, ecosystems thrive, and nature is protected and restored, leading to increased resilience to climate change, weather- and climate-related disasters and other environmental risks."*[3]

Environmental human rights are first recognized by environmental law rather than human rights law at the international level.[4] The year 2021 marked a milestone in the right to a safe, clean, healthy and sustainable environment and its recognition.

2. 'Greening' of human rights, environmental human rights and advanced results in 2021

The connection between human rights and a healthy environment has existed since the start of the environmental movement. Fifty years ago, the United Nations Conference on the Human Environment was organized in Stockholm in 1972. The Governments adopted the Stockholm Declaration[5] in which it is stated in the first paragraph, that every human being *"has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being"* and bears a *"solemn responsibility to protect and improve the environment for present and future generations."* Furthermore, it declares that *"both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself."* Since that time, the right to a healthy environment has gained widespread public and legal recognition across the world.

Human rights are the starting point in this milestone international document.[6] The vision of 'environment as a human rights prerequisite' traces its roots back to the Stockholm Declaration, the first formal international law recognition of the links between environmental protection and human rights. Since the Stockholm Conference in 1972, the relationship between human rights and the environment has developed along the lines of the 'environment as a precondition' and the 'human rights as a tool' approach.[7]

Twenty years later, in 1992, at the UN World Conference on Environment and Development in Rio de Janeiro, the central approach to environmental protection was 'sustainable development', but the Principle No. 1 of the Rio Declaration is an approach similar to our topic: *"People are at the heart of sustainable development. They have the right to live a healthy and productive life in harmony with nature."*[8]

[3] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, Article 2 (1).
[4] Akyüz 2021, 223.
[5] Declaration on the Human Environment, Adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972.
[6] Bándi (n.d.).
[7] Bratspies 2015, 52.
[8] Rio Declaration Environment and Development, 12 August 1992.

States have entered into agreements on many international environmental problems, including climate change, ozone depletion, transboundary air pollution, marine pollution and the conservation of biodiversity.[9]

Instead of considering environmental protection as a precondition for human rights, the relationship between environmental protection and human rights was underlined.[10] *Bratspies* also underlines the followings: this 'human rights as tools' approach also underscores the environmental dimensions of substantive human rights like the right to life and the right to health. There is no question that the realization of many well-established human rights is jeopardized by pollution, environmental degradation, and climate change.[11]

Akyüz's opinion is similar: environmental human rights are based on the relationship between the environment and human rights.[12] The author differentiate among four types of human rights in environmental matters: firstly the right to safe environment, secondly the reinterpretation of existing human rights which means that internationally recognized human rights already require safe environment, thirdly the civil and political rights including freedom of expression, right to association and right to assembly and the last one is procedural rights including right to access to information, right to participation in decision making process and right to access to justice.[13] In his opinion the 1992 Rio Declaration reaffirmed the 1972 Stockholm Declaration and sought to build on it but there are differences between the two declarations. For instance, the principle 10 of the Rio declaration is the unique in that it defines and fosters procedural environmental rights.[14]

2.1. United Nations

For decades researchers, lawyers and politicians have explored the questions of the human right to a healthy environment at both international and European level. Within the UN framework, the Human Rights Council (UNHRC) dealt with the matter of human rights and the environment. The notion of the interdependency of human rights and the environment is being advanced at the international level under the mandate of the UN Special Rapporteur on Human Rights and the Environment (the 'Special Rapporteur'), from 2012.[15]

[9] Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Note by the Secretary-General. United Nations A/73/188, 2018, 8.
[10] Bratspies 2015, 54.
[11] Bratspies 2015, 54–55.
[12] Akyüz 2021, 218.
[13] Akyüz 2021, 218.
[14] Akyüz 2021, 220.
[15] Statement on the Application of the Business Responsibility to Respect Human Rights to Environmental Human Rights Abuses. Report by the Business and Human Rights Working Group, May 28, 2021, point I.

At that time the Human Rights Council established the mandate for the independent expert on human rights and the environment.[16]

Researchers have explored the potential merits and risks of a formal, self-standing human right to a healthy environment for decades.[17] Especially international bodies have recognized the link between human rights and a healthy environment and that environmental harms can be tantamount to human rights abuses.

Following the Human Rights Council Resolution 37/8,[18] the Secretary General has transmitted to the General Assembly the Special Rapporteur's report on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment[19].According to this UN document of A/73/188, the time has come for the United Nations to formally recognize the human right to a safe, clean, healthy and sustainable environment, or, more simply, the human right to a healthy environment[20]. It is important, the understanding of the interdependency of human rights and the environment has led to the development of a human rights-based approach.The relationship between human rights and the environment has evolved rapidly. The greening of well-established human rights, including the rights to life, health, food, water, housing, culture, development, property and home and private life, has contributed to improvements in the health and well-being of people across the world.[21]

On 8 October 2021, the United Nations Human Rights Council recognized for the first time that having a clean, healthy and sustainable environment is a human right. Ahead of Human Rights Day on 10 December and some weeks before the UN Climate Change Conference, COP 26, the Human Rights Council adopted Resolution 48/13 on the human right to a clean, healthy and sustainable environment. [22]

According to the resolution, access to a clean, healthy and sustainable environment is a fundamental human right. Most of UN member states already recognize the right to a healthy environment through national law.

[16] John Knox was appointed the first Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. His mandate was extended in March 2015 as a Special Rapporteur. Mr. David R. Boyd was appointed the Special Rapporteur in March 2018 for three years and in March 2021 the Human Rights Council renewed his mandate for another three years.

[17] Webster & Morgera 2021, 55.

[18] Resolution adopted by the Human Rights Council on 22 March 2018, 37/8: Human rights and the environment. Before it 16 Framework principles on human rights and the environment were presented to the Human Rights Council in March 2018 at its thirty-seventh session. These framework principles set out basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. They reflect the application of existing human rights obligations in the environmental context.

[19] Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment A/73/188, 19 July 2018.

[20] A/73/188, point 37.

[21] A/73/188, point 53.

[22] Resolution 48/13: The human right to a clean, healthy and sustainable environment, A/HRC/RES/48/13.

Considering the value of resolution 48/13, it can make the progressive legal accepts stronger at international level. This resolution reaffirmed that all human rights are universal, indivisible, interdependent and interrelated.[23] Resolution also underlined the sustainable development and its three dimensions: social, economic and environmental.[24]

At the same day, the Human Rights Council also adopted Resolution 48/14 on Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change.[25] Through this second resolution, the Human Rights Council increased its focus on the human rights impacts of climate change and established the Special Rapporteur position dedicated specifically to that issue. This other resolution acknowledges the damage inflicted by climate change and environmental destruction on millions of people across the world. It was also described 'the triple planetary threats' of climate change, pollution and nature loss as the greatest human rights challenge of our era.

The ongoing United Nations draft treaty on regulating the activities of transnational corporations and other business enterprises is in the making. In other words, business and human rights, concerning corporate human rights abuses associated with environmental harms are in the focus of attention.[26]

The Aarhus Convention (adopted in 1998 and entered into force in 2001)[27] takes procedural environmental rights a step further.

2.2. Council of Europe

Based on texts adopted by the Parliamentary Assembly of the Council of Europe and the case-law of the European Court of Human Rights, the Committee of Ministers has entrusted the Steering Committee for Human rights (CDDH) with elaborating a manual on human rights and the environment. The Committee of Ministers approved the publication of Manual on Human Rights and the environment (2006)[28] and a revised manual has been republished in 2012.[29]

In the meantime, Recommendation 1885 (2009)[30] on 'Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment' was prepared by the Parliamentary Assembly.

[23] Resolution 48/13, Preamble.
[24] Resolution 48/13, Preamble.
[25] Resolution 48/14: Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, A/HRC/RES/48/14.
[26] Hartmann & Savaresi 2021, 27–46.
[27] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.
[28] Manual on human rights and the environment – Principles emerging from the case-law of the European Court of Human Rights, 2006.
[29] Manual on human rights and the environment (2nd edn.), 2012.
[30] PACE – Recommendation 1885 (2009) – Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment.

The Parliamentary Assembly of the Council of Europe, referring to Resolution 2396 (2021)[31] on Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, reiterated the need to admit a new generation of human rights. In Recommendation 2211 (2021)[32] the Assembly expressed anxieties because of the rate and extent of environmental degradation, the loss of biodiversity and the climate crisis, which has a direct impact on human heath, dignity and life. The Assembly asked the Committee of Ministers develop an additional protocol to the European Convention on Human Rights (ECHR) on the right to a safe, clean, healthy and sustainable environment, based on terminology used by the United Nations. At the same time, they proposed the draft text for the protocol, which is an integral part of Recommendation 2211 (2021).[33]

According to the Recommendation, the right to a safe, clean, healthy and sustainable environment requires going beyond an approach based on individual rights alone and defines the right to a healthy environment as an autonomous right of humanity.[34]

For the purpose of the additional protocol 'the right to a safe, clean, healthy and sustainable environment' means the right of present and future generations to live in a non-degraded, viable and decent environment that is conducive to their health, development and well-being.[35]

The draft text of the additional protocol to the ECHR enshrines an enforceable right to 'a safe, clean, healthy and sustainable environment'. Members of the Assembly have agreed on the following general principles, in interest of conduciving: (a) principle of transgenerational responsibility, equity and solidarity (Article 2); (b) principle of environmental non-discrimination (Article 3); (c) principle of prevention, precaution, non-regression and in dubio natura (Article 4).

Finally, the substantive and procedural rights are also included. The adoption of the proposed additional protocol would give the European Court of Human Rights a non-disputable base for decisions in connection with human rights violations arising from environment-related adverse acts.

2.3. European Union

The European Parliament resolution of 19 May 2021 on the effects of climate change on human rights and the role of environmental defenders on this matter,[36] among others, points out the Article 37 of the Charter, which commits the EU to

31 Resolution 2396 (2021): Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe.

32 Parliamentary Assembly Recommendation 2211(2021), Council of Europe. Text adopted by the Assembly on 29 September 2021 (27th sitting).

33 Appendix – The proposed text for an additional protocol to the European convention on Human Rights, concerning the right to a safe, clean, healthy and sustainable environment.

34 Recommendation 2211 (2021), Preamble.

35 Recommendation 2211 (2021), Article 1.

36 The European Parliament resolution of 19 May 2021 on the effects of climate change on human rights and the role of environmental deffenders on this matter (2020/2134(INI)).

integrating a high level of environmental protection and improvement of the quality of the environment into its policies and resolution on the European Green Deal (2020).

At the same time this European Parliament resolution refers to the fact that UN is calling for global recognition of the right to a healthy and safe environment as universal right,[37] the Paris Agreements the first international treaty to explicitly recognize the link between climate action and human rights[38] and the European Court of Human Rights has clearly established that various types of environmental degradation can result in violations of substantive human rights, such as the rights to life, private and family life, and the peaceful enjoyment of the home, and prohibition of inhuman and degrading treatment.[39]

This resolution recalls the legal obligation to respect the right to a safe, clean, healthy and sustainable environment,[40] and calls on the Union and Member States to support, at the next UN General Assembly, the global recognition of the right to live in a safe, clean, healthy and sustainable environment as a human right.[41]

3. Background and innovations of the new draft directive

In 1998, the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law.[42] Twenty years later, in 2008, under the auspices of the European Union, Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive)[43] was also adopted on the legal basis of Article 175 of the EC Treaty (now Article 192 TFEU). The period for transposing the Directive into national law expired in December 2010. Environmental crime is among the European Union's central concerns.[44]

The protection of the environment through criminal law was necessary to express a higher level of social disapproval than what can be achieved by existing administrative or civil law, and the Directive was adopted as a response. The Directive is the main European instrument for protecting the environment through criminal law.[45]

[37] The European Parliament resolution 2020/2134(INI), point C.
[38] The European Parliament resolution 2020/2134(INI), point J.
[39] The European Parliament resolution 2020/2134(INI), point K.
[40]The European Parliament resolution 2020/2134(INI), point 5.
[41] The European Parliament resolution 2020/2134(INI), point 7.
[42] Convention on the Protection of the Environment through Criminal Law Strasbourg, 4.XI.1998, Council of Europe, European Treaty Series – No. 172.
[43] Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law (Environmental Crime Directive) of 19 November 2008.
[44] Zeitler 2006, 255.
[45] Commission Staff Working Document, Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, SWD(2020) 259 final, point 1.

3.1. Previous history in the European Union

During last years the European Union has strengthened the activities in this field. By 2015 the European Union recognized the link between environmental crime and organized crime, and between environmental crime, money laundering and terrorist financing. Next year the Council of the European Union invited the Commission to monitor the effectiveness of EU legislation in the field of countering environmental crime.[46] In addition to this, in 2016, the EU Action Plan to combat wildlife trafficking set out the need to review the EU legislative framework on environmental crime.[47] According to the Council Conclusions on setting the EU's priorities for the fight against organized and serious international crime between 2018 and 2021,[48] the Council recognized the need to address environmental crime, especially illegal waste exports and wildlife trafficking, as priorities in the EU. Furthermore, in 2018 the Commission adopted an EU action plan to improve environmental compliance and governance.[49] Next year the European Green Deal[50] was adopted.

The Evaluation of the Directive 2008/99/EC by the Commission covers all Member States including the UK and years from 2011 to 2019.[51] According to this Evaluation, the environmental crimes are the fourth largest criminal activity in the world after drug smuggling, counterfeiting and human trafficking. Environmental offence is often committed by organized crime groups and networks operating transnationally. Some forms of environmental crime, such as illegal wildlife trafficking, can even be a source of funding for terrorist and related activities. The Commission identified the drivers: (a) the opportunity for significant profits, (b) a low risk of detection, and (c) growing international trade.[52]

On 15 December 2021, the Commission published its long-awaited Proposal for a new directive on the protection of the environment through criminal law,[53] thereby contributing to the European Green Deal's overall goals.

[46] Council Conclusions on Countering Environmental Crime of December 2016, Council of the European Union, 12 December 2016, No.15412/16.
[47] EU Action Plan against Wildlife Trafficking, European Commission, 2016., (COM(2016) 87 final).
[48] Council conclusions on setting the EU's priorities for the fight against organised and serious international crime between 2018 and 2021 - Council conclusions (18 May 2017),document 9450/17 of 2017-05-19.
[49] EU actions to improve environmental compliance and governance, COM(2018) 10 final.
[50] The European Green Deal, 11.12.2019, COM(2019) 640 final.
[51] Commission Staff Working Document, Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, SWD(2020) 259 final.
[52] Evaluation of the Directive 2008/99/EC, Introduction.
[53] Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 851 final.

3.2. Proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC

The environmental crimes are evolving, the involvement of legal persons and number of organized crimes with a cross-border dimension are increasing, too. The key findings for relevance of the Evaluation: there are large differences between EU Member States concerning the criminalization of environmental offences, and the level of available sanctions is often considered too lenient.[54] According to the Commission the Directive did not have much effect, because over the past years the number of environmental crime cases successfully investigated and sentenced remained very low, there were considerable enforcement gaps, there were no overarching national strategies to combat environmental crime involving all levels of the enforcement chain and a multidisciplinary approach. Based on the Evaluation findings, the Commission decided to revise the Directive and it was proposed to replace Directive 2008/99/EC.[55]

According to Article 3(3) of the Treaty on European Union (TEU) and Article 191 of the Treaty on the Functioning of the European Union (TFEU), the Union is committed to ensuring a high level of protection and improvement of the quality of the environment.[56]

Criminal law is one part of a comprehensive EU strategy to protect and improve the status of the environment, a priority for the European Commission. Criminal law measures come in as a last resort when other measures (environmental indicators, e.g. the degree of air pollution or biodiversity) have not sufficed to ensure compliance.

3.2.1. The criminalisation of environmental crimes

In the original Directive, 9 environmental offences comprise a broad range of illicit activities such as the illegal emission or discharge of substances into air, water or soil, illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste, as listed in the 72 pieces of environmental legislation contained in the two annexes to the Directive.[57]

The legal basis for the proposed Directive is Article 83(2) TFEU. It sets out the EU's competence to establish minimum rules with regard to the definition of criminal offences and sanctions in EU policy areas which have been subject to harmonisation measures, if this is necessary for effective enforcement. The Proposal defines the scope of the criminal offences to cover all relevant conduct while limiting it to what is necessary and proportionate. [58] Some of the offences are from the current Directive, some are amended and clarified versions of existing ones, and some are new offences.

[54] Evaluation of the Directive 2008/99/EC, Introduction.
[55] Proposal for a Directive, Explanatory memorandum, point 1.
[56] Proposal for a Directive, Preamble (1).
[57] Evaluation of the Directive 2008/99/EC, Introduction.
[58] Proposal for a Directive, Explanatory memorandum, point 2.

The proposed Directive includes new environmental offence categories to the extent required by the underlying environmental legislation. Additional categories of offences based on the most serious breaches of EU environmental law should be added (i.e. offence categories currently not covered by the Directive): (a) illegal timber trade; (b) illegal ship recycling; (c) illegal water abstraction causing substantial damage to water resources; (d) serious breaches of EU chemicals legislation causing substantial damage to the environment or human health; (e) placement on the market of products which, in breach of mandatory requirements, cause substantial damage to the environment or people's health because of the product's use on a larger scale; (f) source discharge of polluting substances from ships; (g) serious breaches of legislation on invasive alien species with Union concern; (h) serious circumvention of requirements to get a development consent and to do environmental impact assessment causing substantial damage; (i) serious breaches related to dealing with fluorinated greenhouse gases.[59]

In the Proposal for a Directive, the Article 3 (1) contains the detailed common minimum rules on definition of 18 environmental criminal offences (point a)-r)). These conducts have a potential high risk to human health and the environment and can lead to particularly serious negative impacts on the environment.

The Draft Directive also clarifies existing offences, with express references in the definition of the offence to other EU directives. Summing up, the Proposal defines environmental offences for future criminalizing.

Member States shall ensure that this listed conduct constitutes a criminal offence when it is unlawful and committed intentionally.

The Article 2 provision contains definitions of terms used in the Directive, including a refined definition of 'unlawfulness' for the purpose of defining environmental criminal offences. 'Unlawful' conduct means infringement one of the followings: (a) the relevant union legislation, or (b) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Union legislation referred to in point (a). The conduct shall be deemed unlawful even if carried out under an authorization by a competent authority in a Member State when the authorization was obtained fraudulently or by corruption, extortion or coercion.

In the framework of definitions there are further terms: 'habitat within a protected site', 'legal person', 'public concerned (persons)' and 'victim'.

As regards victim, nature cannot represent itself in the criminal proceedings. For the purpose of effective enforcement members of the public concerned, should have the possibility to act on behalf of the environment as a public good (within the scope of the Member States' legal framework and subject to the relevant procedural rules).[60]

Related to this is Article 14, which provision concerns procedural rights to participate in criminal proceedings. It should be granted to the public concerned as set out in Article 2.

[59] Stepping up the fight against environmental crime, COM(2021) 814 final.
[60] As defined in this Directive taking into account Articles 2(5) and 9(3) of the Aarhus Convention.In: Proposal for a Directive, Preamble (26).

In the light of Article 3 (2), Member States shall ensure that the conduct referred to in paragraph 1, points (a), (b), (c), (d), (e), (f), (h), (i), (j), (k), (m), (n), (p) (ii), (q), (r) also constitutes a criminal offence, when committed with at least serious negligence. With regard to the inclusion of negligent conduct within the scope of offences, it is important to stress the extent of the reliance of EU environmental rules on preventive and precautionary measures. Criminal law is intended to have a deterrent effect from any inclination towards such conducts, for example in order to obtain a financial gain through underinvestment or corner cutting.

Furthermore, terms used in the definition of offences are clarified in that they specify elements that need to be taken into account when investigating, prosecuting and adjudicating criminal offences: in particular, "*the damage or likely damage is substantial"* or "*the activity is likely to cause damage to the quality of air, the quality of soil or the quality of water, or to animals or plants"* and "*the quantity is negligible or non-negligible."*[61]

The Article 4 (1) criminalizes inciting, and aiding and abetting the commission of criminal offences referred to in Article 3(1). Last one means, the offender is criminalized, when makes an attempt to commit certain criminal offences, listed in Article 4 (2).

3.2.2. Sanctions

To address the current shortcomings of the Directive, take account of new developments and trends in environmental crime, the Commission proposed that the new Directive: (a) update and refine the list of criminal offences, including the new categories of environmental crimes, (b) strengthen the provisions on criminal sanctions, (c) recognize and strengthen the enforcement chain, (d) also recognize and strengthen the role of citizens and civil society.[62]

Going back finalizing of the Directive 2008/99/EC, in the second judgment,[63] the *Court* of Justice of the European Union clarified that the definition of types and levels of the criminal penalties does not fall within the Community's sphere of competence (judgment of 23 October 2007, C-440/05, paragraph 70). This led the Commission to eliminate all references to types and levels of penalties contained in its initial proposal for the Directive. Instead, the adopted final version of the Directive obliged Member States to provide for 'effective, dissuasive and proportionate' criminal penalties.[64]

Later, the Lisbon Treaty introduced an explicit legal basis in Article 83(2) TFEU setting out the Union's competence to establish minimum rules with regard to the definition of criminal offences and sanctions in Union policy areas which have been

[61] Proposal for the Directive, Article 3 (3)–(5).
[62] Stepping up the fight against environmental crime, 3–4.
[63] Regarding the Commission's appeal to the ECJ for the annulment of the Council Framework Decision 2005/667/JHA of 12 July 2005 on strengthening the criminal-law framework for the enforcement of the law against ship-source pollution (Case C-440/05).
[64] Evaluation of the Directive 2008/99/EC, 10.

subject to harmonization measures, provided that this is necessary for effective enforcement.[65]

The Directive does not harmonize sanctions, it only contains a general triad that the listed offenses should be punishable by effective, proportionate and dissuasive criminal sanctions.[66] However, the length of imprisonment and the level of fines for these offenses vary considerably between Member States.[67] The criminal sanctions (prison sentence, criminal financial penalties, accessory sanctions/confiscation) are difficult to compare as Member States set them in accordance with their national legal traditions, which differ significantly.

According to the preamble of the Proposal, the existing systems of penalties under Directive 2008/99/EC and environmental sectoral law have not been sufficient in all environmental policy area to achieve compliance with Union law for the protection of the environment. Compliance should be strengthened by the availability of criminal penalties, which demonstrate social disapproval of a qualitatively different nature compared to administrative penalties.[68]

The Article 5 (1) of the Proposal (Penalties for natural persons) provides minimum standards to ensure that the offences referred to in Articles 3 (Offences) and Article 4 (Inciting, aiding, abetting and attempt) are punishable by effective, proportionate and dissuasive criminal penalties. In addition, the Proposal requires that Member States introduce specific sanction levels and types for environmental criminal offences. The categorization proposed reflects the seriousness of the offences.

The Draft Directive proposes to set thresholds of maximum penalties for natural persons, with the possibility for Member States to implement tougher sanctions. Paragraph 2, 3, 4 state that certain offences referred to in Article 3, in what cases should be punishable by a maximum term of imprisonment of at least ten years, six years or four years.

Paragraph 5 aims at Member States taking measures to ensure that the offences referred to in Articles 3 and 4 can be subject to additional sanctions and measures to allow for a tailored response to different types of criminal behavior.

Article 6 contains obligations to ensure the liability of legal persons for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit. Article 7 sets out sanctions applicable to legal persons involved in the criminal offences covered by the Proposal. Article 10 provision makes sure that Member States give the opportunity to competent authorities to freeze and confiscate the proceeds derived from offences covered by this proposal. Furthermore, the Article 8 and 9 set out the aggravating and mitigating circumstances to be considered when sanctions are applied.[69]

[65] Evaluation of the Directive 2008/99/EC, 10.
[66] 2008/99/ EC, Article 5.
[67] Görgényi 2018, 56–57.
[68] Proposal for the Directive, Preamble (3).
[69] Proposal for the Directive, 18.

The Member States's different legal traditions must be taken into account when establishing the types and levels of penalties. Whether a sanctioning system is considered a deterrent depends also on judicial practice and whether high sanction levels provided by national criminal law are systematically imposed, or if the practice is more lenient. The existence of other complementing administrative or civil sanctioning systems and their relation to and interaction with criminal law, enforcement and sanctioning also play a role.[70]

3.2.3. Other provisions

Persons who report irregularities are known as whistleblowers. Potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation.[71] Article 13 concerns the protection of persons such as whistleblowers, environmental defenders and others reporting information or providing evidence to an investigation relating to environmental criminal offences.

Provisions on sanctions should be strengthened in order to enhance their deterrent effect as well as the enforcement chain in charge of detecting, investigating, prosecuting and adjudicating environmental criminal offences.[72] Article 17 aims at enhancing training activities along the enforcement chain to ensure that all parties involved have the necessary specialized skills and abilities to perform their roles effectively. It is need to improve the effectiveness of the enforcement chain in practice (provisions on training, resources, cooperation and coordination).

Article 19 requires Member States to ensure coordination and cooperation at strategic and operational level among all their competent authorities involved in the prevention of and fight against environmental crime. It is very important to improve cross-border cooperation as well.

Article 20 aims at ensuring a strategic approach to combating environmental crime and includes aspects to be addressed by a *national strategy* which will need to be established in each Member State.

4. Some basic issues related to environmental crime

From the beginning, research has focused on where the circles of environmental crime are located in different legal systems, country by country. The dependence of the related criminal law on administrative law is also on the agenda.

4.1. The place to regulate environmental offences

There are different models in each European country. In Poland and Spain, environmental crime is basically covered by penal codes. In Italy, two offenses have been included in the Penal Code since the implementation of Directive 2008/99/EC,

[70] Evaluation of the Directive 2008/99/EC, 15.
[71] Proposal for the Directive, Preamble (24).
[72] Proposal for the Directive, Preamble (4).

and from 2015 a new chapter in the Criminal Code includes the environmental offenses. In most countries, environmental crimes are either covered by the Penal Code or the Environmental Code or a special environmental law. In Sweden, the latter two laws specifically contain provisions for the criminal protection of the environment, not the Penal Code. In the UK, for traditional reasons, there is neither a penal code nor an environmental code, so the relevant provisions can be found in different laws.[73]

4.2. Types of protection of the environment by criminal law and dependence on administrative law

The neuralgic point of environmental criminal law is the issue of dependence on administrative law.[74] In the field of environmental crime, three possible models can be distinguished, given the relationship between criminal law and administrative law:

(a) In the case of an abstract endangerment,[75] criminal law typically deals with a breach of an administrative provision (obligation), in the absence of actual harm or threat to the environment. In Italy, environmental criminal law is dominated by abstract threats. In Spain, breaches of administrative rules are an immanent element of environmental crime in all cases. In some jurisdictions, there is criticism of the administrative dependence of environmental criminal law. In this model, the relationship between non-compliance and environmental damage is quite distant. In view of all this, it is common in many jurisdictions to identify a concrete endangerment.

(b) In the case of a concrete endangerment,[76] the commission of a criminal offense is not limited to a breach of administrative regulations, but a specific threat to the environment is also required. The advantage is that the legislature does not have to focus strictly on breaches of administrative regulations. In terms of air, water or land, these are emissions that threaten the environment. In the German Criminal Code, for example, there is water pollution under Article 324 [77] in the chapter on crimes against the environment. The implementation of Directive 2008/99 / EC on the protection of the environment through criminal law has increased the number of such offenses.

(c) In the case of autonomous offences,[78] very serious pollution is punished by criminal law provisions. These are cases where the crime would have serious consequences for people's health. The perpetrator will also be penalized if he or she has complied with the conditions set out in the permit. There are examples of autonomous crime in the Spanish Penal Code, enacted in 2010 and amended in 2015. An example of an autonomous crime can also be found in the Convention on the Protection of the Environment through Criminal Law, adopted by the Council of Europe.

[73] Faure 2017, 269–270.
[74] Görgényi 1997, 25–28.
[75] Faure 2017, 274–276.
[76] Faure 2017, 276–278.
[77] StGB 324. §: Gewässerverunreinigung.
[78] Faure 2017, 278–280.

However, Directive 2008/99 / EC does not provide for this. According to *Michael Faure*, in order to strengthen the protection of the environment through criminal law, irregular emissions should be criminalized rather than disregarding administrative obligations.[79]

5. Final remarks

In 2021 the United Nations Human Rights Council's resolution 48/13 on the right to a safe, clean, healthy and sustainable environment generated important fact for this approach. The recognition of these rights by the Human Rights Council has provided important impetus.

In the Council of Europe, the Committee of Ministers has developed the draft text for the additional protocol to the European Convention on Human Rights on the right to a safe, clean, healthy and sustainable environment, too. It is the part of Recommendation 2211(2021).

The European Union's Biodiversity Strategy to 2030[80] refers, inter alia, to the Directive on the protection of the environment through criminal law (2008/99/EC) and in the context that the Commission will ensure that it is implemented and enforced more effectively and, where necessary, review these. The Eighth Action Program builds on the European Green Deal,[81] with discipline in support of its environmental and climate policy objectives and following the 'do no harm' principle.

In 2021 the European Commission as the executive body of the European Union published the Proposal for a new directive on the protection of the environment through criminal law. The Proposal is a part of the EU legislative initiatives under the European Green Deal. Among the actions set out in the Commission's 2019 Green Deal was a commitment to step up efforts against environmental crime. However, the environmental ambition of the Green Deal will not be achieved by Europe acting alone. The Commission will also promote action by the EU, its Member States and the international community to step up efforts against environmental crime.

[79] Faure 2017, 273.
[80] EU Biodiversity Strategy for 2030: Bringing nature back into our lives, COM/2020/380 final.
[81] The European Green Deal, COM(2019) 640 final.

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Zsolt KOKOLY*

Constitutional principles of environmental law in Romania: enshrinement in the Constitution and jurisprudence of the Constitutional Court**

Abstract

The consolidation of the right to a healthy environment as one of the fundamental human rights can be seen as a result of the enshrinement in the Constitution of Romania since its revision in 2003, as well as the interpretations offered by The Constitutional Court in its pertinent jurisprudence. The present study aims to review previous research results in the field of legal doctrine and case law pertaining to environmental law in Romania, as well as to continue the examination of the most relevant cases contributing to the consolidation of constitutional dimensions of the right to a healthy and ecologically balanced environment.

Keywords: environmental law, right to a healthy environment, fundamental laws, Romanian Constitutional Court, case law.

1. Introduction

The need to review and to evaluate the relevant legal doctrine and jurisprudence pertaining to the right to a healthy environment in Romania presents itself as a particularly welcome endeavour in the context of assessing the evolution and consolidation of its constitutional dimensions. Romanian scholarship[1] is unequivocal in characterizing this process as rather slow in its beginning phase, as opposed to the general legal movements in Western European states, and also to some other Central European states.[2]

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[1] Naming here only a few: Cobzaru 2011, 121–197; Duminică & Pârvu 2019, 563–569; Duțu-Buzura 2021, 74–103; Duțu 2014; Enache & Deaconu 2019, 357–380; Matefi & Cupu 2020, 86–93; Matefi 2014, 75–80; Mocanu & Mastacan 2009, 219–225; Mocanu 2013, 137–144; Moraru 2009, 76–79; Șaramet 2018, 634–642; Șaramet 2020, 29–40; Stârc-Meclejan 2014, 167–179.

[2] A synthesis on the evolution of constitutional processes in Central Europe is presented in Șaramet 2018, 634–642, while a detailed in-depth analysis is offered in the issue of the Journal of Agricultural and Environmental Law 15(31) (a thematic issue which aims to present the interface between environmental protection and constitutional law in Central Europe).

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Decisive turning points in the Romanian legal framework comprise the revision of the Constitution of Romania in 2003, so as to include the right to a healthy environment in the category of fundamental human rights, complete with other dispositions: the right to private property corroborated with the obligation of the owners in protecting the environment and the state's obligation in protecting the environment and maintaining a balanced ecology. In parallel with the constitutional revisions, the beginning of the new millennium marks also an increase in the field of environmentally related case-law of the Romanian courts.

Additionally, the consolidation of the constitutional dimensions of the right to a healthy environment in Romania must be understood in the more general and ample framework of Euro-Atlantic integration too, entailing a series of international conventions and treaties, all of which have played a significant role in shaping the national legal landscape. Suffice to name here only a few, like the EU Charter of Human Rights, enshrining in Art. 37 the principles to environmental protection: "*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.*"; the Kyoto Protocol committing industrialized countries and economies in transition to limit and reduce greenhouse gases emissions (1997); the United Nations Framework Convention on Climate Change (1992). A surge in the number of environmental jurisprudence of the Court of Justice of the European Union (CJEU), as well as a firm commitment at European level towards its implication in environmental and climate protection causes, supported by in-depth procedures in European environmental law need to be mentioned when detailing international impact on the challenges the evolution of Romanian environmental law has faced over the last decades.

All developments presented above need to be factored in when presenting the premises of the advancement of Romanian environmental rights with special regard to the status of constitutional environmental protections, but when discussing jurisprudential aspects, the interpretation offered by the CJEU in relation to Art. 8 of the European Convention of Human Rights in its case-law is of particular importance. The interpretation offered by the CJUE in its decisions points to the positive obligation of the states in protecting citizens against severe violations of the environment, here including also the relations between private persons. Another obligation of the states, in the interpretation of the Court, refers to the maintaining the balance between individual rights and public interest in restricting the right to a healthy environment, such as the economic welfare of a country.

The option for reviewing environmental jurisprudence in Romania through the optics of constitutional law is based in part in its status as an essential basis for the entire national law system, having a position where it accredits or repels all novelties, inventions or institutions in the field of law. The constitutional system is the first receptor and major filter for international juridical currents and progress of ideas towards their propagation into the national legal system. Interpretations of legal phenomena anchor frequently in the Constitution, taking into consideration its singular and decisive character, and constitutional references – the general framework of constitutional environmental law as well as its effect on fundamental liberties and rights

– are also to be found with a higher frequency in motivations offered by courts of law.[3] The importance of a balanced relation between the Constitution and the environment is evident, but in the same time, it remains a highly topical issue, implying controversies and debates both in the public sphere, as well as in legal scholarship and jurisprudence.

