# Agrár- és Környezetjog
# Journal of Agricultural and Environmental Law

A CEDR Magyar Agrárjogi Egyesület tudományos közleményei

CEDR Hungarian Association of Agricultural Law

**Évfolyam/Volume XV**

**2020 No. 29**

# Impresszum / Disclaimer

**Kiadja / Published by:**
**CEDR – Magyar Agrárjogi Egyesület /**
**CEDR – Hungarian Association of Agricultural Law**

H-3515 Miskolc-Egyetemváros, A/6. 102., tel: +36 46 565 105

**Felelős kiadó / Publisher**:
*Prof. Dr. habil. Csák Csilla PhD*,
*President*, jogkincs@uni-miskolc.hu

**Felelős szerkesztő / Editor-in-chief**:
*Prof. Dr. habil. Szilágyi János Ede PhD,*
*Head of the Institute, Ferenc Mádl Institute of Comparative Law (Hungary),* cedr.jael@gmail.com

**Technikai szerkesztő / Technical editor**:
*Szilágyi Szabolcs dr. jur.* & *Csirszki Martin Milán dr. jur.*

**Német & angol idegen nyelvi lektorok/linguistic proofreaders (German/English)**:
*Hornyák Zsófia PhD (German)* & *Szilágyi Szabolcs dr.jur. (English)*



**HU ISSN 1788-6171**

**DOI prefix: 10.21029/JAEL**

**A folyóirat letölthető / The Journal can be downloaded from:**

https://ojs3.mtak.hu/index.php/JAEL

https://epa.oszk.hu/01000/01040

https://jael.uni-miskolc.hu/

**A folyóiratot indexeli / The journal is indexed in**:

https://www.mtmt.hu/

https://www.proquest.com/

https://www.crossref.org/

https://road.issn.org/

https://home.heinonline.org/

**A folyóiratot archiválja / The Journal is archived in**:

http://real.mtak.hu/

**A folyóiratot támogatja a Miskolci Egyetem.**
**The Journal is supported by the University of Miskolc.**

# A tartalomból – Contents

# Gyula BÁNDI*
# Interests of Future Generations, Environmental Protection and the Fundamental Law

*Abstract*

*The Fundamental Law of Hungary has a special focus on sustainable development, the protection of the interests of future generations and the common heritage of the nation. The ombudsman for future generation is a special and unique institution, responsible for the safeguard of these issues. The primary mission of the ombudsman is to remind the state, including all the state organs and levels, of this task and responsibility, also to propose legislation and to examine individual complaints. In this article we provide a breif overview of those part of the Fundamental Law, which are well-equipped by the decisions of the Constitutional Court. Among others is is clear from the above cases, that everyone has a three-fold obligation towards the interest of the future generation: conservation of options, conservation of quality, and conservation of access. These are supported by the principle of non-derogation and also by the wide interpretation of precautionary principle, in connection with the fundamental right to the environment.*

**Keywords:** interests of future generations, right to environment, common heritage of the nation, ombudsman for future generations, non-derogation/non-regression principle

## 1. The objective

The Conference at Miskolc, on 14th February 2020 was focused on a potential? review of the Fundamental Law of Hungary. Although the review is not a close reality, there is no explicit political or legislative will today, it is still worth discussing the idea itself, by exploring questions such as: is it necessary, are there any current trends, is there any use of changes, and so forth. Hence, instead of being a 'drafting exercise', the conference actually was tailored to prepare the coming 10th anniversary of the Fundamental Law. The direct focus was agrarian and environmental law, both being significant in Hungary. From among the two subject matters, my interest is dedicated to environmental law, both as a professor, and also as the Ombudsman for Future Generations. As a professor, the constitutional provisions serve as the groundwork for any further studies beyond doubt. As an ombudsman, the provisions of the Fundamental Law – in my specific field mostly in connection with the interests of future generations and also with environmental rights – might be taken as flesh and blood of my activity, serving as the basis of our everyday practice.

Gyula Bándi: Interests of Future Generations, Environmental Protection and the Fundamental Law. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 7-22, https://doi.org/10.21029/JAEL.2020.29.7

* Ombudsman for Future Generations, DSc, PhD, Dr. habil., full professor, Faculty of Law and Political Sciences, Pázmány Péter Catholic University, e-mail: bandi.gyula@jak.ppke.hu.



https://doi.org/10.21029/JAEL.2020.29.7

It is important to note that not only the precise provisions of the legal text are crucial for us, but also the *interpretation* of the legislative stipulations, more precisely the means and methods of how to translate the relatively brief paragraphs and articles into cases, applying them routinely in our practice. We believe and demonstrate that the Fundamental Law, being at the pinnacle of the Hungarian legal system, is undoubtedly a living organism, providing us guidance in the different fields of law. The provisions of the different parts of the Fundamental Law are actual legal requirements, applicable in different real life situations.

Probably the most interesting and by far the most significant element of recent development of the Hungarian legal system is the new constitution (adopted 25th April 2011), labelled as the 'Fundamental Law'. This – even the designation itself – indicates the conceptual change of the Hungarian legal and political system and wishes to suggest the real 'system change', encompassing – among others – many more environmental references and many more positive theoretical foundations for the interest of the environment and future generations than ever before.

## 2. Ombudsman for Future Generations

As a point of departure – supposing that the good reader may not necessarily be aware of it in details – we should learn something about the short history of this institution. In 2007 the attention of European and worldwide environmentalists turned towards Hungary, due to the enactment of the institution of the Parliamentary Commissioner (Ombudsman) for Future Generations, being the third specific individual commissioner next to the general commissioner (the two other specific commissioners at this time were: one responsible for minority rights and one for data protection).[1] This parliamentary institution could receive special privileges and was regarded by many as an instrument for the advancement of sustainability.

The drafters of the new constitution (Fundamental Law) had a somewhat different concept related to the parliamentary protection of human rights, namely those opinions prevailed which did not agree with the relatively strong separate and individual ombudsmen system – altogether four independent institutions –, thus the concept to have one general ombudsman's office with deputies proved to be the preference. This is the current Commissioner for Fundamental Rights, having two deputies, who are also elected by the Parliament, but subordinated to the general ombudsman – one for minority rights and one for future generations. Consequently, the earlier separate Parliamentary Commissioner for Future Generations lost some of its independence only after three and half years. We should also note that the specific commissioner responsible for data protection is not a part of the system of parliamentary commissioners any longer, but a new authority for data protection was established instead. The current mandate of the ombudsmen system is regulated in detail by the Fundamental Law.[2]

[1] For some details, see among others: Majtényi 2008, 17–28. or Fodor 2008, 47–52.

[2] Article 30 (1) The Commissioner of Fundamental Rights shall protect fundamental rights and shall act at the request of any person. (2) The Commissioner of Fundamental Rights shall examine or cause to examine any abuses of fundamental rights of which he or she becomes

Consequently, today the Ombudsman for Future Generations (hereinafter the FG Ombudsman) is a Deputy to the Commissioner for Fundamental Rights. The FG Ombudsman is entrusted with a number of special powers, provided under the Ombudsman Act[3] to foster the interests and needs of future generations and is accountable only to the Parliament. Its constitutional mandate has three main pillars (the details are discussed next): (a) the human right to a healthy environment (Art. XXI), (b) the right to physical and mental health, within which environmental protection is an instrument (Art.XX), (c) and finally a novel provision under Article P) enshrined in the Fundamental Law since 2011 stipulating the 'common heritage of the nation'.

This mandate includes the right to examine and comment on national and local legislative actions; to monitor policy developments and legislative proposals to ensure that they do not pose a severe or irreversible threat to the environment, thus causing possible harm to the interests of future generations; and to raise the attention of all stakeholders including the general public when the interests of future generations are at jeopardy. The FG Ombudsman can also prepare its own legislative proposals[4] and publish non-binding recommendations or ombudsman opinions to ensure that the direct link between the nation's common heritage and the fundamental rights of all generations (including future generation) are respected.

The FG Ombudsman may initiate and/or participate in investigations upon complaints or ex officio which conclude with reports containing recommendations to any public authority including the Government. He can propose the Commissioner to turn to the Constitutional Court or the Curia (Supreme Court) of Hungary in cases where there is a strong belief that a national or local piece of legislation is in violation of the Fundamental Law. Also, the Ombudsman may initiate intervention in public

aware of and shall propose general or specific measures for their remedy. (3) The Commissioner of Fundamental Rights and his or her deputies shall be elected for six years by a two-thirds vote of the Members of Parliament. The deputies shall defend the interests of future generations and the rights of nationalities living in Hungary.

[3] Act CXI of 2011 on the Commissioner for Fundamental Rights: Article 3 (1) The Deputy Commissioner for Fundamental Rights responsible for the protection of the interests of future generations shall monitor the enforcement of the interests of future generations, and (a) shall regularly inform the Commissioner for Fundamental Rights, the institutions concerned and the public of his/her experience regarding the enforcement of the interests of future generations, (b) shall draw the attention of the Commissioner for Fundamental Rights, the institutions concerned and the public to the danger of infringement of rights affecting a larger group of natural persons, the future generations in particular, (c) may propose that the Commissioner for Fundamental Rights institute proceedings ex officio, (d) shall participate in the inquiries of the Commissioner for Fundamental Rights, (e) may propose that the Commissioner for Fundamental Rights turn to the Constitutional Court, (f) shall monitor the implementation of the sustainable development strategy adopted by the Parliament, (g) may propose the adoption, amendment of legislation on the rights of future generations, and (h) shall promote, through his/her international activities, the presentation of the merits of domestic institutions related to the interests of future generations. One may find the English translation at our website: Office of the Commissioner for Fundamental Rights 2020.

[4] After two years of careful consultation a comprehensive proposal on environmental liability has been issued, see: Jövő Nemzedékek Érdekeinek Védelmét Ellátó Biztoshelyettes 2019.

administrative court cases regarding environmental protection, by proposing it to the Commissioner. In the daily work, lawyers and environmental policy experts of the FG Ombudsman's secretariat heavily rely on the decisions and constitutional interpretations of the Constitutional Court and the Curia.

It might be the best to summarize the essence of our mission, using parts of the foreword from the 2018 English language annual report of the Office of the Commissioner (as the report of 2019 is still under translation):[5] "Protecting the rights of future generations is one of the key tenets of sustainable development. The idea of sustainability has an ecologic content, in its key focus is the integration that gives high priority to the environmental conditions of the present and future generations in every decision-making process. It is this kind of sustainability that the Deputy-Commissioner for Fundamental Rights, Ombudsman for Future Generations and his colleagues have been working for in the past ten years. The message of the UN Human Rights Committee of October 2018 clarifies the correlations between the rights of future generations and traditional human rights, this is why we think that it is a great stride forward that when Hungary presented a Voluntary National Review on the implementation of Sustainable Development Goals at the UN's High-level Political Forum in July 2018, the summary prepared by the Hungarian Ombudsman for Future Generations was specifically discussed. Even now, there are very few institutions in the world whose mission is similar to the mandate of the Hungarian Ombudsman for Future Generations. Although the protection of the environment or the future generations is mentioned in many constitutions in the world, there are very few of them in which all this is consistently enforced from the preambles through the general provisions to the fundamental rights.

The primary mission of the Ombudsman for Future Generations is to remind the state, including all the state organs and levels, of this task and responsibility. The elaboration of a modern and efficient system of responsibility is a kind of job in which everyone participates, from the civil society organizations through the professional-economic advocacy groups to the state. The operation of this unique system of cooperation, the harmonization of interests and viewpoints is such a challenge which can be best met by an independent institution like the Ombudsman for Future Generations."

The most recent decision of the Constitutional Court,[6] related to the protection of forest of nature conservation areas testifies: "[35] … the Constitutional Court shows that according to Par. (2) of Art. 1 of the Ombudsman Act the Commissioner for Fundamental Rights should provide special attention to the protection of the interests of those values manifested in Art P) of the Fundamental Law, and the deputy commissioner responsible for the interests of future generations among others might propose that the commissioner should turn to the Constitutional Court. Therefore, the Commissioner for Fundamental Rights together with the deputy commissioner responsible for the interests of future generations plays a crucial institutional role in the protection of those natural and cultural assets which belong to the common heritage of the nation. Par. (1) of Art P) stipulates that the natural and cultural values shall be

[5] Office of the Commissioner for Fundamental Rights 2019, 52–53.
[6] Constitutional Court Decision no.14/2020 (VII.6.).

protected on their own, respectively orders that these should be preserved for future generations which does not have legal personhood, if necessary even against the (actual economic) interest of current generations." This mandate is a challenge for us that we are certainly honoured to face.

Applying the Fundamental Law in our daily practice is the major characteristic of handling citizen complaints. According to Art. 18 of the Ombudsman Act a citizen may file a complaint if he/she feels that the public administration in its broadest sense or a public service provider "infringes a fundamental right of the person submitting the petition or presents an imminent danger thereto (…), provided that this person has exhausted the available administrative legal remedies, not including the judicial review of an administrative decision, or that no legal remedy is available to him/her." Besides conducting investigations upon complaints received, the Commissioner for Fundamental Rights may also conduct ex officio proceedings, in cases when potential infringement affect the fundamental rights of larger groups of natural persons or when a comprehensive inquiry into the enforcement of a fundamental right is justifiable. These investigations – excluding those, where our office has no competence or where the complaint is manifestly unfounded etc. (see for the details Art. 20 of the Act) – are completed with a report, or in cases related to mandate of the FG Ombudsman, with a joint report, which contain a description of the facts uncovered, legal implications and future recommendations for authorities involved.

In all of the abovementioned reports or joint reports[7] referencing the legal basis is an obligatory element, within which the human rights/fundamental rights relationship is the most important aspect, always on the basis of one or more article of the Fundamental Law. This reference does not simply imply an excerpt of the Law, but it is a comprehensive and detailed analysis instead, encompassing the relevant Constitutional Court decisions and the relevant previous Ombudsman practice.[8]

## 3. Fundamental Law and the environment

The Fundamental Law, the new constitution since 2011 (as it is definitely the constitution of the country) is divided into the following parts, each symbolized by different ways of numbering: (a) The preamble, or National Avowal, acting as a much longer preamble than ever before; (b) Groundwork or Foundation, covering several basic rules (official language, capital of Hungary, format of the state, major messages) and also some procedural elements related to legislation; (c) Freedom and Responsibility – in essence the human rights or fundamental rights part; and finally (d) The State, the major institutions of the state up to the budgetary or defence issues.

[7] One may find them in Hungarian at: Alapvető Jogok Biztosának Hivatala 2020.

[8] Usually 4–5 pages of the report go under the subtitle 'In connection with the affected fundamental rights and constitutional values'. As an example: a recent waste management case – Alapvető Jogok Biztosának Hivatala 2019.

### 3.1. The preamble or National Avowal

Contains fundamental environmental elements, embodied in a larger context. "We commit ourselves to promote and safeguard our heritage, our unique language, the Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants; therefore, we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources."

There are two major concepts presented in this paragraph, all are essential from the point of view of the environment: (a) National assets or national heritage, which cover not only assets within the boundaries of Hungary, but also in the whole Carpathian basin. A good example is the 'Pannon biogeographical-region'[9] being a part of the biogeographical-region distribution of the Natura 2000 system since 2007. We may also refer to the concepts of the 'common heritage of mankind'[10] or 'common concern of humanity'[11] in international law as similar arguments. (b) The reference to future generations is a primary element, supported by the decisions of the Constitutional Court from the past three years. This goes along with the emphasis on different types of natural resources, which together may also be taken as constituents of sustainable development.

We should also mention human dignity, a third conceptual question, raised by the Preamble in a different paragraph: 'We hold that human existence is based on human dignity.' Human dignity may best be protected together with the natural environment and environmental protection in a wider context. One cannot separate human dignity from the fact that humanity is part of nature. Human dignity is strictly interrelated with the concept of future generations from the very beginning.

According to Article 1 of the EU Charter of Fundamental Rights:[12] "Human dignity is inviolable. It must be respected and protected." The short explanation, provided for by the EU Fundamental Rights Agency[13] is clear in this respect: "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights." A clear and brief ethical summary is offered by the Venice Declaration:[14] "Respect for creation stems from respect for human life and dignity. It is on the basis of our recognition that the world is created by God that we can discern an objective moral order within which to articulate a code of environmental ethics."

A final important reference to the equity for future generations, in line with the equity towards current generations, as being essential constituents of the constitutional provisions is stated as follows: "Our Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, present and future…."

[9] For details see: European Commission 2019.
[10] One of the early explanations: White 1982.
[11] See: Shelton 2009, 33–40.
[12] Official Journal of the European Union C 303/17.
[13] European Union Agency for Fundamental Rights 2020.
[14] Venice Declaration, 2002.

### 3.2. Foundation

Is the collection of the most important general or basic requirements and statements, such as Article B (1): 'Hungary shall be an independent, democratic state governed by the rule of law.' From the environmental or even more, future generations' point of view, we select below the most relevant articles.

Although with a significantly weaker connection to our portfolio, Par (1) of Art N) should also be mentioned: "Hungary shall observe the principle of balanced, transparent and sustainable budget management." Of course, this does not refer to sustainable development, but states that the budget should be sustainable, also meaning here: 'able to be maintained or continued'[15] keeping in mind that 'a sustainable plan, method, or system is designed to continue at the same rate or level of activity without any problems."[16]

Article P)[17] and more precisely, Par. (1) of the Article is a very complex summary of common heritage, using the definition in a broad context and also referring to future generations, but in a much more detailed and elaborate way: "All natural resources, especially arable land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation's common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations." This article provides a list of elements of common heritage, without being exhaustive, thus allowing the extension of the list. The Constitutional Court is also clear in this respect: „[35] Par. (1) of Art. P) of the Fundamental Law designates the subject of environmental protection in a non-exhaustive list (see the 'especially' expression)."[18]

Still, the truly crucial question here is the focus on obligations and not only the mere reference to rights, as will later be discussed. Some details are highlighted below in connection with decisions of the Constitutional Court. This special emphasis on obligations or duties is very similar to the explanatory memorandum of the relevant document of the Parliamentary Assembly of the Council of Europe, which reads:[19] "12. At present, we are witnessing what could be called a fourth generation of fundamental rights, or a generation of rights and duties for the society of the future. Society as a whole and each individual in particular must pass on a healthy and viable environment to future generations. That is quite simply the principle of solidarity between generations."

[15] According to the Cambridge Dictionary.
[16] According to Collins Dictionary.
[17] See: Sulyok 2019.
[18] Constitutional Court Decision no. 28/2017. (X.25.).
[19] Report | Doc. 12003 | 11 September 2009 Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, B. Explanatory memorandum by Mr José Mendes Bota, Rapporteur, Parliamentary Assembly 2009.

In comparison with Par (1) of Art. P), Par (2) of the same article is far from being a similar fundamental and creative provision ("(2) The limits and conditions for acquisition of ownership and for use of arable land and forests that are necessary for achieving the objectives referred to in paragraph (1), as well as the rules concerning the organisation of integrated agricultural production and concerning family farms and other agricultural holdings, shall be laid down in a cardinal Act."). This paragraph does not have such a far-reaching theoretical objective as Par. (1) has, but is rather a simple answer to a contemporary political issue, which could and should easily be solved in a lower level legal regulation. It is nothing but a kind of regulatory authorization and does not have an interpretative benefit.

Article Q(1) is very similar to Article 3, Par. 5 of the Treaty of European Union (TEU)[20], combining international commitments and cooperation with sustainability: 'In order to create and maintain peace and security, and to achieve the sustainable development of mankind, Hungary shall strive for cooperation with every nation and state of the world.' A good example is the Voluntary National Review of Hungary related to the Sustainable Development Goals (SDGs) of the UN[21] in 2018[22], within which the FG Ombudsman had a separate chapter, mostly focusing on the relationship of human rights and sustainable development. The Review, at its beginning, also refers to the Fundamental Law: "Sustainability is a core strategic principle, and as such is central to policy making in Hungary. The Government sets policies and regulations in order to carry out all the goals established in the Fundamental Law, international agreements, national legislation and strategies, and in connection with the SDGs."[23]

### 3.3. 'Freedom and Responsibility'

Is the human or fundamental rights chapter of the Fundamental Law, containing all the general rights. Here we only refer to those which may directly be taken as environmental rights or are closely related to them.

First, Art. II leads us back to the preamble: "Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception." Human dignity may thus be taken as a central focus of the Fundamental Law.

[20] Consolidated version of the Treaty on European Union, HL C 326., 26.10.2012, 13–390.: "5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

[21] The list of sustainable development goals and targets both in English and Hungarian may be found and downloaded: Világunk átalakítása 2015.

[22] Voluntary National Review of Hungary on the Sustainable Development Goals of the 2030 Agenda 2018.

[23] Ibid. 4.

Article VI Par (1) might also be mentioned, as it is closely correlated with the jurisprudence of European Convention on Human Rights (ECHR): 'Every person shall have the right to the protection of his or her private and family life, home, relations and good reputation.' I would like to remind the Reader of the extensive judicial practice of the European Court of Human Rights, one fundamental point of reference being Article 8 of the European Convention of Human Rights, beingthe right to private life and home.[24] Fortunately, we do not have to use indirect references as the ECHR, since we have our specific environmental rights at constitutional level since 1989.

The wording of Article XIII, Par. (1) underlines again the individual responsibility or obligations, which shall also be taken as a valuable element of human rights chapters, and may serve as the basis – among others – of future liability provisions: 'Every person shall have the right to property and inheritance. Property shall entail social responsibility.'

There are two particular articles focusing on the right to environment mostly in line with the provisions of the previous Constitution. First Article 70/D (public health), and second Article 18 (right to a healthy environment) of the former Constitution is to be noted here. These roots are very important since these could serve as the basis for the practice of the Constitutional Court prior to the Fundamental Law, and the lack of substantial changes in these provisions legalized the continuity of interpretation after the adoption of the Law.

Article XX is somewhat relatively indirect, connecting environmental protection to public health so that environmental protection is taken as an instrument for preserving public health: "(1) Every person shall have the right to physical and mental health. (2) Hungary shall promote the exercise of the right set out in paragraph (1) by ensuring that its agriculture remains free from genetically modified organisms, by providing access to healthy food and drinking water, by managing industrial safety and healthcare, by supporting sports and regular physical exercise, and by ensuring environmental protection."

Some remarks in connection with Apr (2): while access to healthy drinking water[25] echoes the new trends of environmental rights, underlined by World Water Forums and others, the reference to genetically modified organisms (GMOs) and agriculture does not necessarily fit into a constitutional chapter on human rights issues, mainly as there are no other similar messages to any other specific items. Also, we should not forget that the use of GMOs is highly dependent upon the future trends of the EU legislation. While today this provision may be realistic, in the future it might need to be reformulated in a different way.

[24] We do not go into the details of this question, but refer to several papers, such as the most recent summary of ECHR case-law may be downloaded at: European Court of Human Rights 2020 or from among the several papers, see, for example: Verschuuren 2014 or in Hungarian: Raisz 2011, 90–108 or a PhD dissertation: Hermann 2016.

[25] There are several papers in the field of water legislation, such as: Szilágyi 2019, 182–197. or Szilágyi 2018.

Unfortunately, the GMO-free zone is practically very insecure[26]. Somehow this is a naive reference to GMO-free agriculture which may be proclaimed but hard to manage.

Article XXI is the specific article on environmental rights, the first paragraph of which provided the major legal basis for interpretation for the Constitutional Court until recently: "(1) Hungary shall recognize and enforce the right of every person to a healthy environment. (2) Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act. (3) No polluting waste shall be brought into Hungary for the purpose of placement."

While Par (1) is the survival of the today 30 years old formula, having a substantial case practice at least by the Constitutional Court, the two new paragraphs are less practical. Par (2) is a narrow understanding of the polluter pays principle, the main fault of which is the missing reference to prevention and precaution. The principle should be interpreted in a complex mode. A good example of this is the document that was inspired by the OECD 20 years after the first recommendation:[27] "The 'polluter pays' principle ... implies that in general it is for the polluter to meet the costs of pollution control and prevention measures, irrespective of whether those costs are incurred as a result of the imposition of some charge or pollution emission, or are debited through some other suitable economic mechanisms, or are in response to some direct regulation leading to some enforced reduction in pollution."

The preamble of the Environmental Liability Directive also refers to the complex understanding: "According to the 'polluter-pays' principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures."[28] But any other form of liability might also be taken as means of 'payment' – even criminal liability –, of the person found responsible.

Par (3) is an unfortunate reference to the transboundary movement of wastes, because of two reasons: first, similar to the case of polluter pays principle, it would be better placed only in the waste management act, as it really does not fit into a constitutional act; second, the wording, the definitions used here are far from being accurate from the point of view of waste management legal concepts. Neither 'placement[29]' is a proper definition, nor 'polluting waste.' This paragraph does not refer to disposal, or landfilling – which could have been mentioned here – but uses a definition that is not even present in the current Hungarian waste legislation.

[26] In terms of GMO studies see, for example: Tahyné Kovács 2018, 173–194 or Tahyné Kovács 2018, 72–87.

[27] Note on the Implementation of Polluter Pays Principle (OECD, Paris, 1974) in McLoughlin & Bellinger 1993, 146.

[28] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, (OJ L 143, 30.4.2004, 56.), preamble (18).

[29] In some English translations of the Fundamental Law the term 'disposal' is used, but the Hungarian definition does not correspond to it.

Consequently, the wording needs further clarification in the future in case anyone is willing to refer to it, but it would be even better to simply remove from the Fundamental Law.

### 3.4. The State

Finally, within the chapter on the state – beside our reference to the Commissioner for Fundamental Rights – there is one more provision which could also be connected with environmental protection. This article is a provision of the part on public finances, having some reference to the protection of resources and also to future generations. Par (1) Art 38 reads: "The property of the State and local governments shall be national assets. The management and protection of national assets shall aim to serve public interest, to satisfy common necessities and to safeguard natural resources, to take into consideration the needs of future generations..." This message fits properly into the mostly positive and innovative shift of the constitutional law, encompassing sustainable development and primarily the issue of future generations.

Still there might be one element which needs further elaboration, namely what national asset means, mostly in connection with natural resources. The Constitutional Court in one of its recent decisions[30] clearly refers to ecological services, or ecosystem services which offer values, products and services to mankind. They even list the four types of ecosystem services which are commonly used: provisioning services (eg. food, timber, etc.); regulating services (eg. plants cleaning air and filtering water, regulating climate, etc.); cultural services (where, amongst others, recreation belongs); and supporting services (eg. photosynthesis, the creation of soils, the water cycle). When we think about national assets or making decisions about investments, these should also be taken into consideration.

## 4. The case-law of the Constitutional Court

In many instances above, we could refer to the decisions of the Hungarian Constitutional Court which interpret provisions on the right to a healthy environment both of the earlier Constitution and of the current Fundamental Law. After the adoption of the Fundamental Law a major concern was how to use the past decisions under the current situation. Soon after the fourth amendment of the Fundamental Law, the Constitutional Court could find the way to interpret these provisions. The conclusion of the Court was:[31] "[34] The possible employment of arguments from previous decisions shall be decided by the Constitutional Court on a case-by-case basis, looking at the context of the specific problem." Consequently, the Court itself argued for the continuity of constitutional interpretations.

In order to set the scene, we must underline that the Constitutional Court, while a bit hesitant in certain other issues, is relatively active in interpreting the cases in connection with the right to a healthy environment and is widening its approach to cover even more aspects than earlier.

[30] Constitutional Court Decision no. 28/2017. (X.25.).
[31] Constitutional Court Decision no. 13/2013. (VI.17.).

There is no room here to look at the previous decisions[32], but we should provide some recent examples, and a summary of the whole vision of the Constitutional Court decisions.

The first in the list is the decision (Constitutional Court Decision no. 28/2017. (X.25.)), connected with nature conservation, more specifically with Natura 2000 protection versus agricultural uses. Some new provisions of agricultural uses – according to the Court – limited the chances and effectiveness of nature conservation, while it did not prove to be a necessary condition or prerequisite in order to protect any other human right or constitutional value (principle of proportionality). The verdict declared that the legislator had made an omission which led to the lack of conformity with the Fundamental Law. Fortunately, the Court referenced some very important basic requirements, which could be used for any further legal arguments. They underlined the importance of biodiversity, the special use of Natura 2000 sites, referred to the common heritage of the nation – which is closely connected to the common heritage of mankind, – and emphasized the non-regression (or non-derogation) principle – being core issues of the Court decisions since the very first one.[33] According to the Court, while environmental protection is everyone's obligation, the responsibility of the state is even greater, as the state shall also create the underlying legal conditions of effective environmental protection.

In this decision, the Court also interpreted the obligations towards future generations for the first time, as it has been articulated by Article. P) of the Fundamental Law. This encompasses a three-fold obligation: (1) conservation of options, (2) conservation of quality, and (3) conservation of access.

All the three shall be used in a way to protect the interest of future generations. In the given case it means that the purely economic vision in connection with the utilization of Natura 2000 sites may not be accepted. Finally, the Court clearly stated that the state, when making various decisions in connection with nature conservation, must keep in mind the precautionary principle and long-term thinking. The precautionary principle has been taken as part of the constitutional right to the environment.

A next judgment (Constitutional Court Decision no. 3223/2017. (IX.25.)), while rejecting the motion, widely interpreted the principle of non-derogation, which must apply to both the regulatory steps and the individual decision of the authorities. Also, it affirmed the requirement to carry out necessity assessment and proportionality test when making such decisions.

A third judgment – (Constitutional Court Decision no. 13/2018 (IX.4.)) – is based upon the constitutionality initiative of the President of the Republic, using to a large extent the arguments of the FG Ombudsman submitted to the Constitutional Court in an amicus brief . The main issue is water management, more specifically, the unlimited drilling and use of groundwater wells, down to the level of 80 metrers.

[32] There are several analyses on these decisions, such as Fodor 2006 or Bándi 2019, 339–382.
[33] Constitutional Court Decision no. 28/1994. (V.20.).

This judgment combines the references to future generations and right to a healthy environment with the questions of state property or even more with the question of national assets (Article. 38 of the Fundamental Law) – since water resources belong to this scope.

The non-regression principle is underlined again, as being based on the provisions of Fundamental Law, and it is combined with the precautionary principle, also distinctly referred to. When applying these principles the necessity-proportionality test shall be used, comparing the protection of the environment to the protection of various other human rights. As the proposed law aims to eliminate the permitting or notification requirements in case of the given wells without replacing this with any other guarantees, the Court could not accept this regression in the level of protection. We also should not forget – says the Court – that the protection of water resources is a strategic duty of the state. The legislator could not point to any other human rights of constitutional interests which might support the limitation of environmental rights.

Our final example points to another milestone decision by the Constitutional Court, for which the groundwork was started in 2018, when the FG Ombudsman reviewed the consequences of the amendment of the Forest Act. and proposed the Commissioner for Fundamental Rights to initiate a norm control by the Constitutional Court aimed at establishing the lack of conformity with the Fundamental Law at the end of the year. The Commissioner on the proposal of the FG Ombudsman requested the annulment of those provisions which on the one hand decreased the level of protection of protected natural areas, strictly protected natural areas, Natura 2000 areas, as well as the locally protected natural areas, while on the other hand, of those which introduced procedural rules which may bring about such a negative result. He pointed out that the Nature Protection Act ensures the protection of natural values for all the sectors, and the Forest Act may not reduce this level of protection. The goal of the forest managers is determined by the primary function of the forest, this is why the primary function of the forests in protected natural areas should be one of protective nature, as in this way, the economic function of the forest will not be applicable, or only to a limited extent. The amendment of the law prescribed the primary protective function only for the strictly protected natural areas, and not for those natural areas which are 'simply' protected, i.e. not for the majority of the forests. As a result of the amendment, the level of protection of the forests in Natura 2000 areas has also changed significantly, as it has considerably decreased the level of protection of protected species. The FG Ombudsman said that this amendment gave rise to special concerns, as it led to the subordination of nature protection goals in state-owned forests too, although the primary reason for the nationalization of the protected natural areas was always to attain nature protection goals, which should notbe overridden by profit-oriented private interests.

The Court – with some minor exceptions – agreed with the arguments and annulled several items from the forest act.[34] Many of the previous arguments (non-regression etc.) have been repeated, and some new elements added. One of the new reasons has been that the state has a special responsibility towards future generations and should think about the natural and cultural assets as public trust.

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

Forests belong to the national heritage and this implies obligations to all. The natural and cultural assets have their intrinsic value of their own.

As demonstrated above, the case law of the Hungarian Constitutional Court focusing on environmental protection and the rights of future generations is dinamically evolving and the mandate of the FG Ombudsman can offer a useful tool in this process both by initiating constitutional reviews of certain acts or by offering professional legal arguments in amicus briefs.

Summing up the lessons of case-law of the Constitutional Court, mentioning only the most important items, provides the following conclusions: (a) the right to (a healthy) environment is a fundamental right, (b) this requires institutional protection on behalf of the state, (c) and the state has a paramount role, a primary obligation to be active in this field, while (d) the duty to preserve and protect is for everyone, (e) the non-derogation (non-regression or non-retrogression) principle might be taken as the basis of understanding, having material, institutional and procedural aspects, (f) when making decisions the principle of proportionality shall be applied, (g) the interests of future generations shall be protected via the obligation of the current generations, (h) it shall be based on the precautionary and prevention principles, consequently, (i) long-term thinking is a prerequisite, (j) the cultural and natural assets belong to the common heritage of the nation, together with ecosystem services, using the public trust doctrine.

## Bibliography

1. Alapvető Jogok Biztosának Hivatala (2019) *Az alapvető jogok biztosának és a jövő nemzedékek érdekeinek védelmét ellátó helyettesének közös jelentése az AJB-385/2019. számú ügyben*, in: https://www.ajbh.hu/documents/10180/3190211/K%C3%B6z%C3%B6s+jelent%C3%A9s+hullad%C3%A9k+elhelyez%C3%A9se+%C3%BCgy%C3%A9ben+385_2019/2bd49b12-8028-fbc8-407d-2ab4da3fcead?version=1.0 [02.10.2020]
2. Alapvető Jogok Biztosának Hivatala (2020) *Jelentések, indítványok, állásfoglalások*, in https://www.ajbh.hu/hu/jelentesek-inditvanyok-allasfoglalasok [02.10.2020]
3. Bándi Gy (2019) Környezethez való jog, in: Schanda B, Balogh Zs, ed., *Alkotmányjog – alapjogok*, Pázmány Press, Budapest, 339–382.
4. European Commission (2019) *The Pannonian Region*, in: https://ec.europa.eu/environment/nature/natura2000/biogeog_regions/pannonian/index_en.htm [02.10.2020]
5. European Court of Human Rights (2020) *Environment and the European Convention on Human Rights*, in: https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf [02.10.2020]
6. European Union Agency for Fundamental Rights (2020) *EU Charter of Fundamental Rights*, in: https://fra.europa.eu/en/eu-charter/article/1-human-dignity#TabExplanations [02.10.2020]
7. Fodor L (2008) A jövő nemzedékek jogai, *Fundamentum*, 1/2008, pp. 47–52.
8. Fodor L (2006) *Környezetvédelem az Alkotmányban*, Gondolat Kiadó, Debreceni Egyetem, Állam- és Jogtudományi Kar, Debrecen.
9. Hermann V (2016) *Az egészséges környezethez való jog átfogó védelme az Emberi Jogok Európai Bíróságának gyakorlatában*, PhD Thesis, University of Pécs, Pécs
10. Jövő Nemzedékek Érdekeinek Védelmét Ellátó Biztoshelyettes (2019) *A jövő nemzedékek szószólójának jogalkotási kezdeményezése a környezeti felelősség hatékonyabb érvényesítése érdekében*, https://www.ajbh.hu/documents/10180/3157803/Jogalkot%C3%A1si_kezdem%C3%A9nyez%C3%A9s_k%C3%B6rnyezeti_felel%C5%91ss%C3%A9g/4821a1da-bb6b-8659-e97f-66f8b679c17d [02.10.2020]
11. Majtényi B (2008) A jövő nemzedékek és a természeti tárgyak köztársasága?, *Fundamentum*, 1/2008, pp. 17-28.
12. McLoughlin J – Bellinger E G (1993) *Environmental Pollution Control, International Environmental Law and Policy Series*, Graham and Trotman/Martinus Nijhoff.
13. Office of the Commissioner for Fundamental Rights (2020) *Act CXI of 2011 on the Commissioner for Fundamental Rights*, in: http://www.ajbh.hu/en/web/ajbh-en/act-cxi-of-2011 [02.10.2020]
14. Office of the Commissioner for Fundamental Rights (2019) *Report 2018 on the Activities of the Commissioner for Fundamental Rights and his Deputies*, in: http://www.ajbh.hu/documents/14315/2993057/Report+on+the+Activities+of+the+Commissioner+for+Fundamental+Rights+and+his+Deputies+2018/ef5f4ffa-ef99-8cf8-e4d3-47ebb39b1026?version=1.0 [02.10.2020]

15. Parliamentary Assembly (2009) *Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment*, in: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12279&lang=EN [02.10.2020]
16. Raisz A (2011) A környezetvédelem helye a nemzetközi jog rendszerében – avagy nemzetközi környezetjog bírói szemmel, *Miskolci Jogi Szemle*, 1/2011, pp. 90–108.
17. Shelton D (2009) Common Concern of Humanity, *Iustum Aequum Salutare*, 5(1), pp. 33–40.
18. Sulyok K (2019) A környezet védelme és az Alaptörvény P) cikke az Alkotmánybíróság gyakorlatában, *Alkotmánybírósági Szemle*
19. Szilágyi J E (2018) *Vízszemléletű kormányzás – vízpolitika – vízjog: kitekintéssel a vízgazdálkodásra és a víztudományra,* Miskolci Egyetemi Kiadó, Miskolc
20. Szilágyi J E (2019) Water and Law – a summary of the results of a natural resource law research, *Journal of Agricultural and Environmental Law*, 14(27), pp. 182–197., https://doi.org/10.21029/JAEL.2019.27.182.
21. Tahyné K Á (2018) A jogi szabályozás szükségességét kiváltó tényezőkről a GMO-k kapcsán, *Iustum Aequum Salutare*, 16(2), pp. 173–194.
22. Tahyné K Á (2018) Gedanken zur verfassungsrechtlichen Interpretierung der gesetzlichen Regelung der GVOs in angesichts der Verhandlungen der neuen GVO Verordnung der EU und des TTIP (Transatlantic Trade and Investment Partnership), *Journal of Agricultural and Environmental Law*, 10(18), pp. 72–87.
23. Venice Declaration, 2002: Common Declaration on Environmental Ethics of John Paul II and the Ecumenical Patriarch His Holiness Bartholomew I, Venice, Monday, 10 June 2002
24. Verschuuren J (2014) Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe, in: Scholtz W, Verschuuren J, ed., *Regional Integration and Sustainable Development in a Globalised World*, Edward Elgar Publishers
25. Világunk átalakítása (2015) *A fenntartható fejlődés 2030-ig megvalósítandó programja*, in: https://jak.ppke.hu/uploads/collection/545/file/Vilagunk_atalakitasa.pdf [02.10.2020]
26. Voluntary National Review of Hungary on the Sustainable Development Goals of the 2030 Agenda (2018) *Transformation towards sustainable and resilient societies*, in: https://sustainabledevelopment.un.org/content/documents/20137Voluntary_National_Review_of_Hungary_v2.pdf [02.10.2020]
27. White M V (1982) The Common Heritage of Mankind: An Assessment, *Case Western Reserve Journal of International Law*, 14(3)

**Sibilla BULETSA***

# Features of circulation of agricultural lands in Ukraine for legal entities**

*Abstract*

*Land in Ukraine can be in private, communal and state ownership. The lands of Ukraine include all lands within its territory, including islands and lands occupied by water bodies, which are divided into categories according to their main purpose. Legal entities may acquire land mainly for use on the rights of lease, sublease, emphyteusis and permanent use, may have agricultural land on the right of lifelong inherited land tenure, the legal regulation of which is currently absent. In Ukraine at this stage, models of organization of relations between business partners are effectively and justifiably used through the creation of a joint holding company in a foreign jurisdiction, which further establishes the company in Ukraine. As a result of the anti-terrorist operation and the occupation of Crimea on the territory of Ukraine, the rights of thousands of people to housing, land and property, including the rights of agricultural land use, were violated. Today, land lease is the main way of doing agribusiness, lease agreements have become an important tool for absorbing weaker competitors or seizing their land. In conditions of slow growth in the cost of rent, agricultural holdings can afford a slightly higher fee, which gives them a significant advantage over farmers. However, the moratorium on land has been lifted in 2020 and the land market in Ukraine will be introduced on July 1, 2021. From this date, agricultural land will be available to individuals, ie the moratorium on the sale of agricultural land will be lifted. As for legal entities, the land market will be open for them only from January 1, 2024.*

**Keywords:** land, market, reform, agricultural, legal entities, foreigners, tenant, inheritance.

## 1. Introduction

In 1991, after the collapse of the Soviet Union, Ukraine gained independence and began to implement neoliberal reforms by creating the institution of private property. Land reform was launched, which was to completely change the land structure of the country, formed during the Soviet era, when in fact there was only state ownership of land. We have about 28 million hectares of such distributed (or private) land. In total, 31 million hectares are privately owned, and 10.4 million hectares remain state-owned.

Sibilla Buletsa: Features of circulation of agricultural lands in Ukraine for legal entities. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 23-50, https://doi.org/10.21029/JAEL.2020.29.23

* Doctor of Juridical Science, J.S.D., Dr. Habil, Full Professor, Head of the Department of Civil Law and Civil Procedure, Law Faculty, Uzhhorod National University, Head of Association of Civilians in the Transcarpathian region, ORCID: https://orcid.org/0000-0001-9216-0033, e-mail: sibilla.buletsa@uzhnu.edu.ua, https://www.uzhnu.edu.ua/uk/cat/flaw-urcivil.

** *The research of this article was supported by the Ferenc Mádl Institute of Comparative Law.*



https://doi.org/10.21029/JAEL.2020.29.23

Since 1995, Ukraine has been reforming collective farms by transferring land shares to members of collective farms in the form of shares. According to Art. 14 of the Constitution of Ukraine (1996)[1] the right of ownership of land is acquired and exercised by citizens, legal entities and the state exclusively in accordance with the law. On December 3, 1999, the rural population received land shares, which were converted into plots of land and their owners received certificates of ownership.

On October 25, 2001, the new Land Code of Ukraine (hereinafter - the Land Code)[2] was adopted. Article 78 of the LCU stipulates that land ownership is the right to own, use and dispose of land. Land in Ukraine can be in private, communal and state ownership. The lands of Ukraine include all lands within its territory, including islands and lands occupied by water bodies, which are divided into categories according to their main purpose. Article 19 of the LCU defines the categories of land: (a) agricultural land; (b) land for housing and public buildings; (c) lands of nature reserve and other nature protection purpose; (d) health-improving lands; (e) recreational lands; (e) lands of historical and cultural purpose; (f) forestry lands; (g) water fund lands; (h) land for industry, transport, communications, energy, defense and other purposes. Part 2 of Art. 22 of the Land Code of Ukraine, agricultural lands include: (a) agricultural lands (arable land, perennial plantations, hayfields, pastures and fallow lands); (b) non-agricultural lands (economic paths and runs, field protective forest strips and other protective plantings, except for those classified as lands of other category, lands under farm buildings and yards, lands under infrastructure of wholesale markets of agricultural products, lands of temporary conservation, etc.).

## 2. Legal entity as a land user of agricultural land

Legal entities (established by citizens of Ukraine or legal entities of Ukraine) may acquire land plots for business activities. Civil legal capacity arises from the moment of creation of a legal entity and terminates from the date of entry in the unified state register of its termination (Part 4 of Article 91 of the Civil Code of Ukraine – hereinafter CCU). Elements of legal personality of legal entities are enshrined in the constituent documents.

### 2.1. Farms

Farms are the most common type of agricultural enterprises in Ukraine. As of August 1, 2020, 47,506 of them were registered. Almost 4.6 million hectares of agricultural land are in use, of which almost 4.45 million hectares are arable land. The average area of agricultural land cultivated by a farm is 78 hectares, with 75% of existing farms cultivating land up to 100 hectares. The area of agricultural lands and / or lands of the water fund owned and / or used by members of the farm is not less than 2 hectares, but not more than 20 hectares. Today, farms can acquire state, communal and private land for farming, commodity agricultural production, personal farming on lease and emphyteusis.

[1] Konstituciya Ukrayini vid 28.06.1996.
[2] Zemelnij Kodeks Ukrayini vid 25.10.2001.

It is necessary to take into account certain features in the alienation of corporate rights of the farm, which is due to the peculiarities of its organizational and legal form. Starting from May 2016, a farm can be established in one of two organizational and legal forms by the decision of the founder: 1) as a legal entity or 2) as a natural person – entrepreneur**.**

A farm registered as a legal entity has the status of a family farm, provided that its entrepreneurial activity uses the work of members of such a farm, who are exclusively members of one family in accordance with Art. 3 of the Family Code of Ukraine. The procedure for establishing a farm includes two stages: (1) the acquisition by the founder of the right to land for farming and (2) state registration of the farm. The person who is the head of the farm, as well as the members of such a farm must be specified in the charter of the farm, if it is created in the form of a legal entity. When establishing a farm – a legal entity, one of the family members, other family members, as well as relatives may become members of this farm after amending its charter. Thus, following Part 2 of Art. 1, art. 3 of the Law of Ukraine 'On Farms'[3] founders (18 years) and members of farms can be only relatives and family members from 14 years. Therefore, in order to alienate the corporate rights of the farm to a third party who is not a member of the family, it is necessary to convert the farm into a business partnership. In case of transformation, all property, as well as all rights and obligations of the previous legal entity are transferred to the new legal entity (Part 2 of Article 108 of the CCU). Changing the name of the parties to the land lease agreement, in particular due to the reorganization of the legal entity, is not grounds for making changes to the land lease agreement and / or its re-registration (Part 4 of Article 16 of the Law of Ukraine 'On Land Lease'). Therefore, the parties should not renew the lease of land and incur additional costs in the transformation of the farm into a company and subsequently in the alienation of corporate rights of such a company.

Also, in order to facilitate the access of Ukrainian citizens to farming and obtaining land for these needs, it is necessary to remove the rules on the need for experience in agriculture or the availability of education obtained in an agricultural school from the legislation of Ukraine.

### 2.2. Family farm

One of the new subjects of the right to use agricultural land is a family farm, which appeared in 2016. Family farming is a special form of agricultural entrepreneurship, which involves the use of labor of members of one family on agricultural land owned by them on the right of ownership and / or right of use.[4] The family farm has certain features, namely: it is created on the basis of a personal peasant farm, which can own up to 2 hectares of land; subject to state registration as a natural person-entrepreneur or legal entity; is engaged exclusively in the production of agricultural products, its processing and supply; carries out economic activity (except for supply) at the place of tax address; does not use the work of employees; members of the family farm are only family members in the definition of Part 2 of Art. 3 of the

[3] Pro fermerske gospodarstvo: zakon Ukrayini vid 19.06.2003.
[4] Lushpayev 2017, 109.

Family Code of Ukraine (Part 5 of Article 1 of the Law of Ukraine 'On Farming', paragraph 291.4. Of the Civil Code of Ukraine).

### 2.3. Business association

Business partnership is a common type of agricultural enterprise. A business association as a subject of the right to use agricultural land is a legal entity, the authorized (composed) capital of which is divided into shares between the participants (Part 1 of Article 113 of the Civil Code of Ukraine). The most common companies in the field of agriculture are limited liability companies and joint stock companies.

Business associations may acquire the right of agricultural land use in case such a right is contributed by the participant or founder of the company to the authorized capital (Part 1 of Article 86 of the Commercial Code of Ukraine – hereinafter CCU), as well as by concluding lease and emphyteusis agreements. The land legislation of Ukraine also provides for the right of non-agricultural enterprises to lease agricultural land for subsistence farming (paragraph 3 of Article 22, Article 37 of the Land Code).

For the founders of business associations, the main activity of which will be commodity agricultural production, there is no right to receive state-owned land for entrepreneurial agricultural activities, as provided by land legislation for farms. The founders can only: a) privatize land free of charge for personal farming in accordance with Art. 121 of the LCU, and subsequently transfer such land for use to the established company, or b) on general grounds on a competitive basis to obtain land for use in accordance with Art. 124 ZKU.

