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Fundamental Law pillars of sustainable agriculture

Abstract

The purpose of the paper is to introduce the legal practices of the Constitutional Court in connection with the 'sustainability clause' of the Fundamental Law in relation to natural resources. Subsection (1) of Article P) of the Fundamental Law is in the centre of the research, according to which: „Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations.”

Keywords: fundamental law, sustainability, Constitutional Court practice, forest law, water management

1. Foundations of the Constitutional Court's legal construction

The requirement for sustainability has been declared by the creation of Article P) of the Fundamental Law¹ sustainability that extends to environmental, natural and cultural values. The interpretation of the law by the Constitutional Court in the past 10 years with respect to Subsection (1) of Section P) shall be summarized as follows:

I. Subsection (1) of Article P) bears double functions as it may be considered a guarantee for basic human rights to a healthy environment as included in subsection (1) of Article XXI² as well as a sui generis obligation that stipulates the protection of national heritage which prevails beyond subsection (1) of Article XXI.³

II. Article P) of the Fundamental Law contains the protection of the environment as a general objective of the State, as opposed to the right to a healthy environment in Article XXI of the Fundamental Law.⁴

III. Environment as the subject, object and content of protected value and the obligation to protect and sustain the environment (Article P). Environment as the object of protected value means natural resources, biodiversity and cultural values,

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¹ Justification of the Fundamental Law of Hungary – for Article P).

² 'Hungary shall recognise and endorse the right of everyone to a healthy environment.'

³ Constitutional Court Decision no.13/2018. (IX.4.) [14] For environment law regulations of the Fundamental Law see: Horváth 2013, 222–234.

⁴ Constitutional Court Decision no. 24/2016. (XII.12.) [29].



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i.e. environment itself. The Fundamental Law highlights arable land, forests and reserves of water besides the protection of native plant and animal species with respect to biodiversity in a non-taxative way.⁵

IV. As far as its subject is concerned, broadening the scope of obligation is a significant leap forward in the Fundamental Law. While in the former Constitution only the State obligations were included in environmental protection, the Fundamental Law contains the ‘obligation of the State and everyone’ – society and each and every citizen.⁶

V. While it shall not be expected of a natural person or a legal entity to adjust their behaviour to a non-specified, abstract objective beyond being aware of and abiding by the laws in force, the State should be expected to unambiguously determine legal obligations to be kept both by the State and private individuals.⁷ For the sake of the protection of the environment, the accepted specific laws must be accessible, unambiguous and legally enforceable.⁸

VI. Subsection (1) of Article P) of the Fundamental Law is based on the constitutional wording of public trust regarding environmental and natural values, the essence of which is the following: the State, as a so-called trustee handles the natural and cultural treasures for the future generations as a beneficiary and provides access and utilization for the present generation to the extent where the long-term survival of natural and cultural values as assets under protection is not jeopardized. The State must take the interest of present and future generations into account when handling such treasures and drafting regulations.⁹

VII. In accordance with subsection (1) of Article P) of the Fundamental Law, the current generation bears three major obligations: preservation of choice, preservation of quality and providing accessibility. The preservation of choice is based on the consideration that the living conditions of future generations can be best provided if the bequeathed natural heritage can provide the future generations with the freedom of choice in their own problem solutions instead of being forced to an involuntary path by current decisions. According to the requirement of preservation of quality, we must aspire to hand over the natural environment to the future generations in the exact same condition it had been received from previous generations. The requirement of accessibility to natural resources means that the current generation shall have access to resources as long as they respect the equitable interest of future generations.¹⁰

VIII. The responsibility towards future generations expects the lawmaker to evaluate and consider the prospective effects of decisions based on scientific facts and in accordance with the principles of precaution and preservation.¹¹ Based on the principles of precaution and preservation stated in subsection (1) of Article P) and subsection (1) of Article XXI of the Fundamental Law, it is the responsibility of the

⁵ Constitutional Court Decision no. 24/2016. (XII.12.) [29] and Constitutional Court Decision no. 28/2017. (X.25.) [35].