Taking all these premises into consideration, a review of the environmental jurisprudence of The Constitutional Court of Romania (hereinafter 'Constitutional Court'), corroborated with pertinent observations formulated in the legal doctrine offers a chance to assess whether the Romanian legal landscape has successfully assimilated the principles of a new social-environmental reality and further, whether the interpretations offered by the Constitutional Court have created the basis for a solid regulatory, jurisprudential and scholarly framework as a means to a new generation of Romanian constitutional environmental and climate law.

2. Sedes materiae

The right to a healthy environment is part of the third generation rights category, also called solidarity rights given that the states need to cooperate in order to ensure they are respected. Based on its juridical core values, the right to a healthy environment is a social-economic right.

The revised Constitution of Romania stipulates that the right to a healthy environment implies also an obligation, both for natural persons, as well as for legal persons. The right to a healthy environment presents a series of obligations to the state which has to construct a regulatory framework in order for this right to be properly applied. This particular right is also considered a positive right, taking into consideration that the state has to offer legal guarantees for ensuring a healthy and ecologically balanced environment. A healthy environment offers people the proper living conditions necessary for their unobstructed growth and guarantees the possibility to fully exercise other rights such as the right to a decent life, the right to health and the right to physical and psychic integrity.

The 2003 revision of the Constitution of Romania[4] has resulted in the enshrinement of environmental rights and also obligations in three different articles, namely Art. 35 (Right to a Healthy Environment) and Art. 44 Para 7 (Right to Private Property) in Chapter II – Fundamental rights and freedoms, as well as Art. 135 Para 2 pct. e) and pct f) in Chapter IV – Economy and public finance.

Article 35: Right to a Healthy Environment *"1. The State recognizes the right of every person to a healthy, well-preserved and balanced environment. 2. The State shall provide the legislative framework for the exercise of such right. 3. Natural and legal persons have a duty to protect and improve the environment."*

Article 44: Right to Private Property *"7. The right of property compels to the observance of duties relating to environmental protection and insurance of neighborliness, as well as of other duties incumbent upon the owner, in accordance with the law or custom."*

[3] Duțu-Buzura 2021, 76.

[4] Law nr. 429/2003 on the Revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, nr. 758 from 29.10.2003.

Article 135: Economy *"2. The State must secure: e) environmental protection and recovery, as well as preservation of the ecological balance f) creation of all necessary conditions so as to increase the quality of life."*

The connection between constitutional law and environmental law presents itself on multiple levels: the Constitution of Romania comprises legal norms that consolidate the principles of environmental law, such as the exploitation of natural resources according to national interest or creating the necessary conditions for decent life. Moreover, constitutional dispositions regarding fundamental rights and obligations for citizens incorporate the right to a healthy and ecologically balanced environment (and are completed by sectorial regulatory measures) and that the right to property implies obligations to protect the environment. Another link between the domain of constitutional law and that of environmental law can be seen in the fact that the principal bodies and institutions of the state mentioned in the Constitution are invested with general competences in the environmental sector and constitutional norms enshrine the core principles of specialized institutions of the sectorial policy, the Constitution also consolidating the principle of local autonomy and decentralized public services.[5]

The case law of Romanian courts in environmental matters is not particularly extensive; a 2014 in-depth review deems it 'insignificant' and 'without notable results on the positive law' but remarks the growing presence of environmental causes in the jurisprudence of the Constitutional Court.[6]

The Constitutional Court is the sole authority of constitutional jurisdiction in Romania, functioning independently of any other public authority. It functions as the 'guarantor for the supremacy of the Constitution', delivering – among other powers – decisions on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or of commercial arbitration. The Constitutional Court is composed of 9 judges, appointed for a 9-year term of office, which cannot be extended or renewed. The Constitutional Court carries out its activity in plenum and the acts of the Court are adopted by a majority vote of the judges, unless otherwise provided for by law. The quorum for the plenum is two-thirds of the number of judges. Judges must vote in the affirmative or in the negative, since abstention is not permitted.

In the present study, we will examine a selection from the jurisprudence of the Constitutional Court, pertaining to the legal guarantees of ensuring a healthy environment; the right to a healthy environment from three perspectives: obligations of natural persons, obligations of legal persons and obligations of the state (the environmental stamp); the right to a healthy environment in relation to the right of property.

3. Constitutional regulatory framework for environmental issues in Romania

As emphasized in the introduction to the present study, the consolidation process of the fundamental human right to a healthy environment, as well as the process of setting legal guarantees for the unhindered application of this right has been

[5] Duțu 2014, 93–94.

substantially influenced by the ratification of international conventions in this field of law and by the Euro-Atlantic integration of Romania.

Though the need to recognize and to guarantee the right to a healthy environment has presented itself as an important topic after the fall of the Communist regime, the first democratic Constitution of Romania, adopted in 1991 did not yet validate it as a fundamental right. The text contained multiple references to environmental issues, introducing the obligation of the state to regenerate and to protect the environment, as well as maintaining the ecological balance, but such a partial recognition cannot be assimilated as constitutional guarantee of the right to a healthy environment.[7]

The enshrinement of the right to a healthy environment in the Fundamental Law of Romania took place in 2003, when the Constitution was revised and the national referendum has validated the new form. In drafting of the new legal norm, it is important to mention the Decision of the Constitutional Court regarding the constitutionality of the legislative amendment, stating the following: "*In order for the objective of the legislative amendment to be met, the Court considers that it is necessary that the human right to a healthy environment be inserted to Chapter II of Title II of the Constitution."*[8]

Consecutively, the right to a healthy environment was formulated in Art. 35 (Right to a Healthy Environment), placed in Chapter II (Fundamental rights and liberties) of Title II (Fundamental rights, liberties and obligations) and structured in three paragraphs. Professor Duțu, one of the pioneers of environmental law in Romania argues that a more precise title for Art. 35 could have been 'the right to a healthy environment and the obligation to protect it'.[9]

This article explicitly and independently declares the fundamental human right to a healthy environment (Art. 35 Para 1) and defines the role of the state (Art .35 Para 2), recognizing the power invested in state authorities for validating this right, and also assimilating the more general legal doctrine of considering environmental protection foremost a public duty.

The same cannot be said about the correlative obligation of natural and legal persons to protect and improve the environment (Art. 35 Para 3) as this disposition does not entail a self-supporting existence like the other fundamental obligations of citizens (these being featured in Title II, Chapter III – Fundamental duties). These two elements corroborated express the specific character of the new constitutional provisions where the fundamental human right to a healthy environment exists in parallel with the obligation of natural and legal persons to protect and improve the environment. This obligation exists only in relation to the right to a healthy environment, acting as its special guarantee.

[6] Duțu 2014, 103–104.
[7] Mocanu 2009, 219–225.
[8] Decision of the Constitutional Court nr. 148/2003, Published in the Official Gazette nr. 317 of March 12, 2003.
[9] Duțu 2014, 143.

It could be argued that an explicit formulation of the duties in protecting the environment would be in excess because the right to environment implies on one hand a positive obligation for the state to protect and an indirect obligation to constrain people in this respect. However, such a provision proves its utility not only as a psychological incentive (in eliciting from the public a sense of responsibility and a drive to action), but it acquires a legal signification too, elevating environmental protection to the level of fundamental duty.[10]

Other scholars share to a certain extent the critical observations formulated by M. Duțu and see the ambiguous formulation of Art. 35 as the result of a somewhat 'rushed' need for harmonizing domestic regulations necessary for Romania's adhesion to the European Union.[11] An issue raised in this regard is the equivocal formulation of Art. 35 Para 1, as it can be considered as leaving room to interpretation: it may be interpreted that the holders of this right are all the natural persons on Romania's territory (Romanian citizens, foreign citizens, or stateless persons), since it fails to stipulate whether it refers only to Romanian citizens or not. One may deem that this right is not circumstantiated by the principle of the territory where the law is to be enforced (since its holder can be any person residing on Romania's territory, temporarily or permanently). Furthermore, some researchers feel that his ambiguity is leading to the assumption of a special dimension, which expresses the universality of the right to a healthy environment as a fundamental right.[12] However, the limits and features of a 'healthy and ecologically balanced environment' (the notion preferred and used by the lawgiver) are difficult to set. It is also the lawgiver, who, by regulating the maximum acceptable levels of pollution in the receiving environments (the norms of environment quality) and by setting the amount and concentrations of pollutants that may be released by a given source (emission norms), sketches the dimension of 'healthy' and 'ecologically balanced', since it is believed that as long as these norms are respected, the environment is 'healthy' and 'cologically balanced'.

Provisions in Art. 44 Para 7 also play a key role in defining the legal specificity of the right to a healthy environment, as this disposition interprets the relationship between the right to property and the right to environment. A direct result of these constitutional provisions are the limitations exerted by environmental regulation on the entire regulatory framework concerning property. According to scholarly literature, this constitutes a phenomenon of constitutional servitude in the purpose of public utility, determining a special legal regime adapted to the public necessities of environmental protection.[13]

[10] Duțu 2014, 143.
[11] Ioniță 2012, 12.
[12] Ioniță 2012, 12.
[13] Mocanu & Mastacan 2009, 225.

4. Strengthening the dogmatic of the right to a healthy environment in the jurisprudence of the Constitutional Court

4.1. The right to a healthy environment

Invoked exceptions of unconstitutionality have presented the Constitutional Court with multiple opportunities to interpret and to deliberate upon the right to a healthy environment and the guarantees of ensuring it.

Interpreting the dispositions comprised in Art. 24 Para 1(c) of the Government Decree nr. 98/1998 regarding the regulation and the administration of the national forest fund[14] which state that *"reducing the forest surface in the national forest fund is forbidden except for the following situations: […] c) the execution of works, installations and constructions necessary to manage the forest fund or in one's own interest by the request of the owners and having the approval of the central public authority in charge of silviculture."*

The author of the exception of unconstitutionality claims that the legal norm comprised in the dispositions cited below represents a violation of several constitutional dispositions regarding the supremacy of the Constitution, the respect of fundamental human rights as instituted by international treaties, as well as the right to a healthy environment.

In its assessment of the exception of unconstitutionality, the Court has found that according to Art. 2 of the Government Decree nr. 98/1998, the state is solely responsible for the economical, social and ecological exploitation strategy of the forests, irrespective of the holder of rights. Romanian forests are administered and managed in the framework of an integrated system, towards the general scope of their continuous exploitation, for the use of their ecological and social-economic utility both in the present as well as in the future. For the safeguarding of this principle, the dispositions in the Government Decree nr. 98/1998 formulate the definite interdiction of reducing the surface of the forests from the national forest fund. As exception from this general rule, the Romanian lawmaker has set out some exemptions, here being included the one criticized by the author of the exception on unconstitutionality (the possibility of reducing the surface of forests for the execution of works, installations and constructions necessary for the management of the forest fund or justified by the own interest of the rights holders of forest areas). In both situations, the lawmaker requires that these areas be removed permanently from the national forest fund, this procedure constituting a preliminary condition for the approval by the central public authority in charge for silviculture for the execution of work processes defined by law. Consecutively, it is the authority in charge for silviculture that holds the duty of monitoring the correct application of the law, in this case the obligation to verify if the conditions are met for deforestation and also the obligation to control the means in which works, installations and constructions necessary for the management of the forest fund or justified by the own interest of the owners are conducted.

[14] Government Decree nr. 96/1998 regarding the regulation and the administration of the national forest fund, published in the Official Gazette nr. 122 of 26.02.2003, completed by Law nr. 120 of 2004, published in the Official Gazette nr. 408 of 06.05.2004).

The ultimate objective of this state control is to allow reduction of forest areas strictly when necessary and in full respect of the sectorial legal framework.

Having observed all these considerations, the Court has arrived to the conclusion that the legal dispositions invoked by the author of the exception of unconstitutionality respect the constitutional principles regarding the right to a healthy environment, the state deciding for this option to guarantee the legal framework necessary for its application.[15]

The jurisprudence of the Constitutional Court in environmental matters comprises also cases where the decision had to be passed both in observance of the constitutional right of citizens to a healthy environment corroborated with the obligation of the state to protect and implement the environment, as well as in relation to binding measures of European law (Art. 191 Para 1 of the Treaty on the functioning of the European Union, Directive 92/43/EEC the Council on the conservation of natural habitats and of wild fauna and flora, Directive 2009/147/EC the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds).

In regards to the first aspect of the issue in question, the Court finds that the modification of Art. 10 of the Emergency Government Decree nr. 57/2007[16] is oriented towards the construction of natural protected areas, having to take into consideration, besides the interest of the local community, also the dispositions comprised in the general urbanistic plans. This is meant as a protective measure for land areas that are located within the built-up zone at the time of the creation of the protected natural areas, meaning they can be incorporated within the protected natural area only in strictly justified situations and following a thorough scientific assessment. The modification comprised in the legal text refers to the possibility of incorporating into the protected natural area also land from the urban built-up areas located in the proximity of territories that meet the criteria to qualify as protected natural areas as far as irrefutable evidence is presented regarding the necessity of such operations in a scientifically valid study.

Consequently, the new regulation ensures a just balance between the right of the community to a healthy environment and the requirements necessary for modifying the status from urban land to natural protected area, a procedure mandatorily based on scientifically valid research. In addition, the new law completes the dispositions regarding the modification on the delimitation of protected natural areas of national interest, introducing an exception to the general character of the dispositions validated in the legal framework: the removal of some surfaces from the interior land of the protected natural areas if, by 29 June 2007 (the date Emergency Government Decree nr. 57/2007 entered into effect) there were government decisions in place granting concession licenses for the exploitation of non-renewable mineral resources, based on

[15] Decision of the Constitutional Court nr. 1200 of 13.12.2017, published in the Official Gazette nr. 60 of 25.01.2008.

[16] Emergency Government Decree nr. 57/2007 regarding the regime of natural protected areas, conservation of natural habitats, wild flora and fauna, published in the Official Gazett nr. 442 of 29.06.2007.

the current mining law framework. This exception is designed to operate in the conditions set by the new regulation. The removal of some surfaces from the interior land of natural protected areas takes place following the request of the license holder, under the following conditions: (a) presentation of a copy of the decision by the government regarding the granting of a concession license of mining exploitation; (b) the creation at the initiative and the expenses of the requesting party of a compensation land that is equivalent in surface to the one removed from the interior land of the protected natural area, amended with a 100 m wide buffer zone extending the whole length of the neighboring land strip; (c) evidence regarding the property title of the surfaces designated for compensation: sales contract or land exchange contract, donation, concession or other documents attesting property, or the written accept of the owners regarding the inclusion of land to the protected natural area; (d) documentation finalized in STEREO 70 or GIS applications regarding the limits of the surfaces introduced to or removed from the interior of protected natural areas; (e) administrative documents provided by the head of the central public authority in charge for environmental protection, in cases where the supplementary surfaces meet the criteria in place for designating protected natural areas under the provisions of the legal framework instituted by Emergency Government Decree nr. 57/2007.

Having deliberated on all the above presented arguments, the Court decides that the verification of the cumulative fulfillment of conditions set out by the new law is subsequent to the main condition. Specifically, this refers to the requirement that the removal from the land of the natural protected area comprises a surface for which, by the date the pertinent legal provisions entered into effect, the government approved concession licenses for the exploitation of non-renewable mineral resources, based on the current mining law framework. The Court found that this new law removed from under the jurisdiction of Emergency Government Decree nr. 57/2007 situations existing de facto and de jure before the legal novelty entered into effect (the mining law in effect at the time conferred a different legal regime to these situations). As a matter of fact, starting with June 29, 2007, the dispositions of the Emergency Government Decree came to be applied retroactively and voided previously valid legal documents (concession licenses for the exploitation of non-renewable mineral resources). In this aspect, the law modifying the Emergency Government Decree presents a character of reparations, introducing for future reference an exception from applying the dispositions of the acting legal norm to situations previously governed by different, sectorial regulation.

On the other hand, the law introduces a series of conditions the license holder of the exploitation of non-renewable mineral resources, in order to grant permission to remove some surfaces from the interior land of natural protected areas and to bring to fruition the concession contract legally signed with the state. In doing so, there are some incumbent duties, such as the creation at the initiative and the expenses of the requesting party of a compensation land that is equivalent in surface to the one removed from the interior land of the protected natural area, amended with a 100 m wide buffer zone extending over the whole length of the neighbouring land strip.

Should this compensation land strip not be provided, the concession license holder loses its right to exploit the land inside the natural protected area and the land in question remains governed by the legal regime on the conservation of natural habitats and of wild fauna and flora.

The Court draws attention on the fact that by introducing provisions on the delimitation of protected natural areas of national interest, the modifications in place ensure the legal framework necessary on one hand, for every person's right to a healthy and ecologically balanced environment, and one the other hand, the free access of every person's right to an economic activity and also to free initiative within the legal premises. The Court emphasizes that in this case, given the importance of the thematic in question, the lawgiver has decided to create a legal framework in accordance with the provisions of Directive 92/43/EEC the Council on the conservation of natural habitats and of wild fauna and flora, Directive 2009/147/EC the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds. The restrictive character of the provisions governing the exploitation of natural resources in natural protected areas is explicitly stated, placed within the framework of a regulated market under state monitoring, that is controlled by public authorities. This set of rules is enacted in order to provide a just balance between the general interest regarding the right to a healthy and ecologically balanced environment and the private interest of economic operators that have acquired concession licenses for mining exploitation. As such, this set of rules features the adequate and necessary particularities for the fulfillment of the objectives they were created for.

In examining the alignment to European provisions, he Court finds that the national law-making process has achieved its goals and has provided a valid legal framework to express the core principles of the two directives, while also reconciling legitimate but concurring interests and managing in the end to consolidate the national regulatory framework in the field.

In the legal context of both national as well as European regulation, the fact that the lawmaker chose to exert legal norms over situations that had no applicable dispositions under the previous legal regime cannot be seen as a constitutional impediment.

With regards to the criticism expressed towards the mandatory respect of European legal acts, the Court has stated in several of its decisions that *"using a European legal norm in the framework of constitutionality control, as a norm interposed for reference, implies, on the basis of Art. 148 Para 2 and Para 4 of the Constitution, a cumulative condition: on the one hand, this norm should be sufficiently clear, precise and unequivocal by itself, or its definition should be sufficiently clear, precise and unequivocal interpreted by the Court of Justice of the European Union, on the other hand, the legal norm should assimilate a certain level of constitutional relevance, so that its normative content could override a possible breach by the national law of the Constitution, which is the single direct reference norm in the process of constitutionality control. Under these circumstances, the endeavour of the Constitutional Court is different from a simple application and interpretation of the*

law, comprising the power courts and administrative authorities are invested with, and it is also different from the control of legality on legislative acts by the Parliament of the Government."[17]

Examining these premises, the Court has drawn the conclusion that the European legal provisions can be considered as clearly and precisely formulated, promoting the core value of the right to a healthy environment. Moreover, the Court states that the European legal norms in question protect the same fundamental values as the ones expressed in the Constitution of Romania, i.e. the right to a healthy environment. Thus, their constitutional relevance which could form the basis for a constitutionality control by indirect reference to the European norms, is absorbed in the content of the constitutional norm guaranteeing the protection of the fundamental right to a healthy environment. Following a control by the Court to assess the relevant constitutional provisions (Art. 35), it has been established that the law modifying the Emergency Government Decree complies with it, and so the Court decides that the arguments on the constitutionality of law corroborated with the constitutional provision expressly formulated are to be applied, Art. 148 of the Constitution being referenced in support of this decision.[18]

4.2. The right to a healthy environment – obligations of the state

The Constitutional Court has dealt with in a number of cases regarding the obligation of the state to ensure the safekeeping of the right to a healthy environment, these decisions referring to the legal characters of the environmental tax (a means of budgetary revenue created in the more general framework of implementing environmental tax reforms during the harmonization process inside the EU are).

In deciding over a case disputing the exception of unconstitutionality of the environmental stamp (tax) for auto vehicles, an obligation introduced by the provisions of Emergency Government Decree 9/2013 regarding the environmental stamp for automobiles,[19] weighting on the existing jurisprudence, the Constitutional Court declared that the introduction of the environmental tax is based on the necessity of creating an environmental fund with clearly set objectives, this tax representing a parafiscal charge to be levied one single time. The Court also stated that the legal framework in granting the right to a healthy environment has been created by the provisions of Art. 35 Para 2 of the revised Constitution, and also, in accordance with Art. 1 Para 2 of Emergency Decree nr. 9/2013 of the Government of Romania, this tax constitutes a budgetary revenue to the Environment Fund and is to be used by the Administration of the Environment Fund to finance programs and projects in environmental protection.

[17] Decision of the Constitutional Court nr. 668 of 18.05.2011, published in the Official Gazette nr. 487 of 08.07.2011; Decision of the Constitutional Court nr. 921 of 07.07.2011, published in the Official Gazette nr. 673 of 21.09.2011.

[18] Decision of the Constitutional Court nr. 313 of 09.05.2018, published in the Official Gazette nr. 543 of 29.06.2018.

[19] Emergency Government Decree nr. 9/2013 regarding the environmental stamp for automobiles, published in the Official Gazette Part I, nr. 119 of 04.03.2013.

Taking these arguments into consideration, the Court has drawn the conclusion that the dispositions made by the lawmaker have been justified by the need to fulfil an obligation enshrined in the text of the Constitution.[20]

In another case, a request for exception of unconstitutionality of provisions was raised against provisions comprised in Art. IV of Government Decree nr. 16/2013 regarding the modification and completion of Law nr. 571/2003 on the Fiscal Code and the regulation of some fiscal-budget aspects.[21] In its deliberations, the Constitutional Court has found that, in a similar way to the vehicle emission tax or to the vehicle pollution tax, the environmental stamp has been introduced by the lawmaker in order to fulfill its duties enshrined in the constitutional provisions of Art. 35 Para 1 and Para 2. The objective of these dispositions is to ensure the proper legal framework for the exercise of the right to a healthy and ecologically balanced environment. The creation of this type of tax aims to support the protection of the environment and the improvement of air quality, and also, to accommodate the values set by community field legislation. By way of consequence, the positive obligation of the Romanian state in creating a proper legal framework for the exercise of the right to a healthy and ecologically balanced environment is enabled precisely through the creation of such a tax and charging, according to a set of criteria, the auto vehicles for the pollution they emit. It is the opinion of the Court that this specific tax is the legal embodiment of the constitutional provisions formulated in Art. 35 Para 3, enshrining the obligation of natural and legal persons to protect and improve the environment.

The premises in this case reflect the conclusions of an earlier decision by the Court,[22] regarding the pollution tax incorporated in the Emergency Decree nr. 50/2013,[23] where the judgment passed also extended over the problem of equity, stating that such a tax should be paid by the polluter. Thus, by way of consequence, these considerations also apply to this type of tax introduced by Emergency Decree of the Government nr. 9/2013, namely the environmental tax.[24]

[20] Decision of the Constitutional Court nr. 118 of 10.03.2015, published in the Official Gazette nr. 318 of 11.05.2015; Decision of the Constitutional Court nr. 121 of 10.03.2015, published in the Official Gazette nr. 245 of 16.04.2015; Decision of the Constitutional Court nr. 127 of 10.03.2016, published in the Official Gazette nr. 433 of 09.06.2016; Decision of the Constitutional Court nr. 70 of 28.02.2017, published in the Official Gazette nr. 404 of 30.05.2017.

[21] Government Decree nr. 16/2013 regarding the modification and completion of Law nr. 571/2003 on the Fiscal Code and the regulation of some fiscal-budget aspects, published in the Official Gazette nr. 490 of 02.08.2013.

[22] Decision of the Constitutional Court nr. 802 of 19.05.2009, published in the Official Gazette nr. 428 of 23.06.2009.

[23] Emergency Government Decree nr. 50/2008 regarding the creation of vehicle pollution tax, published in the Official Gazette nr. 327 of 25.04.2008. Repealed.

[24] Decision of the Constitutional Court nr. 487 of 25.09.2014, published in the Official Gazette nr. 901 of 11.12.2014; Decision of the Constitutional Court nr. 40 of 21.01.2014, published in the Official Gazette nr. 140 of 26.02.2014.

The constitutionality of the vehicle pollution tax has been extensively examined by the Constitutional Court. The dispositions of Emergency Government Decree nr. 50/2008[25] have been analysed in a process for exception of unconstitutionality, referring both in general to the general framework of these dispositions, as well in particular to Art. 11 of the Emergency Government Decree. Concerning the inherent critics on the constitutionality of the Emergency Government Decree, the Court has emphasized the following: the positive obligation of the state to ensure a proper legal framework for the exercise of the right to a healthy environment is enabled precisely by the dispositions formulated in the contested Emergency Government Decree. This legislative act charges the auto vehicles for the pollution they emit, based on a set of criteria, and from a fiscal point of view, such a charge (the environmental tax) can be seen as giving expression in legal form to the obligations formulated in the text of the Constitution.[26]

4.3. The right to a healthy environment – obligations of legal persons

The right to a healthy environment implies obligations also for legal persons, and the jurisprudence of the Court offers guidance in this sense. Examining exceptions of unconstitutionality raised in regard with provisions comprised in Emergency Government Decree nr. 195/2005,[27] the Court has found that provisions comprised in Art. 17 Para 3 and Para 4 of this Decree introduce sanctions for not respecting the obligations imposed by legally binding acts such as the environmental approval, the environmental authorization, and the integrated environmental authorization.[28] Failure to respect these provisions result in the suspension and ultimately, in the annulment of these acts. These sanctions have a different legal nature as opposed to penalties or criminal sanctions, given the possibility of their application irrespective of the determination of contravention liability or criminal responsibility.

Regarding the issue of sanctions in the field of environmental law, it is worth mentioning here that research literature also emphasizes the importance of judicial responsibility in this domain: it is considered to be another way of sustaining environmental protection and its improvement by applying more severe sanctions in this field. By sanctioning actions against the environment, the lawmaker also expresses its intention in educating both the parties receiving the sanctions, as well as other citizens, in order to raise ecological awareness for preventing pollution and improving environmental conditions.[29]

[25] Emergency Government Decree nr. 50/2008 regarding the creation of vehicle pollution tax, published in the Official Gazette nr. 327 of 25.04.2008. Repealed.
[26] Decision of the Constitutional Court nr. 802 of 19.05.2009, published in the Official Gazette nr. 428 of 23.06.2009.
[27] Emergency Government Decree nr. 195/2005 regarding protection of the environment, published in the Official Gazette nr. 1196 of 30.12.2005.
[28] Decision of the Constitutional Court nr. 774 of 18.12.2014, published in the Official Gazette nr. 124 of 18.02.2015.
[29] Matefi 2014, 75–80.

In the case before the Court, the judges have arrived to the conclusion that these dispositions comprise legal guarantees against abusive application of the sanction to suspend the environmental authorization and to forbid the activities, but in the interpretation of the Court, these dispositions also comprise a method to be used by the lawmaker in providing the economic operators with the real possibility to abide the law, that is to respect the dispositions formulated in the environmental approval, the environmental authorization, and the integrated environmental authorization.

In examining the arguments presented, the Court states that the legal measures at the core of the debate cannot be separated from the general framework of the legal act, created under the auspices of the pertaining articles enshrined in the Fundamental Law, creating an obligation for the state to ensure the legislative context for the exercise of the right to a healthy and ecologically balanced environment, a fundamental right granted to every person. These provisions represent the legal basis for the obligations formulated in Emergency Government Decree nr. 195/2005, stating that every legal and natural person has the obligation to protect the environment, and, correspondingly, they need to respect the dispositions that are comprised in the ensuing regulatory framework. This decree introduces a precise list of cases where fines and sanctions are perceived, while also offering a definition of the terms and expressions formulated in the text of the legislative act.[30]

The jurisprudence of the Constitutional Court offers other examples in regard to the obligations of legal persons to protect and improve the environment: deliberating upon another case of exception of unconstitutionality, the Court has examined the obligations pertaining to legal persons who produce, store, commercialize and/or use chemical fertilizers and plant protection products and use aerial applications in administering them. The obligation comprises the necessity to obtain beforehand the authorization from the authorities in charge with environmental protection, the authorities in charge with sanitary policies and also the county committees in charge with the melliferous base and nomadic beekeeping, after having published an information in the mass-media, otherwise the activities constitute contravention and is punishable by fines.

The Court interprets these dispositions as the expression of the lawmaker's intention to ensure the exercise of the right to a healthy and ecologically balanced environment. Moreover, Emergency Government Decree 195/2005 is based on these constitutional provisions in creating the general legal framework in the field of environment. Under the imperative of protecting the environment and ensuring the exercise of this fundamental right, certain obligations are conferred to natural and to legal persons. It is important here to make the distinction between obligations pertaining to property titles and property owners and the obligations pertaining to legal persons, or as is the case, economic agents that conduct activities affecting the environment. This is why the Court rules out the incidence of the provisions contained in Art. 44 Para 2 and Para 7 (constitutional provisions regarding the right to property and obligations of the owners).

[30] Decision of the Constitutional Court nr. 92 of 03.03.2015, published in the Official Gazette nr. 318 of 11.05.2015.

In conclusion, the Court states that the constitutional provisions regulating the right to a healthy and ecologically balanced environment and the dispositions in the sectorial legislation are not opposing in content.[31]

The jurisprudence of the Court presents also other examples pertaining to the obligations of legal persons in the field of ensuring the fundamental right to a healthy environment. An exception of unconstitutionality was raised towards the obligation of legal persons producing industrial recyclable waste as formulated in Emergency Government Decree nr. 16/2001.[32] The provisions in this Decree state that for legal persons active in the field of activity detailed above, it is mandatory to ensure that environmental and public safety measures are respected and that the reintegration of the waste into the productive circuit is done following the standard procedures laid down in the text of the legal act. Examining these procedures, it becomes clear that the waste holder has the option of choosing one of the possibilities enlisted. The exception of unconstitutionality raised in this case refers to the procedure of dispensing recyclable industrial waste by specialized economic agents, authorized to recycle based on documentation of provenience. The author of the exception of unconstitutionality expresses the opinion that these dispositions violate the principles of freedom of trade and fair competition, enshrined in the Constitution (Art. 135 Para 1 and Para 2 pct. a)). The criticism towards the dispositions of the Emergency Government Decree formulated by the author of the exception of unconstitutionality comprised the allegations that this procedure creates in fact a monopole for the activities of economic operators specialized in and authorized for the recycling of industrial waste, taking into consideration that only economic agents authorized according to the dispositions of the legal act have the possibility both to dispense as well as to exploit recyclable industrial waste. It is also the opinion of the author of the exception of unconstitutionality that the dispositions enshrined in the text of Law on competition nr. 21/1996[33] should apply to economic agents holding monopole for this type of activities, so as to prevent foul play with the prices.

After examining the arguments presented, the Court finds that the dispositions forming the object of controversy are not contrary to the Constitution, as the Emergency Government Decree provides legal persons operating in the field of industrial waste management with options regarding their chosen form of recycling industrial waste. Both legal persons ensuring collection of recyclable industrial waste from natural persons, as well as owners of recyclable industrial waste, that is legal persons active in the field of waste management, are obliged to conduct these activities fully respecting environmental and public safety measures and only based on authorization to exploit by the National Committee of Waste Management.

[31] Decision of the Constitutional Court nr. 1084 of 20.11.2007, published in the Official Gazette nr. 848 of 11.12.2007.

[32] Emergency Government Decree nr. 16/2001 regarding the management of recyclable industrial waste, published in the Official Gazette nr. 104 of 07.02.2007.

[33] Law nr. 21/1996 regarding competition, published in the Official Gazette nr. 153 of 29.02.2016.

The Court finds that any legal person holding industrial waste for recycling and willing to do so, is entitled to conduct such activities, but only in strict observance of the criteria laid down by the dispositions in the relevant sectorial regulation. It is the opinion of the Court that the legal dispositions do not create a monopole as claimed in the exception of unconstitutionality, but rather create the set of conditions for conducting activities in the field of industrial waste recycling. Also, these dispositions do not contravene the constitutional provisions regarding the right to the protection of health and the right to a healthy and ecologically balanced environment.[34]

4.4. The right to a healthy environment – obligations of natural persons

Deliberating upon another case regarding the regulations comprised in Government Decree nr. 96/1998,[35] the Court has come to the conclusion that the dispositions comprised in the legal text establish obligations for the owners of forest areas and also sanctions for disrespecting them, the latter representing the object of the exception of unconstitutionality raised in this case. The strict observance of these dispositions is necessary to prevent massive tree felling and deforestation of the land, which would result in grave consequences for the environment and for the public health situation. These are the major interests that impose the criminalization and the sanctioning of the acts comprised in the legal dispositions, criticized by the author of the exception of unconstitutionality and thus, even if these actions are conducted by the owners of the forest areas, the restriction of the right to property is in this case in full conformity with the constitutional provisions regarding the right to a healthy environment.

The Court emphasizes that the restriction of the right to property in case of forest land areas, enacted by means of criminalizing the cutting of trees, plants and seedlings by the owners without approval takes into consideration the constitutional provisions regarding the right to a healthy environment.[36]

Another example for the obligations imposed on natural persons regarding the right to a healthy and ecologically balanced environment are to be found in a decision of the Court focused on the dispositions comprised in Law nr. 107/1996.[37] In the interpretation of the Court, this law establishes a framework for conserving, protecting and improving the marine environment and so the violation of these dispositions constitutes contravention or crime, to be sanctioned accordingly.