### 2.4. Agricultural cooperatives

Another organizational and legal form of the subject of the right to use agricultural land is an agricultural cooperative - a legal entity formed by individuals and / or legal entities that are producers of agricultural products and voluntarily united on the basis of membership and self-government to conduct joint economic and other activities to meet economic, social and other needs and agricultural cooperative association – a legal entity formed by agricultural cooperatives that have voluntarily merged on the basis of membership and on the basis of self-government to conduct joint economic and other activities to meet economic, social and other needs (paragraph 7.8 of Article 1 of the Law of Ukraine 'On Agricultural Cooperation').[5] Agricultural cooperation – a system of agricultural cooperatives and agricultural cooperatives.

An agricultural cooperative is formed by the decision of the constituent assembly of its founders not less than 3 persons. A member of an agricultural cooperative may be a producer of agricultural products – a legal entity or an individual. An individual who has reached 16 years of age may be a member of an agricultural cooperative.

A legal entity operates in an agricultural cooperative through its authorized representative. An agricultural cooperative can be formed by reorganization (merger, division, separation) of another agricultural cooperative.

[5] Pro silskogospodarsku kooperaciyu: Zakonu Ukrayini vid 21.07.2020.

As of August 1, 2020, 1,277 agricultural service cooperatives are registered in Ukraine. Agricultural cooperatives are legal entities that carry out agricultural activities or serve their members, so the right to use agricultural land cooperatives acquire on a common basis as all legal entities in Ukraine, including companies.

In accordance with Part 1 of Art. 22 of the Law of Ukraine 'On Cooperation' the land of the cooperative consists of land leased to him or purchased by him.[6] Agricultural cooperatives can acquire land plots on the right of emphyteusis.[7]

## 2.5. Agroholding

Another relatively new subject of the right to use agricultural land is the agricultural holding. The formation of agricultural holdings mainly took place from the processing industry (bakery, flour milling, oil and fat, sugar, meat and dairy), development of own logistics facilities (elevators in particular) and trade networks, and the last stage was the lease of property and land shares, equipment, etc.[8] The specificity of the agricultural holding as a subject of the right to use agricultural land is that its legal status is not currently defined by the legislation of Ukraine, but its structure may include farms, business associations and agricultural cooperatives, so the peculiarities of their right to use agricultural land are regulated by land legislation and legislation. which determines the legal status of the relevant legal entities that are part of the agricultural holding. In view of this, the subjects of the right to use agricultural land are legal entities that are part of the structure of the agricultural holding. This leads to the fact that the landowner may not know who is the actual user of his land, as all responsibilities of the land user to pay rent, use the land for its intended purpose, compensation in case of destruction or damage to the land is legal. a person who is a de jure land user.

The second feature of the legal position of the agricultural holding in the context of the exercise of the right to use agricultural land rights is that it carries out agricultural activities on large areas of land, which can be divided into clusters depending on the location of land, in order to organize efficient agricultural activities. As of 2018, the largest 5 agricultural holdings in Ukraine use 570 thousand hectares, 560 thousand hectares, 430 thousand hectares, 370 thousand hectares and 250 thousand hectares, respectively. According to the size of agricultural land controlled by the agricultural holding, the first echelon (over 100 thousand ha), the second (50–100 thousand ha), and the third (26–50 thousand ha) can be distinguished.[9]

[6] Pro kooperaciyu: Zakonu Ukrayini vid 10.07.2003.

[7] This is the right to use someone else's land for agricultural purposes. Unlike a land lease agreement, emphyteusis can be alienated to another person; land user; – the owner of the land has a preemptive right to purchase emphyteusis; – if under the land lease agreement the parties can be replaced only by mutual consent (except in cases established by law), the lessee has the right to sublease the land only if provided for in the lease agreement, then in case of emphyteusis the landowner, if the land user purpose and does not worsen the characteristics of the land, has a sufficiently limited means of influencing the use of land by the land user.; - emphyteusis can be inherited by the land user.

[8] Bogdana 2017, 98.

[9] Bogdana 2017, 100.

Agroholding companies have a number of advantages over individual companies, which include: reduction of transaction costs, the ability to diversify risks, lower unit costs, increased productivity, access to capital, use of advanced technologies and innovations in production and management, attracting foreign investment, etc. Disadvantages of the functioning of agricultural holdings include rising unemployment in rural areas, insufficient number of social programs, prevailing monoculture and neglect of crop rotation principles, deterioration of soil quality characteristics.[10]

Problematic issues in the expansion of land holdings of agricultural holdings are cases when: lease agreements do not pass state registration, and in those that have passed, the registration inscription does not allow to judge which body and when the registration was carried out; the agreements do not contain all the essential terms of the lease agreements and all annexes, and for a long time the terms of the agreements are not revised; short-term lease of land shares is a potentially problematic point in connection with the need to renegotiate lease agreements after registration of ownership of land shares and receipt by owners of acts of ownership of land; lease of unclaimed shares is also potentially problematic due to the possibility of claiming shares by their owners and early termination of the lease.[11]

Agroholding companies have a number of advantages over individual companies, which include: reduction of transaction costs, the ability to diversify risks, lower unit costs, increased productivity, access to capital, use of advanced technologies and innovations in production and management, attracting foreign investment, etc. The disadvantages of the functioning of agricultural holdings include rising unemployment in rural areas, insufficient number of social programs, the prevailing monoculture and neglect of the principles of crop rotation, deterioration of soil quality.

Problematic issues in the expansion of land holdings of agricultural holdings are cases when: lease agreements do not pass state registration, and in those that have passed, the registration inscription does not allow to judge which body and when the registration was carried out; the agreements do not contain all the essential terms of the lease agreements and all annexes, and for a long time the terms of the agreements are not revised; short-term lease of land shares is a potentially problematic point in connection with the need to renegotiate lease agreements after registration of ownership of land shares and receipt by owners of acts of ownership of land; the lease of unclaimed shares is also potentially problematic due to the possibility of claiming shares by their owners and early termination of the lease.

Thus: (a) farms are the most numerous subjects of the right to use agricultural land among legal entities, but in terms of land size they are significantly ahead of agricultural holdings; (b) family farms are the newest subject of the right to use agricultural land law, which can acquire the right to lease land and the right to emphyteusis; (c) the right to lease land and the right to emphyteusis on land of state, communal and private property are acquired by farms, business associations and agricultural cooperatives on the general terms and conditions defined in the Land Code of Ukraine; (d) agricultural holdings are the largest users of agricultural land in Ukraine, but their structure includes other agricultural enterprises.

[10] Zavalnyuk 2017, 56–59.; Girnik 2016, 42.
[11] Melnik, Pidgirna & Belinska 2018, 6.

The consequence of this is that the legal users of agricultural land are farms, business associations and agricultural cooperatives. Due to the fact that the legal status of agricultural holdings is not defined by law, it does not have land legal personality[12].

## 3. Mergers and acquisitions in agribusiness

Medium and large agricultural enterprises, such as agricultural holdings, are interested in a significant increase in the amount of agricultural land they cultivate, so these entities enter into mergers and acquisitions (mergers & acquisitions), acquiring rights to other agricultural enterprises, as well as their real estate, means of production, and most importantly – agricultural land and rights to them.

Transactions on mergers and acquisitions in agribusiness have their own characteristics and differ significantly from the conclusion of similar transactions in other areas of management. Typically, mergers and acquisitions in agribusiness occur through the conclusion of contracts of sale of the so-called 'land bank', corporate rights or a single property complex of the agribusiness entity. Also, the specificity of such agreements is related to the fact that the buyer could not acquire ownership of certain types of agricultural land, which was due to the moratorium (paragraph 15 of Section X 'Transitional Provisions' of the LCU). An agricultural enterprise could only acquire the right to use such land plots, but with the adoption of the law on the land market everything changed. For these reasons, the vast majority of agricultural land belongs to enterprises on the right of use. At the same time, according to the current legislation in Ukraine, individuals cannot sell their land use rights, but only transfer land plots to 'secondary' land use, for example, sublease. Regarding the transfer of the right of emphyteusis and the right of permanent use of agricultural land to 'secondary' use, the legislation does not clearly enshrine the possibility of concluding such agreements.

In 2017, mergers and acquisitions in agriculture accounted for 11% of the total number of such transactions in all sectors of the economy and ranked second among all industries,[13] which indicates a rapid process of consolidation of agricultural enterprises. Transactions on mergers and acquisitions in agribusiness are concluded primarily to increase the area of agricultural land that is suitable for cultivation, as well as to acquire real rights to real estate, agricultural machinery, means of production and other property, as well as rights that may belong a legal entity that joins or is absorbed by the buyer.

There are several legally possible ways to acquire the right to agricultural land when concluding transactions on mergers and acquisitions in agribusiness:

(1) Concluding land lease and emphyteusis agreements, the subject of which is the right to use land plots owned by the landlord. With regard to land plots that are leased, land sublease agreements are concluded, but this is possible provided that the land lease agreement enshrines the lessee's right to sublease land plots under Part 1 of Art. 8 of the Law of Ukraine 'On Land Lease.' If the terms of the land lease agreement do not provide for such a right of the lessee, you must obtain the written consent of the landowner to transfer the land to sublease.

[12] Yurchenko 2019a, 102.
[13] TOP-5 znakovih M&A ugod u 2017 roci v Ukrayini 2018.

This leads to additional risks of 'loss' of land that is transferred to sublease, because landowners are wary of changing the user of the land, especially on the same terms as under the current land lease agreement (Part 2 of Article 8). Law of Ukraine 'On Land Lease'). The right of emphyteusis and the right of permanent use of land cannot be transferred to sublease, therefore all lands that belong to the rights of use of the primary land user will not pass to the acquirer.

(2) Concluding a contract of sale of corporate rights of a legal entity, ie with the transactions of merger and acquisition. According to the transfer deed, all property and rights belonging to the acquired legal entity, including the rights of agricultural land use, pass to the new legal entity, but only to those lands to which the rights belong to the legal entity (Part 2 of Article 107 of the CCU). For the remaining lands, the rights to which belong to the founders and / or participants (members) of the legal entity, the rights will be acquired under separate agreements, the type of which will depend on the type of land right of the acquired entity.

(3) Increasing the area of cultivated agricultural land is the conclusion of a transaction of purchase and sale of rights to use agricultural land. The legislation does not explicitly provide for such a possibility, however, in practice the parties enter into a memorandum or agreement of intent to purchase and sell agricultural land use rights, which sets out the essential terms of the future agreement on purchase and sale of agricultural land use rights (main agreement), namely: (a) the area of land plots, the rights of use of which will be alienated, the location of lands and cadastral numbers of land plots; (b) the term for which the right to use the land is acquired (for example, may not exceed the term established by the land lease and emphyteusis agreements); (c) the price of acquiring land use rights. Other conditions on terms and stages of legal, financial and accounting audits are also indicated; the moment of concluding the main contract; the right to unharvested crops on land plots, the rights of use of which are transferred; stages of carrying out the necessary actions before concluding the main contract and others.

(4) Purchase and sale of an agricultural enterprise as a single property complex. Land plots and rights, including agricultural land use rights, are a component of the unified property complex (Part 2 of Article 191 of the CCU). Thus, the agricultural enterprise may include non-agricultural land under farm buildings, structures, yards, etc., as well as agricultural land that is necessary for economic activity. Therefore, during the acquisition of a single property complex, the land is transferred to agricultural land owned by the company on the right of ownership, lease or permanent use. The right to follow the land plot, which is on the right of use, during the acquisition of property, which is located on it, is enshrined in Part 2 of Art. 120 of the LCU, Art. 377 of the CCU and Part 3 of Art. 7 of the Law of Ukraine 'On Land Lease.'

## 4. Foreigners, stateless persons, foreign legal entities, international associations and organizations, as well as foreign states as participants in the Ukrainian agricultural land use market.

The rights of foreigners are guaranteed by Article 26 of the Constitution of Ukraine, which states that foreigners and stateless persons legally staying in Ukraine enjoy the same rights and freedoms, as well as bear the same obligations as citizens of

Ukraine – for exceptions established by the Constitution, laws or international treaties of Ukraine. Foreigners, stateless persons, foreign legal entities, international associations and organizations, as well as foreign states are participants in the agricultural land use market in Ukraine and the legislation of Ukraine does not impose restrictions on the acquisition of agricultural land of all forms of ownership for these entities. They may have land for individual or collective gardening on lease. The use of land plots of horticultural societies is carried out in accordance with the law and the statutes of these societies. This right is enshrined in Part 3, 5 of Art. 22, part 2 of Art. 93 ZKU, part 1, item in part 2 of Art. 5 of the Law of Ukraine 'On Land Lease.'[14] In accordance with Part 5 of Art. 22 of the LCU, parts of agricultural land may not be transferred to the ownership of foreigners, stateless persons, foreign legal entities and foreign states.

For business activities, non-residents may acquire built-up land plots in case of acquisition of real estate located on them and undeveloped (vacant) land plots, but it is obligatory – for construction of objects related to economic activity. And outside the settlements such enterprises will be able to acquire land ownership only in the case of acquisition of real estate located on them).[15]

According to paragraphs. 170.1.3 of the Tax Code of Ukraine (hereinafter – TCU) real estate owned by a non-resident individual is leased exclusively through a natural person-entrepreneur or a resident legal entity (authorized persons). Such persons perform representative functions of a non-resident on the basis of a written agreement and act as its tax agents regarding rent. A non-resident who violates the provisions of this sub-clause shall be deemed to be evading tax.[16] A foreigner who owns an agricultural land plot (received the Extract) and wants to lease it, must enter into a representation agreement with a natural person-entrepreneur or legal entity. The contract is concluded in writing and certified by a notary. The term of the contract is determined by agreement of the parties. In the contract, the parties must clearly define the legal actions to be taken by the attorney (for example, enter into an additional agreement to the lease agreement, receive rent, etc.). If a foreigner has not registered his ownership of the inherited land plot (has not received the Extract), he cannot dispose of it. Therefore, it is impossible to renew the lease agreement under such conditions.

If the foreign landlord and the tenant intend to conclude an additional agreement on the renewal of the lease agreement, they must do so within one year from the date of receipt of the Extract by the heir, because during this time the foreigner (his authorized person) can dispose of it. The transfer of ownership of the leased land to another person is not a ground for changing the terms or termination of the lease agreement.

If a foreigner (stateless person) intends to voluntarily alienate an agricultural land plot, he may do so by concluding an appropriate civil law agreement (purchase, sale, mines, donations, etc.). If the land inherited by a foreign citizen is leased, the lessee has a preemptive right to acquire it and the foreigner must notify the lessee in writing of his

[14] Pro orendu zemli: Zakon Ukrayini vid 06.10.1998.
[15] Basanska 2017, 105.
[16] Podatkovij kodeks Ukrayini vid 02.12.2010.

intention to sell the land, indicating its price and other conditions of sale. If the lessee waives his preemptive right to purchase the leased land, the rights and obligations of the lessor under the lease agreement of this land are transferred to the new owner of such land.

As of 2018, there were 41.5 million hectares of agricultural land in Ukraine, which accounted for 68.7% of the entire territory of Ukraine, of which arable land – 32.5 million hectares, perennial plantations – 0.9 million hectares, hayfields – 2.4 million hectares, pastures – 5.4 million hectares, fallows – 0.2 million hectares. As of 2019, foreign legal entities engaged in agricultural activities used a significant area of agricultural land, namely 3.5 million hectares.[17] For example, in Poland, as of 2016, 200,000 hectares of agricultural land were under the control of foreign investors, in Hungary, as of 2013, the area of foreign-controlled land was 1 million hectares, in 2017 alone, Lithuania, Bulgaria and Romania have more than 700 thousand hectares of agricultural land[18] under control of foreign companies.

The issue of acquisition by foreign investors of agricultural land use rights to large tracts of land is acute worldwide. This is due to the fact that such acquisitions limit a number of rights of locals, mostly in rural areas. Such rights include: (a) the right of access to land resources; (b) the right to work at the place of residence, as smaller agricultural enterprises attract less hired labor; (c) the right to food security, because foreign producers export agricultural products to their countries, resulting in increased food prices in the country of production. Also, foreign farmers are not interested in investing in sustainable economic development of rural areas and the local population, as their main interest is to use land resources for growing agricultural products.[19]

Ukraine's reservation on the establishment set out in Annex XVI-D to Chapter 6 of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand,[20] states that there is no restrictions on land lease by foreigners and foreign legal entities. In view of this, enshrining in law restrictions on foreigners' acquisition of agricultural land use rights in Ukraine in order to protect the rights of the local population would be contrary to the Association Agreement. The Strategy for Promoting Private Investment in Agriculture for the period up to 2023 provides for the promotion of foreign investment.[21] Foreign citizens and legal entities, making investments, can also be subjects of land relations, acquiring and exercising land rights. Foreign investment as a type of profit-oriented activity is realized by businesses through non-resident companies. According to the current legislation of Ukraine, the possibilities and procedure for acquiring land plots for ownership and use are determined separately. Thus, according to the Land Code of Ukraine, foreign legal

[17] Amosov 2019a, 1.
[18] Borodina, Yarovij & Mihajlenko 2017, 113–115.
[19] Gerstter, Kaphengst, Knoblauch & Timeus 2011, 15–16.
[20] Pro ratifikaciyu Ugodi pro asociaciyu mizh Ukrayinoyu, z odniyeyi storoni, ta Yevropejskim Soyuzom, Yevropejskim spivtovaristvom z atomnoyi energiyi i yihnimi derzhavami-chlenami, z inshoyi storoni: Zakon Ukrayini vid 16.09.2014.
[21] Strategiya spriyannya zaluchennyu privatnih investicij u silske gospodarstvo na period do 2023 roku: shvalena rozporyadzhennyam Kabinetu Ministriv Ukrayini vid 05.07.2019.

entities may acquire ownership of non-agricultural land plots: (a) within settlements – in the case of acquisition of real estate and for the construction of facilities related to business activities in Ukraine; (b) outside the settlements – in case of acquisition of real estate.

If foreign legal entities interested in acquiring land plots of state or communal property submit an application to the Council of Ministers of the Autonomous Republic of Crimea, regional, Kyiv or Sevastopol city state administration or village, settlement, city council and state privatization body. The application shall be accompanied by a document certifying the right of ownership of real estate (buildings and structures) located on this land plot, and a copy of the certificate of registration by a foreign legal entity of a permanent establishment with the right to conduct business in Ukraine.

Unlike property rights, there are no restrictions on leases and other land uses in Ukraine for foreign legal entities. For example, the State Fiscal Service points to the need to register a non-resident who owns real estate in Ukraine in one of the following ways: (a) a permanent establishment of a non-resident; (b) a separate subdivision of a non-resident (representative office of a non-resident); (c) property manager; (d) legal entity with foreign investments.

Thus, the acquisition of land rights for foreign legal entities is directly related to the acquisition or creation of real estate, and in some cases – with the registration of a permanent establishment. At the same time, the legislation clearly states that foreign companies may acquire ownership of non-agricultural land. That is, if a foreign company intends to register directly with it the real right to land, including the right to lease, it must establish a permanent establishment.

An investor may establish limited liability companies to implement an investment project related to agricultural land in Ukraine. This organizational and legal form is the most convenient and least expensive to create and administer. Investors who intend to raise share capital may establish a private or public joint stock company. A foreign company can register and record its permanent establishment for tax purposes, which will in fact be equated to a resident for state bodies. A joint holding company is established in Ukraine in a foreign jurisdiction, which later establishes a company in Ukraine. At the same time, partners manage their business in Ukraine through a non-resident company using 'joint stock agreements,' ie agreements on joint business management.[22]

Thus, joint ventures established with the participation of foreign legal entities and individuals may acquire ownership of non-agricultural land.[23]

## 5. Features of lease of agricultural land by legal entities

Leases in Ukraine have become the main (though not the only) way to establish control over agricultural land. In 2017, the average cost of renting one hectare of privately owned land in Ukraine was about 40 euros. Legal entities have concentrated hundreds of small plots of land (on average 4 hectares) under their control due to lease

[22] Ruchko 2017, 2.
[23] Kulchitskij 2019, 1.

agreements. The government has also been actively involved in this process, handing over state-owned lands through public electronic auctions. In order to develop the market of agricultural land use rights, including land lease rights, it is necessary to introduce the purchase and sale of land lease rights, which in turn will help attract additional investment in agricultural production.[24]

Article 13 of the Law 'On Land Lease'[25] stipulates that a land lease agreement is an agreement under which the landlord is obliged to transfer the land plot to the lessee for possession and use for a certain period, and the lessee is obliged to use the land plot in accordance with the terms of the agreement. and requirements of land legislation.

The right to lease agricultural land in Ukraine is characterized by the following general features: (1) arises on the basis of an agreement (Part 1 of Article 93 of the Land Code, Article 1 of the Law of Ukraine 'On Land Lease'). The essential conditions of the land lease agreement, in particular, are: – the date of conclusion and term of the lease agreement; – rent with indication of its size, indexation, method and conditions of calculations, terms, the order of its introduction and revision and responsibility for its non-payment; (2) arises from the moment of state registration (Article 125 of the Land Code, Part 5 of Article 6 of the Law of Ukraine 'On Land Lease') and is executed in accordance with the Law;[26] (3) has a paid nature in cash and in kind (Articles 21-22 of the Law of Ukraine 'On Land Lease'). The rent for land plots of state and communal property shall be paid by the lessee from the date of registration of the land lease agreement, unless otherwise established by the terms of the agreement; (4) may be subleased (Part 5 of Article 93 of the Land Code, Article 8 of the Law of Ukraine 'On Land Lease'); (5) has a hereditary nature (Part 1 of Article 7 of the Law of Ukraine 'On Land Lease'); (6) tenants of land plots may be citizens and legal entities of Ukraine, foreigners and stateless persons, foreign legal entities, international associations and organizations, as well as foreign states (Part 2 of Article 93 of the LCU), state authorities and local authorities. self-government (Part 2 of Article 5 of the Law of Ukraine 'On Land Lease'); (7) the interest of the lessee is to carry out activities on the leased land, but which does not violate its intended purpose; (8) the maximum term of the right is up to 50 years; (9) the right to lease land is terminated from the moment of state registration of the termination of the real right on the basis of a document confirming the termination of the right to lease the land. Such a document may be a land lease agreement, an additional agreement on the termination of the land lease agreement, a will, a court decision. The grounds for termination and termination of the land lease agreement are specified in Art. Art. 31-32 of the Law of Ukraine 'On Land Lease.'

The specific features of the right to lease agricultural land include: (1) the minimum term of the right to lease agricultural land for commercial agricultural production, farming, personal farming is 7 years (Part 11 of Article 93 of the LCU), and the minimum lease term reclamation lands – 10 years (Part 12 of Article 93 of the Land Code); (2) the object of lease is a land plot of agricultural purpose of private, state and

[24] Yurchenko 2017, 303.
[25] Pro orendu zemli: Zakon Ukrayini vid 06.10.1998.
[26] Pro derzhavnu reyestraciyu rechovih prav na neruhome majno ta yih obtyazhen: Zakon Ukrayini vid 01.07.2004.

communal property (Article 3 of the Law of Ukraine 'On Land Lease'); (3) the lessee has a special obligation to preserve soil fertility and rational use of natural properties of land (Article 24 of the Law of Ukraine 'On Land Lease'); (4) the lessee acquires ownership of products and income from cultivated crops (Article 25 of the Law of Ukraine 'On Land Lease'); (5) the right to exchange agricultural land plots, which are the objects of lease agreements and are located in one land plot (Part 3 of Article 37 of the Land Code);[27] (6) in case of early termination of the land lease agreement at the initiative of the landlord (except for early termination of the lease agreement due to failure of the lessee to fulfill its obligations), the lease of which was acquired by auction, the lessor reimburses the lessee for its acquisition, determined by the terms of the agreement and the law, and losses incurred by the lessee as a result of early termination of the lease agreement, unless otherwise provided by the lease agreement; (7) the land plot encumbered by the pledge may be leased with the consent of the pledgee; (8) landowners and land users pay land tax from the date of ownership or right to use the land (Article 287 TCU). The data of the State Land Cadastre are the basis for calculating the land tax. Payment for the lease of agricultural land plots, land shares (units) must be at least 3% of the value of the land plot, land share (share) determined in accordance with the legislation (paragraph 288.5 of Article 288 of the TCU). In this case, the annual amount of rent for agricultural land may not exceed 12% of the regulatory monetary value.[28] In connection with the introduction of quarantine, Law №540[29] provided for exemption from payment for land (land tax and rent for land plots of state and communal property) for the period from 1 to 31 March 2020 for land plots owned or used, including on lease, by individuals or legal entities, and used by them in economic activities (ie for profit).

Citizens and legal entities may not lose the right to use the land plot in the absence of grounds, the list of which is exclusive.[30] This court decision closely intertwined both the issue of legal succession of legal entities and the issue of deprivation of the successor's right to use the land, the right to use which the latter was granted indefinitely. In this case, the Cooperative Market filed a lawsuit with the local government to recognize the decision of the local self-government to terminate the right of permanent use of land on which this market was located. The Supreme Court sided with the enterprise and stated in its ruling that the provisions of Art. 141 of the LCU contain an exclusive list of grounds for termination of the right to use the land.

[27] Yurchenko 2019b, 23–25.

[28] Normative monetary valuation of land plots is carried out to determine the amount of land tax, state duty on mines, inheritance and donation of land plots, rent for land plots of state and communal property, losses of agricultural and forestry production, value of land plots over 50 hectares for outdoor sports and sports and recreation facilities, as well as in the development of indicators and mechanisms for economic incentives for the rational use and protection of land. Normative monetary valuation of land plots is carried out by legal entities that are developers of land management documentation (Law of Ukraine "On Land Valuation").

[29] Pro vnesennya zmin do deyakih zakonodavchih aktiv Ukrayini, spryamovanih na zabezpechennya dodatkovih socialnih ta ekonomichnih garantij u zv'yazku z poshirennyam koronavirusnoyi hvorobi (COVID-19): Zakon Ukrayini vid 30.03.2020.

[30] Rishennya Velikoyi palati Verhovnogo Sudu Ukrayini vid 05.11.2019 № 906/392/18.

In turn, the actions of public authorities and local governments aimed at depriving the subject of the right to use the land after the state registration of such a right outside the grounds specified in Art. 141 of the LCU, are such that violate the right to use the land, and citizens and legal entities may not lose the previously granted to them in cases established by law the right to use the land in the absence of grounds established by law. The enterprise, which was the original land user in possession of the market, changed the name of the legal entity and re-registered the charter of the said legal entity, while the USREOU code did not change. Therefore, by deciding to terminate the right of permanent use of the land plot, which is indefinite and acquired in accordance with the state act, the local self-government body violated and terminated the right of permanent use of the land plot without proper legally established grounds.

## 6. Agricultural land market in Ukraine: acquisition, emergence and termination of legal entities

Article 15 of the LCU of the Transitional Provisions provided for a ban on individuals and non-governmental organizations until January 1, 2005 to sell or otherwise transfer ownership of two categories of land owned by them: (1) plots intended for individual farms or for other commercial agricultural products and (2) land shares. The moratorium was extended ten times. However, a new step towards lifting the moratorium was the decision of the European Court of Human Rights in the case 'Zelenchuk and Tsitsyura v. Ukraine' of 22.05.2018.[31] In particular, the decision states that the absolute ban on the purchase and sale of agricultural land in Ukraine is a violation of the human right to private property, enshrined in Art. 1 of the European Convention on Human Rights. The court also recommended that the state adopt more balanced legislation within a 'reasonable time' that could allow it to emerge from the phase of 'legislative stagnation' in the field of land reform.

According to the State Geocadastre, of the 60.3 million hectares of Ukrainian land, almost 70% is agricultural land with high fertility, 41 million hectares of agricultural land are subject to a moratorium, when land can not be bought, sold or pledged to the bank or to contribute to the authorized capital of the enterprise, of which 27.7 million hectares (68%) are shares that are privately owned by citizens and are the main means of production in agriculture, a guarantee of food security of the state and its economic growth. The moratorium also covered 10.5 million hectares of state and communal land. The moratorium covers 96% of agricultural land, with 68% being shares of peasants.

The grounds for acquiring the right to land from a land plot of state and communal property are provided by the state 116 of the Land Code. Citizens and legal entities acquire property rights and rights to use land plots from state or communal lands by decision of executive authorities or local self-government bodies within their powers or by the results of the auction.

They believe that it is necessary to form a holistic strategy to stimulate small landowners – from start-up financing for young farmers to the development of infrastructure that would facilitate small producers' access to markets.

[31] Sprava «Zelenchuk i Cicyura proti Ukrayini», Zayavi № 846/16 ta № 1075/16.

Priority should be given to food production over other forms of land use, such as bioenergy production. This should be complemented by environmental laws that will protect the environment from irresponsible agricultural production.[32]

According to Art. 82 of the LCU, legal entities (established by citizens of Ukraine or legal entities of Ukraine) may acquire land plots for business activities in the case of: (a) purchase under a contract of sale, rent, gift, mine, other civil law agreements; (b) contribution of land plots by its founders to the authorized capital; (c) acceptance of inheritance; (d) the emergence of other grounds provided by law.

On April 28, 2020, the President of Ukraine Volodymyr Zelensky signed the Law 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Conditions of Circulation of Agricultural Land' (the so-called "Law on the Land Market").[33] This law was adopted by the Verkhovna Rada (Ukrainian Parliament) of Ukraine on March 31, 2020 (draft law №2178-10) and provides for the possibility of alienation of agricultural land. The main goal is to introduce a model of the land market that will unite farmers in its support and will contribute to the growth of agricultural production efficiency. I note that according to a survey conducted by the Sociological Group 'Rating' on October 24–27, 2019 – 69% of Ukrainians are against giving foreigners the right to buy and sell land. 7% – for allowing this 'in the near future' 4% – in a year, 8% – in a few years.[34]

According to this law, the land market in Ukraine will be introduced on July 1, 2021. From this date, agricultural land will be available to individuals, ie the moratorium on the sale of agricultural land will be lifted. As for legal entities, the land market will be open for them only from January 1, 2024. Ownership of agricultural land will be available to: (a) citizens of Ukraine; (b) legal entities of Ukraine, created and registered under the legislation of Ukraine, the participants (shareholders, members) of which are only citizens of Ukraine and / or the state, and / or territorial communities; – territorial communities and the state.

Banks will be able to acquire ownership of agricultural land only by way of foreclosure on them as collateral. Such land plots must be alienated by banks at land auctions within two years from the date of acquisition of ownership.

Ownership of agricultural land by legal entities established and registered under the legislation of Ukraine, participants (founders) or ultimate beneficial owners (controllers) of which are persons who are not citizens of Ukraine, may be exercised from the date and subject to approval by referendum.

At the same time, foreigners, stateless persons and legal entities are prohibited from acquiring shares in the authorized (composed) capital, shares, units, membership in legal entities (except in the authorized (composed) capital of banks) that are owners of agricultural land. However, this restriction will also expire after the abolition of the restriction is approved in a referendum. On June 18, 2020, the Verkhovna Rada (Ukrainian Parliament) adopted in the first reading the Presidential Bill №3612 'On Democracy through an All-Ukrainian Referendum.'

[32] Amosov 2019b, 2.

[33] Pro vnesennya zmin do deyakih zakonodavchih aktiv Ukrayini shodo obigu zemel silskogospodarskogo priznachennya: Zakon Ukrayini vid 31.03.2020.

[34] Okremi aspekti stavlennya naselennya do zemelnogo pitannya 2019.

The document was supported by 252 people's deputies.[35] According to the draft, only one issue can be put to an all-Ukrainian referendum.[36] All-Ukrainian referendum can be called on the people's initiative proclaimed by presidential decree (at the request of at least 3 million citizens of Ukraine who have the right to vote, provided that signatures on the all-Ukrainian referendum are collected in at least two-thirds of administrative-territorial units, and not less than one hundred thousand signatures in each of them). The wording of the referendum should be clear and understandable; such that does not allow different interpretations; the answer to the question should be 'yes' or 'no.' The Council of Europe Commission for Democracy through Law (Venice Commission) approved an urgent opinion on the draft law on the All-Ukrainian referendum (№3612) and made several recommendations.[37] The document will be recommended for approval at the 124th plenary session of the Venice Commission from 8 to 9 October 2020.

The Law on Land Market provides for the conditions under which the acquisition of ownership of agricultural land is prohibited: (1) legal entities, participants (shareholders, members) or final beneficiaries of which are persons who are not citizens of Ukraine – for agricultural land plots of state and communal property, agricultural land plots allocated in kind (on the ground) to owners of land shares (shares), and which are located closer than 50 kilometers from the state border of Ukraine (except for the state border of Ukraine, which passes by sea); (2) legal entities, participants (shareholders, members) or final beneficiaries of which are citizens of the state recognized by Ukraine as the aggressor state (Russia) or the occupying state; (3) persons belonging to or belonging to terrorist organizations; (4) legal entities, participants (shareholders, members) or final beneficiaries of which are foreign states; (5) legal entities in which it is impossible to establish a beneficial owner (controller); (6) legal entities, the beneficial owners (controllers) of which are registered in offshore zones. For example, Barbados, Bermuda, Seychelles. (7) individuals and legal entities in respect of which special economic and other restrictive measures (sanctions) have been applied; (8) legal entities established under the legislation of Ukraine, which are under the control of individuals and legal entities registered in the countries included in the FATF in the list of states that do not cooperate in combating money laundering and sanctioned companies. Today there are two such countries – Iran and North Korea.

The total area of agricultural land owned by a citizen and a legal entity may not exceed 10,000 hectares, ie it is not possible to own 10,000 hectares and at the same time own any share in a legal entity that owns agricultural land.

At the same time, by January 1, 2024, was introduced an additional restriction on the acquisition of agricultural land in the property: a limit of 100 hectares and granting the right to purchase land only to individuals. There is a possibility that one person will be able to buy all the land within one OTG and this can make the community dependent on one company. Until January 1, 2030, the sale price of agricultural land allocated in kind (on the ground) to the owners of land shares (units) may not be less

[35] CDL-PI(2020)009-e Ukraine 2020.

[36] Proekt Zakonu pro narodovladdya cherez vseukrayinskij referendum vid 09.06.2020.

[37] Venecianska komisiya nadala rekomendaciyi shodo zakonoproyektu Zelenskogo pro referendum vid 22.07.2020.

than their regulatory monetary value. In each area it has its own indicator. The highest price per hectare of arable land in Ukraine is in Cherkasy and Chernivtsi regions – 33 thousand 646 hryvnias and 33 thousand 264 hryvnias, respectively. The lowest is in Zhytomyrska, 21 thousand 411 hryvnias. In Rivne region one of the lowest – 21 thousand 938 hryvnias per hectare of arable land. A fixed price should protect unit holders and local budgets from deliberately lowering prices.[38] Payments for land are made exclusively in non-cash form. It is not allowed to acquire the right of ownership of land plots under repayment agreements in case the purchaser of the right of ownership does not have documents confirming the sources of funds or other assets at the expense of which such right is acquired. The cost of 1 hectare of agricultural land after the opening of the market will be a maximum of $2000 by 2030.

The law stipulates that the sale of agricultural land of state and communal ownership is prohibited. It is also prohibited to alienate agricultural land located in the temporarily occupied territories of Donetsk and Luhansk oblasts, the Autonomous Republic of Crimea and the city of Sevastopol, except for transfer them in inheritance.

Citizens who have the right of permanent use, the right of lifelong inherited ownership of land plots of state and communal property intended for farming (farming), as well as tenants of land plots that have acquired the right to lease land by reissuing the right of permanent use in 2010 year, have the right to repurchase such land in the property with installments of up to ten years at a price equal to the normative monetary value of such land, without land auction. In the case of purchase of land with installment payment, ownership passes to the buyer after payment of the first payment.

Tenants who work on the land and have the right to use it no later than 2010 can buy the land in installments of up to 10 years at the cost of regulatory monetary valuation of such plots and without land auctions. The buyer receives the right of ownership after the first payment. During this time, the farmer will pay for this land at the level of rent, and sometimes less, and in a maximum of 10 years it will be his own land. Today there are about 560 thousand hectares of such lands.

The lessee has the opportunity to transfer the preemptive right to purchase the land to another person, but the owner must be notified in writing, but the possibility of the lessee transferring the preemptive right to purchase land to others may lead to certain land concentration schemes. If the owner wants to sell his share, and the producer will not have the right to buy it, the tenant will transfer the preemptive right to another person for redemption. I will note that if the holding does not want to buy the share, then this preemptive right will be transferred (sold) to speculative investors for resale. Most likely, tenants will have prior agreements with speculative investors and will become actual sellers of shares.

The law prohibits the sale of state and communal lands. It is also prohibited to alienate agricultural land located in the temporarily occupied territories of Donetsk and Luhansk oblasts, the Autonomous Republic of Crimea and the city of Sevastopol, except for their inheritance.

[38] Kirilenko 2020.

Thus, the lifting of the moratorium on land sales entails: (1) increase in rent. Rental prices will double in a few years. Currently, the average rental price is 60-80 dollars. For the owner of a share of 3-4 hectares, it is an increase in annual income of about two hundred dollars. There are about four million such shareholders in Ukraine. Instead, for giant holdings such as Ukrlandfarming or Kernel, which have a land bank of 600,000 hectares, the projected increase in rents by $60 will result in an increase in costs of $36 million annually. (2) the tendency to reduce land banks. Manufacturers will have to increase efficiency on smaller areas. The productivity of agricultural producers in Ukraine is still much lower than in the West and even in neighboring Russia. The state should help small farmers, and large ones have enough resources to modernize. (3) farmers who will buy the land on which they work: it will be possible to take bank loans as collateral for this land. (4) foreigners and foreign companies were given the opportunity to buy Ukrainian land only as a result of an all-Ukrainian referendum. (5) restrictions on the purchase of land do not work. There are always opportunities to get around them, which creates corruption and a shadow market. Even without any restrictions, the volume of purchase and sale transactions will not exceed 10-15 percent of land each year. The concentration of tens of thousands of hectares of land can be avoided by raising land taxes or introducing a tax on land sales in the event of resale: these fees will fill local budgets and make it unprofitable to buy land for speculation. If the state gradually sells this land, it will bring billions in budget revenues.[39] (6) he State Geocadastre is actively preparing for the start of the land market to transfer the distribution of land on the ground. (7) at any time the land can be taken from farms. Today they have a situation of uncertainty. We are talking about 500 thousand hectares, which they cultivate, they will be able to repay the loan for 10 years after receiving 500 thousand in private ownership.

## 7. Inheritance of agricultural land by legal entities

In the genesis of inheritance of the right to land in Ukraine there are the following stages: Stage I – inheritance of the right to land in the days of Kievan Rus (IX-XIII centuries); Stage II – inheritance of the right to land in the Lithuanian-Polish era, the times of the Commonwealth (XIV-XVII centuries.); Stage III – inheritance of the right to land in the days of the Zaporozhian Sich (Hetmanate) (late XV-early XVIII centuries.); Stage IV – inheritance of land rights in the Ukrainian lands as part of the Austro-Hungarian and Russian Empires (XVIII-XIX centuries); Stage V – inheritance of the right to land in the Ukrainian lands during the Soviet era (1922-1991); Stage VI – inheritance of the right to land in the years of independence of Ukraine and before the adoption of the Central Committee of Ukraine and the Land Code of Ukraine (from 1991 to 2003); Stage VII – inheritance of the right to land in the modern period (from 2003 to the present).[40]

[39] Tejze & Kanevskij 2019.
[40] Sergiyivna 2019, 14.

The revival of the categories of inheritance law, the object of which are land and real estate, in Ukraine began with the adoption of the Central Committee of Ukraine (Article 1225),[41] LCU (paragraph 'd' of Part 1 of Article 81) and other regulations, which returned to civil circulation the right of private property and other real rights to land (the right to lifelong use of land, superficies, emphyteusis, easement). A necessary condition for inheriting a land plot and rights to it is the existence of the relevant real right of the testator in relation to it. A land plot in respect of which the testator did not have rights at the time of the opening of the inheritance cannot be the object of inheritance.

The rights and obligations of foreign individuals and legal entities, stateless persons to inherit arise on the same grounds as for individuals and legal entities of Ukraine. Property to them is inherited regardless of belonging to any state, unless otherwise provided by law.[42]

It should be noted that legal entities in Ukraine can be heirs: (a) by will (Article 1222 of the Civil Code of Ukraine, hereinafter – the CCU). The heir to the will is the person specified in the will. (b) under a hereditary contract (Chapter 90 of the CCU).

### 7.1. By will

A legal entity may inherit a land plot or rights to it, if a natural person – owner / user, makes a will in favor of this legal entity and if it has civil capacity. Therefore, in order to inherit real rights to land, a legal entity must exist at the time of the opening of the inheritance (the day of death of the testator or his declaration of death). If the legal entity determined by the testamentary heir is terminated before the opening of the inheritance, the will in this part will not have legal force. In this case, the hereditary succession will be carried out in accordance with the law. As there are no legal restrictions, the heir can be a legal entity regardless of the type (private, public) and any organizational and legal form (company, farm, etc.). A legal entity may accept the inheritance or refuse to accept it. However, it cannot be removed from the right to inherit under Art. 1224 of the CCU, as the actions, statuses and actions specified in the specified norm are peculiar only to natural persons.

Clause 10 of the Resolution of the Plenum of the Supreme Court of Ukraine[43] states: in accordance with Art. 1225 CCU ownership of land passes to the heirs under the general rules of inheritance (while maintaining its intended purpose) upon confirmation of this right of the testator by a state act on land ownership or other title document. In the order of inheritance may also be transferred the right to use land for agricultural purposes (emphyteusis), the right to use someone else's land for construction (superficies), the right to use someone else's property (easement).

Citizens of Ukraine, foreigners and stateless persons, legal entities, territorial communities, and the state may acquire the right to own land by accepting an inheritance (Articles 81-84 of the LCU). The heirs can be only natural persons –

[41] Civilnij kodeks Ukrayini: Zakon Ukrayini vid 16.01.2003.
[42] Hodiko 2016, 110.
[43] Pro sudovu praktiku u spravah pro spadkuvannya: Postanova Plenumu Verhovnogo Sudu Ukrayini vid 30.05.2008.

citizens of Ukraine, foreigners and stateless persons. Legal entities cannot be heirs, because in cases of termination of their activities the procedure for transferring their property to other persons or the state is determined not by the rules of inheritance, but by special rules on liquidation or reorganization of legal entities. Heirs by law and by will may be two or more persons. In this case, there is a right of joint partial ownership of land in accordance with Art. 87 of the LCU.

The procedure for registration of inheritance of land by foreigners and stateless persons does not differ from the procedure of inheritance defined for citizens of Ukraine. That is, first a foreigner (stateless person) must accept the inheritance within 6 months, in the absence of objections from other heirs and subject to the provision of the necessary documents, he receives a certificate of inheritance (Articles 1268, 1269 CCU). After receiving the certificate, the heir registers his rights to the inherited property. To register the right to land, he can apply: either to the state registrar of the Department of State Registration of the Ministry of Justice or to a notary – at the same time as the certificate (for a fee) or separately (for a fee), submitting the relevant documents. Confirmation of state registration is an Extract from the State Register of Property Rights (hereinafter – the Extract). The current legislation establishes the form of an extract from the State Land Cadastre,[44] in which the cadastral number of the land plot must be indicated.

However, the LCU establishes the obligation of a foreign citizen or stateless person who inherited an agricultural land plot to alienate such a land plot within 1 year. Failure to comply with this requirement is the basis for the forced termination of rights to land, which is carried out in court (Article 140 of the LCU). Since agricultural land cannot be transferred to foreigners, it should be recognized that the issuance of a certificate of inheritance by a notary is not based on law. There is a conflict of norms, one of which allows the acceptance of agricultural land in inheritance (Part 4 of Article 81 of the LCU), and others do not allow the emergence of ownership of these plots (Part 2 of Article 81, Part 2 of Article 82 of the CCU). In the norms of the Land Code, the issue of disposing of agricultural land plots by persons who acquired these plots during their tenure as citizens of Ukraine and subsequently changed their citizenship remains unclear. From January 1, 2013, the title deed to the land plot is an extract from the register of property rights. The basis for registration of ownership of land is a certificate of inheritance. However, before applying to the state registration service for registration of property rights, it is necessary to make sure that the land is registered in the State Land Cadastre. For state registration of ownership and other real rights to land, the heir also submits an extract from the State Land Cadastre of land (if the document confirming the emergence, transfer or termination of ownership or other real rights to real estate, no information on the cadastral number of the land plot).

The inherited land plot must be alienated no later than one year from the date of acceptance of the inheritance. Otherwise, such a plot of land will be forcibly alienated. Here a dilemma arises: how can a foreigner alienate a land plot voluntarily if there is a moratorium on the sale of agricultural land? Of course, everything could be solved by

[44] Pro zatverdzhennya Poryadku vedennya Derzhavnogo zemelnogo kadastru: postanova Kabinetu Ministriv Ukrayini vid 17.10.2012.

abandoning the inheritance in favor of other Ukrainian heirs, or if they do not exist, in favor of the state. However, the latter option is unlikely to be acceptable to most.

The Letter of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases will be useful here,[45] which states that foreigners are not prohibited from selling agricultural land. But in practice, foreigners have many problems with the alienation of land, which is caused by unregulated and sometimes contradictory norms.[46]

In practice, the prosecutor's office appeals to the courts to terminate the right of private ownership of agricultural land. Courts satisfy such claims, alienate land plots in favor of territorial communities or the state. In their decisions, the courts note that a foreign citizen retains the right to receive full reimbursement of the value of the land. However, the procedure for such compensation has not been approved, so it is likely that this procedure is not carried out. It is possible that in the case of legislative regulation of this issue, stakeholders will be able to obtain appropriate funds.

If the landlord is a foreigner, then in accordance with Art. 32 of the Law 'On Land Lease'[47] if the lease agreement has not expired, and the land has passed by inheritance to a foreigner (stateless person), the lessee has the right to use such land under the conditions specified in the previously concluded lease agreement (unless otherwise provided by the agreement).[48]

Based on these instructions, notaries refuse to issue a certificate of inheritance for land, which: were acquired by the testator before 2013; rights to which are certified by State acts on land ownership; not registered in the State Land Cadastre; do not have a cadastral number.

State registration of land plots is carried out at the request of the owner of the land plot or the authorized person, ie the heir of the land plot who has accepted the inheritance. For the state registration of a land plot, the following shall be submitted to the State Cadastral Registrar, which carries out such registration: – application in the established form; the original land management documentation, which is the basis for the formation of land; land management documentation, which is the basis for the formation of land in the form of an electronic document.

[45] Pro deyaki pitannya zastosuvannya norm Zemelnogo kodeksu Ukrayini: List vid 16.01.2013.

[46] The annual period for voluntary alienation of land begins from the date of receipt of the Extract. For example, if a foreigner in 2015 accepted the inheritance, which includes agricultural land, and received a certificate and extract only on March 23, 19, he must alienate the inherited land by March 23, 20. It should be noted that, respectively. to Art. 1296 of the CCU, the issuance of a certificate to heirs is not limited by any term, and its absence does not deprive them of their rights to inheritance.

[47] Pro orendu zemli: Zakon Ukrayini vid 06.10.1998.

[48] For example, a limited liability company entered into a land lease agreement with a citizen in 2005 for a period of 20 years. In 2013, the landlord died. His successor is a Hungarian citizen. LLC can use the land in accordance with the terms of the contract until 2025. And the heir, having received the Extract on 15.12.14, must alienate the inherited land plot by 15.12.15. However, even if he does not do so by the specified deadline, it will not affect the right of the LLC to use the leased land. If the lease of the inherited land has expired, the lessee has no legal grounds to use it without renewal of the contract.

When carrying out the state registration of a land plot, it is assigned a cadastral number. A literal interpretation of paragraphs 2 and 3 of Section VII of the Law of Ukraine 'On the State Land Cadastre'[49] gives grounds to conclude that they actually 'block' the receipt of a certificate of inheritance for a land plot without a cadastral number, the ownership of which arose before 2004, as the heirs are unreasonably deprived of the right to register such land plots on the basis of technical land management documentation for the establishment (restoration) of the boundaries of the land plot in kind (on the ground).

In case of refusal of territorial bodies of the State Geocadastre to carry out the state registration of the land plot on the grounds that in the exhaustive list of persons who can address with the application for the state registration of the land plot there are no heirs of such plot, there is a need to address in court with the statement of claim. inheritance. After receiving a court decision on the recognition of land ownership by inheritance, it is necessary to prepare a land management project to establish (restore) the boundaries of the land in kind (on the ground). On the basis of the specified project of land management registration of the land plot in the State land cadastre with assignment to it of cadastral number then the extract from the State land cadastre in the order provided is issued.