⁶ Constitutional Court Decision no. 16/2015. (VI.5.) [92].

⁷ Constitutional Court Decision no. 28/2017. (X.25.) [30].

⁸ Constitutional Court Decision no. 28/2017. (X.25.) [30].

⁹ Constitutional Court Decision no. 14/2020. (VII.6.) [22].

¹⁰ Constitutional Court Decision no. 28/2017. (X.25.) [33].

¹¹ Constitutional Court Decision no. 13/2018. (X.10.) [13].

State to prevent the deterioration of environmental conditions as a result of a certain provision from occurring.¹² Consequently, the lawmaker must verify that a certain planned regulation does not result in a derogation, hereby, does not cause irreversible damage and does not create theoretical possibility for such damage.¹³ All of this means that in order to determine that an act is in conflict with subsection (1) of section P) and subsection (1) of Article XXI. based on the principles of precaution and prevention- the actual deterioration of environmental conditions is not necessary, the mere risk of deterioration (the negligence of responsibility to evaluate risks of deterioration) may be sufficient to determine it is in conflict with the Fundamental Law.¹⁴

IX. Subsection (1) of Article P) and subsection (1) of Article XXI of the Fundamental Law are tightly linked to the principle of non-derogation,¹⁵ directly.¹⁶ Non-derogation pertains to substantive, procedural and organisational regulations regarding the protection of environment and nature for they jointly can enforce the Fundamental Law and they must be considered by law enforcers during the application of the provisions in individual cases.¹⁷ Non-derogation is not an absolute rule in nature, that is, the level of protection may be decreased if it is necessary for the application of another constitutional law of value. However, the extent of decrease must not be disproportionate to the objective desired to be achieved.¹⁸

2. Constitutional review regarding the amendment of the Forest Act

The Act on Forest Law¹⁹ (henceforth: Forest Act) shall be pointed out as a specific legal regulation, the foundation of which is based on sustainability and sustainable forest management. Among the objectives are the determination of the conditions of sustainable forest management,²⁰ and the requirement that such methods shall be applied if forest management ensure the preservation of biodiversity, naturalness, naturality, productivity, revivability and vitality of the forest.²¹ In compliance with it, statutory legal regulations serve sustainable forest management.

The categorization of forests based on naturalness²² should be mentioned as an example where different management requirements are demanded in case of forests belonging to higher categories.

¹² Constitutional Court Decision no. 27/2017. (X.25.) [49].

¹³ Constitutional Court Decision no. 13/2018. (X.10.) [62].

¹⁴ Constitutional Court Decision no. 16/2015. (VI.5.) [110].

¹⁵ In connection with the non-derogation principle see: Bándi 2017, 9–23.; Bándi 2012, 6–15.

¹⁶ Constitutional Court Decision no. 13/2018. (X.10.) [20].

¹⁷ Constitutional Court Decision no. 3223/2017. (IX.25.) [28]–[29].

¹⁸ Constitutional Court Decision no. 16/2015. (VI.5.) [80], Constitutional Court Decision no. 4/2019. (III.7.) [44].

¹⁹ Act XXXVII of 2009 about forests, protection of forests and forest management.

²⁰ Paragraph 1 of the Forest Act.

²¹ Section (1) of Paragraph 2 of the Forest Act.

