

## CONSTITUTIONAL PROTECTION OF HEALTHY ENVIRONMENT AND SUSTAINABILITY IN THE HUNGARIAN CONSTITUTIONAL LAW

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### **Abstract**

*The normative text of the Fundamental Law of Hungary makes several references to environmental protection. From the National Avowal to the end of the chapter entitled "The State", every section of the Fundamental Law contains its own provisions expressing the country's commitment to environmental values. Our lecture examines these provisions in the context of the practices of the Constitutional Court and of the relevant literature.*

*From the National Avowal to the end of the chapter entitled "The State", every section of the Fundamental Law contains its own provisions expressing the country's commitment to environmental values.*

*The Foundation of the Hungarian Fundamental Law is the first section in which environmental protection appears, and it contains the general values, principles and objectives associated with the social order, with Article P) being the first to mention the prominent role of nature conservation.*

*Following this, environmental protection appears in articles XX and XXI of Freedom and Responsibility, which establishes the fundamental rights. Paragraph (1) of Article XXI establishes the right to a healthy environment in the same manner as the previous Constitution.*

*Fundamental Law includes the requirement for sustainability.*

*The Constitutional Court's Decision 16/2015 (VI. 5.) AB declared that the Fundamental Law not only maintained the level of protection of the fundamental constitutional right to a healthy environment, it also contains considerably broader provisions than the Fundamental Law in this area.*

**Key words:** *right to healthy environment, environmental protection, sustainability, environmental law, constitution, human rights, Fundamental Law of Hungary*

### **Introduction**

In Hungary we call our Constitution "the Fundamental Law", just like the German Fundamental Law (Grundgesetz).

The Fundamental Law of Hungary is the supreme set of rules that form the basis of Hungary's legal system.

Hungary's first written constitution was originally adopted in 1949, during the Soviet occupation of Hungary. In 1989 during the change of the political system the legislature approved a total amendment of the constitution, though formally (de iure) Hungary remained the only one among the former post-socialist countries that had not adopted a new constitution after the fall of Communism, until 2011. Despite this, we refer to the Hungarian constitution since 1989 as a new one, because in the sense of its content, it became a "rule of law constitution". Hungary's current constitution entered into force on 1st January 2012, which is referred to as "Fundamental Law" compared to "constitution". It is quite a unique situation in the world when a new constitution is adopted under an already existing constitutional court. In most of the countries today, where a constitutional court operates, the court's case law has been developing under the same constitution. In Hungary, the Constitutional Court (Alkotmánybíróság, henceforth abbreviated: CC) has been operating since 1990 and has been developing its case law for more than two decades, when it had to face a completely new constitution in the Fundamental Law.

### **Healthy environment and sustainability in the Fundamental Law**

The Fundamental Law of Hungary entered into force in 2012. The Fundamental Law not only maintained the level of protection of the fundamental constitutional right to a healthy environment, compared to our Previous Constitution, but the new Fundamental Law also contains considerably broader provisions than the previous constitution in this area.

In this respect, the Fundamental Law further developed the value system and approach to environmental protection of the Fundamental Law and the Constitutional Court.

The normative text of the Fundamental Law of Hungary makes several references to environmental protection.

The preamble of our Constitution is called "National Avowal", or the "National Avowal of Faith". From the National Avowal to the end of the chapter entitled "The State", every section of the Fundamental Law contains its own provisions expressing the country's commitment to environmental values. Concerning the normative text, the Foundation is the first section in which environmental protection appears, and it contains the general values, principles, and objectives associated with the social order, with Article P) being the first to mention the prominent role of nature conservation.

The National Avowal indicates that "Hungary is committed to the protection of the natural and built environment of the Carpathian Basin within the framework of sustainable development, taking into account both the people of today and future generations. Hungary therefore stands for sustainable development, ensuring a healthy environment for future generations, but at the same time, since environmental problems are independent of state borders, it treats the protection of nature and the environment as a global issue.