It often happens that the land belonged to the testator on the basis of a state act. But at the same time in the State land cadastre there is no information on assignment of cadastral number to such land plot[50]. In this case, the process of registration of inheritance on the land is slowed down by the need to organize actions to include the land in the database of the State Land Cadastre and obtain a response from the cadastre. There are cases when the heir is denied a certificate of the right to inherit the land, because he can not provide the original state act of ownership of the land, issued in the name of the testator. If the problem is only in its loss, then you should get a duplicate of the state act, for which you need to apply in writing to the authority that issued it.

The right of lease, emphyteusis and superficies may be inherited by a legal entity if in the relevant agreements: (a) nothing is stated on this issue, (b) or the right to inherit the relevant right is directly established.

However, the issue of inheritance of property rights to state / communal land is more interesting for farmers. Opponents of inheritance in legal disputes refer to the rules: (a) Part 1 of Art. 81 of the Law 'On Land Lease,' which prohibits the alienator's alienation of the right to lease land of state or communal ownership to others, the introduction of the lease right to the authorized capital, its transfer as collateral; (b) Part 3 of Art. 1021 of the LCU, according to which emphyteusis and superficies established in respect of land of state or communal ownership may not be alienated by

[49] Pro Derzhavnij zemelnij kadastr: Zakon Ukrayini vid 07.07.2011.

[50] Cadastral number – a digital unique bar code of real estate, which allows you to identify a particular plot of land relative to its location. It is unique within the state and cannot be repeated. Assigning a number is a mandatory component of the privatization process, registration of property rights, settlement of contractual relations and obtaining data from the state register.

its land user to other persons (except in cases of transfer of ownership of buildings and structures), contributed to the authorized capital, pledged.

If a testator who leases state or communal lands under a contract that does not contain a direct prohibition on inheriting the right to lease makes a will in favor of a legal entity, such legal entity will be the tenant of this land plot. Similarly, the right to emphyteusis and superficies is inherited. It is clear that in such circumstances, the lease agreement, superficies, emphyteusis continues to operate, only the user's identity changes. After all, the relevant right passes to a clearly defined person – the heir.[51]

### 7.2. Inheritance agreement

Article 1302 of the CCU stipulates that under the inheritance contract one party (acquirer) undertakes to comply with the orders of the other party (alienator) and in case of his death acquires ownership of the alienator's property.[52] It should be noted that the rules of inheritance law do not apply to the inheritance agreement. Under such an agreement, the property belonging to the alienator is disposed of during his lifetime, but with the acquisition by the acquirer of the right of ownership of the property after the alienator's death.

An essential condition of the inheritance contract is its subject, which is the property of the alienator. The parties to the inheritance agreement are the alienator – the spouse, one of the spouses or another person and the acquirer – a natural or legal person. The purchaser may be obliged to take certain actions, both before the death of the alienator and after his death, so this condition must be clearly defined in the inheritance agreement.[53] When concluding an inheritance contract, the acquirer, if he is an heir by will or by law, does not lose the right to inherit in the share of property that was not specified in the contract.

Thus, the inheritance agreement is concluded in writing and is subject to notarization, as well as state registration in the Inheritance Register. The inheritance register is an electronic database that contains information, in particular, on certified inheritance agreements. In case of non-compliance by the parties with these requirements, the inheritance agreement is considered null and void. The parties to the inheritance contract have the appropriate rights and obligations, which must be notified by a notary.[54] Yes, Art. 1305 of the CCU stipulates that the purchaser in the inheritance contract may be obliged to perform a certain act of property or non-property nature before the opening of the inheritance or after its opening. These actions should be carried out depending on the orders of the alienator, before or after his death. The provisions of Chapter 90 of the Civil Code of Ukraine show that the purchaser fulfills the obligations imposed on him by the contract at his own expense and is not entitled to reimbursement and payment of remuneration at the expense of the property assigned to him by the alienator.

[51] Visicka 2019.
[52] Civilnij kodeks Ukrayini: Zakon Ukrayini vid 16.01.2003.
[53] Segenyuk 2017, 50.
[54] Ishina 2016, 481.

At the same time, the alienator has the right to appoint a person who after his death will monitor the implementation of the inheritance agreement. In the absence of such a person, control over the performance of the inheritance contract is exercised by a notary at the place of opening the inheritance. The notary will demand from the purchaser the relevant documents (certificates, invoices, receipts, checks, etc.) confirming the execution of the alienator's orders after his death[55].

In view of the above, the inheritance agreement is a bilateral transaction, according to the concept of which the purchaser is obliged to take certain actions on the instructions of the alienator, in exchange for which the ownership of the property passes to him. Therefore, the scope of responsibilities of the acquirer should be determined not on the basis of unilateral expression of the alienator's will, but by mutual consent of the parties, taking into account the contractual nature of the legal relationship.

In order to prevent the transfer of property that is the subject of the inheritance agreement to third parties, the notary simultaneously with the certificate of this agreement, imposes a ban on alienation and enters information about it in the Unified State Register of prohibitions on alienation of real estate. The ban is lifted after the alienator's death on the basis of a death certificate.

A will made by the alienator in respect of the property specified in the inheritance contract is void regardless of the time of its preparation. If the will contains instructions not only in respect of the property that is the subject of the inheritance agreement, but also in respect of other property of the testator, such a will is invalid only in part of the disposal of property specified in the inheritance agreement.

Since the inheritance agreement is related to the persons of its participants, the provisions of Art. 1308 of the CCU determines the right of the parties to apply to the court for early termination of the contract: (1) at the request of the alienator in case of non-compliance by the purchaser of his orders; (2) at the request of the purchaser in case of impossibility to fulfill the alienator's orders, both before death and after the alienator's death.[56]

In case of death of the acquirer, the inheritance contract is considered terminated. In this case, the heirs of the acquirer have the right to demand from the alienator reimbursement of expenses incurred in the performance of the inheritance contract in the part of the obligations that were performed by the acquirer before his death. If according to the inheritance contract the acquirer was obliged to perform certain actions after the death of the alienator, then in case of death of the acquirer the obligation to perform these actions passes to his heirs.

Thus, the inheritance contract is both an order in case of death and a contract, the content of which determines its essential conditions.

[55] Kuharyev 2016, 146.
[56] Spadkovij dogovir 2020.

## 8. Conclusion

Given the above, it should be noted that Ukraine is experiencing a process of improving agricultural land use rights. The land market is being opened, existing laws are being amended and new ones are being adopted.

In summary, we can describe the features of the right of agricultural land use in Ukraine: (a) the dominance of the right of land use in the system of rights to agricultural land under the ban on the alienation of lands of commercial agricultural production until 01.07.2021; (b) the grounds for the right of agricultural land use are a contract, will, decision of the executive authorities or local governments, court decisions; (c) the moment of occurrence of the right of agricultural land use is the moment of its state registration, and concerning the right of lease of land shares (units) – from the moment of concluding the contract; (c) subjects of agricultural land use rights may be citizens of Ukraine, natural persons – entrepreneurs, business associations, foreigners, stateless persons, foreign legal entities, as well as such special subjects of agricultural land use as citizens who run personal farms, family farms farms, farms, agricultural cooperatives, agricultural holdings, state and municipal agricultural enterprises.

The following may receive ownership or use of agricultural land: (a) citizens – for personal farming, gardening, horticulture, haymaking and cattle grazing, conducting commodity agricultural production; (b) agricultural enterprises – for conducting commodity agricultural production; (c) agricultural research institutions and educational establishments, rural vocational schools and secondary schools – for research and educational purposes, promotion of best practices in agriculture; (d) non-agricultural enterprises, institutions and organizations, religious organizations and associations of citizens – for subsidiary agriculture; (e) wholesale markets for agricultural products – to accommodate their own infrastructure.

The subject of legal regulation are public relations, which have as their object agricultural land, occupying most of the territory of Ukraine, is the most valuable natural resource, the main means of production in agriculture, national wealth, as well as those that can be used for agricultural needs and land shares. The content of the right of agricultural land use is a set of subjective rights and legitimate interests, legal obligations and prohibitions on possession and use, as well as partial disposal of land for agricultural purposes. The purpose of acquisition and realization of the right of agricultural land use can be use of lands for business needs, namely: for conducting commodity agricultural production, farming, placement of infrastructure of wholesale markets; and for non-entrepreneurial needs, in particular for personal farming, subsidiary agriculture, horticulture, gardening, haymaking and cattle grazing, for research and educational purposes, promotion of best practices in agriculture.

The Law on the Land Market proposes to determine the features of the legal regulation of the circulation of agricultural land on the basis of market mechanisms for the transfer of land rights, in particular: (a) from 01.07.2021 the ban on alienation of agricultural lands of all forms of ownership is lifted; (b) determines the subjective composition of persons who can acquire ownership of agricultural land: citizens of Ukraine, territorial communities, the state, legal entities of Ukraine and foreign citizens and stateless persons in case of acquisition by inheritance and the obligation to alienate

the land during year; (c) a rule is established according to which until January 1, 2024 it is not allowed for legal entities, the beneficial owner (controller) of which are foreigners, stateless persons, legal entities established under legislation other than the legislation of Ukraine, foreign states, land ownership agricultural purpose. These requirements do not apply to cases of ownership of land by their tenants, who are agricultural producers, if at least three years have passed since the state registration of the legal entity – acquirer of property rights, as well as cases of ownership of land by these persons; (d) the minimum starting price for the sale of land plots of state and communal property at land auctions is set at a level not lower than the normative monetary value; (e) the lessee's preemptive right to purchase the land plot is ensured; (f) the state registrar is obliged to enter information on the price (value) of property rights, including rights of use, in the Register of property rights; (g) the right of citizens to purchase land plots for farming (farming) farming, which belong to them on the right of permanent use and the right of lifelong inherited possession, is ensured. It is possible to redeem in installments of up to five years at a price equal to the normative monetary value of such land plots[57].

Until January 1, 2030, the sale price of agricultural land allocated in kind (on the ground) to owners of land shares (units) can not be less than their regulatory monetary value, but most likely it will be a minimum – $1,000 per hectare. First of all, farmers will buy land from shareholders. This amount will not be enough to develop their own economy, so it is likely that shareholders will spend it on basic needs. Meanwhile, farmers will be able to earn 2 times more money for the same plot, selling it to the average agricultural enterprise. Finally, the final stage of speculative transactions will be the direct purchase of land by large foreign investors. Thus, the least beneficial will be the initial owners for whom, allegedly, all the reform is happening. There is no ban on the sale of land to legal entities whose beneficial owners are foreigners. This allows for some fraud when a legal entity registered in Ukraine has a foreign beneficial owner who, in fact, becomes the owner of the land. Permission to sell agricultural land will in fact give rise to the institution of trust ownership, ie the 'quiet market' of land for foreign legal entities and foreigners in general.

It should be noted that even with the moratorium, nothing prevents foreign businesses from renting land. As in the case of Mriya Agricultural Holding, which manages approximately 30,000 hectares, and the corporate rights to which were purchased by Saudi Arabia and in fact the tenant of a large piece of land is Saudi Arabia. Europeans rent a lot, they already use the land here.

Finally, I note that foreigners who inherited agricultural land are obliged to alienate them within a year by concluding a civil contract (purchase, sale, mines, donations, etc.). If the heir does not voluntarily alienate the inherited land plot within a year, this is a ground for compulsory termination of the right to the land plot. The prosecutor's office has the right to sue for the forcible termination of foreigners' ownership of inherited agricultural land. It is more profitable for foreigners who have inherited such land plots to alienate them voluntarily and receive funds for them. After all, in the case of forced deprivation of the right to these areas, obtaining compensation is controversial.

[57] Rada pidtrimuye vidkrittya rinku zemli v Ukrayini.

## Bibliography

1. Amosov M (2019a) *Rinok zemli: koli i z yakimi obmezhennyami vin pochne pracyuvati,* in: https://commons.com.ua/ru/moratirij-i-koncentracija/ [28.09.2020]
2. Amosov M (2019b) *Skilki inozemnih investoriv obroblyayut ukrayinsku zemlyu,* in: https://mbiz.censor.net.ua/resonance/3130937/skolko_inostrannyh_investorov_obrabatyvaet_ukrainskuyu_zemlyu [28.09.2020]
3. Basanska N (2017) Nerezidenti yak sub'yekti prava vlasnosti na zemlyu: problemi ta perspektivi, *Pidpriyemnictvo, gospodarstvo i pravo*, 9., pp. 104–106.
4. Borodina O M, Yarovij V D & Mihajlenko O V (2017) Koncentraciya ta zahoplennya silskogospodarskih zemel v YeS: vikliki suchasnosti, *Ekonomika silskogo gospodarstva,* 4., pp. 109–124.
5. CDL-PI(2020)009-e Ukraine (2020) *Urgent Joint Opinion on draft Law 3612 on democracy through all-Ukraine referendum*, in: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)009-e [28.09.2020]
6. Dub B (2017) Suchasnij stan i tendenciyi ekonomichnoyi bezpeki agroholdingiv v Ukrayini, *Agricultural and Resource Economics: International Scientific E-Journal*, 3(1), pp. 94–107.
7. Gerstter C, Kaphengst T, Knoblauch D & Timeus K (2011) *An Assessment of the Effects of Land Ownership and Land Grabon Development with a Particular Focus on Small Holding and Rural Areas*, in: https://vysitska.com/2019/11/26/ [28.09.2020]
8. Girnik L V (2016) Diyalnist agroholdingiv v Ukrayini ta yihnij vpliv na rozvitok silskogo gospodarstva, *Visnik shidnoyevropejskogo universitetu ekonomiki i menedzhmentu*, 1(20), pp. 35–43.
9. Hodiko Y Y (2016) Osoblivosti pravovogo rezhimu spadkuvannya zemelnih dilyanok, *Naukovij visnik Mizhnarodnogo gumanitarnogo universitetu*, 22., pp. 109–112.
10. Ishina N A (2016) Institut spadkovogo dogovoru u zakonodavstvi Ukrayini ta Nimechchini: porivnyalno-pravovij analiz, *Pravo i suspilstvo*, 2., pp. 45–51.
11. Kirilenko O (2020) *Minimum 22 tisyachi griven za gektar i referendum pro zemlyu dlya inozemciv: yak zminili umovi vidkrittya rinku zemli*, in: https://4vlada.com/minimum-22-tysiachi-gryven-za-gektar-i-referendum-pro-zemliu-dlia-inozemtsiv-yak-zminyly-umovy-vidkryttia-rynku-zemli [28.09.2020]
12. Kuharyev O (2016) Vikonannya spadkovogo dogovoru: notarialna ta sudova praktika, *Mala Enciklopediya Notariusa*, 5(89), pp. 140–149.
13. Kulchitskij N (2019) *Moratoriyi na prodazh zemli silskogospodarskogo priznachennya,* in: https://lhs.net.ua/wp-content/uploads/woocommerce_uploads/2018/06/2_Moratorii-na-prodazh-zemel-silhosppryznachennia.pdf [28.09.2020]
14. Lushpayev S (2017) Pravove stanovishe simejnogo fermerskogo gospodarstva: okremi pitannya*, Pidpriyemnictvo, gospodarstvo i pravo*, 3, pp. 107–110.
15. Melnik O I, Pidgirna V S & Belinska Y O (2018) Suchasni tendenciyi rozvitku agroholdingiv u napryami zemelnogo zabezpechennya, *Agrosvit*, 11., pp. 3–7.
16. Segenyuk A V (2017) Spadkovij dogovir: ponyattya, harakteristika, osoblivosti, *Chasopis civilistiki*, 25., pp. 49–52.

17. Tejze Y & Kanevskij D (2019) *Dosit mifiv: hto vigraye vid skasuvannya moratoriyu na prodazh zemli v Ukrayini*, in: https://p.dw.com/p/3P68w [28.09.2020]
18. Urazovska O S (2019) *Spadkuvannya prava na zemelnu dilyanku za zakonodavstvom Ukrayini*, Avtoreferat disertaciyi na zdobuttya naukovogo stupenya kandidata yuridichnih nauk, Odesa.
19. Visicka I V (2019) Spadkuvannya prav na zemlyu yuridichnimi osobami: vid bazhannya do realizaciyi, *AgroPro*, 17., in: https://vysitska.com/2019/11/26 [28.09.2020]
20. Yurchenko (2017) Yuridichna priroda prava orendi ta prava korotkostrokovogo koristuvannya zemlyami silskogospodarskogo priznachennya v Ukrayini, *Derzhava i pravo*, pp. 298–305.
21. Yurchenko E S (2019a) *Pravo silskogospodarskogo zemlekoristuvannya v Ukrayini*, Disertaciya, Kiyiv.
22. Yurchenko E S (2019b) *Pravo silskogospodarskogo zemlekoristuvannya v Ukrayini: teoretichni ta praktichni aspekti*, Monografiya, Kiyiv.
23. Zavalnyuk K S (2017) Osoblivosti rozvitku ta funkcionuvannya agroholdingiv v Ukrayini, *Ekonomika ta upravlinnya pidpriyemstvami*, 1(123), pp. 56–59.

# Magdolna Gedeon*
# Die Rechtslage des Grundbesitzes im Spiegel der Lehre von der Heiligen Krone

*Abstract*

*In relation to the Doctrine of the Holy Crown there are two opposing views. In one of the opinions the state power and the lands belonged to the Holy Crown, and for this reason the decisions about the lands had to be made by the ruler and the orders together. In the other opinion the state power and the lands belonged to the ruler, and for this reason the relation between the king and the person who was donated with a land was a private legal connection. Although the mineral resources originally belonged to the Holy Crown, in the course of time the Habsburg rulers achieved that they could dispose alone, without the consent of the orders, over the mine revenues. In this way, by the 18th century, the relation between the king and the mining contractors became a private legal connection. Comparing the rules of the Bergregal and the rules related to the lands we can conclude that the lands belonged to the Holy Crown, and not to the ruler.*
**Keywords**: Doctrine of the Holy Crown, lands, Bergregal, Habsburgs

Über die Lehre von der Heiligen Krone wird auch heute viel diskutiert. Hat diese in unseren Tagen einen Sinn? Ist diese Lehre eine mythische Theorie, oder ein mittelalterlicher Überrest? Kann die Lehre von der Heiligen Krone auch heute eine Basis für die Rechtskontinuität bilden?

Die Heilige Krone wird auch im ungarischen Grundgesetz erwähnt.[1] Nach der Meinung von János Zlinszky besteht der heutige Sinn der Lehre von der Heiligen Krone darin, dass sie "das Symbol der im öffentlichen Leben der politischen Nation teilnehmenden Einheit war. Die moderne Formulierung dieser Lehre ist die These der Verfassung, die die Souveränität dem ganzen Volk gibt."[2] Diese Souveränitätstheorie spielte eine bedeutende praktische Rolle in der Übung der Hoheitsrechte.

Magdolna Gedeon: Die Rechtslage des Grundbesitzes im Spiegel der Lehre von der Heiligen Krone. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 51-65, https://doi.org/10.21029/JAEL.2020.29.51

* dr. jur., PhD, Universitätsdozentin, Universität Miskolc, Staats- und Rechtswissenschaftliche Fakultät, Lehrstuhl für Römisches Recht, e-mail: jogmagdi@uni-miskolc.hu.

[1] Nationales Bekenntnis im Grundgesetz: „Wir halten die Errungenschaften unserer historischen Verfassung und die Heilige Krone in Ehren, die die verfassungsmäßige staatliche Kontinuität Ungarns und die Einheit der Nation verkörpern."

[2] Zlinszky 2013, 227.

https://doi.org/10.21029/JAEL.2020.29.51

## 1. Die „Echart-Polemik“

In Bezug auf die Lehre von der Heiligen Krone ist die berühmteste Polemik, die zwischen Ferenc Echart und Ákos Timon[3] entstand.[4] Echart verfasste auch eine Monographie über die Lehre von der Heiligen Krone, worin er seine These ausführlicher erläuterte.[5] Nach der Auffassung von Timon knüpfte sich die staatliche Gewalt nicht an die Person des Königs, sondern an die Heiligen Krone: “die staatlichen Hoheitsrechte sind keine königlichen Majestätsrechte mehr, sondern Rechte der Heiligen Krone (iura Sacrae regni Coronae), die prinzipiell der Heiligen Krone zustehen und erst von dieser auf den König übergehen.”[6]

Das Wesen der übertragenen Gewalt wurde von Werbőczy folgenderweise formuliert: “Als die Ungarn ihn (nämlich Stefan den Heiligen) aus freiem Willen zum König wählten und krönten, wurde das Recht der Erhebung in den Adelsstand, folglich das Recht der Schenkung, wodurch die Adeligen ausgezeichnet und von den Nicht-Adeligen gesondert werden, vollkommen, zugleich mit der Herrschaft und der Regierung von der Gemeinschaft und Kraft des Willens der Gemeinschaft auf die Heilige Krone dieses Reiches und demzufolge auf unsern Fürsten und König übertragen.“[7]

Demzufolge setzte Timon fest: “Das Staatsgebiet ist das Gebiet der Heiligen Krone; die königlichen Einkünfte sind Einkünfte der Heiligen Krone (peculia oder bona Sacrae regni Coronae); jedes freie Besitzrecht stammt von der Heiligen Krone, als der Wurzel (radix omnium possessionum) und fällt daher nach dem Aussterben des Geschlechts an die Heilige Krone heim.”[8]

Echart meinte aber, dass Werbőczy “die organische Ansicht der Heiligen Krone nur für den Beweis der These der gleichen adeligen Freiheit verwandte, sonst stand er auf dem Grund der in der alten historischen Entwicklung ausgebildeten Kronenlehre, und der aus den Chroniken übernommenen Volkssouveränität.”[9]

[3] Ákos Timon (1850–1925) war der Vertreter der historischen Rechtsschule. Er betonte die Originalität der ungarischen Rechtsentwicklung, deren Bedeutung und Wirkung nur mit der englischen Rechtsentwicklung vergleichbar war. Die Ansichten über die ungarische Rechtsentwicklung von Timon wurden auch in seiner Zeit kritisiert (Vgl. Bódi 2015, 31). Timon erörterte seine These über die Heilige Krone in den Werken: Timon 1907, Timon 1920. Die wichtigsten Thesen der Lehre von der Heiligen Krone sind auch in seinem Lehrbuch auffindbar: Timon 1904.

[4] Ákos Timon starb im Jahre 1925. Ferenc Echart (1885–1957) disputierte mit Folgern von Timon. Über die Polemik siehe ausführlicher: Törő 2016. Die Programmstudie von Echart: Echart 1931.

[5] Echart 1941. Echart versuchte seine These meistens durch die Interpretation des Wortlauts der Urkunden zu unterstützen.

[6] Timon 1904, 512.

[7] Tripartitum, tit. 3. p. I. § 6. (Übers. Timon 1904, 513).

[8] Timon 1904, 513.

[9] Echart 1941, 210.

János Zlinszky erklärte, dass der ungarische Staat schon auch vor Stefan dem Heiligen durch die geteilte, kontrollierte Gewalt geprägt wurde. In Ungarn entwickelte sich nicht auf das System der Privatgewalten basierten Feudalismus, sondern eine öffentlich-rechtliche Ständeordnung.[10] Zlinszky schreibt über die geteilte Macht folgenderweise: "Zu der Übung der Staatsoberhauptmacht gehört, – wie das im Gesetzbuch und in den Mahnungen des Stefans des Heilligen befestigt wird[11] – dass der Rat aus der Übung der Macht nicht ausgeschlossen werden darf, und die Freien in ihrer Freiheit behalten werden sollen, ihre Rechte durch Gesetzgebung und Jurisdiktion nicht entzogen werden dürfen. In diesen Prinzipen – gegenüber derjenigen Lehre des Lehnswesens, dass jedermann sich infolge der persönlichen Beziehung unter die Macht des an der Lehnspyramide stehenden Herrscher unterwerfen soll, und gegenüber der kirchlichen Ideologie, wonach der König durch die Salbung und durch die kirchlichen Auswahl nur dem Gott verantwortlich ist, das weder Unverantwortlichkeit noch gemeinsame Macht bedeutet – vertritt Ungarn die geteilte Macht. Der König, der Rat und das aufgerüstete Volk üben die Macht gemeinsam. Dieser Gedanke wird auch – offensichtlich nicht in der späteren Ausführlichkeit – in den Artikeln von Stefan dem Heiligen festgesetzt."[12]

## 2. Die Änderungen der Rechtslage des Grundbesitzes

Nach der Auffassung, die der Lehre von der Heiligen Krone eine starke öffentlich-rechtliche Bedeutung voraussetzt, gehörte der Bodenbesitz nicht zu der Person des Königs, sondern zur Heiligen Krone. Zwischen dem König und dem Grundbesitzer gab es keine privatrechtliche, sondern eine öffentlich-rechtliche Beziehung. Imre Hajnik erklärte, dass der Grundbesitz in seiner Zeit vor allem volkswirtschaftliche Bedeutung und infolgedessen auch soziale und politische Wirkung hatte. Im mittelalterlichen feudalen Europa hatte der Grundbesitz auch besondere politische Relevanz. Die Ständeordnung und die Regierung wurden nämlich mit dem Grundbesitz verknüpft. Die wichtigeren politischen und gesellschaftlichen Tätigkeiten, wie auch die Kriegsdienstleistung, basierten am Grundbesitz. Hajnik meinte aber, dass die Lehnspyramide mit der Ständeordnung in Ungarn zur Zeit des Stefans des Heiligen nicht gleichgestellt werden darf. Der Grundbesitz zog nach sich in Ungarn nämlich den Unterschied zwischen den vollen und den nicht ganz vollen Freien, aber das führte sich nicht zur Differenz zwischen der Freien.[13]

[10] Zlinszky 2013, 133–134.
[11] In den Mahnungen des Königs Stefan des Heiligen an seinen Sohn Emerich wird mehrmals die Krone solcherweise erwähnt, als der Träger der Macht. Der König schließt die Mahnungen folgenderweise: "Die königliche Krone wird durch die Gesamtheit der oben Gesagten geschaffen, ohne die niemand auf der Erde regieren und in den Himmel kommen kann" (Érszegi 1987, 61).
[12] Zlinszky 2013, 227–228.
[13] Hajnik 1867, 29–38.

Ferenc Echart stritt aber die Rückführungsbarkeit der Lehre von der Heiligen Krone bis Stefan den Heiligen. Er meinte, dass die ungarische Verfassungsentwicklung nicht mehr oder weniger durch das öffentliche Recht geprägt wurde, als die übrigen europäischen Verfassungen. Er vermutete deshalb das privatrechtliche Lehnsverhältnis zwischen dem König und dem Grundbesitzer: "Die lehnsrechtliche Auffassung hatte eine große Bedeutung auch in der ungarischen Rechtsentwicklung. Die Entstehung unserer Verfassung wurde unter der Wirkung der lehnsrechtlichen Auffassung, und nicht unter der Ausrichtung eines eigenartigen, ungarischen öffentlich-rechtlichen Geistes vollgezogen. Dadurch wurde auch bewiesen, dass wir uns der Wirkung der allgemeinen mittelalterlichen Kultur auch am diesem Gebiet nicht entzogen."[14] Echart setzte fest, dass das Donationssystem diejenige Rechtsauffassung über das Verhältnis zwischen dem Herrscher und den Untertanen erstellte, die durch das Lehnswesen in Westeuropa geschafft wurde. Er meinte, dass die mittelalterlichen Menschen keine öffentlich-rechtliche Gesinnung hatten. Diese Menschen betrachteten den König als den obersten Besitzer, den Besitzer aller Boden, von dem alle Bodenbesitz stammt.[15]

Timon schreibt aber Folgendes: "Das ungarische Volk begeisterte sich nicht für ein Individuum, oder ein Individuen; sondern für Ideen für die Gesamtheit. Die natürliche Folge hiervon war, dass bei den Ungarn das Prinzip der Individualität sich nie über das Staatsprinzip emporschwingen konnte und dass im öffentlichen Leben der Ungarn die privatrechtliche Richtung gegenüber der öffentlich-rechtlichen stets unterliegen musste."[16]

Nach Echart symbolisierte die Krone die der Person des Königs zustehende Gewalt. Er anerkannte die 'bleiche' Differenzierung der Krone und der Person des Königs in Bezug auf die unveräußerlichen Güter, er meinte aber, dass es aus keinen öffentlich-rechtlichem Aspekt erfolgte, sondern das war die Garantie der Beibehaltung der königlichen ererbten Gewalt. Die heutigen wissenschaftlichen Forschungen sehen aber in der Bedeutung der unveräußerlichen königlichen Güter die Beschränkung der Gewalt durch die Gemeinde.[17]

Diese Auffassung wird auch durch die Lehre von der Heiligen Krone bestärkt, die von Werbőczy in seinem Tripartitum eindeutig festgesetzt wurde. Timon fast die Lehre von Werbőczy folgenderweise zusammen: "Die unmittelbare Beziehung des freien Besitzrechts auf die Heilige Krone bringt eine neue Basis der Gemeinfreiheit, der Teilnahme an den öffentlichen Rechten: den Begriff der Mitgliedschaft der Heiligen Krone hervor. Wer sein Besitzrecht von der Heiligen Krone herleitet und demnach in unmittelbarer Beziehung zu ihr steht, ist ein Glied der Heiligen Krone (membrum Sacrae regni Coronae) und nimmt als solches an der Ausübung der in der Heiligen

[14] Echart 1931, 313. Man soll betonen, dass Echart kein Rechtswissenschaftler war, er suchte die Beweise zu seinen Festsetzungen im Sinn der positiven Denkrichtung in den Urkunden. Er studierte römisches Recht nicht, beherrschte deshalb keine kategorische Denkweise hinsichtlich der Rechtsinstitute. Er konnte die Wesensarten des Eigentums und den Unterschied zwischen den öffentlich- und privatrechtlichen Verhältnissen nicht ganz verstanden (vgl. Zétényi 1997, 144).
[15] Echart 1941, 315.
[16] Timon 1904, 74–75.
[17] Tóth 2008, 92.

Krone vereinigten öffentlichen Gewalten: der gesetzgebenden, vollstreckenden und richterlichen Gewalt teil. Neben den Adeligen sind noch die begüterten Kirchen und die Städte Glieder der Heiligen Krone, denn auch diese haben ihre Grundbesitze (iure radicali) von der Heiligen Krone empfangen. Sie alle bilden zusammen mit dem König, dessen Haupt die Heilige Kröne heiligt, jenes einheitliche, öffentlich-rechtliche Ganze, jenen lebendigen Organismus, den die mittelalterlichen Quellen als den ganzen Körper der Heiligen Krone (totum sacrae regni Coronae) bezeichnen, und den wir unter dem Wort Staat verstehen."[18]

Nach Werbőczy bedeutete also die Lehre von der Heiligen Krone, dass die Gewalt des Königs von den Gliedern der Heiligen Krone beschränkt werden konnte. Die Glieder der Heiligen Krone waren diejenigen, die ihren Grundbesitzen von der Heiligen Krone erhielten. Wie das von Timon formuliert wird: "Es wurde eine eigentlich öffentliche Gewalt und zwar eine constitutionell beschränkte."[19] Die Glieder der Heiligen Krone konnten ihre Rechte an den Landtagen ausüben, also konnte die Gewalt des Königs durch Gesetzen beschränkt werden. Werbőczy formuliert das folgenderweise: "So begannen denn die Könige Gesetze zu schaffen, indem sie das Volk einberiefen und befragten. Und so pflegt es auch zu unseren Zeiten zu geschehen."[20]

Daraus folgt, dass das Lehnswesen in Ungarn nicht einwurzeln konnte. Das wurde durch die starke öffentlich-rechtliche Konstellation der Heiligen Krone verhindert. Die Besitzverleihung begründete kein Lehnsverhältnis zwischen dem König und dem Begüterten. Diese Verhältnisse wurden nicht durch Kontrakten, sondern durch Gesetze geregelt.[21]

Timon schreibt darüber Folgendes: "Die Schenkungsgüter verwandelten sich nicht in Lehnsgüter. […] Das königliche Schenkungsrecht wurde nicht als private Machtbefugnis des Königs, sondern als ein Bestandteil der öffentlichen Gewalt aufgefasst, die dem König als dem souveränen Oberhaupt des Staates zusteht. Eben darum ist das Schenkungsgut, ebenso wie das Geschlechtsgut[22] die Belohnung öffentlicher Verdienste (laurea virtutis), die keine anderen, als die aus dem öffentlichen Verband fließenden öffentlichen Pflichten nach sich zieht und keinerlei lehnähnliches Abhängigkeitsverhältnis zwischen dem König und dem Donatar begründet."[23]

Péter Váczy sieht den Unterschied zwischen Schenkungsgüter und Benefizium darin, dass dem Donatar das Besitzrecht 'in proprium' erteilt wurde, blieb also das Verfügungsrecht nicht bei dem König, wie im Fall des Lehnswesens, als der Vasall nur das Gebrauchsrecht am Boden erhielt.[24] Im Einklang mit dieser Festsetzung schreibt auch Bónis: "Die dingliche Seite des Lehnsverhältnisses umfasst die Frage der rechtlichen Natur des Lehnsbesitzes. Die Prinzip, wonach das Benefizium im Eigentum

[18] Timon 1904, 513–514.
[19] Timon 1904, 514.
[20] Tripartitum, tit. 3. p. II, § 2. (Übers. Timon 1904, 515).
[21] Tomcsányi 1940, 274.
[22] Ungarisch szállásbirtok: diejenige Boden, die nach der Landnahme den Geschlechten zugeteilt wurden.
[23] Timon 1904, 363.
[24] Váczy 1932, 373.

des Lehnsherren steht, und der Vasall leitet sein Verfügungsrecht aus ihrem stärkeren Recht ab, das zu dem Recht der Entlehner ähnlich ist, entsteht schon im fränkischen Recht. Dieses Recht enthält in sich: Besitz, Gebrauch, und Verantwortung für den Bestand."[25]

Wenn wir diese Frage ganz vereinfacht und vom praktischen Aspekt prüfen, können wir behaupten: wenn die Adeligen, die das Besitzrecht erhielten, als die Glieder der Heiligen Krone die Gewalt des Königs durch Gesetze beschränken konnten, wenn Gesetze hinsichtlich der Bodenbesitzen gebracht wurden, gehörten diese nicht zu der Person des Königs, sondern zu der Heiligen Krone. Daraus folgt, dass kein privatrechtliches Lehnsverhältnis, sondern eine öffentlich-rechtliche Beziehung zwischen dem König und den Adeligen bestand.

Aus der Änderungen der Regeln in Bezug auf die Bodenbesitzen können wir darauf folgern, dass die königliche Gewalt am diesen Gebiet beschränkt werden konnte. Die Rechtslage der Grundbesitze wurde durch Artikel festgesetzt. In den Gesetzen Stefans des Heiligen finden wir hinsichtlich der Rechtslage der Geschlechtsgüter und der Schenkungsgüter keinen Unterschied.[26] Die Erbfolge wurde nicht beschränkt, die Sippengenossen und Seitenverwandten konnten auch die Schenkungsgüter erben, wie die Geschlechtsgüter. Kálmán beschränkte aber das Erbfolgerecht hinsichtlich der Schenkungsgüter: er schloss die Sippengenossen und Seitenverwandten von der Sukzession aus. Die Schenkungsgüter konnte der engere Familienkreis erben, also die männlichen Deszendenten, falls keine vorhanden wären, der Bruder und dessen söhne. Betreff der von Stefan dem Heiligen verliehenen Schenkungsgüter blieben noch die vorigen Regeln aufrecht.[27] Die Adeligen wollten aber das Erbrecht der Sippengenossenen und Seitenverwandten wiederherstellen. Das erreichten sie durch den Artikel IV. der Goldenen Bulle.[28]

[25] Bónis 2003, 47.

[26] Stefan I, decr. II, cap. 35. "Wir haben der Wille des Rates zugestimmt, dass jedermann der Herr seines Eigentums seien, genauso auch der Schenkungen des Königs, bis er lebt, ausgenommen die Güter, die zum episcopatum und comitatum gehören. Nach seinem Tod haben seine Söhne ähnliche Rechte" (Márkus 1896–1901, Bd. I, 36). Dieser Artikel beweist auch die Festsetzung von Zlinszky über die geteilte königliche Macht, da dieses Dekret wegen der Wille des Rates erteilt wurde. Siehe noch das sog. Ratsgesetz aus dem Jahr 1298. Art. XXIII.: […] „wenn der Herr König dies unterliesse, so sei alles, was er ohne den Rat der Vorgenannten in Betreff grosser Schenkungen oder Besetzung von Ämter oder in anderen wichtigen Dingen beschlösse, unverbindlich" (Übers. Timon 1904,176).

[27] Kálmán, decr. I, cap. 20: "Die Güter, die von Stefan dem Heiligen verliehen wurden, werden von jeden Nachfolgern nach dem Erbfolgerecht vererbt. Die Schenkungen der anderen Könige werden von den Söhnen geerbt, wenn es keinen Sohn gibt, folge der Bruder, nach dessen Tod sollen seine Söhne auch nicht aus der Erbschaft ausgeschlossen werden. Wenn es aber keinen Bruder gibt, gehöre das Besitz dem König" (Márkus 1896–1901, Bd. I, 102– 103).

[28] Art. IV:1222: "Wenn ein Adelige ohne Sohn stirbt, soll seine Tochter den vierten Teil des Gutes erben, über das andere soll er so verfügen, wie er möchte. Und wenn er ohne Testament stirbt, sollen seine Seitenverwandten erben. Und wenn er überhaupt keine Verwandten hat, wird der König es in Besitz nehmen" (Márkus 1896–1901, Bd. I, 132–133).

Der Artikel IV. der Goldenen Bulle im Jahre 1222 wurde im Jahre 1351 aufgehoben, als der Avitizitätsprinzip eingeführt wurde.[29] Laut Timon: "Die neue Besitzverfassung, welche unter den Königen aus dem Hause Anjou sich consolidierte, und dann Jahrhunderte lang das Fundament der ständischen Verhältnisse bildete, beruhte auf zwei Grundprincipien: dem Aviticitätsprincip und dem Princip der Heiligen Krone. Das erstere bedeutete die Gebundenheit des Grundbesitzes gegenüber dem Geschlecht (Sippe), letzteres die Gebundenheit gegenüber der die öffentliche Gewalt vorstellenden Heiligen Krone. […] Die Quelle, das Fundament alles Grundbesitzes ist der Heilige Krone. Das Staatsgebiet ist das Gebiet der Heiligen Krone; ein freies Besitzrecht hat nur derjenige, der seinen Grundbesitz unmittelbar von der Heiligen Krone als Wurzel allen Besitzrecht (radix omnium possessonium) herleitet. Das Geschlecht – d. i. die Descendenz – des Donatars besitzt ein von der Heiligen Krone hergeleitetes radikales Recht an dem Gute, solange ein Glied des Geschlechts vorhanden ist; dann kehrt der Grundbesitz zur Wurzel zurück und unterliegt der neuerlichen königlichen Verleihung."[30]

## 3. Die Einführung der Lehnsverhältnisse am Gebiet des Bergwesens

Die Könige waren sich im Klaren über die Bedeutung der Heiligen Krone, und sie wussten sehr gut, dass diese ihre Rechte begrenzt. Die öffentlich-rechtliche Kraft der Heiligen Krone kann durch die Geschichte des Bergregals bewiesen werden.

Aus dem Bergregal stammen die Rechte, die dem König vorbehalten waren. Diese Rechte wurzelten im Interesse und in den eigenartigen Bedürfnissen des Bergbaus. Der König wurde auf diesem Gebiet als 'oberster Bergherr' bezeichnet.[31] Als oberster Bergherr konnte der König über das Bergwesen regieren. Die vorbehaltenen Bergprodukte gehörten dem König. Dieser hatte also das Recht, diese Schätze auch auf fremden Grundstücken abzubauen. Wenn er die Bergbautätigkeit nicht selbst ausüben wollte, konnte er dieses Recht anderen überlassen und er erhielt dafür einen Teil des Ertrages, meistens einen Zehntel. Das war die urbura oder die Frohn.

Heiner Lück schreibt über das Bergregalrecht in Deutschland, dass die Bergunternehmer, da ihre Tätigkeit spezielle Kenntnisse erforderten, viele Privilegien erhielten. Die Herrscher erteilten die Privilegien den Unternehmern, damit die Bergleute ihren Wohnsitz verlassen und unter dem Schutz des Herrschers die Bergwerke betreiben. Die wichtigsten Punkte der Privilegien waren, dass die hospes ihre eigenen, hauptsächlich aus Deutschland mitgebrachten Rechte anwenden dürfen.[32]

[29] Ludvig I, praef. der decrete von 1351 § 11: Die Regeln der Goldenen Bulle von 1222 werden befestigt, ausgenommen der Artikel IV, wonach die Adeligen über seinen Güter frei verfügen können. "Sie haben kein Recht das zu tun, sondern ihre Besitze verfallen nach Recht und Gesetz bedingungslos, ohne irgendwelchen Widerspruch, den nächsten Verwandten und Sippengenossen" (Márkus 1896–1901, Bd. I, 170–171).
[30] Timon 1904, 552–556.
[31] Wenzel 1866, 73.
[32] Lück 2008, 529.

Auf diese Weise wurde z. B. auch die Bergstadt Schemnitz gegründet. König Béla IV. rief nämlich deutsche Siedler ins Land, die nach 1244 die von den Mongolen zerstörte Stadt wieder aufbauten. Sie bekamen neue Privilegien und fassten ihre mitgenommenen Rechte und die am Ort entstandenen Rechtsgewohnheiten zusammen. Der König bestätigte die auf diese Weise geschaffenen Statuten der Stadt. In diesem Privilegium finden wir schon eine Hinweis auf die Heilige Krone: "[…] vnd gebnn In vnd verleihnn, Recht vnd freyheitt als hernoch geschribnn set, Die der heilignn Krön vnd ihrem nwtz wol fuegnn vnd frwmmen."[33] Der König vindizierte also die Einnahmen aus der Bergwerke nicht für sich, sondern für die Heilige Krone. Nach Timon "sah das ungarische Volk den Staat in dieser Zeit, die im Interesse der Gesamtheit organisierte Gesellschaft, als organisches Ganze in der Heiligen Krone verkörpert."[34]

Die Beschränkung der Bergregalrechte des Königs finden wir auch im Artikel I:1514: "Die Einnahmen der königlichen Heiligen Krone wurden bis jetzt für verschiedenen Menschen festgebunden und einstweilen entfremdet. […] wir entschieden vor allem, dass alle Einkünfte des Königs […] die Bergwerke und Salzkammern, Gold- und Silberbergwerke, und die königlichen Städte zurückgegeben werden sollen."[35]

Die ungarischen Könige hatten anhand des Regalrechts auch die Befugnis erhalten, die Bergbautätigkeit zu verwalten. Wegen der Erhöhung der Einnahmen des Staatshaushalts erschienen die Zentralisationsbestrebungen auf dem Gebiet des Bergwesens schon im 16. Jahrhundert. Im 16. Jahrhundert stiegen nämlich die Kosten der Bergwerke, da es sehr aufwendig war, Erz aus den tieferliegenden Schichten abzubauen. Deshalb wollten die Unternehmer immer mehr Erträge behalten und der Hof versuchte seine Aufsicht über den Bergbau auszuweiten. In Westeuropa funktionierte das Regalrecht nach den Prinzipien des Lehnswesens: Der Herrscher regierte das Bergwesen als sein Eigentum, er konnte über die Einnahmen aus der Montanindustrie selbst verfügen. Die Herrscher des Hauses Habsburg, die auch ungarische Könige, sowie gleichzeitig oberste Bergherren waren, wollten diese Auffassung auch in Ungarn einführen. Deswegen wollten die Herrscher das Bergwesen ohne Stände und mit Verordnungen verwalten.

Der erste Schritt war auf diesem Weg die Einführung der Maximilianische Bergordnung, die nach mehreren Umarbeitungen im Jahre 1560 fertiggestellt wurde und sie wurde nach langem Verhandeln von Kaiser Maximilian II. am 10. Februar 1565 verkündet.[36] Diese Ordnung konnte aber nicht in Kraft treten, da die Bergstädte nicht zu einer Einigung bereit waren, obwohl schon 1564 in einer Verordnung des Kaisers bestimmt wurde, dass die neue Bergordnung überall in den Bergstädten verkündet und in 32 Exemplaren ausgeteilt werden solle.[37] Die Maximilianische Bergordnung konnte schließlich am 16. Februar 1573 in sieben niederungarischen Bergstädten verkündet werden, nachdem die aus den alten Bergrechten der Bergstädte zusammengestellten

[33] Fuchs 2009, 25.
[34] Timon 1904, 511.
[35] Márkus 1896–1901, Bd. I, 707.
[36] Kundmachungspatent, 10. Februar 1565. (Schmidt 1832–1839, Bd. 2, 1).
[37] Kaiserliche Reskript, 10. September 1564. (Schmidt 1832–1839, Bd. 1, 412).

Erläuterungen als Anhang zu der neuen Bergordnung hinzugefügt worden waren.[38] Eine Passage der neuen Bergordnung besagt, dass diese nur in dem Fall angewandt werden solle, wenn man in den Erläuterungen keine passende Regel finden würde.[39] Also kam die Maximilianische Bergordnung nur subsidiär zur Geltung.

Die Maximilianische Bergordnung enthält praktische, dem damaligen Bergbau zeitgemäße, geeignete Vorschriften. Warum verteidigten die Bergstädte ihre Rechte gegen die neue Bergordnung so hartnäckig? Gleich auf der ersten Seite der Maximilianischen Bergordnung findet sich die Information, dass alle Bergwerke und künftigen Stollen, samt den zu ihrem erfolgreichen Abbau aufzubrauchenden Wäldern und Wasserleitungen dem Kammergut gehören, und dass es den weltlichen und kirchlichen Herren und Adeligen und den Städten verboten ist, mit dem Abbau zu beginnen, ohne eine besondere königliche Erlaubnis ein Bergwerk aufzuschlagen, abzubauen und dort zu arbeiten, und von den Bergmännern und Amtsleuten der Hofkammer Urbar oder Fron zu fordern.[40]

Mit Hilfe dieses Paragraphen sollte eine vorher in Ungarn nicht gebräuchliche Regel eingeführt werden, nach der – wie das von Delius erklärt wird – 'das Bergwerksregale dem Landesherrn unmittelbar vorbehalten wird.'[41] Gábor Bóday, Übersetzer des Werkes von Delius fügt aber dieser Bemerkung zu: "Das ungarische Verfassungsrecht kannte jedoch keine »unmittelbar vorbehaltenen« Regalrechte und die Bergwerkshoheit konnte auch vom König ausschließlich im Rahmen der ungarischen Gesetze durch die offiziellen Behörden, unter der Aufsicht des Landestages, ausgeübt werden."[42]

Die Maximilianische Bergordnung wurde im Jahre 1723 durch den CVIII. Artikel als lex privata der Berggerichte als Gesetz akzeptiert: "Die Bergerichte bleiben, nach deren mehr als vor einhundert Jahren festgelegten Privatgesetzen, in ihrer derzeitigen Form erhalten."[43] Mit Hilfe des Artikels von 1723 konnte die Bergordnung bis 1854, bis zum Inkrafttreten des österreichischen Berggesetzes, gültig bleiben.

Aufgrund der Maximilianischen Bergordnung konnte der Habsburger Hof auch eine von den Ständen völlig separierte, zentralisierte Bürokratie in der Bergverwaltung ausbauen. So konnten die Habsburger Herrscher erreichen, dass sie über die Einkünfte aus der Bautätigkeit allein, ohne den Ständen verfügen konnten. Der König, als der oberste Bergherr verwaltete das Bergwesen mit Verordnungen. Also gehörten die Bergschätze nicht mehr der Heiligen Krone, sondern der Person des Königs, zwischen dem Bergunternehmer und dem Herrscher entstand nicht mehr ein öffentlich-

[38] Kundmachungspatent, 16. Februar 1573. (Schmidt 1832–1839, Bd. 2, 224). Hier kann man auch den Text der Bergordnung lesen. Eine weitere Ausgabe mit den Erläuterungen und mit den Reskripten von Königin Maria Theresia: Maximilian II, 1805.
[39] Maximilian II, 1805, 28, I. § 5.
[40] Maximilian II, 1805, 28. I. § 1.
[41] Delius 1806, Bd. 2, 426. Delius setzt hier auch fest, dass ein Lehnsverhältnis zwischen dem König und dem Bergunternehmer entsteht: "So stehet es ihm auch frey (dem Landesherr), den Bergbau in seinen Ländern entweder selbst unmittelbar zu betreiben, oder denselben seinen Unterthanen unter Vorbehaltung gewisser Rechte und Abgaben in die Lehen zu reichen."
[42] Delius 1972, 455, Anm. 129.
[43] Márkus 1896–1901, Bd. 4, 646, Art. CVIII:1723: „Judicia montanistica secundum privatas eorundem leges, ultra seculum stabilitas: in suo esse manebunt."

rechtliches, sondern ein Lehnsverhältnis. Das kann auch durch eine Verordnung bewiesen werden.