²² Section (1) of Paragraph 7 of the Forest Act. Categories of naturalness given in the Hungarian Forest Act: “(a) Natural forests: the forest has the natural composition, structure and dynamics characteristic for the given growing site. The stand has grown naturally from seed or sprout and only few individuals of adventine species can be found and no trees of invasive species can be

The enforcement of sustainable forest management is not only a fundamental, but also an international obligation. Forest Law itself refers to the European Union Forest Strategy²³ and decisions passed in the Ministerial Conference on the Protection of Forests in Europe.²⁴ It should be noted, that Hungary is one of the member states the framework convention of the UN Environment Programme (UNEP) for the protection and sustainable development of the Carpathians²⁵ its section 7 records the internationally accepted principles of sustainable forest management in the ecoregion of the Carpathians. A distinct minutes includes sustainable forest management in connection with the framework convention.²⁶

The National Forest Strategy 2016-2030²⁷ stipulates the following in connection with sustainability: “forest must be developed and utilized in such a manner and pace that management possibilities are preserved for future generations, at the same time the forest preserves its biodiversity, naturalness, productivity, revivability and vitality, it shall comply with the threefold function of the forest (in balance with social demands) economic and protective requirements and shall fulfill its role serving health-social, cultural, touristic, educational and research purposes. The territory, ecological and immaterial value, productivity, and economic purpose of the forest must not decrease during sustainable development.”²⁸

found; (b) semi-natural forests: the stand is similar to the natural forest but can have artificial origin and management. The ratio of adventine species is not higher than 20% and few individuals of invasive species can be found; (c) second growth trees: the structure and composition of the stand is transformed by human activity and lacks some elements characteristic for the given site. Most of the stand consists of naturally occurring species, the ratio of adventine species is 20-50% and there may be 20% of invasive species in the stand; (d) transition forests: highly transformed in structure and composition, only a smaller part of the stand consists of species naturally occurring on the growing site, the structure is simpler and lacks most of the natural structure. The ratio of adventine species is 50-70% and there may be 50% of invasive species; (e) Cultivated and park forests: the ratio of adventine species is higher than 70% or the ratio of invasive species is higher than 50%, the ratio of naturally occurring species is less than 30%; (f) Plantations: the stand typically consists of adventine species of artificial cultivars or hybrids and the stand has a regular structure suitable for machinery works. The harvest rotation is at least 15 years, the stand is intensely cultivated.”

²³ The announcement of the Commission to the European Parliament, the Council, EU Economic and Social Committee, Committee of the Regions- New EU forest management strategy, Brussels 2013.09.20., COM/2013/0659 final.

²⁴ Conferences: 1990 Strasbourg, 1993 Helsinki, 1998 Lisbon, 2003 Vienna, 2007 Warsaw, 2011 Oslo, 2015 Madrid. About sustainable forest management: Hegyes 2011, 26–49. Declared with the Government Decree no. 306/2005. (XII.25.).

²⁵ Declared with the Government Decree no. 306/2005. (XII.25.).

²⁶ See 195/2013. (VI.12.) Government statute about the protection and sustainable development of the Carpathians, in connection with the Framework Convention 22 May 2003, Kiev.

²⁷ Magyarország Kormánya 2020, declared: Government Decree no. 1537/2016. (X.13.) on the National Forest Strategy 2016–2030.

²⁸ National Forest Strategy chapter III.

Consequently, it shall be established that provisions of laws with the subject of forest ensure the preservation of forests as natural resources in the spirit of sustainability. By taking this into consideration, 14/2020. (VII.6.) Constitutional Court decision which examined if some provisions of the comprehensive amendment²⁹ of the Forest Law are in conflict with the Fundamental Law, it is prominently suitable to analyze subsection (1) of Article P) of the Fundamental Law and to present the practical operation of the foundations mentioned in the first part of the study.

In consequence of the amendment, the notion of Natura 2000 as a protective provision has changed. According to the new notion, Natura 2000 protective provision “as a designated part of Natura 2000 network refers to sites of community of importance or sites of special community importance, areas of habitats directive and forests of naturalness specified in subsections a), b) of section 7.”³⁰ Moreover, it has been established by the Constitutional Court that the notion of Natura 2000 has undoubtedly been restricted³¹ and that protective provision Natura 2000 cannot be applied in the case of every forest located in Natura 2000 area.³² Furthermore, it has been determined that certain protective provisions are extended to forest habitats of community importance or sites of special community importance.³³ As a result, there has been a derogation compared to former regulations, therefore the next step was to examine whether the derogation was unlawful.