On the other hand, the subjective scope of responsibility for the right to a healthy environment has also changed. This is because the Constitutional Court has viewed the right to a healthy environment as substantively the essence of the state's obligation to protect institutions."

Within the European Union, such special concern for future generations is quite rare in the preamble of the constitutions.

In the first years after it was established, the Constitutional Court of Hungary issued its decision of the year 1994, which is of decisive importance concerning the dogmatics of the right to a healthy environment.

The Constitutional Court explained already in 1994 that the "*right to environmental protection is primarily an independent and institutional protection taken in and of itself.*"

*The right to a healthy environment raises the guarantees of the state's fulfilment of its obligations regarding environmental protection to the level of a fundamental right, including the conditions for limiting the protection of the environment. The protection of this right to a healthy environment must be performed (only) by providing legal and organizational guarantees."*

In this Constitutional Court Decision 28 of the year 1994, the Constitutional Court of Hungary also found that the right to a healthy environment makes it the state's duty to protect the environment and maintain the natural basis of life.

In light of this, "the state must also replace its task of ensuring subjective rights with legislative and organizational (institutional) guarantees".

The Constitutional Court also emphasized that the level of institutional protection concerning the right to a healthy environment is not arbitrary.

*"Based on the subject matter and dogmatic particularities of the right to a healthy environment, it follows that the state cannot reduce the level of nature protection ensured by legislation unless doing so is unavoidable for the enforcement of other constitutional rights or values.*

*Even in such cases, the degree of reduction of the level of protection must not be disproportionate in comparison to the aim to be achieved."*

Furthermore, it also stated that the enforcement of the right to a healthy environment also requires that *"the state not step back from preventive rules aimed at environmental protection in favour of protection provided by sanctions. This requirement can only be deviated from in case of unavoidable necessity and only proportionally."*

Later, after the Fundamental Law entered into force the Constitutional Court confirmed that the right to a healthy environment is *"not a fundamental right, but neither is it a mere constitutional duty (state objective), but part of the objective, institutional protection aspect of the right to life, which defines the state's duty to maintain the natural foundations of human life as a separate constitutional right."*

It is part of the Constitutional Court's settled practice that the level of protection of the environment must not be lowered, as expressed by the principle of non-derogation. The Constitutional Court points out that the principle of non-derogation, which can be traced back to the Fundamental Law, only prohibits a step backwards which could result in irreparable damage to nature or the environment (Decision no. 17 of the year 2018. AB).

The National Avowal also states that the Fundamental Law "shall be an alliance among Hungarians of the past, present and future."

Therefore, even the National Avowal indicates that current governments must make decisions that *serve the interests of future generations.*

The Fundamental Law of Hungary has a separate chapter, which establishes the fundamental rights, it is called Freedom and Responsibility. Environmental protection appears in articles XX and XXI of Freedom and Responsibility, which establishes fundamental rights. Paragraph (1) of Article XXI establishes the right to a healthy environment in the same manner as the previous Constitution.

In the subsequent paragraphs of Article XXI of the Fundamental Law, one of the most striking constitutional innovations is the declaration of the principle of 'the polluter pays', according to which anyone who causes damage to the environment is obliged – as specified by law – to remedy such damage or bear the costs of doing so.

Another new development is paragraph 3 of Article XXI of the Fundamental Law, which prohibits the importation of polluting waste into the territory of Hungary for the purpose of disposal.

The Fundamental Law now specifies the task of protecting the environment by protecting individual environmental resources, as well as prohibiting the importation of polluting waste into the country for disposal.

Article Q) of the Fundamental Law expressly refers to the requirement for sustainable development, as well as including the requirement for a safe environment.

In accordance with this: "In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world."

The seventh item of the National Avowal also includes the triad of sustainable development requirements encompassing economic, social, and environmental development and sustainability.

In addition to this, the requirement for sustainability appears among the principles of budget management in Article N) of the Fundamental Law.

According to Article N) Hungary is committed to the principle of a balanced, transparent, and sustainable management of the budget. Parliament and the Government shall have primary responsibility for the fulfillment of this principle, moreover, the *Constitutional Court*, the courts, municipal governments, and other public bodies shall respect this principle of sustainable management of the budget.