Die von den Privatpersonen angetriebenen Gewerkschaften spielten eine große Rolle in der Erhöhung der Einnahmen des Königs, da er aus der nach den Metallen eingezahlte Fron und aus der Zwangseinlösung bedeutenden Gewinn erhielt. Aus der Regulierung der Gewerkschaften wird geklärt, dass der Habsburger Hof – wegen der Sicherung der Einnahmen – die Gewerke mit verschiedenen Mittel veranlassen wollte. Die Staatsorgane griffen aber nur zur Sicherung der Rückerstattung der staatlichen Finanzierung in den Betrieb der Gewerkschaften ein.

Die Gewerken waren solche Personen, die nur finanziell im Betrieb der Gewerkschaft teilnahmen. Ihre Teile wurden durch die Kuxe verkörpert.[44] Über die Rechtslage der Kuxe finden wir mehreren Verordnungen in den Quellen. Neben den Verordnungen, die den Kauf der Bergteile regelten, wurden von der Hofkammer auch solche erteilt, die die Beerbung der Kuxe verordneten. Nach einer Verordnung aus dem Jahr 1779[45] fielen die Kuxe nicht unter das ius condivisionis,[46] die zivilrechtlichen Regeln bezogen sich auf sie auch nicht in den Ländern, wo die Maximilianische Bergordnung als Gesetz in Kraft tritt. Auf diesem Grund bezogen sich auf sie die Regeln der Avitizität auch nicht. Daraus folgte, dass die Gewerken über ihre Kuxe frei verfügen konnten. Die Bergteile konnten frei verkauft, verschenkt, verpfändet werden. Die Gewerken durften auch die Kuxe frei testieren. Sie hatten nur im Fall Vorkaufsrecht auf die Kuxe, wenn ihr Eigentümer in Retardat[47] geriet. Wenn ein Gewerke mit ihren Teilen aufhörte, und er keine Fristung bei der Berggericht erhielt, konnte dieser Teil wieder gemutet werden.

Die Verordnung setzt also fest, dass die Landgesetze auf die Bergteile keine Wirkung hatten, so wurden die Bergteile des Gewerkes von den Beschränkungen völlig befreit. In diesem Fall wurde die Wirkung der Gesetze durch eine Verordnung aufgehoben. Die Diskrepanz wurde in der Rechtsquellenordnung dadurch aufgelöst, dass "die Bergverwandte als freie, landesfürstliche Lehnsleute zu betrachten sind, auf welche die Landes- und Zivilgesetze keinen Einfluss haben."[48] Auf diesem Grund kann ausschließlich der König im privatrechtlichen Lehnsverhältnis Regeln erteilen, die sich auf die Gewerken beziehen. Der König hatte also das Recht, diese Verhältnisse durch Verordnungen zu verwalten.

[44] "Kux ist der bestimmte ideelle Teil, Anteil an einer gewerkschaftlichen Zeche oder Grube, welche früher aus 128, jetzt aus 100 Kuxen oder Teilen nach dem Decimalstyle besteht und substantiell nur ein Ganzes bildet" (Erklärendes Wörterbuch 1869, 91).
[45] Hofkammerdekret, 14. Mai 1779. (Schmidt 1832–1839, Bd. 14, 292).
[46] Ius condivisionis: die nächsten Geschlechtsgenossen sollten bei der Erbteilung ihr Vermögen einrechnen. Der Geschlechtsgenossen konnten über ihren Sondervermögen bis zur Erbteilung frei verfügen (vgl. Homoki 2005, 55). Nach der zitierten Verordnung sollten die Bergteile nicht eingerechnet werden.
[47] Retardat: der Gewerke zahlt die die Kuxe belasteten Kosten nicht aus.
[48] Hofkammerdekret, 14. Mai 1779. (Schmidt 1832–1839, Bd. 14, 292).

Josef der II. wollte seine Macht auch mit Hilfe der Verordnungen im Bergwesen stärken, die Hofkammer verbreitete ihre Macht vollständig am Gebiet des Bergbaus. Diese Methode wollte aber von den Ständen nach dem Tod von Josef II. gerade durch die Bergrechtskodifikation geändert werden, da der Landtag hoffte, auf dieser Weise seinen Einfluss im Bergbau zu verstärken.

Nach Emma Bartoniek[49] hatte die Lehre von der Heiligen Krone in der Neuzeit kleinere Bedeutung, als früher. Die Heilige Krone bleibt aber das Symbol des ungarischen Staates, und war die Quelle aller Grundbesitze. In diesem Sinn wurde am meisten erwähnt.[50]

Nach dem Tod von Josef dem II. wollten die Stände durch die Gesetzgebung die Vollmacht des Herrschers beschränken.[51] Die Lehre von der Heiligen Krone spiegelt sich auch im Artikel XII:1790.[52] Der Kodifikationsversuch begann schon am Landtag 1790/1791, als der Artikel LXVII. auf dem Grund des Artikels XXII.[53] verordnete, dass eine Deputatio Montanistica ein Berggesetz verfassen soll. Obwohl die Kommission einen Entwurf mit 53 Artikeln zusammenstellte, wurde das nicht als Gesetz empfangen. Der Artikel IX. im Jahre 1827[54] ernannte einen neuen Kommission, der die bisherigen Regeln systematisch ordnete und einen Entwurf mit 189 Paragraph vorbereitete. Das wurde aber sogar nicht vom Landtag geprüft.[55]

Im Jahre 1844 wurde der erste wahre ungarische Berggesetzentwurf dem Landtag vorgelegt. Die Hofkammer schickte aber einen Ausschuss wegen der Untersuchung des geplanten Gesetzes aus. Aus der Meldung dieses Ausschusses kommt hervor, dass gerade die Rechte des Königs durch das neue Berggesetz beschränkt worden wären, und in der Regierung des Bergbaus hätte der Landtag mehrere Befugnisse erhalten. Dieser Gesetzesentwurf hätte also die Vollmacht der

[49] Emma Bartoniek (1894–1957), Historikerin und Bibliographin. Sie wollte nicht Stellung nehmen, publizierte ihre eigene Meinung über die Lehre von der Heiligen Krone (Bódi 2015,7).
[50] Bartoniek 1987, 168.
[51] Die Bedeutung der Heiligen Krone wird aber dadurch gezeigt, dass Josef der II. die Krone nach Wien liefern ließ, die nach seinem Tod nach Budapest geliefert wurde. Dieser Weg der Heiligen Krone wurde als der Siegeszug der Unabhängigkeit der Stände, die ungarische Selbständigkeit und Freiheit betrachtet (Kardos 1992, 37).
[52] „Die Macht der Gesetzgebung, der Aufhebung und Erklärung der Gesetze betreffen in Ungarn und in den angeschlossenen Teilen, ohne der Beschwer des Artikels VIII:1741, den gesetzmäßigen gekrönten König und zu dem Landtag einberufenen Stände gemeinsam, und das kann außer ihnen von niemand geübt werden" (Márkus 1896–1901, Bd 3, 160–161). Dieser Artikel wurde im Weiteren als die gesetzgeberische Grundformel der Lehre von der Heiligen Krone betrachtet (Kardos 1992, 43, 37).
[53] Die Bestrebung der ungarischen Ständen, den Einfluss in Bergwesen zu erhalten, spiegelt sich auch in diesem Artikel, der in sich hält, dass der König den Ständen versprach, das Bergwesen unter die ungarischen Kammer zu stellen, die Berggesetze mit dem Landtag zu verbessern. Am Ende des Artikels steht aber, dass „der König die wirtschaftliche Regelung des Bergwesens, als zu den königlichen Befugnissen gehörende Sache, im Bereich seiner Entscheidung aufhält" (Márkus 1896–1901, Bd. 3, 202–203; 166–167). Das bedeutete, dass der König, als oberster Bergherr, über die Einnahmen weiterhin selbst verfügen wollte und die wirtschaftlichen Umstände mit den Verordnungen regeln konnte.
[54] Márkus 1896–1901, Bd. 3, 442–443.
[55] Vgl. Balkay 1904, 464; Wenzel 1866, 60.

fremden Hofkammeroffiziere beseitigt, und das hätte bedeuten, dass die verantwortungslose Wirtschaftsführung der Hofkammer beendet worden wäre, und die nationalen, verfassungsrechtlichen Aspekte in Betracht nehmenden Verhältnisse sich durchgebrochen hätten, die Einnahme aus dem Bergbau nicht allein den König bereichert hätten, sondern das ganze Land. Dieser Artikel hätte also das Bergwesen wieder unter die Heilige Krone geordnet.

Wegen dieser Meldung des Ausschusses wurde der Entwurf nicht sanktioniert. Wie Gusztáv Wenzel erklärte: "dieser Entwurf regelte nicht mehr, was das Bergregal ist, sondern was sind die Objekte der königlichen Verleihungen und Bergerlaubnissen. Damit wäre diese Frage vom Gebiet des zivilrechtlichen abstrakten Begriffes an das Gebiet des von der Bergbaufreiheit geordneten Rechtslebens durchgeführt worden."[56]

Die historischen Verhältnisse ermöglichten, im Jahre 1854 das allgemeine österreichische Berggesetz in Ungarn eizuführen. Das von der ungarischen Entwicklung fremde Gesetz befestigte die Vollmacht der Habsburger im Bergbau. Die feudalen Bindungen wurden aber beseitigt, und die industrielle Entwicklung einen Schwung bekommen konnte.[57] In drittem Paragraph können wir lesen den Begriff des Bergregals, wonach die Bergschätze der Person des Königs gehörten.[58]

Die Geschichte des Bergregals unterstützt eher die Auffassung von Ákos Timon. Wie das nämlich oben geschildert wird, kämpften die Habsburger Herrscher bewusst dafür, dass die aus dem Bergwesen einfließenden Einkünfte nicht der Heiligen Krone sondern ihnen gehören. Das hätten sie hinsichtlich der Grundbesitze nicht erreichen können, da die Adeligen und die Städte gerade durch die Schenkungsgüter die Glieder der Heiligen Krone waren. Auf diesem Grund kann festgesetzt werden, dass die Grundbesitze nicht dem König, sondern der Heiligen Krone gehörten, zwischen den Begüterten und dem König keine privatrechtliche, sondern eine öffentlich-rechtliche Beziehung entstand, die Rechte des Königs bezüglich der Grundbesitzes durch Gesetze beschränkt werden konnten.

## 4. Der Artikel P des Grundgesetzes und die Lehre von der Heiligen Krone

Der Artikel P des Grundgesetzes entspricht der Lehre von der Heiligen Krone: "Die natürlichen Kraftquellen, insbesondere Ackerboden, Wald und Trinkwasservorräte, sowie die biologische Artenvielfalt, insbesondere einheimische Pflanzen- und Tierarten, und die kulturellen Werte bilden das gemeinsame Erbe der Nation, dessen Schutz und Bewahrung für die zukünftigen Generationen die Pflicht des Staates und aller Menschen darstellt."

[56] Balkay 1904, 464–466; Wenzel 1866, 76.
[57] Izsó 2004, 16.
[58] "Unter Bergregale wird jenes landesfürstliche Hoheitsrecht verstanden, gemäß welchem gewisse, auf ihren natürlichen Lagerstätten vorkommende Mineralien der ausschließlichen Verfügung des allerhöchsten Landesfürsten vorbehalten sind" (Grenzenstein 1855, 79).

Die Lehre von der Heiligen Krone ist nämlich eine besondere Souveränitätstheorie, die auch die Einheit der Nation ausdrückt. Die Glieder der Heiligen Krone sind heute die Glieder der Nation.[59] Die natürlichen Kraftquellen, auch die Ackerboden, sollen für die nächsten Generationen versichert werden. Also ist der Umweltschutz die Aufgabe aller Menschen, aller natürlichen und Rechtspersonen.[60]

[59] Timon formuliert das folgenderweise: "Dereinst jemand, der sein Besitzrecht von der Heiligen Krone ableitete, war der Mitglied der Heiligen Krone (membrum Sacrae Regni Coronae), und er nahm auf diesem Grund in der Übung der dem Heiligen Krone gebührenden Hoheitsrechte teil. Seit der Annahme der bürgerlichen Rechtsgleichheit bilden die ganze Nation, jeden Einwohner des Gebiets der Heiligen Krone samt mit der Heiligen Krone gekrönten König das öffentlich-rechtliche Ganze, die lebendige Organisation, die vom unseren alten öffentlichen Recht als der Körper der Heiligen Krone (totum corpus Sacrae Regni Coronae) gezeichnet wurde, die in unseren Tagen Staat genannt wird" (Timon 1920, 14).

[60] Vgl. Gáva, Smuk & Téglási 2017, 17.

## Bibliographie

1. Balkay B (1904) Bányatörvényünk reformálásának első kísérletei, *Bányászati és Kohászati Lapok, Bányászat*, 37(39), pp., 462–469.
2. Bartoniek E (1987) *A magyar királykoronázások története*, Magyar Történelmi Társulat, Budapest.
3. Bódi S (2015) A Szent Korona-eszme különbségei Echart Ferenc, Timon Ákos és Bartoniek Emma felfogásában, *Polgári Szemle*, 11(1–3), pp. 327–341.
4. Bónis Gy (2003) *Hűbériség és rendiség a középkori magyar jogban*, Osiris, Budapest.
5. Delius C T (1806) *Anleitung zu der Bergbaukunst nach ihrer Theorie und Ausübung*, Bd. 2, Hof- und Staats-Druckerey, Wien.
6. Delius Kristóf Traugott (1972) Értekezés a bányászati kamerális tudomány alapelveiről (ford. Bóday Gábor), in: *Bevezetés a bányatan elméletébe és gyakorlásába valamint a bányakincstári tudományok alaptételeinek ismertetésébe*, OMBKE, Bányászati Szakosztály, Budapest, pp. 445–479.
7. Érszegi G (Hrsg.) (1987) *Árpád kori legendák és intelmek*, Szépirodalmi Könyvkiadó, Budapest.
8. Grenzenstein G (Hrsg.) (1855) *Das allgemeine österreichische Berggesetz vom 23. Mai 1854, und die Verordnungen über die Bergwerksabgaben vom 4. October 1854*, Friedrich Manz, Wien.
9. Echart F (1931) *Jog- és alkotmánytörténet*, in: Hóman Bálint (Hrsg.) A magyar történetírás új útjai, Magyar Szemle Társaság, Budapest, pp. 269–323.
10. Echart F (1941) *A Szentkorona-eszme története*, MTA, Budapest.
11. Erklärendes Wörterbuch (1869) *Erklärendes Wörterbuch der im Bergbau, in der Hüttenkunde und in Salinenwerken vorkommenden technischen Kunstausdrücke und Fremdwörter*, Falkenberg, Burgsteinfurt, 1869.
12. Schmidt F A (1832–1839) *Chronologisch Systematische Sammlung der Berggesetze der Österreichischen Monarchie. II. Abteilung: Chronologisch Systematische Sammlung der Berggesetze der Königreiche: Ungarn, Kroatien, Dalmatien, Slavonien und des Grossfürstenthums Siebenbürgen*, Band I–XXV, J. P. Sollinger, Wien.
13. Fuchs P (Übers.) (2009) *Das Rechtsbuch von Schemnitz – Selmecbánya város középkori jogkönyve*, Montan-Press, Budapest.
14. Gáva K, Smuk P & Téglási A (2017) *Az Alaptörvény értékei*, Dialog Campus Kiadó, Budapest.
15. Hajnik I (1867) *Magyarország az Árpád-királyoktól az ősiségnek megállapításáig és a hűbéri Európa*, Heckenast Gusztáv, Pest.
16. Lück H (2005) Bergrecht, Bergregal, in: Cordes A, Haferkamp H-P, Lück H, Werkmüller D, Schmidt-Wiegand R (Hrsg.), *Handwörterbuch zur deutschen Rechtsgeschichte*, Band I. Erich Schmidt Verlag, Berlin, pp., 527–533.
17. Lück H (2015) Die Entwicklung des deutschen Bergrechts und der Bergbaudirektion bis zum Allgemeinen (preußischen) Berggesetz 1865, in: Wolfhard W (Hrsg.) *Geschichte des deutschen Bergbaus*, Bd. 2. Salze, Erden und Kohlen. Der Aufbruch in die Moderne im 18. und frühen 19. Jahrhundert. Münster, Aschendorff, 2015, pp., 111–216.
18. Homoki Nagy M (2005) *A magyar magánjog történetének vázlata 1848-ig*, JATE Press, Szeged.

19. Izsó (2004) The introduction and influence of the Austrian Common Mining Law in Hungary, in: *The 150th anniversary of issue of the Common Mining Law* (Konference, Hradec nad Moravici, Czech Republic, 9. 2004.) Montanex, Ostrava, pp. 15–17.
20. Kardos J (1992) *A Szent Korona és a Szent Korona-eszme története*, IKVA, Budapest.
21. Márkus D (Hrsg.) (1896–1901) *Corpus Juris Hungarici,* I–VIII, Franklin, Budapest.
22. Maximilian II. (1805) *Neue Berg-Ordnung des Königreichs Ungarn, und solcher Cron einverleibten Gold, Silber, Kupfer, und anderer Metall- Bergwerken, Sammt denen Erläuterungen zweyer Alten Berg-Ordnungen Der sieben königl. Freyen Berg-Städte 1. Chemnitz u. Königsberg 2. Schemnitz, Neusohl, Bugganz, Dülln und Libeten*, Aus der k. auch k. k. Hof- und Staats Druckerey, Wien.
23. Timon Á (1904) *Ungarische Verfassungs- und Rechtsgeschichte mit Bezug auf die Rechtsentwicklung der westlichen Staaten*, Puttkammer und Mühlbrecht, Berlin.
24. Timon Á (1907) *A Szent Korona és a koronázás közjogi jelentősége*, Rákosi Jenő Budapesti Hírlap Újságvállalata, Budapest.
25. Timon Á (1920) *A Szent-Korona elmélete és a koronázás*, Stephaneum Nyomda Rt, Budapest.
26. Tomcsányi M (1940) *Magyarország közjoga*, Királyi Magyar Egyetemi Nyomda, Budapest.
27. Törő L D (2016) Az „Echart-vita", Echart Ferenc 1931-es programtanulmányának kortárs visszhangja, *Aetas* 31(4), pp., 57–77.
28. Tóth Z J (2008) *Magyar közjogi hagyományok és nemzeti öntudat a 19. század végétől napjainkig, Adalékok a Szent Korona-eszme történetéhez*,, Szent István Társulat, Budapest.
29. Váczy P (1932) A hűbériség szerepe Szent István királyságában, *Századok*, 66(1–3), pp., 369–392.
30. Wenzel G (1866) *A magyar és erdélyi bányajog rendszere*, Kir. Magyar Egyetemi Nyomda, Buda.
31. Zétényi Zs (1997) *A Szentkorona-eszme mai értelme*, Püski Kiadó, Budapest.
32. Zlinszky J (2013) A Szentkorona-eszme és története, in: Koltay András (Hrsg.): *A XII táblától a 12 ponton át a magánjog új törvénykönyvéig*, Szent István Kiadó, Budapest, pp., 227–245.

# Minko GEORGIEV* – Dafinka GROZDANOVA**
# Acquisition and inheritance of agricultural land in Bulgaria - from fragmentation towards consolidation***

*Abstract*

*The theory of agricultural land mobility tries to answer the question whether or not it is possible to produce more and cheaper agricultural goods through land consolidation. Acquisition, inheritance, and in the Bulgarian case also the use of property of agricultural lands, are an instrument for the vertical and real/literal integration of the farmers. However, they indirectly affect the access to agricultural land.*
**Keywords:** agricultural land, acquisition, inheritance, fragmentation, consolidation, legal entities

## 1. Introduction

With the establishment of the Third Bulgarian State in 1878 legislation in relation to agricultural lands in the country was developed and the continental – pandect system was chosen. For the development of public relations, the purchase, selling and inheritance of land were most important. At a later stage, lease/rent agreements were added to the ways of using the land since 1989.

Inheritance is the primary way to acquire property. In this part, the Bulgarian doctrine copies the classical Roman law. The inheritances are normally transferred to one or more inheritors. This leads to high fragmentation of the property. The classical theories consider that the fragmentation of agricultural land leads to inefficient management of the resources. Thus, Bulgarian legislation always focussed to reduce the fragmentation of the agricultural land. After 1989 and during the transitional period thereafter agricultural land was restituted in real terms and more than 2 million properties were fragmented, some with 10-20 or more co-owners. The costs related to the administrative procedures for the succession of agricultural land by restitution grew and therefore access to land became an important negative external factor. In the early 90's, this led to low liquidity of agricultural land. The tendencies of the connected markets – those of goods and labour – respectively of the whole agriculture of Bulgaria were also negative.

Minko Georgiev – Dafinka Grozdanova: Acquisition and inheritance of agricultural land in Bulgaria. From fragmentation towards consolidation. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 66-84, https://doi.org/10.21029/JAEL.2020.29.66

* PhD, Associate Professor, Faculty of Economics, Agricultural University of Plovdiv, Bulgaria, e-mail: mm72gg@gmail.com.
** PhD student, Faculty of Economics, Agricultural University of Plovdiv, Bulgaria, e-mail: dafi_bg@abv.bg.
*** *The research of this article was supported by the Ferenc Mádl Institute of Comparative Law.*

https://doi.org/10.21029/JAEL.2020.29.66

Attempts to consolidation of agricultural land based on buying and selling proved unsuitable. For this reason, two new approaches have been created after 2007. The first one was creating specially purpose entities (legal entities). These players (legal entities) moved the market spurred consolidation together with the big agricultural producers. Their vertical integration was not allowed. The second approach was developing a mechanism for literal integration. Agricultural lands were to be consolidated on the basis of 'their use.' Some of the effects of fragmentation due to successions were reduced gradually.

In a study to assess the methods related to the acquisition of agricultural land the position and the negative effects should be analyzed: (1) distribution of the resources – how the adverse effects ensue from concentration; (2) non-market benefits – how certain players recipe opportunities, including by limiting the access to the resource for others; (3) interaction in organizations – how integration can deform so common objectives; (4) internal redistribution of weights – how double marginalization acts, respectively, how to transfer costs indirectly from one entity to another one.

## 2. The theoretical 'clash' and agricultural land

The theory for land mobility is linking the possible consolidation of the primary production factor with other non-productive external effects: drought, urbanization and others.[1] The term 'land grabbing' is used in the context of the monopoly acquisition of resources, in this case agricultural land.[2] At the same time, it does not offer a reliable explanation for the dual effects of economic efficiency. It is analysed as a coordination problem[3].

The decisions of the positive/statutory law are only used to justify a 'mistake'[4] in order not to enter into the depth of the problem and the integration of the organization and structures of group discrimination.[5] There is a lack of uniquely decisions for jointly use of exhaustible these resources. It is considered that the classic approach[6] to introduce a quota and restrictions or tax negative external effects[7] can solve the problem. No one benefits from the fragmented resource.[8] At the same time the benefits to consolidate the agricultural land are becoming increasingly controversial, extra fuzzy and not well analyzed effects of double marginalization.[9]

[1] Hartvigsen 2014, 6–8.
[2] Kay 2016, 26–30.
[3] Bachev, Ivanov & Sarov 2020, 106–137.
[4] Hovenkamp 1990, 823–828.
[5] Hovenkamp 2010a, 616–644.
[6] See Hardin 1968, 1243–1248.
[7] See 'The Tax of Pigou.' Pigou 1920.
[8] See Kopeva, Noev & Evtimov 2002, 63–65 and Boliairi 2013, 273–302.
[9] Hovenkamp 2010b, 2–10.

It is assumed that especially small contractual agreements defined by rural communities, have enough forces[10] to settle fairly most of the effects, while at the same time it is clear that legal entities, owners and producers; farmers and their families are very different in the representation of character. They are different, even in small contractual agreements, some with more pronounced economic strategies whilst others are socially oriented. Their analysis, especially in recent years, does not take into account which of the ways of acquiring property helps some and harms others. It is further noted that all of them have rather polarized targets.[11]

At the local level, discrimination is allowed through the levels of the resource-product chain.[12] It should be clarified why, despite the high degree of integration, consumers of agricultural products do not receive a higher value than consolidated resources – agricultural land.[13]

Agricultural land has a new meaning. For large legal entities it has become in opportunities for new forms of profit sustainable rents[14] in order to imminent for indirect cost reduction by transferring them to other entities.

## 3. Methods

Through historical analysis, the development of some of the legal institutions of property is presented. The positively legal analysis was used for the purpose of explaining these legal provisions, as well as definitions such as 'conversion in deals with agricultural lands.'

The Discrete Structural Analysis (DSA)[15] should explain the effects of double marginalization. Empirical data were collected from the lands of two settlements in the Plovdiv region. Measurement of transaction costs should be done at two levels: through the costs of protection of property rights in agricultural contracts and added losses (L) due to the lack of access to the resource. In practice, costs are measured as a function $f(x_1) + f(x_2) = Y$,

[10] See Ostrom 1990, that in competition for resources, successful self-regulation is possible, but in very small larger groups only.

[11] Van Dijk & Kopeva 2006, it is about the operational problems of agricultural land, banking in the context of fragmentation. A few years later, it is of importance the distortions in the consolidation process of resources – the concentration of agricultural land. See Medarov 2013, 168–193.

[12] Kaysen & Turner 1959, as well as Bain 2013, have set the beginning of the paradigm of discrimination across the levels of the resource-product chain (structure-conduct-performance (S-C-P)). Although that it was developed for the needs of the industrial organization, it is considered that it fully applies to our case.

[13] Theorists of the 'antitrust paradox' believe that integration, which leads to a monopoly position, should not be considered a problem when, even in the case of price discrimination, consumers receive a product with a higher value. A central question is whether, with a monopoly on agricultural land, it is possible not to pass on discrimination through the levels of the product chain. See Bork 1993.

[14] See Van Dijk 2003, 149–158.

[15] See Williamson 1991, 271-286 for further detailed explanation of the nature of DSA.

where by:
TTrC = Tr CC + L = Y,
and where by:
TTrC – total transaction costs – Y,
TrCC – transaction costs in the contract - transfer of rights from transactions and other means – ($x_1$),[16]
L – Losses due to lack of access to the resource – ($x_2$)[17]

The comparison between internal redistribution should explain how specific ways of acquiring or using property affect the groups of persons involved in agricultural land. The graphical method illustrates the comparison between long lines of information and clarifies the trends in the studied system.

The comparison between internal redistribution should explain how specific ways of acquiring or using property affect the groups of persons involved in agricultural land. The graphical method illustrates the comparison between long lines of information and clarifies the trends in the studied system.

## 4. Historical review

### 4.1. First period (1878-1947)

Codification of legislation, hereditary legal relationship as a reason for fragmentation and consolidation strategy. By the Articles 67 and 68 of the Constitution of Tarnovo (1879) ownership and inheritance are legitimized in Bulgaria. Inheritance law (IL) was adopted by the Bulgarian state firstly after the acquisition of Independency of Bulgaria in 1879. For the first time, it also defines masculine relationships. Codification determined the course of legal links with agricultural property, including workshops, their factories and understood what is happening with their farm land. Since 1890 stability of the institute on the operation of general inheritance of properties was granted. Agricultural lands were inherited as part of the general patrimonium, in gender equality. However, this was the reason for the permanent fragmentation of agricultural land.

The period 1897-1908 is marked by the increased crushing the inheritance rule on the line: – plenty of it inherited partitions existed. The attempts were to reduce the fragmentation formalized by special rules laid down by Articles 240 and 241 of the Law by placing on the agricultural lands in the share of only one of the male heirs. The partition of farmland was limited, and in case of failing to split – the agricultural land was put on an auction to sell it as whole.

With an amendment to the Law (Article 104) in 1906 rights were introduced to empower male heirs to purchase of shares of ownership of agricultural lands. Pursuant to Article 242 of the Law heirs, who have participated with their own funds and labour

[16] Costs are measured without including the price of the resource (agricultural land). See Benham & Benham 2000; 369–374; Djankov, La Porta, Lopez-de-Silanes F & Shleifer, 8–14.

[17] The loss function L is calculated as an alternative income from agricultural land. See McChesney 2003, 2–10 on the negative effects of ownership and the relationship to the cost of accessing it.

in the farm, could claim a contribution as a basis for a larger share of land. However, the number of small properties in this period (1908-1934) continued to grow. Only during the period of First World War Delay there was a delay of this form of "natural division" and from there to the fragmentation.

A first strategy for consolidation the consolidation of land in Bulgaria started actually from 1911. A new administrative structure 'Land consolidation Service' as a subordinated body to the Ministry of Agriculture and State Property was created which however, managed to unite farmers' estates in only 57 settlements up to 1928. The economic growth in the 1930s was the reason for the increase of the consolidated ownership of agricultural lands.

### 4.2. Second period (1947-1989)

Change of property, consolidation, lack of a real market for the agricultural land. Consolidation in Bulgaria lasted until 1945. About 10% of the ownership of agricultural land was consolidated. 6455 existing cooperatives merged into 15 industry alliances with 993 thousand members around 1945, producing 70% of the national turnover. The members were more than 1 million and 200 thousand. With 'collectivization'[18] after 1951, a large share of arable agricultural land has become part of the state centralized agricultural cooperatives (SCAC). In practice the existence of private plots are very limited and only for personal needs mainly located near or in the settlements.

In practice the Constitution of 1971 imposes the cooperative ownership as a base, but it is in a regime of planned management and state control (sui generis). Although the agricultural cooperatives have increased the efficiency in agriculture, they did not sell and did not lease agricultural land. Due to this fact it can be considered that the agricultural land market, during this period did not exist.

During the period of the last 50 years of the twentieth century, Bulgaria had a modern regulations for property, are suitable for the production relations in the agriculture. Some of them, still in force today, are applied subsidiary according to the special legislation related to agricultural land[19]. This legal framework suggests a relatively easy adaptation and legal security. However, it was not suitable for new relations in agriculture and especially those conditioned by markets.

[18] Collectivization – the process of including assets / agricultural land in cooperatives. Cooperatives – labour cooperative farms, some of which were transformed into agro-industrial complexes in the 80s, and which were liquidated in the period after 1992.

[19] Law on the Purchase of Large Agricultural Machinery – 1948; Law on Cooperative Organizations – 1948(1953); The Law for protection of the arable land – 1967; Decree 922 (on accords and rents in agriculture), Citizens' Property Act – 1973, as well as general legislation: Law on Obligations and Contracts (LOC) – 1951; Inheritance Law (IL) – 1950 and Property Act(PA)-1950.

## 5. Forward to the consolidation of agricultural land

### 5.1. Third period (1989-2020)

Private property and restitution, legal entities and agricultural land, new conditions for vertical and literal integration. The period of Restitution (1992) was characterized by the return of previous ownership of property of agricultural lands. In 1991, the current Constitution of the Republic of Bulgaria (CRB) entered into force. In accordance with the principle of inviolability of private property Article 17(3) of the CRB restoring the farmland in real their borders started in 1992. The Agricultural Land Ownership and Use Act (ALOUA) were created.[20] The processes of land restitution run in parallel with the liquidation of the cooperatives. As a result, over 2 million plots distributed in 4-5 parcels and thus with an average parcel size of 0.4-0.5 ha were generated up to the year 2010. Under these conditions, the legislator tried to recover the market relations. In 1997 'rents' in agriculture were settled.[21] This change 'helped' the properties to become part of a long-term production relationship.[22] However, the effects of the division of land have not been reduced. There is no 'predestined' issue of fragmented property rights; inheritance of a succession creates property and with more than one number heirs. Because of the new mode of manufacture and trade in Bulgaria legislation has been adopted that serves only the legal entities. The entrepreneurs which acquired or managed agricultural land, as well as those who have business related to fruits harvested from agricultural land can acquire the status of legal entities: so called "trader" under the new legal framework in 1991.[23]

Since 1999, the issue of legal entities in agricultural and production cooperatives has been formally resolved. Initially their number increases.[24]

[20] Agricultural land ownership and use act - the texts in the beginning of the period regulate the return of the property, including the heirs, the administrative procedure, protection of the property – (art. 3–14); the liquidation of the old state agricultural cooperative and structures – (§12 and §13 (1)). See also (§7) of the Transitional and Final Provisions of the Agricultural Cooperatives Act (ACA).

[21] Law on the rent of agricultural land (LRAL). In the period after 1950 in Bulgaria there is a LOC only - chapter IV 'Rental of things' art. 228–239. The lease lasts no more than 10 years, unless it is a commercial transaction art. 229 of the CPA. It is not suitable for agricultural land, on which the relationship should be long-term - for example, with a high payback period, as for perennials.

[22] In (IL), in the period of transition are included the legal novelties of: art. 9a – the figure of the 'subsequent spouse;' art. 90a – 'wills of agricultural land included in cooperatives;' art. 91a 'renunciations of inheritance in the case of property that was part of a cooperative.'

[23] Commercial Act (CA). See Art. 1 of the CA. Traders are the persons performing certain transactions by occupation. It should be mentioned that in the period immediately after the beginning of the transition – private persons could carry out economic activity under Decree 56. (The Decree belongs to the State Council of the People's Republic of Bulgaria of 25.02.1989).

[24] Law on Agricultural Cooperatives (LAC). This law is special in relation to the CA, according to which the cooperatives after 1991 are registered and operate until 1998. The cooperative is a legal entity, where the members manage as compliments and distribute the profits, like limited partners. At the same time, they can participate with personal work in the cooperative.

It has been shown that up to 1999 they have 43% of the arable land at their disposal.[25] Since 2000, however, this trend is turned. The number of 'passive' members is increasing – those who inherited land but 'left' it in cooperatives and who usually live in cities. The thesis confirmed that the "broken relation with agricultural land between the owners of the resource (in this case the agricultural land) and the organizations which managed it" does not deal with imbalances of distribution of property rights. Consolidation is carried out in short-term strategies. It was believed that the conditions in Bulgarian productive agricultural cooperatives were not considered as success of the model of integration. Competitors with greater market power continue to expulse of the market resource 'agricultural land.' In the period 2002-2003, there was an acute need of consolidation. For this reason, new organizational forms and models of consolidation have been created in 2003.[26] A Law on Legal Entities entered into force in the country, aimed solely at the acquisition and management of agricultural land.[27]

### 5.2. EU accession (2007)

During the pre-accession period, the support of agricultural producers became a fact in Bulgaria since 1998.[28] With the accession to the EU Common Agriculture policy (CAP) a stimulation of production through consolidated agricultural land was adopted. Funding become an important stimulus for efficiency, and thus to consolidate the assets.

It was only in 2008 that the country's legislation gave legitimate definitions of 'dominance,' 'monopoly' as forms of unfair competition. Like the European legislation, the legal framework of Bulgaria does also not solve the issue of competition for the resource.[29]

---

[25] Draganova 2002, 99–100.

[26] First, FAO commissioned a case study of land fragmentation and land consolidation during 2001-2002. Project second, during 2003-2005: 'Land consolidation by agreement in Bulgaria' was implemented with technical and financial support from the Dutch Cadastre and Dutch development funds. Also during 2003-2005, the project 'Consultation services for implementation of pilot land consolidation' was implemented by CMS Bruno Morel of France and Geokonsult of Bulgaria. During 2006-2007, a second Dutch-supported land consolidation project 'Land consolidation strategy and program for Bulgaria' was implemented with technical and financial support from DLG and Dutch development funds. Finally, the project 'Integrated land consolidation project village of Katunets, Lovech region' was implemented in 2009-2010, also whit support by DLG and Dutch funding.

[27] Law on Special Investment Purpose Companies (LSIPC). At the beginning of the period there were 67 companies under this law. Currently there are only 5.

[28] Law on Support of Agricultural Producers (LPA). The LPA does not even 'try' to resolve the theoretical disagreement over the 'inclusion' of subsidies in their production functions. In practice, the law is an indulgence for producers to increase the area, hence the profits by reducing production.

[29] Law on Protection of Competition (LPC). Chapter 4 of the LPC is on the abuse of 'monopoly' and 'dominant position;' Chapter 5 – defines 'concentrations.' There are no special legal rules protecting against unfair competition in 'natural resources,' including agricultural land. A state monopoly is established only by law (Art. 18 para. 4 of the CRB) and Art. 19 para 2 of the LPC, but there are no restrictions for private monopolies at the local, local level.

Legal definitions for domestic / local market for land are lacking at this stage. Individuals with greater market power can acquire indefinite resources in a given land. In this way, they indirectly restrict access to agricultural land to other, more difficult-to-adapt players.[30] 'Cartels' are considered to be agreements between producers, but only if it is established that the latter have agreed on the prices of the products produced or access to membership in professional organizations. Transparency in administrative procedures is low. It is not considered as a form of unfair competition that the information barriers created within the literal and hybrid organizations are not respected.

Since 2008, new formats related to the protection of the various methods of acquisition and transfers of ownership have been launched. A new format is for commercial activities.[31] The Physical actions previously related to the acquisition and transfer of ownership are replaced with electronic ones; this leads to accelerate the speed and the security of the processes slightly. The integration of property into the registration systems is not significant for a better protection but especially available for legal entities. Still under the discussion is the question to what extent size of public spending is reduced.

In accordance with the Treaty of Bulgaria's accession to the EU and in accordance with amendments of the Bulgarian Constitution foreign physical persons and foreign legal entities may acquire ownership of agricultural land since 2014. As laid by Article 22 (2) of the Bulgarian Constitution foreigners and foreign legal entities may acquire land ownership under the conditions arising from the Treaty of Accession of Bulgaria to the EU or under an international treaty ratified, promulgated and entered into force for the Republic of Bulgaria or by inheritance according to the Law[32]. Legal entities registered in accordance with the Bulgarian law are considered Bulgarian legal entities even if they are established by foreigners. The latter have never been restricted in the acquisition of agricultural land. At present 82% of the arable land in Bulgaria is under the control of 19 legal entities, and 50% under the control of only one legal entity.[33]

## 6. The mechanism of integration - local concentration of ownership

By Bulgarian legislation a cascade of legal mechanisms has been developed, supporting the consolidation of the agricultural land.

[30] We are already trying to develop the doctrine of competition for the 'indirect discrimination' in contracts. See Ruschev 1999.

[31] The Law on Cadastre and Property Register (LCPR) by 2020 has been introduced in almost the entire country. The Law on the Property Register is the only one in the country that has an entirely electronic format.

[32] In 2014, the Parliament 'tried' to extend the 'moratorium' on the acquisition of property by foreigners (the Decision of the National Assembly of November 2013/promulgated, SG, issue 93/25.10.2013/). Decision № 1 of 28.01.2014 on constitutional case №22 of 2013 - Parliament's decision on a 'moratorium' was declared unconstitutional.

[33] See study by Georgiev & Roycheva 2018, 552.

### 6.1. Inheritance and farmers in the light of the Heritance Act

Inheritance by law leads to the fragmentation of both, agriculture lands and subjective rights associated with them.[34] Concurrently, legal amendments of Articles 9a; 90a and 91 of the Heritance Act should reduce the fragmentation by the distribution of agricultural land in favour of heirs operating as agriculture producers. However, the general norms of the Heritance Act and the cited legal novelties work in the opposite direction. Currently, they create local fragmentation[35] of property rights and very little of agricultural property. This type of fragmentation is particularly strong at the local level.

### 6.2. The rules for subsidies per unit area

Subsidies for processing of the agricultural land have long lasting and deep impact on incentives for local consolidation. Payments per unit size add effects in addition to the subsidy received for the production produced. Accordingly, when the first stimulus of the subsidy per unit area prevails, the aims of the farmer as regards the structure of his profits are distorted. The agricultural producer can be seen to be converted to 'rent seeker.'[36] Aimed to circumvent the law local practices have been developed, for example, the land is ploughed, there after not planted and despite the lack of yield gained the profit is simply formed on the basis of the resulting subsidy per unit area.[37]

### 6.3. Procedure for land cultivation under Article 37(c) ALOUA

Upon the submission of a declaration under Articles 69 and 70 of the Regulation for application of ALOUA farmers declare annually the form of management and manner of permanent use of agricultural land. In cases where owners or producer do not declare certain processing or use of their agricultural land or have lost the access to it – the other major agricultural tenants in the village agree on the grounds of Article 37(c) ALOUA having the right to manage that land. It is assumed that the lack of transparency[38] is the basis for the deformations in the described mechanism. New negative practices invented by big producers' e.g. legal entities having agricultural land are to 'send' another producer 'generally called re-tenant' to maintain

[34] Boliari 2017, 275–280 for the relationship between inheritance and fragmentation in Bulgaria.
[35] Any new inheritance prevents the property from being sold. Because many of the heirs are living far from the land, which can only be sold through a local notary. Sales, through authorization, through consular offices outside Bulgaria are expensive and difficult.
[36] Many studies have outlined the link between subsidies and land grabbing. See Land concentration, land grabbing and people's struggles in Europe, TNI, Final Report 2013. We consider it necessary to outline the connection between: 'land grabbing' and 'rent seeking.' See also Tullock G 1980.
[37] According to the data of the Regional Agricultural Services, a decrease in these practices is reported only after 2017.
[38] We believe that the lack of transparency is at the root of the problem 'land grabbing' a level EU. See a report by Hungarian researchers Szilágyi, Raisz & Kocsis 2017, 162 on the same.

the agricultural land and to use it. There have been isopolistic relations,[39] which create conditions for 'denial of entry.'[40] Indirectly, this is supporting the acquisition of agricultural land by large legal entities operating in the area.

### 6.4. Rule for 'rent' without the consent of all co-owners of the land under Article 4(a) ALOUA[41]

We consider that the provision on 'rental of property by co-owners of ideal parts' is in conflict with a decision of the Constitutional Court(CC)[42] since 1995 and indirectly supports large legal entities. As described in the previous paragraph, the refusal to participate in the production of agricultural land – leads to the fact that at a later stage the land becomes the property of one of the legal entities operating in the land. There are also new vicious practices – the one, the co-owner, who manages to conclude a land lease agreement, concludes fictitious agreements by announcing a lower rental price. Thus, despite the obligation – the other co-owners to be reimbursed according to the inheritance quotas, they will receive a lower rent than actually agreed.

### 6.5. The rule 'stocking density on pastures' under Article 98 Regulation 74/1991 (last amended 2019)

The rules on 'stocking density of pasture animals' give preference only to larger entities in agriculture. The amendment was applied (ex tunc), which eliminated smaller farmers who did not have enough animals in a certain area.[43] This mechanism creates conditions for consolidation and polarization of the different types of production.

### 6.6. Decision of the Bulgarian Supreme Court of Cassation(SCC) on the institute of conversion of 'lease to rent'

According to the Bulgarian legal system it is possible to conclude two types of transactions related to the 'use' of agricultural land by 'lease or rent.' The first type 'lease' derives from LOC-1951. The general norm was created for the purpose of the short-term use of movables property and estates different from agricultural land.

[39] Stiglitz 1974 , 219 on the issue of agricultural policies.
[40] See Ploeg, Franco & Borras 2015, 157 for the way in which it should be used 'denial of entry.'
[41] Art. 4a of ALOUA entitles the owner holding more than 25% shares of agricultural land to enter into a lease with a third party, without agreed here the other co-owners. The other co-owners must receive compensation according to their share – Art. 31 of PA.
[42] In Constitutional case № 8 of 19 June 1995, the (CC) of the Republic of Bulgaria ruled by resolution № 12 of 1995, declare unconstitutional 'dispositions' of foreign private property in any form.
[43] Decision of the SCC of 2017 – confirmed the absence of contradictions with the CRB of the provision. Farmers to use land from the State Land Fund are not eligible for density should be removed. The SCC considered that it was not competent to rule on the contradiction with the principle of legitimate legal expectations.

The legislation of 1951 is still in force today. These transactions, however, have a maximum term of 10 years. This is unsuitable for long term investments with long payback periods, such as growing perennial fruits. By LRAL-1997 a special legal framework was created accordingly to the alternative type 'rent' only for agricultural land. In general, both types of transactions can be applied for agricultural land. However, the transaction according to LRAL-1997 is presenting a significant difference in respect of the way of the form of termination and other conditions to the hiring conditions according to LOC-1951. The rent protects the production relations and the sustainable investments in agriculture in greater extent.

By an Interpretative Decision of the (SCC)[44] in 2016 an opportunity was created for the conversion of the 'rent of agricultural land' under the LRAL into the 'lease' under the LOC. An economic incentive for imposing cheaper deals on transactions of agricultural land was the objective of the decision of the Court. If the individual tenant is in a stronger position, rents always being converted into lease. The latter is a prerequisite for increasing the levels of consolidation and moving to productions with high intensity, but with lower added value in some places. Short-term legal relations create conditions for easier acquisition of such land by legal entities in future.

## 7. The mechanism of integration - local concentration of ownership

### 7.1. Exemption from corporate taxation of collective investment schemes

Trusts registered under the Law on Special Investment Purposes Companies (SIPC) are entitled to tax relief.[45] Legal entities in agriculture may register under this law and gain from this tax advantage. Taking this into consideration legal entities managing large amounts of lands as owners or renters under the objective of land consolidation prefer to work with large legal entities of producers. This relation between the two legal entities generates a financial stimulus for vertical integration at the end of the resource-product chain.

### 7.2. Influence of the infringement procedure of the European Commission against Bulgaria and other Member States concerning the acquisition of agricultural land

The European Commission started an infringement procedure against Bulgaria in accordance with Article 258 of the Treaty of Functioning of EU (TFEU) for breaching the EU legislation[46] arguing that Bulgaria's legislation requires a long-term residency of a buyer of agricultural land in Bulgaria, which discriminates against other EU nationals.

[44] The interpretative decisions of the SCC are not a source of law, but are binding on the courts of the country.

[45] The tax preference is regulated in art. 174 and art. 175 of the Corporate Income Tax Act.

[46] See the Markets in Financial Instruments Act (MFIA) and Economic and Financial Relations Act with Companies Registered in Preferential Tax Jurisdictions, the Persons Controlled by Them and Their Beneficial Owners (FRACRPTJ).

Points of consideration are related to changes in Articles 3 to 5 of ALOUA introducing the terms 'residency' and rules for the 'origin of capital' as regards the legal entities. At this point the procedure reflects only slightly on local consolidation of agricultural land. Cross-border vertical mergers, in case of legal entities operating with agricultural land, will be accelerated in case of an infringement decision of the EU Court against Bulgaria.

## 8. The empirical evidences of indirect discrimination. 'Transfer of burden' from large legal entities to the other groups


**Figure 1: Inheritances /Sales**

On Figure 1 shows the trends of 'distributions' related to agricultural land.

The secondary ways of acquiring agricultural land purchase – sales are having an upward trend. In comparison the primary way of acquiring – the inheritance is showing the descending trend. Less and less agricultural land is distributed among the families (family farms) which are the main source of inheritance. Legal entities are major players – as buyers of the agricultural land. The trend becomes more significant after 2016.