Legislative justification has been specified, according to which the protection is not implied in EU law, in addition, protection on the current level is not necessary having regard to the development and aspects of forest management. The competent minister stated that the derogation occurred in consideration with the foresters’ right to property. The Constitutional Court has made the following declaration in response to the arguments put forward: (a) The fact, in itself, that the maintenance of the protection level is not implied with regard to Natura 2000 areas in the EU regulations, does not automatically make it obligatory and thus necessary to decrease the protection level;³⁴ (b) According to subsection (3) of section I of the Fundamental Law, the decrease of

²⁹ The amendment has been accepted along with Act LVI. of 2017 and came into force 1 September 2017.

³⁰ Section (2) of Paragraph 24 of the Forest Act.

³¹ According to previous regulation, Nature 2000 protected forests: forests in Natura 2000 area

³² Constitutional Court Decision no. 14/2020. (VII. 6.) [44] “Natura 2000 protection shall not be given to forest areas that have been categorised into the Natura 2000 network based on the rules of the principle of protection of birds, second growth forests, transition forests, cultivated forests and plantations.”

³³ The determination of each type of habitat is listed in the 275/2004. (X.8.) Government decree: “2. § In the application of the following decree: (...) (c) habitats of community significance: a 4. annex A) those community habitat types that are threatened by disappearance or shrinkage of the area or inherently limited range; (...) (d) habitats of special community significance: a 4. annex B) those community habitat types that are threatened by disappearance and for which the community bears a special responsibility; (...) (h) designated Natura 2000 area: habitat of community significance, that as a result of the procedure determined in the decree, have been designated by the European Committee as a special nature conservation area. and included in Annex 6 and 7; (...)”.

³⁴ Constitutional Court Decision no. 14/2020. (VII.6.) [56].

the protection level shall only occur in case of the assertion of fundamental rights or for the sake of protecting constitutional values. The lack of an obligation arising from EU law by itself shall not constitute either as a fundamental right or a constitutional value;³⁵ (c) The actions of foresters have not been restricted by the amendment of the Forest Law, on the contrary, it has provided further rights thus we shall not talk about the restriction of property rights. Therefore, the Constitutional Court shall not evaluate whether subsection (1) of Article P) or subsection (1) of Article XXI of the Fundamental Law justify the restriction of property rights in subsection (1) of Article XIII., on the contrary, it should evaluate whether the further extension of economic rights within the property rights is in accord with subsection (1) of Article XXI.³⁶

In the light of the above, it is found that the need for amendment shall not be justified either with the property rights in subsection (1) of Article XIII³⁷ or the right to conduct a business in subsection (1) of Article XII.³⁸

Further, according to another amendment in connection with the function of the forest³⁹ from 1 September 2017 it is forbidden exclusively for forests situated in specially protected nature areas to have economic functions.⁴⁰ The scope of the former regulation was wider in the sense that it was forbidden in the case of every forest situated in protected natural areas.⁴¹ The Constitutional Court established, the amendment resulted in unequivocal derogation compared to the previous protection level, as the validation of economic function has been included in the purpose of the forest management in case of protected nature areas.⁴² By examining its necessity and proportionality, it has been determined that it shall not be concluded from the Fundamental Law that the State shall allow owners to carry out economic activities and foresters in protected natural areas that have previously been excluded from the possibility for economic activity. In this respect, the Constitutional Court has also referred to the fact that the legislator did not provide any reason why it would be necessary for the owners and foresters to facilitate the economic interest by creating opportunity for economic purposes in protected nature areas.⁴³ As a result of the evaluation, the Constitutional Court determined, the provision is in fact in violation of subsection (1) of Article P) and subsection (1) of Article XXI. of the Fundamental Law.