Based on the Fundamental Law, referenced also by the author of the exception of unconstitutionality, local councils and city halls function legally as independent administrative authorities and in this capacity are responsible for managing public affairs in cities and villages. The principles of public local administration as enshrined in the Constitution, such as the principle of decentralization, local autonomy and deconcentrated public services, cannot be interpreted as investing authorities of local public administration with the power to make decisions autonomously, nor as an absolute freedom to function, exceeding the limits of the existing legal framework.

[34] Decision of the Constitutional Court nr. 506 of 16.11.2004, published in the Official Gazette nr. 68 of 20.01.2005.

On the other hand, the act of exercising legal attributions of verification and control over the way administrative-territorial units respect legal provisions cannot be seen as violation of the principle of autonomy which offers the basis for their functioning.

Thus, the Court states that the obligations defined in the Law on water are not incumbent on administrative-territorial units, because the field controlled by inspectors from the National Water Resources Management Program is not the property of the legal person, but the public property of the state. This statement should be corroborated with the explicit obligation to protect and improve the environment, enshrined in the Constitution, which affects all legal and natural persons. Moreover, public property is guaranteed and protected by law and belongs to the state or to the administrative-territorial units.[38]

4.5. The right to a healthy environment in relation to the right to property

The jurisprudence of the Constitutional Court comprises multiple cases focusing on the right to a healthy and ecologically balanced environment in relation to the right to property, and a synthesis of the pertinent case-law is offered in a study by Duminică & Pîrvu.[39] The examination of the decisions implying these two factors reveals a common feature in the pertinent case law, indicating that in the Court's opinion the legislator has the competence to establish an appropriate legal framework for the exercise of the attributes of the right to property, without harming the general or particular legitimate interests of other subjects of law, thus stating a few reasonable limitations of its performance.[40] In accordance with the principle of proportionality, the limitations brought to the right to property shall be reasonable. It means that those limitations shall have to be appropriate for guaranteeing this fundamental right. Also, by applying the principle of proportionality in the area of the protection of the right to property, the Court has stated that it refers to the compliance with the obligations in the area of the environment protection, obligations established for general interest. Thus, the state is authorized to establish norms for the protection of agriculture, silviculture, domestic animals etc. The Court has also underlined that these norms are constitutional for as long as the obligations stated are reasonable.

The study cited above presents the example of a case focusing on the dispositions of Government Decree nr. 195/2005.[41] The object of the criticism raised under the form of request for exception of unconstitutionality comprised the limitation of the right to property, perceived to be unjust because of the sanctions for changing the destination of the surfaces set as green spaces and/or as such foreseen in the

[35] See supra, footnote 14.
[36] Decision of the Constitutional Court nr. 114 of 11.03.2004, published in the Official Gazette nr. 276 of 30.03.2004.
[37] Water Law nr. 107/1996, published in the Official Gazette nr. 244 of 08.10.1996.
[38] Decision of the Constitutional Court nr. 497 of 06.05.2008, published in the Official Gazette nr. 407 of 30.05.2008.
[39] Duminică & Pîrvu 2019, 563–568.
[40] Duminică & Pîrvu 2019, 565.
[41] See infra, footnote nr. 27.

urbanization documentation, the reduction of their surfaces or their relocation, irrespective of their legal regime.

The Court has found that the dispositions of the disputed Government Decree have been adopted in spirit of the relevant constitutional provisions. Moreover, the protection and guaranteeing the right to a healthy and ecologically balanced environment, as enshrined in the Fundamental Law, represent also the purpose of the legal text in question. In the vision of the Court, the right to property invoked by Art 44 of the Constitution is not absolute, aspect emphasized over time in its jurisprudence.

Also, the Court argues that "*the limitation of the exercise of the right to property (…) also has a moral and social justification, given that the rigorous compliance with these norms represents a major objective for the protection of the environment, thus of the existing green areas, having a direct connection with the level of public health, which represents a value of national interest.*" By way of consequence, the Court dismisses the exception for unconstitutionality and states that the dispositions criticized in the legal act are not contrary to the core values of this right, as they establish only an objective and reasonable limitation, in accordance with the fundamental rights.

Another decision of the Court can be brought up here as an example to illustrate the dynamics between environmental exigencies and right to property.[42] The author lodging in the request for exception of unconstitutionality has claimed that the dispositions comprised in Law nr. 46/2008[43] are unconstitutional because they violate the right to property, as the dispositions in question require natural persons, owner of forested areas, to provide guard services through a forest district. In the examination of evidence brought before the Court, it has been decided that the constitutional provisions allow the legislator to state rules harmonizing the incidence of other fundamental rights with the property right in a systematic interpretation of the Constitution, so that they will not be suppressed by the regulation of the property right.[44] The Court expresses the opinion that the Fundamental Law allows the establishment of legal limitations to the property right with the purpose of protecting the public interests, such as the interest in sanitation and public health, the social, cultural-historical, urbanistic and architectural interests etc., with the condition that these legal limitations do not harm the very substance of the property right.

These considerations have determined the Court to declare that the dispositions in the disputed text of law refer to strict rules concerning the obligations of the owner of a forestry fund, regardless of the form of ownership, on the obligation of compliance with the forestry regime and the rules on environmental protection, of forestry arrangements, as well as other obligations. These obligations represent a legal application of the constitutional provisions regulating the right to environmental protection and assuring neighbourliness, the Court declaring that *"the virtue of the fact that*

[42] Decision of the Constitutional Court nr. 541 of 12.07.2016, published in the Official Gazette nr. 834 of 21.10.2016.
[43] Law nr. 46/2008, regarding the Forest Fund, published in the Official Gazette nr. 611 of 12.08.2015.
[44] Duminică & Pîrvu 2019, 566.

the forest represents an asset of national interest, the legislator has established a strict legislative framework in the area of the content of the property right over it."[45]

5. Conclusions

Case law is considered an auxiliary source of law, and European as well as international examples demonstrate its utility in imposing a series of fundamental principles of environmental law.[46] From the jurisprudence of the Constitutional Court of Romania, a series of decisions can be selected to the aid of law practitioners and scholars: the decisions made by the judges of the Court since the revision of the Constitution in 2003 and the enshrinement of the right to a healthy and ecologically balanced environment in the constitutional provisions, along with the duty to protect and implement the environment applicable on the state, legal persons and natural persons.

The argumentations and clarifications by the Court regarding the legal character, the definitional context, possible restrictions of this fundamental human right, as well as the extent of obligations also formulated by the legislator present a wide-ranging but unitary scale of interpretation. The Court has examined the notion of right to a healthy and ecologically balanced environment in relation to several sectorial regulations and has come to the conclusion in all the reviewed cases that the dispositions comprised in these regulations can be interpreted as the expression of the constitutional provisions (in fiscal acts, acts of local public administration, contravention liability and sanctions and such).

The reviewed jurisprudence presents also some common features as far as the constitutional basis or rapport to constitutional provisions and sectorial regulation is concerned: regulations have been aligned with the constitutional provisions stating the right to a healthy and ecologically balanced environment, and legislative acts adopted following the revision of the Constitution are anchored in the constitutional provisions, respecting the principles formulated in the text.

The case-law of the Court presents also the necessary references to European law and the alignment to provisions contained in the binding directives, concluding that the national legal framework manages to express the core principles enshrined in the European directives applicable in the field of environmental law.

Besides the conceptual context pertaining to the notion of right to a healthy environment, the Court has had the opportunity to offer interpretations also regarding the relation between right to a healthy environment and right to property, focusing mostly on the restrictions to the right of property, justified by the safekeeping of guarantees for the right to a healthy environment.

The right to a healthy and ecologically balanced environment is granted in the Constitution to all persons, which means that the holder of this right can be both individuals as well as communities, and in a parallel way, the exercise of this right can be made both individually as well as collectively.

[45] Duminică & Pîrvu 2019, 567.
[46] Cobzaru 2011, 121–127; Marcusohn 2011, 32–79.

The obligations for natural persons, legal persons and also for the state, formulated in the text of the constitutional provisions can be seen as the legal guarantees for the safekeeping of the right to a healthy and ecologically balanced environment.

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István OLAJOS[*] – Mónika MERCZ[**]

The use of the precautionary principle and the non-refoulement principle in public law – Or how far the boundaries of constitutional principles extend[**]

Abstract

In addition to interpreting the precautionary principle, the present article shows that this principle of environmental law applies to agricultural practice as well. In a separate chapter, we analyze the relationship between the non-refoulement (also known as non-derogation) principle and the precautionary principle in connection with the latest cases of the Hungarian Constitutional Court's practice. This article summarizes the counter-arguments of the constitutional judges against a strong interpretation of the precautionary principle and analyzes whether a strong interpretation of said principle prevails in the practice of the Deputy Ombudsman for Future Generations.

Keywords: non-refoulement, non-derogation, precautionary principle, precautionary principle as a principle outside environmental law, strong and weak concepts of the precautionary principle, Housing Act, the application of the precautionary principle in the Ombudsman for Future Generations' practice.

1. The meaning of the precautionary principle and other related principles

The precautionary principle, together with the prevention and the restoration principle determine human activity in relation to the environment. The three principles can actually be interpreted collectively, and are appraisable in their combined effect.[1] The precautionary principle concerns the most common human behaviour.[2] In this field, the relationship between the behaviour and the environment, those elements and its totality is not entirely clear yet. It cannot be shown exactly how human behaviour will affect the environment or certain elements of it. Therefore, human behaviour shall be considered something that inherently poses a potential danger to the elements of the environment, precisely for the total of them.

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1 Fodor 2014, Fodor 2003, 40–43.

2 O'Riordan & Cameron 1994.

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Therefore, until the specific danger is not shown, we need to manage human activity as a potentially endangering factor, while its specific risk is not predetermined.[3] Regarding the application of the principle, Gyula Bándi highlights three important elements in his summary article written in 2013: 1. The protection of the environment, 2. The serious or irreversible damage, 3. The level of scientific certainty.[4]

For the purpose of the application of the precautionary principle, these elements shall be reached by the activity, which we have to survey regarding the precautionary principle. The activity, for which the principle arises, is not an environmental activities in the strict sense of the word,[5] so it does not extend to the activity of the huge industrial emitters entailing together with noise, radiation, waste, but it extends to the fields of nature farming, plant and animal health and human health, where the impact of the environment applies as the part of a more general expectation, not as a general rule.[6]

The second element is the serious or irreversible damage. If the damage reaches this rate, the principle, which determines human behaviour, will be the prevention and after that the recovery. If it does not reach this rate detectably yet, we have to compare the rate of the profit available by the activity with the rate of the damage, which adversely affects the environment. If the damages exceed the rates of the available profit, then the facility is not allowed.[7] The issue of irreversibility depends on which mode of action can be reconciled for the overcompensation of the particular effect.[8] If the direct effects are much faster than the results inducible by the defense mechanisms, then the effect is irreversible, and measures of the principle of restoration shall be applied.[9] Thirdly, if the negative effect reaches the scientifically demonstrated level, the human intervention shall be specific and preventive regarding the occurrence of the negative consequences of the concrete demonstrated negative effect or it shall be oriented to the restoration of the occured damages and the balance of nature and other environment. While it is not detectable, in the meantime, the lawmaker and law enforcer need to do everything in order that the presumed, but non-established effects shall not occur.[10]

The principle has undergone significant development since 2013. Today, the precautionary principle is a principle that refers to an approach to the protection of the environment or human health that is based on taking precautionary measures even when there is no clear indication of harm or threat thereof,[11] so that we should treat

[3] Bándi 2019.
[4] Bándi 2013, 474–476.
[5] Krämer 2012.
[6] Douma 2003.
[7] United Nations General Assembly, World Charter for Nature, A/RES/37/7, 48th plenary meeting, 28.10.1982.
[8] See more: Bell, McGillivray & Pedersen 2013; Birnie, Boyle & Redgwell 2009.
[9] Sands 1994, 300–301.
[10] The constituent parts of precautionary principle, Factors triggering resources to precautionary principle, Communication for the Commission on precautionary principle, COM/2000/0001 Final.
[11] Bell, McGillivray & Pedersen 2013, 68.

human activity as a potential threat.[12] Gyula Bándi emphasizes the protection of the environment, serious or irreversible damage and the level of scientific certainty as the most important elements in the application of the principle.[13] The starting point of the principle is that our knowledge of science is limited, therefore the time of protecting our environment must begin as soon as possible.[14] As a result, the precautionary principle appears one step ahead of the prevention principle. As a result, the interests of the environment must be taken into account in the pre-construction planning phase, i.e. the assessment of potential threats must be carried out before certain measures are taken.[15] The application of the precautionary principle may also be the result of a new situation and a new reassessment of the situation.[16]

Although, according to Gyula Bándi, there are three possible ways in which this principle may have developed,[17] we do not have accurate information about its antecedents and origins,[18] but it is certain that it has appeared in more and more international legal documents since the 1990s.[19] In terms of its international application, I must mention that both principles have been applied to this day. The precautionary principle has first been invoked in the case law of the Court of Justice of the European Union in Cases C-157/96[20] and C-180/96.[21] Precaution itself appears differently in different contexts, has a different meaning,[22] and its role and effect in different legal systems is different.[23] In Hungary, the strong enforcement of the principle is typical.[24]

Regarding the principle of prevention, it is used if the damage has not occured yet, but in connection with the activity related to the preservation of the direct environment, analysing the impact mechanisms analyzed, the damage is likely to happen. The occurrence has not appeared from nowhere, but the occurrence is certainty based on the natural laws and the scientific conclusions. That's why, regarding such activities, the user of the environment shall calculate with the measures for the protection of environment during the design, and these measures shall be suitable to avoid the occurrence of serious or irreversible environmental damages. During the design of human activity, the technologies, which aim is to avoid the damages, are the parts of construction and their main purpose is to avoid greater damages.[25]

[12] Bándi 2019.
[13] Bándi 2013, 474-476.
[14] Fodor 2007, 48.
[15] Bobvos 2011, 31-41.
[16] Fodor 2019, 39.
[17] Bándi 2019.
[18] Krämer 2012, 22.
[19] Cooney 2005, 12–24.
[20] Case C-157/96, 1998, 63–64.
[21] Case C-180/96, 1998, 99–100.
[22] Birnie, Boyle & Redgwell, 2009, 155.
[23] Vermeule 2012, 181.
[24] Szilágyi 2019, 89.
[25] Bándi et al. 2008.

The principle of recovery means that if the environmental damage has already happened, the person responsible for the damage should not only compensate for the caused damage, but this person, cooperating with the environmental protection organisation system, shall promote such mechanisms, which are suitable for the recovery of the disrupted environmental balance. Therefore the law, as the equipment of recovery, shall take action not only with the liability forms applicable in individual branches, but also as the set of legal liability, as the equipment of recovery. Regarding the caused environmental damages, the administrative, criminal and civil liability applies together with their impact mechanism.[26]

Another related principle is the non-derogation principle, which we will use under the name 'non-refoulement' principle. This is a change we decided to make honouring Gyula Bándi's wishes, who advised using the term non-refoulement.

2. The precautionary principles and the agricultural developments

The precautionary principle first appeared in food law among the areas affected by agriculture. The most important aspect of the principle is that for the purpose of the protection of consumers' health protection, protection measures may be applied if suspicion arises that the consumption of some foods would be previously not known risk, but these could not be corroborated with scientific evidence. The introduction of this principle was established by the concerns of the customers regarding the spongiform encephalopathy of bovine.[27] It indicates the persistence of the consumer protection approach in the establishment of European food policy.[28] In applying the principle, the European food law considers the production process of the products and it does not solely take into account the characteristics of the final product.[29] The result of the application of the principle led to the application of a quasi moratorium against GMO products between 1998 and 2003.[30] In the present case, in the first round the Panel did not accept the Union's argument that they based the authorisation procedure on the risk estimation procedure applied for the protection of plant, animal or human health. As they forbade the distribution of all investigated GMO products, so it did not talk about general risk estimates. In its final argument, the Panel accepts the reference to the effects expressed to the animal, plant and human health, if it is supported by an investigation, which is effective and built by similar principles.[31] The whole decision mechanism of the WTO confirms the approach of the drug and food control organization of the U.S. (FDA, *Food and Drog Administration*), that the risk estimate procedure is built by the characteristics of the final product, not the process of the

[26] Csák 2012, 18–19.
[27] de Sadeleer 2000, 144–151.
[28] Cooney 2005.
[29] Bánáti 2007, 32–33.
[30] Mcmahon 2007, 322.
[31] Szilágyi 2010, 122–123.

production. This approach excludes the application of precautionary principle in case of WTO, which promotes free trade.[32]

However, the approach is still not too far from the thinking of the European Union.[33] It is very well illustrated by the welcome of the Hungarian position regarding the case of MON 810 maize. In the union proceeding, after the notification of the member state, the risk estimate mechanism and the authorisation are the competence of the European Commission.[34] The Commission, based on the result of the impact assessment, carried out in its own country authorised the public cultivation of MON 810 maize variety in the area of the European Union. In order to prevent the domestic public cultivation of this maize variety contained in the community variety catalogue from 2004, Hungary initiated a safeguard clause procedure. The procedure was essentially established on the basis of the precautionary principle, which is both the settled principle of food law and environment law. Hungary argued that the test results performed in the maize area of US are not clearly adopted to the Pannonian geographical region, where the most mixed climate elements prevail within Europe (because this region is affected by dry and humid continental, oceanic and mediterranean influences) and in complementarity with the basin effect caused by Carpathian Basin. In such areas, the risk of gene absconding proved the dry continental climate could not be verified, therefore, the environmental and flora fauna, furthermore the human health is not scientifically proven, but it lives in the assumable protection with the opportunity of safeguard clause. The argument of Hungary was not accepted by the Commission, but it was accepted by the Council decided in the framework of safeguard clause procedure with qualified majority.[35]

The precautionary principle is of paramount importance for food safety. The obligation of states includes, as a minimum, the obligation to ensure freedom from starvation and minimum access to essential foods of adequate nutritional value and safety.[36] According to the legal definition, the state resulting from the fulfillment of food safety is a level of safety that is based on the knowledge and recognition of health risks according to science.[37] Where there is a risk of harm to health, all necessary measures must be taken to eliminate the risk, even if insufficient scientific evidence is available to demonstrate this.[38] The precautionary principle is therefore an important principle of food safety, with traceability and proper risk analysis, as well as clearly defined responsibilities.[39]

In the European Union, the precautionary principle has been reaffirmed in the case law of the Court of Justice of the European Union (CJEU) on the prohibition of the use of neonicotinoids on plants attractive to bees.[40]

[32] Bánáti 2007, 32.
[33] Fisher 2002, 7–28.
[34] Foster, Vecchia & Repacholi 1991, 979–981.
[35] Szilágyi 2010, 118–119.
[36] Wernaart 2013, 63.
[37] Horváth 2015.
[38] Téglásiné 2017, 179.
[39] Szabó 2014, 28.
[40] Horváth 2015.

In 2005, it was found that the presence of genetically modified organisms in pollen and some of its honey samples offered for sale as a dietary supplement by Karl Heinz Bablok and his beekeepers was detected. Due to the presence of GMOs, their products have become unsuitable for placing on the market.[41] According to Bablok, pollen is not a GMO under Regulation (EC) No 1829/2003 because it was no longer suitable for specific and individual reproduction when it entered honey.[42] In its judgment, the CJEU reflected that even if pollen could not be regarded as an organism and therefore as a GMO, the product could still be withdrawn from the market because it was found containing ingredients produced from GMOs.[43] By opting for a broad interpretation, the CJEU confirmed that all foods containing a genetically modified organism should be included in the scope of Regulation (EC) No 1829/2003.[44] This also means applying the precautionary principle from a food safety point of view.[45] It follows from the principle that, where the existence or extent of risks is uncertain, in particular with regard to risks to the environment, protective measures may be taken without having to wait for full proof of the reality and severity of those risks.[46]

The role of the precautionary principle in food safety is different on an international level. The US interpretation is contrary to EU practice, as in their view the precautionary approach has an intolerable economic blocking effect.[47] Under U.S. law, when assessing the health risk of a GM plant or product made from it, its chemical composition should be compared to that of the non-GM product, but to that of the closest conventional plant.[48] In the case of Argentina, progress has been made in recent years in applying the principle, with the province of Santa Fe including in its law on nature and land management declaring land covered by the law to be 'common natural assets' to be managed and developed in a precautionary manner.[49] In Bulgaria, in addition to Regulation (EC) No 1829/2003 of the European Parliament and of the Council and related legislation, legislation on GMOs aims to transpose the precautionary principle from EU law to some extent, thus ensuring an adequate level of food safety.[50] Finnish legislation refers several times to the precautionary principle from the point of view of food safety, and the reference to this principle also appears before their courts.[51] In the case of Poland, the application of the precautionary principle with regard to GMO-free status is also a priority as a public obligation.[52]

[41] Szabó 2014, 25.
[42] C-442/09 (44).
[43] 1829/2003/EK Article 3.
[44] Szabó 2014, 26–27.
[45] Olajos, Nagy & Csirszki 2019, 3.
[46] Horváth 2015.
[47] Horváth 2015.
[48] Raisz 2021, 144.
[49] Victoria & Malanos 2019, 3.
[50] Bulgarian Paper 2019, 5.
[51] Anttila 2019, 3–15.
[52] Czechowski 2019, 8–20.

It can be said, therefore, that the practice of states generally adopts the precautionary principle as the basis of food security. The focus of the European Union's genetic engineering regulations is not on the product itself, but on the technology by which it is produced.[53]

The precautionary principle has arisen as the solution of the general philosophy problem in the German legal literature. Is it ethical to use the stem cells of unborn embryos in order to save the health of living people with them?[54] The author is looking for argument systems for the purpose of protection of unborn human life. One of the basics of his argument system is the precautionary principle, while he determines two examples known from philosophy as the confirmation of this argument. The debate is based on general human assumptions, in the spirit of this, he defines the precautionary principle with the equipment of philosophy in such a way: *"[…] in situations with good doubts whether a being falls within in the scope of a moral norm, it has to be assumed that this is the case, if the opposite assumption and its possible positive outcomes do not stand in an acceptable proportion to the moral harm that would be caused if the assumption is denied."*[55]

For defending this argument, they themselves must hold the opinion that embryos do not possess the worth-conferring property in question but have a certain connection – that of numeric identity and potentiality – to a being worthy of protection.[56]

The first analogon is provided by reference to the example of a hunter.

It says that a hunter is not allowed to fire at a living being that moves in the undergrowth if he is uncertain whether the beings are deer or playing children. This prohibition is meant to be valid even if the hunter's family feels the pinch of hunger and accordingly the shooting of deer would realize an ethical good of high rank. The conclusion drawn from this example is that we are in the same situation as the hunter. As long as there are good doubts concerning the moral status of the embryo, we ought to treat them (the doubts) in the same way as the beings in the undergrowth, i.e. abstain from killing them.[57]

The other example is the example of slaves: The slavery, as an institution, was already convicted by several people in ancient times on the basis that it breaks out live and clever people from society.[58] Whatever justifies the outstanding moral status of human beings – be it the ability to form life plans and to lead the life as a person, be it some sort of recognition, be it the ability to perform certain abilities or the possession of certain properties or faculties – there is no doubt that slaves possessed these abilities as they are ordinary human beings. Furthermore, slaves themselves are able to claim recognition.[59]

[53] Raisz 2021, 144.
[54] Fodor 2018, 42–64.
[55] Damschen & Schönecker 2002, 187–267.
[56] Düber 2012, 159–169.
[57] Düber 2012, 164.
[58] Damschen & Schönecker 2002, 251.
[59] Düber 2012, 165.

Approving Dübner argument, it can be said that precautionary principle can be used as an additional principle to the protection of human health and environment until we have confidence in the existence of the presumed danger. We have to do this in order to the vulnerable and protected groups,[60] furthermore the protection of the environment to be protected. This approach is strengthened by the role of the law in the environmental protection and the equipment-nature of the law. However, the equipment used in the solution of the environmental and food chain problems could not be used as the solution of general ethical and philosophical problems, if it could not be confirmed by logical argument.

3. The precautionary principle in the practice of the Constitutional Court of Hungary. Regarding the implementation of Act LXXVIII of 1993 (Housing Act) at World Heritage Sites

The President of the Republic – pursuant to Article 6 (4) and Article 9 (3) (i) of the Fundamental Law – requested a preliminary norm control procedure pursuant to Section 23 (1) of Abtv, regarding certain rules concerning the lease and alienation of flats and premises in Act LXXVIII of 1993 (Housing Act), which was adopted by the Parliament on 15 June 2021, as well as Section 1 of the Amending Act of Act CXCVI of 2011 on National Assets (Bill no. T/16223), and the closely related Articles 2–3 of the same Act, in order to examine its compliance with the Fundamental Law.

The purpose of the law affected by the procedure is to enable the tenants of apartments in a building listed as part of the World Heritage Sites, which were previously excluded from the right to purchase state and municipal housing prior to the change to acquire ownership of the apartments they rented. Accordingly, Section 1 of the Act – Act LXXVIII of 1993 on certain rules concerning the lease of apartments and premises and their alienation (hereinafter the Decision) with the amendment of the Housing Act – on 31 December 2020, in the case of a lease, establishes the right of purchase on the municipal and state-owned real estate in the listed building on the World Heritage Site and in the protected area. It also establishes the right of purchase, the rules for calculating the lease underlying the right to purchase and the detailed rules for determining the purchase price.

The Constitutional Court ruled on the motion of the President of the Republic that the provisions of the Act adopted by the Parliament but not yet promulgated, which would have granted buying option right to the tenants who have rented a state-owned or municipally-owned apartment in a national heritage building for not more than 25 years, are contrary to the Fundamental Law. In its decision, the Constitutional Court also ruled as a constitutional requirement that in the case of the exercise of the right of option granted to the tenants of flats in a national heritage building, the heritage protection authority must give its consent to the sale by taking into account the aspects of national heritage protection. The procedure of the Constitutional Court was based on a motion by the President of the Republic, in which he requested an examination of the conformity with the Fundamental Law of Sections 1 to 3 of the Act

[60] Harnócz 2018, 81–106.

amending the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises and the Act CXCVI of 2011 on National Assets.

The purpose of the provisions of the Act affected by the motion is to enable the tenants to acquire ownership of the flats they rent, provided that these flats are located in national heritage buildings previously excluded from the right of option applicable to state and municipal flats in the context of the privatization of exclusive state property prior to the change of the regime. In the view of the President of the Republic, the legislative objective and the right of option established in the contested draft amendment to the Act are incompatible with the constitutional requirement to protect and preserve the built environment as part of the cultural heritage, in particular the buildings under national heritage protection.

While under the current legislation, a flat in a national heritage building can only be sold with the consent of the heritage protection authority, in accordance with the provisions of a specific law, the new provisions laid down in the proposed Act would establish a right of option to the entire range of state- and municipality-owned national heritage properties in the World Heritage Area and its protection zone.

According to the President of the Republic, this is contrary to non-refoulement, which guarantees the protection and preservation of cultural values, and the need for such a restriction on municipality ownership is unjustified and disproportionate.

In relation to the restriction of the right to property, the Constitutional Court explained that the right of option may result in the termination of the right to property, which is a heavy burden and requires compensation. The municipality must receive a consideration for the flats lost due to the right of option that keeps in its assets a value commensurate with the value of the flats it owned. The method of securing the proportionality of values must be formed by the legislature. Any variation or amendment to the existing provisions satisfying the constitutional condition that the principle of proportionality is respected is possible. The Act has defined three categories of persons entitled to the right of option: those who have been renting the flat for between 5 and 15 years, those who have been renting it for between 15 and 25 years and those who have been renting it for more than 25 years. According to the reasoning, the law-maker considered the conditions under which tenants – who had previously acquired a right of option – in a similar situation to the tenants concerned now, could exercise it under the statutory and municipal rules established in the 1990s, to be the relevant conditions.

However, in the Constitutional Court's view, the provisions of the Act are only consistent with the law-maker's objective in the case of tenants whose tenancy exceeds 25 years. Moreover, the exceptional nature – as required by the Fundamental Law – of the regulatory solution concerning the other two categories of subjects has not been justified by the law-maker. The Constitutional Court has therefore declared the provisions of the Act relating to the right of option of the tenants who have been in a tenancy for less than 25 years to be contrary to the Fundamental Law.

The Constitutional Court further explained in its decision that the requirement of non-refoulement previously established in relation to the right to a healthy environment is constitutionally applicable to the obligation undertaken by the State in the context of the protection of national heritage buildings.

Its essential aim is to ensure that the level of protection once achieved is not lowered. It is a constitutional requirement that, in the case of the sale of national heritage buildings, the State should provide appropriate guarantees to ensure that the relevant building is managed after the change of ownership in accordance with its level of national heritage protection. This is a particularly important guarantee in the case of the flats covered by the Act under review, most of which are being taken out of state or municipal ownership for the first time.

The Constitutional Court has therefore stressed that the State has a duty to incorporate into its legislation guarantees that contribute to maintaining the level of protection, even in the case of legal transactions concerning national heritage buildings. Therefore, the Constitutional Court established as a constitutional requirement under Article P (1) of the Fundamental Law that the agency exercising the regulatory right to protect national heritage buildings should not subordinate the interests of the protection of heritage buildings to other aspects in its decision-making, and thus it should give consent to the sale, as a precondition of exercising the right of option, by taking into account the aspects of the protection of national heritage buildings.

The prohibition of withdrawal is now interpreted in accordance with the precautionary principle and the prevention principle, as well as with the first paragraph of Article P and Article XXI.[61] In addition, the legislator must take into account the principles of caution and prevention in all cases where legislation on the protection of the environment is reformed, since failure to protect nature and environmental protection can lead to irreversible processes.

The Constitutional Court, in its decision CCH 4/2019. (III.7.), presented a summary of the constitutional interpretation of the principle of non-refoulement. It confirmed the interpretation that the prohibition of withdrawal is a fundamental aspect of the right to a healthy environment. Its limitation may be determined in accordance with the third paragraph of Article 1 of the Fundamental Law.[62]

The Constitutional Court therefore pointed out that the right to a healthy environment is not an absolute right, it can also be limited according to the fundamental rights test laid down by the Fundamental Law. In the interpretation of the body, it follows from the subject matter of the right to the environment and its dogmatical characteristics that the level guaranteed by nature conservation legislation cannot be reduced by the State, unless this is unavoidable to the effect of other constitutional law or value.

The level of reduction of the level of protection is not disproportionate to the objective pursued. In the practice of the Constitutional Court, non-refoulement applies, not optically, but according to its function, to the application of the fundamental rights test. According to the test laid down in the decision of the Constitutional Court of 4/2019, it must be examined that the motion was submitted: (1) whether they are subject to the right to a healthy environment, (2) a non-refoulement at the level of protection can be established, and yes, (3) whether the non-refoulement can be justified by Article I of the Fundamental Law 1 (3) (adapted) Depending on paragraph 1 of this

[61] CCH 25/2021. (VIII.11.) (56).
[62] CCH 4/2019. (III.7.) (57).

Article, i.e. whether the necessity is constitutional according to the proportionality criteria.[63]

In its later practice, the Constitutional Court extended the right to a healthy environment to protect the built environment. In the Constitutional Court's Decision 27/1995. (VII.25.), the Constitutional Court stated that it follows from the right to the environment that the level of protection of the built environment in its legislation cannot be reduced by unbinding administrative decisions.[64]

According to the practice of the Constitutional Court, the right to a healthy environment, the basic law, in a small way, covers the protection of monuments in a synchronised manner. In the CCH 3104/2017 (V.8.), the State therefore commits, in the context of the protection of monuments, to the values it intends to retain for future generations, which, in constitutional terms, shares the withdrawal ban established in the area of the right to a healthy environment.[65]

According to CCH 3104/2017 (V.8.), Article P) (1) is a pillar of the institutional guarantees of the fundamental right to a healthy environment, which establishes the protection, maintenance and preservation of the values of the natural and built environment, of the common natural and cultural heritage of the nation and of future generations as a general constitutional responsibility of the State and of everyone and makes it an obligation under the Fundamental Law.[66] The maintenance of the level of protection is a constitutional requirement for monuments, especially when international world heritage protection is associated with the regulation not only for preservation and control aid bodies but also for other legal acts outside public law.[67] The rules for the general protection of monuments in the separate chapter of the Environmental Protection Act. The municipal enforcement regulation lays down the material and formal rules necessary to guarantee our professional protection in this regulation, as well as the designation of the historic authorities.[68]

In regards to maintenance and use, the Environmental Act provides for additional rules compared to the Civil Code. This additional rule does not mean supplementing the rights of ownership, but contains rules on compliance with the obligations arising from ownership. For example, it is not enough for monuments to meet only the requirements of well-known, universally prescribed normal use. Among the ownership sub-licenses, the environmental law highlights the right to use and names the maintenance obligation as an obligation to do so.[69]

This also indicates that the owners of monuments are faced with several obligations arising from these rights. In line with the general rules on the maintenance of the elements of the built environment, the basic obligation of maintenance rests with the owner of the monument.

[63] CCH 4/2019. (III.7.) (58).
[64] CCH 27/1995. (VII.25.) (59).
[65] CCH 3104/2017 (V.8.) (60).
[66] CCH 3104/2017 (V.8.) (61).
[67] CCH 3104/2017 (V.8.) (83).
[68] CCH 3104/2017 (V.8.) (84).
[69] CCH 3104/2017 (V.8.) (85).