### **The protection of the Fundamental Law regarding arable land**

The Fundamental Law mentions arable land among *natural resources* in its above mentioned Article P), but it does not define what it means. It should be added, that even the definition of a conceptual term, such as arable land, rarely is used in a constitution.

Article 3 sec. a) of the Act LV of the year 1994 defines the various elements within the scope of arable land from a legal point of view. As so defined arable land is a piece of ground, which is recorded in the Land Registry, situated in the outskirts of a settlement and kept in the record in the following land uses: as plough-land, vineyard, fruit garden, garden, meadow, pasture (lawn), reedy area, forest, afforested area or fish-pond. The provisions relating to arable land should be applied to those pieces of interior land which are cultivated as an agricultural or forestry area (see Article 2 of the Act on arable land). Additionally, arable land is regulated in a lot of other legislative enactments and is not easily definable (Bobvos 2004). In the definition of arable land, the provisions of the Act take into consideration only the aspect of cultivation and do not consider the size of the area. Only the "farm" is defined according to its territorial extent (Kozma 2012).

At the same time, according to my point of view, apart from the protection of arable land under the Fundamental Law, it appears inappropriate for legislative enactments by lower levels of government to attempt to precisely define the concept of arable land for constitutional purposes. Constitutional law claims to define its own legal terms or concepts autonomously, independent from the other branches of law. This type of autonomy has particular importance with respect to the jurisprudence of the European Convention of Human Rights, where the autonomy of concepts of the Convention in relation to the national systems of law is an essential condition for efficient legal protection (see Frowein-Peukert 2003).

The autonomy of Constitutional Law in this respect is fundamental to enforcing constitutional guarantees against the legislative branch. This thesis is valid even in the case where the *definition of concepts of Constitutional Law* cannot become completely separated *from the concepts* and the system of individual branches of law (Sonnevend 2003). On the other hand, if the definition of a legal term (e.g. the protection of property) in constitutional law and in any other branch of law were completely equal (i.e. the constitution protected the same "property" as the civil code), the amendment of the law of a lower level would result in

the amendment of the constitutional protection at the same time. This theory is proven by the fact that the Act on arable land ranks a forest within the concept of arable land, while Article P of the Fundamental Law differentiates between arable land and forests.

It is the Constitutional Court, that should finally define the concept of arable land and the related scope of protection.

Arable land is, on the one hand, an instrument of production, fixed assets or "estate" in terms of economy, on the other hand, the basis of the existence of society, the object of property ownership (as real estate), in the terms of Civil Law, and also a part of the territory of the State. The Constitutional Court, while defining the characteristics of arable land, also considers the specific natural attributes and those relating to land as a species of property. The Constitutional Court defined, in connection with the former, land – also within the scope of the former Constitution – as a natural object or natural resource being available to a limited extent, as a "limited estate", which cannot be increased nor substituted by another object (See the Decision of the Constitutional Court of No. 35/1994. (VI. 24) AB, ABH 1994, 197, 201).

The fact that Article P of the Fundamental Law mentions arable land among natural resources suggests the former conceptual definition by the Constitutional Court can be maintained, as well as advancing the characteristics of environmental protection into foreground.

## Conclusions

As a Conclusion, we can say that Hungary's present constitution, the Fundamental Law not only maintained the level of protection of the fundamental constitutional right to a healthy environment, compared to our Previous Constitution, but the new Fundamental Law also contains considerably broader provisions than the previous constitution in this area. Within the European Union, such special concern for future generations is quite rare in the preamble of the constitutions.

The constitutional basis of the right to a healthy environment was established already in the first years after the Constitutional Court was established, by the Constitutional Court decision of the year 1994. The Constitutional Court confirmed the principle of *non-derogation* also under the Fundamental Law.

One of the most striking constitutional innovations is the declaration of the principle of 'the polluter pays', and the regulation that prohibits the importation of polluting waste into the territory of Hungary for the purpose of disposal.

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