The Commissioner of Fundamental Rights proposing constitutionality proceedings has raised objections to the amendment, the Forestry Authority does not determine the purpose of the forest and the notary cannot fully validate the execution

³⁵ Constitutional Court Decision no. 14/2020. (VII.6.) [56].

³⁶ Constitutional Court Decision no. 14/2020. (VII.6.) [60].

³⁷ “Everyone shall have the right to property and inheritance. Property shall entail social responsibility.”

³⁸ “Everyone shall have the right to choose his or her work, and employment freely and to engage in entrepreneurial activities. Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and potential.”

³⁹ According to the Forest Law, forests shall have protection, public welfare and economic functions.

⁴⁰ Section (5) of Paragraph 25 of the Forest Act.

⁴¹ Section (4) of Paragraph 24 of the Forest Act.

⁴² Constitutional Court Decision no. 14/2020. (VII.6.) [113].

⁴³ Constitutional Court Decision no. 14/2020. (VII.6.) [117].

of protection purposes in protected areas declared by the municipality regulation, it depends on the civil action of the property owner and the civil law agreement between the notary and the forester.⁴⁴

The Constitutional Courts has determined that in this case the derogation occurred compared to the previous regulation: “Based on the comparison of the regulation in force prior to 1 September 2017 and the current regulation, the Constitutional Court determined that while forests in protected areas had a primary nature conservation purpose prior to 1 September 2017, the current regulation of the Forest Law in effect, the natural conservation purpose of the forest shall occur following an agreement between the forester and the notary of the competent local authority initiating the cooperation. Prior to the agreement, the Forestry Authority did not have the capacity to restrict forestry activities in case of protected areas of local significance.”⁴⁵

In relation to the derogation, legislative justification of the amending law did not contain any arguments. According to the minister, the notary's power of initiative introduced in the amending regulations provides opportunity for the notary to initiate the determination of purpose, it shall not only apply to protected areas declared by the municipality, while the agreement with the forester is necessary in the case when the municipality want to entrust a forester with the maintenance, development and safe-keeping of the area..⁴⁶

The standpoint of the Constitutional Court in connection with this was that the explanation of the minister was based on the misinterpretation of the law considering that the Forest Act stipulates the agreement with the forester for the notary in the case when the municipality shall not want to entrust a forester with the tasks (but for example a self-owned company).⁴⁷ Besides, the legislator has not justified the derogation with the assertion of any fundamental rights or the protection of any constitutional value, thus unlawfulness shall be determined.⁴⁸

Prior to 1 September 2017, the Forestry Authority could stipulate the abandonment of 5% of living tree stands in case of natural, semi-natural, second-growth forests for landscape conservation, soil conservation and forest management purposes.⁴⁹ Following the comprehensive amendment, the legislator enabled the abandonment of trees exclusively in the case of nature conservation or Natura 2000 natural, semi-natural forests that is not in second-growth forests even if they are

⁴⁴ Section (4) of Paragraph 23 of the Forest Act : “If the determination of the purpose of the forest occurs out of community interest based on subsection (3), the forester is entitled to reimburse damage and extra costs.”

⁴⁵ Constitutional Court Decision no. 14/2020. (VII.6.) [74].

⁴⁶ Constitutional Court Decision no. 14/2020. (VII.6.) [80].

⁴⁷ Constitutional Court Decision no. 14/2020. (VII.6.) [82].

⁴⁸ The Constitutional Court has not only determined unlawfulness in connection with the agreement with the forester in subsection (1) of section P and subsection (1) of section XXI of the Fundamental Law, but also the principle of responsible handling of public moneys as based on the regulation, forester shall include the reimbursement of damages and additional costs in the agreement if the amount is disproportionate or it has not occurred – Constitutional Court Decision no. 14/2020. (VII.6.) [81–82].