However, it is not always possible to be satisfied with the maintenance of the existing state, since the preservation of monument values is also an essential element of the protection of monuments. According to Section 41 of the Environmental Act, the owner or the owner of the property rights must ensure the maintenance and good maintenance of the monuments. The monument must be maintained intact and without changing its nature. The maintenance and good maintenance obligation also covers the architectural, training and art components and accessories that form the specific values of the monument. The requirement of the first paragraph of the basic law to ensure compliance with its obligation to maintain the law by enforcing the conditions laid down by law that can be examined individually. The Environmental Protection Act is 42. § (1). According to paragraph 1 of this Article, the identity, residence and place of residence of the owner of the monument is unknown, and the preservation and good maintenance of the monument is ensured by the authority at the expense of the owner, i.e. the State obligation to preserve the value also exists in the underlying way in the case of a privately owned monument.[70]

4. Extensive application of the precautionary principle and its constitutional criticism

In the practice of the Hungarian Constitutional Court, after the previous antecedents, the so-called principle of the precautionary principle first appeared more strongly in Decision 13/2018 (IX. 4.) on declaring that Section 1 and Section 4 of the Act on Amending, with respect to water abstractions, the Act LVII of 1995 on Water Management. In the given case, the government's intention to relinquish its goal of exempting the owners of wells drilled over 80 meters from the notification and licensing obligation as non-refoulement came to the attention of the Constitutional Court.

Section 45 (7) (s) of Act LVII of 1995 (Water Management Act) would allow the government to exempt existing owners of the use of groundwater from the obligation to permit and notify existing water law practices throughout the current water law practice, almost legally providing them with agricultural utilization of water resources above 80 meters.

Groundwater is state-owned, so it is up to the authorities to authorize it for agricultural purposes, and under the current provisions, water abstraction requires notification and a permit for the survival of a private water facility. The majority view is therefore that unauthorized authorization of unlicensed and unreported private use of state-owned water resources would deprive future generations of water use rights and the possibility of public management, thus complementing the precautionary principle.

Justices dr. Ágnes Czine, dr. Balázs Schanda and dr. István Stumpf attached concurring reasonings to the Decision, while Justices dr. Egon Dienes-Oehm, dr. Imre Juhász, dr. Béla Pokol, dr. Mária Szívós and dr. András Varga Zs. attached dissenting opinions to the decision.

[70] CCH 3104/2017 (V.8.) (87).

In her concurring reasoning, Justice Dr. Ágnes Czine states that while she agrees with both the decision and the reasoning itself, she feels it necessary to point out the impact of Article P) (1) of the Fundamental Law and quite a few Decisions' impact on this topic. The right to a healthy environment requires legal protection of an attitude different from that of other fundamental rights. The reason for this is that the failure to protect nature and the environment may induce irreversible processes.[71] Prevention and the precautionary principle play a decisive role in the protection system of the right to a healthy environment.[72] She holds that with regard to the precautionary principle the Constitutional Court had to explore the environmental risks implied in the regulation challenged by the petition, and the scientific background of the problem had to be examined as well.[73] She thinks it was verifiable beyond doubt that interventions into the aquifers without permission or reporting bear the real risk of contamination and thus the reduction of drinking water reserves.[74] In her opinion, the legislative reasoning of the challenged normative text should not be left unnoticed, and it clearly indicates the content of the government decree to be adopted in the future on the detailed rules.[75] She states that maintaining the water right licensing procedure is an important guarantee of preserving the quantity and the quality of the stocks of sub-surface waters.[76]

In his concurring reasoning, Justice Dr. Balázs Schanda references the National Avowal of the Fundamental Law.[77] He also states that the reduction of the level of protection is unconstitutional unless it is made necessary by the enforcement of another fundamental right or constitutional value. However, the non-refoulement should be assessed in the complete regulatory context, rather than in itself.[78]

The concurring reasoning by Justice Dr. István Stumpf references the National Avowal and Article P) (1) of the Fundamental Law.[79] He holds that conflict with the Fundamental Law can be identified in the fact that – by reducing the guarantees of statutory level – the amendment opens up the possibility for regulating the issue with a government decree, reducing the former level of protection of the stock of water, which is against the requirement of precaution and it is contrary to the State's obligation of carefully protecting the nation's natural heritage and of preserving it for the future generations.[80]

[71] CCH 13/2018 (IX.4.) (78)–(79).
[72] CCH 13/2018 (IX.4.) (81).
[73] CCH 13/2018 (IX.4.) (84).
[74] CCH 13/2018 (IX.4.) (85).
[75] CCH 13/2018 (IX.4.) (93).
[76] CCH 13/2018 (IX.4.) (96).
[77] CCH 13/2018 (IX.4.) (98).
[78] CCH 13/2018 (IX.4.) (99).
[79] CCH 13/2018 (IX.4.) (100).
[80] CCH 13/2018 (IX.4.) (106).

Justice Dr. Egon Dienes-Oehm stated in his dissenting opinion that the majority decision makes an attempt to support with a new and legally questionable argument the prohibition of reducing the level of protection, which is, in itself, disputable and disputed.[81] He thinks that the reporting obligation as well as the obtaining of other water right permits necessary for a water project, together with more severe supervision and with the consistent application of misdemeanour sanctions would be suitable for guaranteeing the protection of nature as a prominent subject of protection under the Fundamental Law.[82] Justices Dr. Mária Szívós and Dr. András Varga Zs. both agreed with this dissenting opinion.

Justice Dr. Imre Juhász had a different dissenting opinion, in which he holds that the decision shall erode the principle of the separation of the branches of power, actually taking away the competence of the executive power when it declares that the statutory provisions are contrary to the Fundamental Law. Before the Government had an opportunity to adopt this decree, the majority decision deprived it of the chance to implement the Act. He thinks we should have been granted the opportunity to know the government decree in order to be in a position to assess which option would serve the purpose of protecting our waters.[83]

The dissenting opinion of Justice Dr. Béla Pokol is one that Justices Dr. Mária Szívós and Dr. András Varga Zs. both agreed with. Leaving out in the past the constitutional right of ownership from the questions discussed here may also raise a problem about arguing with the principle of 'non-derogation' widely used by environmentalists and also referred to several times in the majority decision.[84] The concerns raised in the petition with regard to the government decree-level regulation to be issued in the future could have been remedied by placing a constitutional warning in the reasoning of the decision.[85]

The dissenting opinion by Justice Dr. Mária Szívós states that the decision failed to adequately determine the level of protection achieved, as it examined the question only from formal aspects, i.e. it is based on the normative text of the legal provisions presented in detail in the decision. By examining the issue in details, it is beyond doubt that – in line with the concerns that have been expressed by the professional organisations for a long time – the cause of the problem is indeed the fact that as much as 90% of the relevant wells have been established illegally, i.e. their establishment is not preceded by licensing procedure and the authorities in charge of providing supervision have no information about these wells. This is because the State has failed, for a long time, to enforce (through the competent organs) the level of protection ensured.[86]

[81] CCH 13/2018 (IX.4.) (109).
[82] CCH 13/2018 (IX.4.) (110).
[83] CCH 13/2018 (IX.4.) (115).
[84] CCH 13/2018 (IX.4.) (121).
[85] CCH 13/2018 (IX.4.) (122).
[86] CCH 13/2018 (IX.4.) (127).

Justice Dr. András Varga Zs.'s dissenting opinion contains the idea that the rejection of the petition and prescribing a regulatory requirement about the government decree to be adopted could have been deductible from the Fundamental Law.[87] He thinks the main question is the standard (or criterion) that can overturn the presumption about the constitutionality of a law. Is it a certain injury of one of the Constitutional Court's provisions that takes place logically, on the basis of our knowledge of the reality, or is it a certain degree of probability of such an injury, or the mere possibility of the injury.[88] I hold that the presumption of constitutionality is always turned over by the injury of a provision that has taken place (in case of a constitutional complaint) or that is to take place assuredly (in case of other norm controls).[89]

Regarding this Decision, Ede János Szilágyi states that the Constitutional Court of Hungary developed a considerably strong concept of the precautionary principle. According to him, this concept means that the proper implementation of the precautionary principle is a strict condition for the Hungarian lawmakers. Namely, if the Hungarian lawmakers do not take the precautionary principle into account in an appropriate way during the adoption of a legal provision, this will cause a lack of conformity with the Hungarian constitution. Ths the Constitutional Court of Hungary shall annul the affected legal provision.[90] Apart from the determination of the precautionary principle by the CCH merely in its jurisdiction, there is an opportunity - and nowadays, a push - to define the precautionary principle in the constitution itself.[91] The authors of this article do not agree with the possibility of defining this principle in the Fundamental Law itself for several reasons, which we will further explain.

5. Analysis of the precautionary principle in light of the practice of the Ombudsman for Future Generations

Examining the practice of the Ombudsman for Future Generations,[92] we can see that although environmental reports do not provide the majority of all annual reports, they do occur every year. The precautionary principle does not appear in every report, motion or resolution. Sometimes the reference base is only Article XX and Article XXI of the Fundamental Law.[93] If the non-refoulement appears in the report, this may be in the light of the interpretation of the Constitutional Court.[94] The decisions and interpretation of the Constitutional Court also play a role in the reference base of joint reports.[95]

[87] CCH 13/2018 (IX.4.) (140).
[88] See more. Szilágyi 2021(9) 211–215.
[89] CCH 13/2018 (IX.4.) (138).
[90] Szilágyi 2019, 88.
[91] Szilágyi 2019, 109.
[92] Szilágyi 2021, 132–133.
[93] AJB-4642/2020, 2–3.
[94] AJB-94/2020, 8.; AJB-1100/2020, 6.
[95] AJB-1100/2020, 6.

Acting in the activities of the Deputy Commissioner, CCH 13/2018. (IX.4.), since it directly refers to the fact that *"the responsibility for future generations arising out of the Fundamental Law requires the legislator to assess the expected impact of its measures on the basis of scientific knowledge, in accordance with the principles of precaution and prevention. evaluate and consider."*[96] Based on the precautionary principle, the Ombudsman's legislative proposal also addressed the issue of enforcing environmental liability and reforming the system of sanctions.[97] The decisions of the Constitutional Court are cited in many places in all available annual reports on the activities of the Commissioner for Fundamental Rights, which show the depth of the relationship between the two bodies and justify a joint examination of Constitutional Court decisions and reports by the Commissioner for Future Generations. In the examination of the activities of the Deputy Commissioner for the Protection of the Interests of Future Generations, the precautionary principle has been invoked in 17 of the last 27 years, a total of 42 times. Since 2012, the application of the principle has grown exponentially, appearing every year.[98]

Regarding environmental administrative issues, the need for a broad interpretation is clearly visible, AJBH would prefer the interpretation as a constitutional principle. According to Gyula Bándi, the precautionary principle is not only an environmental principle, but also a constitutional principle.[99] According to him, this principle can be applied not only in environmental law, but also in constitutional law as a whole. The proportionality test would be applied here in terms of whether an activity has a significant impact on the environment.

Despite this objective, we have not found any examples of a broad interpretation in the specific documents, only the objectives and interpretive activity of the accounts support the application of the principles at the constitutional level.

6. Summary

To sum up, we can state that even the Ombudsman for Future Generations' practice raises questions about the applicability of the strong concept of the precautionary principle. Therefore, supported by the data available as well as following Justice Dr. Imre Juhász's dissenting opinion, in which he holds that CCH 13/2018 shall erode the principle of the separation of the branches of power, actually taking away the competence of the executive power, we do not stand by the strong concept of the precautionary principle. We believe that while the precautionary principle is absolutely necessary in environmental law, its inclusion into the Fundamental Law would have devastating consequences. We do not support the powers of the Constitutional Court of Hungary spreading so far that it diminishes the powers of the executive branch.

[96] AJB-2037/2020, 13.
[97] AJB-2037/2020, 22.
[98] Mercz 2021, 19.
[99] AJB-3658-2/2018, 4.

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Anita PAULOVICS* – Adrienn JÁMBOR**
The Right to a Healthy Environment in the Hungarian Constitution***

Abstract

The aim of the study is to present the development of the environmental law institutions founded up to the present day. Regulations concerning the protection of the environment had first been defined on international level before they appeared in the national legal system. Basic questions of environmental law are being analysed in this study. The history of environmental law is reviewed briefly from the 1950s to the present day both in international and national aspects as well as the constitutional foundation of environment protection within the right to a healthy environment and its Constitutional Court practice. This study will not touch upon the detailed study of the underlying principals of the national environmental law.
Keywords: right to a healthy environment, environmental protection, polluter pays principle, constitution, Constitutional Court.

1. Introduction

Problems concerning the protection of the environment started to increase significantly in the second half of the 21st century. Intensified exploitation of the environment both on international and national level demanded that environmental protection become a priority. Increasing production and consumer demand both contributed to growing ecological concerns. All the elements of the environment (earth, water, air, etc.) were immensely affected which has resulted in a stricter and more defined regulation as regards environment protection. In the past few decades, it has become ever so clear, both on international and states levels, that environment pollution has gone so far that it now prospectively endangers the survival of mankind. Environmental problems indicate the codependence of nations and peoples. Not a single nation, however powerful, can protect their environment without cooperation beyond its borders. Therefore, environmental protection inevitably has an international dimension. There are typically two tendencies contributing to making environmental protection laws. The first one is the preventing and regulating integrated pollution, which enables the regulation of the ecosystem as a whole instead of by sectors.

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This mechanism aims particularly to avoid the transboundary effects of pollution (spreading pollution from water to air for example). The second tendency is the use of economic means to manage and monitor measures taken. According to this latter approach, the government specifies aims and makes it possible for the members of a regulated community to share the burden of complying. As a result, international organizations such as the United Nations and the European Union, along with the nations seek to prescribe environmental targets and laws that would ensure the protection of the environment.

2. The development of environmental protection

The development of environmental protection and environmental regulations is one of the answers to the recognition of environmental concerns, whose aim is to sustain, or more precisely restore a certain balance.[1]

When defining environmental law, it is equally important to acknowledge that the environment is a system. This system has elements which are in correlation therefore, the environment is much more than just a set of its elements, so its protection needs to be extended to include the relationships connecting the elements.[2]

There is a recent approach according to which environmental regulations cannot be separated from the protective requirements (such as technical or safety requirements) of the production process, but it is the integrated regulation of the work that affects the condition of the environment in consideration of the environment.

Thus, environmental protection applies not only to the protection but management, preservation, attendance, development, restoration, etc. and not only to endangering factors but usually natural resources, materials, energy. Regulations aim to pay attention to all these simultaneously.[3]

According to environmental protection law, environmental protection involves the totality of activities and measures, which aim to prevent endangering, harming, polluting of the environment. It also targets to reduce or eliminate the damage caused and restore to conditions to a level prior to the damage.[4]

However, implementing the regulation of environmental protection into the legal system has for long been a contentious question. When we review the literature, there are approaches according to which environmental law is: (a) the most recent and dynamically developing area of the legal system becoming an independent branch of law with specific principles and methods; (b) a functional branch of law focusing independently on the legal requirements of environmental protection; (c) mixed specialized law or overlapping laws with elements of public and private law; (d) not an independent branch of law but part of the traditional branch of laws; (e) has become devoid of purpose due to its status as an independent branch of law having been questioned and therefore it should not be dealt with.[5]

[1] Kerényi 2003, 76–78.
[2] Fodor 2015, 14.
[3] Fodor 2015, 18.
[4] Act LIII of 1995., 4. § 32.
[5] Fodor 2015, 29.

As for the function of the environmental protection within the legal system, it could be stated that environmental protection cannot be considered an independent branch of law but rather as an area of law having a mixed nature. This area of law is connected to several other areas of law such as administrative law, civil law, criminal law, and specialized areas (agricultural law or financial law).[6]

3. The history of environmental protection

3.1. The development of environmental protection on the international level

The environmental dangers threatening the world are immense, many of them are global therefore the international community can only deal with these with concerted action. International law is a key means in the battle against the reduction of biological diversity and climate change as well as other significant environmental issues.

From the 18th century, provisions concerning environmental protection emerged. These were, for example the banning of hunting practices during mating seasons, or in the 19th century, the regulation of industrial factories as regards noise and air pollution.

Despite all the above, international environmental law only appeared in the 1970s with the adoption of the Stockholm Declaration at the first international environmental protection conference held in 1972. The principles stated in the Declaration were the foundation of modern environmental law. The Stockholm conference organized under the aegis of the UN symbolically means the beginning of environmental protection. Subsequently came upon laws concerning environmental protection, whose sectoral approach applied to specific environmental elements as part of economical and social processes.[7]

From the basic principles written in the closing document of the Stockholm environmental protection conference many are worth mentioning as this conference had a lasting influence on the environmental politics of the European Economic Community at the time: (a) everyone has the right to a healthy, human environment; (b) developing countries should be supported in their development and in making up their backlog; (c) in the purpose of the optimal utility of resources, environmental protection should be integrated into the decision-making process on development issues. systematic planning - in the coordination of economic and environmental interests; (d) the importance and support of environmental education and research; (e) countries have the sovereign right to utilize their natural resources according to their environmental policies without causing any harm beyond their borders; (f) the countries must cooperate in the protection of the environment and improvement of regulations; (g) the requirements for developed countries cannot be applied automatically to developing countries due to the issues of costs, value measures and the difference in natural environment etc.[8]

[6] Csák 2008, 10.
[7] Csák 2008, 10.
[8] Fodor 2015, 72–73.

Following the Stockholm conference, the appetite for regulations greatly increased both on national and international levels. In 1982 the United Nations Assembly adopted the document called the World Chart for the Environment and in the same year, the UNCLOS, in other words the Montego Bay Naval law agreement was made.[9]

It was in 1992 when the Rio conference was held where the integrative aspect was promoted following the appearance of sustainable development, with the definition that specific environmental elements and environmental effects need to be inspected and prevented as a whole.[10]

In the Rio de Janeiro world conference held in 1992 with the title Environment and Development, new basic principles were laid down among which there are some that substantially refer to national judiciary, not just political or international: (a) in terms of sustainable development, the needs of the future generations must be ensured; (b) special attention needs to be paid to the needs of countries that are poorer and less fortunate regarding environmental impact; (c) global affinity (the principal of common, but distinguished responsibility) in terms of which the countries hold the responsibility for preserving the earth ecosystem in unity but fairly, according to their share of polluting of the environment; (d) individuals must be ensured the right to take part and be informed when it comes to making decisions; (e) harmony of the natural environment and environmental regulations; (f) polluter pay, etc.[11]

The Johannesburg summit was held in 2002 entitled 'sustainable development' which pointed out the insufficiency in the implementation of the elements declared at the Rio conference, furthermore, it recorded the insufficiency regarding the issues of integrative protection. The reasons for insufficiency were: (a) the principle of integration does not work with sufficient efficacy; (b) more resources are being used than the ecosystem can provide; (c) there is a lack of long-term principals and connected policies in terms of finance, economy, and trade; (d) there is insufficient financial background for implementing new regulations; (e) the effect of globalization on the environment.

The documents adopted at the conference did not have mandatory power, at the same time they are very important as they shape the regulations of environmental law.[12]

There was another UN conference held in Rio de Janeiro in 2012 called 'Rio+20' on sustainable development. The adopted document entitled 'The Future we Would Like to See' confirmed the participant countries' obligation of sustainable development, along with recognizing the validity of the principles adopted in 1992 in Rio. In regard to the principals of integration, the need for the integration of sustainable development dimensions was emphasized as the results of the past 20 years cannot be considered satisfactory in this respect. Revolutionary is the road to achieve sustainable development, the conception of the so called 'green economy' whose much favoured means are the so-called sustainable consumer and production models.[13]

[9] Raisz 2011, 96.
[10] Csák 2008, 10.
[11] Fodor 2015, 73.
[12] Csák 2008, 10.
[13] Fodor 2015, 73.

4. Environmental protection regulations in Hungary

In Hungary the area of environmental protection was regulated with a framework by the 1976/II. act on human environmental protection. Provisions for some sectors' regulated laws were connected to the regulations based on the sectoral approach.

The integrative aspect appeared in the national environmental protection regulations from the 1990s. Primarily, the change of perspective was seen as a result of economic influence, considering the technological advancement, environmental impact beyond the borders, which involved environmental elements in complexity. The 1976/II act was an interlocutory stage between the speciality regulations and the currently effective 1995/LIII act on the general regulations of the protection of the environment. The insufficiency of the law adopted in 1972 were the lack of: (a) complexity; (b) integrative aspect; (c) environmental protection provisions; (d) responsibility; (e) prevention.

The law did not prioritize prevention, but otherwise handling or eliminating instead of decreasing environmental pollution, minimalizing emission, or recycling environmentally hazardous materials.

The 1995 law's innovative nature was to prioritize prevention, and introduce institutes for impact assessment (for example, in case of new establishments, the survey and prognosis of the impact on the environment and, on the other hand the product fee were introduced considering the principle of polluter pay[14]).[15]

Since the adoption of the environmental protection law, it has been modified several times much as the sectoral environmental protection regulations in many cases. From the 2000s the necessity of modifications was justified partly due to the fact that as part of the European Union, regulations must meet the Union's strict conditions regarding environmental protection. This has been completely achieved by today.

5. Right to the environment as the third generation right

Human rights are observed on an everyday basis. The common similarity in every reference regarding human rights is that by human rights we mean the important, strong and inevitable rights that an individual is in need of and entitled to. Every single social aim sooner or later becomes a human right: there are human rights to water, healthy environment, food, well being, development and so on. Qualifying for human right emphasises the importance of demand or need as human rights necessarily mean insurable rights. Governments and the legal system must ensure human rights unconditionally: the importance of this insurance is that human rights – they are always norms – must be implemented and maintained as positive rights by the legal system and most of all by government agencies specifying in law.[16]

[14] See more: Csák 2011, 31–45.
[15] Csák 2008, 11.
[16] Jámbor 2020, 993-994.

The importance and role of environmental protection in a country are defined by principal and constitutional level regulations. The right to the environment is in the Constitutional Law and it was mentioned in the Constitution effective until 2012. The right to the environment is a so called third generation right which means that it appeared later than other fundamental rights.

Human rights have several classifications, but the most widely used classification is the one based on the foundation of human rights according to which the rights men are entitled to belong to different generations. Most of the individual rights that belong to the first generation are traditionally called freedom rights. These ensure the individual their undisturbed life, activities and social position, and this freedom could be interfered and controlled by the state only in exceptional and reasonable scenarios. These are so called negative rights since the state, as the obligated, is demanded not to interfere. Freedom rights are further categorized into individual (citizen) freedom rights including the right to life and political freedom rights such as free speech.[17] The framework of the first-generation rights is mostly similar since the subject of the right, in other words the entitled, is the individual, the obligated is the state or the persons acting on behalf of the state, and the subject matter is refraining from interfering or acting.

Second generation such as economic, social and cultural rights were the result of the change in the state's involvement. The 19th century capitalist system would not provide protection to the needy against suppression or deprivation, however, with the increasing redistribution of state resources and the limiting of private owners' independence, the state's involvement increased more and more in ensuring the citizens' welfare. Increasing is the number of Constitutions which include, within the people's entitled rights as the individual's entitlement, the state's requirement to interfere, the state's different economic, social and cultural obligations. Following the second world war most constitutional democracies included the economic (such as the right to go on strike), social (such as the right to healthcare) and cultural rights (such as the right to education) in their catalogue listing the basic rights.

The rights in the third generation of human rights were initiated by the rising global problems in the second half of the 20th century, problems like the differences between the developed north and the developing southern states, furthermore the occurring insolvable problems within some states. The right to a healthy environment is in this latter group of the third-generation rights.[18]

The right to the environment is a third generation right. It has several important features that distinguish it from the traditional rights – from the classical rights to freedom or economic, social and cultural rights. These features are the following: (a) being global means, it does not just ensure the rights of the individuals or their small or extended groups, but maintains the existence of human life and the human race, (b) the effort of a single nation is usually not enough for the right to the environment to prevail due to the global nature of the environmental problems, (c) a further feature of the right to the environment is that harming it has no direct and immediately felt effect, the damage caused will have its impact felt in a long term, immediate effects

[17] Halmai & Tóth 2003, 83.

[18] Halmai & Tóth 2003, 86–87.

could only be measured by sensors, (d) the importance of all these in the aspect of enforcing these rights is that the infringement will not bring pressure for immediate justice like in the case of restricting freedom.[19]

The right to a healthy environment is in mutual connection with two basic rights: the right to life and the right to human dignity.[20] According to the interpretation of the Constitutional Court *"the right to the environment is really part of the objective, institutional protection side of the right to life: it separately names the state's obligation as a fundamental right regarding sustaining the natural foundations of human life."*[21]

The right to the environment appears in a general definition in 1972 (Stockholm). The Stockholm Declaration's I. fundamental principle lays down: People have the fundamental right to freedom, equity and appropriate living conditions in a quality of environment that ensures their dignity and prosperity.[22]

Healthy environment can be specified in both a strict and a broader sense. In a strict sense: the lack of environmental pollution, environmental damage, the lack of permanent or temporary health conditions. In a broader sense, a healthy environment does not only mean that the health threatening pollutants s are not present, but the healthy environment is a safe, undisturbed and aesthetic environment, in fact it also means environment – health.[23]

6. The right to environment in the Constitution

Environmental protection was first included in the fundamental law (57. §) as a result of an amendment in 1972 in the form of the right the citizens are entitled to. As a result of the amendment to the constitution in 1989, the 18 § of the Constitution declared: The Hungarian Republic acknowledges and enforces everyone's right to a healthy environment. Furthermore, the Constitution's 70/D. § declaring the highest level of right to a healthy body and soul recorded that this right is guaranteed – among others – via the protection of the built and natural environment by the Hungarian Republic.[24] The fact of double mention already promoted environmental protection. According to the Constitutional Court, the use of the word 'Constitution' (including the right to a healthy environment and the state's task regarding environmental protection in the means of implementing the right to a healthy environment) cannot be interpreted as a restriction of the right to a healthy environment.[25]

In its decision 996/G/1990 AB, the Constitutional Court at the beginning of its operation declared that, on the grounds of the above constitutional provisions, *"the state is obligated to establish and operate specific institutions which serve the realization of the right to a healthy environment…the obligations need to include the protection of the natural foundation of life and need to be extended to the establishment of institutions managing finite resources…"*

[19] Sári & Somody 2008, 317.
[20] Horváth 2013, 229.
[21] Decision 28/1994. (V.20.) of the Constitutional Court.
[22] Csák 2008, 13.
[23] Csák 2008, 14.
[24] Act XX of 1949, 70/D. § (2).
[25] Sólyom 2001, 612.

The 1990 decision along with the 28/1994 decision (from here on: environmental fundamental decision) reflects the interpretation of the Hungarian Constitutional Court regarding the right to the environment. Pursuant to these, the right to the environment belongs to the fundamental rights, therefore it is one of the constitutional values receiving the highest protection. Due to its specific subject matter or its connection to the other fundamental rights, it stands out. *"The right to the environment is neither a subjective fundamental right, nor it is a constitutional task or state objective, but a so called third generation constitutional right, its nature is still disputed and very few constitutions include it."*[26]

The fact that it is not a so called subjective fundamental right means that this right is *"independent and institutional protection in itself, namely a specific fundamental right that has a predominant and determining objective and an institutional protection side."* Instead of the protection of the subjective rights the state's obligation in this respect is providing organizational guaranties.[27]

Therefore, the right to the environment does not mean that everyone – even from the state – would be able to claim rights and immediately (through legal proceedings) enforce it before the court, demanding an environmental condition which meets their individual needs. Nevertheless, the requirements laid down by the state – according to the Constitutional Court – must compliment the subjective side, in other words, must ensure the same (high) level of protection as if it were a legitimate, and classic fundamental right (or a subjective right).[28]

The most important means of enforcing the right to the environment is legislation. In the first place the legislator's obligation is to make legislations that ensure the constitutional values, in the present case providing the legal framework of the sensible management of natural resources. It does not only mean that the legislator particularly needs to make environmental legislations, but that they need to consider the affected environment in regulating the different living conditions (integration). The legislators are not obligated to ensure the protection level required by the scientists (or the maximum level) as they need to consider the achievability, the economic and sociopolitical objectives as well as other constitutional values (for example the freedom of possession and businesses). Therefore (if we exceed the necessary requirements of the protection of life) the sufficient protection level in space and time may be different or it might change as regards environmental protection. However, as the issue is the environmental foundation of human life, the level of protection must be high. According to the Constitutional Court, it is also a basic requirement that the legal order must prevent the condition of the environment from deteriorating. In case the regulations are not able to operate, or they cannot protect the environment, it means that the legislators made a mistake on the level of the protection, or the state did not establish the proper institutional system and organizational guarantees to enforce the regulations. However, the insufficient choice of the level of protection – according to

[26] Fodor 2006, 44.
[27] Fodor 2006, 45.
[28] Fodor 2015, 105.

the principal literature – can only have constitutional law consequences in extreme cases.[29]

From all the requirements by the Constitutional Court is outstanding the non derogation principle.[30] In this decision the Constitutional Court recorded that *"the right to a healthy environment includes the Hungarian Republic's obligation that the state cannot reduce the level of environmental protection ensured by the environmental protection regulations unless it is inevitable in the implementing of other fundamental rights or constitutional values. The deduction rate of the level of protection still cannot be out of proportion when it comes to the achievable target."*[31] The board pointed out that the right to a healthy environment is not an absolute right, it could also be limited according to the fundamental right test laid down by the Fundamental Law.[32]

The non derogation principle does not seek the choice of the first protection level, but to change the previous one. The derogation protects the previously chosen – already achieved with the legislations – level of protection from decrease, in other words the legislators cannot possibly decrease the achieved level of protection during the course of the legal regulation. The explanation for this is that decreasing the requirements regarding environmental protection could lead to the deterioration of the environment in a way that it could be irretrievable later. Therefore, this – as the environmental foundation of human life is in question – cannot be allowed. There could be many reasons in practice for the decrease, but the Constitutional Court, in order to avoid the disadvantageous consequences, the condition of the environment could have, (in theory) only in limited cases (in practice at no time) acknowledges such reasons as constitutional. Merely an economical reason or enforcing the freedom of businesses and property rights are not sufficient for the decrease.

Based on the derogation the step back is usually not a possibility unless it is absolutely necessary in order to enforce a constitutional value.[33]

The Constitutional Court in its decision of 14/1998. (V.8.) on the one hand repeated the implemented decisions according to the 1994 decision, on the other hand it acknowledged that the heavy involvement of the environment is necessarily inherent in the development policies: *"There is not a single developed country that would be capable of guaranteeing, in its whole area without differentiating, the minimal involvement of the environment. The improvement of the living conditions for humans or even maintaining their level is impossible without production investments or the development of the infrastructure, as railway construction or town developments will inevitably increase the previous involvement of the environment in the given area."*[34]

7. The right to the environment in the Fundamental Law

The Fundamental Law includes several innovative provisions in the matter of environment with an outstanding concern regarding the interest of the future

[29] Fodor 2015, 107.
[30] See more: Bándi 2017, 9–23.
[31] Decision 28/1994. (V.20.) of the Constitutional Court.
[32] Decision 17/2018. (X.10.) of the Constitutional Court.
[33] Fodor 2015, 108.
[34] Hermann 2017, 96.

generations.[35] At the time of the adaptation of the Fundamental Law, the legislators took into consideration the basic findings the Constitutional Court had adopted in its twenty-year-practice.

The requirements of preserving and maintaining environmental protection were raised to fundamental law level by section 1 of article P) of the Fundamental Law, these exemplary requirements, name which specific environmental values need to be protected by everyone: *"Natural resources, especially farmland, forests and water resources, biological diversity, most importantly native plants and species of animals as well as cultural values contribute to a country's common inheritance therefore it is the state's and everyone's obligation to protect, maintain, and preserve them for the future generations."* A significant improvement needs to be emphasized, namely that the Fundamental Law now points out 'everyone's' commitment, so it extends the circle of the obligated as opposed to the Constitution, in which only the state's commitment was emphasized regarding environmental protection. According to the Fundamental Law environmental protection is every natural and legal individual's obligation.[36] The right to a healthy environment was declared on the one hand as a right everyone is entitled to, on the other hand. the individual responsibility appears in connection to environmental protection.[37]

This regulation confirms the requirements developed previously by the Constitutional Court regarding the state's obligations, the initiation of sensible farming and the citizens' responsibility to cooperate in the protection of the environment (this latter has not been an element in the system of rights and obligations stated in the Constitution).

Environmental protection, as the obligation of the state and the citizens, was separately regulated in this section: this obligation is the protection, maintenance and the preservation of the environment for the future generations. Mentioning the future generations is also forward thinking, a rule warning the state to consider long term aspects. The Constitutional Court explained that the present generation has three obligations regarding the preservation of natural resources for the future generations: the preservation of the possibility of choice, quality and accessibility.[38]

These principles help the evaluation of the present and the future generations' interest in equal aspects, creating a balance in enforcing the three obligations as stated in article P).[39]

In 3104/2017. (V.8.) of the Constitutional Court decision the board explains that the Fundamental Law section 1 article P is a pillar of the institutional protection guarantee ensuring the right to a healthy environment as a basic right. This pillar states that based on the Fundamental Law, it is everyone's obligation and general constitutional responsibility to protect, maintain the natural and built environment, the nation's common, natural and cultural inherited values and preserve these for the future generations. The sustainability requirement founded for the constitutional protection of the nation's common inheritance appears in the Fundamental Law as an achievement

[35] Raisz 2012, 43.
[36] Gáva, Smuk & Téglási 2017, 17.
[37] Csink & T. Kovács 2013, 19.
[38] Szilágyi 2018, 80.
[39] Decision 13/2018. (IX.4.) of the Constitutional Court.

of constitutional development, which can, as new constitutional value, place basic rights and other constitutional values in new perspective of development. The constitutional responsibility for the nation's common inheritance is general as well as joint and several in the Fundamental Law. However, based on the practice of the Constitutional Court concerning the right to a healthy environment, the state has a kind of primacy and authority within the general range of responsibilities. In fact the state is obligated to enforce this responsibility by institutional protection guarantees as well as by the establishment of institutional protection, correction and putting these into effect. Therefore, the entire content regarding the constitutional responsibility for the nation's common inheritance is framed and developed by legal practice, by Constitutional Court practice and future legal development in addition to the enforcement of the institutional protection guarantee ensuring the basic right to a healthy environment and the requirement for legal certainty.[40]

In addition to the right to a healthy environment, the obligation for sustainable development is specifically laid down in the Fundamental Law. In this regard, article Q) refers to the state's international responsibilities when it states that *"Hungary…in the interest of sustainable development of mankind aims to cooperate with all countries and nations of the world."*

The right to a healthy environment is necessarily in connection with the right to a healthy body and soul laid down in article XX. of the Fundamental Law. Article XX. lays down the right to health and the means of enforcing this right, in many ways connecting it to the requirements regarding the environment: This *"…right is enforced in Hungary by providing an agriculture that is free from genetically modified live-stock, providing healthy food and water as well as ensuring the protection of the environment."* This provision, regarding water and food, establishes the state's obligation, in providing a more tangible service (drinking water as one of the environmental services of water supply) according to the present practice and the government's objectives, as well as the safety of the distribution of a product line (regulations concerning the safety of food, the establishment of an institutional system).[41]

The section 1 of article XXI. in the Fundamental Law includes, identically to the Constitution, that *"Hungary recognizes and enforces everyone's right to a healthy environment."*

In its decision 16/2015 (VI. 5.) the Constitutional Court stated that the ensuring and enforcing the right to a healthy environment in section 1 of article XXI. fulfills the state's objective drawn up in the section of article P). Maintaining the achieved level of protection of a healthy environment, as a result, ensures the accomplishment of the state's cited objective and the enforcement of the basic right to a healthy environment.