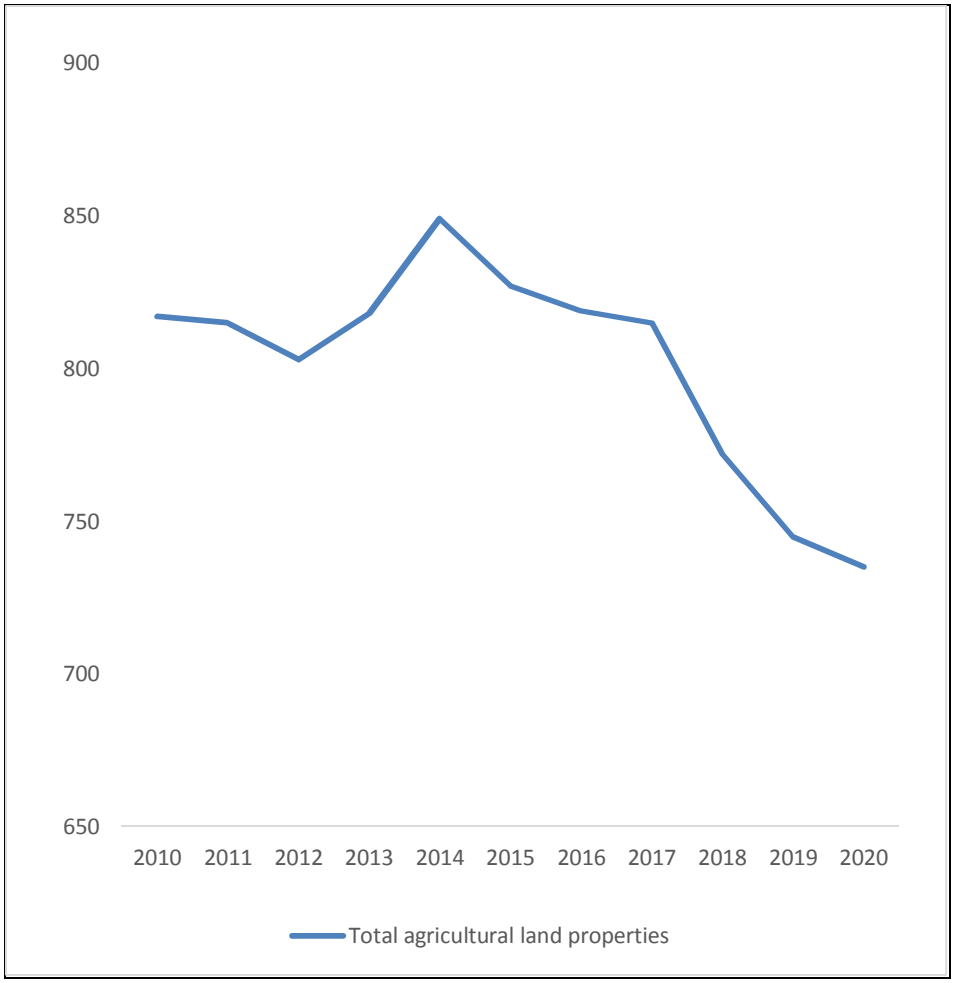


**Figure 2: Land properties**

The total number of agricultural lands in the settlements are analyzed in Figure 2. The tendency is that the number of agricultural properties is decreasing, despite the high number of co-owners. The fragmentation continues to have an effect, but less and less owners owned larger areas. The local concentrations increased.

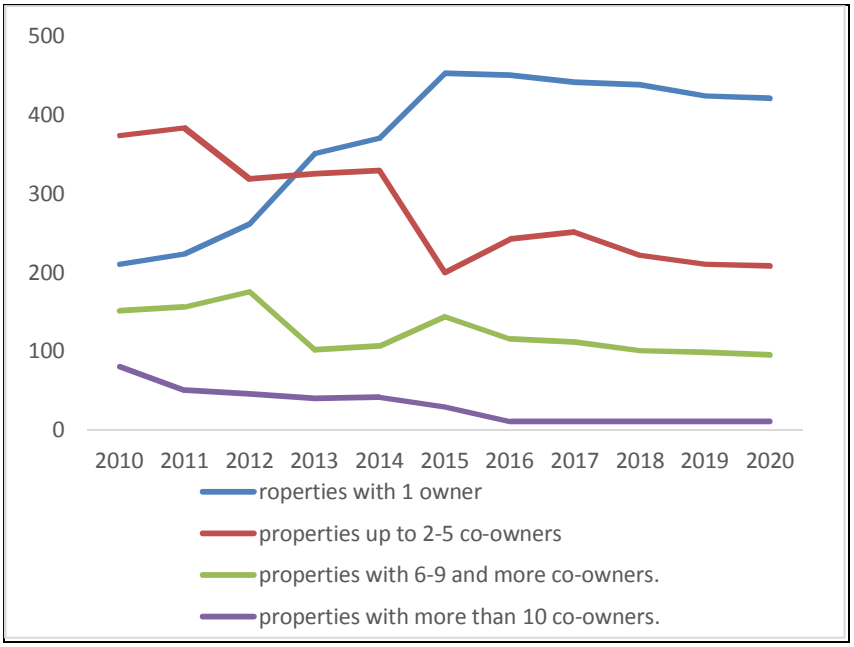


**Figure 3: Co-owners**

In Figure 3 shows how the number of co-owners has moved over the years. Co-ownership cases (number of co-owners on one property) decreases. This is due to the reason that some of the properties because of inheritance falls into a new group with a higher number of co-owners or because they have been bought in 97% by the legal entities.

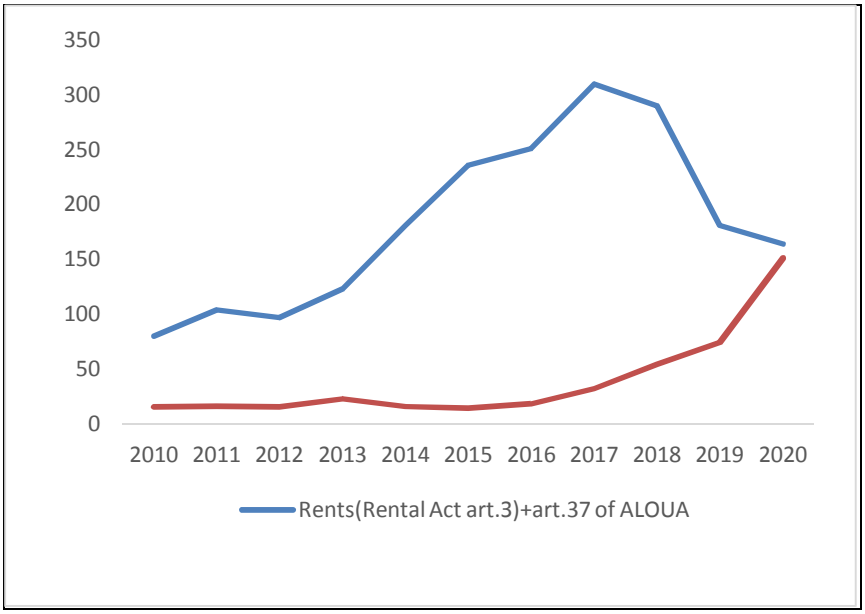


**Figure 4: Land use contracts**

On Figure 4 it is compared the two types of acquiring land by 'lease' according to LOC or 'rent' according to LRAL. The rents increased until 2018, when the rule of Article (4a) of ALOUA entered into force and when the conversion is possible. The co-owners are gradually reorienting themselves to consolidate agricultural land through 'rent.' It is considered that these are mainly small landowners, sellers of land or landlords under Article 37c of ALOUA.

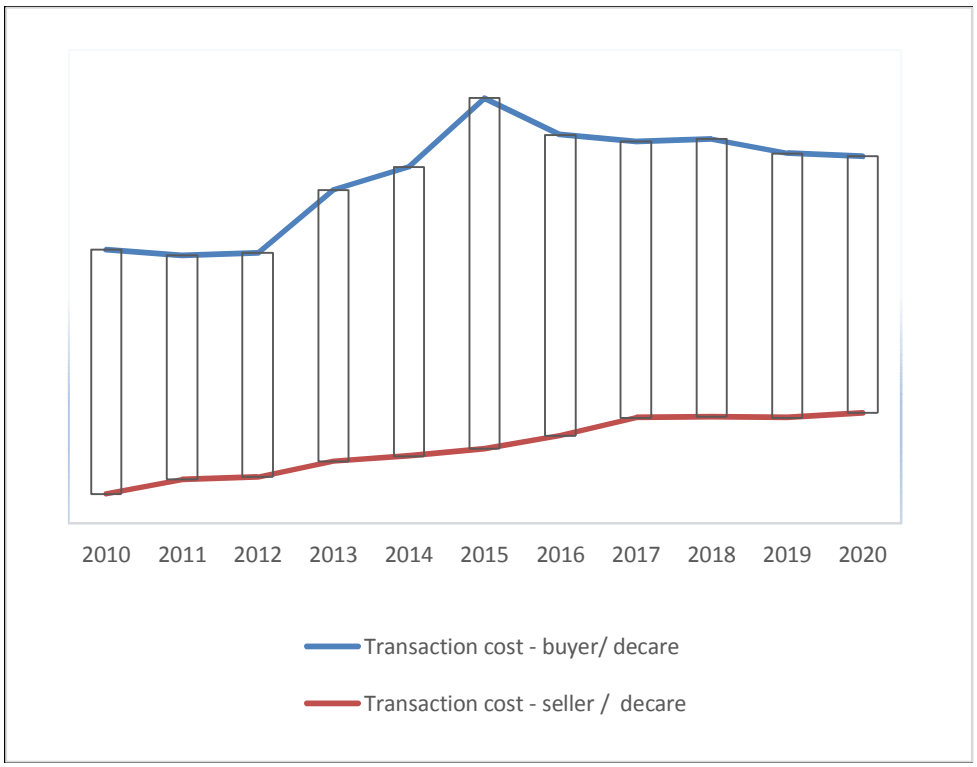


**Figure 5: Allocation of the transaction costs**

Figure 5: The electronic formats of the registers are showing a kind of 'shrinking of the scissors' of the transaction costs. But the average transaction costs increase faster for small owners, sellers and other individuals, than those for buyers being usually legal entities.

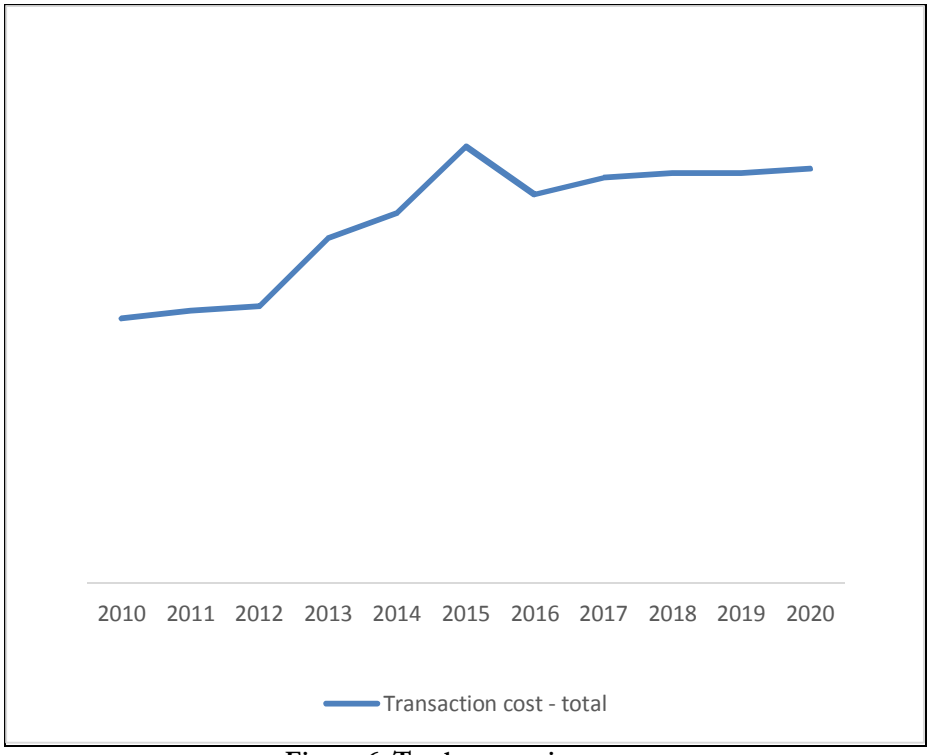


**Figure 6: Total transaction costs**

Figure 6: The total amount of transaction costs also increases supposing that this could be an empirical proof of an indirectly transferred burden[47] through access to agricultural land at the local level.

## 9. Conclusion

The inheritances have less and less overall effect on the distribution of ownership of agricultural land in contrast to secondary means of acquisition – sales. Consolidation based on land use has a pre-emptive effect over those in which property is acquired through purchase and sale or other means of acquiring property. The effects of consolidation outpaced those associated with fragmentation.

Consolidation in Bulgaria is related to land grabbing at the local level. The subsidy for legal entities should be considered as rent seeking. Transparency in the methods of acquiring agricultural land is low. Some legal possibilities, which we have called 'mechanisms,' create an advantage for some groups of subjects over the other subjects which are more difficult subjects to adapt. The coordination goals set in the strategic document VGGT (FAO) – are not achieved.[48]

[47] Beluhova-Uzunova, Hristov & Shishkova 2020, 60–62. describe this burden as a kind of imbalance between small and large farms.

[48] Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) of the Food and Agriculture Organization (FAO) of the United Nations (UN).

Due to the organizational economies of scale – legal entities in the country's agriculture, gradually 'readjust' their activities to work only with other legal entities. Using ownership consolidation mechanisms, legal entities are integrated vertically. Thus, discrimination is transferred across the levels of the resource product chain.

De lege farenda: The CAP objectives 'efficiency and that of market stability' set out in Article 39 'a' and 'c' laid down by the TFEU[49] should also be reconsidered in the context of land consolidation. The demand for rent through subsidies should be stopped. Balance between efficiency of the consolidated production factor agricultural land and market stability will provide a higher value for consumers of agricultural products.

A concept for the 'indirect discrimination' or a hybrid organization concerning the access to agriculture land should be created. The latter is possible if changes are made to secondary legislation, e.g. EU Regulation 1308/2013, in which an anti-competitive provision related to the agreements on access to agricultural land should be incorporated. Horizontal legislation should define 'local markets.' The legislative framework for the protection of competition must analyze market distortions at the local level.

[49] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, Volume 51, 9 May 2008, 2008 / C 115/01 (TFEU).

## Bibliography

1. Bachev Hr, Ivanov B & Sarov A (2020) *Why and How to Assess the "Governance" Aspect of Agrarian Sustainability Case of Bulgaria*, Chapters 2 in: Gorawala P, Mandhatri S (eds.) Agricultural Research Updates 30, Nova Science Publisher, New York, pp. 106–139.
2. Bain J S (2013) *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries*, t.3 Harvard University Series on Competition in American Industry Series, Harvard University Press.
3. Beluhova-Uzunova R, Hristov K & Shishkova M (2020) Small Farms in Bulgaria – Trends and Perspectives, *Agricultural Sciences*, 11(25), pp. 59–66. doi: 10.22620/agrisci.2019.25.008
4. Benham Al & Benham L (2000) *Measuring the costs of exchange*, Chapters 24 in: Claude Ménard (ed.), Institutions, Contracts and Organizations, Edward Elgar Publishing. pp. 367–375, doi:https://doi.org/10.4337/9781781952764.00039
5. Boliari N (2013) Does Land Fragmentation Affect Land Productivity? Empirical Evidence from Bulgaria, *Review of Agricultural and Environmental Studies* 94 (3), pp. 273–302, doi: 10.4074/S1966960713003019
6. Boliari N (2017) Can Partible Inheritance Explain Land Fragmentation? The Case of Bulgaria, *Agrarian South: Journal of Political Economy*, 6(3) pp. 334–353, https://doi.org/10.1177/2277976017745194
7. Bork R (1993) *The Antitrust Paradox* (s.ed.), New York: Free Press.
8. Djankov S, La Porta R, Lopez-de-Silanes F & Shleifer A (2002) The Regulation of Entry, *The Quarterly Journal of Economics*, 117(1) pp. 1–37.
9. Draganova M (2002) *Collisions in the Transformations of Rural Life*, Lik Publishing House.
10. Georgiev M & Roycheva A (2018) Rules on integration of organizations using agricultural land – an obstacle for competition, *Book of proceedings International* May Conference on Strategic Management – IMCSM18 May 25–27, 2018, Bor, Serbia, pp. 548-559., doi:10.2139/ssrn.3275647
11. Gray H M (1960) *Carl Kaysen and Donald F. Turner. Antitrust Policy: An Economic and Legal Analysis*. pp. 23, 345. Cambridge, Mass.: Harvard University Press, 1959, The Annals of the American Academy of Political and Social Science, 330(1), pp. 199–199, doi: 10.1177/000271626033000183
12. Hardin G (1968) *The Tragedy of the Commons,* 162(3859), pp. 1243–1248, doi:10.1126/science.162.3859.1243
13. Hartvigsen M (2014) Land Mobility in a Central and Eastern European Land Consolidation Context. *Nordic Journal of Surveying and Real Estate Research*, 10(1), pp. 1-24., https://journal.fi/njs/article/view/41460
14. Hovenkamp H (1990) Positivism in Law & Economics, *California Law Review,* 78(4), pp. 815–852.
15. Hovenkamp H (2010b) Antitrust and the Close Look: Transaction Cost Economics in Competition, Policy. pp. 1–14, http://dx.doi.org/10.2139/ssrn.1661993

16. Hovenkamp H. (2010a) Harvard, Chicago, and Transaction Cost Economics in Antitrust Analysis, *The Antitrust Bulletin*, 55(3), pp. 613–662, doi: 10.1177/0003603X1005500305
17. Kay S (2016) Land Grabbing and Land Concentration in Europe. A Research Brief. *Transnational Institute for HOTL, Amsterdam, December 2016,* https://tinyurl.com/y59usb8d [04.11.2020]
18. Kopeva D, Noev N & Evtimov V (2002) Land fragmentation and land consolidation in the agricultural sector – A case study from Bulgaria. *FAO*. https://tinyurl.com/y3jpbabp [04.11.2020]
19. McChesney F (2004). What'd I Say?: Coase, Demsetz and the Unending Externality Debate, pp.1-32, http://dx.doi.org/10.2139/ssrn.491182
20. Medarov G (2013) Land concentration, land grabbing and land conflicts in Europe: The case of Boynitsa in Bulgaria. 10 Bulgaria in Franco J & Borras S (eds.) In Land Concentration, Land Grabbing and People's Struggles in Europe, *Transnational Institute: Amsterdam, The Netherlands*, pp. 5–236.
21. Ostrom E (1990) Governing the Commons. The Evolution of Institutions for Collective Action. *Cambridge University Press*.
22. Pigou A (1920) *The economics of welfare*. London, Macmillan and Co.
23. Ploeg J VD, Franco JC & Borras Jr SM (2015) Land concentration and land grabbing in Europe: a preliminary analysis, *Canadian Journal of Development Studies / Revue canadienne d'études du développement*, 36(2) pp. 147–162, doi:10.1080/02255189.2015.1027673
24. Ruschev I (1999) Concluding contracts under General Conditions - Problems in the Doctrine and the Practice. *Labor and law* (Available 19.10.2020 e-page).
25. Stiglitz J (1974) The Review of Economic Studies Incentives and Risk Sharing in Sharecropping, *Oxford University Press*, 41(2), pp. 219–255, doi: 10.2307/2296714
26. Szilágyi J E, Raisz A & Kocsis B E (2017) New dimensions of the Hungarian agricultural law in respect of food sovereignty – A magyar agrárjog legújabb fejlődési irányai az élelmiszer-szuverenitás szempontjából. *Agrár- és Környezetjog*, 12 (22), pp. 160–201, https://doi.org/10.21029/JAEL.2017.22.160
27. Tullock G (1980) Efficient rent-seeking. Toward a theory of the rent-seeking society. In: Buchanan J & Tollison R & Tullock G (eds.). *College Station: Texas A&M Press*. pp. 97–112.
28. Van Dijk T & Kopeva D (2006) Land banking and Central Europe: Future importance, current initiatives and Western European past experience. *Land use policy*, 23 (3), pp. 286–301, https://doi.org/10.1016/j.landusepol.2004.07.005
29. Van Dijk T (2003). Scenarios of Central European Land Fragmentation. *Land Use Policy*, 20(2), pp. 149–158.
30. Williamson O (1991) Comparative Economic Organization: The Analysis of Discrete Structural Alternatives. *Administrative Science Quarterly*, 36(2), pp. 269–296, doi: 10.2307/239335

# Morten HARTVIGSEN* – Maxim GORGAN**
# FAO experiences with land market development and land management instruments in Eastern Europe and Central Asia

*Abstract*

*Most countries in Eastern Europe and Central Asia have farm structures characterized by excessive land fragmentation and small average farm sizes. Well-functioning agricultural land markets are a precondition for agricultural and rural development in general. However, agricultural land markets remain weak and still face many constraints in the region. Land management instruments such as land consolidation and land banking in addition to facilitating agricultural development also contribute to land market development. The Food and Agriculture Organization (FAO) of the United Nations is providing technical assistance to the member countries*

Morten Hartvigsen – Maxim Gorgan: FAO experiences with land market development and land management instruments in Eastern Europe and Central Asia. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 85-103, https://doi.org/10.21029/JAEL.2020.29.85

* FAO Regional Office for Europe and Central Asia (Budapest, Hungary), e-mail: morten.hartvigsen@fao.org.
Morten Hartvigsen is since 2015 working for the Food and Agriculture Organization of the United Nations (FAO), the Regional Office for Europe and Central Asia in Budapest, Hungary, as Land Tenure Officer and Delivery Manager of the FAO Regional Initiative on empowering smallholders and family farms. He graduated as Chartered Surveyor in 1991 from Aalborg University, Denmark. In 2015, Morten Hartvigsen defended at Aalborg University his PhD Thesis 'Land Reform and Land Consolidation in Central and Eastern Europe after 1989 – Experiences and Perspectives.' In his professional career, he was during 1991 – 2006 employed by the Land Consolidation and Land Banking Unit of the Danish Ministry of Environment and Food. During 2006–2015, he was Head of the Land Management Section at Orbicon A/S, a private Danish consultancy with 500 employees. Since 2000, he has worked internationally with land consolidation, land management, land market development and rural development.
** FAO Regional Office for Europe and Central Asia (Budapest, Hungary), e-mail: maxim.gorgan@fao.org.
Maxim Gorgan is from 2020 Land Tenure Officer at the Food and Agriculture Organization of the United Nations (FAO), the Regional Office for Europe and Central Asia. He joined the organization in 2016 as International Consultant. He holds a Master Degree in Economics and Business Management from the Mediterranean Agronomic Institute of Chania, MAICH (Greece) and a Bachelor in Finance from the Academy of Economic Sciences of Moldova. His professional experience started in Moldova in 2007 with involvement in the World Bank funded Voluntary Land Consolidation Pilot Project in six villages. During 2009-2011, he was employed by the Ministry of Agriculture of Moldova to coordinate the upscaling of land consolidation in 40 villages. During 2011-2016, he was Head of the Land Tenure Section of the non-governmental organization ACSA in Moldova. From 2011, he started to work internationally as Land Consolidation and GIS Expert.

https://doi.org/10.21029/JAEL.2020.29.85

*in Eastern Europe and Central Asia related to development of agricultural land markets and introduction of land management instruments such as land consolidation and land banking.*
**Keywords:** Land market development, land management instruments, land consolidation, land banking, Eastern Europe and Central Asia.

## 1. Introduction

The farm structures in most countries in Eastern Europe and Central Asia have changed completely after land reforms were implemented at the beginning of transition in the 1990s. In some countries private ownership to agricultural land was the outcome of land reforms while in most countries in Central Asia farmers have been allocated use rights to the agricultural land that remained in state ownership. Land rights have been formally recorded in land registries and cadastre agencies. This has in most countries provided the basic infrastructure for formal agricultural land markets to function.

In section 2 of this paper, the current farm structures and their linkage to the land reforms implemented in the 1990s are explained with focus on the structural problems in many countries with excessive land fragmentation and small average farms sizes.

Well-functioning agricultural land markets are a precondition for agricultural and rural development in general. Section 3 is about development of agricultural land markets in the region. In order to be able to support and facilitate development of agricultural land markets, it is important to have in place a conceptual framework. The five stage development model of Williamson et al. (2010) is explained in section 3.1, while section 3.2 is a discussion of existing constraints for development of formal agricultural land markets in Eastern Europe and Central Asia. In section 3.3 the current development stage of the 18 FAO programme countries and territories in the region is discussed through the application of the suggested conceptual framework.

A number of land management instruments can be applied to address the structural problems with land fragmentation and small farms sizes and also many of the other identified constraints for land market development. These land management instruments are discussed in section 4 and include land consolidation, land banking, mediation of lease and also active management of state owned agricultural land. The Food and Agriculture Organization of the United Nations (FAO) has played a leading role in the introduction of the mentioned land management instruments in the region and is actively supporting development of formal agricultural land markets.

## 2. Farm structures in Eastern Europe and Central Asia

The countries in Central and Eastern Europe (CEE) and Central Asia (CA) began a remarkable transition from centrally planned economies towards market economies in 1989 when the Berlin Wall fell and the Iron Curtain lifted. Land reforms with the objective to privatize and/or individualize state-owned agricultural land managed by large-scale collective and state farms were high on the political agenda in most countries in the region.[1]

[1] Hartvigsen 2013a.

The two fundamentally different overall approaches to land reform in the CEE countries have been restitution of land rights to former owners and distribution of land rights to the rural population. Many and often contradictory factors such as historical background, land ownership situation at the time of collectivization and ethnicity have been important while designing the land reform process in each country.[2] In the three Baltic countries, agricultural land was restituted to the pre-WWII owners and their successors and resulted in an ownership structure similar to that before 1940. Also in the Czech Republic and Slovakia agricultural land was restituted to the former owners. In Poland and the countries in ex-Yugoslavia, the collectivization had failed and 75-80 percent of the agricultural land remained in private ownership and was used by small family farms during the socialist era and land reforms have had little impact on the farm structures in those countries. In Albania, Moldova, Armenia, Georgia and Azerbaijan the former state owned agricultural land was in the 1990s distributed equally to the rural population.

In most of the CEE countries, the land reforms after 1989 have completely changed the farm structures that existed during the socialist era while in other countries, the farm structures remain basically the same. In the Western Balkans, Caucasus and Central Asia, farm structures are dominated smallholders and small family farms.[3] In countries such as Albania, Armenia, Bosnia and Herzegovina, Georgia, North Macedonia and Kyrgyzstan the average farm sizes are between one and three hectares and between 95 and 99 percent of all farms are smaller than 5 ha. Small family farms have become the backbone of the post transition farm structures in Central Asia.[4] Other countries such as Serbia, Moldova and Kazakhstan have dualistic farm structures with many small family farms and few large-scale corporate farms.

In addition to small average farm sizes a characteristic of farm structures is in many countries excessive fragmentation of both land ownership and land use. The level of fragmentation of both land ownership and land use in the 18 countries, where FAO provides technical assistance in Europe and Central Asia, is assessed in Figure 1.

The structural problem with excessive land fragmentation and small farm sizes is hampering agriculture and rural development and hence also most initiatives in support of development.[5] Small-scale agriculture production is ongoing mostly in subsistence and semi-subsistence farms where most of the production is consumed in the household and the farms have weak access to markets and food value chains. Farms have low productivity and low competitiveness.

[2] Hartvigsen 2013b.
[3] FAO 2020a.
[4] Lerman & Sedik 2018.
[5] Hartvigsen 2019.

| COUNTRY | LEVEL OF FRAGMENTATION OF OWNERSHIP IN AGRICULTURAL LAND | LEVEL OF FRAGMENTATION OF LAND USE IN AGRICULTURAL LAND |
|---|---|---|
| Albania | High | High |
| Armenia | High | High |
| Azerbaijan | High | High |
| Belarus | Low | Low |
| Bosnia-Herzegovina | High | High |
| FYR Macedonia | High | High |
| Georgia | High | High |
| Kazakhstan | Low | Low |
| Kosovo* | High | High |
| Kyrgyzstan | Low | Low |
| Moldova | High | Medium-high |
| Montenegro | High | High |
| Serbia | High | High |
| Tajikistan | Low | Low |
| Turkey | High | High |
| Turkmenistan | Low | Low |
| Ukraine | Low-medium | Low |
| Uzbekistan | Low | Low |

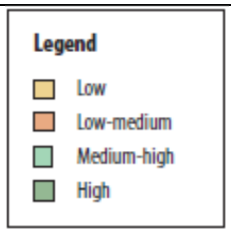


**Figure 1: Level of land fragmentation in the FAO Regional Office for Europe and Central Asia (REU) programme countries[6]**

Land fragmentation and small farm sizes are also among the root causes of out-migration from rural areas and in several countries in the region a main reason for arable agricultural land being abandoned. In *Armenia*, according to the 2014 Agricultural Census, 33 percent of the land of family farms and 38 percent of the land of corporate

[6] References to Kosovo shall be understood in the context of UN Security Council Resolution 1244 (1999) and Hartvigsen, 2019.

farms is abandoned.[7] Land abandonment is widespread in most Western Balkan countries. In North Macedonia, also around one-third of all arable agricultural land is unutilized. In Bosnia and Herzegovina, the similar figure is 45 percent. This has created an unutilized potential for local economic growth by strengthening local food production. This is an issue that has gained further importance in consequence of the COVID-19 pandemic.

## 3. Constraints for development of agricultural land markets in Eastern Europe and Central Asia

Well-functioning agricultural land markets are a precondition for agricultural and rural development in general. Regarding land markets in general there is a general consensus that in order for a land market to work, there must be (a) a clear definition and sound administration of property rights, (b) a minimum set of restrictions on property usage consistent with the common good, (c) the transfer of property rights must be simple and inexpensive, iv) there should be transparency in all matters and (d) there must be an availability of capital and credit.[8] A precondition for the existence of formal land markets is that land rights are formally registered in a land registry.

However, as we will see in the following, agricultural land markets in most countries in Eastern Europe and Central Asia and their development suffer from many different constraints.

### 3.1. Conceptual framework for land market development

In order to be able to support and facilitate development of agricultural land markets, it is important to have in place a conceptual framework. Building on the development model of Williamson et al., land markets are seen to develop through five evolutionary stages[9] (See Figure 2). Most nations will experience more than one stage at a time, and find that smooth transition from simple to complex markets is difficult to manage.

The basis for development (stage 1 in the model) is the existence of agricultural land. In stage 2, formal land rights are established and recorded in the land registry. In most countries, the outcome of land reforms was private ownership to most of the agricultural land, in particular the arable agricultural, and private ownership to property including agricultural land is protected by the Constitutions in these countries. However, tradable land rights do not necessarily have to be to in the form of private ownership but can also be formally registered and protected use rights to agricultural land that is owned by the State. In principle also private use rights to state land can be traded at the formal agricultural land market. These first two stages of the model are seen as preliminary stages.

[7] FAO 2017.
[8] Dale & Baldwin 2010.
[9] Williamson et al. 2010, 151.

In stage 3 of the development model land trading is taking place but often between community members (e.g. relatives and neighbours) that know each other and the land market activity (number of transactions) is still relatively limited. The commoditization of agricultural land is beginning, offering a wide range of rights, powers and opportunities. The better these are organized and understood, the better the market will operate.

With stage 4, the land market becomes more mature and the number of land transactions is increasing. Trading takes also place between parties that are not well connected in advance. Also in stage 4 credit mechanisms begin to be available. Land rights are beginning to be converted into tradable commodities.

In stage 5 of the land market development – the complex commodities market stage – the land market is fully developed and fully integrated in the economy, land is accepted as collateral and leverages its wealth acceleration role. The system relies heavily on the cognitive capacity of society to understand and use tradable commodities, the rule of law, government capacity, and national ability to compete for capital in international marketplaces.

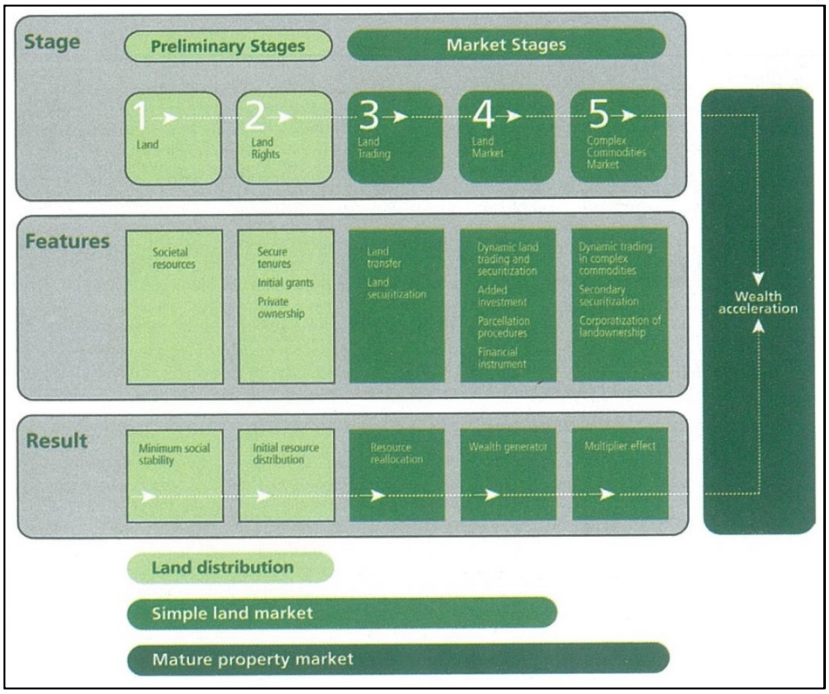


**Figure 2: The evolutionary stages in development of formal land markets[10]**

[10] Williamson et al. 2010, 151.

### 3.2. Constraints for development of formal agricultural land markets

It is a precondition for the existence of a formal agricultural land market that land rights are formally recorded in a land registry and that the information in the land registry is kept updated when there are changes. In most of the countries where FAO is providing technical assistance in the region (see Figure 1), the first registration of formal land rights is almost completed. In many countries this was done as part of the finalization of the land reform process. An exception is Georgia, where only around one-third of all land parcels are still formally registered. In addition, there are in several countries smaller or larger 'pockets' of unregistered land.

Following the land reforms from 1990 onwards, land administration systems including cadastre agencies and land registries were built up in the countries with large-scale donor support. Land rights were formally registered after land reform and land markets were supported, including for agricultural land. From the mid-1990s onwards, the World Bank has funded 42 land projects in 24 European and Central Asian (ECA) countries.[11]

Different types of constraints hamper the development of agricultural land markets. The constraints and the seriousness of the constraints vary from country to country and sometimes from village to village. In the countries in ex-Yugoslavia, the formal land markets were very much restricted and land registration was largely neglected during the decades of collectivization.[12] The situation has not changed much since Yugoslavia dismantled and new independent countries emerged. A large percentage of the formally registered owners have been deceased for decades and inheritance remains unresolved in the families. Unresolved inheritance is widespread in many countries in Eastern Europe and Central Asia.

Another important constraint in many countries is the common practise of informal land transactions. Seller and buyer are in agreement on a transaction with agricultural land and its conditions but the transaction is often not formally registered in the land registry. Among the main reasons for this are complicated transaction procedures, high transaction costs (compared to the value of the land), land transaction taxation and corruption. The above mentioned informalities are preventing the land parcels from accessing the formal agricultural land markets.

Experiences from FAO land consolidation pilot projects in Albania and Azerbaijan show that most of the agricultural land sales in the pilot communities after the land distribution in the 1990s have not been formally registered. This undermines the sustainability of the formal land administration systems[13] and the high degree of informality in the land markets is then again leading to insecure land rights and risk of disputes and conflicts that are very difficult to solve in the court system after decades of informality. The above mentioned large-scale investments in building land registration systems in the region are undermined as property rights fall out of formal registration into informality, in particular in rural areas where the land value is much lower than in urban areas.

[11] Törhönen 2016.
[12] Hartvigsen 2019.
[13] Haldrup 2011.

Furthermore, experiences have shown that a large list of more "technical" land registration problems exist in many countries, which are also slowing down or even preventing land market activities. Some of them are easy to resolve such as misspelled names of owners or new name of owner after marriage. Inconsistency between the property titles and the reality on the ground (e.g. mismatches of surface area, boundary inaccuracies) are more complicated to solve. Such situations exist with different frequency in all the countries in the Eastern Europe and Central Asia. In Albania, discrepancy between the title document, the so-called Tapi, issued during the land distribution in 1991-1992 and the first registration in the mid-1990s requires resurveying in order to bring the area in compliance with the second registration.[14] In Azerbaijan, the situation is quite similar and existing inconsistences in the area and size of parcels most be eliminated through new surveying at the expense of the landowners before a formal land transaction can be registered.[15]

All the above mentioned constraints need to be resolved before the land parcels can enter the formal agricultural land markets.

### 3.3. Status for development for formal agricultural land markets

The development of formal agricultural land markets are at very different stages in Eastern Europe and Central Asia but markets are in general still weak, e.g. compared with EU member countries. In Figure 3, the 18 FAO programme countries and territories are assessed against the five development stages in Figure 2.[16] With the existence of agricultural land in all the assessed countries, they have all default reached stage 1 of the model.

In all countries and territories, except in Belarus, land rights (stage 2) have been established to agricultural land. In Belarus, agricultural land remains in state property and use. Belarus is the only country in the region where agricultural land is both owned and managed by the state. The agricultural sector is centrally planned and represented by state-owned agricultural enterprises. Private ownership exists only to small household plots around the villages distributed in the final years of the Soviet Union and the 1999 Land Code confirmed that citizens may own up to one ha of agricultural land in a household plot and up to 0.25 ha of agricultural land under and around a private house.[17]

[14] Hartvigsen 2013a, 21–24.
[15] Hartvigsen, Ismayilov & Gorgan 2020.
[16] Williamson et al. 2010.
[17] Hartvigsen 2013a, 44.

| | Country | Stage 1 Land | Stage 2 Land rights | Stage 3 Land trading | Stage 4 Land Market | Stage 5 Complex commodities market |
|---|---|---|---|---|---|---|
| 1 | Albania | √ | √ | √ | | |
| 2 | Armenia | √ | √ | √ | √ | |
| 3 | Azerbaijan | √ | √ | √ | | |
| 4 | Belarus | √ | | | | |
| 5 | Bosnia-Herzegovina | √ | √ | √ | | |
| 6 | Georgia | √ | √ | (√) | | |
| 7 | Kazakhstan | √ | √ | | | |
| 8 | Kosovo* | √ | √ | √ | | |
| 9 | Kyrgyzstan | √ | √ | √ | | |
| 10 | Moldova | √ | √ | √ | √ | |
| 11 | Montenegro | √ | √ | √ | | |
| 12 | North Macedonia | √ | √ | √ | √ | |
| 13 | Serbia | √ | √ | √ | √ | |
| 14 | Tajikistan | √ | √ | | | |
| 15 | Turkey | √ | √ | √ | √ | |
| 16 | Turkmenistan | √ | √ | | | |
| 17 | Ukraine | √ | √ | | | |
| 18 | Uzbekistan | √ | √ | | | |

**Figure 3: Assessment of development stages of formal agricultural land markets in Western Balkans, Eastern Europe and Central Asia[18]**

As mentioned in Section 3.1, countries reach stage 3 when simple land trading has started to take place often between relatives and neighbours and the land market activity is still relatively limited. Most of the countries in Eastern Europe and Central Asia have reached this stage. The exceptions are Belarus (as already mentioned still in stage 1, Kazakhstan, Tajikistan, Turkmenistan, Ukraine and Uzbekistan, so mainly countries in Central Asia. Ukraine implemented a land reform in so far two stages. First the state owned agricultural land was distributed equally in shares to the rural population.

[18] References to Kosovo shall be understood in the context of UN Security Council Resolution 1244 (1999).

The second phase of the Ukrainian land reform began with a presidential decree in December 1999 that confirmed the right of the land share owners to have the land distributed as physical land parcel(s) and subsequently led to the large-scale conversion from land shares to physical parcels. However, from 2001 a moratorium on buying and selling of agricultural land was introduced and the formal agricultural sales land market has been closed since then. Assessments made by the World Bank and others show that lifting the ban on the agricultural land market will have very positive effects on the economy in the country in general.[19] In March 2020 legislation was adopted in that Parliament that will open the formal agricultural land sales market from July 2021and Ukraine will enter stage 3 of the model.

In the four Central Asia countries in stage 2 (all CA countries except Kyrgyzstan), agricultural land remains in state ownership and land use rights are still not tradable in a formal land market. In Uzbekistan, agriculture is one of the most regulated sectors of the economy and land (use) rights are often not well protected and insecure. In Tajikistan, the situation is similar to Uzbekistan in that peasant farms have been granted use rights over agricultural land. The Land Code opens in principle for trading of private land use rights but has so far not been followed up by adopting detailed legislation and setting up infrastructure for a land market based on tradable use rights to state land.[20]

Seven of the 18 countries and territories are currently in stage 3 (land trading stage). In Georgia, land trading is possible but only with the land parcels that are first time formally registered (as discussed in Section 3.2, only around 30 percent of the agricultural land).

In the Western Balkans, Albania, Bosnia and Herzegovina, Kosovo and Montenegro are assessed to be in stage 3. In Albania, the agriculture land market is not vibrant with sales transactions covering in total 700 to 800 ha/year. Furthermore, it is the expectation that most of these transactions are not for agricultural purposes, but with the objective to change the land use (e.g. construction).[21] In addition to the formal land transactions, informal transactions are as mentioned widespread in Albania.

Kyrgyzstan is the only country in Central Asia, where land reforms that took place mainly from 1997 to 1999 have resulted in private land ownerships as the arable agricultural land was distributed to the rural households. At the same time a moratorium in the land market was introduced, which was lifted in 2001.[22] Today, 90 percent of all arable land belongs to the private sector, and the Land Registry Service is functioning. However, the number of annual land sales is still not significant (around 3,600 transactions in 2009) and many land market transactions are related with urban sprawl and housing.

Five of the 18 countries and territories are currently assessed to be in stage 4 (land market stage) and no countries have yet reached the 5th and final stage (complex commodities market). The five countries are Armenia, Moldova, North Macedonia, Serbia and Turkey.

[19] Deininger & Nivievskyi 2019.
[20] FAO 2018.
[21] FAO 2020b.
[22] FAO 2020c.

Land turnover in the land market is one way to measure the activity level in the agricultural land market and to some degree also market efficiency. Land turnover is usually measured as the percentage of all (arable) agricultural land that is changing owner in a certain year. In comparison, during 1997 – 2007, between 1 and 2 percent of the total agricultural area (UAA) was traded annually in Belgium, Italy, France and Finland, while the same figure for the Netherlands in the same period varied between 2 and 4 percent.[23]

In Lithuania, the annual land turnover of private owned land was around 3 percent in the period 2000-2003, while it dramatically increased to 5-7 percent after becoming EU member country in 2004 (FAO, 2017). In the Czech Republic, the annual turnover of private purchased land amounted to about 0.3 percent of the total agricultural area in average during the period of 1993-2001. However, from 2002 to 2004, the annual turnover of private land increased to 1.5 percent and 3.3% in 2005 after EU accession.

In Armenia in 2016, the land turnover was around 1 percent (4,535 ha of agricultural land in private property transferred through buying-selling transactions out of the in total 455,249 ha private owned agricultural land). In the Republic of Moldova in 2014, the market of agricultural land experienced a turnover of around 0.8 percent. In North Macedonia, the similar figure during 2016-2018 in average was around 0.6 percent and the average parcel size traded was around 0.3 ha.[24] Thus the annual turnover in the mentioned CEE countries was still lower than in the mentioned "new" EU member countries around their time of accession in 2004. In addition many of the transactions with agricultural land are as mentioned not for the purpose of agricultural development but rather driven by speculation and construction intentions close to urban areas. In Serbia, the annual turnover of the utilized agricultural area (UAA) has varied between 1 and 3 percent in recent years.[25]

In addition to the discussed number of transactions (land turnover), land markets can also be looked at through other aspects such as land prices and their development, credit markets, land market participants and how they are regulated. In particular, it is important that a system of regulations on one hand does not jeopardize land market functioning, but on the other hand is guiding and facilitating the market towards desired policy objectives. An important path towards achieving the policy objectives of agricultural development by increase of productivity and competitiveness of farms is to avoid speculation in the agricultural land market by giving priority to local farmers and ensuring that spatial planning is conducted and enforced in protection against unplanned and unregulated urban sprawl on agricultural land. A detailed analysis of these additional aspects is beyond the scope of this paper.

In the countries currently in stage 3 or 4, in total 12 of the 18 countries and territories, development of agricultural land markets, both sale and rental markets, are hampered by a high degree of formally registered owners that are absent from the village where the land is located. Some of these owners out migrated from the country decades ago and often have little interest in their land.

[23] Swinnen et al. 2008.
[24] FAO 2019a, 22.
[25] FAO 2020d.

In completed and ongoing FAO supported land consolidation projects in North Macedonia, it was found that in average more than 1/3 of all owners were absent from the region where the land is located.

## 4. Land management instruments in support of development of agricultural land markets

As discussed in Section 3, agricultural land markets are either not existing or if they do remain weak in most of the Eastern European and Central Asian countries. This is together with the underlying structural problems such as land fragmentation and small average farm sizes in general hampering agricultural and rural development. However, a number of land management instruments exist that can be used to address the mentioned structural problems and also to support development of formal agricultural land markets. These land management instruments include land consolidation, land banking, mediation of lease and also active management of state owned agricultural land.

The existence of excessive land fragmentation in an area is not only caused by land reforms or by inheritance traditions where agricultural land parcels in some countries traditionally are sub-divided between the heirs. Also land market development in itself can result in land fragmentation as farmers purchase available land that is not adjacent to land parcels they already own or farm.

### 4.1. Land consolidation

Land consolidation is in particular in Europe and South Asia a well-established land management instrument. In many countries in Western Europe, modern land consolidation goes back more than 100 years. The traditional objective has been to support agricultural development by reducing land fragmentation and facilitating on a voluntary basis farm enlargement and often linked with improvement of agricultural infrastructure such as irrigation, roads and drainage based on local needs. The FAO Legal Guide on Land Consolidation, published in 2020, defines land consolidation as:[26]

Land consolidation is a legally regulated procedure led by a public authority and used to adjust the property structure in rural areas through a comprehensive reallocation of parcels, coordinated between landowners and users in order to reduce land fragmentation, facilitate farm enlargement and/or achieve other public objectives, including nature restoration and construction of infrastructure.

Land consolidation should be implemented fully in line with the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of Local Food Security (VGGT).[27] It is a principle of the VGGT that legitimate tenure rights should be strongly protected. The tenure guidelines have a section on land consolidation where a key principle says that landowners and farmers participating in land consolidation projects should be at least as well off after the project compared with before.

[26] Versinskas et al. 2020.
[27] CFS 2012.

In most Western European countries with ongoing national land consolidation programmes, land consolidation has developed into a multi-purpose instrument which allows to pursue different objectives in the same project, e.g. agricultural development in one area and public initiated nature restoration in another area. The approach also allows as an alternative to expropriation of private owned agricultural land to compensate the landowner and farmer in land instead of a monetary compensation and in this way avoiding to destroy local farm structures.

Implementation of land consolidation programmes and projects in a number of ways contribute also to development of agricultural land markets. When agricultural land parcels are very small and fragmented the transaction costs of purchasing them may be higher than the value of the land and the market is often not functioning. This is illustrated in Figure 4 with an example from a World Bank funded land consolidation pilot project in Moldova during 2007-2009.[28]

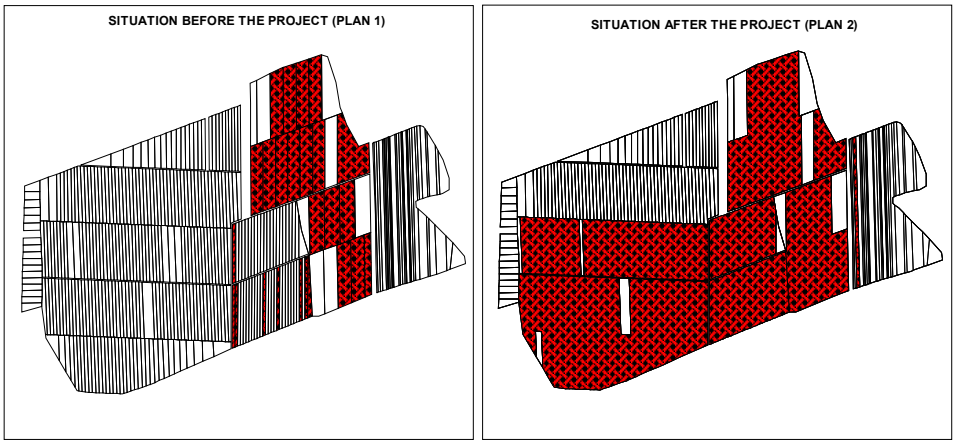


**Figure 4: Land market development through land consolidation in Bolduresti village in Moldova[29]**

A local farmer wanted to acquire about 30 hectares in order to establish a new orchard. His interest area had 124 individual owners when he began to acquire land for the project. The farmer managed to acquire an area of about 10 hectares by purchasing a number of parcels with an average size of about 0.7 ha. However, the remaining area comprised parcels as small as 0.14 ha, and the high transaction costs and time constraints of dealing with a large number of owners caused the farmer to give up. Through the land consolidation project, the farmer was able to acquire and consolidate another 15 hectares of unproductive orchard in a relatively short period of time. This involved purchasing approximately 110 parcels from about 80 landowners. After the finalization of the pilot project the farmer continued to purchase parcels in his area of interest and in 2009 he planted a new plum orchard on the consolidated land. After the land consolidation project, the land market in the area has started to function and the farmer can continue to purchase parcels in the market and enlarge his orchard.

[28] Hartvigsen, Gorgan & Palmer 2013.
[29] Hartvigsen, Gorgan & Palmer 2013.