⁴⁹ Section (4) of Paragraph 73 of the Forest Act.

situated in protected nature or Natura 2000 areas.⁵⁰ The Constitutional Court clarified that the amendment regulation legally maximized the obligation of abandonment with regard to the characteristics of the forest, in certain cases excluded the obligation of abandonment.⁵¹ The Forestry Authority shall decide otherwise, only following an agreement with the forester.⁵² According to the standpoint of the Constitutional Court, derogation shall unequivocally be determined in order to facilitate the economic interest of the foresters. Taking this into consideration, it was essential to investigate whether the derogation was necessary and proportionate. During this process, the Constitutional Court stated what shall be concluded from subsection (1) of Article P) of the Fundamental Law is that in areas with significant protected value economic activities shall be regulated by law in order to protect this natural value.⁵³ Moreover, it has been found that the purpose of the adopted amendments was not the regulation of economic activities in order to protect natural values but the opposite, to restrict the responsibility to protect natural values in order to enable economic activities to be carried out without interruption.⁵⁴ According to the Constitutional Court, the regulation is not compatible with the requirement of proportionality either, as the law does not provide any opportunity for competent authorities to enforce the protection function in case of forest areas, with admittedly protective functions.⁵⁵ A violation of the Fundamental Law has been determined.

3. Constitutional Court review regarding water law issue

In the following, similarly to the forest management research, a Constitutional Court decision will be introduced with regard to water management.⁵⁶

Humanity, fauna and economy cannot exist without good quality water resources.⁵⁷ Plenty of water is necessary in all areas of life from energy generation to the production of food.

⁵⁰ Section (1) of Paragraph 27 of the Forest Act: “(a) the Forestry Authority shall specify temporary or permanent abandonment for mature protection purposes for up to 5%; (b) in case of increment felling-providing no risk is posed on forest protection- naturally dead wood shall be abandoned 5 cubic metre per hectare in the area depending on the size, composition and location of the protected area.”

Section (1) of Paragraph 28 of the Forest Act: “(a) the Forestry Authority shall specify temporary or permanent abandonment for mature protection purposes for up to 5%; (b) in case of increment felling-providing no risk is posed on forest protection- naturally dead wood shall be abandoned 5 cubic metre per hectare in the area depending on the size, composition and location of the protected area.”

⁵¹ Constitutional Court Decision no. 16/2020. (VII.6.) [139].

⁵² Section (1) of Paragraph 28/A of the Forest Act: “Restrictions beyond what is included in sections 27., 28 or subsection (1) shall be allowed following an agreement with the forester.”

⁵³ Constitutional Court Decision no. 14/2020. (VII.6.) [158].

⁵⁴ Constitutional Court Decision no. 14/2020. (VII.6.) [162].

⁵⁵ Constitutional Court Decision no. 14/2020. (VII.6.) [159].

⁵⁶ In this paper, we are not discussing the Constitutional Court decisions on arable lands. In connection with this topic, see: Olajos 2018, 190–212. and Farkas-Csamangó 2012, 53–54.

⁵⁷ European Commission 2020.

Nowadays, the social, environmental and economic roles of water have become more significant. The protection and utilization of water resources have become one of the most important factors of sustainable development. There is an ever growing pressure on our water and water-related ecosystem which results in the decline of biodiversity.⁵⁸ The role of water appears in the quality of life of the citizens (e.g. safe drinking water supply), in satisfying ecological water demands (e.g. environment protection) in agriculture, forest management and in fish farming. Moreover, it has a significant role as environmental, economic conditions in several industrial, transportation, service activities as a renewable energy source. That is why it is necessary to distinguish water as a natural resource and its protection and utilization are not only local, regional and national, but communal and global responsibility.⁵⁹ Taking this into account, we must protect our national wealth, water reserves for life and fundamental right to live shall not prevail without water.⁶⁰

Consistent and deliberate utilization is a key concern if we consider water as a limited renewable energy source. In order to sustain the condition of water, it must be utilized without causing any damage to our rivers, lakes, their fauna or without exhausting undercurrent waters. Nevertheless, the majority of waters in Hungary are damaged due to the human intervention of the last two decades.⁶¹ One of the best examples for this is the decrease of groundwater level in the Great Hungarian Plain and more frequent drought. Consequently, the task of sustainable water management is not only to preserve the current condition but to improve the condition of waters and to restore the habitats destroyed.