Reference to the responsibilities of the polluter appears as an annex in the Fundamental Law as well as the prohibition by the Fundamental Law to dump or traffic hazardous waste across the border: *"… (2) Anyone causing harm to the environment is obligated – determined by the law – to restore or cover the cost of the restoration. (3) It is forbidden to enter Hungary with hazardous waste for the purpose of dumping it."* The first regulation refers to the legal responsibilities of the environmental law[42] which is connected to the principles

[40] Decision 3104/2017. (V. 8.) of the Constitutional Court.
[41] Fodor 2015, 111.
[42] See more: Fodor 2020, 42-66.

of environmental law (the principle of polluter pay which is raised to constitutional level by the Fundamental Law). Regulations on waste[43] is unprecedented in Europe, and regarding its content – as waste is considered goods in the EU – it is the regulated based on the restrictions on the free transport of goods. Regarding its bonding power, it cannot be enforced directly, but provide guidance for further legislative proposals.[44]

The Constitutional Court in its decision 3114/2016. (VI. 10.) declared that the right to a healthy environment must be ensured by the state in its obligation of objective institutional protection, furthermore, the step back of the once achieved level of environmental protection must be justified by the state in consideration of the necessity and scale and along with applying other basic rights. The board also emphasized that *"…the objects of the protection regarding the right to a healthy environment are the external phenomena that could be influenced by the state, and which are directly able to have an effect on human health as well as contribute to achieving the regulation objectives of the Fundamental Law by the state's regulations. The object of the protection regarding the right to a healthy body and soul is the citizens' physical integrity and well-being. Although the objects of the protection are different in the two basic rights, they are necessarily interconnected as in some cases the violation in the right to a healthy environment could as well mean the restriction of the right to physical and spiritual health. Nevertheless, they share similarities in dogmatic aspect of the constitutional right in a way that only actual restriction proposes the possibility of the violation of fundamental rights."*

8. Closing thoughts

Environmental protection all over the world has received great significance since the middle of the 20th century. Air pollution, the lack of safe drinking water, trade and disposal of hazardous goods and waste, soil erosion, global climate change and decreasing biological diversity in a wide range demand measures to provide favorable environmental conditions for life and the well-being of mankind.

To establish a sustainable future requires universal actions in decreasing the long-term negative effects concerning the economy, society and the environment as well as in recognizing the need for changes.

Nowadays, communication networks make it possible to faster raise the awareness of the existence and extent of environmental problems. However, the large-scale mobility of people, products and goods can also contribute to the problems, for example by bringing in non-native species or spreading pollutants. Excessive consumption means a threat to the exhaustion of – living and non-living – resources while the increasing emission of greenhouse affecting gases harmfully change the global climate. High population density heavily affects the resources and causes pollution to an extent which exceeds the assimilation ability or capacity of the Earth. Resulting from the nature and range of human activity, there are constantly emerging problems, consequently modifying the European Union and international environmental protection regulations is a constant need.

[43] See more: Csák 2014, 16–32.
[44] Fodor 2015, 113.

In Hungary regulations of the basic issues of environmental protection are in accordance with international and EU trends. A provision regarding the right to a healthy environment was also included in the Constitution which provision was interpreted by the Constitutional Court's practice and was filled with content. At the same time, it established a strong constitutional requirement for the legislator (for example the non derogation principle). The Fundamental Law confirmed the constitutional foundations of the right to a healthy environment as well as the protection of the environment as an annex to the previous regulations of the Constitution.

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Land Consolidation in Croatia, Problems and Perspectives**

Abstract

Land consolidation is a very important instrument in agricultural planning and in making agricultural policies. It has a very long history in Croatia, dating to 18th century. However, it was formally made into legislation in the late 19th century. From then onward, it was rather widely used as a tool for consolidating fragmented pieces of agricultural land. After the independence in 1991, Croatia changed its constitutional and political setup in a manner which made further use of the existing law on land consolidation from 1979 impossible. However, the law stayed in force until the new law entered into force in 2015. Consequently, the institute of land consolidation was legally regulated the entire time, but the law was not applicable. Therefore, no land consolidations were made after 1991. Furthermore, last initiated land consolidation dated from 1989 and it was not, formally finished as the bodies which conducted land consolidations were abolished and new ones were never created. This is why the Constitutional Court had to react and this reaction brought the new law concerning land consolidation in 2015. However, from 2015 until now, no land consolidations were conducted or even initiated under the new law. In 2021, the Government started drafting the new law on land consolidation.

Keywords: land consolidation, tradition, Constitutional Court, problems in practice.

1. Introduction

"Land fragmentation exists as a side effect with detrimental implications for private and public investments, sustainable economic growth and social development, and natural resources. Less-favoured and least developed regions with economies still depending on agriculture have witnessed negative growth rates, soaring unemployment, increasing rural poverty and as a result, serious social and economic disintegration and wide-spread disappointment among local actors and stakeholders. … The small and fragmented parcels, sometimes scattered over different political, juridical and administrative boundaries obstruct spatial/territorial planning especially in terms of land administration, land use planning, and land management. This hampers the implementation of rural regional development policies, strategies, programmes, and projects aimed to improve rural livelihoods."[1] Land consolidation represents an institute which modern development started back in the 18th century, and from that time its adaption to different needs of different times is visible. The first law regulating land consolidation originates from Denmark at the beginning of the 18th century.[2]

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[1] The Munich Statement 2002.

[2] Staničić 2013, 1127. Ivković et al. 2010, 299.

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Its basic purpose is the consolidation of fragmented agricultural land in order to enable for effective and profitable production of agricultural goods.

However, through time also urban land consolidation had developed. Therefore, today[3] two types of land consolidation exist – agricultural land consolidation and urban land consolidation.[4] Agricultural land consolidation is used to enable the most possible unification of land for all land owners in the area in which it is performed. Usually, during land consolidation a new network of roads, canals and other devices is built, needed meliorations of land are performed and ownership (and possession) relations are resolved.[5] It is, of course, possible to find reasons *pro* et *contra* land consolidation. Among the pros there can be found: it is easier to cultivate unified land, it is easier to monitor the cultivation, heavy machines can be used, less land is lost to boundaries etc. On the other side, the opponents use the following arguments: one can profit and the other can lose in the land consolidation procedure, danger of hail is greater, smaller plots are more valuable and easier to sell and the cost of the procedure is too great.[6] Of course, another thing which is not to be neglected is that it is usually possible to conduct land consolidation without consent of owners and/or holders of land (depending on the percentage needed to start it).

„A main objective of land consolidation is to improve the land holdings of farmers by concentrating their farms in as few parcels as possible, and to support the farms with roads and infrastructure when needed. …Executed properly, land consolidation contributes to improvements in the productivity, efficiency, and competitiveness of the agricultural sector. It secures jobs in rural areas. It leads to better land use planning and land management. It facilitates private and public investment in rural space. It supports environmental protection and natural resource management if it is done in a comprehensive way."[7]

1.1. Different definitions of land consolidation

As a procedure, land consolidation requires the cooperation of several professions in order to achieve the aforementioned targeted results as it represents a very complex procedural institute. One needs lawyers, of course, but also economists, surveyors, agronomists, etc. in order to properly conduct it. Without cooperation of all aforementioned professions, land consolidation is impossible. *"A review of contemporary definition of land consolidation and a comprehensive review of land consolidation projects clearly show that they are of high level of complexity and high financial investments and consequently designing of land consolidation should be provided carefully in order to reach the necessary level of their effect."*[8]

[3] Both types existed in Croatia until 2013, when urban land consolidation was stricken out from our legislation without any explanation.
[4] Staničić & Pribičević 2014, 1.
[5] Krbek 1962, 160.
[6] Staničić, 2013, 1128.
[7] The Munich Statement 2002.
[8] Lazić et al. 2020, 1330.

Teleological definition of land consolidation starts from the objective which is primarily achieved by it and in that sense *"land consolidation of agricultural land is an operation of land development with one most important objective – unifying scattered and fragmented plots of land with the additional objective of improving production and work and living conditions in the rural area."*[9]

Economical definition of land consolidation states that *"it is a devised set of investment projects by which social-economic goals of development are achieved with the use of state supports and other means of social accumulation"*[10] and it sets out that land consolidation achieves social goals with state supports from which a conclusion that it is a procedure conducted in public interest is derived, which is to be taken into account when legislatively regulating its costs.[11]

One of the goals of land consolidation is surely an organized landscaping because of what a spatial-planning definition must be mentioned, by which land consolidation is determined as *"a social activity which is devised in a manner by which it affects the environment with the purpose of changing it in a way to reduce entropy and disintegration and to increase organization and cohesion."*[12]

Geodetic profession also has a definition of land consolidation which understands that it is an *"agrarian-technical operation which main purpose is to gather fragmented plots of land in several rounded areas."*[13]

At the end, the legal definition of land consolidation must be mentioned. From the legal theory's viewpoint, it represents a special administrative procedure which is conducted with the goal of deciding administrative matters in the area of development and protection of agricultural land, forests, water management, environmental protection and spatial and urban planning.[14]

1.2. Content and spatial coverage of land consolidation – forms of land consolidation

Potential of land consolidation comes from the fact that it represents the only procedure which is able to radically change the organization, disposition and form of prior existing plots of land on a specific area.[15] This is why land consolidation offers significant possibilities regarding the realization of great investment and infrastructure projects which cannot otherwise be realized, or their realization would be significantly hindered. The land consolidation projects initiation in the developed European countries such as Finland, Sweden, Netherland, Switzerland, Germany and others are conditioned by provision of the cost benefit analysis, and the benefits must be greater than the cost.[16]

[9] Trifković, Ninkov & Marinković 2013, 1.
[10] Miladinović 1997, 13.
[11] Staničić & Pribičević 2013, 1.
[12] Miladinović 1997, 13.
[13] Medić & Fanton 1992, 197.
[14] Miladinović 1997, 13, Borković 2002, 616.
[15] Staničić & Pribičević 2014, 2.
[16] Lazić et al. 2020, 1331.

The question remains in what measure will those possibilities be exploited what depends on needs and opportunities in concrete cases. Therefore, it is possible to differentiate multiple forms of land consolidation, depending on the complexity of the land consolidation intervention. As definite forms we have land consolidation of lower intensity (moderate land consolidation)[17], and its opposite, land consolidation of higher intensity (radical land consolidation).[18] Some authors also mention re-land consolidation (regrouping of state owned land) and land consolidation thorough expropriation procedure (sometimes it follows the building of great infrastructure of general interest).[19] Also, we can have a whole sequence of combined solutions by which concrete needs on a specific territory are satisfied.[20] *"There is no common methodology for land consolidation effects accepted. The methodology varies from a country to a counter because of the differences in natural and social conditions, different goals of land politics and in most cases it is dependent on available data. Bearing in mind that the wide spectra of methodologies for effects of land consolidation estimation, the chosen method should be harmonized with specific requirements in the country where the land consolidation project is provided."*[21]

2. The development of land consolidation in Croatia

It is necessary to mention that Croatia has always been, especially in the past, mostly agricultural country. Rural areas comprise more than 90% of mainland Croatia, and around 47% of the population lives on it.[22] Therefore, problems linked with agriculture have always been very important. Land consolidation was first regulated in 1891 by the Land Consolidation Act of 1891. However, it was not unknown even in the earlier period. Namely, land consolidation was regulated by several laws dating in the early 19th century which enabled for land consolidation even without the consent of the parties involved.[23] Only in the period from 1870 to 1879 forceful land consolidation was prohibited. A very important law regulating land consolidation was the Land Consolidation Act from 1902 whose drafting started in 1899. During the drafting of this Act which was in force until 1945, an extensive debate was held, in public, and in the parliament. This Act resulted in 212 land consolidation procedures until 1941 and other data suggest that around 120 cadastral municipalities entered into the land consolidation procedure from 1902 until 1941.[24]

After the Second world war, the land consolidation did not take place until 1954, when the first socialist land consolidation regulations entered into force. Prior that time, the state conducted numerous agrarian reforms in 1945 and 1953. However, the fragmentation and scattering of land became a large obstacle in land cultivation. Therefore, the need for land consolidation emerged again.

[17] Roić 2012, 157.
[18] Roić 2012, 157, Boban 2011, 281.
[19] Boban 2012, 281.
[20] Medić 1978, 42.
[21] Lazić et al. 2020. 1331.
[22] Ivković, Barković & Baćani 2010, 298.
[23] Staničić 2013, 1129.
[24] Staničić & Pribičević 2014, 2, Ivković et. al. 2010, 301.

This need was, at the beginning, satisfied by conducting arondations, but without a proper legal framework. These procedures were marked by large formal mistakes which made the needed changes in cadaster and land books impossible.[25] This is why the aforementioned Land Consolidation Act from 1954 came into force. Land consolidations could had been instigated by interested parties or by decision of state authority. The proclaimed goal of this regulation was to create larger and more suitable land plots in order to enable more efficient and more profitable cultivation of land and to create preconditions to perform meliorations and urban development. It is noteworthy to mention that this Act resembled the 1902 Act for the most part.[26] It was significantly changed in 1965, but this change was rated by experts as a step back in the development of land consolidation regulation.[27] After the constitutional amendments in 1971, federal laws were incorporated into the republic legislation and federal laws contained norms regarding land consolidation. So, after 1971 the regulation of land consolidation was fragmented, and new regulation was necessary. In 1979 the new Land Consolidation Act entered into force. This was the last socialist law which regulated land consolidation and it was in force (but not in use) until 2015. In the period from 1956 until 1991 in total 656,782 hectares undergone land consolidation and 603,068 hectares were hidromeliorated. In average, 19,302 hectares of agricultural land underwent land consolidation yearly, and average plot increased from 0.4 hectares to 1.04 hectares, and number of plots by a holding decreased from 8.8 to 3.4.[28] Of course, this did not satisfy the needs of agricultural production and did not resemble the objectives achieved in most European states.[29]

3. The 'vacuum' period of land consolidation in Croatia

Land consolidations were performed in Croatia, in accordance with the Land Consolidation Act from 1979 (1979 Act) until the Republic of Croatia became independent in 1991. Prior to that, in December 1990, the new Constitution was enacted. It is important to mention that the 1979 Act was a part of the republic, not federal legislation, which means that it remained a part of Croatian legal order even after independence.[30] However, it was not, under the new Constitution and different legal and territorial setup, possible to apply it. As a consequence, no land consolidation procedures have ever been initiated from 1991.[31] The main problem was the constitutional protection of property and the 1979 Act enabled for forceful land consolidation, not in accordance to the proportionality principle and the need to compensate those who loose part of their property in full market value (not all participants of land consolidation emerge from the procedure with equal land area they entered into the procedure).

[25] Medić & Fanton 1992, 202.
[26] Staničić & Pribičević, 2014, 2.
[27] Medić & Fanton 1992, 202.
[28] Ivković, Barković & Baćani. 2010, 301.
[29] Ivković, Barković & Baćani 2010, 302.
[30] Malenica 2015, 370.
[31] Marušić 2001, 114.

The other important issue was the fact that all bodies which were to conduct the land consolidation procedure ceased to exist with time and reforms in territorial setup.[32] This is especially true for the once existent Republic Committee for land consolidation.[33] Sadly, new ones were not ever created as the 1979 Act was never amended in the Republic of Croatia. Therefore, we had legal regulation of land consolidation, but this legal regulation was not applicable which created the legal and factual impossibility to perform the land consolidation procedure. This in a situation in which the state, notwithstanding great natural potentials, faces growing problems in agricultural production. Beside the fact that this situation has a negative effect on our economy, such state of affairs in the agrarian sector is also the cause of poor standard of life in rural areas, in which a growing number of young people leaves to more prosperous urban zones. Because of that our rural areas continuously loses new strengths and knowhow.[34] It is a rather devastating fact that, from the independence until today, not a single land consolidation procedure has been conducted.[35] In a country that regulated this institute so far back as the early 19th century and which has conducted more than several hundred large land consolidation procedures. The data shows that, for example, in the period 1956-1991 around 650,000 hectares of agricultural land were unified.[36] However, because of long flow of time, almost no one in state administration remembers how to conduct land consolidation procedures and most citizens do not even know that this institute even exists. Moreover, although urban land consolidation was revived in early 2000s, it disappeared after the enactment of new Building Act and the new Spatial Planning Act in 2013, without any explanation why this occurred.[37] While it existed (2007-2013) it was defined as a procedure of merging plots of building land into one whole and its division to building and other land in accordance with the detailed spatial plan on whole land consolidation area with simultaneous resolving of ownership and other relations on that whole with the objective of dividing the building land to the owners of the whole in proportion to the area and to the local government for the needs of public areas. Its main objective is to enable unimpeded development and construction of cities and settlements.[38]

However, this was not the only problem.

3.1. The pending land consolidation procedure issue and the decision of the Constitutional Court

The Constitutional Court of the Republic of Croatia made the decision U-IIIA-3222/2009[39] in December 2013 in which the Court ordered the Government of the Republic of Croatia to, in the shortest possible deadline, but not longer than three

[32] Malenica 2015, 370.
[33] Staničić 2017, 4.
[34] Staničić & Pribičević 2013, 2.
[35] Marušić 2001, 114, Staničić & Pribičević 2013, 2., Staničić 2016, 78.
[36] Staničić 2016, 91.
[37] Staničić 2016, 78.
[38] Boban 2012, 284.
[39] Official Gazzette, no. 14/2014.

months, determine the competent body for conducting all necessary actions to conclude the administrative matter in the procedure conducted by the Municipal land consolidation commission which originated in 1989. From the above stated, it is obvious that the land consolidation procedure was initiated according to the 1979 Act in 1989, but was never completed. As was already mentioned, after the new Constitution and the independence, most land consolidation bodies ceased to exist. This is especially true regarding the second instance land consolidation body – the Republic land consolidation Commission.[40] Consequently, the commenced land consolidation procedure never reached the end of procedure. In the aftermath, negative clashes of competence between the Ministry of Justice, Ministry of Agriculture, and counties (on the regional level) arose with a problem of establishing competence. The Committee for complaints of the Parliament suggested to the Ministry of Justice, Agency for agricultural land and the Ministry of Agriculture to commence necessary activities in order to enable for the continuation of the 'stalled' procedure. However, the legal framework did not enable for such continuation, in the opinion of said bodies. Consequently, the procedure was stalled for more than twenty years. The Constitutional Court found, in 2013, that the key reason for unreasonable lengthy procedure was the fact *"that the Land Consolidation Act was enacted in 1979 in the Socialist Republic of Croatia, and not even today was it aligned nor with the administrative-territorial setup nor with the state administration or local administration systems. On the other hand, until today the regulation which would contain clear rules regarding the competence of bodies of state or public authority for the deciding of started, yet unfinished land consolidation procedures do not exist."* Because of this, the Constitutional Court had no choice but to declare that *"such legal state of affairs is not aligned with the principle of the rule of law (Article 3 of the Constitution). It reiterated its view, expressed in multiple decisions, by which the state is obliged to organize its legal order in a manner that enables for the bodies of state and public authority to fulfill the demands enshrined in Article 29 para 1 of the Constitution and Article 6 para 1 of the Convention, as this is important for the correct and regular conducting of court and other legal procedures."*

Although this decision of the Constitutional Court is to be warmly greeted, it is not without flaw. It should be greeted as it prompted legislative changes and the enactment of a new law regulating land consolidation. However, there is a special issue regarding this decision. Namely, the Court ordered the Government to decide, on its own by its decision, which public body is competent for the continuation of the 'stalled' land consolidation procedure. In other words, the Constitutional Court empowered the Government to designate the competent authority, without clear legal basis for such a decision. It is important to note that the Constitution prescribes that setup and affairs of state administration and the manner of their performance shall be determined by law (Article 114 para. 1). Furthermore, the General Administrative Procedure Act (GAPA)[41] prescribes that law (Article 15 para. 1) must determine the competence of public bodies. Therefore, it is highly questionable whether the Constitutional Court had had the right to order the Government to determine, by its decision, the competent body for the continuation of this 'stalled' land consolidation procedure. Perhaps it would have been a better solution if the Constitutional Court ordered the Government

[40] Staničić 2016, 77.
[41] Official Gazette, no. 47/2009.

that it is obliged to initiate, within three months, the amendments of the 1979 Act in order to solve the problem of non-existent competent bodies. Alternatively, if the prior solution would have been deemed impossible, to initiate the enactment of a special law by which the competent bodies for the continuation of initiated but unfinished land consolidation procedures would be determined.[42] The Government, as is known to the author, opted for the enactment of a completely new law regulating land consolidation that came into force in 2015. This Act contains a provision that regulates such situations – where the procedure has been initiated according to the 1979 Act, but no first instance decision has been brought, or there has been a first instance decision, but it never has become final. In such cases, the competent body is determined according to the new Act, and the procedure is carried out according to the 1979 Act.

4. The new Land Consolidation Act from 2015

The above analyzed decision of the Constitutional Court shows that the situation with the legal regulation of land consolidation, which was existent, but not applicable as was explained above, was not sustainable any more. The Government acknowledged the fact that small and fragmented plots of agricultural land still prevail in the Republic of Croatia, what does not enable for a successful and profitable agricultural production. Most of the rural settlements and municipalities do not have the vitality in order to overturn unfavorable trends.[43] Furthermore, agricultural holdings in Croatia are six times smaller than the ones in most EU member states. Such fragmented holdings cause the increase of costs of tillage, sowing, protection and harvesting, causing decrease of income and no competitiveness.[44] Therefore, a new law on land consolidation was needed.[45] In 2015, the new (now in force) Land Consolidation of Agricultural Land Act (2015 Act)[46] came into force. After almost 25 years the conditions for 'reinventing land consolidation' were finally set as the 'legal gap' that existed since 1991. As was explained, there was no real legal gap, but there was a legal gap *de facto*, if not *de iure*.[47] The 2015 Act prescribes that land consolidation is performed in order to unify plots of land into bigger and regular ones, so they can be used better than before the land consolidation. It is also prescribed that land consolidation is in the interest of the Republic of Croatia. This means that it is possible to perform land consolidation by force, notwithstanding the eventual opposition by the owners.[48] Land consolidation must be performed in accordance with the yearly and perennial programs that are made by a governmental Agency for agricultural land.

[42] Staničić & Pribičević 2013, 3.
[43] Ivković, Barković & Baćani 2010, 298.
[44] Ivković, Barković & Baćani 2010, 298.
[45] Ivković, Barković & Baćani 2010, 308.
[46] Official Gazette, no. 51/2015.
[47] Staničić 2017, 4.
[48] Staničić 2016, 92.

The prerequisites for initiating land consolidation are that fragmentation and irregular shape of land makes it impossible to cultivate it purposefully, that existing property relations or extreme fragmentation of land make organization of production impossible in a way to ensure purpose for the invested funds on an area on which water buildings for melioration are already built or are being built and if the construction of new traffic infrastructure and/or arrangement of larger watercourses would cause further fragmentation of existing plots and disturbances in road and canals network (Article 5 para. 1). It is important to note that 2015 Act does not differ much from the prior in force 1979 Act. Of course, there are some significant changes. It was stated in theory that it is an Act by which any land consolidation will be performed with extreme difficulty.[49] This Act centralized the initiating part of the land consolidation procedure, and decentralized the performing of the land consolidation in the field.[50] Namely, only the Agency for agricultural land is, in effect, determining on which area land consolidation will be initiated, not taking into account the real needs and interests of owners and users of land. This represents a sharp turn from the tradition which dates in 1902, by which the owners and users of land were entitled to initiate the procedure.[51] One should think on the merits of initiating such a procedure in a case where the majority of owners and possessors of land are not inclined to participate.[52] The biggest flaw in the 2015 Act, as was seen by legal theory, is the solution by which land consolidation bodies are not allowed to determine ownership as a preliminary question during the procedure. Namely, when we examine Article 11 of the 2015 Act, one can see that it is necessary, in order to perform land consolidation, to determine the real state of ownership over the land which will be entered into the land consolidation procedure. If the ownership is not disputable, there is no problem and the procedure can be performed. However, if the ownership over the land is under dispute, the 2015 Act prescribes that such disputes must be resolved in front of a competent court. Of course, the 1979 Act contained a similar provision, but with an added paragraph that stated that, in case that disputes would significantly burden the performing of land consolidation, land consolidation bodies are allowed to resolve them as a preliminary question. Sadly, the 2015 Act does not contain such a provision. When we link this fact with the provision of Article 26 of the 2015 Act which prescribes that the land consolidation bodies are not allowed to apply the institute from the General Administrative Procedure Act – to resolve a preliminary question except if the parties transfer the resolving of such a preliminary question to them. In case of already instigated disputes it is questionable if this is really a possibility. According to this, if there is a dispute regarding ownership of land which should enter into the land consolidation procedure, the procedure cannot end until such disputes are prior dealt with.[53] This legal regulation in reality makes land consolidation impossible. If we take into account that land consolidation is performed on an area of one or more cadastral municipalities, it is safe to presume that there will be a large number of pending

[49] Staničić 2016, 108.
[50] Malenica 2015, 371.
[51] Malenica 2015, 376.
[52] Staničić 2016, 111.
[53] Staničić 2016, 110.

disputes over the ownership of plots of land which are to be entered into the land consolidation procedure. If the prerequisite for ending the procedure is the all such disputes are resolved, in other words, the decision on land consolidation cannot be issued if all disputes are not resolved, is it realistic to expect this in any reasonable time? Therefore, it is necessary, in order to fulfill the purpose of the 2015 Act that the land consolidation bodies use the institute from the general administrative procedure (preliminary question).[54] When we take into account the composition of the land consolidation bodies, we can see that in every one a municipal judge should preside (municipal judges rule on ownership disputes in general) so there really is no obstacle for the land consolidation bodies to rule on ownership disputes as a preliminary question within the land consolidation procedure.

Furthermore, it must be stressed out that the 2015 Act ignores the fact that the land consolidation procedure is an administrative procedure which should be performed according to the rules set up in GAPA. This will, without doubt, cause collisions between the two Acts in which case it will not be easy to determine which one has priority.[55]

These elements combined with the aforementioned loss of institutional memory (there are very few people who know how to perform land consolidation procedures since the last one originates from 1989[56]) resulted with zero land consolidation procedures in the period from 2015. Only five pilot projects were instigated, but all of them stayed only in the phase of conceptual design. Because of the delay in continuing with land consolidations, a theme debate of the Committee for Agriculture if the Croatian Parliament was arranged in 2017 in order to discuss the initiative of five faculties of the University of Zagreb to instigate the amendments of the existing legal setup and to promote the need to perform land consolidations.[57] It is obvious that the 2015 Act did not fulfill its purpose and that a new Act is needed in order to finally create such legal regulation which would enable, in reality, land consolidation. Of course, not all problems arise from flaws in the 2015 Act. Namely, The Government of the Republic of Croatia adopts the annual consolidation plan at the proposal of the Agency for agricultural land, and the Croatian Parliament adopts five-year plan of land consolidation, also at the proposal of the Agency. The Government did not adopt any yearly plans nor did the Parliament adopt the first five-year plan.[58] Although the 2015 Act exists, there was obviously no political will to enforce it, notwithstanding its obvious flaws.

5. Suggestions for the legislative change in order to enable land consolidation in Croatia

As was mentioned above, the land consolidation procedure is extremely centralized regarding the decision whether to, and in what area, initiate the procedure.

[54] Staničić 2016, 110.
[55] Staničić 2016, 111, Staničić 2017, 6.
[56] Staničić 2017, 4, Ivković, Barković & Baćani 2010, 310.
[57] Staničić 2017, 4.
[58] Staničić 2017, 6.

Only Agency for agricultural land in authorized to prepare land consolidation plans and to submit them to the Government (yearly plans) and to the Parliament (five-year plans). It is necessary to authorize the owners and holders of land to give initiative to instigate the procedure by a qualified majority. In addition, the municipalities should also have a say in such matters, as they are best aware of the state of affairs on their territory. Especially as they bear the costs of the land consolidation. It is also worth rethinking the situation in which land consolidation is initiated even most of the owners and/or holders of land are not in favor of it. Of course, practice of conducting land consolidation throughout Europe shows that it is nowhere only voluntary, but public interest must be respected. Therefore, it is customary to determine the percentage of participants whose land would be taken into land consolidation who must be for its initiation.[59]

It is also worth mentioning that the system of land consolidation is very complicated with many bodies that are obliged to participate in it. First, we have the Agency that prepares the procedure, formally instigates it and names the committee for land appraisal. Second, we have the county land consolidation committee that conducts the procedure in the first instance. Third, we have the State land consolidation committee that resolves appeals against first instance decisions. Fourth, we have the special committee that determines the state of land and resolves all property issues regarding the land which is entered into the procedure. Fifth, there is a special committee for land appraisal and seven the contractor of professional geodetic works. Therefore, it is obvious that the procedure should be less complicated and with less bodies. Of course, land consolidation will always be a lengthy and rather complicated administrative procedure, but certain phases of the procedure can be merged, and a lot of responsibility should be places on the municipalities on which area land consolidation is carried out.[60] However, only such owners and/or holders who really deal in agriculture should have a say in whether land consolidation should be conducted or not. Others should be given the opportunity to sell their land to the state or other participants.[61]

As was said, land consolidation is an administrative procedure and, as in all administrative procedures, GAPA is applicable. 2015 Act does not contain special provisions regarding many questions what could cause problems in practice as than GAPA is applicable entirely. Therefore, it is necessary to take a stand that in land consolidation procedures all interim decisions (with the exception of the decision to initiate land consolidation) can only be disputed in the appeal against the land consolidation decision. If this would not be the case, the procedure would be too lightly and almost impossible to conclude.[62] Perhaps it would be even better to exclude appeals in land consolidation procedures, so the only available legal remedy would be administrative dispute. As we have two-tier administrative adjudication, a solution in which the normally second instance High Administrative Court of the Republic of Croatia should adjudicate in the first instance as the court of first and last instance.

[59] Ivković, Barković & Baćani 2010, 308.
[60] Staničić 2017, 6.
[61] Ivković et al. 2010, 308.
[62] Staničić 2017, 6.

This would not be an exception, as the High Administrative Court Acts as a first instance court in several administrative areas (access to information, public procurement etc.). This because 'normal' legal protection in our administrative law includes two-tier administrative procedure and two-tier administrative dispute. In even the best circumstances, it is impossible for a decision, which is under scrutiny, to become final under a year if the party exhausts all available legal remedies. When it comes to land consolidation, it is also important to allow for extraordinary legal remedies narrowly. For example, renewal of proceedings as an extraordinary legal remedy prescribed by GAPA is always excluded in land consolidation procedures. However, one should rethink the use of other extraordinary legal remedies prescribed by GAPA and not excluded in land consolidation procedures. Namely, if the land consolidation is carried out after the decision becomes final, all changes will also be carried out in all relevant registries and new plots of land will be created, divided among the participants, new roads, canals etc. will be built. Most extraordinary legal remedies prescribed by GAPA can be used several years after the decision has become final, even parallel with an administrative dispute. The annulment of a final land consolidation decision can therefore have grave consequences for all participants and the municipality so special care should be given to this issue when we regulate land consolidation.

6. Conclusion

Land consolidation in Croatia has a long history of use. Legal regulation of this institute started in the 19th century, with its continuous use throughout the entire 20th century. Fragmentation of land was always and still is a major problem in profitable agricultural production. However, after 1991 land consolidation ceased to be used as a tool in agricultural policy and practice. Institutional memory regarding land consolidation is almost extinct as last land consolidation was instigated in 1989 and was never formally finished. The fact that we have had legal regulation *de iure*, but not in reality, effectively disabled the use of land consolidation. On the other hand, there was a step in the right direction when urban land consolidation was introduced in the legal area of building and spatial planning in 2007. However, this institute was also never successfully used in practice. Furthermore, it 'disappeared' after the 2013 legislative changes and was never reintroduced. The only conclusion that can be reached is that Croatia abandoned land consolidation altogether. Fortunately, the Constitutional Court brought its decision U-IIIA-3222/2009 in late 2013 which prompted the Government to reopen the debate on land consolidation as a useful tool. Soon after, the 2015 Act came into force. However, this Act did not bring sufficient change as it is really not applicable in practice.