An important side-effect of land consolidation is also that the existing land administration and land registration problems (discussed in Section 3.2) in the project area are largely cleaned up and solved with the registration of the new formal land rights as and outcome of the land consolidation in the area. Thus, it is normal that the number of land market transactions in an area increase in the period after land consolidation is finalized.

In Central and Eastern Europe, land fragmentation and land consolidation appeared on the political agenda in many countries in the late 1990s after land reforms from the beginning of transition in the 1990s had led to excessive land fragmentation and small farm sizes in most of the countries.[30] FAO has played a leading role in supporting the introduction of land consolidation and the development of national land consolidation programmes in Central and Eastern Europe from 2000 on.[31] The FAO regional land consolidation programme has three main pillars: (a) technical guidelines, (b) field projects in the programme countries, and (c) the informal network of land tenure professionals interested in land consolidation, land banking, land market development, etc. (LANDNET). The FAO Legal Guide on Land Consolidation[32] is a recent flagship publication. Since the first field project, started in Armenia in 2004, FAO has so far supported 11 countries in CEE, related to land consolidation. The starting point for the technical support is usually the recognition in the country of the need to address land fragmentation and small farm sizes and a vision to develop an operational national land consolidation programme.

In North Macedonia, in 2014-2017, FAO supported the preparation of the national land consolidation programme by implementing two pilots to test the 2013 Law on consolidation of agricultural land before scaling up, and provided additional training and capacity building.[33] From 2017 to 2021, FAO is supporting the implementation of a first round of land consolidation projects under the national programme through the EU funded project Mainstreaming of the National Land Consolidation Programme (MAINLAND).

### 4.2. Land banking

Land banking is a land management instrument that has proven its effectiveness and importance in facilitating the implementation of land consolidation projects.[34] Land banking is used broadly and combined with land consolidation in Western European countries, like Denmark, Germany and the Netherlands, as a tool to increase land mobility during the land consolidation planning.[35] The instrument is also used to compensate landowners in land, instead of monetary compensation, when agricultural land is taken out of production for public-initiated projects and to facilitate farm size enlargement.

[30] Hartvigsen 2015.
[31] Hartvigsen 2019.
[32] Versinskas et al. 2020.
[33] Hartvigsen 2019.
[34] Versinskas et al. 2020.
[35] Hartvigsen 2014.

The possible synergies between land consolidation and land banking instruments in a CEE context have been discussed at several regional land consolidation conferences and workshops during the last decade. However, an assessment conducted in 2015 found that land banking in connection with land consolidation projects has so far largely failed and the potential remains unused.[36] There are a number of reasons for this and some of them are country specific. A general explanation appears to be related to the organization of state land management (see Section 4.4) and land consolidation in the countries. Often different public institutions are responsible for the land consolidation programmes and the management of the state land fund, and efforts are often not coordinated.

However, FAO has in the last couple of years seen an increased interest from member countries to engage in land banking activities and support to development of land banking instruments is ongoing or planned in Armenia, Azerbaijan, Turkey and North Macedonia.

### 4.3. Mediation of lease

In most of the 18 FAO programme countries and territories in the region (see Figure 3) where agricultural land markets are still weak, as discussed in Section 3, many of the formally registered landowners are not farming their land and are also often not living in the village where the land is located but have moved to city centres or even abroad. In such situation on top of the structural problems with excessive land fragmentation, small farm sizes and numerous land registration problems, agricultural land is at high risk of ending up as unutilized.

Mediation of lease is a land management instrument that supports the rental land market by facilitating rental agreements between the owners of agricultural land and the local farmers. The Land Bank of Galicia (Spain) is a good example of a mediation of lease instrument.[37] The bank/fund operates mainly with use rights and assumes the role of intermediary manager between landowners and tenants that often do not know each other because the registered owner has left the village where the land is located. By invoking contract assurances that both sides may rely on, it offers convincing guarantees to the owners of not losing ownership over land, being paid according to the lease contract, as well as recovering the property in normal conditions for its use after the contract has ended. Tenants, on the other hand, may rely on a pre-set minimum period of rent of five years, an advantageous guarantee for farmers who wish to implement medium-to-long-term investments.

The key instrument in the process is a web-based system with an updated and accurate database of land plots, at national level available for rent and under which conditions. The information in the database should be regularly updated with new land plots becoming available for lease, ideally entered by the owners into the system. At the same time, the web-based system also allows interested farmers to see what is available for lease and request the lease after which the agency in charge with mediation of lease will complete the lease agreement with the owner and the user.

[36] Hartvigsen 2015.
[37] FAO 2019b.

### 4.4. Active management and privatization of state owned agricultural land

Many countries in CEE have large reserves of state owned agricultural land after the finalization of land reforms. In Lithuania, 400,000 ha remain in state ownership and in North-Macedonia, around 240,000 ha of agricultural land remain in state ownership.[38] This is more than 40 percent of all arable agricultural land.

State owned agricultural land represents a very valuable asset that provides policy options if the Government wants to engage in an active land policy. State land provides when it is entered into the agricultural rental and sale land markets an excellent opportunity to support development of target groups such as small family farms and young farmers. This often requires that state land is not automatically rented out or sold in auctions to the highest offers. It is also essential for the success of land consolidation projects (see Section 4.1) that the existing state land in the land consolidation project areas is made available for the project, ideally both through re-allotment and privatization.

The state land or parts of it can be an excellent starting point for a land bank (see Section 4.3). FAO has during 2019-2020 provided technical assistance to North Macedonia and Montenegro on improved management and privatization of state owned agricultural land.

## 5. Conclusions and perspective

Small scale family farms dominate the farm structures in most of the 18 FAO programme countries and territories in the Western Balkans, Eastern Europe, Caucasus and Central Asia. In countries such as Albania, Armenia, Bosnia and Herzegovina, Georgia, North Macedonia and Kyrgyzstan the average farm sizes are between one and three hectares and between 95 and 99 percent of all farms are smaller than 5 ha. In addition, fragmentation of both land ownership and land use is excessive in most countries. The small farms are divided into several small and often badly shaped land parcels and have often problems with access to appropriate agricultural infrastructure such as roads, irrigation and drainage.

In addition to these structural problems, which are hampering both the development of agricultural land markets and of agriculture and rural areas in general, formal land markets are constrained from a number of additional issues such as an often large degree of informality, both informal land transactions and unresolved inheritance, where the land registry is not updated. Furthermore, a large list of more 'technical' land registration problems exist in many countries, including inconsistency between the property titles and the reality on the ground.

When the five stage model for development of land markets of Williamson et al. (2010) is applied on the countries in Eastern Europe and Central Asia, it is clear that all countries except Belarus have reached development stage 2 where land rights are established, either in form of private ownership or use rights to state owned agricultural land (Figure 3). In Belarus, agricultural land remains in state property and use.

[38] Hartvigsen 2015.

Two-third of the countries (12) are assessed to be in stage 3, where simple land trading has begun but the sales market for agricultural land is still limited. Land markets in most of the countries in stage 3 are usually characterized by a high degree of informality. So far only five countries, Armenia, Moldova, North Macedonia, Serbia and Turkey are assessed to be in stage 4, the land market stage, and no countries have yet reached stage 5 (complex commodity market) or will do so in the foreseeable future. In these countries, the annual land turnover of private agricultural land has reached a level of 0.5 to 1 percent of the utilized agricultural land. This is still below the market activity in most EU member countries.

We have illustrated that land management instruments such as land consolidation, land banking, mediation of lease and active management of state owned agricultural land can support development of the agricultural land markets. The instruments are applied usually with the objective to reduce land fragmentation and facilitate farm enlargement on a voluntary basis. More consolidated and larger farms are positively contributing to further land market development. In addition, a side-effect of land consolidation is that the land registry is 'cleaned up' from informalities and land registration problems are solved integrated in the land consolidation process.

The active use of land banks, state land and mediation of lease instruments allows for an active land policy, often to develop subsistence or semi-subsistence farms into commercial family farms, the type of farms, which is the backbone of the farm structures in most EU member countries. The increased competitiveness and productivity of farms is the outcome. An active land policy also allows to provide access to land of young farmers. Finally, the discussed land management instruments are also crucial in addressing the problem of land abandonment and in this way strengthening local food production. This is an issue, which has increased in importance during the 2020 COVID-19 pandemic.

## Bibliography

1. CFS (2012) *Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security*, CFS Rome.
2. Deininger K & Nivievskyi O (2019) *Economic and Distributional Impact From Lifting The Farmland Sales Moratorium*, Vox Ukraine.
3. Dale P & Baldwin R (2010) *Lessons learnt from the emerging land markets in Central and Eastern Europe.*
4. FAO (2017) *Policy note on land abandonment and recommendations for policy advice on introduction of a land consolidation instrument in Armenia*, Unpublished project report prepared under GCP/ARM/006/EC.
5. FAO (2018) *Legal assessment of selected issues against the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forestry in the context of National Food Security in Tajikistan,* Unpublished project report.
6. FAO (2019a) *Report on management and sale of state owned agricultural land*, Unpublished project report prepared under TCP/MCD/3701/C1.
7. FAO (2019b) *Discussion paper on the policy response to the land abandonment problem in Armenia through introduction of land banking and land consolidation instruments*, Unpublished discussion paper prepared under TCP/ARM/3701/C1.
8. FAO (2020a) *Smallholders and Family Farms in Europe and Central Asia, Regional Synthesis Report*, Budapest, in: https://doi.org/10.4060/ca9586en [02.10.2020]
9. FAO (2020b) *Smallholders and family farms in Albania.* Country study report 2019, Budapest, in: http://www.fao.org/3/ca7450en/CA7450EN.pdf [02.10.2020]
10. FAO (2020c) *Smallholders and family farms in Kyrgyzstan*. Country study report 2019, Budapest, in: http://www.fao.org/3/ca9826en/CA9826EN.pdf [02.10.2020]
11. FAO (2020d) *Smallholders and family farms in Serbia*, Country study report 2019, Budapest, doi: https://doi.org/10.4060/ca7449en
12. Haldrup N O (2011) *Land registration in developing countries – An introduction*, Lambert Academic Publishing.
13. Hartvigsen M, Gorgan M & Palmer D (2013) Experiences with Land Reform and Land Consolidation in Moldova, *FAO Land Tenure Journal*, 2/2012, in: http://www.fao.org/nr/tenure/land-tenure journal/index.php/LTJ/article/view/59 [02.10.2020]
14. Hartvigsen M (2013a) *Land Reform in Central and Eastern Europe after 1989 and its outcome in form of farm structures and land fragmentation*, FAO Land Tenure Working Paper 24, in: http://www.fao.org/docrep/017/aq097e/aq097e.pdf [02.10.2020]
15. Hartvigsen M (2013b) *Land Reform and land fragmentation in Central and Eastern Europe*, Land Use Policy 36 (2014), 330–341., in: http://www.sciencedirect.com/science/article/pii/S026483771300166X [02.10.2020]
16. Hartvigsen M (2014) Land Mobility in a Central and Eastern European Land Consolidation Context, *Nordic Journal of Surveying and Real Estate Research*, 10(1), 2014, in: http://ojs.tsv.fi/index.php/njs/article/view/41460 [02.10.2020]
17. Hartvigsen M (2015) *Experiences with land consolidation and land banking in Central and Eastern Europe after 1989*, FAO Land Tenure Working Paper 26, in: http://www.fao.org/3/a-i4352e.pdf [02.10.2020]

18. Hartvigsen M (2019) FAO support to land consolidation in Europe and Central Asia during 2002-2018 – Experiences and way forward, *FAO Land Tenure Journal*, 1/2019, in: http://www.fao.org/3/CA3184EN/ca3184en.pdf [02.10.2020]
19. Hartvigsen M, Ismayilov A & Gorgan M (2020) *Development of a land consolidation instrument in the Republic of Azerbaijan*, Paper presented at FIG Working Week in Amsterdam in May 2020.
20. Lerman Z & Sedik D (2018) Transition to smallholder agriculture in Central Asia*, Wiley Journal of Agrarian Change*, 2018/18, pp. 904–912.
21. Swinnen J, Ciaian P & d'Artis K (2008) *Study on the Functioning of Land Markets in the EU Member States under the Influence of Measures Applied under the Common Agricultural Policy,* Centre for European Policy Studies (CEPS).
22. Törhönen M-P (2016) *Keys to Successful Land Administration - Lessons Learned in 20 Years of ECA Land Projects*, World Bank Group.
23. Versinskas T, Vidar M, Hartvigsen M, Mitic Arsova K, van Holst F & Gorgan M (2020) *Legal Guide on Land Consolidation - Based on regulatory practices in Europe*, FAO Legal Guide 3, Rome, doi: https://doi.org/10.4060/ca9520en.
24. Williamson I, Enemark S, Wallace J & Rajabifard A (2010) *Land Administration for Sustainable Development*, ESRI Press Academic, Redlands, California.

# Péter HEGYES* – Csaba VARGA**
# The legal environment of electromobility in Hungary

*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 corm 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 Law[1] 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 XXI[2] 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 apple in Article P). Environment as the object of protected value means natural resources, biodiversity and cultural values,

Péter Hegyes – Csaba Varga: Fundamental Law pillars of sustainable agriculture. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 104-117, https://doi.org/10.21029/JAEL.2020.29.104

* dr. jur., PhD, asssistant professor, University of Szeged, Faculty of Law and Political Sciences, Institute of Business Law, email: hegyes.peter@juris.u-szeged.hu.
** dr. jur., PhD student, University of Szeged, Faculty of Law and Political Sciences, Institute of Business Law, email: csvarga@juris.u-szeged.hu.

[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].

https://doi.org/10.21029/JAEL.2020.29.104

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 Law[19] (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 naturalness[22] 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 Strategy[23] 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 Carpathians[25] 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 2016-2030[27] 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, naturality, 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 os 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 yeast, 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 amendment[29] 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 restricted[31] 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 XIII[37] 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 forest[39] 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 Naura 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 occured – 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 states[63] "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 Directive[67] 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 reserves[69] 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 management[71]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 generations[73] 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 38[76] 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.

## Bibliography

1. Bándi Gy (2017) A visszalépés tilalma és a környezetvédelem, in: Gellén K, Hegyes P & Farkas-Csamangó E (eds.) *Honori et virtuti*, Iurisperitus, Szeged, pp. 9–23.
2. Bándi Gy (2012) Gondolatok a környezethez való jogról, in: Raisz A (ed.) *A nemzetközi környezetjog aktuális kihívásai*, Miskolci Egyetem, Miskolc, pp 6–15.
3. Csák Cs (2019) The protection of aquatic ecosystems, *Agrár- és Környezetjog* 27/2019, pp. 7–38, doi: 10.21029/JAEL.2019.27.7
4. Budapest Energy Summit (2016) *Hogyan áll a hazai fenntartható vízgazdálkodás?*, in: https://nrgreport.com/cikk/2016/11/30/hogy-all-a-hazai-fenntarthato-vizgazdalkodas [03.07.2020]
5. European Commission (2020) *Environment*, in: https://ec.europa.eu/environment/basics/green-economy/water-resources/index_hu.html [10.02.2020]
6. European Environment Agency (2020) *Data centre overview*, in: https://www.eea.europa.eu/themes/water/dc [02.10.2020]
7. Farkas-Csamangó E (2012) A táj, mint vidéki forrás, in: Csák Cs (ed.) *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, Miskolci Egyetem, Miskolc pp. 53–54.
8. Fodor L (2013) *A víz az Alaptörvény környezeti értékrendjében*, Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica, XXXI/2, Miskolc, p. 331.
9. Hegyes P (2011) Cross-border cooperation in the field of the regulation of sustainable forest management, *Agrár- és Környezetjog* 11/2011, pp. 26–49.
10. Horváth G (2013) Az Alaptörvény környezetjogi előírásai, in: Szoboszlai-Kiss K & Deli G (eds.) *Tanulmányok a 70 éves Bihari Mihály tiszteletére*, Universitas-Győr Nonprofit Kft., Győr, pp. 222–234.
11. Magyarország Kormánya (2020) *Nemzeti Erdőstratégia*, in: https://www.kormany.hu/download/a/1a/d0000/Nemzeti_Erdőstratégia.pdf [05.02.2020]
12. Olajos I (2018) The summary of the research on agricultural land as a natural resource, *Agrár- és Környezetjog* 25/2018, pp. 190–212, doi: 10.21029/JAEL.2018.25.190
13. Raisz A (2012) A vízhez való jog egyes aktuális kérdéseiről, in: Csák Cs (ed.) *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, Miskolci Egyetem, Miskolc, pp. 151–159.
14. Szilágyi J E (2019) Systematization and some current issues of water law and water regulation in the framework of the European Union, *Agrár- és Környezetjog* 26/2019, pp. 255–275, doi: 10.21029/JAEL.2019.26.255
15. Szilágyi J E (2019) Water and Law – a summary of the results of a natural resource law research, *Agrár- és Környezetjog* 27/2019, pp. 182–197, doi: 10.21029/JAEL.2019.27.182

16. Vidékfejlesztési Minisztérium (2013) *Nemzeti Vízstratégia a vízgazdálkodásról, öntözésről és aszálykezelésről*, in: https://2010-2014.kormany.hu/download/9/92/11000/NVS%202013%20nov%206.pdf [02.10.2020]

**Artur KUBAJ***

# Legal frame for the succession/transfer of agricultural property between the generations and the acquisition of agricultural property by legal persons – in Poland**

*Abstract*

*The article presents the most important rules concerning the transfer and inheritance of agricultural real estate in Poland, as well as the rules for the acquisition of such real estate by legal persons. In the part concerning the transfer of agricultural property, the methods and principles of acquisition agricultural property (including inheritance) by young farmers are indicated. In particular, the author focused on showing the facilities that favor the generational change in Poland. In the section on the acquisition of agricultural real estate by legal entities, the reader can find information about the conditions for such acquisition by entities from outside Poland. In particular, restrictions have been indicated, and the procedure for acquisition real estate has also been discussed.*
**Keywords:** agricultural property, legal persons, acquisition, succession, transfer, generation change, young farmer, Poland

## 1. The rules of transferring agricultural property between generations

### 1.1. Introduction

Transferring farms between generations is an important element of agricultural land management, because favorable age structure of farm owners is one of the key elements that may affect the competitiveness of agriculture. In Poland, this structure is favorable. Only 8.4% are farmers over 65,[1] while in the EU countries, there are 33%[2] such farmers. However, it should be noted, that despite the financial situation of households in Poland, the average monthly disposable income per capita in the professional group of farmers is still at one of the lowest levels. Moreover, there are also significant disparities at the level of individual countries.[3] The low profitability of the Polish agricultural sector, may significantly reduce the attractiveness of the farmer profession. Increasing the attractiveness of this profession, must therefore be associated with increasing the competitiveness and profitability of agriculture, which in

Artur Kubaj: Legal frame for the succession/transfer of agricultural property between the generations and the acquisition of agricultural property by legal persons – in Poland. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 118-132, https://doi.org/10.21029/JAEL.2020.29.118

* Head of the Agricultural System Structuring Unit, Department of Land Affairs, Ministry of Agriculture and Rural Development, e-mail: arturkubaj@op.pl.
** *The research of this article was supported by the Ferenc Mádl Institute of Comparative Law.*
[1] Poczta 2013, 164.
[2] European Commission 2020.
[3] Ministerstwo Rolnictwa i Rozwoju Wsi 2020, 8.

https://doi.org/10.21029/JAEL.2020.29.118

turn will give farmers financial satisfaction. The attractiveness of agriculture should be related with the attractiveness of rural areas in an integral way. Therefore, efforts to eliminate development disproportions in the urban-rural relationship, should not be limited. The high level of mobility, makes it easier for young and well-educated people to make decisions about changing jobs. Therefore farmers should be ensured, that their hard work is adequately rewarded and that living conditions in rural areas are comfortable. Access to good quality basic public services in rural areas is certainly an argument for young people to enter and to stay in agriculture and rural areas. Agriculture is characterized by high capital intensity, therefore, apart from barriers related to the access to agricultural land, also the cost of farm technical equipment constitutes a huge financial effort. Support for the farms modernization is therefore an indispensable element, and in the case of a young farmer, who starts farming for the first time, it should be correspondingly higher.

It should also not be forgotten, that agriculture varies greatly among Member States. Support from the Common Agricultural Policy is necessary to increase the attractiveness of agriculture and rural areas in individual countries and regions, while the effectiveness of this support will depend on the appropriate adjustment of the scope of support to the needs of a given region. Maintaining the Community approach, the Member States should have a certain freedom in shaping this support, e.g. by defining the group of recipients of support.

### 1.2. Inter vivos transfer of agricultural property

#### 1.2.1. Types of contracts leading to a generational change in agriculture

In the Polish legal system, inter vivos transfer of ownership of an agricultural holding means, in principle, the transfer of ownership of agricultural property that is part of the holding. A farm in civil law turnover is a collection of things (universitas rerum). The transfer of the farm inter vivos is therefore synonymous with the transfer of agricultural property (which is part of this farm). On the other hand, an 'agricultural holding,' may be acquired according to the regulations of Act of 20 December, 1990 on the social insurance of farmers, Journal of Laws of 2020, item 174, as amended, hereinafter: 'Act on the social insurance of farmers'[4] and Act of 23 April, 1964 - Civil Code, Journal of Laws of 2019, item 1145, as amended, hereinafter: 'Civil Code.'[5]

In Poland, there are four ways in which a farmer can transfer his agricultural property to the younger generation: (1) a contract of sale, (2) a contract of donation, (3) a contract of annuity, (4) a contract with a successor.

The contract of sale, is an agreement regulated in the Civil Code[6]. By the contract of sale, the seller shall assume the obligation to transfer to the buyer the ownership of a thing and to release the thing to him, while the buyer shall assume the obligation to collect the thing and to pay the seller the price.

[4] Act on the social insurance of farmers, Art. 84.
[5] Civil Code, Art. 981 and 1058.
[6] Ibid. Art. 535.

Detailed regulations, regarding the sale of property, when it is agricultural, can be found in the Act of 11 April, 2003 on the shaping of the agricultural system, Journal of Laws of 2020, item 1655, hereinafter: 'Act on the shaping.' Agricultural property, can be purchased, by any Polish and foreign natural person (from the EU and outside the EU), under a number of requirements. These requirements apply to agricultural properties with an area of 1 ha and more. Other properties, not covered by the requirements, are properties that: are not part of the State Treasury's Agricultural Property Stock, are not internal roads, have not been sold to former tenants in a special procedure (Act of 19 October, 1991 on the management of agricultural property of the State Treasury, Journal of Laws of 2020, item 396, as amended, hereinafter 'Act on management,'[7]and which are covered with ponds in less than 70%).

The most important limitation in the acquisition of such property by a natural person, is that the buyer should be a person who: (1) holds agricultural qualifications, (2) is an owner, holder of perpetual usufruct, owner-like possessor or lessee of agricultural properties with a total utilised area not exceeding 300 ha, (3) has resided for at least 5 years in a municipality where one of the agricultural properties is situated, (4) manages the farm personally for this period (5 years). A farm – should be understood as agricultural land if it constitutes (or may constitute) an organized economic unit – in which the area of the agricultural property is not less than 1 ha. A person who meets these requirements, is called an individual farmer.[8]

Exempt from the obligation to meet these requirements, includes seller's relatives. Relatives should be understood as descendants, ascendants, siblings, children of siblings, siblings of parents, spouse, adoptive and adopted persons and stepchildren.[9] Undoubtedly, such an exemption has a positive effect (i.e. facilitates, due to the lack of the need to meet the above-mentioned requirements related to the purchase of property), the transfer of real estate to younger persons who are members of the seller's family. Other buyers exempt from these requirements are for example: local government units, the State Treasury, the Church and religious associations (including Catholic, Orthodox, Jewish religious communities).[10]

Other natural persons (i.e. those who do not meet the requirements and are not exempt from these requirements) must obtain the consent of the General Director of the National Center for Agricultural Support (hereinafter: the Government Agency), issued in the form of an administrative decision. In the first half of 2020, 4.293 such decisions were issued. Most of them (3.977) were positive.[11] There are two procedures the buyer can choose to obtain consent. In the first one, the seller submits an application for sale, in which he should prove that: (1) it was not possible to sell to an individual farmer, (2) the buyer undertakes to conduct agricultural activity on the acquired agricultural property, (3) as a result of the acquisition, there shall be no

[7] Act on the management, Art. 42 sec. 1 and 6.
[8] Act on the shaping, Art. 6.
[9] Ibid. Art. 2 point 6.
[10] Ibid. Art. 2a sec. 3.
[11] KOWR (2020), 2.

excessive concentration of agricultural land.[12] According to the second procedure, such consent may be obtained if buyer: (1) has an agricultural qualifications, (2) undertakes to conduct agricultural activity on the acquired agricultural property, (3) undertakes to reside for a period of 5 years, from the date of acquiring the agricultural property, in in the area of the municipality in which one of the agricultural property that will be part of his farm is situated.[13] Of these two procedures, natural persons can use both procedures, while legal persons can apply for consent only under the rules of the first procedure.

When purchasing an agricultural property under a sale contract, the State Treasury has a pre-emption right. However, it does not serve when the pre-emptive right is used by the leaseholder of this real estate who meets the requirements (e.g. he has agricultural qualifications), his farm is not larger than 300 ha, and also when the agricultural real estate has an area of less than 0.3 ha.[14]

A natural person, after purchasing an agricultural property under a contract of sale, has significant limitations: (1) it is obliged to manage the agricultural holding that the agricultural property became the part of, for a period of at least 5 years; (2) for 5 years, it cannot sell acquired property or even give it to other entities. The obligation to manage a farm (limitation no. 1 in particular exempts those buyers, who purchased real estate as a seller's relatives. The ban on the dispose of real estate (limitation no. 2 does not apply, inter alia, to situations where the buyer disposes of it or gives it to his relative. Neither of these two restrictions, however, applies to those acquired properties that have an area of less than 0.3 ha, as well as those located in the city with an area of less than 1 ha. The five-year ban on the dispose of real estate, may be excluded after the acquisition, if Government Agency approves it. The consent to sell before the expiry of 5 years is granted by way of an administrative decision, in cases justified by the important interest of the purchaser of the agricultural property or the public interest.[15]

Another method of acquiring real estate, which may be applied in the case of a generational change in agriculture, is a contract of donation. This contract is also regulated in the Civil Code.[16] By a contract of donation, the donor shall assume the obligation to make a gratuitous performance for the benefit of the donee at the expense of his property. As in the case of a sales contract, additional, important regulations are included in the Act on the shaping. Under these additional regulations, if an agricultural property has an area of larger than 1 ha, the buyer must meet the same requirements as the buyer under the contract of sale (e.g. must have agricultural qualifications) or obtain the consent. The only difference is when applying for consent, donor do not have to show that it was not possible to sell property to individual farmer. The same circumstances, as in the case of the sales contract, result in the lack of the necessity to meet the requirements (e.g. when the donee is donor's relative).

[12] See Judgement of Voivodship Administrative Court in Warsaw of 27 August, 2019 no. IV SA/Wa 2728/18.
[13] Act on the shaping, Art. 2a sec. 4 points 1–3.
[14] Ibid. Art. 3.
[15] Ibid. Art. 1a and 2b.
[16] Civil Code, Art. 888.

In the case of a donation contract, the State Treasury has no pre-emptive right (as in the case of a contract of sale), but the State Treasury has the right to acquire property for a price agreed by the parties to the donation contract.[17] This right does not apply when the following circumstances occur jointly: (1) the donated property will enlarge the farm of the farmer who meets the mentioned requirements (e.g. he has agricultural qualifications), (2) the property is located in the municipality of residence (or the neighboring municipality) of the donee. Moreover, the State Treasury does not have this right, when the donee is donor's relative.

The third type of real estate acquisition, that can be used by farmers who want to transfer their property to the younger generation, is a contract of annuity. It is regulated in the Civil Code: "If, in exchange for the transfer of the ownership of an immovable property, the acquirer has assumed the obligation to provide the transferor with means of subsistence for life (…), he shall, barring a contract to the contrary, accept the transferor as a member of his household and provide him with food, clothing, accommodation, light and fuel, ensure him the proper help and care in illness, and give him, at his own expense, a funeral in accordance with the local customs."[18] Additional regulations, as in the previous types of contracts, can be found in the Act on the shaping. The requirements, obligations and the right to acquire, are the same as for the donation agreement mentioned above.

The contract with the successor is the last of the presented contracts, which allows to transfer an agricultural property to younger farmers. It is an agreement designed to encourage aging farmers to transfer their agricultural property to a younger generation. It is regulated in the Act on the social insurance of farmers. By an agreement with a successor, a farmer who is the owner (co-owner) of a farm, undertakes to transfer to a person younger than him by at least 15 years (successor) the ownership (share in joint ownership) and possession of the farm upon acquiring the right to a retirement pension or invalidity pension, if the successor will be working on this farm till then. The contract with the successor may contain other provisions, in particular concerning mutual benefits of the parties[19]. Special provisions relating to this contract – like all those relating to agricultural property – can be found in the Act on the shaping. In relation to this contract, the same rules apply as the acquisition under the donation and annuity contract - with one difference: the right of the State Treasury to acquire property is excluded.

However, contracts with the successor are not concluded very often in Poland. It is caused by the lack of understanding of it by farmers and legal problems related to the overlapping (duplication) of some of its regulations with the provisions of the Civil Code. Significantly more often, farmers who want to donate their agricultural property to their children, choose a donation or annuity contract. In the case they want to sell their property to the younger generation, but outside the family – farmers choose a contract of sale.

[17] Act on the shaping, Art. 4.
[18] Civil Code, Art. 908.
[19] Act on the social insurance of farmers, Art. 84.

### 1.2.2. The influence of the transfer of agricultural property on the lease

The sale of agricultural property under the agreements discussed above, often takes place during the lease. In such a situation, first of all, in the case of a contract of sale, the lessee has a pre-emption right[20]. He is entitled to it, if he meets the requirements (i.a. he has agricultural qualifications) and his farm is not larger than 300 ha). Moreover, in each case, the buyer enters into a lease - he becomes the lessor. However, in a situation where the real estate is sold to a relative, the lease agreement may continue. The buyer from the seller's family is not obliged to cultivate the acquired property. However, if the sale is made to a natural person outside the family, the buyer has (inter alia) obligation to personally manages the farm, which includes the acquired property. This means that the current lessee, can no longer use the property. The lease agreement should therefore be terminated, in order to allow the new owner (from outside the seller's family) to fulfill his obligation to cultivate the acquired property for 5 years.

### 1.2.3. Impact of the transfer of agricultural property on the seller's retirement

Pursuant to the provisions of the Act on social insurance of farmers,[21] the agricultural retirement pension is granted to an insured person who meets all of the following conditions: (1) has reached retirement age; the retirement age for women is 60 and for men 65; (2) has been subject to retirement and disability pension insurance for a period of at least 25 years. However, the amount of the pension is partially suspended until the end of agricultural activity (the suspended part may even constitute 95% of the full pension).[22] The cessation of activities can be achieved, among others, by selling properties to younger farmers under the agreements discussed above. Such a structure is aimed, on the one hand, at encouraging farmers of retirement age to sell their property, and, on the other hand, at discouraging their purchase by other farmers who are also of retirement age. As a result, these properties are sold to younger farmers.

## 1.3. Inheritance of agricultural property/farms in Poland

In agriculture, generational change also takes place through mortis causa ordinances. In Poland, there are basically no separate regulations that would regulate the inheritance of agricultural property/farms in a different way than other (non-agricultural) property. Until 2001, such regulations did exist in the Civil Code (they specified the requirements for a heir), but were found by the Constitutional Tribunal to infringe, among others, the principle of equality set out in the Constitution of the Republic of Poland.[23]

[20] Act on the shaping, Art. 3.
[21] Act on social insurance of farmers, Art. 19 sec. 1.
[22] Ibid. Art. 28.
[23] See Judgement of the Constitutional Tribunal of 31 January, 2001 No. P. 4/99.

Currently, the regulations concerning agricultural properties/farms also exist in the Civil Code, but they are applied only to inheritances opened before February 14, 2001. Currently, the only regulations distinguishing the position of heirs, can be considered the provisions of the Act on the shaping, which (in a specific factual and legal state) give Government Agency the right to acquire agricultural property from in the inheritance mass of the deceased owner[24]. It applies only to the situation, where the inheritance takes place on the basis of a will, and the heir indicated by the testator is a person out from the family (i.e. he is not a relative), who does not meet the requirements. The purpose of this regulation is to protect family farms and ensure proper management and proper management of agricultural land.

### 1.4. Facilitations for young farmers

#### 1.4.1. Facilitations in the field of taxation

Many young farmers acquire their first agricultural land by inheriting from their family members. Thus, an important incentive for such people to continue running a farm on inherited land, are tax remissions, obtained under the condition of starting agricultural activity.

According to the Act of 28 July, 1983 on inheritance and donation tax, Journal of Laws of 2019, item 1813 as amended,[25] hereinafter 'Act on inheritance,' acquisition by inheritance by natural persons properties located in Poland, thus also agricultural property, is in usual situations subject to inheritance tax. However, according to Art. 4 sec. 1 point 1 of the Act on inheritance, the acquisition of agricultural land, is tax-free, in a situation where, as a result of the acquisition, a farm is created or enlarged, and the area of the farm created or resulting from the extension will not be less than 11 ha and not more than 300 ha and the farm will be managed by the successor for a period of at least 5 years.

Another tax relief, for the young generation of farmers, is in the Act of 26 July, 1991 on personal income tax Journal of Laws of 2020, item 1426, as amended[26], hereinafter: 'the PIT Act.' The provisions of the PIT Act (and therefore the taxes resulting from it) do not apply to revenues from agricultural activities (except revenues from special departments of agricultural production and revenues from forest management).

Further exemptions, that can be used by young farmers, include the provisions of the Act of 15 November, 1984 on agricultural tax Journal of Laws of 2020, item 333. In their light, land intended for the creation of a new farm (or extension of an existing farm) to an area not exceeding 100 ha, is exempt from agricultural tax for 5 years.

Moreover, according to the provisions of the Act of 9 September, 2000 on tax on civil law transactions Journal of Laws of 2020, item 815, as amended, the sale of land constituting a farm is tax-free, in a situation where, as a result of the acquisition:

[24] Act on the shaping, Art. 4.
[25] Act on inheritance, Art. 1 sec. 1 point 1.
[26] PIT Act, Art. 2 sec.1 points 1 and 2.

a farm is created or enlarged, the area of this farm will not be less than 11 ha and not more than 300 ha and the farm will be managed by the buyer for a period of at least 5 years from the date of purchase.

### 1.4.2. Facilitations related to financial support

#### 1.4.2.1. Informing

The European Union obliges the Managing Authority for the Rural Development Program (RDP) 2014-2020 to inform the public, recipients of activities and all interested parties that the projects co-financed by the European Agricultural Fund for Rural Development (EAFRD) could be implemented thanks to financial aid.[27] This obligation also applies to the support instrument for young farmers. Provision of advertising and promotion RDP 2014-2020, is implemented through the RDP Communication Strategy 2014-2020.[28] Conducted communication allows to implement certain goals in the Program, for example by effectively informing about the possibilities offered by the Program and presenting its effects. Information and promotion activities are matched to target groups and their needs. Full information on the implemented activities of the Program, including activities supporting young farmers, is available on the website of the Ministry of Agriculture and Rural Development, as well as on the website of the paying agency, i.e. the Agency for Restructuring and Modernization of Agriculture. In addition, a number of information activities are implemented, such as programs, news and spots broadcast on television and broadcasts on radio stations, informing about the possibility of using individual support instruments offered under RDP 2014-2020. Due to the increasing access to the Internet, there are also activities which publish information on the possibility of using support for young farmers via social media (mainly Facebook and Twitter) and on specialized internet portals. Some of these activities were dedicated (in whole or in part), to the young farmers – and thus, the generational change that takes place thanks to the support in rural areas. The RDP 2014-2020 information policy, including in the field of support for young farmers, results in a large number of applications submitted for support from RDP 2014-2020 by potential beneficiaries.

[27] Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December, 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, Official Journal of the European Union L 347/487, Art. 66 sec. 1, lit. c and i.

[28] Prepared in accordance with the provisions of the Commission Implementing Regulation (EU) No 808/2014 of 17 July, 2014 laying down rules for the application of Regulation (EU) No 1305/2013 of the European Parliament and of the Council on support for rural development by the EAFRD, Official Journal of the European Union L 227/18.

### 1.4.2.2. Financial programs supporting the transfer of farms to young farmers in order to encourage them to a generational change

Payments to young farmers in the first pillar of the Common Agricultural Policy (CAP). The payment for young farmers in the first pillar of the CAP, is intended to facilitate the establishment of farms by young people and their structural adjustment after the start of their activity. This support is also intended to contribute to maintaining the vitality of rural areas by preventing land abandonment and depopulation of rural areas, and to maintain generational replacement in the countryside. Payment for young farmers, is granted in Poland to the area of land covered by the single area payment not exceeding 50 ha. Since the introduction of payments in 2015, the number of applicants for this support has been systematically growing: from 95.4 thousand in 2015 to approx. 162 thousand in the 2019 campaign. The area reported for support is also growing every year: from approx. 1.1 million ha in 2015 to approx. 1.8 million ha in 2019. The total amount of support under this instrument is on average approx. EUR 68 million per year, which is approx. 2% of the financial envelope. The amount of the payment rate is determined as a value between 25% and 50% of the national average payment per hectare. In the 2019 campaign, the payment rate is approximately EUR 37.7/ha.[29]

Bank loan principal repayment. According to Polish regulations,[30] there is possibility of granting partial aid repayment of the capital of a bank loan intended to finance part of the costs of purchasing agricultural land by young farmers in order to create or enlarge a farm, under the special conditions.[31] The total amount of aid in the form of a partial repayment of capital may not exceed 60% of the amount of the bank loan granted and may not be higher than the PLN equivalent of PLN 20.000 euro (converted according to the average exchange rate of the National Bank of Poland established on the day of granting the aid).

Support for farmers under existing rural development programs. In Poland, since 2004, young farmers have been supported by appropriate support instruments under following programs: Sectoral Operational Program 'Restructuring and modernization of the food sector and rural development 2004-2006' (SOP), Rural Development Program for 2007-2013 (RDP) 2007-2013) and the Rural Development Program for 2014-2020 (RDP 2014-2020). One of the main goals of each of the above-mentioned programs, is to improve the competitiveness of the agricultural sector, while support for young farmers is to serve this purpose through generational replacement in agriculture.

[29] Ministerstwo Rolnictwa i Rozwoju Wsi 2019, 3.
[30] Regulation of the Council of Ministers of 27 January, 2015 on the detailed scope and methods of implementing certain tasks of the Agency for Restructuring and Modernization of Agriculture, Journal of Laws of 2015, item 187, as amended, § 3.
[31] Commission Regulation (EU) No 702/2014 of 25 June, 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, Official Journal of the European Union L 193/1, Art. 18.

It is important for the competitiveness of the Polish agricultural sector to maintain a favorable age structure in the agricultural population. Young farmers are better educated and have greater tendency to introduce new solutions and innovations. For these reasons, they determine the development of the agricultural sector. This means, that this kind of support is of great importance. The instrument supporting young farmers starting agricultural activity under RDP 2014-2020 is the sub-measure 'Assistance in starting business activity for young farmers,' operation type 'Bonuses for young farmers.' The support concerns the development of agricultural activity on a farm in terms of plant or livestock production, as well as preparation for sale of agricultural products produced on the farm, by a young farmer, i.e. a person who starts running a farm for the first time as the sole farm manager, is no more than 40 years old and has appropriate professional qualifications (resulting from education or work experience in agriculture) or will undertake to complete professional qualifications (education) within three years from the date of notification of the decision on granting aid. The start of agricultural activity on a farm should take place not earlier than 24 months before the date of submitting the application for aid and begins on the day when the person applying for the aid becomes the owner or takes possession of a farm with an area of at least 1 ha of agricultural land. The aid in the amount of PLN 150.000 is paid in two installments: 1st installment – 80% of the aid amount (within 9 months from the date of delivery of the decision on granting aid); 2nd installment – 20% of the aid amount (after the business plan is properly implemented). The applicant presents a business plan for the development of the farm in terms of agricultural activity or preparation for sale of agricultural products produced on the farm. The business plan should be implemented within 3 years from the date of payment of the first installment of aid. It is possible to extend the implementation of the business plan to a maximum of 4 years. A farm indicated in the business plan: (1) has an area of agricultural land equal to at least the national average; (2) at least 70% of the minimum size referred to in the point above (basic part of the holding) is owned by the beneficiary; (3) has an economic size of not less than 13,000 euro and no more than 150 thousand euro. As a result of the implementation of the business plan, it is necessary to document the increase in the economic size of the farm by at least 10% in relation to the baseline value. The beneficiary also undertakes to: (1) conduct business activity as a manager at least until 5 years from the date of payment of the 1st installment of aid; (2) to be a subject of social insurance for farmers, by a period of at least 12 months; (3) keeping simplified accounting on the farm. The head of an agricultural holding conducts business activity on an agricultural holding personally (he works on this holding and makes all decisions concerning the holding), on his own account and on his own behalf, bears costs and benefits in connection with its running.[32]

[32] Act of February 20, 2015 on supporting rural development with the participation of the European Agricultural Fund for Rural Development under the Rural Development Program for 2014-2020, Journal of Laws of 2020, item 1371.

#### 1.4.2.3. Facilitation of real estate acquisition

Facilitations for young farmers in the field of real estate trading on the private market have already been mentioned above in Chapter 1.2. ('Inter vivos transfer of agricultural property'). The most important of the facilitation indicated there, supporting the generational change in agriculture, was the release from the requirements and obligations, in a situation where the buyer is the seller's relative.

However, it is also possible to purchase property from the State Treasury. The issues related to the acquisition of such land are regulated by the Act on the management. In order to sell the land, Government Agency organizes auctions, in the first place, for the individual farmers. It should be noted, however, that in that auctions may also participate persons who, in order to recognize them as an individual farmer, they do not meet only the requirement for a 5-year period of personal farming, if these persons are not more than 40 years old[33] (the so-called 'young farmers').

## 2. The rules of purchasing agricultural property by legal persons

### 2.1. Introduction

The most important regulations concerning the acquisition of agricultural property by legal persons can be found in the Act of 24 March, 1920 on real estate acquisition by foreigners, Journal of Laws of 2017, item 2278, and the Act on the shaping.

### 2.2. Acquisition of agricultural property by Polish legal entities and from other EU countries as well as Iceland, Norway, Liechtenstein and Switzerland

Legal persons, due to the fact that by their nature they cannot meet the requirements for a preferred purchaser of agricultural property (i.e. they cannot have agricultural qualifications), are forced to apply for the consent of the Government Agency. In order to obtain such consent, the seller submits an application for sale, in which he should prove that: (1) it was not possible to sell to individual farmer, (2) the buyer undertakes to conduct agricultural activity on this property (3) there will be no excessive concentration of agricultural land.

Showing, that it was not possible to sell to an individual farmer, is as follows. First, the seller should post an advertisement on a website specially created for this purpose. Such an advertisement should include: (a) the designation of the agricultural property being sold, including data from the land and building records regarding its designation, area, valuation class and type of agricultural land, and the land and mortgage register number or a set of documents kept for this property; (b) description of the buildings and other property components included in the sold agricultural property; (c) information on the intended use of the agricultural property sold in the local spatial development plan, in the local revitalization plan, in the local reconstruction plan, and in the absence of a local plan – information on the location of

[33] Ibid. Art. 3 sec. 1 point 6 lit. a.

the public purpose investment determined in the final decision on the location of the public purpose investment, information on the manner of development the area and development conditions specified in the final decision on development conditions; in the absence of a final decision on the conditions of development and land development – information on the findings of the study of conditions and directions of spatial development of the commune; (d) the price of agricultural real estate; (e) the time limit for submitting a reply to an agricultural property advertisement, which may not be less than 30 days from the date of its publication. The condition of the impossibility of sale will be met when: (a) no individual farmer submits a response to the advertisement and (b) the price of agricultural property, which is not built-up or without plantings, specified in the advertisement of agricultural property, does not exceed by 50% or more the average price of agricultural land for a given valuation class of land in in a given voivodeship for the quarter preceding the date of reporting the average price of agricultural land by the Central Statistical Office (unless the seller of the agricultural property has an appraisal report which shows that the price of the agricultural property offered by his property is actually so high). As far as the lack of response to the advertisement is concerned, apart from its complete lack, it is considered that the reply to the advertisement about an agricultural property was not submitted also in the case when: (1) the price of the agricultural property proposed in response was over 5% lower than that specified in the advertisement and was not accepted by the seller or (2) has been submitted after the deadline. The response to the advertisement should contain at least: (a) the proposed purchase price of an agricultural property, (b) the name and surname of an individual farmer who intends to buy an agricultural property, together with an address, (c) a statement that he is an individual farmer. (There are also regulations preventing bogus advertisements. Both – the seller, who would place the advertisement without the intention to conclude a contract of sale, and the entity that would submit a response to the advertisement about agricultural real estate without the intention to conclude a contract, are obliged to repair any damage caused by their apparent actions). After completing the procedure related to the advertisement, the seller of the property has 6 months (from the expiry of the advertisement validity) to submit the application for consent to the sale the property.

The second condition, i.e. concerning agricultural activity, will be met, if the person representing the legal person submits a declaration in which he undertakes to conduct such activity.

The third condition will be met if there is no 'excessive concentration' of agricultural land on the buyer side after the transaction. Agricultural land is: arable land, orchards, permanent meadows, permanent pastures, built-up agricultural land, land under ponds and land under ditches.

After obtaining the consent, the legal person will have obligations: (1) for 5 years manage a farm which includes the acquired property; (2) for 5 years, it cannot sell it or even give it to other entities. However, in cases justified by the important interest of the purchaser of agricultural real estate or the public interest, Government Agency may consent to the earlier disposal (i.e. before the 5-year period expires).

### 2.3. Acquisition of agricultural real estate by legal entities other than the EU countries, Iceland, Norway, Liechtenstein and Switzerland

Legal persons from out of the EU countries, Iceland, Norway, Liechtenstein and Switzerland, are: (1) a legal person established in a country other than the EU, Iceland, Norway and Liechtenstein and Switzerland; (2) a company without legal personality, which has its registered office abroad, established in accordance with the legislation of foreign countries, belonging to a natural person without citizenship of one of the EU countries, Iceland, Norway, Liechtenstein or Switzerland or a legal person established outside these countries; (3) legal person and commercial company without legal personality, established in the territory of Poland, but controlled directly or indirectly by the persons or companies mentioned earlier (in points 1 and 2). Controlling the company means that a legal or natural person from out of the above-mentioned countries, holds directly or indirectly more than 50% of votes at the shareholders' meeting or general meeting or has a dominant position. The company has a dominant position when: (a) it is entitled to appoint or dismiss the majority of members of the management board of another capital company (subsidiary) or (b) is entitled to appoint or remove the majority of members of the supervisory board of another capital company (subsidiary) or (c) holds directly or indirectly a majority of votes in the subsidiary.

The rules for the acquisition of agricultural property by legal entities from out of the EU, as well as Iceland, Norway and Liechtenstein and Switzerland are the same as for legal entities from EU countries, as well as Iceland, Norway and Liechtenstein and Switzerland – with one difference. Namely, it is the obligation to obtain the permit of the Minister of the Interior. This document is issued, by way of an administrative decision, by the minister responsible for internal affairs, unless the Minister of National Defense and the Minister of Agriculture and Rural Development raise an objection. Such objection is expressed by way of a decision within 14 days from the date of delivery of the application by the minister competent for internal affairs (in particularly justified cases, it may be extended to 2 months). A permit is issued to a legal person if: (1) the acquisition of property does not endanger the defense, state security or public order, and is not opposed by social policy and public health considerations; (2) there are circumstances confirming ties with Poland. The circumstances confirming the ties of a legal person with Poland may include, in particular, the performance of economic or agricultural activities in the territory of Poland, in accordance with the provisions of Polish law. Such an application must contain (1) designation of the applicant and its legal status; (2) designation of the property being purchased; (3) name of the transferor; (4) specification of the legal form of property acquisition; (5) information about the purpose and possibility of acquiring property. A legal person should attach to the application documents confirming its relationship with Poland. The area of property, should be justified by actual needs resulting from the nature of the economic activity performed. Before issuing a permit, the Minister of the Interior may: (1) request the presentation of evidence and information necessary to consider the application; (2) verify (also with the help of the competent government administration bodies), that the transaction will not endanger the defense, state security or public order, and whether it will be in the interest of the state.