With the Fundamental Law in force, it has been fundamentally recorded that “water resources are a common national heritage whose protection, reservation and preservation for future generation are the responsibility of the State and everyone.”⁶² According to subsection (1) of Article P) water resources constitute nominated natural resources. The concept of sustainability is mentioned as a requirement in water management as a task related to waters and water facilities. The law states⁶³ “the protection of water resources and the foundation and approval of financial and cost management for sustainability as the tasks of the State.”⁶⁴

The protection of waters does not only appear on a national level, it is a significant area at EU level as well. Due to the harmonization of the law, EU provisions must be complied with.⁶⁵ The purpose of the plan to preserve EU water resources is to remove the obstacles that aggravate the protection of EU water resources.⁶⁶

⁵⁸ H/4581. National Assembly provision.

⁵⁹ Ministry of Rural Development: National water strategy on water management, irrigation and drought management.

⁶⁰ Fodor 2013, 331.

⁶¹ Budapest Energy Summit 2016.

⁶² Subsection (1) of section P) of the Fundamental Law.

⁶³ Act LVII. of 1995 on water management.

⁶⁴ Act LVII. of 1995 on water management.

⁶⁵ EUMSZ 191 – subsection 193. in connection with WU regulations and water law see: Szilágyi 2019(a), 255–275., Szilágyi 2019(b), 182–197., Szilágyi 2013. Csák 2019, 7–38., Raisz 2012, 151–159.

⁶⁶ COM/2012/0673.

Therefore, domestic water laws have been created in line with EU expectations focusing on sustainability. The EU Water Framework Directive⁶⁷ declares that water is not a commercial product but heritage which must be protected, sheltered and handled. Water Framework Directive lays down the legal framework for the protection of inland surface waters, transitional waters, coastal waters and groundwaters. The principle objective of the Water Framework Directive along with the protection of ecological, chemical and quantitative conditions is to provide conditions for sustainable water management.⁶⁸ The plan introduced by the EU Committee 15 November 2012 to preserve EU water reserves⁶⁹ is about the essential steps to execute the listed objectives. Its primary objective is to provide the inhabitants of Europe with sufficient amounts of good quality water within a reasonable period.⁷⁰

The subject of 13/2018. (IX.4.) Constitutional Court decision bill T/384 is to amend water management law in connection with which the President of the Republic has submitted a motion. Based on the motion of the President of the Republic to determine unlawfulness, according to the justification of the bill, the purpose of the bill is to create a regulation that allows the creation of a water facility without a permit or declaration up to 80 metres well depth. Accordingly, a water facility shallower than 80 metres where the water reserve does not exceed the home water demand shall be created without a permit or a declaration.

As it can be seen, the proposer of the motion failed to attach impact study or further professional reasons. The law on water management⁷¹ has been amended: activities that have been subject to authorization shall be carried out without a permit.⁷² Furthermore, the President of the Republic hinted that the Deputy Commissioner responsible for the protection of the interest of future generations⁷³ argued against the adaptation of the law, as he considered it concerning that the State abdicated the protection of natural resources included in Article P) of the Fundamental Law. Therefore, enables uncontrollable water extraction which, at the same time, bears the risk of contamination. The spokesman of the future generation challenged the derogation of the protection level of the environment (non-derogation),⁷⁴ thus the Fundamental Law does not comply with the State obligation in subsection (1) of Article P), the prohibition to derogation from the achieved protection level and the requirement of the precautionary principle.

The majority of undercurrent water reserves can be found in such a natural-geological environment where contamination can get into the water supply.