The reasons for this are threefold. Firstly, the procedure prescribed is unnecessarily complicated and lengthy with many bodies in prescribed cooperation. Secondly, the land consolidation bodies are prohibited to resolve ownership disputes, which renders impossible to conclude the procedure in a reasonable time. Thirdly, the state does not show the political will to conduct land consolidation as it never brought the needed land consolidation plans which are the basis for the next step – initiating land consolidation procedures according to the plan of land consolidation in that year.

Therefore, land consolidation is not to be expected while the 2015 Act is in force. However, there are legislative changes in the making and it is possible that we will have a new Land Consolidation Act in 2022.[63]

[63] The author is a member of the working group named by the competent ministry.

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Hajnalka SZINEK CSÜTÖRTÖKI*

The current legislation on land protection in Slovakia with particular regard to the decision of the Slovakian Constitutional Court on unconstitutional provisions of the Act on land acquisition**

Abstract

The accession of the Slovak Republic to the European Union opened a whole new chapter in the country's history and brought dynamic changes to its land transfer legislation. In the Slovak Republic, the moratorium forbidding the purchase of agricultural land by foreigners expired in 2014. Following this period, the European Commission launched a comprehensive examination of the legal status of land acquisitions in the new Member States. The investigation revealed that certain provisions of the Slovak land regulation restricted the EU's fundamental economic freedoms. Even before this revelation, Act no. 140/2014 Coll. on the acquisition of ownership of agricultural land had been the subject of numerous public debates. Consequently, the Slovak Constitutional Court annulled a significant part of the Act on land acquisition in its decision of November 14, 2018. This article introduces the current legislation on land protection in Slovakia and describes the aforementioned decision of the Constitutional Court of the Slovak Republic in detail.

Keywords: natural resources, agricultural land, land transfer law, Slovak Republic.

1. Introduction

The accession of the Slovak Republic to the European Union (hereinafter referred to as EU) opened a whole new chapter in the country's history and brought dynamic changes to its land-use legislation.[1] Member States that joined the EU on May 1, 2004 undertook in their accession documents to bring their national rules in line with

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[1] For a more detailed description of Slovak regulations in Slovak language related to this topic, see, for example, the following: Lazíková & Bandlerová 2011; Lazíková & Bandlerová 2014, 116–125; Ilavská 2016, 38–45. For literature in English, see, for example: Lazíková, Bandlerová & Lazíková 2020, 98–105; Drábik & Rajčániová 2014, 84–87; Csirszki, Szinek Csütörtöki & Zombory 2021, 29–52; Lazíková et al. 2015, 367–376; Palšová et al. 2017, 64–72; Palšová 2019, 72–76; Palšová 2020; Bandlerová, Lazíková & Palšová 2017, 98–103; Palšová, Bandlerová & Machničová 2021, 873; Dufala, Dufalová & Šmelková 2017, 156–166.

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EU legislation.[2] However, for a transitional period, the acceding Member States were allowed to maintain their national legislation in force, even though a few of them were restrictive on the acquisition of ownership of agricultural and forestry land. As we will see, this was essentially the beginning of the most dynamic period of Slovak land regulation.

After April 30, 2014 – the end of the transitional period – the European Commission (hereinafter referred to as EC) conducted a comprehensive examination of the national rules of the newly acceded Member States. Consequently, the EC learnt that certain provisions of the national rules of these States on land use restricted the EU's fundamental economic freedoms. In the case of Slovakia, the affected fundamental freedoms included free movement of capital and freedom of establishment. Violating these fundamental rights could significantly reduce cross-border investment in agriculture. However, it is noteworthy that even before the investigation of the EC, the Constitutional Court of the Slovak Republic had already examined the constitutionality of certain provisions of the Act no. 140/2014 Coll. on the acquisition of ownership of agricultural land (hereinafter referred to as the Act on land acquisition).

2. Overview of the constitutionality and most important sources of the Slovak land law

In Slovakia, major changes in agricultural and forestry land legislation occurred in 2017. These changes were primarily linked to the constitutional protection of agricultural and forestry land, which can be found in Chapter Two, Part Two of the Constitution of the Slovak Republic,[3] under the title 'Basic Human Rights and Freedoms.' Similar protective measures are enacted in Part Six of the Constitution, titled 'The Right to the Protection of the Environment and Cultural Heritage.'

Agricultural land, which is both an integral part of a country's territory and an important natural heritage, is available in limited quantity. Therefore, it should be the duty of every country to protect their agricultural land. In case of Slovakia, this 'duty' has been declared in the Slovak Constitution via amendment[4] no. 137/2017 Coll.,[5] with effect from June 1, 2017.[6] This change responds to the Programme Declaration of the Government of the Slovak Republic for 2016–2020 (hereinafter referred to as Programme Declaration).[7]

[2] On the regulation of the agricultural sector in the EU in the light of EU accession, see: Bányai 2016, 106.

[3] Ústavný zákon č. 460/1992 Zb., Ústava Slovenskej republiky. In English: Constitution of the Slovak Republic, Act no. 460/1992 Coll. Hereinafter referred to as Constitution of the Slovak Republic or Constitution or Slovak Constitution.

[4] Of the 140 MEPs: 113 for, 19 against, 5 abstained, 3 did not vote.

[5] Ústavný zákon č. 137/2017 Z. z., ktorým sa mení a dopĺňa Ústava slovenskej republiky č. 460/1992 Zb.

[6] The amendment to the Constitution was adopted on May 16, 2017.

[7] Programové vyhlásenie vlády Slovenskej republiky

According to the Programme Declaration, Slovakia is a predominantly rural country and, therefore, the policies of the Government aim to support and promote rural development and improve the living conditions of rural populations. The Government considers agriculture, food, and forestry as strategic sectors of the State's economic policy, and they are irreplaceable in the structure of the economy.[8]

The Constitution enshrines the fundamental right to live in a favourable environment. Additionally, it is the constitutional duty of the State to protect and enhance the environment and different types of cultural heritage. Additionally, the provision that none may endanger or damage neither the environment nor natural resources and cultural heritage beyond reasonable limits is also enacted in the Constitution.[9] According to the Constitution, the State shall ensure a cautious use of natural resources, protection of agricultural and forestry land, ecological balance, and effective environmental care, and protect specified species of wild plants and animals. The Constitution specifically emphasizes the protection of agricultural and forestry land among natural resources.[10] Additionally, these two natural resources are defined as non-renewable natural resources[11] and the Constitution accords them priority protection in order to ensure the country's food security.[12,13] The inclusion of the concept of food security in the Constitution is critical, especially in the context of the provisions laid down in the Treaty on European Union,[14] which states that national security is an exclusive competence of the Member States.[15] The concept of national security can also be seen as the concept of State security, and, consequently, the concept of food security can also be considered as an integral part of State security.[16]

[8] For information, see the Programme Declaration of the Government of the Slovak Republic
[9] Constitution of the Slovak Republic, Article 44 Sections (1)–(3).
[10] Constitution of the Slovak Republic, Article 44 Sections (4)–(5).
[11] For more on this subject, see, for example: Hornyák 2017; Orosz 2018; Olajos 2018; Szilágyi 2018.
[12] See, for example, the material issued by the Office of the National Council of the Slovak Republic on the occasion of the 25th anniversary of the Slovak Constitution, written by Natália Rolková Petranská. See: Rolková Petranská 2017, 70.
[13] Constitution of the Slovak Republic, Article 44 Section (4): "*The state looks after a cautious use of natural resources, protection of agricultural and forest land, ecological balance, and effective environmental care, and provides for the protection of specified species of wild plants and animals."* See also the Constitution of the Slovak Republic, Article 44 Section (5): *"Agricultural and forest land are non-renewable natural resources and enjoy special protection by the state and society."*
[14] Consolidated version of the Treaty on European Union, Article 4 Point 2: "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*"
[15] The last sentence of the Consolidated version of the Treaty on European Union, Article 4 Point 2.
[16] Pavlovič 2020, 67.

However, the rights enshrined in Article 44 of the Constitution are not directly enforceable, but they can be enforced through different Acts. This possibility is stated in Article 44 Section (6) of the Constitution, which explicitly refers to the enforceability of third-generation human rights, also known as solidarity rights. It is important to underline that solidarity rights include not only the right to protect cultural heritage but also the right to protect the environment. It arises from the provision of the Constitution that everyone has a right to a sustainable environment. Notwithstanding the previous sentence, this right cannot be considered as an individual right, as its purpose is primarily to ensure that society benefits from it. That's why it must be considered as an intergenerational right, but it should also be noted that solidarity is inherent in the right to the environment.[17]

It is also noteworthy that Article 20 Section (2) of the Constitution has been amended as follows: *"The law shall lay down which property, other than property specified in Article 4 of this Constitution,[18] necessary to ensure the needs of society, national food self-sufficiency, the development of the national economy and public interest, may be owned only by the state, municipality, or designated individuals or legal persons. The law may also lay down, that certain things may be owned only by citizens or legal persons resident in the Slovak Republic."*

This amendment enables the legislator to restrict the acquisition of agricultural and forestry land by certain groups of persons – legal as well as natural – including foreigners. The Explanatory Memorandum to the Act on land acquisition[19] (hereinafter referred to as the Explanatory Memorandum) justifies these changes based on the need to establish a framework for the protection of agricultural land against speculative purchases, which could have negative consequences.[20]

The State ought to be responsible for the protection of its land through legislation as well as control of certain activities, supported by sanction mechanisms. These instruments should, therefore, be legally binding and enforceable. Certain arguments state that the changes in the Constitution on land protection are rather declaratory. However, it enabled the legislators to adopt laws on land protection, which were anchored in the Constitution.[21]

[17] Pavlovič 2020, 63.

[18] Constitution of the Slovak Republic, Article 4: *"(1) Raw materials, caves, underground water, natural and thermal springs and streams are the property of the Slovak Republic. The Slovak Republic protects and develops these resources, and makes careful and effective use of mineral resources and natural heritage to the benefit of its citizens and subsequent generations.(2) The transport of water taken from water bodies located within the territory of the Slovak Republic outside the borders of the Slovak Republic by vehicles or pipeline is prohibited. This prohibition does not apply to water intended for personal use, drinking water put into consumer containers within the territory of the Slovak Republic and natural mineral water put into consumer containers within the territory of the Slovak Republic; nor to water provided for humanitarian help or assistance in states of emergency. Details of conditions for transporting water for personal use or water provided for humanitarian help and assistance in states of emergency shall be stated in a specific Law."*

[19] The explanatory memorandum to the Act on land acquisition is available in Slovak language on the website of the National Council of the Slovak Republic.

[20] Pavlovič & Ravas 2017.

[21] Pavlovič 2020, 63.

The Slovak land regime regulation is a complex system of legal norms. The most important legal source in this context is the Act on land acquisition,[22] which regulates certain legal stages in the acquisition of ownership of agricultural land by transfer and also regulates powers of public administrative bodies regarding the transfer of ownership of agricultural land. A detailed listing of all legal sources is beyond the scope of this study.[23]

3. A short historical overview on land acquisitions

As stated above, the accession of Slovakia to the EU on May 1, 2004 was an important milestone in the history of Slovak land regulations. The legal framework of the EU has undoubtedly played a decisive role in its land protection. However, there is still no legal provision to protect the agricultural land in the country – to date, no legal measures have been implemented to limit the sale of agricultural land.

On October 12, 2017, at the request of the European Parliament,[24] a guidance was published by the EC to help the newly acceded Member States to eliminate legal barriers to the sale and purchase of agricultural land, such as excessive price speculation and concentration of property rights.[25] The guidance shows that Member States possess

[22] Zákon č. 140/2014 Z. z. o nadobúdaní vlastníctva poľnohospodárskeho pozemku

[23] For the most important sources of Slovak land law, see, for example: Act no. 229/1991 Coll. on ownership of land and agricultural property, as amended (Zákon č. 229/1991 Z. z. o úprave vlastníckych vzťahov k pôde a inému poľnohospodárskemu majetku), which regulates the rights and obligations of owners, users, and lessees of land, as well as the competence of the State in regulating ownership and user rights on land; Act no. 180/1995 Coll. on certain measures for land ownership arrangements, as amended (Zákon č. 180/1995 Z. z. o niektorých opatreniach na usporiadanie vlastníctva k pozemkom); Act no. 504/2003 Coll. on the lease of agricultural land plots, agricultural enterprise, and forest plots, as amended (Zákon č. 504/2003 Z. z. o nájme poľnohospodárskych pozemkov, poľnohospodárskeho podniku a lesných pozemkov); Act no. 180/1995 Coll. on certain measures for land ownership arrangements, as amended (Zákon č. 180/1995 Z. z. o niektorých opatreniach na usporiadanie vlastníctva k pozemkom); Act no. 330/1991 Coll. on land arrangements, settlement of land ownership rights, district land offices, the Land Fund and land associations, as amended (Zákon č. 330/1991 Zb. o pozemkových úpravách, usporiadaní pozemkového vlastníctva, pozemkových úradoch, pozemkovom fonde a o pozemkových spoločenstvách); Act no. 162/1995 Coll. on cadastre of real estate and on registration of ownership and other real estate rights, as amended (Zákon č. 162/1995 Z. z. o katastri nehnuteľností a o zápise vlastníckych a iných práv k nehnuteľnostiam); Act no. 220/2004 Coll. on the protection and use of agricultural land, as amended (Zákon č. 220/2004 Z. z. o ochrane a využívaní poľnohospodárskej pôdy); Act no. 40/1964 Coll., Civil Code, as amended (Zákon č. 40/1964 Zb., Občiansky zákonník); Act no. 202/1995 Coll., the foreign exchange act, as amended (Zákon č. 202/1995 Z. z., Devízový zákon).

[24] For further information, see the motion for a European Parliament resolution on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers.

[25] For more information, see: Sales of farmland: Commission issues guidelines to Member States.

the legal power to implement measures to control the sale of agricultural land.[26] As the EC report shows, the guidance aims to protect economic interests and investments connected to the land regime. It is worth mentioning that these rules derive from the Accession Treaty of 2003, which granted the new Member States a transitional period.[27]

Generally speaking, the Member States that joined the EU in 2004, including Slovakia, are legally obliged to harmonize their national rules with the EU rules. For most of the Member States, this transitional period lasted seven years, till 2011, but the Slovak Republic submitted a request[28] to the EC for a three-year extension.[29]

Consequently, on April 14, 2011 the EC adopted Decision no. 2011/241/EU[30] approving the application and extending the transitional period concerning the acquisition of agricultural land in Slovakia until April 30, 2014.[31]

Since April 30, 2014, the EC has conducted an extensive investigation among the newly acceded Member States.[32] It learnt that certain provisions in national laws of these States still restricted EU's fundamental economic freedoms. In case of Slovakia, the restriction on free movement of capital and the freedom of establishment were explicitly problematic, as restricting these fundamental rights could lead to a significant

[26] The guidance defines as acceptable the restrictions based on the prior authorization of the national authorities for the acquisition of the land, restrictions on the size of the land to be acquired, State price interventions or, for example, pre-emption rights for land acquisitions. The guidance marks unacceptable the State interference for the imposition of an obligation to cultivate land or a prohibition on the acquisition of land, and the requirement of an agricultural qualification as a precondition for land acquisitions.

[27] Pavlovič 2020, 65.

[28] The main reason for the transitional period was the need to protect the socio-economic conditions for agricultural activities in Slovakia, owing to the introduction of a single market system and the transition to the common agricultural policy. Additionally, further concerns about the potential impact on the agricultural sector were to be considered because of the large initial differences in land prices and incomes, especially in comparison with the Western and northern countries. The transitional period was intended to facilitate the process of land restitution and privatization for farmers. See: Nociar 2016.

[29] Lazíková & Bandlerová 2014, 121.

[30] Commission Decision of 14 April 2011 extending the transitional period concerning the acquisition of agricultural land in Slovakia.

[31] Commission Decision of 14 April 2011 extending the transitional period concerning the acquisition of agricultural land in Slovakia (2011/241/EU) is available in English language (and also in official languages of the EU) on the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011D0241&from=HU

[32] Ágoston Korom and Réka Bokor, *"Land policy of the new Member States – Transparency and non-discrimination."* The authors indicated that although *"the European Commission has discretionary powers as to which Member State to open a full investigation or infringement procedure against"* and that the EC *"monitors the application of EU law for all Member States on an ongoing basis and takes action on complaints against the laws and measures of all Member States equally,"* they found the discrimination against the new Member States to be worrying, unjustified, and unfounded. For further information, see: Korom & Bokor 2017, 262–263, 266.

reduction in cross-border agricultural investment.[33] Therefore, in 2015, the EC launched infringement proceedings against five Member States: Hungary, Bulgaria, Latvia, Lithuania, and Slovakia. In case of Slovakia, the legal provisions related to 10 years of permanent residence or registered office and a minimum of three years of commercial activity in agricultural production were controversial. The most problematic, however, was the criterion of a long-term residence in Slovakia,[34] which resulted in discrimination of other EU nationals.[35] The Slovak legislature responded to this situation by amending a certain paragraph of the Foreign Exchange Act,[36] which fully opened the agricultural land market not only to EU citizens, but also to third-country nationals. Additionally, several new rules concerning the purchase of agricultural land were adopted by the country.[37]

The Act on land acquisition, which came into force on June 1, 2014 regulated the transfer of agricultural land, while ensuring a relatively wide contractual freedom. The explanatory memorandum of this Act stated that a principal objective of the legislation was to regulate the acquisition of agricultural land to prevent speculative land purchases, and, thereby, create a legal framework to allow agricultural production to continue as originally intended. The prime objective of the law, therefore, is to ensure that agricultural land is used by the user for its intended agricultural purposes.[38]

One of the most important provisions of the Act on land acquisition was the introduction of a strictly regulated tendering procedure. According to it, the seller was obliged to upload his intention to sell the agricultural land[39] at least 15 days before the transfer to the database on transfer of ownership of agricultural land, which was established by the Ministry of Agriculture and Rural Development of the Slovak Republic. Additionally, the landowner had to publish his offer on the bulletin board of the territorially competent municipality. The publication of the official notice on the bulletin board of the municipality was free of charge, and the municipality had to cooperate in publishing such offers.[40] The potential buyer was obliged to indicate his intention to acquire ownership of the land at the address of the owner, within the time limit specified, and for the price offered in the register.[41] If these conditions were fulfilled, the ownership of the agricultural land could be acquired by a natural or legal person who had been resident or had a registered office in the country for at least 10 years and had been engaged in agricultural activity for at least 3 years before the

[33] See the press release of the EC: *"Financial services: Commission requests Bulgaria, Hungary, Latvia, Lithuania mnd Slovakia to comply with EU rules on the acquisition of agricultural land*."
[34] Macejková 2016, 19–20.
[35] Szilágyi 2017, 176.
[36] Act no. 202/1995 Coll., the Foreign Exchange Act, Paragraph 19a: *"A foreigner can acquire ownership of real estate in the country if there are no restrictions on the acquisition of such property in special laws."*
[37] Lazíková, Bandlerová & Lazíková 2020, 100.
[38] Kollár 2019.
[39] The procedure for the transfer of ownership of land, laid down in Paragraph 4 of the Act on land acquisition.
[40] Strapáč 2015, 15.
[41] Lazíková, Bandlerová & Lazíková 2020, 101.

conclusion of the contract.[42] If no one expressed the intention to buy the land offered for sale in this way, the agricultural land could be claimed (in the first place) by a person having permanent residence or a registered office in the municipality where the agricultural land was located. In the absence of interest, an offer could be made to natural person residents or legal persons with a registered office in a neighbouring municipality.[43] If no one expressed an intention to buy the land offered for sale in this way, the agricultural land could be offered to the person having permanent residence or a registered office outside the municipality in whose administrative territory the agricultural land was located. If no acquirer (irrespective of permanent residence or registered office) expresses interest in acquiring the land in the tendering procedure, the transferor may transfer the land exclusively for the price or value equal to that indicated in the unsuccessful tendering procedure, and exclusively to a person who has been a permanent resident or has a registered office in the territory of the Slovak Republic for at least 10 years. Additionally, the transfer may be made no later than six months after the unsuccessful completion of the tendering procedure.[44] The competent district office[45] was responsible for verifying the existence of legal requirements for the transfer of ownership of land.

It should be noted, however, that even before the formal request of the EC, the Act on land acquisition was the subject of numerous professional and political debates because of its provisions. Consequently, two political groups of the National Council of the Slovak Republic (hereinafter referred to as the Slovak Parliament) submitted a petition[46] to the Constitutional Court of the Slovak Republic seeking examination of the constitutionality of the aforementioned provisions.[47]

4. Decision of the Constitutional Court of the Slovak Republic on the constitutionality of certain provisions of the Act on land acquisition [48]

On November 14, 2018 the Constitutional Court of the Slovak Republic[49] ruled in a closed session, on the one hand, on the motion of a group of 40 members of the Slovak Parliament to initiate proceedings under Article 125 Section (1) Point (a) of the

[42] Kollár 2019.
[43] Act on land acquisition, Paragraph 4 Section (7)
[44] Relevans advokátska kancelária 2017.
[45] The territory of Slovakia is divided into eight regions *(kraje)* and 79 districts *(okresy)*.
[46] The petition was not a joint petition, but two separate petitions were submitted. The first one was filed by a group of 40 members of the Slovak Parliament on 2 July 2014, while the second one was filed by a group of 33 members of the Slovak Parliament on 3 July 2014. The Constitutional Court in its preliminary examination of the petition found that the conditions for the substantive examination of the two cases provided were met, and therefore merged the two petitions. For this reason, they were recorded as one petition in the paper.
[47] Drábik & Rajčániová 2014, 84.
[48] Decision no. PL. ÚS 20/2014 of the Constitutional Court of the Slovak Republic.
[49] Ústavný súd Slovenskej republiky. Hereinafter referred to as Constitutional Court or Slovak Constitutional Court.

Constitution of the Slovak Republic[50] examining the conformity of the Act on land acquisition with certain provisions[51] of the Constitution of the Slovak Republic, and, on the other hand, on the motion of a group of 33 members of the National Council of the Slovak Republic to initiate proceedings pursuant to Article 125 Section (1) Point (a) of the Constitution on the conformity of the Act on land acquisition with certain provisions[52] of the Constitution.[53] In its decision, the Constitutional Court found that the provisions of Paragraphs 4, 5 and 6 of Chapter I of the Act on land acquisition in question were not in line with certain provisions of the Constitution of the Slovak Republic;[54] however, it did not accept the rest of the proposals of either group.[55]

Given the limited scope of the study, I will introduce only those parts of the decision that I consider paramount.[56]

It is clear from the nature of the legal norms examined and the petitioners' arguments that the key issue for the Slovak Constitutional Court was the assessment of the constitutionality of the problematic legislation in relation to Article 20 Section (1) of the Slovak Constitution.[57,58] Article 20 of the Constitution enshrines that everyone has the right to own property and the ownership right of all owners possesses the same legal content and needs the same protection. The Article further states that property acquired in a manner that is contrary to Slovak laws shall not enjoy such protection,

[50] Constitution of the Slovak Republic, Article 125 Section (1) Point a): *"The Constitutional Court decides on the compatibility of laws with the Constitution, constitutional laws and international treaties to which a consent was given by the National Council of the Slovak Republic and which were ratified and promulgated in a manner laid down by law..."*

[51] More specifically, Article 1 Section (1), first sentence, in conjunction with Article 2 Section (2); Article 12 Sections (1) and (2); Article 13 Sections (3) and (4); and Article 20 Sections (1), (2), and (4) of the Constitution of the Slovak Republic.

[52] More specifically, Article 1 Section (1); Article 2 Section (2); Article 12 Sections (1) and (2); Article 13 Sections (3) and (4); Article 20 Sections (1), (2), and (4); Article 35 Sections (1) and (2); and Article 55 of the Constitution of the Slovak Republic.

[53] The Slovak Constitutional Court, in its preliminary examination of the motions to open proceedings, concluded that the conditions for the substantive examination of the two cases provided for in the Constitution and in Act No. 38/1993 of the National Council of the Slovak Republic on the organization of the Constitutional Court of the Slovak Republic, the procedure before it, and the status of its judges, as amended, were met, and therefore, by its decision of September 17, 2014, PL. ÚS 20/2014, it merged the two motions to open proceedings into a joint procedure and accepted them for further proceedings. It did not grant the requests for suspension of the contested legislation.

[54] More specifically, Article 1 Section (1); Article 13 Section (4), and Article 20 Section (1) of the Constitution of the Slovak Republic.

[55] Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, 1 and 2.

[56] The decision of the Constitutional Court itself is 81 pages long, which does not include the dissenting opinions.

[57] Constitution of the Slovak Republic, Article 20 Section (1): *"Everyone has the right to own property. The ownership right of all owners has the same legal content and protection. Property acquired in any way which is contrary to the legal order shall not enjoy such protection."*

[58] For more on the right to property, see, for example: Drgonec 2019; Orosz et al. 2021; Čič et al. 2012.

and that the right of inheritance is fundamentally guaranteed.[59] Thus, based on this it can be concluded that the property rights of all owners have the same legal content; however, there is no precisely defined (delimited) definition for such content.[60] It can, therefore, be concluded that the right to property is considered a fundamental right by the Slovak Constitutional Court, but the right to acquire property is not considered a fundamental constitutional right. The Constitutional Court has already ruled in several cases that Article 20 Section (1) of the Constitution does not guarantee the right to acquire property[61] and that Article 20 Section (1) of the Constitution only protects property acquired in accordance with the law in force.[62,63]

As highlighted by the Constitutional Court, the legislation in question is substantially related to the fundamental right to property, and the Act on land acquisition is intended to impose limits on the transfer of ownership to a form of individualized ownership, where the limits are determined by the legal conditions of the entity to which the owner of the agricultural land wishes to transfer ownership. The inspected legislation, therefore, focuses directly on the conditions for the use of one of the legal elements of the right to property, namely the right to dispose of the object of property *(ius disponendi)*,[64] and, therefore, falls within the scope of Article 20 Section (1) of the Constitution of the Slovak Republic.[65]

Based on the proportionality test,[66,67] the Slovak Constitutional Court concluded that all the three factors of the proportionality test[68] failed in terms of the restriction of

[59] Constitution of the Slovak Republic, Article 20 Section (1).

[60] It is worth mentioning that the Slovak Constitutional Court has repeatedly accepted the content of the right to property as defined by the Roman private law by stating that the owner is entitled to possess, use, enjoy, and dispose of the object of the right to property (see, for example, decisions no. PL. ÚS 15/06 and II. ÚS 8/97). This is, therefore, the most complete and broadest definition of a subjective right to ownership, which includes both the general characteristics of a subjective right and specific characteristics that clearly distinguish it from other subjective rights (PL. ÚS 30/95).

[61] Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 13/97

[62] Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 33/95

[63] Like the Constitutional Court of Hungary. In this context, see the Decision of the Constitutional Court of Hungary, no. 743/B/1993, ABH 1996, 417. The Constitutional Court of Hungary has also ruled that acquired property must be protected by fundamental rights and that the guarantees for the protection of this property right must be defined (Decision no. 575/B/1992). On the constitutional issues of land transactions regulation, see, for example: Csák 2018. For the related Hungarian case law, see: Olajos, Csák & Hornyák 2018; Olajos, 2015.

[64] Civil Code, Paragraph 123.

[65] For further, see the Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, 31.

[66] The proportionality test has still not found its place in the Slovak legal environment, which is because of the fact that the Constitutional Court was relatively late in applying this test in its decision-making. Although the first two steps of the proportionality test were defined in a simplified form in 2001 (see in this respect, Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 3/00), they were not developed and applied to the extent necessary, and were used only as part of the supporting argument. In fact, the actual application of the

the fundamental right to property.[69] However, as was stated by the Slovak government, the inspected legislation passes all three steps of the proportionality test,[70] for the following reasons. First, because the objective of the legislation can only be achieved by adopting measures that would remedy the existing legal situation because agricultural land to be protected in the public interest is gradually, but appreciably, decreasing.[71] Nevertheless, it is indubitable that the legislature, inspired by the best practices of other countries, would have adopted legislation that explicitly regulates the conditions for the acquisition of ownership of agricultural land.[72] Regarding the second criterion of the proportionality test, it can be stated that agricultural land is indispensable for society's needs and the development of national economy, and given the active public interest in its professional agricultural and environmental management, it can only be owned by persons who meet certain legal conditions. However, the legislation in force also lays down criteria to prevent abuse of such conditions and protect current and future owners of agricultural land against arbitrary decisions by persons entitled to acquire ownership of agricultural land.[73] Moreover, the comparison of the contested legislation with the Act on protection and use of agricultural land is quite important because this Act protects land after it is acquired by someone else, whereas the Act on land acquisition does not act *ex post* but preventively, that is, before a new owner acquires the agricultural land. As regards the third step of the adequacy test of the legislation, it

legislation in the constitutional procedure can only be discussed since 2011. See: Zelenajová 2016, 379.

[67] The proportionality test can also be characterized as a constitutional restriction of a human right or fundamental freedom only if several – usually three – steps (in other words, a subtest) are met. See: Ľalík 2016, 285. In the first stage, the appropriateness test is applied, whereby an act restricting a fundamental right is examined to determine whether it is suitable for achieving the objective pursued, which may include the protection of the public interest. The second stage is the test of indispensability, the test of necessity, that is, the need to compare the legislative measure under examination, which restricts a fundamental right or freedom, with other measures that serve the same purpose but do not affect fundamental rights and freedoms or affect them to a lesser extent. The final stage is to examine the criterion of proportionality in the strict sense.

[68] In other words, the inadequacy of the legislation under examination to achieve the objective pursued, the existence of other legislation allowing targeted and technically justified interference with the beneficial element of the property right, the restriction imposed by the legislation under examination on the dispositive element of the property right.

[69] Furthermore, see the decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, Point 3.

[70] Agreeing with the argument of the Slovak Government.

[71] It also should be noted that Act no. 220/2000 Coll. on the protection and use of agricultural land, as amended, does not provide protection against speculative land purchases, subsequent changes in the type of land, and possible misuse of ownership.

[72] See, for example, the legislation in Hungary, Poland, Germany, France, or Slovenia.

[73] Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, 20, Point 30.

can be concluded that it interferes proportionally with the property rights of agricultural landowners, but does not interfere with the substance of the property right.[74]

It would constitute an impermissible interference with the right to property only if the contested legislation were to eliminate the dispositive element of the right to the ownership of agricultural land altogether, or if it were to make the disposal of agricultural land subject to compliance with a procedural regime that would make the disposal of agricultural land effectively impossible – but the contested legislation obviously does not have that effect.[75] Along that logic, the contested measure also passes the third step of the proportionality test and can, therefore, be found to be in line with Article 20 Section (1) of the Constitution of the Slovak Republic.[76]

Additionally, the Constitutional Court stated that, "*The protection of agricultural land and its productive potential is a public interest whose nature legitimises regulatory intervention by the State in the agricultural land market environment. Agricultural land is part of the land, that is to say, of immovable property, which is the subject of property rights and other rights in rem and of legal obligations. The two characteristics outlined above logically require that the requirement to protect the productive potential of agricultural land (public interest) and the fundamental right granted to the owners of agricultural land by Article 20 Section (1) of the Constitution be constitutionally compatible.*"[77] The Act on land acquisition is a piece of legislation that predominantly regulates the content of the property rights of the owners of agricultural land. In the view of the Constitutional Court, its protective function in relation to the productive potential of agricultural land is more a matter of legislative wish than reality.[78]

Furthermore, the Slovak Constitutional Court considers the Act on land acquisition to be an adequate and effective instrument for the protection of agricultural land. It notes, however, that the legislature undoubtedly has room to optimize the legislation in question or even introduce new regulatory restrictions of a targeted nature capable of guaranteeing the achievement of the objective pursued. In this respect, the Slovak Constitutional Court highlights the examples of foreign legislation – notably Austria and, to some extent, Hungary – which require proven professional competence of the organization owning or managing the agricultural land. The Slovak legal system, *de lege lata*, does not require any professional experience of the person carrying out agricultural production.[79]

[74] For more information, see the dissenting opinion of *Iveta Macejková*, judge of the Constitutional Court in the Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, last pages.
[75] See the dissenting opinion of *Iveta Macejková*, judge of the Constitutional Court in the Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, last pages.
[76] I can agree with the position of the Slovak Government at the time on the arguments made in relation to the proportionality test. See the Constitutional Court Decision in question, points 28–31.
[77] Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, 78.
[78] Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, 255.
[79] Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, 79.

In the context of the decision of the Constitutional Court, agreeing with the dissenting opinion[80] of Constitutional Judge *Milan L'alík*, it is for the legislature to assess, justify, and decide on the need to change the various technical protection regimes for agricultural land in relation to the various legitimate interests, including the possible dilution of the owner's right of disposal. Additionally, it should be emphasized that only the Constitutional Court has the power to review arbitrary and irrational excesses that operate in a complex manner, and are not present in the examined case.[81]

Furthermore, on November 18, 2015 the Plenary Session of the Slovak Constitutional Court decided to continue the proceedings in the case only after the conclusion of the infringement proceedings against the Slovak Republic initiated before the EC on March 26, 2015. However, in light of the fact that the infringement proceedings had not yet been definitively closed on November 14, 2018, it was inappropriate to decide on the merits of the case.[82,83]

In conclusion of this chapter, it can be stated that the Constitutional Court has confirmed the unconstitutionality of parts of the Act on land acquisition that also coincide with the problems raised by the EU. It is noteworthy that Slovakia addressed the problem much earlier than the EU did. While Slovakia's swift response is a positive step, the decision of the Constitutional Court shows that the need to optimize the rules for the protection of agricultural land has been on the agenda recently. Slovakia has recognized the fact that agricultural land is a valuable natural resource that should be protected.

5. Conclusions

In my opinion, the decision of the Plenum of the Constitutional Court of the Slovak Republic of November 14, 2018,[84] PL. ÚS 20/2014 has taken a surprising turn for everyone. It can be agreed that it is the most significant decision regarding the land transfer regulation.