The permit may specify special conditions for the acquiring legal entity, the fulfillment of which will depend on the possibility of its acquisition.

## 3. End

The above rules for real estate transactions, both within the generational change and among legal entities, take into account the Commission's interpretative communication on the acquisition of agricultural land and European Union law.[34] According to it, the EU Treaties allow for the introduction of restrictions on foreign investment in agricultural land when they are proportionate, aim to protect the legitimate public interest (including limiting excessive land speculation), but at the same time these regulations cannot discriminate against citizens of other EU countries due to nationality. On the one hand, the discussed provisions very well protect agricultural properties against their speculative purchase at the expense of family farms, and on the other hand, they comply with the principle of proportionality, protect the legitimate public interest and do not discriminate buyers on the basis of nationality.

[34] European Commission 2017, 5.

## Bibliography

1. European Commission (2017) *Commission interpretative communication on the law on the acquisition of agricultural land and European Union law,* in: https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=OJ:C:2017:350:FULL&from=EN [07.10.2020]
2. European Commission (2020) *Young people in farming, in:* https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/young-farmers_en [07.10.2020]
3. Krajowy Ośrodek Wsparcia Rolnictwa (2020), *Zbiorcze Sprawozdanie okresowe z działalności KOWR w okresie od 01.01-30.06.2020*, Warsaw.
4. Ministerstwo Rolnictwa i Rozwoju Wsi (2019), *Materiał dla Ambasady Węgier w Polsce na temat wymiany pokoleniowej w rolnictwie*, Warsaw.
5. Ministerstwo Rolnictwa i Rozwoju Wsi (2020), *Diagnoza sektora rolno-spożywczego i obszarów wiejskich w Polsce przygotowana dla potrzeb opracowania Planu Strategicznego Wspólnej Polityki Rolnej na lata 2021-2027*, Warsaw.
6. Poczta W ed. (2013) *Gospodarstwa rolne w Polsce na tle gospodarstw Unii Europejskiej – wpływ WPR*, Zakład Wydawnictw Statystycznych, Warsaw.

**György MARINKÁS***

# The Right to a Healthy Environment as a Basic Human Right – Possible Approaches Based on the Practice of the Human Rights Mechanisms, with Special Regard to the Issues of Indigenous Peoples

*Abstract*

*The aim of the author is to examine the nexus between the development of the indigenous peoples' rights – which came like a blast – and the prevalence of the right to a healthy environment. As another goal, the author aims to reveal how the protection of indigenous peoples' rights can facilitate the realisation of environmental protection and sustainable development goals. In order to achieve his goals, the author – after clarifying the definitions in the first chapter – introduces the indigenous peoples and healthy environment related practice of the three regional human rights protection mechanisms – namely the European, the Inter-American and the African – in the second chapter. In the third chapter, the author briefly introduces those rights of the indigenous peoples, which could serve the protection of indigenous peoples' rights and the positive and negative examples. The author draws his conclusions in the last chapter.*

**Keywords:** healthy environment, basic human right, human rights mechanisms, indigenous peoples

## 1. Grounding

The eve of the international environmental law dates back to the 1972 Stockholm Declaration, which was the first to stipulate that "Man 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 […]"[1] At the same time, the declaration stipulated the duty of man to protect and improve the environment for future generations. The above quote verifies the statement that the right to healthy environment stems from the connection of human rights and the environment protection.[2] This nexus was emphasized by judge Christopher G. Weeramantry in his

György Marinkás: The Right to a Healthy Environment as a Basic Human Right – Possible Approaches Based on the Practice of the Human Rights Mechanisms, with Special Regard to the Issues of Indigenous Peoples – Az egészséges környezethez való jog, mint alapvető emberi jog - Lehetséges megközelítések az egyes emberi jogvédelmi mechanizmusok gyakorlata alapján, különös tekintettel az őslakos népeket érintő kérdésekre. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 133-170, https://doi.org/10.21029/JAEL.2020.29.133

* dr. jur., PhD, researcher, Ferenc Mádl Institute of Comparative Law, e-mail: gyorgy.marinkas @mfi.gov.hu.

[1] Stockholm Declaration (16 June 1972), Principle 1.

[2] Hermann 2016a, 39.



https://doi.org/10.21029/JAEL.2020.29.133

dissenting opinion[3] annexed the judgement[4] brought by the International Court of Justice (hereafter: ICJ) in the Gabčíkovo-Nagymaros Project.[5] He argued that: "The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself." Weeramantry's other conclusion that is worth highlighting is that the traditional legal system consisted the concept of sustainable development, without stipulating it expressis verbis.[6] – This conclusion is verified by the practice of the Strasbourg, the Inter-American and the African Court.

When discussing the topic, the basic theoretical question is, whether the preceding anthropocentric or the recent ecocentric approach is more expedient.[7] Answering this question is not easy at all, since the human rights mechanisms[8] feature significant differences in their respective practices.

The anthropocentric approach can be regarded as the classic appreciation of the right to a healthy environment, which does not classify the right to a healthy environment as an individual human right. Instead, it protects the environment by 'greening' the already existing civil and political rights, and by utilising these rights and the institutions created in order to protect them. Since this approach does not recognise the right to healthy environment as a sui generis human right, it cannot exist as a subjective right and its existence as a collective right is also excluded. Whereas, the ecocentric approach treats the right to healthy environment as a solidarity right, the subject of which is the collective and not the individual. The point of origin of this perception is that the environment is the precondition of life on the Earth, thus a value, which worth protection per se. Moreover, it perceives the protection of the environment as a precondition of protecting human rights. As a consequence environment protection goals may prevail over human rights.[9] – As it is to be introduced in the next part, several human rights mechanism realised the above mentioned interrelatedness of human rights and environment protection.

The task to be solved is harmonizing the two approaches in a way that enables to facilitate the adventages of both. That is to say, the anthropocentric approach – due to its minimalistic attitude – does not allow to make the best of this right. The ecocentric approach – although its goals are desirable – does not fit in the classic system of human rights. As Veronika Hermann argues the desirable goal is to find a system, which considers the environment as a value worth the protection, but by the end of the day

[3] The dissenting opinion of judge Christopher G. Weeramantry in the Gabčíkovo-Nagymaros case, 91–92.
[4] ICJ, Gabčíkovo-Nagymaros case, judgement, 15 September 1997.
[5] For a detailed analysis of the case see: Raisz & Szilágyi, 2017.
[6] Bándi 2013, 69.
[7] Hermann 2016b, 26.
[8] Although the recent research does not cover the environmental law of the EU, it is worth mentioning that the EU's approach is anthropocentric, that is to say it regards the protection of human life and health as the ultimate goal. In spite of all, the environment protection law of the EU is one of the most developed and most innovative. Still, the question, whether the EU can roll over the anthropocentric approach remains unanswered. See: Alblas 2017; see furthermore: Pikramenou, Nikoletta, Rights of Nature: Time to Shift the Paradigm in the EU?
[9] Hermann 2016b, 5.

lets the human interest prevail. Herman resolves this conflict by approaching human rights from the aspect of human needs. As she argues, every human right can be equated with one or two human needs, just like every human need can be expressed with one or two human rights. The special subjects of human rights can be rendered as needs. Is the right to a healthy environment can be considered as a human right based on the above logic? – Asks Hermann. – The right to a healthy environment expresses a need for an environment, which provides food, [10] water, air and space of living that is not detrimental to health. It is evident that if the individual lives in an environment, where he/she is not capable to acquire healthy water and/or food or the air is polluted to such a degree that it jeopardises his/her health that cannot be reconciled with human dignity. That is to say, the general objective of the right to a healthy environment is to protect human dignity, while its special objective is to protect the environment.[11] As Hermann concludes her flow of thoughts.

The intergenerational equity has to be mentioned among the fundamental conceptions. Intergenerational equity demands every generation to pass the environment in a condition as that given generation received it. As judge Pinto de Albuquerque argued in one of his dissenting opinions from 2012 the prevalence of intergenerational equity is a precondition of realising sustainable development.[12] On the other hand, there is a precondition of the intergenerational equity as well: its prevalence postulates the prevalence of intragenerational equity. As Veronika Greksza argues, the fulfilment of the preceding one cannot be expected from a generation that cannot satisfy the needs of its own members.[13]

## 2. A Summary of the Practices of the Regional Human Rights Mechanisms

### 2.1. The Practice of the European Human Rights Mechanism

The keystone of human rights protection in Europe, the European Convention on Human Rights[14] (hereafter: ECHR) neither refers expressis verbis to the right to a healthy environment nor to the protection of human environment. Although the solid idea of adopting a protocol emerged in 1999, actual steps were not taken.[15] That is to say, the European Mechanism contributes to the protection of the right to a healthy environment indirectly, through the case-law of the European Court of Human Rights (hereafter: ECtHR).[16] The Court – which stands on the ground of evolutive interpretation[17] – has already deducted certain elements of the right to healthy environment form the ECHR in some of its cases, typically from the right to life[18] (Article 2 of the ECtHR) and the right to respect for private and family life (Article 8 of

[10] On the respective provisions of the Hungarian Basic law, see: Hojnyák 2019.
[11] Hermann 2016b, 6.
[12] See: ECtHR, Hermann v. Germany.
[13] Greksza 2015, 16–19.
[14] European Convention on Human Rights (Rome, 4 November 1950).
[15] Greksza 2015, 22.
[16] Hermann 2016b, 3.
[17] For a detailed analysis of the evolutive interpretation please see: Szemesi 2008.
[18] ECtHR, Öneryildiz v. Turkey.

ECtHR).[19] The scope of rights may be invoked is rather wide, however.[20] In Hermann's interpretation, this solution means the recognition of the environmental dimension of the already existing rights rather than the amplification of the established system with environmental rights. She concludes that as a result the level of the existing protection is lower than it could be.[21] Greksza, who examined the case-law of the ECtHR from the aspect of its compliance with the principle of intergenerational equity, articulated two further critiques. Firstly, the principle of intergenerational equity has not received the necessary emphasis so far in the case-law of the ECtHR. Secondly, that the requirement of the significant disadvantage alongside with the direct and personal concern hinders the development of a preventive approach.[22] As to date[23] the principle of intergenerational equity was mentioned only in the Hermann v. Germany case.[24] – In his dissenting opinion, Judge Pinto de Albuquerque, made his statement on the precondition of sustainable development, namely that is prerequisites the prevalence of intergenerational equity. The latter ones are held disquieting by Greksza, because they render any actio popularis like intervention in favour of nature impossible. [25]

Hermann and Greksza made similar de lege ferenda proposals. Hermann argues that the ECtHR – utilizing the living instrument character of the ECHR – could increase the level of the states positive protection obligation based on the right to life (Article 2 of the ECtHR) and the right to respect for private and family life (Article 8 of ECtHR). This obligation should include the protection of the elements of the environment and the rationalised utilization of natural resources. The legitimacy for this is provided by the common constitutional traditions.[26] Greksza also considers the evolutive interpretation as a possible solution. In her view, the ECtHR could derive the collective aspects of the right to healthy environment from the letters of the ECHR.[27] What is more, the Court could increase the level of protection provided for the procedural rights, if it would presume the personal concern – thus the indirect victim status – of the civil organisations aimed at environmental protection.[28]

[19] ECtHR, Lopez Ostra v. Spain.

[20] For a list of the aforementioned rights and related rights please open Greksza's article at pages 22-23.

[21] Hermann 2016a, 6.

[22] The theoretical grounds of the tools aimed at facilitating the shaping of preventive approach please see: Nagy 2013.

[23] Based on the research carried out by the writer of the current article on the 5th June 2020, the statement made by Greksza in 2015 stands fast.

[24] ECtHR, Hermann v. Germany.

[25]As mentioned above, the environment protection law of the European Union fells outside the scope of the current study. On the other hand, the author considers it worth mentioning that the restricted locus standi of private persons before the European Court of Justice has been a subject to heavy criticism ever since the court existed. Recently debates arise regarding the need for a broader locus standi in environmental matters. Szegedi 2014a; Szegedi 2014b.

[26] Thirty member states – out of the 47 – incorporated provisions on the value of environment or obligations to protect environment. Furthermore, 2/3 of the population of the CoE member states are live in a country, which constitution either protects or takes into consideration the environment protection, the right to a healthy environment or the intergenerational equity.

[27] Greksza 2015, 25.

[28] Hermann 2016a, 205–210.

The fact that 41 member states of the Council of Europe (hereafter: CoE) – out of the 47 – have ratified the Aarhus Convention,[29] and that 2/3 of the member states have a constitution[30] that contains environmental protection.[31] The tool of dynamic interpretation is limited, however: the ECtHR can only diverge from its earlier case-law if certain criteria are met.[32] The adaption of a protocol on the protection of the environment would mean more clearer legal solution. That's what Greksza argues for. The necessary political back-up is non-existent, however:[33] the Committee of Ministers of the CoE has dismissed any proposals so far arguing that most of the member states grant the right to healthy environment in its constitution. Furthermore – as a novel counter-argument – the committee highlights that the Charter of Fundamental Rights of the European Union[34] guarantees the right to a healthy environment in its Article 37. This argument is rather weak, however: the above mentioned article does not stipulate any basic rights. Instead it's a political agenda.[35]

Regarding the rights of indigenous peoples, it can be stated that in this regard, the European Mechanism has always represented a rather restraint attitude compared to the Inter-American or the African one.[36] If it ever heard cases related to indigenous peoples, those cannot be regarded as relevant from the point of the right to a healthy environment.

### 2.2. The Practice of the Inter-American Human Rights Mechanism

Similarly to the ECHR neither the American Convention on Human Rights[37] (hereafter: ACHR) nor the American Declaration on the Rights and Duties of Man[38] contain expressis verbis provisions on the right to a healthy environment. Contrary to European Mechanism however, the member states of the Organisation of the American States[39] (hereafter: OAS) succeeded in granting this right: Article 11 of the San Salvador protocol[40] of the ACHR grants the right to a healthy environment and the duties of the states to grant it.

The Inter-American Court of Human Rights (hereafter: IACtHR) had to face the issue of preserving the environment in its indigenous peoples related case-law.[41]

[29] Aarhus Convention.
[30] Recently the constitutional status of the principle of precaution was examined by the constitutional court.
See: Szilágyi 2019; A magyar Alaptörvény rendelkezéseinek részletes elemzését lásd: Téglásiné Kovács & Téglási 2019.
[31] Hermann 2016a, 205–210.
[32] Greksza 2015, 25.
[33] Hermann 2016a, 205–210.
[34] Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391–407).
[35] Greksza 2015, 26.
[36] See: Marinkás 2018, 186–190.
[37] American Convention on Human Rights (San José, 23 May 1969).
[38] American Declaration on the Rights and Duties of Man (Bogotá, 1948).
[39] See: OAS 2020.
[40] San Salvador protocol (San Salvador, 17 November 1988).
[41] Raisz 2008.

However, the emphasis was put on other rights in these cases,[42] a part of those rights, e.g. the free, prior and informed consent (hereafter: FPIC) may be utilized for environmental protection purposes.[43]

Having regarded the IACtHR's sensitivity for environmental protection issues, it was expected that the court – as soon as it gets the opportunity – will elaborate the connection between the right to a healthy environment and other rights. It is no exaggeration to say that the student made rings round his master.[44] In its advisory opinion of 15 November 2017,[45] the IACtHR – interpreting Article 4 (1) on the right to life and Article 5 (1) on the right to human dignity – made important statements.

Firstly, the Court stated that the right to a healthy environment may be derived from the right to life and the right to human dignity.[46] Feria-Tinta and Milnes argues that the judgement feautures more merits than this: this was the first time, when an international tribunal interpreted the environmental law as a uniform system, and held that the right to a healthy environment is a basic right, equal to other such rights.[47] Despite the fact that the advisory opinion was initiated regarding a particular project, the judgment may be abstracted well on every possible bi- or multilateral environmental dispute. The chance for the prevalence of the judgement's provisions[48] are enhanced by the fact that the written opinions of the OAS member states regarding the right to a healthy environment were all in favour Colombia's petition and the interpretation enshrined in it.[49]

Secondly, the IACtHR by delivering this judgment opened the gate for the diagonal human rights claims. – As Feria-Tinta and Milnes call it. – This means that citizens of a third state – other than the polluter state – may lodge a petition against the state, which is responsible for the pollution.[50] By doing so the Court enables the effective protection of the victims of cross-border pollutions, particularly because the Court stated that the locus standi exist in case of pollutions caused by private parties if the state can be held responsible because it failed to perform its supervisional taks.

[42] For a detailed analysis of the indigenous related cases of the IACtHR see: Marinkás 2013a, Marinkás 2013b, Marinkás 2012.
[43] See: Marinkás 2018, 111–135.
[44] The case-law of the ECtHR serves as model and as a reference for the IACtHR even from the beginning, since the ECtHR already elaborated a full-fledged case-law by the time the IACtHR started to function. Later, however the IACtHR affected the case-law of the ECtHR. See: Raisz 2010, Raisz 2009, Raisz 2007.
[45] EJAB, OC-23/17.
[46] The IACtHR based its reasoning on the followings: firstly it stated that there is an inevitable connection between nature protection and the prevalence of human rights, secondly it held that certain human rights are extremely vulnerable in this regard. That is to say the degradation of nature directly effects their prevalence. Furthermore, the IACtHR defined those rights, which prevalence is of paramount importance to increase the effectiveness of environment protection, including the right to free speech and the right to participate in decision making. See: EJAB, OC-23/17, paras. 47, 55, 65.
[47] Feria-Tinta & Milnes 2019.
[48] Banda 2018.
[49] Feria-Tinta & Milnes 2019, 50–51.
[50] IACtHR, OC-23/17, paras. 81–82, 93–94, 104.

This shall be regarded as a significant turning point, since the standpoint of the Inter-American system was rather moderate in this issue.[51]

Thirdly, the IACtHR defined the material and procedural obligations of the states in this field,[52] which may be derived from the prevalence of the right to life and human dignity. These obligations are particularly:[53] (a) to prevent significant environment degradation, (b) to establish regulation and supervision, (c) to obey the principle of precaution and the (d) to cooperate in good faith. – The latter one includes (e) the obligation to inform the potentially affected state. – Last, but not least the state is obliged to (f) inform the citizens and to (g) provide them with possibility to take part in the decision making and protect their (h) right to judicial protection.

Fourthly, it shall be highlighted that IACtHR in its advisory opinion paid special attention[54] for the constitutional rules of the OAS member states. The Court emphasized in this regard that legal systems of Colombia and Ecuador treat nature as a quasi legal entity, which holds rights. Their rights are protected by the supreme courts of the beforementioned countries.[55] However the advisory opinion does not mention the Colombian Atrato river case, it is worth mentioning, because the Supreme Court of Colombia held that the river was a legal entity, entitled for certain rights and the right to judicial protection of these rights.[56] Furthermore, the same court in its 2018 judgement,[57] stated that the Amazonas rain forest was a legal entity. The court's intention was to protect the rain forest from the ever increasing deforestation.[58]

### 2.3. The Practice of the African Human Rights Mechanism

Contrary to the above introduced human rights documents, the African Charter on Human and Peoples' Rights[59] (hereafter: Banjul Charter) contains a provision on the right to a healthy environment, however it does not mention it expressis verbis. Article 24 of the Banjul Charter states that 'All peoples shall have the right to a general satisfactory environment favourable to their development.' The definition was criticized by many for its rather vague nature. The task of providing an exact explanation of 'general satisfactory environment' and 'favourable to […] development' was left to the African Commission on Human and Peoples' Rights (hereafter: ACHPR) – 'watchdog' of the Banjul Charter – and partly to the national supreme and constitutional courts. The former one got the chance to make a clarification in the SERAC and others v. Nigeria case[60]– a.k.a. Ogoni-case[61] – for the first time. – It is worth mentioning that the

[51] Feria-Tinta & Milnes 2019, 54–55.
[52] Feria-Tinta & Milnes 2019, 55–56.
[53] IACtHR, OC-23/17, paras. 95–103, 242.
[54] IACtHR, OC-23/17, para. 62.
[55] The Supreme Court of Colombia, judgement, T-622-16, 10 November 2016; The Supreme Court of Ecuador, judgement, 218-15EP-CC, 9 July 2015.
[56] See: The Constitutional Court of Colombia, judgement, T-622/16.
[57] The Supreme Court of Colombia, judgement, STC 4360-2018.
[58] The event preceding the case was a 44% increase in deforestation from 2015 to 2016.
[59] African Charter on Human and Peoples' Rights (Banjul, 27 July 1981).
[60] ACHPR, SERAC and others v. Nigeria case (155/96).
[61] For a detailed analysis see: Marinkás 2014.

Ogoni-case is relevant for the protection of indigenous rights. – The ACHPR held that Article 24 of the Banjul Charter together with Article 16 – which grants the right 'to enjoy the best attainable state of physical and mental health' – creates an unambiguous obligation for the state. As the Commission held: it is 'clear that there is no right in the African Charter that cannot be made effective.'[62] This approach is rather familiar with the African Human Rights Mechanism: the Banjul Charter does not contain any reference for the so called progressive realization in case of the third generation rights. – The sole exemption is Article 16, however the original intention of the drafting parties was overwritten by the case-law of the court. Furthermore it has to be emphasized that the ACHPR applied the so called 'obligations approach' during the consideration on the merits of the case, which was elaborated by Henry Shue,[63] and further developed by Asbjørn Eide.[64] This approach dispenses with the traditional generation-based classification of human rights, thus enables the evaluation of these rights with equal weight.[65] This approach is based on the following premise: the state has 3+1 obligations regarding human rights: it has to respect, protect, fulfil and facilitate them.[66] The first obligation – unlike the other three – is a negative obligation, which obliges the state to abstain from the infringement of human rights. The protection of human rights is a positive obligation, which requires active involvement from the state: it has to protect citizens from the possible infringement of third parties. – Either natural or legal entities. – The fulfilment of rights obliges the state to bring any action that enables the citizens to enjoy their rights. Last, but not least by facilitating the rights, the state tries to obtain the support of the society for these rights.[67]

On the other hand, the ACHPR – besides promoting the rights of indigenous peoples and environmental protection goals – paid attention to a vital interest of the states, namely the right to access natural resources to be found on their territory. The Commission made the following statements: "It requires the state to take reasonable […] measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."[68] First of all it has to be highlighted that the Commission acknowledged the right of the states to access natural resources to be found on their territories, secondly by doing so the states have to fulfil several procedural guarantees – e.g. the right to be informed and to be involved into the decision making – in order to facilitate the prevalence of the right to a healthy environment. Last, but not least the right to judicial protection has to be provided for every citizen. As Emeka P. Amechi points out, however the ACHPR was occupied by the procedural side of Article 24 rather than its material side. Thus – unlike in the previous cases – material side was not elaborated.[69]

[62] Ogoni-case, paras. 52–53, 68.
[63] Shue, 1980.
[64] See: Asbjørn Eide 2020.
[65] Please visit the website of the Icelandic Human Rights Centre 2020.
[66] ACHPR, Ogoni-case, paras. 43–48.
[67] Marinkás 2018, 141–142.
[68] ACHPR, Ogoni-case, para. 52.
[69] Amechi 2009, 63.

The majority of the supreme and constitutional courts of the African states exhibited a similar attitude: they tried to strike a balance between the environment protection goals and the interest of the state to utilize their natural resources for their development. In this regard the case-law of the ACHPR tally in with the national courts' practice, that is to say they both concluded that certain amount of environmental pollution and a certain degree of environmental degradation is conform with the Banjul Charter. What is more the citizens shall endure it.[70]

The right to a healthy environment was mentioned in the Endorois-case,[71] however only in an indirect way: the ACHPR considered it through the prevalence of FPIC.[72] – It is worth mentioning that ACHPR alongside with the other organs of the African Union do not originate the FPIC only from the right to self-determination. They usually invoke other rights as well.[73]

The African Court on Human and Peoples' Rights (ACtHPR) delivered only one indigenous peoples related case so far, namely the Ogiek-case,[74] in which the Court did not examine the Article 24 of the Banjul Charter.[75] The case is worth mentioning for other aspects, however.[76]

## 3. The protection of indigenous peoples' rights and the environment through the right to land

### 3.1. The development of the right to land

The international law did not pay attention to the rights of the indigenous peoples until the last quarter of the indigenous peoples' rights, including their right to own and possess the lands they have been occupying from time immemorial. A change has started only in the last decades,[77] which was induced by scholars. This was followed by the practice of human rights mechanisms with a certain delay and uncertainty. States still do not exhibit a uniform practice. What is more some of the states still strongly oppose the recognition of indigenous land rights, since they regard it as a threat to their right to access natural resources within their territory.

[70] Ibid., 67, 69.
[71] ACHPR, Endorois-case.
[72] See: Marinkás 2014b.
[73] Roesch 2017.
[74] ACHPR, Ogiek-case.
[75] For the details of the case see: Marinkás 2018, 161–168.
[76] It has to emphasize that the ACtHPR – departing from the practice of the ACHPR – used the definition of Erica-Irene Daes, the former president of the UN Working Group on Indigenous Populations instead of the definition elaborated by the ACHPR. For the detailed analysis of defining the indigenous peoples with special regard to the African ones, please see: Marinkás 2018, 18–22, 138–140.
[77] Marinkás 2015a.

Several indigenous-specific document pay attention to the indigenous peoples' right to own and possess land. ILO Convention 169[78] provides a stronger guarantee for indigenous' peoples land rights than any other human rights documents. The aforementioned document deals with land rights in seven articles. The first one is Article 13, which emphasizes the close connection between indigenous peoples and their lands. Article 14 demands 'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.' The use of 'possess' induced debates in the literature, which had to be settled by the ILO. The ILO in its guideline took the view the wording of the Convention does not prerequisite the current possession of the land, some kind of nexus between the indigenous peoples and land has to exist, however.[79] It can be concluded from the guideline and practice of the ILO organs[80] ILO Convention 169 does not allow demands that seek to remedy historical injustices. As a result several indigenous peoples are excluded from the circle of potential petitioners.

As another important question it had to be decided whether the indigenous peoples are entitled to own or possess their lands. The drafters of ILO Convention 107[81] – the predecessor of No. 169 – intentionally omitted the right to possess and opted for solely mentioning the right to own. They argued that if the right to possess was included into the Convention, governments would recognise only the right of possession, weakening the legal position of indigenous peoples. Contrary to this, Convention 169 – as a step back in this context – recognises both the right to own and possess. The obvious reason was that some states wanted to make their indigenous population believe that they do not have the right to own their traditionally occupied lands, they can only pass it from generation to generation. Alexandra Xanthaki argues that this interpretation can be deemed as grounded in the light of political realities.[82] Nevertheless, ILO Convention 169 grants an effective protection: Article 17 requires states to protect the lands of the indigenous peoples. In this regard states have to recognise traditional land transfer methods. In the meantime states are obliged to prevent the land acquisition of non-indigenous person acting with malicious intentions e.g. making use of their traditions or the fact that most indigenous peoples are unaccustomed to law.

The indigenous peoples' rights are protected by the UN Declaration on the Rights of Indigenous Peoples[83] (hereafter: UNDRIP) as well. Article 10 of the Declaration states that: 'Indigenous peoples shall not be forcibly removed from their lands or territories.'

[78] C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).
[79] Indigenous and Tribal Peoples Rights in Practice. A Guide to ILO Convention No. 169.
[80] In 2000 the Governing Body of the ILO brought its decision in the case of the Danish Uummannaq community, which initiated the return of their ancient lands. The Body declined the request and held that the return of the Uummannaq community would require the displacement of other indigenous peoples, who occupied the land in the meanwhile. This – as the Governing Body argued – would result in a trauma, similar to that occurred some 50 years ago. – Document No. (ILO): 162000DNK169, para. 36; See furthermore: Marinkás 2015b
[81] C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107).
[82] Xanthaki 2007, 83.
[83] A/RES/61/295.

The UNDRIP approaches the land rights from the direction of cultural rights, which is in conformity with the practice of UN bodies,[84] the recent point of view of the scholars[85] and – last but not least – with the own interpretation of indigenous peoples. As the representative of an Australian indigenous group stated: "land is basis of creation stories, faith, spirituality and culture. Furthermore, it means a connection between the recent and the past generations. The loss or degradation of land causes serious hardship for indigenous peoples."[86] The representative of the International Indian Treaty Council – a person with an indigenous origin – held that: "land is the sacred mother of indigenous peoples, their life-giver and their source of survival, therefore [their right to land] constitutes the heart and spirit of the draft."[87] – Namely the draft of the UNDRIP.

Summarizing the above it can be concluded that the culture-based approach can be regarded as the main-stream theory, despite its drawbacks.[88] The latter one refers to the fact that the decision makers – who are likely to come from the majority of the society – tend to picture the culture of indigenous peoples in a false way either completely or partly.[89]

Olivier De Schutter – the former UN Special Rapporteur on the right to food – elaborated a completely different approach in his reports analysing the right to land. He argues that the right to land is two-headed: firstly, it can be regarded as a sui generis right, which can be derived from the right to property and from the recognition of the close connection between indigenous peoples and their lands. Secondly it can be regarded as an instrumental right of the right to food,[90] since land is the basic tool of producing food, thus needs special protection.[91] However this approach is logical in itself, having regarded the close spiritual connection between indigenous peoples and their lands, it cannot be regarded as relevant from the viewpoint of indigenous rights.

### 3.2. Negative examples and good practices

The author of the current article, after studying the relevant cases and the literature came to the conclusion both in his 2016 PhD thesis and in his 2018 monography that there is a clear and verifiable nexus between the recognition of indigenous peoples rights and the realization of environment protection goals. Based

[84] Marinkás 2018, 231–233.
[85] Julian Burger argues that 'in case indigenous peoples do not receive the control over their own future, their development and over their own lands, their situation will not improve at all.' – Burger 1994, 195.
[86] ATSIC, Native Title Amendment Bill 1997, Issues for Indigenous Peoples. ATSIC, Canberra, 1997, 5.
[87] UN Doc, E/CN.4/1997/102), para. 248.
[88] Dulitzky, 2010.
[89] In order to avoid the above dilemma Marcos Orellana argues that the protection of indigenous peoples' lands shall be grounded on the right to life, instead on the right to property, since the right to life – unlike the right to property – is almost exempt from restrictions. However, Orellana himself acknowledges that this would create tension between the tribes and the states. See: Orellana & Marcos 2008, 846–847.
[90] The right to food in the Hungarian law-system is analysed by: Téglásiné Kovács 2017.
[91] De Schutter 2010, 306.

on the events occurred ever since and literature analysing them, his conclusion still stand on their ground.

Among others Allen Blackman and his fellow co-authors – after studying the results of the two years of research – came to the conclusion[92] that the thorough protection of indigenous rights have a positive effect on deforestation. – Some scholars argue however, that one must be cautious regarding the general applicability of these results.[93]

The aforementioned deforestations are caused by the overexploitation of land, which is mainly attributable to the wide-spread single-crop systems, which induces erosion and soil depletion. As a result more land is needed to be involved into agricultural use year by year. – This procedure is named as land grabbing by De Schutter.[94] – It is worth mentioning as an important interconnectedness that the firm protection of indigenous peoples' rights makes the execution of land grabbing less easy. Ironically, however some activities aimed at environment protection may speed up land grabbing. As an ample example, the ever increasing demand for biofuels on the one hand cause deforestation to meet the demand for the basic commodities and on the other hand jeopardise food security of the affected states. As the special rapporteur pointed out, the shift to produce the basic commodities of the biofuel may result in a shortage of food and in the increase of food prices. The latter one can mean starvation for the people of the developing countries, who usually have to spend a vast majority of their income on food.[95]

As an interconnected problem the number of internally displaced persons (hereafter: IDP) grows year by year. Having a glance at the last decade, the fact that the actual number of IDP exceeded the estimations published before 2010 can be considered as a telling data. While even the estimations predicted several tens of millions persons, [96] in their 2020 article Renée V. Hagen és Tessa Minter claimed that the number was twenty million. Annually.[97]

The UN Reducing Emissions from Deforestation and Forest Degradation (hereafter: UN REDD) was launched in 2008 to help the developing countries in reducing excessive deforestation. Tropical forest are disappearing in a frightening extent: between 1990 and 2005 13 million hectares of rain forests were cut or burned down annually as an average. This means 200 square kilometres per day, which exceeds the ability of the rain forests to renew or the capacity of the forestation programs. Deforestation and logging attributes to 17 % of the emission of green-house gases, since in the developing countries it's a wide-spread practice to burn down the forests in order to gain arable lands.[98]

[92] Blackman & Allen. et al., 2017.
[93] Robinson & Brian 2017.
[94] De Schutter, 2011.
[95] De Schutter 2010, 306–309.
[96] See: Internal Displacement Monitoring Centre 2009.
[97] See: Hagen & Minter 2020.
[98] See the website of the UN REDD: FAO, UNDP, UNEP Framework Document 2008.

Earlier, the UN REDD was criticised, because even traditional users of land, namely the indigenous peoples, were excluded from their lands, who only exploited its natural resources in an extent, which is necessary for their survival.[99] Those, who tried to return to their land were confronted[100] with the authorities, which seek to prevent their return even by imposing criminal sanctions.[101] This is the so called Yellowstone-model from the 19th century. In this approach the best way to protect nature in its original shape is excluding every human activity, except for tourism. Excluding human activity means the prohibition of the traditional ways of agriculture pursued by the indigenous peoples.[102] This outdated model – which proved to be harmful in several developing country[103]– was replaced by another model in several national parks of several countries.[104] One of the recent best practices is the inclusion of indigenous peoples into the UN REDD programme in the Darién region of Panama with a positive result based on the research of Javier Matero-Vega and his fellow researchers.[105]

## 4. Conclusions

The author – after studying the case-law of the regional human rights mechanisms and the relevant literature – argues that there is a clear interconnectedness between the thorough protection of indigenous peoples' rights and the achievement of environment protection goals, including the prevalence of the right to healthy environment. The more sensitivity the given human rights mechanism displays towards human rights, the more it is inclined to take nature protection into consideration. This is clear based on the comparative analysis of the case-law of the European and the Inter-American mechanisms: while the former one seems to display limited willingness to protect indigenous peoples' rights and reluctant in utilizing its full capacity to facilitate the prevalence of the right to a healthy environment, the latter one 'leads the field.' The African Mechanism – which pays special attention to the protection of indigenous rights just like the Inter-American Mechanism – puts emphasis on environment protection goals as well. It has to be noted however that the Banjul Charter contains several third generation rights expressis verbis, which is a great advantage.

The above mentioned conclusions are reinforced by the positive effects of the programmes carried out with the involvement of indigenous peoples: the traditional way of life of indigenous peoples is an ample example of using natural resources only to an extent what is necessary. However the author is realistic in this field and argues that while this knowledge cannot be imported into the modern societies as a whole, utilizing this knowledge at least in parts can be deemed as necessary.

[99] De Schutter 2010, 308–309.
[100] See: Endorois-case.
[101] Hershey 2019.
[102] See: Poirier & Ostergren, 2002.
[103] Hershey 2019, 68.
[104] See: Marinkás 2018, 262–264.
[105] Mateo-Vega 2017.

The other conclusion of the author is that sensitivity of a given regional human rights mechanism towards indigenous peoples' rights affects the constitutional law and to the law system of the member states. South-American states serve as an ample example in this regard, which gradually recognised more and more rights of the indigenous peoples and in the recent time rights related to environment protection as well. This is attributable to the case-law of the Inter-American system. It has to be mentioned however, that in case of the European Mechanism the situation is quite the opposite: while most member states of the CoE sport a constitution that guarantees the right to a healthy environment, the ECHR still does not contain any such provisions. This omission had to be remedied by the ECtHR with a mixed result.

## Bibliography

### Books, articles, studies

1. Alblas E (2017) *EU Environmental Policy: In the Pursuit of? Conflicting Objectives in Light of the Anthropocene,* Research Master in Law Research Master in Law Tilburg University, The Netherlands.
2. Amechi E P (2009) Socio Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples' Rights, *Law, Environment and Development Journal*, 5(1), pp. 58–72.
3. Banda M L (2018) Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, *American Journal of International Law,* 22(6)
4. Bándi Gy (2013) A környezethez való jog értelmezése a fenntartható fejlődési stratégia és az Alaptörvény fényében, *Acta Humana*, 2013/1., pp. 67–92.
5. Blackman A (2017) Titling Indigenous Communities Protects Forests in the Peruvian Amazon, *Proceedings of the National Academy of Sciences of the United States of America*, 114(16), pp. 4123–4128.
6. Burger J (1994) The Economic Rights of Indigenous Peoples, in: van Der Vilst L, ed., *Voice of the Earth, Indigenous Peoples, New Partners and the Right to Self Determination in Practice*, Utrecht, The Netherlands Centre for Indigenous Peoples, pp. 195–207.
7. De Schutter O (2010) The Emerging Human Right to Land', *International Community Law Review*, 12(3), pp. 303–334.
8. De Schutter O (2011) The Green Rush: The Global Race for Farmland and the Rights of Land Users', *Harvard International Law Journal*, 52(2), pp. 503–560.
9. Dulitzky A E (2010) When Afro-Descendants Became Tribal Peoples: The InterAmerican Human Rights System and Rural Black Communities, *UCLA Journal of International Law and Foreign Affairs*, 15(1), pp. 29–82.
10. Feria-Tinta M & Milnes S C (2019) International Environmental Law for the 21st Century: The Constitutionalization of the Tight to a Healthy Environment in the Inter-American Court of Human Rights Advisory Opinion 23' *Anuario Colombiano de Derecho Internacional/ Colombian Yearbook of International Law,* 12., pp. 43–84.
11. Greksza V (2015) Questions of a Comprehensive Protection of the Right to a Healthy Environment in Strasbourg', *Pécs Journal of International and European Law*, 2015/1, pp. 16–27.
12. Hagen R V & Minter T (2020) Displacement in the Name of Development. How Indigenous Rights Legislation Fails to Protect Philippine Hunter-Gatherers', *Society & Natural Resources*, 33(1), pp. 65–82, doi: 10.1080/08941920.2019.1677970
13. Hermann V (2016a) *Az egészséges környezethez való jog átfogó védelme az Emberi Jogok Európai Bíróságának gyakorlatában*.' PhD Dissertation.
14. Hermann V (2016b) *Az egészséges környezethez való jog átfogó védelme az Emberi Jogok Európai Bíróságának gyakorlatában*, Thesis of the PhD Dissertation.

15. Hershey R A (2019) Paradigm Wars Revisited: New Eyes on Indigenous Peoples' Resistance to Globalization. Indigenous Peoples', *Journal of Law, Culture and Resistance*, 5(1), pp. 43–78.
16. Hojnyák D (2019) Az agrárszabályozási tárgyak megjelenése az EU tagállamainak alkotmányaiban, különös tekintettel a Magyar Alaptörvényben megjelenő agrárjogi szabályozási tárgyakra', *Miskolci Jogi Szemle*, 14(2), pp. 58–76.
17. Marinkás Gy (2012) Az őslakosok jogainak megjelenése az Amerikaközi Rendszerben: az őslakosok joga ősi földjeikre, különös tekintettel a Mayagna (Sumo) Awas Tingni kontra Nicaragua ügyre, in: Raisz A, ed., *A nemzetközi környezetjog aktuális kihívásai,* Miskolci Egyetem, Miskolc.
18. Marinkás Gy (2013) A Saramaka emberek kontra Suriname ügy; avagy az Amerikaközi Bíróság, mint az őslakos népek jogainak élharcosa, in: Sáry P, ed., *Publicationes Universitatis Miskolciensis Sectio Iuridica et Politica,* Tomus XXXI, Miskolc, Miskolci Egyetemi Kiadó.
19. Marinkás Gy (2013a) Az őslakosok jogainak védelme az Amerikaközi Bíróság joggyakorlatában, avagy elég hatékony-e a tulajdonhoz és a bírói védelemhez való jogra alapozott védelem?, in: P. Szabó B & Szemesi S, eds., *Profectus in Litteris V. Előadások a 10. Debreceni állam- és jogtudományi doktoranduszkonferencián,* 2013. június 7., Lícium-Art, Debrecen.
20. Marinkás Gy (2014a) Az Ember és Népek Jogainak Afrikai Bizottságának őslakos népekkel kapcsolatos joggyakorlata, különös tekintettel az Ogoni-ügyre', *ProFuturo*, 4(1), pp. 127–144
21. Marinkás Gy (2014b) Az Endorois ügy, egy hosszú út eredménye – avagy az afrikai emberi jogvédelmi mechanizmus joggyakorlata és az őslakos népek jogainak védelme, *Debreceni Jogi Műhely*, 11(1).
22. Marinkás Gy (2015) A Hingitaq 53 és mások kontra Dánia ügy, avagy az őslakos népek át- és kitelepítésének kérdései az európai emberi jogvédelmi mechanizmus vonatkozásában, in: Szabó M, ed., *Doktoranduszok Fóruma,* Miskolc, 2014. November 20., Az Állam- és Jogtudományi Kar szekció kiadványa, Miskolc, Miskolci Egyetemi Kiadó.
23. Marinkás Gy (2015a) Az őslakos népek földhöz való joga és egyes környezetjogi kérdések, in: Hallók Tamás, ed., *Publicationes Universitatis Miskolciensis Sectio Iuridica et Politica,* Tomus XXXIII, Miskolc, Miskolci Egyetemi Kiadó, 2015, pp. 269–285.
24. Marinkás Gy (2018) *Az őslakos népek védelmének aktuális jogi kihívásai*, Monography, private edition, ISBN 978-615-00-3844-5
25. Mateo-Vega J (2017) Full and effective participation of indigenous peoples in forest monitoring for reducing emissions from deforestation and forest degradation (REDD +): trial in Panama's Darién, *Ecosphere*, 8(2), pp. 1–19.
26. Nagy Z (2013) *Környezeti adózás szabályozása a környezetpolitika rendszerében*, Miskolci Egyetem, Miskolc.
27. Orellana M A (2008) Saramaka People v. Suriname, *American Journal of International Law*, 102(4), pp. 841–847.
28. Poirier R & Ostergren D (2002) Evicting People from Nature: Indigenous Land Rights and National Parks in Australia, Russia, and the United States, *Natural Resources Journal*, 42(2), pp. 331–351.

29. Raisz A (2007) Hasonlóságok és különbségek a strasbourgi és a San José-i emberi jogi ítélkezésben; avagy mit tanulhatunk a latin-amerikaiaktól?, *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, 2007, Tomus XXV/2, pp. 431–445.
30. Raisz A (2008) Indigenous Communities before the Inter-American Court of Human Rights – New century? New Era?, *Miskolc Journal of International Law*, 5(2), pp. 35–51.
31. Raisz A (2009) Kölcsönhatás az Emberi Jogok Európai és Amerikaközi Bírósága között egyes emberi jogok tekintetében, *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica,* 2009, Tomus XXVII/2, pp. 361–387.
32. Raisz A (2010) *Az emberi jogok fejlődése az Emberi Jogok Európai és Amerikaközi Bíróságának kölcsönhatásában*, Novotni Kiadó, Miskolc.
33. Raisz A & Szilágyi J E (2017) Cross Border Issues of the Hungarian Water Resources, *Quarterly Journal of Environmental Law*, 2017/1, pp. 73–98.
34. Shue H (1980) *Basic Rights; Subsistence, Affluence and US Foreign Policy'*, New Jersey, Princeton University Press.
35. Szegedi L (2014a) Eltérő jogvédelmi mércék az Európai Unió Bíróságának gyakorlatában, avagy az Aarhusi Egyezmény többszintű európai átültetésének kompromisszumai', *Európai Jog,* 2014/5, pp. 1–12.
36. Szegedi L (2014b) The Eastern Way of Europeanisation in the Light of Environmental Policy Making? – Implementation Concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe, *ELTE Law Journal* 2014/1, pp. 117–134.
37. Szemesi S (2008) *A diszkrimináció tilalma az Emberi Jogok Európai Bíróságának gyakorlatában*, PhD Dissertation.
38. Szilágyi J E (2019) The Precautionary Principle's 'Strong Concept' in the Case Law of Constitutional Court of Hungary, *Lex ET Scientia International Journal,* 26(2).
39. Téglásiné Kovács J & Téglási A (2019) Felelősséget viselünk utódainkért, ezért anyagi, szellemi és természeti erőforrásaink gondos használatával védelmezzük az utánunk jövő nemzedékek életfeltételeit – A Nemzeti hitvallás környezet- és természetvédelmi tárgyú rendelkezései, in: Patyi A, ed., *Rendhagyó kommentár egy rendhagyó preambulumról Magyarország Alaptörvénye, Nemzeti hitvallás,* Dialóg Campus Kiadó, Budapest.
40. Téglásiné Kovács J (2017) *Az élelemhez való jog társadalmi igénye és alkotmányjogi dogmatikája,* PhD Dissertation, Budapest.
41. Xanthaki A (2007) *Indigenous Rights and United Nations Standards. Self-Determination, Culture and Land,* Cambridge University Press, New York.

**International treaties and EU law**

1. Aarhus Convention (25 June 1998/30 October 1998)
2. African Charter on Human and Peoples' Rights (Banjul, 27 July 1981/21 October 1986)
3. American Convention on Human Rights (San José, 23 May 1969)
4. American Declaration on the Rights and Duties of Man (Bogotá, 1948)

5. C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) (27 June 1989/5 September 1991)
6. Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391–407)
7. San Salvador-i protokoll (San Salvador 17, November 1988)
8. Stockholm Declaration (16 June 1972)
9. UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295)

**Decisions of international tribunals and other organs**

1. ACHPR, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, (276/2003), 25 November 2009
2. ACHPR, SERAC et al. v. Nigeria, (155/96), 27 October 2001
3. ACtHPR, ACHPR v. Kenya (006/2012), Judgement on merits, 26 May 2017
4. ECtHR, Hermann v. Germany (9300/07), Judgement, 26 June 2012
5. IACtHR, advisory opinion OC-23/17 on the interpretation of Articles 4 (1) and 5 (1) of the ACHR, 15 November 2017, Ser. A. No. 23
6. ICJ, Gabčíkovo-Nagymaros case, Judgement, 25 September 1997
7. Report of the Committee set up to examine the representation alleging non-observance by Denmark of the indigenous and Tribal Peoples Convention, 1989 (No. 169). Document No. (ILO): 162000DNK169

**Decisions of national courts and other forums**

1. The Constitutional Court of Colombia, Center for Social Justice Studies et. al. v. Presidency of the Republic et al. Judgment T-622/16 (10 November 2016)
2. The Supreme Court of Colombia, STC 4360-2018
3. The Supreme Court of Ecuador, Judgement 218-15EP-CC, 9 July 2015

**Reports and others**

1. ATSIC, Native Title Amendment Bill 1997, Issues for Indigenous Peoples. ATSIC, Canberra, 1997
2. The Declaration of the Indian Treaty Council for the UN Working Group (Report of the Commission Working Group, (UN Doc, E/CN.4/1997/102))
3. Internal Displacement Monitoring Centre: Global Overview of Trends and Developments in 2007. (April, 2008); UNHCR: 2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, 2009
4. UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD). FAO, UNDP, UNEP Framework Document, 20 June 2008

**Online sources**

1. Asbjørn Eide (2020) *The human right to adequate food and freedom from hunger*, in: http://www.fao.org/docrep/w9990e/w9990e03.htm [04.06.2020]
2. FAO, UNDP, UNEP Framework Document (2008) *UN REDD*, in: https://bit.ly/2JrOgky [04.06.2020]

3. Icelandic Human Rights Centre (2020) *The Concepts of Human Rights: An Introduction. Definitions and Classifications,* in: http://www.humanrights.is/en/humanrights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-humanrights/definitions-and-classifications [07.06.2020]
4. Indigenous and Tribal Peoples Rights in Practice (2009) *A Guide to ILO Convention No. 169. International Labour Standards Department,* in: https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_171810/lang--en/index.htm [07.06.2020]
5. Pikramenou N (2020) *Rights of Nature: Time to Shift the Paradigm in the EU? Earth Law Center,* in: https://www.earthlawcenter.org/nikolettas-ron-article#_edn1 [07.06.2020]
6. Robinson B E (2017) *Community land titles alone will not protect forests. Letter to the authors of the Titling Indigenous Communities Protects Forests in the Peruvian Amazon,* in: https://www.pnas.org/content/114/29/E5764 [07.06.2020]
7. Roesch R (2017) *The Ogiek Case of the African Court on Human and People's Rights: Not so Much News After All?,* in: https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all/ [07.06.2020]
8. OAS (2020) *Organization of American States*, in: http://www.oas.org/en/ [28.08.2020]

**MARINKÁS György***

# Az egészséges környezethez való jog, mint alapvető emberi jog – Lehetséges megközelítések az egyes emberi jogvédelmi mechanizmusok gyakorlata alapján, különös tekintettel az őslakos népeket érintő kérdésekre

## 1. Alapvetés

A nemzetközi környezetvédelmi jog kezdete az 1972-es Stockholmi Nyilatkozathoz köthető, amely elsőként rögzítette, hogy „Az embernek joga van a szabadsághoz, az egyenlőséghez és a megfelelő életfeltételekhez egy olyan környezetben, amely lehetővé teszi, hogy életét méltóságban és jólétben töltse […]"[1] A nyilatkozat egyben azt is rögzítette, hogy az embernek kötelessége megőrizni és fejlesztenie a környezetet a következő generációk számára. A nyilatkozat fent idézett részlete alapján helytálló az a megállapítás, hogy az egészséges környezethez való jog az emberi jogok és a környezetvédelem összekapcsolódásából ered.[2] E kapcsolatot hangsúlyozta Christopher G. Weeramantry bíró, amikor a Bős–nagymaros ügyben[3] a Nemzetközi Bíróság (a továbbiakban: NB) által hozott ítélethez[4] fűzött különvéleményében a következőket írta: „[a környezet védelme] elengedhetetlen feltétele más emberi jogok, így az egészséghez és az élethez való jog érvényesülésének."[5] Említést érdemel továbbá Weeramantry azon megaállapítása, miszerint a hagyományos jogrendek anélkül tartalmazták a fenntartható fejlődés fogalmát, hogy erre külön kitértek volna.[6] – E kijelentést igazolta a cikkben ismertetésre kerülő strasbourgi, Amerika-közi és afrikai joggyakorlat.