⁶⁷ 2000/60/EK principle (23 October 2000).

⁶⁸ Vidékfejlesztési Minisztérium 2013.

⁶⁹ (EN) (COM(2012) 673).

⁷⁰ European Environment Agency 2020.

⁷¹ Paragraph 28/A of Act LVII. of 1995.

⁷² For example water works, creation, renovation, utilization, operation of water facility.

⁷³ Resolution of 24 May 2017.

⁷⁴ Constitutional Court Decision no. 13/2018. (X.10.) [20].

The administration, protection and safety of such water reserves is an especially significant State responsibility. Thus the amendment would mean considerable setback and would violate subsection (1) of Article P) and subsection (1) of Article XXI. Also a violation of the previously mentioned provisions would be if the law enabled a future government decree to regulate the scope of activities regarding permits and declaration obligation yet no assurances have been determined.

The Constitutional Court has made the following observations considering legal and professional factors during its investigation. According to the National Asset Act,⁷⁵ groundwaters are exclusive property of the State. Thus, based on subsection (1) of Article 38⁷⁶ of the Fundamental Law, they constitute national treasure, the protection of which “is of common interest, meeting common needs, the conservation of natural resources with consideration to the needs of future generations.” Groundwaters are exclusive property of the State are under protection based on both subsection (1) of Article P) and subsection (1) of Article 38 of the Fundamental Law. This means that the State shall manage them taking into consideration not only the current generation but the needs of future generations, while protecting them as natural resources. In connection with the water rights licensing system, the Constitutional Court determined it is necessary not only to maintain the system but in certain cases aggravation shall be justified taking into account that the quantitative and qualitative protection of groundwater is a strategic task. If the activity is allowed to be conducted without licence and declaration, it, in itself, shall be evaluated as a derogation. It is not necessary to have a deterioration in the environment to violate the non-derogation principle, the mere risk of deterioration shall suffice.⁷⁷ The legislator shall prove that a proposed amendment does not result in derogation.⁷⁸ The Minister of the Interior has mentioned the reduction of administrative burden on the citizens as a justification for the regulation, which has not been accepted by the Constitutional Court because the declaration obligation shall not be considered an unnecessary administrative burden as this is the only legal solution for the State to ensure the quantitative and qualitative protection of groundwater. In the given case, the Constitutional Court concluded that subsections 1 and 4 enable water extraction without license and declaration thus violates the non-derogation principle of subsection (1) of Article P) and subsection (1) of Article XXI. of the Fundamental Law.

⁷⁵ 2011. CXCVI 4 (1) Point d).

⁷⁶ „The property of the State and of local governments shall be national assets. The management and protection of national assets shall aim at serving the public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations. The requirements for preserving and protecting national assets and for the responsible management of national assets shall be laid down in a cardinal Act.”

⁷⁷ Constitutional Court Decision no. 16/2015. (VI.5.) justification (110).

⁷⁸ Constitutional Court Decision no. 27/2017. (X.25.) justification (49).

4. Summary

Under Article P) (1) of the Fundamental Law, the constitution-based protection of natural resources and cultural assets raised to a higher level due to the establishment of the sustainability clause. According to Article P), the Constitutional Court interprets the reservation and preservation of the protected assets for the future generations as a sui generis obligation. Such obligation burdens not just the state, but everyone else. Pursuant to the Constitutional Court's jurisprudence regarding legislation, the prohibition of withdrawal, as a general rule, shall govern the level of protection established by the laws concerning the protected assets under Article P). Derogation from this rule may only be allowed for the protection of other fundamental rights or values, but the decrease of the level of protection cannot be disproportionate compared to the purpose meant to be achieved. Accordingly, the Constitutional Court reviews the constitutionality of legal actions in the following three steps: was there any withdrawal compared to the former level of protection; if yes, was it necessary; if it was necessary, whether the decrease of the level of protection was proportionate compared to the purpose meant to be achieved.

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