Regarding Slovakia, we see that restrictions on the acquisition of agricultural land have been in force for more than four years. The regulation of the Act on land acquisition severely restricted the owners from selling the land. It can also be concluded that the legislature intended to protect agricultural land. However, the decision of the Constitutional Court of the Slovak Republic, and the infringement proceedings brought by the EC, among others, against Slovakia, show that legal restrictions on the transfer

[80] It is also stated that States possess the discretion to prevent the acquisition of agricultural land for speculative purposes, even if the restriction in question is not the most appropriate, best, or reasonable, but is in some way related to the objective pursued and has, in the meantime, been achieved. By this logic, the regulation was not unconstitutional if it pursued a legitimate aim and the means chosen to achieve it were still acceptable.

[81] See the dissenting opinion of *Milan L'alík*, Constitutional Court judge in the Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, last pages.

[82] As Constitutional Judge *Peter Brňák* indicated in his dissenting opinion.

[83] See the last page of the Constitutional Court Decision in question.

[84] Published on February 11, 2019 in the Collection of Act of the Slovak Republic *(Zbierka zákonov Slovenskej republiky)*.

of agricultural land interfered with the property rights of individuals owning such land as well as with the free movement of capital and the freedom of establishment.[85] Thus, the pressure from the EC and the efforts of certain members of the Slovak Parliament[86] to annul certain provisions of the Act on land acquisition contributed to the ruling of the Constitutional Court that the above-mentioned provisions were in conflict[87] with the Constitution of the Slovak Republic. Eventually, certain contested provisions[88] of the Act on land acquisition[89] were annulled. The decision of the Constitutional Court has resulted in a cardinal change, especially regarding the acquisition of agricultural land, because now not only natural persons, but legal persons also can acquire unrestricted ownership of agricultural land in Slovakia.[90] In my opinion, this leads to the conclusion that the Slovak State is currently not adequately implementing its real responsibilities in the field of land protection. However, it is necessary to state, as the Constitutional Court emphasizes in its decision, that the more important the constitutionally protected interest, the greater the responsibility of the State to protect it effectively. If land is not adequately protected by law and institutions, it becomes a commodity that can be easily manipulated and abused.[91]

Last year, in October 2020, an amendment to the Act on land acquisition was submitted by the Ministry of Agriculture and Rural Development of the Slovak Republic for inter-ministerial consultation, which was scheduled to enter into force on May 1, 2021. The aim of the proposal was to restrict the acquisition of ownership of agricultural land in order to avoid speculative land purchases.[92,93] However, the proposal did not receive a positive response, especially from certain professional organizations and investors; no new legislation has been introduced since then.

[85] Ptačinová 2019.

[86] For example: *Peter Osuský*, *Ondrej Dostál*, *Alojz Baránik* and *Milan Laurenčík* (former) MPs' proposal for a law on the repeal of the Act on land acquisition, submitted on September 23, 2016. Available on the official website of the National Council of the Slovak Republic.

[87] Veliký 2019.

[88] Paragraphs 4, 5, and 6 of the Land Law were repealed, which, as already mentioned, regulated the procedure for the transfer of ownership of agricultural land, the provisions on the compulsory offer, and the provisions on the verification and presentation of the conditions for the acquisition of ownership of agricultural land.

[89] For more information, see: Ptačinová 2019.

[90] With exceptions based on the principle of reciprocity. In this context, see: Paragraph 7 of the Act on land acquisition.

[91] Palšová, Bandlerová & Machničová 2021, 11.

[92] An article on this topic (in Hungarian) was submitted in April 2021 by the author to the journal Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica.

[93] The proposal and the full documentation have been published on Slov-Lex, the Legislative and Information Portal of the Ministry of Justice of the Slovak Republic. The complete package is available in Slovak language on the following link: https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2020-504

This leads to the conclusion that, although the State has recognized the fact that agricultural land has high value and needs protection, and has also taken steps to protect agricultural land, progress is unlikely at this time due to the lack of an institutional framework for implementation of land protection legislation.

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Szilárd SZTRANYICZKI*

Aspects regarding the sale of agricultural land located outside the built-up area boundary in Romania, by reference to the Romanian Constitution and the European Union Law**

Abstract

The aim of this study is to present and evaluate the possible impact of the most recent legislative amendments from Romania that include important regulations regarding the sale and purchase of agricultural land located outside the built-up area boundary. At the same time, our aim is to study the compliance of the adopted legal norms with the requirements of EU law in this field, with reference to the case-law of the European Court of Justice and of the Constitutional Court of Romania.

Keywords: Constitutional Court of Romania, case-law of the European Court of Justice, agricultural land located outside the built-up area boundary, economic freedom, free movement, equal rights, pre-emption right, the principle of proportionality, free movement of capital.

1. Introduction

This study aims to analyse whether the legal framework on the sale of agricultural land located outside the built-up area boundary in Romania is compatible with European Union law, taking into consideration that Law no. 175/2020[1] has been subjected to constitutional control before its promulgation. According to the Romanian Constitution, the provisions of the founding treaties of the European Union, as well as other mandatory Community regulations prevail over conflicting national legislation, in compliance with the provision of the Act of accession.[2]

Before turning to the exhaustive presentation of this topic, it is appropriate to specify that according to some opinions already expressed in the specialty literature there is a potential infringement of several fundamental rights and freedoms guaranteed both by the fundamental law and by European Union treaties – equal rights, freedom of movement, right to private property, economic freedom, the fairness of fiscal burdens – which are likely to significantly change the legal regime applicable to the sale

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[2] According to the provisions of Article 148 (2) of the Romanian Constitution.

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of agricultural land located outside the built-up area boundary.[3]

Essentially, the authors of the exception of unconstitutionality claimed that the law *"is indirectly aimed at restricting the right of citizens of EU Member States and citizens of Member States to the Agreement on the European Economic Area (AEEA) to acquire ownership of agricultural land located outside the built-up area boundary."*[4]

Decision no. 586/2020 of the Constitutional Court was adopted with the majority of votes, while the judges who voted against delivered two separate opinions sustaining the unconstitutionality of the regulation.[5]

We anticipate that the object of our study is of interest, particularly because one of these two separate opinions[6] has pointed out – by reference to Article 148 (4) of the Romanian Constitution – that, among others, the judicial authority guarantees the implementation of obligations born from the act of accessions and the provisions of Article 148 (2) of the fundamental law, and therefore *"European Union nationals who, based on the provisions of the Law submitted to constitutional control in the case herein, encounter difficulties in acquiring agricultural land located outside the built-up area boundary in Romania may turn to the courts of law, which can either exclude from application the relevant provisons of the Law, or they may address a preliminary question to the Court of Justice of the European Union in order to clarify the meaning of Article 63 and 65 of the TFEU[7] corroborated with Annex VII, point 3 of the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union."*

A further argument for a more thorough examination of these legal problems is represented by the fact that *"Article 148 (2) of the Romanian Constitution gives systematic and unconditional priority to the provisions of the founding treaties of the European Union over any conflicting national provision. This means that if the Romanian Parliament were to adopt a legal provision which is contrary to Article 63 of the TFUE, this would be ab initio inapplicable. Consequently, since they are contrary to Article 63 of the TFUE and Annex VII, point 3 of the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union, the provisions of the Law are also ab initio invalid in relation to Article 148 (2) of the Romanian Constitution."*

Thus, we shall have in view the arguments behind the exceptions of unconstitutionality concerning Law no. 175/2020 on the amendment of Law no. 17/2014 on certain measures for the regulation of the sales and purchase of

[3] Prescure & Schiau 2016, 28–29; Popescu 2020, 135–136; Jora 2016, 10; Papuc 2019, 125;

[4] According to point 18 of Decision no 586/2020 of the Constitutional Court of Romania. This decision was published in the Official Journal of Romania no. 721/11 August 2020, Constitutional Court of Romania.

[5] The decision on the exception of unconstitutionality regarding the provisions of the Law on the amendment of Law no. 17/2014 on certain measures for the regulation of the sales and purchase of agricultural land located outside the built-up area boundary, published in the Official Journal of Romania no. 721/11.08.2020. One of the two separate opinions we refer to was written by judges Livia Doina Stanciu and Elena-Simina Tănăsescu, and the other one by Mona-Maria Pivniceru.

[6] The separate opinion of Livia Doina Stanciu and Elena-Simina Tănăsescu, Decision no. 586/2020 of the Constitutional Court of Romania 32–33.

[7] The Treaty on the Functioning of the European Union, Official Journal of the European Union 2012.

agricultural land located outside the built-up area boundary, as well as those stated in the reasoning of Decision no. 586/2020 of the Romanian Constitutional Court, particularly those aspects that are the object of our study and continuing with the argumentation of the applicability of Community law, with reference to the infringement of one of the fundamental freedoms, i.e. the free movement of capital, by indicating the relevant case-law of the Luxembourg Court, while the final part is obviously reserved to conclusions.

2. The application of Law no. 17/2014 to persons

The provisions of Law no. 17/2014 apply to Romanian citizens, to citizens of European Union Member States, of Members States to the Agreement on the European Economic Area (AEEA) and of the Swiss Confederation, to statless persons domiciled in Romania, in a European Union Member State, in a Member State to the AEEA or in the Swiss Confederation, as well as to Romanian legal entities and legal entities that have the nationality of an EU Member State, an AEEA Member State or of the Swiss Confederation.

Third-country nationals and stateless persons domiciled in a third country, as well as third-country legal entities may acquire ownership of agricultural land located outside the built-up area boundary under the conditions set in international treaties, on a reciprocal basis, as regulated by Law no. 17/2014.[8] Consequently, if the legal provisions recognise the right of third-country nationals and stateless persons to acquire ownership of land in general, Law no. 17/2014 becomes applicable to acquiring agricultural land located outside the built-up area boundary for these persons as well.

This law, however, does not apply to the sale of agricultural land located outside the built-up area boundary that belong to the private property – of local or country interest – of administrative-territorial units.[9]

According to the initial form of the law, the alienation of agricultural land located outside the built-up area boundary by sale shall respect the pre-emption right of co-owners, lessees, neighbouring owners, as well as of the Romanian state (through the State Property Agency), in this order, and it shall be carried out at the same price and under equal conditions.

Law no. 175/2020 modifies and enlarges the sphere of pre-emptors: (a) 1st rank pre-emptors: co-owners, 1st degree relatives, spouses, relatives and relatives in-law up to the 3rd degree, inclusively; (b) 2nd rank pre-emptors: the owners of agricultural investments in fruit trees, vineyards, hops, irrigations excluding private irrigations and/or the lessees. If on the land for sale there are agricultural investments in fruit trees, vineyards, hops or irrigations, the owners of such investments have priority in purchasing this land; (c) 3rd rank pre-emptors: owners and/or lessees of agricultural land

[8] According to Article 44 (2), 2nd thesis of the Constitution, foreign nationals and stateless persons may only acquire ownership of land under the conditions resulting from Romania's accession to the European Union and from other international treaties that Romanian is a party to, on a reciprocal basis, as provided by organic law, as well as by way of legal inheritance.
[9] Article 20 (3) of Law no. 17/2014, as amended by Law no. 138/2014.

neighbouring the land on sale; (d) 4th rank pre-emptors: young farmers; (e) 5th rank pre-emptors: the Gheorghe Ionescu-Șișești Academy of Agricultural and Forestry Sciences, research and development facilities in the field of agriculture, forestry and the food industry regulated by Law no. 45/2009 on the organisation and functioning of the Gheorghe Ionescu-Șișești Academy of Agricultural and Forestry Sciences and of the reasearch and development system in the field of agriculture, forestry and the food industry, as subsequently amended, as well as agricultural educational establishments for the aim of purchasing agricultural land located outside the built-up area boundary with the destination strictly necessary to agricultural reasearch, located in the vicinity of existing plots in their patrimony; (f) 6th rank pre-emptors: natural persons domiciled/residing in administrative-territorial units where the land is located or in neoghbouring administrative-territorial units; (g) 7th rank pre-emptors: the Romanian state, through the State Property Agency.

Law no. 175/2020 also introduces other limitations on the legal circulation of agricultural land, which become applicable if none of the holders of the pre-emption right exercises his/her right. In this case, the agricultural land may only be sold to natural persons or legal entities that comply with certain requirements set by law.

In the case of natural persons, these cumulative requirements are the following:[10] (a) the domicile/residence of the natural persons in question should be situated on the national territory for at least 5 years prior to the registration of the offer to sell; (b) to carry out agricultural activities on the national territory for at least 5 years prior to the registration of this offer; (c) to be registered with the Romanian fiscal authorites for at least 5 years prior to the registration of the offer to sell agricultural land located outside the built-up area boundary.

In the case of legal entities, the cumulative legal requirements are more complicated: (a) the main seat and/or secondary seat of legal entity in question should be situated on the national territory for at least 5 years prior to the registration of the offer to sell; (b) it should carry aut agricultural activities on the national territory for at least 5 years prior to the registration of the offer to sell agricultural land located outside the built-up area boundary; (c) to present the documents which show that at least 75% of the total revenues for the last 5 fiscal years come from agricultural activities as provided for in Law no. 227/2015 on the Fiscal Code, as subsequently amended, classified according to NACE codes through order of the Minister of agriculture and rural development; (d) the domicile of the partner/shareholder who controls the company should be situated on the national territory for at least 5 years prior to the registration of the offer to sell agricultural land located outside the built-up area boundary; (e) if the structure of legal entities, partners/shareholders that control the company comprises other legal entities, the partners/shareholders controlling the company should prove that their domicile is situated on the national territory for at least 5 years prior to the registration of the offer to sell agricultural land located outside the built-up area boundary.

[10] Article 4 of Law no. 17/2014, as amended by Law no. 175/2020.

Thus, the priority right to purchase is not a veritable potestative right. It seems that imposing this right is only a limitation on the freedom of contract: owners are limited by these provisions to choose their buyers from a limited circle of persons who fulfill certain requirements established by the law-maker who thus wishes to direct ownership transfers of agricultural land located outside the built-up area boundary in a certain direction.

The sale of land at a price smaller than the price asked in the initial offer to sell, under more advantageous conditions for the buyer than those comprised in the offer or breaching the legal conditions that apply to buyers entails absolute nullity.[11]

3. Decision no. 586/2020 of the Constitutional Court. A special look at the compliance of Law no. 175/2020 with European law

The draft law for the amendment of Law no. 17/2014 was examined by the Romanian Constitutional Court, which was vested to decide upon both intrinsic and extrinsic unconstitutionality criticisms. In the following, we shall turn our attention to aspects related to compliance with European Union law, as reflected in the reasons of Decision no. 586/2020, but also in the two separate, dissenting opinions.

Thus, the claim of unconstitutionality argues that *"acquiring ownership under restrictive conditions, restricting disposition to certain categories of potential buyer, imposing the fulfillment of certain conditions by the buyer, such as residence/domicile/seat on the national territory for at least 5 years prior to the registration of the offer to sell, carrying out agricultural activities on the national territory for a period of at least 5 years prior to the registration of the offer to sell, a certain percentage of the revenues generated from agricultural activities for a period of at least 5 years prior to this moment (for legal entities), lead to a change in the legal regime of ownership of agricultural land and they may be qualified as measures restricting the exercise of certain rights and freedoms, contrary to Article 53 of the Constitution."*

At the same time, the authors of this claim argue that the new conditions imposed on acquirers of agricultural land located outside the built-up area boundary may not be *"justified from the perspective of non-discriminatory treatment, the protection of certain general interest objectives and proportionality"*, indirectly causing the restriction of the right of European Union citizens and European Economic Area citizens to acquire ownership of agricultural land, and thereby infringing the provisions of Article 148 of the Romanian Constitution which refer to the implications of integration into the European Union, claiming at the same time that the provisions of the Treaty on the accession of Romania to the European Union were also infringed.

Dwelling on this criticism, most judges of the Constitutional Court consider that the legal texts in question *"do not regulate any restriction or exclusion of natural persons or legal entities from Member States to purchase agricultural land, but they impose certain conditions for achieving the aim of the law, i.e. capitalising land ownership. All these conditions are common to natural persons and legal entities from EU Member States, and there is no different legal treatment between them inasmuch as the right to purchase agricultural land located outside the built-up area boundary is concerned. The criticised texts do not prohibit and they neither exclude the right of natural*

[11] Article 7 (8) of Law no. 17/2014, as amended by Law no. 175/2020.

persons and legal entities from outside the national territory to purchase such land if the conditions stipulated in the law – which are valid for Romanian natural persons and legal entities as well – are fulfilled. Therefore, those stated above demonstrate that the law-maker did not operate with the criterion of citizenship/nationality, but with a set of objective criteria aimed at the ability of the buyer to keep the category of use of the agricultural land located outside the built-up area boundary and to work it effectively." The conclusion of a sale contract as buyer requires a solid and well defined material base on the national territory, as well as relevant work experience under the pedoclimatic conditions characteristic to Romania. It follows that the law does not set arbitray conditions for purchasing agricultural land located outside the built-up area boundary but rather conditions that support the purpose of the law.[12]

Contrary to this majority opinion, the first separate opinion argues that conditioning *"the acquisition of agricultural land located outside the built-up area boundary on acquierers establishing their domicile/residence on the national territory by a law adopted in 2020 (…) amounts to a restrictive measure for potential acquirers, who although being European Union nationals, do not have their domicile/residence on the national territory, i.e. it violates the commitments made by Romania towards accession to the European Union as they result from point 3, Annex VII to the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union."*[13] According to the other separate opinion *"the criticised provisions, although they do not regulate an express and direct exclusion of natural or legal persons from the Member States from purchasing agricultural land located outside the built-up area boundary, impose certain conditions that may be classified as having equivalent effect."*[14]

In sustaining the principal argument it has been pointed out that the legislative project does not set arbitrary conditions in the field of purchasing agricultural land located outside the built-up area boundary, but rather they are justified in the light of achieving the purpose of the law, being intended to *"demonstrate the ability of natural/legal persons to carry out agricultural activity on the land purchased."*

As for reference to the case-law of the Court of Justice of the European Union, the majority of the judges of the Constitutional Court consider that the draft law under examination does not concern and discuss the freedom of establishment of persons or the free movement of capital, therefore in principle it does not meet the requirements to turn into a restriction of these rights.

Consequently, these reasons that imply the examination of European Law elements were also of such nature as to substantiate the solution – adopted with a majority of votes – of dismissing as unfounded the exception of unconstitutionality against the draft law for the amendment of Law no. 17/2014.

We may not however disregard the two separate opinions which outline a direction of analysis diametrically opposed to those stated above and support a debate that has to gravitate around the applicable EU law.

Thus, in their separate opinion, judges Livia Doina Stanciu and Elena Simina Tănăsescu argue that *"by regulating certain measures that are equivalent to restricting the free*

[12] Point 101 of Decision no. 586/2020 of the Constitutional Court of Romania.
[13] Point 3.2.2. of the Separate opinion formulated by Livia Doina Stanciu and Elena-Simina Tănăsescu.
[14] Point 2 of the Separate opinion formulated by Mona-Maria Pivniceru.

movement of agricultural land within the framework of the European Union, the Law entails a failure of Romania to fulfill its commitments based on EU treaties and breaches Article 148 of the Constitution."

We would like to highlight the following aspects from the legal reasoning of this separate opinion: (1) legislative measures of the type at issue are within the margin of appreciation of national legislators but they have to fulfill two requirements, i.e. they should not constitute in fact obstacles to the free movement of land and they have to be adopted according to the fundamental law; (2) according to the opinion of the two judges the draft law examined does not fulfill these rigours because, on the one hand, the principle of bicameralism is violated as *"important provisions of the Law (the regulation of new pre-emptors, giving preference to national buyers, prohibitive taxation of land movement, excempting only certain operations in a discriminative manner etc.) have not been known to or debated by the first Chamber seised and it is exactly these provisions that render a significantly different content to the Law than that envisaged by both its initiator and the first Chamber seised."* On the other hand, according to a further argument *"these provisions, adopted exclusively by the decisional Chamber, also determine the effects contrary to European Union law, as although by themselves they do not directly hinder the free movement of capital – i.e. agricultural land in Romania – within the European Union, in fact they impose measures of equivalent effect stipulated in the founding treaties of the European Union and the case-law of the Court of Justice"*; (3) the conclusion is that the new legislative amendments give priority to Romanian nationals, entailing violations of both the commitments made by our country in view of accession to the European Union and of certain provisions of the primary EU law – in this case Article 63 of the Treaty on the Functioning of the European Union[15] –, which means that Article 148 of the Romanian Constitution is infringed.

In the second separate opinion as well – that of judge Mona-Maria Pivniceru – the conditions imposed through the new legislative amendments represent equivalent measures to restricting the free movement of capital even if they do not expressly and directly exclude natural and legal persons from Member States from purchasing agricultural land located outside the built-up area boundary. By reference to the decisions of the European Court of Justice, such as the one in case no. C-370/05, the above mentioned judge notes that *"when exercised, the right to acquire, exploit and alienate*

[15] Article 63 (1) of the Treaty on the Functioning of the European Union has the following normative content: *"Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."* Article 65, especially paragraphs (1) and (2) of the Treaty on the Functioning of the European Union allow for derogations from the free movement of capital, recongising the right of Member States: *"(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested; (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security."* It is important to note that in order to be considered derogations allowed under the above cited conditions, the measures and procedures imposed shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

immovable property on the territory of another Member State, which represents a necessary complementation of the freedom of establishment, generates movements of capital that comprise operations by which non-residents make investments on the territory of a Member State", and therefore falls within the remit of EU law.

After reviewing the case-law of the Court of Justice of the European Union, which in time has recognised the public policy objectives that may justify restrictions of investments in farmland,[16] the above mentioned judge reaches the conclusion that the criticised legislative measures *"impose a restriction that may not be admitted from the perspective of European Union law as it does not pursue an objective of general interest, therefore it is not necessary to analyse it from the perspective of the principle of proportionality, which evaluates the attainment of the objective set by means that do not exceed what is necessary for its attainment."*

4. Classification of the issue of agricultural land sale within the remit of EU law. Main directions in the case-law

The 2017 document entitled *"Commission Interpretative Communication on the Acquisition of Farmland and the European Union Law,"*[17] specifies that the acquisition of farmland falls within the remit of European Union law, namely *"the right to acquire, use or dispose of agricultural land falls under the free movement of capital principles set out in Articles 63 et seq. of the Treaty on the Functioning of the European Union."*[18]

Thus, although there is no secondary legislation on the acquisition of land at the Europen level, the prerogative/margin of appreciation of Member States to decide the regulation of their land market is recognised, but they are obliged to comply with the principles of the primary European law, especially with those pertaining to fundamental freedoms and the principle of non-discrimination. As for the latter one, it should be taken into account that certain provisions are likely to *"discriminate, not formally but in their practical effects, against nationals from other EU countries or impose other disproportionate restrictions that would negatively affect investment."*[19] In this regard, the legal specialty literature considers that measures that do not explicitly discriminate between persons according to their

[16] Curia Europa, cases such as: C-182 83, C-302 97, C-423 98, C-452 98, C-370 05.

[17] The usefulness of reference to this document is highlighted by its content. Thus, this communication that sets guidelens to be followed in this field, providing support to Member States that are in the process of adapting their internal legislation, refers to the *"advantages and challenges implied by foreign investments in agricultural land. Moreover, the communication specifies the applicable EU law and the case-law of the CJEU. Finally, this communication draws certain general conclusions from the case-law on the way legitimate public interests may be addressed in compliance with EU law"*, case C-370 05.

[18] Although the notion of movement of capital is not defined in EU law, by reference to the case-law of the Court of Justice in the speciality literature it has been noted that this freedom *"designates financial operations essentially aimed at the placement or investment of sums, and not remuneration for a service provided. The movement of capital represents an autonomous transaction, not an operation resulting from another one. Within the framework of achieveing the European financial space, it is favoured by the freedom of establishment and by the freedom of financial institutions to provide services, especially of those performing banking activities"*, Groza 2014, 106.

[19] Commission Interpretative Communication on the Acquisition of Farmland and the European Union Law.

nationality, residence or the origin of capital amount to indirect discrimination if the incriminated measure has negative effects on the movement of capital.

Classification within the remit of European law may be explained in light of the fact that agriculture is also part of the internal market, and the fundamental freedoms of EU investors, especially those related to the free movement of capital and the freedom of establishment are recognised as forming an integral part of the internal market.

Nevertheless, EU law allows exceptions even in the case of fundamental freedoms, certainly only as long as they do not constituite *"a means of arbitrary discrimination or a dissimulated restriction of the free movement of capital and payments."*[20] Furthermore, as is well-known and also in line with the general principles of law, any derogation from fundamental freedoms shall be interpreted and applied in a restrictive manner, and the general standard used during judicial review of these restrictions is provided by the principle of proportionality,[21] which is of such nature as to allow the verification of a just balance – in our case between the need to attract capital to rural areas in view of sustainable and durable development and ensuring legitimate agrarian policy objectives.

When applying the proportionality test, the first condition is that of the legitimate objective pursued through the adoption of national measures. In this regard, we shall indicate the agricultural policy objectives that may justify limitations on fundamental freedoms, as centralized in the Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, by reference to the relevant case-law of the CJUE: *"(a) to increase the size of land holdings so that they can be exploited on an economic basis, to prevent land speculation; (b) to preserve agricultural communities, maintain a distribution of land ownership which allows the development of viable farms and management of green spaces and the countryside, encourage a reasonable use of the available land by resisting pressure on*

[20] Groza 2014, 103.

[21] This principle is regulated at EU level by Article 5 of the Treaty on European Union which in paragraph (4) provides as follows: *"Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."* Moreover, according to Article 52 (1) of the Charter of Fundamental Rights of the European Union *"any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."* Furthermore, we would like to mention that the principle of proportionality is also enshrined at the constitutional level, and here we shall refer to the Romanian Constitution, which in Article 53 provides that any limitation on the exercise of the rights and freedoms must be provided for by law and respect the conditions set in the same constitional text – the attainment of legitimate objectives/aims such as as those listed in Article 53 (1), while limitations may only be made if they are necessary in a democratic society, they are proportionate to the situation which determined it, they shall be applied in a non-discriminatory manner and without affecting the existence of the right or freedoms. For a specialty paper dedicated to this principle see Papuc 2019.

land, prevent natural disasters, and sustain and develop viable agriculture on the basis of social and land planning considerations (which entails keeping land intended for agriculture in such use and continuing to make use of it under appropriate conditions); (c) to preserve a traditional form of farming of agricultural land by means of owner-occupancy and ensure that agricultural property be occupied and farmed predominantly by the owners, preserve a permanent agricultural community, and encourage a reasonable use of the available land by resisting pressure on land; (d) to maintain, for town and country planning or regional planning purposes and in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions; (e) to preserve the national territory within the areas designated as being of military importance and protect military interests from being exposed to real, specific and serious risks".

Once the legitimate character of the aim stated by the legislator is argumented and accepted, a further challenge may be posed by justifying that the limitation is necessary and adequate to achieve the objective invoked, i.e. that it is adequate to lead to the fulfillment of the aim pursued.[22] Thus, whether the measures recently adopted by the national legislator exceed what is necessary to achieve the objective undertaken and already indicated in the statement of reasons is a legitimate question.

From the constant case-law of the Court of Justice we note that a national measure limiting the free movement of capital, through an indirect discriminatory effect *"is permissible only if it is justified, based on objective criteria that are independent from the origin of the capital concerned, by overriding reasons in the public interest and observes the principle of proportionality, a condition that requires the measure to be appropriate for ensuring the attainment of the objective legitimately pursued and not to go beyond what is necessary in order for it to be attained."*[23]

This means that judicial assessment shall verify if national measures are adequate and necessary for the attainment of the legitimate objective relied on – if they genuinely reflect a concern to attain that objective in a consistent and systematic manner[24] and, moreover, it shall be verified if other measures capable, in some circumstances, of being less detrimental to the free movement of capital have been considered[25].

For example, in the case we refer to-Festern, C-370/05, the Court considers that the obligation to establish one's residence on a national territory in itself does not ensure the attainment of the objective pursued by the legislator – preserving the traditional, owner-occupancy form of farming – also affecting the right of the acquirer to choose his place of residence freely, therefore with implications on the guarantees granted by Article 2 (1) of Protocol no. 4 to the European Convention on Human Rights as well. Moreover, it is noted that associating a temporal condition to such an obligation goes beyond what could be regarded necessary, resulting in a long-term suspension of the exercise of a fundamental freedom.

[22] Boar 2014, 38.
[23] Curia Europa, Judgement of the CJUE of 6 March 2018, Segro and Horvath, C-52/16 and C-113/16, paragraph 76. The same conclusions may be drawn from the Judgement of the Court of 21 May 2019, the European Commission against Hungary, C-235/17, paragraph 59.
[24] Curia Europa 2019. Judgement of the Court of 21 May 2019, the European Commission against Hungary, C-235/17, paragraph 61.
[25] Curia Europa. Judgement of the CJUE of 25 January 2007, Festersen, C-370/05.

The conclusion stating that *"the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and specific evidence substantiating its arguments."*[26] The case-law that we refert to notes that *"if a Member State wishes to rely on an objective capable of justifying an obstacle to the freedom to provide services arising from a national restrictive measure, it is under a duty to supply the court called upon to rule on that question with all the evidence of such a kind as to enable the latter to be satisfied that the said measure does indeed fulfil the requirements arising from the principle of proportionality,"*[27] therefore it shall provide *"specific evidence substantiating its arguments."*[28]

At present, the position of the European Union is not definitely clarified. The European Commission issued an interpretative communication which is based exclusively on the current state of the case-law of the CJEU. On the one hand, this communication recognises the specific importance of farmland, considering that the special regulation of agricultural land sale is justified, and on the other hand it is considered that many restrictions do not comply with European Union law.[29] Furthermore, according to the CJEU, *"national rules under which a distinction is drawn on the basis of residence in that non-residents are denied certain benefits which are, conversely, granted to persons residing within national territory, are liable to operate mainly to the detriment of nationals of other Member States. Non-residents are in the majority of cases foreigners."*[30]

In the future, the compliance of this new Romanian regulation with EU law shall be verified, while the cited separate opinions and a careful analysis of the Commission interpretative communication foreshadow a solution of non-compliance of national law with EU law. However, it is undeniable that requirements of public order, such as food security, the exploitation of agricultural natural resources according to national interests, making available these resources to those working effectively in agriculture and who do not use the transfer of agricultural land ownership for speculative investment purposes require the adoption of serious restrictions on agricultural land sale as agricultural land may not be regarded as a simple good whose free movement is essential. This aspect should be recognised and reflected by EU law inclusively, both in its written form and in its form originating from the case-law of the European Court of Justice.

[26] Curia Europa. Judgement of the CJUE of 6 March 2018, Segro and Horvath, C-52/16 and C-113/16, paragraph 85, but also the Judgement of 23 December 2015, Scotch Whisky Association and others, C-333/14, paragraph 54.
[27] Curia Europa. The Judgement of 8 September 2010, Stoß and others, C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07, paragraph 71 is also cited, through analogy.
[28] Curia Europa. Judgement of the Court of 21 May 2019, the European Commission against Hungary, C-235/17, paragraph 94, and in the same vein the Judgement of 26 May 2016, Commission/Greece, C-244/15, paragraph 42.
[29] Commission Interpretative Communication on the Acquisition of Farmland and European Union law, published in the Official Journal of the European Union C-350 of 18.10.2017.
[30] Curia Europa. Cases C-279/93, Finanzamt Köln-Altstadt/Schumacker, point 28; C-513/03, van Hilten-van der Heijden, point 44; C-370/05, Eckelkamp, point 46.

5. Conclusions

Our study did not propose to formulate definite, indubitable conclusions regarding the possible impact of the new rules inserted by Law no. 175/2020 in Law no. 17/2014. As for the reasons of unconstitutionality dealt with by the Constitional Court in Decision no. 586/2020, even before the entry into force of the new rules, the provisions analysed by the Court enjoy a strong presumption and even guarantee of compliance with the Constitution. However, starting from the sound arguments invoked in the reasoning of the separate opinions cited above, we consider that the debate remains open, both at the academic and judicial level.

Furthermore, it is our opinion that, inasmuch as the relatively detailed regulation of the conditions and procedure for the acquisition and sale of agricultural land to third persons who are residents of EU Member States is concerned, this regulation enjoys the appearance of a legitimate legal instrument adequate to the promotion of certain general interests of the Romanian nation until a court finds that prohibitive and/or discriminatory criteria and conditions have been imposed which constitute by themselves unjustified limitations/restrictions of certain rights and fundamental freedoms. We may not however deny the sovereign attribute of the Romanian legislator to establish the limits for the exercise of certain rights concerning categories of goods of particular economic and social importance, as well as it's prerogative to impose rational and necessary conditions and requirements for the promotion and protection of general interests, certainly in compliance with the principles that EU law is based on.

On the other hand, taking into consideration the opinions and theoretical controversies which have already emerged, it is possible or even probable that in certain actual disputes the interested parties would be tempted to request Romanian national courts to find that certain provisions of Law no. 17/2014, as amended by Law no. 175/2020, are contrary to EU principles and, consequently, their application be ceased if it is found that they are contrary to EU law. Moreover, it may not be excluded that the national courts would request the CJEU to give a preliminary ruling on the legal provisions concerned. Until then, however, the new regulation shall be applied in a rigorous and consecvent manner in order to attain the aims pursued by the legislator.

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Vojtěch VOMÁČKA* – Jana TKÁČIKOVÁ**
Agricultural Issues and the Czech Constitution***

Abstract

The article deals with the regulation of agricultural activities in the constitutional order of the Czech Republic, which consists mainly of the Constitution and the Charter of Fundamental Rights and Freedoms. The authors focus on two basic areas of regulation that often complement each other in practice: the protection of property rights and entrepreneurship and the protection of the environment. The protection of land as part of the environment is analysed from the perspective of the constitutionally enshrined obligations of the state and also as part of the right to self-government, which is manifested in particular in the process of land-use planning. The article mainly reflects the case law of the Constitutional Court and, marginally, of the Supreme Administrative Court. The authors conclude that the individual requirements of constitutional law are interconnected and form a general but very fundamental framework for the performance of agricultural activities.
Keywords: Agriculture, Constitution, Agriculture Land Protection, Protection of Property and Entrepreneurship, Right to Favourable Environment.

1. Introduction

The concept of agriculture is not defined in the Czech legal system. For the purpose of this article, agriculture is primarily perceived as an activity tied to agricultural land, which is not only an object of property rights but also an essential component of the environment.[1] Then agriculture is also a business activity aimed at the production of agricultural products, especially foodstuffs, in line with the definition of the agricultural production provided by Act No. 252/1997 Coll., on Agriculture (hereinafter Agriculture Act): *"an activity encompassing crop and livestock production, including the production of breeding animals and plant propagating material, as well as the processing and sale of own agricultural production, and further forest and water management."*[2]

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[1] Such a concept is well established in Czech legal science. See Tkáčiková, Vomáčka, Židek et al 2020.

[2] Section 2e(4) of the Agriculture Act.

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Agricultural issues are not directly addressed by the Czech Constitution (hereinafter the Constitution), the Charter of Human Rights and Freedoms (hereinafter the Charter), constitutional laws, and other sources of constitutional law, which together form the Constitutional Order of the Czech Republic. However, this does not mean that the Czech legislation of the highest legal force is irrelevant to agriculture.

Two areas related to the key constitutional provisions correspond to the abovementioned understanding of agriculture: protection of property and entrepreneurship and protection of the environment, particularly soil. This article mainly focuses on these two areas, less attention will be paid to the general framework of land management which is constituted by the basic state-forming regulations and rules of public administration, including, for example, the demarcation of state borders, the creation of territorial self-government units, or the judicial system crucial for the resolution of disputes concerning land use. The constitutional dimension of taxes and subsidies will be intentionally left aside, because although it is important for agriculture, it does not carry any significant specifics in this area. At least briefly in this context, it is possible to draw attention to a recent case in which the Constitutional Court has considered different tax burdens applicable to different land. It concluded that the tax burden on land owned by natural persons and legal entities is justified in comparison with the tax exemption on land owned by the State, as it does not violate the principle of equality or is not extremely disproportionate.[3]

The Constitutional Court interprets the constitutional requirements related to agricultural activities in the context of the obligations arising from the Czech Republic's membership in the European Union.[4] In particular, the principles arising from EU law, including the principle of protection of fundamental rights, are reflected.[5]

2. Agriculture and Constitutional Protection of Property and Entrepreneurship

The constitutional protection of property in Art. 11 of the Charter is based on a general guarantee and equal protection. Therefore, any interference with land ownership, possession, or management can be brought before the Constitutional Court after exhausting the ordinary remedies available in the ordinary courts, provided it reaches a certain degree of seriousness. Similarly, the landowners affected by agricultural activities may seek remedies before the civil or administrative courts and after that file the constitutional complaint invoking their property rights protected under the same provision of the Charter.

[3] Ruling of the Constitutional Court of 18 May 2021, No. Pl. ÚS 97/20.

[4] The Czech Republic has been a member of the European Union since 2004. Therefore, the regulation of agriculture must comply with the obligation arising from Art. 10a of the Constitution, on the basis of which an international treaty may delegate certain powers of the Czech Republic's authorities to an international organisation or institution.

[5] In the *Sugar Quota* case, for example, the Constitutional Court assessed the compatibility of the national legislation with the principle of legitimate expectation, the principle of legal certainty and the prohibition of retroactivity, the prohibition of discrimination and the principle of equality, and finally also the principle of protection of the right to entrepreneurship and to operate other economic activities. For detail, see ruling of the Constitutional Court of 8 March 2006, No. Pl. ÚS 50/04.

The right to property is not absolute. Article 11(3) of the Charter provides that the exercise of the property right *"shall not harm human health, nature or the environment beyond the extent prescribed by law."*

The concept of *harm* is to be interpreted extensively, which is of practical relevance because a number of environmental offenses and crimes are of a threatening, not a disruptive (harmful in a strict sense) nature.[6] Besides various emission limits, the legal instruments implementing Art. 11(3) also include different preventive legal tools, supervision and control mechanisms, and permitting regimes.[7]

2.1. Expropriation and Restitution Disputes

Article 11(4) of the Charter provides conditions for expropriation and states it is only permitted in the public interest, based on law, and for compensation. According to the Constitutional Court, State may determine which property may be owned only by it to secure the needs of society, the development of the economy or the public interest.[8]

However, the State may take care of the careful use of its natural resources and protect its natural wealth, even if it does not confiscate private property in favour of the interests of other private entities.[9] This corresponds, for example, to the statutory concept of land adjustments,[10] which are carried out in the public interest as defined in Section 2 of Act No. 139/2002 Coll., on land adjustments and land offices.[11] As a consequence, the assessment of whether the objectives and purpose of land adjustments have actually been achieved is not just a matter for the individual parties, but for society as a whole.[12] The public interest in the land adjustments proceedings is determined by the qualitative level defined by the purpose of the land development in the quoted provision, i.e. the interest of a quantitatively expressed group of owners in a

[6] See judgements of the Supreme Administrative Court of 9 August 2018, No. 9 As 277/2017-28; of 10 August 2018, No. 10 As 99/2016-31; of 27 January 2015, No. 6 As 229/2014-82.

[7] For detail, see Vomáčka & Tomoszek 2020, 383.

[8] See the ruling of the Constitutional Court of 25 September 2018, No. Pl. ÚS 18/17, para. 128.

[9] See dissenting opinion of Judge Šimáčková in the resolution of the Constitutional Court of 5 August 2014, No. Pl. ÚS 26/13.

[10] Land adjustments should ideally also lead to an improvement in the functions of the landscape in terms of the water regime, soil erosion and biodiversity, but the result may not always be only soil protection; it may also lead to a negative change in terms of maintaining the overall ecological functions of the land concerned.

[11] See the ruling of the Constitutional Court of 27 May 1998, No. Pl. ÚS 34/97, and the resolution of the Constitutional Court of 31 March 2011, No. III ÚS 2187/10.

[12] See the judgment of the Supreme Administrative Court of 15 December 2009, no. 6 As 185/2002-86. See also the judgment of the Supreme Administrative Court of 14 March 2019, no. 339/2018-25: *"It cannot be assumed that all the owners affected by the modifications will agree with their implementation and with the specific changes brought about by the land modifications. This follows from the above-mentioned principle that the fulfilment of the purpose (and thus the public interest) of complex land adjustments must be assessed from the perspective of the whole, not from the perspective of the particular interests of individual parties to the proceedings."*

qualitatively new spatial and functional arrangement of land ownership relations, using the method laid down by law.[13]

The restitution disputes (return of confiscated property under the former regime) have been of high importance for agriculture. They have been, at their core, somewhat technical, relating to proving that the conditions for restitution have been met, in particular, citizenship and permanent residence.[14] The Constitutional Court also reviewed and accepted the conditions for returning property to the churches, including extensive agricultural land.[15] Later on, it rejected an attempt to retroactively tax church restitution.[16]

2.2. Protection of Property

The jurisprudence of the Constitutional Court concerning the protection of property encompasses a wide range of cases relating in particular to the legal status of agricultural land, usually following the administrative decision of the Ministry of Agriculture or other official authority and consequent unsuccessful action in the administrative justice.

In practice, complainants most often challenge the decision whether their land falls within the regime of Act No. 229/1991 Coll., on the regulation of ownership relations to land and other agricultural property.[17] This Act regulates the rights and obligations of owners, original owners, users and lessees of land, as well as the State's competence in regulating ownership and use rights to land. The decisions on the nature of land are therefore relevant in terms of obligations of the owners and restitution claims and the release of confiscated properties. Similarly, decisions regarding the nature of land under the forest protection and management regulation[18] are disputed.[19] Constitutional complaints also challenge decisions on evidence of the agricultural land based on Act No. 252/1997 Coll., on Agriculture.[20]

The Constitutional Court, however, only rarely upholds the complaint. It may only interfere in the decision-making of the administrative authorities and general courts in the event of excesses, which it rarely finds in the abovementioned cases.

[13] In its judgment of 21 April 2016, No. 1 As 169/2015-42, the Supreme Administrative Court added: *"The requirement of the consent of the owners of a qualified majority of the area of the land in question is only one of the means of ensuring the fulfilment of the defined public interests in the land improvements being carried out. Other such means are: discussion of the proposal with all the owners of the land in question, participation of the state administration authorities concerned, cooperation with the planning authorities and, last but not least, participation of the municipal council of the municipality in the process and decision-making on the land improvements."*

[14] Ruling of the Constitutional Court of 12 July 1994, No. Pl. ÚS 3/94.

[15] Ruling of the Constitutional Court of 29 May 2013, No. Pl. ÚS 10/13.

[16] Ruling of the Constitutional Court of 1 October 2019, No. Pl. ÚS 5/19.

[17] Resolutions of the Constitutional Court of 26 January 1998, No. I. ÚS 308/96; of 13 January 1998, No. IV. ÚS 479/97; of 28 September 1999, No. IV. ÚS 350/99; of 18. 11. 2003, No. I. ÚS 549/03; of 26 March 2019, No. IV. ÚS 4281/18; of 4 December 2019, No. II. ÚS 1571/19.

[18] Act No. 289/1995 Coll., on Forests and on Amendments to Certain Acts.

[19] Resolution of the Constitutional Court of 17 October 2017, No. I. ÚS 2673/17.

[20] Resolution of the Constitutional Court of 5 May 2021, No. II. ÚS 3413/20.

Usually, it concludes that the administrative authorities and the general courts made sufficient factual findings, adequately dealt with the parties' arguments, and reached logical legal conclusions, which they justified in a constitutionally compliant manner.

2.3. Protection of Entrepreneurship

The protection of entrepreneurship is based on Article 26 of the Charter, according to which everybody has the right to the free choice of the profession and the training for that profession, as well as the right to engage in enterprise and pursue other economic activity. Although freedom of entrepreneurship is considered a different, second category of right compared to the right to property, it is also seen both conditional for the formation of property and linked to property.[21]

Various conditions and limitations may be set by law upon the right to engage in certain professions or activities. However, any restrictive measures must take into account the principles of predictability of the protection of legitimate expectations stemming from the general principle of the substantive rule of law. For this reason, in 2006, the Constitutional Court declared unconstitutional the change in the legal regulation of so-called secondary agricultural entrepreneurs who could fulfil the requirements of their activities personally and not through another person.[22]

It is not only qualification requirements that can restrict business. The legislator may, at its discretion, introduce price or quantity regulation of production in a particular sector of the economy, define or influence the type and number of entities operating in it, or limit the contractual freedom to apply production on the market or to purchase raw materials and production equipment. However, *"the limits set by the constitutionally guaranteed fundamental principles, human rights and freedoms must be respected."*[23]

In Europe, so-called production quotas[24] became synonymous with a tool to stabilise the market for certain agricultural products (e.g. sugar, milk)[25] in the last two decades of the 20th century. Their introduction was considered to be in the public interest, both in terms of securing and maintaining the production of the agricultural commodity in question and in terms of securing a market for each producer at an appropriate minimum price, and hence income for farmers. The Czech legal regulation of production quotas was reviewed by the Constitutional Court not only from the perspective of the constitutional order, but also with regard to the basic sub-principles and fundamental rights arising from EU (Community) law.

[21] Ruling of the Constitutional Court of 30 October 2002, No. Pl. ÚS 39/01.
[22] Ruling of the Constitutional Court of 20 June 2006, No. Pl. ÚS 38/04, para. 45.
[23] Ruling of the Constitutional Court of 16 October 2001, No. Pl. ÚS 5/01.
[24] Production quota systems, or other similar instruments such as prohibition of new vineyards planting, are designed to regulate an underperforming market for certain products, to limit the quantity of their production, as well as to limit new investment in the sector thus regulated. In the European Union and in the Czech Republic, this instrument is no longer used in agriculture in this form.
[25] For detail, see Křepelka 2003, 121–131.

According to the Constitutional Court, there is no individual right corresponding to a market free from all legal regulation which is in line with the regulation of the agricultural commodities market at EU level.[26]

Nevertheless, the regulatory measures must respect the principle of proportionality, even if there is a public interest. The legislator's interference with the freedom of enterprise must be proportionate and not exclude its main purpose to render the business unreasonable.[27] The purposelessness and disproportionality of the measure would be contrary to Article 4(4) of the Charter, because the essence and purpose of the right to conduct business would not be respected.[28] On the other hand, while respecting the abovementioned principles, the choice of restrictive instruments and the extent to which they are applied is primarily a task for the legislator, and the Constitutional Court is not called upon to assess the economic aspects of the necessity and necessity of restricting entrepreneurship or to determine the conditions under which it is possible to do business, given the need to safeguard individual, often juxtaposed or even conflicting public interests.[29]

Although a restriction on the production of agricultural products may be regarded as a restriction on the right to use the property which has exceeded the production quota, according to the Constitutional Court, the prevention of the sale of that surplus (milk) does not affect the property itself and cannot be regarded as an expropriation, since the achievement of a certain price by selling the product on the market is not part of the fundamental right to property.[30] Neither is there a devaluation of property, as the Constitutional Court found in the case of price regulation in favour of purchasers in cases where they were linked to contractual directness or forced maintenance of existing contractual relations.[31] In this context, the Constitutional Court recalled that, *inter alia*, the tightening of the quality requirements for the production of goods in the course of business or other economic activity often means for the entrepreneur or farmer a price disadvantage for the products he produces or the raw materials and equipment he uses for production. However, such regulation is often necessary in order to better safeguard a wide range of important general interests that are often still inadequately protected. In such cases, however, the objection of a restriction on the right of ownership would undoubtedly be considered unacceptable.

In the context of a restriction on the right to property or freedom of enterprise, the question of compliance of the restrictive measure with the principle of equality and non-discrimination always arises. In the case of production quotas, the Constitutional Court held that their purpose is *"not to disadvantage or, on the contrary, to favour a certain group*

[26] See Regulation No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.
[27] Ruling of the Constitutional Court of 8 December 2015, No. Pl. ÚS 5/15.
[28] See Hejč 2020, 194–198.
[29] Ruling of the Constitutional Court of 20 November 2001, No. Pl. ÚS 5/01.
[30] Ibid.
[31] Ruling of the Constitutional Court of 21 June 2000, No. Pl. ÚS 3/2000.

of producers, but to ensure equal conditions on the market".[32] Any disadvantage or favouring of certain entities does not automatically mean unconstitutional discrimination, since equality cannot be understood as an absolute category and must always be considered as relative equality, requiring the elimination of unjustified differences.[33] Thus, unconstitutional discrimination was not found in the case of farmers operating exclusively in a system of permanent confinement, who were subject to production quotas compared to organic dairy farmers, since the welfare of the animals constituted a relevant public interest justifying the inequality in question.[34]

The Constitutional Court also assessed the reasonableness and proportionality of Act No. 395/2009 Coll., on significant market power in the sale of agricultural and food products and its abuse. This Act applies to the entire food chain, which includes entities and their activities from primary agricultural production, through processing to the retail sale of food. The aim of the Act is to prevent unequal market positions of individual operators, the application of unfair commercial practices by food buyers and the deterioration of the market position of food suppliers including the impairment of their ability to supply food to the market. According to the Constitutional Court, the objective of the law is legitimate, and the individual measures are proportionate, and use means that do not interfere with the essence and meaning of the right to conduct business.[35] The Constitutional Court did not assess which regulation is optimal for achieving the declared objective, but whether the chosen means are not manifestly unreasonable.

Similarly, the Constitutional Court assessed the obligation of some food business operators to donate safe, but unsold or unsaleable food to humanitarian or charitable organizations free of charge. It concluded that such obligation does not affect the essence of business as an activity carried out for profit and also at the risk of loss. The interference by the legislator with the right of ownership of the foodstuffs in question was then considered appropriate, necessary and proportionate, as it pursues the general interest, *inter alia*, the reduction of food waste and the protection of the environment.[36] However, as Judge Šimíček aptly pointed out in his dissenting opinion, the Constitutional Court failed to elborate on the interference with the rights of food producers (suppliers), for whom *"the procedure under the contested provisions should constitute an ultima ratio public law solution, which is only considered after it is not possible to resolve the matter within the framework of commercial relations for various reasons."*[37]

[32] Ruling of the Constitutional Court of 20 November 2001, No. Pl. ÚS 5/01.
[33] Ruling of the Constitutional Court of 8 October 1992, No. Pl. ÚS 22/92.
[34] Ruling of the Constitutional Court of 20 November 2001, No. Pl. ÚS 5/01.
[35] Ruling of the Constitutional Court of 7 April 2020, No. Pl. ÚS 30/16.
[36] Ruling of the Constitutional Court of 18 December 2018, No P. ÚS 27/16.
[37] Dissenting opinion of Judge Šimíček on the reasoning of the ruling of the Constitutional Court of 18 December 2018, No Pl. ÚS 27/16.

3. Agriculture and Constitutional Protection of the Environment

The purpose and effects of the constitutional protection of the environment on agriculture are threefold: First, it serves as a guidance tool for policymaking and a general requirement for balancing various public and private interests in detailed regulation and in each individual case. Second, environmental protection is conceived a reason to restrict the property rights by the State based on Art. 11(3) and 11(4) of the Charter (see above) and an inherent limitation on the exercise of any right for the sake of environmental protection based on Art. 35(3) of the Charter. All these provisions share *"the same spirit."*[38]

Article 35(3) of the Charter provides that *"In the exercise of his or her rights, no one may endanger or damage the environment, natural resources, the species richness of nature or cultural monuments beyond the extent prescribed by law."* The purpose and intent of this provision are not to prohibit across the board all potentially hazardous activities to the environment but rather to legitimise legal measures that restrict or impose conditions on the exercise of various rights on the grounds of environmental protection. Specific restrictions can be identified in many Acts. They may take the form of an express prohibition or an obligation, the fulfilment of which results in a restriction of one of the rights of the obliged person.[39]

Third, the soil is protected as a natural resource under Art. 7 of the Constitution (protection of natural wealth) and Art. 35(1) of the Charter (right to a favourable environment).

3.1. Soil as a Part of Natural Wealth According to Article 7 of the Constitution

According to Art. 7 of the Constitution, *"The state shall concern itself with the prudent use of its natural resources and the protection of its natural wealth."* The Constitutional Court interprets the concept of natural wealth quite broadly, which means that various natural resources, including soil, can be natural wealth and that both categories merge into the concept of natural values[40] or even into the general concept of the environment.

[38] Ruling of the Constitutional Court of 18 July 2017, No. Pl. ÚS 2/17, para. 37.

[39] The consequence of a breach of the prohibition or failure to comply with the obligation is usually creating a liability relationship and the possibility of being sanctioned for the infringement. However, it should be noted that the legislation does not always associate the possibility of a sanction with a breach of a specified obligation in the field of environmental protection. The restrictive measure may take the form of a duty to act or an obligation to refrain from a particular action. It may arise directly from the law, but it may also stem from various protective or corrective measures adopted by public authorities, from partial conditions for the enforcement of decisions, and from control and sanction measures to fulfil the right to a favourable environment. See, *inter alia*, resolution of the Constitutional Court of 22 September 2003, No. IV. ÚS 707/02.

[40] See e.g. the ruling of the Constitutional Court of 13 December 2006, No. Pl. ÚS 34/03: *"The object of the hunting law is therefore game, which in the abstract represents primarily a natural wealth that the state has set itself the objective of protecting. The seriousness and fundamental nature of this protection is primarily due to the fact that the protection of natural values has become the subject of regulation directly in the*

Thus, the protection of land and soil can be conceived *"legitimate, constitutionally consistent objective (public interest)"*[41] and, at the same time as a duty, the fulfilment of a positive obligation of the State. It is thus one of the typical state objectives that *"should be kept in mind, for example, in the exercise of decision-making activities (use of competences) of any public authority and also, for example, in the preparation and approval of the draft law on the state budget - as a certain budgetary priority."* [42]

So far, Art. 7 of the Constitution has not been invoked in a particular case concerning agriculture. However, the Constitutional Court constitutes a direct link between Art. 7 of the Constitution, and both guarantees and limitations of basic rights and freedoms.

For example, the levy for permanent withdrawal of agricultural land from the agricultural land fund pursuant to Act No. 334/1992 Coll., on the Protection of the Agricultural Land Fund,[43] is considered a legitimate restriction of property rights according to the aforementioned Art. 11(3) of the Charter. In addition, based on the State's obligation under Article 7 of the Constitution, the levy presents an essential part of the protection of natural wealth. If removed, it could jeopardise the system of soil protection because it contributes significantly to the State's obligation to protect natural resources. In this respect, the Constitutional Court noted that there is room for the legislator to deepen legal protection, while contrary changes weakening the positive obligation of the state in Article 7 of the Constitution are not permissible.[44]

The public interest expressed in Article 7 of the Constitution is therefore fulfilled by various activities aimed at maintaining or improving the state of natural wealth, which may consist in direct activities of the state to protect agricultural land, such as the above-mentioned land adjustments, or in active obligations of landowners. These are for example required by Section 68 of Act No. 114/1992 Coll., on Nature and Landscape Protection. According to this provision, the owners shall improve the state of the preserved natural and landscape environment to the best of their ability in order to preserve the species richness of nature and maintain the system of ecological stability. The purpose of the provision is to ensure that (in the future) a condition that is so favourable from the point of view of environmental protection is not affected. This is a matter of prevention (e. g. regular mowing of the land), but not exclusively. According to the Constitutional Court, the requirement even *"reflects the need of remedial measures and aims at a situation where the ecological stability and the biodiversity of the land have*

Constitution of the Czech Republic, according to Article 7 of which the State shall ensure the careful use of natural resources and the protection of natural wealth."

[41] The ruling of the Constitutional Court of 8 July 2010, No. Pl. ÚS 8/08. See also the ruling of 13 December 2006, No. Pl. ÚS 34/03, in which the Constitutional Court stressed that the seriousness the protection of natural wealth is underlined by the fact that the protection of natural values has become the subject of regulation directly in the Constitution.

[42] Šimíček 2010, 131.

[43] According to Art 1(1) of the Act on the Agricultural Land Fund Protection, the agricultural land fund is considered a basic natural resource of the Czech Republic, an invaluable source of production enabling agricultural production and one of the main components of the environment. Its protection is not limited to basic protection in the sense of preservation (survival), since it also includes improvement and rational use of the land.

[44] Ruling of the Constitutional Court of 15 March 2016, No. Pl. ÚS 30/15, para 32.

already been affected (a minori ad maius). This is a legitimate, constitutionally compliant objective (public interest) of environmental protection."[45]

3.2. Soil Protection as Part of the Right to Self-Government

Agricultural land in the form of territory is a fundamental attribute of a municipality as a local government unit. The right to self-government is guaranteed by Article 8 in conjunction with Article 100(1) of the Constitution. The municipality is entitled to defend its rights against unlawful interference by the State and other entities.

Municipalities adopt generally binding ordinances which may direct or restrict the performance of agricultural activities, for example by setting conditions for the burning of dry plant materials in open fires.[46] The Constitutional Court also confirmed the competence of municipalities to restrict the breeding of livestock in certain parts of the municipality by means of a generally binding ordinance, based on the general authority to regulate activities related to the protection of the environment and public order.[47]

The basic manifestation of self-government for the development of the territory is the competence to adopt spatial planning documentation. This competence includes the designation of new development areas, which is directly related to the need to protect agricultural land.[48] It is crucial for the protection of soil that the positive commitments of the State are already reflected at the level of planning following the general requirements of the Building Act (Act No. 183/2006 Coll.) and the hierarchy of instruments for the protection of agricultural land fund provided by Act No. 334/1992 Sb., on Protection of Agricultural Land Fund.

In spatial planning processes, individual public and private interests, as well as individual public interests, are weighed against each other. The protection of agricultural land may thus come into conflict with other interests of society, and since it does not have automatic priority over other interests, it is logically necessary to seek a balance of interests. As the Supreme Administrative Court held, *"the protection of agricultural land, like the protection of other components of the environment, cannot be absolutized. The different components of protection must be in balance with each other, just as a balance must be sought between environmental protection and other social interests."*[49]

[45] For the performance of such measures, should they exceed the general obligations arising from both civil and public legal regulation, the owners or tenants are entitled to compensation for the restriction of the right of ownership. See ruling of the Constitutional Court of 8 July 2010, No. Pl. ÚS 8/08.

[46] Pursuant to Section 16(5) of Act No. 201/2012 Coll., on Air Protection.

[47] Pursuant to Section 10 of Act No. 128/2000 Coll., on Municipalities, which implements the constitutional mandate. See ruling of the Constitutional Court of 21 October 2008, No. Pl. ÚS 46/06.

[48] Judgement of the Supreme Administrative Court of 22 December 2011, No. 8 Ao 6/2011-87.

[49] Judgement of the Supreme Administrative Court of 18 July 2006, No. 1 Ao 1/2006-74.

The obligation to enforce the public interest in the protection of the agricultural land fund lies primarily on the agricultural land fund protection authorities. They issue binding opinions when new buildable areas at the expense of agricultural land are defined and assess the proposed land use solution with regard to the principles of agricultural land fund protection. These principles must also be followed by those who prepare the spatial planning documentation – the municipal offices. They must propose and justify a solution that is the most advantageous in terms of the protection of the agricultural land fund and other general interests protected by law. This requirement further translates to an assessment of the appropriate use of the built-up area and an assessment of the need to designate buildable areas as part of the justification of the land-use plan.

The highest protection classes of the agricultural land can only be used for non-agricultural purposes if other public interest significantly outweighs the public interest of protecting the agricultural land fund.[50] This balancing must take place in the planning process and even though the legal requirements are rather ambiguous,[51] it is one of the conditions for the legality of the approved spatial plan. According to the settled case-law, *"the interest in the development of the municipality may, of course, prevail over the interest in environmental protection in the specific circumstances of the case, but it is a prerequisite that the need for development is demonstrated by a detailed and comprehensive analysis of the existing situation (in particular the possibility of using existing areas) and a forecast of future development based on realistic expectations."*[52]

According to the Constitutional Court, the protection requirements cannot be waived even if the agricultural land of the highest protection classes is affected only to a small extent or if its classification in the highest protection classes is considered by the complainants to be merely an act of the executive power unsupported by facts.[53] The requirement to prove that the public interest significantly outweighs the public interest in the protection of agricultural land cannot be met where there is no other public interest. The Constitutional Court has stated on numerous occasions that not every collective interest can be described as a public interest.[54]

Even if the use of agricultural land for non-agricultural purposes is consistent with the zoning plan, an additional requirement applies - land may be withdrawn only if necessary.[55] However, this requirement cannot be interpreted as absolute, so that a change in the land use plan would be possible and the creation of new buildable areas would only be permissible after the existing possibilities have been fully exhausted. Such rigorous interpretation would result in an excessive blocking of the territory.[56]

[50] Section 4(4) of the Act on the Protection of the Agricultural Land Fund.
[51] See Franková 2019, 35-44.
[52] Judgement of the Supreme Administrative Court of 6 June 2013, No. 1 Aos 1/2013-85.
[53] For example, the construction of a commercial centre in an area where a number of similar buildings is already located. See resolution of the Constitutional Court of 23 June 2020, No. III.ÚS 1030/20.
[54] See resolutions of the Constitutional Court of 23 June 2020, No. III. ÚS 1030/20; of 28 March 1996, No. I. ÚS 198/95.
[55] Section 4(1) of the Act on the Protection of the Agricultural Land Fund.
[56] Judgement of the Supreme Administrative Court of 28 May 2009, No. 6 Ao3/2007-116.

The political discretion of how far a municipality will go in protecting farmland is not for the courts to evaluate. Courts are entitled to assess compliance with the conditions of procedural and substantive law, possible deviation from substantive legal limits and the interference with subjective rights of natural and legal persons.[57] However, if a municipality fails to comply with the legal requirements for the protection of agricultural land, which represent a minimum standard, the zoning plan may be revoked on this ground. Such a step is certainly an interference with the right to exercise self-government, but it cannot be *"unlawful if it is taken in a situation where the municipality's actions are in direct conflict with the interests protected by the Agricultural Land Protection Act."* [58] The repeal of a zoning ordinance may also result from protection which is overly stringent, particularly because it is disproportionate to other interests, or is chicanery,[59] or represents a significant reversal in the municipality's planning activities that are intended to be settled over a longer period of time.[60]

3.3 Links to the Right to a Favourable Environment

Interventions in agricultural land can affect a variety of people, both individuals who can promote the public interest in land protection through their own interests and special entities such as NGOs called upon directly to protect the public interest. According to the Constitutional Court, *"the fact that the environment is a public good (value) within the meaning of the preamble to the Constitution and the Charter and Article 7 of the Constitution does not exclude the existence of a subjective right to a favourable environment (Article 35(1) of the Charter), as well as the right to claim it to the extent provided for by law."*[61] The provisions of Article 7 of the Constitution and Article 35(1) of the Charter are not mutually independent; according to the Constitutional Court, the establishment of the right to a favourable environment is directly linked to the State's obligation to protect natural resources.[62] The same approach is evident in the case law of the general courts, according to which *"the public interest in the protection of the environment overlaps with the right of individuals to the protection of a healthy environment under Article 35(1) of the Charter"*.[63]

The link between the right to a favourable environment and the protection of soil is also confirmed by the practice in which claimants increasingly argue, usually in addition to the infringement of their right to property, also the infringement of the right to a favourable environment, e.g. as a result of the disproportionate expansion of built-up areas leading to population growth[64] or, such in the construction of a golf course, which *"constitutes a significant burden on the local ecosystem, affecting the availability of*

[57] Ruling of the Constitutional Court of 7 May 2013, No. III. ÚS 1669/11.
[58] Resolution of the Constitutional Court of 23 June 2020, No. III. ÚS 1030/20.
[59] See judgement of the Supreme Administrative Court of 4 October 2011, No. 4 Ao 5/2011-42.
[60] See judgement of the Supreme Administrative Court of 29 January 2020, No. 9 As 171/2018-50.
[61] Ruling of the Constitutional Court of 10 July 1997, No. III. ÚS 70/97.
[62] See ruling of the Constitutional Court of 15 March 2016, No. Pl. ÚS 30/15, para. 21.
[63] Resolution of the extended senate of the Supreme Administrative Court of 29 May 2019, No. 2 As 187/2017-264.
[64] See judgement of the Supreme Administrative Court of 6 December 2019, No. 6 As 125/2019-20.

local water sources, altering soil permeability, disturbing hydrological conditions in the landscape and causing pesticides to penetrate the soil."[65]

Since access to judicial protection is based on the condition of interference with rights,[66] it is essential for the effective protection of soil that it can be invoked by persons other than the owners who are affected on their right to a favourable environment. These may be both natural persons and, according to the Constitutional Court, environmental NGOs.[67] Municipalities do not have the right to a favourable environment, but they represent the interests of their inhabitants and, in particular, defend their own right to self-government (see above). Therefore, they may be affected by an intervention in the soil on their own territory, or even by its consequences if it occurs outside the territory of the municipality. The Supreme Administrative Court concluded that even if the municipality *"does not farm itself and the termination of the agricultural use of the disputed areas does not in itself adversely affect the legal sphere of the municipality, the purpose for which the areas under consideration are defined cannot be disregarded"*[68] and that the change of land designation from agricultural to non-agricultural for the construction of a large-scale commercial zone may have a negative impact on the environment in the area in question – and consequenetly even neighbouring municipalities. Thus, the municipalities' concern is conceived broadly which implies that the municipality can, under specific sircumstances, challenge a spatial plan of another municipality: *"It is sufficient for a municipality to plausibly allege possible prejudice by the spatial plan of a neighboring municipality (prejudice need not be proven), and then the municipality can challenge all aspects of the protected public interests."*[69] In practice, however, the municipalities are more likely to challenge a superior spatial planning documentation adopted at the regional level, which restricts their development. Usually, they lack capacity to bring a dispute to the court or do not want to disrupt good relations with other municipalities.

4. Conclusion

The regulation of agricultural activities is not directly enshrined in the Czech Constitution, but it manifests itself primarily through the State's commitment to the protection of natural resources and the constitutional guarantee of individual rights and freedoms, in particular the right to property, the right to entrepreneurship, the right to a favourable environment and self-government. The various provisions of the Constitution are interrelated, so that not only is agricultural land an object of ownership, but at the same time the protection of soil is a public interest which needs to be balanced against other public and private interests.

The case law of the Constitutional Court indicates a tendency towards an extensive interpretation of the concepts of natural resources and natural wealth, so that the protection of soil can also be subsumed under the duties of the State.

[65] Resolution of the Supreme Administrative Court of 10 October 2019, No. 6 As 108/2019-28.
[66] Section 65(1) of Act No. 150/2002 Coll., Code of Administrative Justice.
[67] See ruling of the Constitutional Court of 30 May 2014, No. I. ÚS 59/14.
[68] Resolution of the extended senate of the Supreme Administrative Court of 29 May 2019, No. 2 As 187/2017-264.
[69] Buryan 2020, 2.

Moreover, it is linked to subjective rights of individuals and the right to self-government of the municipalities which can participate at decision-making and consequently access the courts. In most of the cases, the Constitutional Court has been dealing with various legal measures restricting ownership or entrepreneurship. Only rarely has it upheld the complaint since it does not interfere in the political discretion of the legislator.

In particular, the Court takes into account whether the restrictions serve for the public interest and whether the essence and purpose of the restricted right is respected.

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