György Marinkás: The Right to a Healthy Environment as a Basic Human Right – Possible Approaches Based on the Practice of the Human Rights Mechanisms, with Special Regard to the Issues of Indigenous Peoples – Az egészséges környezethez való jog, mint alapvető emberi jog - Lehetséges megközelítések az egyes emberi jogvédelmi mechanizmusok gyakorlata alapján, különös tekintettel az őslakos népeket érintő kérdésekre. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 133-170, https://doi.org/10.21029/JAEL.2020.29.133

* dr. jur., PhD, kutató, Mádl Ferenc Összehasonlító Jogi Intézet, e-mail: gyorgy.marinkas@mfi.gov.hu.

[1] Stockholmi Nyilatkozat (1972. június 16.), 1. elv.

[2] Hermann 2016a, 39.

[3] Az ügyről részletesen lásd: Raisz & Szilágyi 2017

[4] NB, Bős-Nagymaros ügy.

[5] Christopher G. Weeramantry bíró különvéleménye a Bős-Nagymaros ügyben hozott ítélethez, pp. 91–92.

[6] Bándi 2013, 69.

https://doi.org/10.21029/JAEL.2020.29.133

A téma tárgyalása során az alapvető elméleti kérdés az, hogy az időben korábbi antropocentrikus, vagy az újkeletűbb ökocentrikus megközelítés a célravezetőbb-e.[7] A kérdés megválaszolása nem könnyű már csak arra való tekintettel sem, hogy az egyes mechanizmusok[8] gyakorlatában jelentős eltérések figyelhetők meg e téren.

Az antropocentrikus megközelítés tekinthető az egészséges környezethez való jog klasszikus felfogásának, amely az egészséges környezethez való jogot nem kezeli önálló emberi jogként. Helyette a már meglévő polgári és politikai jogok 'zöldebbé' tétele révén, illetve e jogok – és az azok garantálása érdekében létrehozott intézmények – igénybevétele révén részesíti védelemben a környezetet. Annak folyományaként, hogy e megközelítésben az egészséges környezethez való jog nem tekinthető önálló emberi jognak, az nem jelenhet meg alanyi jogként, és a kollektív alanyi kör léte is kizárt. Az ökocentrikus megközelítés ezzel szemben az egészséges környezethez való jogot szolidaritási jogként képzeli el, amelynek alanya elsősorban a kollektíva, nem pedig az egyén. E felfogás kiindulópontja tehát a környezet, mint a földi élet feltétele, és ezáltal per se védelemben részesítendő érték. Sőt, a környezet védelmét az emberi jogok védelmének előfeltételének tekinti, amiből következik, hogy az egyéni szabadságjogok korlátozhatóak a természet védelme érdekében.[9] – Amint a következő részben bemutatásra kerül, több emberi jogvédelmi mechanizmus is felismerte az emberi jogok és a környezet védelmének fent említett összefüggését.

A megoldandó feladat a két megközelítés összehangolása oly módon, hogy mindkettő előnyei kihasználhatók legyenek. Az antropocentrikus nézőpont ugyanis a minimalista megközelítése miatt nem teszi lehetővé az e jog kínálta lehetőségek kiaknázását. Az ökocentrikus megközelítés pedig – bár a céljai kívánatosak – nem illeszkedik az emberi jogok klasszikus rendszerébe. Amint Hermann Veronika írja, egy olyan elmélet lenne kívánatos, amely a környezet tekinti védendő értéknek, de végső soron mégiscsak az emberi érdekeket tartja szem előtt. Hermann ezt az ellentétet az emberi jogoknak a szükségletek szemszögéből történő vizsgálata révén tartja feloldhatónak. Amint írja, minden emberi jog megfeleltethető egy, vagy több szükségletnek, ugyanúgy, ahogyan minden szükséglet kifejezhető egy vagy több emberi joggal. Az emberi jogok speciális tárgyai így hozzárendelhetőek egy-egy szükséglethez. Emberi jog-e ezek alapján az egészséges környezethez való jog? – Teszi fel a kérdést. – Az egészséges környezethez való jog egy olyan környezet iránti igényt fejez ki, amelyben biztosított az egészségre nem káros étel,[10] víz, levegő, valamint életkörnyezet. Magától értetődő, hogy ha az egyén olyan környezetben él, amelyben nem képes egészséges vízhez, és/vagy ételhez hozzájutni, vagy a levegő olyan mértékben szennyezett, hogy az veszélyezteti az egészségét, az nem egyeztethető össze az emberi méltósággal.

[7] Hermann 2016b, 26.

[8] Jóllehet jelen kutatásnak nem képezi tárgyát, érdemes megjegyezni, hogy az EU által alkalmazott megközelítés antropocentrikus, azaz a környezet védelmének végső célját az emberi élet és egészség védelmében jelöli meg. Ennek ellenére az EU környezetvédelmi joga az egyik legfejlettebb és leginnovatívabb a világon. – A kérdés, hogy az EU a közeljövőben megfogja-e haladni az antropocentrikus megközelítést. Lásd: Alblas 2017; lásd továbbá: Pikramenou, Nikoletta, Rights of Nature: Time to Shift the Paradigm in the EU?

[9] Hermann 2016b, 5.

[10] A magyar Alaptörvény vonatkozó rendelkezéseinek elemzését lásd: Hojnyák 2019.

Az egészséges környezethez való jog általános célja tehát a méltóság védelme, míg speciális célja a környezet védelme[11] – zárja a következtetéseit Hermann.

A kapcsolódó alapfogalmak között kell még említeni a nemzedékek közötti méltányosság elvét, azaz, hogy minden nemzedék úgy köteles tovább adni a környezetet az elkövetkező generációnak, ahogyan azt kapta. Amint Pinto de Albuquerque bíró írta egy 2012-es különvéleményében, a nemzedékek közötti méltányosság érvényesülése elengedhetetlen a fenntartható fejlődés megvalósításához.[12] Ugyanakkor a nemzedékek közötti méltányosság elvének is van előfeltétele: érvényesülése a nemzedéken belüli méltányosság érvényesülését feltételezi. Amint Greksza Veronika írja, előbbi teljesítését nem lehet elvárni az adott generációtól, amennyiben az a saját tagjainak szükségleteit sem képes kielégíteni.[13]

## 2. A regionális emberi jogvédelmi mechanizmusok gyakorlatának áttekintése

### 2.1. Az európai emberi jogvédelmi mechanizmus joggyakorlata

Az emberi jogok európai védelmének alappillére, az Emberi Jogok Európai Egyezménye[14] (továbbiakban EJEE) expressis verbis nem rendelkezik sem az egészséges környezethez való jogról, sem az emberi környezet védelméről. Jóllehet 1999-ben komolyan felmerült egy kiegészítő jegyzőkönyv elfogadásának ötlete, azt nem követte cselekvés.[15] Az európai mechanizmus tehát, csak közvetve – az Emberi Jogok Európai Bíróságának (továbbiakban: EJEB) gyakorlata által – járul hozzá a környezetvédelemhez.[16] A Bíróság az evolutív értelmezés[17] talaján állva az egészséges környezethez való jog néhány elemét már levezette az Egyezményből az általa vizsgált ügyekben. Jellemzően az élethez való jogból[18] (EJEE 2. cikk) és a családi élet tiszteletben tartásához való jogból[19] (8. cikk), a felhívható jogok köre azonban meglehetősen széles.[20] Hermann értelmezésében azonban e megoldás a fennálló jogok környezeti dimenziójának a felismerését, és nem a fennálló rendszernek környezeti jogokkal való bővítését jelenti. A meglévő védelem szintje így, álláspontja szerint, alacsonyabb a megvalósíthatónál.[21] Greksza, aki abból a szempontból vizsgálta az EJEB joggyakorlatát, hogy az megfelel-e a nemzedékek közötti méltányosság elvének, két további kritikát fogalmazott meg: egyrészről, hogy a nemzedékek közötti méltányosság mindezidáig nem kapott kellő hangsúlyt az EJEB joggyakorlatában, másrészt, hogy a kellően súlyos joghátrány, valamint a közvetlen és személyes érintettség megkövetelése

[11] Hermann 2016b, 6.
[12] Lásd EJEB, Hermann k. Németország.
[13] Greksza 2015, 16–19.
[14] Róma, 1950. november 4.
[15] Greksza 2015, 22.
[16] Hermann 2016b, 3.
[17] Az evolutív értelmezésről részletesen lásd: Szemesi 2008.
[18] EJEB, Öneryildiz k. Törökország.
[19] EJEB, Lopez Ostra k. Spanyolország.
[20] E jogok felsorolását és a kapcsolódó ügyeket lásd Greksza cikkében, annak 22-23. oldalán.
[21] Hermann 2016a, 6.

akadályozza a preventív szemlélet[22] kialakítását. Az előbbi, mint írja ez idáig[23] egyedül a Hermann k. Németország ügyben[24] került említésre. – Az ítélethez fűzött különvéleményében tette Pinto de Albuquerque bíró a fentebb már idézett megállapítását azt illetően, hogy a fenntartható fejlődés előfeltétele a generációk közti méltányosság. Az utóbbiakat pedig Greksza azért tartja aggályosnak, mert lehetetlenné tesz bármilyen actio popularis jellegű fellépést a környezet védelme érdekében.[25]

A védelem szintjének javítására Hermann és Greksza hasonló de lege ferenda javaslatokat tesznek. Hermann álláspontja szerint az EJEE 'living instrument' karakterét kihasználva a Bíróság magasabbra emelhetné az állam pozitív védelmi kötelezettségét az élethez való jogból (2. cikk), valamint a magán- és családi élet tiszteletben tartásához való jogból (8. cikk) kiindulva. E kötelezettség magában kell, hogy foglalja a környezet elemeinek védelmét és a természeti erőforrásokkal való racionális gazdálkodást. A Bíróság legitimációját ehhez a lépéshez a közös alkotmányos hagyományok adnák.[26] Greksza is az evolutív értelmezésben látja az egyik lehetséges megoldást, álláspontja szerint az EJEB az EJEE rendelkezéseiből le tudná vezetni a környezethez való jog kollektív aspektusait.[27] A Bíróság továbbá az eljárási jogok védelmi szintjét is ki tudná terjeszteni, ha vélelmezné a környezetvédelmi civil szervezetek érintettségét, és így a közvetett áldozati státuszt.[28] A legitimációt e lépéshez az a tény adná, hogy az Európa Tanács (a továbbiakban: ET) tagállamai közül 41 tagállam ratifikálta az Aarhusi Egyezményt,[29] valamint a tagállamok 2/3-a alkotmányos szinten[30] rögzít környezetvédelmi rendelkezéseket.[31] A dinamikus értelmezés eszköze azonban korlátozott: az EJEB a korábbi joggyakorlatától csak bizonyos feltételek teljesülése esetén térhet el.[32]

[22] A preventív szemlélet kialakulását elősegítő közgazdasági eszközrendszerek elméleti alapjait lásd: Nagy 2013.

[23] Greksza 2015-ben tett megállapítása a jelen írás szerzője által végzett keresés alapján 2020.06.05-én is megállja a helyét.

[24] EJEB, Hermann k. Németország.

[25] Amint az fentebb említésre került, az Európai Unió környezetvédelmi joga nem képezi jelen tanulmány tárgyát, a szerző ugyanakkor érdemesnek tartja megjegyezni, hogy a magánszemélyeknek az Európai Unió Bírósága (EuB) előtti korlátozott keresetindítási joga kezdetektől fogva viták tárgyát képezte. Újabban a keresetindítási jognak a környezetvédelmi kérdések kapcsán történő kiszélesítése merült fel több EuB ítéletben. Részletesen lásd: Szegedi 2014a; Szegedi 2014b.

[26] Az Európa Tanács 47 tagállamából 30 állam alkotmányában található meg a környezet, mint érték, vagy védelmének kötelezettsége. Továbbá az ET polgárainak közel 2/3-ának jogait olyan alkotmány védi, amely tekintettel van a környezetvédelemre, az egészséges környezethez való jogra, valamint a generációk közötti méltányosságra.

[27] Greksza 2015, 25.

[28] Hermann 2016a, 205–210.

[29] Aarhusi Egyezmény.

[30] A magyar környezetvédelmi szabályozásban legutóbb az elővigyázatosság elvének alkotmányos státusza képezte az alkotmánybíróság vizsgálatának tárgyát. Részletesen lásd: Szilágyi 2018; A magyar Alaptörvény rendelkezéseinek részletes elemzését lásd: Téglásiné Kovács & Téglási 2019.

[31] Hermann 2016a, 205–210.

[32] Greksza 2015, 25.

Tisztább jogi megoldást jelentene, ha a környezet védelméhez való jog kiegészítő jegyzőkönyv formájában az Egyezmény részét képezné. E javaslatot teszi Greksza is. A kiegészítő jegyzőkönyvhöz azonban hiányzik a politikai elhivatottság:[33] az ET Miniszteri Bizottsága többek között arra való hivatkozással utasított el minden felmerülő javaslatot, hogy a tagállamok javarésze garantálja az egészséges környezethez való jogot az alkotmányában, továbbá – új ellenérvként –, hogy az Európai Unió Alapjogi Chartájának[34] 37. cikke is rögzíti azt. Ez utóbbi érv ugyanakkor gyenge lábakon áll: a szóban forgó cikk nem alapvető jogot rögzít, hanem egy politikai célkitűzést.[35]

Az őslakos népek jogait illetően általánosságban megállapítható, hogy az európai mechanizmus e téren meglehetősen tartózkodó álláspontot képvisel az Amerika-közi és az afrikai mechanizmushoz képest.[36] Amennyiben tárgyalt is őslakos népeket érintő ügyeket, azok az egészséges környezethez való jog kapcsán nem relevánsak.

### 2.2. Az Amerika-közi emberi jogvédelmi mechanizmus joggyakorlata

Az EJEE-hez hasonlóan sem az Emberi Jogok Amerikai Egyezménye[37] (a továbbiakban: EJAE), sem az Emberi Jogok és Kötelezettségek Amerikai Nyilatkozata[38] nem tartalmaz expressis verbis rendelkezést az egészséges környezethez való jogról. Az európai mechanizmussal ellentétben azonban az Amerikai Államok Szervezete[39] (a továbbiakban: AÁSZ) tagállamainak sikerült megállapodniuk a jog garantálását illetően: az EJAE kiegészítő jegyzőkönyve, a San Salvador-i protokoll[40] 11. cikke tartalmazza az egészséges környezethez való jogot, valamint az államok kötelességét e jog garantálása érdekében.

Az Emberi Jogok Amerika-közi Bírósága (EJAB) több, az őslakos népeket érintő ügyben foglalkozott a környezet állapotának megóvásával.[41] Jóllehet ezen ügyekben[42] a hangsúly más jogokon volt elsősorban, azok egy része, például az előzetes tájékoztatáson alapuló szabad beleegyezés elve (angol elnevezésének rövidítése nyomán: FPIC) hatékonyan használható környezetvédelmi célokra is.[43]

Tekintve az EJAB érzékenységét a környezetvédelmi kérdésekre, várható lépés volt, hogy amint lehetősége nyílik rá, részletesen is ki fogja fejteni az egészséges környezethez való jog és az egyéb emberi jogok kapcsolatát. E téren talán nem túlzás azt állítani, hogy le is előzte a mesterét.[44]

---

[33] Hermann 2016a, 205–210.
[34] Az Európai Unió Alapjogi Chartája.
[35] Greksza 2015, 26.
[36] Lásd: Marinkás 2018, 186–190.
[37] Emberi Jogok Amerikai Egyezménye (San José, 1969. május 23.).
[38] Emberi Jogok és Kötelezettségek Amerikai Nyilatkozata (Bogotá, 1948).
[39] Lásd: OAS 2020.
[40] San Salvador, 1988. november 17.
[41] Raisz 2008.
[42] Az EJAB őslakos népeket érintő ügyeiről részletesen lásd: Marinkás 2013a, Marinkás 2013b, Marinkás 2012.
[43] Ezt illetően lásd: Marinkás 2018, 111–135.
[44] Az EJAB számára az EJEB joggyakorlata a kezdetektől fogva mintaként és hivatkozási pontként szolgált abból kifolyólag is, hogy az EJAB létrehozásának idejére az EJAB már

A 2017. november 15-én kihirdetett tanácsadó véleményében,[45] amelyben az EJAB az EJAE élethez való jogról szóló 4. cikk (1) bekezdését és az emberi méltósághoz való jogot rögzítő 5. cikk (1) bekezdését értelmezte, mérföldkő jelentőségű megállapításokat tett.

Egyrészről megállapította, hogy az élethez és az emberi méltósághoz való jogból levezethető az egészséges környezethez való jog.[46] A Feria-Tinta – Milnes szerzőpáros szerint azonban ennél is többről van szó: ez volt első olyan eset, amelyben egy nemzetközi bíróság, mint egységes rendszert értelmezte a környezetjogot, valamint az alapjogok között helyezte el az egészséges környezethez való jogot és a többi alapjoggal egyenrangúként definiálta azt.[47] Annak ellenére, hogy a tanácsadó vélemény egy konkrét beruházás kapcsán került indítványozásra, az ítélet jól absztrahálható bármely jövőbeni bi- vagy multilaterális környezeti vitára. Az ítéletben foglaltak érvényre jutásának[48] esélyeit növeli, hogy az AÁSZ tagállamai részéről érkezett észrevételek támogatták Kolumbia beadványát és az abból kiolvasható értelmezést az egészséges környezethez való jogot illetően.[49]

Másrészről, az EJAB tanácsadó véleményével megnyitotta az utat a Feria-Tinta – Milnes szerzőpáros megfogalmazásában 'átlós' emberi jogi keresetek előtt, azaz, hogy a szennyezésért felelős állam főhatalma alá nem tartozó személyek is eljárást kezdeményezzenek a szóban forgó állammal szemben.[50] A Bíróság ezáltal a jövőre nézve lehetővé teszi, hogy a határokon átnyúló környezetszennyezések áldozatai hatásos védelemben részesüljenek, különösen azért, mert nem csak a közvetlenül az állami szerveknek betudható szennyeződések esetén mondta ki a joghatóságát, hanem bármely olyan tevékenység esetén, amely felett az állam tényleges ellenőrzést gyakorol. Mindez azért tekinthető jelentős fordulópontnak, mert ez idáig az Amerika-közi rendszer álláspontja is óvatosnak volt mondható e téren.[51]

Harmadrészt, az EJAB megállapította az államok anyagi és eljárásjogi kötelezettségét a környezet védelem terén,[52] amely az élethez és az emberi méltósághoz való jog tiszteletben tartásának és érvényre juttatásának kötelezettségéből vezethető le.

kiforrott ítélkezési gyakorlattal rendelkezett. A későbbiekben azonban az EJEB ítélkezési gyakorlatára is hatást gyakorolt az EJAB gyakorlata. A kérdéssel a hazai szakirodalomban Raisz Anikó foglalkozott behatóan. Lásd: Raisz 2010, Raisz 2009, Raisz 2007.

[45] EJAB, OC-23/17.

[46] Az EJAB mindezt az alábbiakra alapozta: egyrészt megállapította, hogy környezetvédelme és az egyéb emberi jogok érvényesülése között vitathatatlan kapcsolat áll fenn, illetve, hogy az emberi jogok egyes csoportja különösen sérülékeny ilyen szempontból. Azaz, a környezet állapotának romlása közvetlenül rontja az érvényre jutásuk mértékét. Az EJAB ezenfelül azonosította azon jogok körét, amelyek érvényre jutása különösen fontos a környezetvédelem színvonalának emelésében ideértve a szólás szabadságát, valamint a döntéshozatalban való részvételt. EJAB, OC-23/17, paras. 47, 55, 65.

[47] Feria-Tinta & Milnes 2019.

[48] Banda 2018.

[49] Feria-Tinta & Milnes 2019, 50–51.

[50] EJAB, OC-23/17, paras. 81–82, 93–94, 104.

[51] Feria-Tinta & Milnes 2019, 54–55.

[52] Feria-Tinta & Milnes 2019, 55–56.

E kötelezettségek különösen:[53] (a) a jelentős környezeti károsodás bekövetkeztének megakadályozása, (b) szabályozás és felügyelet kialakítása, (c) az elővigyázatosság elvének figyelembevétele és (d) a jóhiszemű együttműködés kötelezettsége. – Az utóbbiba beleértendő (e) a potenciálisan érintett állam tájékoztatásának kötelezettsége. – Végül, de nem utolsó sorban, a lakosság vonatkozásában (f) a tájékoztatáshoz és a (g) döntéshozatalban való részvételhez, valamint (h) a bírói védelemhez való jog garantálása.

Negyedrészt, kiemelendő, hogy az EJAB a tanácsadó véleményében külön figyelmet szentelt[54] az AÁSZ tagállamok alkotmányos szabályozásának, kiemelve, hogy a kolumbiai és ecuadori jogrendszer kvázi jogalanyként kezeli a természetet, amelyet e státuszában jogok illetnek, meg és amely jogokat az említett két ország legfelsőbb bíróságai is védelmükben részesítettek.[55] Bár a tanácsadó vélemény nem említi, ehelyütt érdemes megemlíteni a kolumbiai Atrato-folyó ügyét, amelyben a Kolumbiai Legfelsőbb Bíróság magát a folyót nyilvánította jogok alanyának, amelyet megillet a védelem joga,[56] illetve azt a 2018-as ítéletet,[57] amelyben a testület az Amazonas őserdőt nyilvánította jogalanynak, hogy megvédje az egyre növekvő mértékű erdőirtástól.[58]

### 2.3. Az afrikai emberi jogvédelmi mechanizmus joggyakorlata

Az Ember és Népek Jogainak Afrikai Chartája[59](a továbbiakban: Afrikai Charta) a fentebb tárgyalt emberi jogi dokumentumokkal ellentétben rögzíti az egészséges környezethez való jogot, jóllehet azt expressis verbis nem így fogalmazza meg. A Charta 24. cikke értelmében minden népnek joga van 'az általánosságban kielégítő szintű környezethez, amely elősegíti a fejlődésüket.' A megfogalmazást számos kritika érte annak túl általános jellege miatt. Annak meghatározása, hogy pontosan mit jelentenek a 'kielégítő szintű környezet,' illetve az 'elősegíti a fejlődést' kifejezések, a Charta rendelkezéseinek betartása felett őrködni hivatott Ember és Népek Jogainak Afrikai Bizottságára (a továbbiakban: ENJABiz) és részben a nemzeti felsőbb bíróságokra maradt. Előbbinek legelőször a SERAC és mások k. Nigériai Szövetségi Köztársaság ügyben[60] – vagy ismertebb nevén Ogoni-ügyben[61] – nyílt rá lehetősége, hogy a fent említett kérdéseket tisztázza. Érdemes megemlíteni, hogy az Ogoni-ügy az őslakos népek szempontjából is relevánsnak tekinthető. Az ügyben a Bizottság megállapította, hogy a Charta 24. cikke – az elérhető legmagasabb fokú szellemi és testi egészséget garantáló – a 16. cikkel egyetemben egyértelmű kötelezettséget ró az államra.

[53] EJAB, OC-23/17, paras. 95–103, 242.
[54] EJAB, OC-23/17, para. 62.
[55] Kolumbia Legfelsőbb Bírósága, ítélet T-622-16, 2016 november 10.; Ecuador Legfelsőbb Bírósága, ítélet 218-15EP-CC, 2015. július 9.
[56] Lásd: Kolumbia Alkotmánybírósága, ítélet, T-622/16.
[57] Kolumbiai Legfelsőbb Bírósága, STC 4360-2018.
[58] Az ügy előzménye az volt, hogy 2015-ről 2016-ra 44%-val növekedett az erdőirtás üteme.
[59] Az Ember és a Népek Jogainak Afrikai Chartája.
[60] Ismertebb nevén az Ogoni-ügy.
[61] Részletesen lásd: Marinkás 2014.

Amint a Bizottság írta: 'nincs olyan jog az Afrikai Chartában, amelyet ne lehetne érvényesíteni.'[62] E megközelítés egyébként nem tekinthető idegennek az afrikai emberi jogvédelmi mechanizmustól: az Afrikai Chartában ugyanis a harmadik generációs jogok esetében sem találunk a progresszív megvalósításra való utalást. – Az egyedüli kivétel éppen a 16. cikk, amelynek esetében így a joggyakorlat felülírta a Chartát aláíró államok szerződéskori akaratát. – Kiemelendő továbbá, hogy az ENJABiz az ügy érdemben történő elbírálása során az ún. 'kötelezettségek megközelítést' alkalmazta, amely Henry Shue,[63] valamint – az elméletet tovább fejlesztő – Asbjørn Eide[64] nevéhez köthető, és amely elszakadva a hagyományos, generációk szerinti felosztástól lehetővé teszi, hogy az egyes jogok egyenlő súllyal essenek latba.[65] Az elmélet lényege, hogy az államnak az emberi jogokat illetően 3+1 kötelezettsége van: tisztelnie, védenie, teljesítenie, valamint elő kell mozdítania azokat.[66] Az első kötelezettség, az emberi jogok tisztelete – a többivel ellentétben – negatív tartalmú kötelezettség, azt követeli meg az államtól, hogy tartózkodjék az emberi jogok megsértésétől. Az emberi jogok védelme pozitív tartalmú kötelezettség, vagyis az államnak garantálnia kell, hogy harmadik személyek – akár magánszemélyek, akár jogi személyek – ne sérthessék meg az egyén jogait. Az emberi jogok teljesítése olyan lépések meghozatalát követeli meg az államtól, melynek köszönhetően széles rétegek tudják gyakorolni jogaikat. Végezetül, az előmozdítás értelmében az állam igyekszik minél szélesebb körű társadalmi elismertséget szerezni az alapvető emberi jogoknak.[67]

Az ENJABiz az ügyben az őslakos népek és a környezetvédelmi szempontok mellett ugyanakkor az államok azon igényét is figyelembe vette, hogy hozzáférhessenek a területükön található természeti kincsekhez. A Bizottság e téren az alábbi megállapításokat tette: „az államnak kötelessége, hogy megtegyen minden ésszerű […] intézkedést a szennyeződés és a környezet állapot romlásának megakadályozása érdekében […], hogy biztosítsa a természeti erőforrások […] fenntartható felhasználását."[68] Kiemelendő egyrészről, hogy az ENJABiz elismerte az állam azon jogát, hogy hozzáférjen a területén található természeti kincsekhez, másrészről, hogy e közben az egészséges környezethez való jog érvényre jutásának biztosítása érdekében számos eljárási garancia teljesülését kívánja meg, ideértve a tájékoztatáshoz való jogot, a döntéshozatalban való részvételhez való jogot – e kettő hatékony gyakorlása érdekében – az előzetes hatástanulmány készítésének kötelezettségét. Végül, de nem utolsó sorban az egyén számára biztosítani kell a bírói védelemhez való jogot. Amint azonban Emeka P. Amechi rámutat, az ENJABiz leginkább a 24. cikk eljárásjogi vetületeit vizsgálta, viszont annak anyagi jogi tartalmát – más korábban általa vizsgált jogokkal ellentétben – nem fejtette ki.[69]

[62] Ogoni-ügy, para. 52–53, 68.
[63] Shue, 1980.
[64] Lásd Asbjørn Eide 2020.
[65] Lásd Icelandic Human Rights Centre 2020.
[66] ENJABiz, Ogoni-ügy, paras. 43–48.
[67] Marinkás 2018, 141–142.
[68] ENJABiz, Ogoni-ügy, para. 52.
[69] Amechi, 2009, 63.

Az afrikai államok legfelsőbb és alkotmánybíróságai jellemzően az ENJABiz joggyakorlatához hasonló álláspontra helyezkedtek, azaz próbálnak egyensúlyt találni a környezetvédelmi szempontok és az államok azon jogos igénye között, hogy a területükön található természeti kincseket a fejlődésük szolgálatába állíthassák. E téren tehát egybevág az ENJABiz és a tagállami bíróságok gyakorlata azt illetően, hogy egy bizonyos fokú szennyeződés bekövetkezte és a környezet állapotának egy bizonyos mértékű romlása megengedhető a Charta rendelkezései alapján, azt az állampolgárok tűrni kötelesek.[70]

Az Endorois-ügyben[71] is szóba került az egészséges környezethez való jog, igaz ez esetben csak közvetetten, az FPIC érvényre jutásának szempontjából vizsgálta azt az ENJABiz.[72] – Az FPIC kapcsán érdemes megjegyezni, hogy az ENJABiz és az Afrikai Unió egyéb szervei a gyakorlatukban az FPIC jogalapját nem kizárólag az önrendelkezéshez való jogban jelölik meg, helyette egyéb jogokat is felhívnak.[73]

Az Ember és Népek Jogainak Afrikai Bírósága (ENJAB) eddig egyetlen őslakos népeket érintő ügyet tárgyalt – jelesül az Ogiek-ügyet[74] –, az Afrikai Charta 24. cikkének sérelmét azonban abban nem vizsgálta,[75] jóllehet az ügy egyéb szempontból figyelemreméltó.[76]

## 3. Az őslakos népek jogainak védelme és a környezetvédelme a földhöz való jogon keresztül

### 3.1. A fejlődés íve

A nemzetközi jog a XX. század utolsó negyedéig nem sok figyelmet szentelt az őslakos népek jogainak, ideértve az ősi földjeik birtoklásához és használatához való jogaikat. Változásra az elmúlt évtizedekben került csak sor,[77] amely a témával foglalkozó szakértők irányából indult. Mindezt némi késéssel és bizonytalansággal követte az emberi jogi mechanizmusok gyakorlatának változása. Az államok gyakorlata a mai napig nem egységes, mi több sok esetben erős ellenállást tanúsítanak az őslakos népek földhöz való jogainak elismerésével kapcsolatban, mivel azt a területükön található természeti kincsekhez való hozzáférés akadályának tekintik.

[70] Uo. 67, 69.
[71] ENJABiz, Endorois-ügy.
[72] Részletesen lásd: Marinkás 2014b.
[73] Roesch 2017.
[74] ENJAB, Ogiek-ügy.
[75] Az ügy tényállását lásd: Marinkás 2018, 161–168.
[76] Kiemelendő, hogy az ENJAB szakítva az ENJABiz gyakorlatával, nem az Őslakos népekkel és közösségekkel foglalkozó ENJABiz szakértői munkacsoport őslakos definícióját alkalmazta annak eldöntésénél, hogy az Ogiek népcsoport őslakos csoportnak tekinthető-e, helyette az ENSZ Őslakos Népekkel Foglalkozó Munkacsoport egykori elnöke Erica-Irene Daes kritérium rendszerét alkalmazta. Az őslakos népek definiálásának problematikáját, különös tekintettel az afrikai őslakos népekre lásd: Marinkás 2018, 18–22, 138–140.
[77] Marinkás 2015a.

Az őslakos specifikus dokumentumok közül több is foglalkozik a föld tulajdonjogával és használatának kérdéseivel. Az ILO 169-es számú egyezménye[78] minden más, emberi jogi dokumentumnál erősebb garanciákat tartalmaz a földhöz való jogot illetően. A 169-es számú egyezményben a földek kérdésének összesen hét cikket szenteltek, ezek közül a legelső a 13. cikk, amely kiemeli az őslakos népek és a földjeik között fennálló kapcsolatok szorosságát, a 14. cikk pedig megköveteli az őslakos népek tulajdon- és birtokjogának elismerését, a tradicionálisan birtokolt földek vonatkozásában. A 'birtokol' kifejezés értelmezése vitákat eredményezett a szakirodalomban, a felmerülő kérdéseket az ILO-nak kellett eloszlatnia. A szervezet álláspontja szerint az egyezmény szövegezése alapján nem kitétel, hogy az adott nép jelenleg is birtokolja az adott területet, azt azonban igen, hogy valamiféle kapcsolat fennálljon az adott nép és a földterület között.[79] A fenti iránymutatásból – és az ILO szerveinek joggyakorlatából[80] – következik, hogy a 169-es számú egyezményre nem lehet történelmi igazságtalanságra építő követeléseket alapítani, ezáltal számos őslakos népet zár ki az igényérvényesítés lehetőségéből.

A földekkel kapcsolatos másik kardinális kérdés az volt, hogy az őslakosokat a tulajdonhoz való jog illeti-e meg, vagy csak a birtoklás joga. A 107-es számú egyezmény[81] szándékosan csak a tulajdonhoz való jogot említi, a szerződés előkészítése során ugyanis komoly aggályok merültek fel azt illetően, hogy a birtoklás jogának belefoglalása, gyengítené-e a rendelkezést azáltal, hogy lehetővé tenné a kormányok számára, hogy válasszanak a két jog között, és kizárólag a birtokjogot ismerjék el. A 169-es számú egyezmény, ezzel szemben – a jelen kontextusban visszalépésként értelmezve – mind a két jogot elismeri, és garantálja. A birtokláshoz való jog rögzítésének nyilvánvaló oka az volt, hogy az államok – legalábbis egy részük – továbbra is abban a hitben szerették volna tartani az őslakos népességüket, hogy a föld felett nem rendelkezhetnek tulajdonjoggal, csak átörökíthetik azt, generációról generációra. Ezen értelmezés – ismerve a politikai realitásokat – Alexandra Xanthaki szerint is megalapozottnak mondható.[82] E hiányosságtól függetlenül az egyezmény hatékony védelmet garantál: a 17. cikke az állam felelősségévé teszi az őslakosok földjeinek megvédését. E körben az államnak el kell ismernie az őslakos népek tradicionális földátruházási eljárásait, egyben kötelessége megakadályozni, hogy a nem őslakos származású személyek, az őslakos népek hagyományait, vagy jogban való járatlanságát kihasználva, földterülethez jussanak.

[78] Az ILO 169. számú egyezménye.
[79] Indigenous and Tribal Peoples Rights in Practice. A Guide to ILO Convention No. 169.
[80] Az ILO Kormányzó Tanácsa 2000-ben bírálta el a Dániában honos Uummannaq közösség kérelmét, melyben ősi földjeik visszaszolgáltatását kérvényezték. A Tanács a kérelmet elutasító döntésében több indokot is felhozott, az egyik ezek közül az volt, hogy a területet időközben más őslakos csoportok is birtokba vették, ahhoz, hogy a közösség kérését teljesítsék, őket ki kellene telepíteni az adott területről, amely a viszonylag újonnan érkezett népességnek hasonló traumát okozna, mint ötven évvel korábban az Uummannaq közösségnek. – Document No. (ILO): 162000DNK169, para. 36; Lásd továbbá: Marinkás 2015b.
[81] Az ILO 107. számú egyezménye.
[82] Xanthaki 2007, 83.

Az őslakos népek földhöz való jogait az ENSZ Őslakos Népek Jogairól Szóló Deklarációja[83] (a továbbiakban: UNDRIP) is védelemben részesíti: a 10. cikke tiltja az őslakos népek erőszakos elmozdítását földjeikről vagy területeikről. Az UNDRIP rendelkezései a földek kérdését a kulturális jogok felől közelítik meg, amely megfelel az ENSZ szervek bevett joggyakorlatának,[84] a földhöz való jog kortárs szakirodalmi álláspontjának[85] és végül, de nem utolsó sorban az őslakos népek saját értelmezésének. Amint azt egy ausztrál őslakos csoport képviselője kijelentette: „a föld az alapja a teremtés történeteknek, a vallásnak, a spiritualitásnak és a kultúrának. Kapcsolatot jelent továbbá a jelen és a múlt generációk között. A föld elvesztése, vagy megkárosítása komoly nehézséget okoz az őslakos népek számára."[86] Az International Indian Treaty Council – őslakos származású – képviselőjének szavaival: „a föld az őslakos népek szent anyja, életadója és túlélésük forrása, ennek megfelelően [a földhöz való joguk] képezi [az UNDRIP] tervezet szívét és lelkét."[87]

Összefoglalva tehát megállapítható, hogy az őslakos népek földhöz való jogainak védelme kapcsán a kulturális alapú megközelítés tekinthető a meghatározó irányzatnak, annak hátulütőivel együtt,[88] ideértve azt is, hogy a többségi társadalom tagjai közül kikerülő döntéshozók szerint az őslakos közösségeket meghatározó kulturális jegyek több esetben nem – vagy nem olyan formában – léteznek, amint azt az említett döntéshozók elképzelik.[89]

Egy a fentitől élesen különböző megközelítést alkalmaz Olivier De Schutter, aki 2008 és 2014 között az ENSZ élelemhez való joggal foglalkozó különleges rapporteureként, több jelentésében elemezte a földhöz való jogot, amely véleménye szerint kettős természetű: egyrészről szemlélhető úgy, mint egy önálló jog, amely alapvetően a tulajdonhoz való jogból eredeztethető, és annak elismerésén alapul, hogy az őslakos népek szorosan kötődnek ősi földjeikhez. Más nézőpontból vizsgálva, a földhöz való jog tekinthető úgyis, mint amely alapvetően instrumentális jellegű, az élelemhez való joghoz[90] viszonyítva: a föld a napi betevő megtermelésének

[83] A/RES/61/295.
[84] Marinkás 2018, 231–233.
[85] Julian Burger szerint, „amennyiben az őslakos népek nem kaphatják vissza az irányítást a saját jövőjük és fejlődésük, valamint a földjeik fölött, a helyzetük semennyit sem fog javulni. – Burger 1994, 195.
[86] ATSIC, Native Title Amendment Bill 1997, Issues for Indigenous Peoples. ATSIC, Canberra, 1997, 5.
[87] UN Doc, E/CN.4/1997/102), para. 248.
[88] Dulitzky 2010.
[89] A fenti dilemmák elkerülése végett Marcos Orellana javaslata az, hogy az őslakosok földjeinek védelmét, a tulajdonhoz való jog helyett, célszerűbb lenne az élethez való jog védelmére helyezni, hangsúlyozva a fennmaradáshoz való jogukat és azt, hogy ehhez szükségük van a területükön található természeti kincsekre. Így, mivel az élethez való jog – a tulajdonhoz való joggal ellentétben – szinte korlátozhatatlan, biztosítani lehetne, hogy az adott törzsek érdekei minden esetben elsőbbséget élvezzenek. Ugyanakkor – hívja fel a figyelmet maga Orellana – ez a megoldás elkerülhetetlenül feszültséget okozna a törzsek és az államok közt. Lásd: Orellana, Marco 2008, 846–847.
[90] Az élelemhez való jog magyar szakirodalmi feldolgozását lásd: Téglásiné Kovács 2017.

legalapvetőbb feltétele, ilyen szempontból kiemelt védelmet érdemel.[91] Jóllehet az érvelése a maga rendszerén belül logikus, az őslakos népek esetében a földjeikkel fennálló szoros spirituális kapcsolat miatt e materialista megközelítés nem tekinthető relevánsnak.

### 3.2. Negatív példák és jó gyakorlatok

Jelen tanulmány írója 2016-os doktori értekezésében, majd a 2018-ban kiadott monográfiájában a tanulmányozott jogesetek és a szakirodalom alapján arra a következtetésre jutott, hogy kimutatható és igazolható kapcsolat áll fenn az őslakos népek földhöz való jogainak elismerése és a környezetvédelmi célok megvalósíthatósága között. E megállapításai a fenti két munka kéziratainak lezárását követően bekövetkezett fejlemények és az azokat elemző szakirodalom alapján is megállta a helyét. Többek között Allen Blackman és szerző társai is arra a következtetésre[92] jutottak, hogy azon területeken, ahol az őslakos népek földhöz való jogai kellőképpen körülbástyázottak, az erdőirtások mértéke számottevően csökkent a két éves vizsgálati időszak alapján. – Jóllehet egyes szakirodalmi álláspontok óvatosságra intenek a Blackman féle kutatásban tett megállapítások generális alkalmazhatósága kapcsán.[93]

Az említett erdőirtások egyik fő oka a földek túlhasználata, amelyet többek között az egyre elterjedtebb – súlyos talajeróziót és a talaj kimerülését eredményező – monokultúrás növénytermesztés is indukál. Emiatt, évről évre több földet kell bevonni a művelésbe. – E folyamatot nevezi De Schutter földrablásnak.[94] – Fontos összefüggés e téren, hogy minél szilárdabb az őslakos közösségek földhöz való joga, annál kevésbé lehetséges véghez vinni a földrablást. Ironikus módon egyébként akár környezetvédelmi indíttatású tevékenységek növelhetik a földrablás mértékét. Ennek eklatáns példája a bioüzemanyagok iránti növekvő kereslet, amely egyrészről újabb és újabb erdők kiirtását – azaz földrablást –, von maga után, másrészről súlyosan veszélyezteti az érintett országok élelmezésbiztonságát. Amint arra a különleges rapporteur rámutatott: a bioüzemanyagok alapanyagainak termesztésére való átállás élelmiszerhiányt és az élelmiszerek árának növekedését vonja maguk után, amely a harmadik világ lakosai számára – akik jellemzően élelemre kénytelenek költeni a bevételük többségét – könnyen az éhezést jelentheti.[95]

Kapcsolódó probléma, hogy az érintett területekről kitelepített vagy elmenekült személyek száma évről évre növekszik. Beszédes adat, hogy a 2010-es évtizedre visszatekintve a lakhelyüket elhagyni kényszerült személyek (internally displaced persons), száma jelentősen meghaladta a 2010 előtt kiadott becsléseket: bár az előrejelzések is több tízmillió emberrel számoltak tíz év alatt,[96] Renée V. Hagen és

[91] De Schutter 2010, 306.
[92] Blackman et al., 2017.
[93] Robinson 2017.
[94] De Schutter 2011.
[95] De Schutter 2010, 306–309.
[96] Lásd: Internal Displacement Monitoring Centre 2009.

Tessa Minter a 2020-as cikkében az elérhető információk alapján húsz millióra tette az érintettek számát, éves szinten.[97]

Az ENSZ REDD (angol nevén: Reducing Emissions from Deforestation and Forest Degradation) programot 2008-ban hívták életre annak érdekében, hogy segítse a fejlődő országokat a túlzott mértékű erdőirtás visszaszorításában. A trópusi erdők ugyanis rémisztő mértékben tűnnek el: az 1990 és 2005 között évente átlagban 13 millió hektárnyi esőerdőt vágtak ki – ez naponta átlagosan 200 km²-et jelent –, amely többszörösen meghaladja az erdők természetes megújuló képességét, valamint az erdőtelepítési programok kapacitását. Az erdőirtás és a fakitermelés az üvegházhatású gázok kibocsátásának 17 %-áért felelős, a fejlődő országokban ugyanis a legtöbb esetben egyszerűen felégetik az erdőket annak érdekében, hogy művelhető földterülethez jussanak.[98]

Az ENSZ REDD Programját korábban azért érték kritikák, mert annak keretében a területet tradicionálisan használó, az erdő természeti kincseit a saját létfenntartásuk által megkövetelt mértékben használó őslakos közösséget is kitiltották a területről.[99] Amennyiben tagjai megpróbáltak visszatérni a területre[100] azzal kellett szembesülniük, hogy a hatóságok azt minden eszközzel – ideértve a büntetőjogi eszközöket is – akadályozzák.[101] Ez az XIX. századi ún. Yellowstone-modell, amelynek értelmében a természeti környezet eredeti állapotban történő megóvásának legjobb módja az, ha – a természetjárás kivételével – minden emberi tevékenységet megszüntetnek a területen, beleértve a helyi őslakos közösségek hagyományos gazdálkodási módjait is.[102] Ezen idejétmúlt modellt – amelynek alkalmazása a fejlődő világban különösen károsnak bizonyult[103] – a föld számos országának nemzeti parkjában és környezetvédelmi területén meghaladták már.[104] Az egyik legutóbbi jógyakorlat a Panama Darién régiójában lakó őslakos népek bevonása az őserdő megőrzését célzó ENSZ programba. – A Javier Matero-Vega és kutatótársai által jegyzett tanulmány[105] szerint pozitív eredménnyel.

## 4. Konklúziók

A szerző álláspontja a regionális emberi jogvédelmi mechanizmusok gyakorlatának tanulmányozását, valamint a szakirodalom áttekintését követően az, hogy az őslakos népek jogainak minél szélesebb körű garantálása és a környezetvédelmi célok – ideértve az egészséges környezethez való jogot – teljesülése között egyértelmű összefüggés áll fenn. Minél inkább érzékeny egy regionális emberi jogvédelmi mechanizmus az őslakos népeket érintő kérdésekre, annál inkább hajlandó

[97] Lásd: Hagen & Minter 2020.
[98] Lásd FAO, UNDP, UNEP Framework Document (2008).
[99] De Schutter 2010, 308–309.
[100] Lásd példának okáért a fentebb idézett Endorois-ügyet.
[101] Hershey 2019.
[102] Lásd: Poirier & Ostergren, 2002.
[103] Hershey 2019, 68.
[104] E példákat lásd: Marinkás 2018, 262–264.
[105] Mateo-Vega, 2017.

környezetvédelmi megfontolásokat is figyelembe venni. Mindez egyértelmű az európai és az Amerika-közi emberi jogvédelmi mechanizmus gyakorlatának összevetése alapján: míg előbbi kevés hajlandóságot mutat az őslakos népek védelemben részesítése iránt és az egészséges környezethez való jogot illetően sem aknázza ki teljesen a mechanizmusban található 'tartalékokat,' utóbbi mindkét téren élenjár. Az afrikai mechanizmus – amely az Amerika-közihez hasonlóan kiemelt figyelmet szentel az őslakos népek védelmének –, a környezetvédelmi kérdéseket is hangsúlyosan kezeli a gyakorlatában. Jóllehet e téren nagy előny számára, hogy az Afrikai Charta több harmadik generációs jogot is expressis verbis garantál.

A fenti megállapításokat az őslakos népek környezetvédelmi programokba való bevonásával megvalósuló projektek pozitív hatásai is alátámasztják: az őslakos népek tradicionális életmódja kiváló példája annak, amikor egy közösség pontosan annyit vesz el a természettől, amennyire szüksége van. Jóllehet a szerző realista a téren, hogy a modern társadalmak esetén e tudás nem alkalmazható egy az egyben, az őslakos népek tudásának tanulmányozását, valamint az ismereteik környezetvédelmi célú felhasználását mindenképpen hasznosnak tartja.

A szerző további megállapítása, hogy egy adott regionális emberi jogvédelmi mechanizmus őslakos népek jogai iránt tanúsított érzékenysége hatást gyakorol a tagállami alkotmányos és törvényi szabályokra, jó példával szolgálnak erre a dél-amerikai államok, amelyek fokozatosan egyre több jogot ismertek el az őslakos népek javára – és az utóbbi időben a környezetvédelme terén is –, nem kis részben az Amerika-közi mechanizmus gyakorlatának hatására. Meg kell ugyanakkor említeni, hogy az európai mechanizmus esetében fordított helyzet áll fenn: míg az ET tagállamok többsége garantálja az egészséges környezethez való jogot az alkotmányában, az EJEE továbbra sem rendelkezik róla. E hiányosságot az EJEB joggyakorlatának kellett pótolnia, vegyes eredménnyel.

## Irodalomjegyzék

**Könyvek, szakcikkek, tanulmányok**

1. Alblas E (2017) *EU Environmental Policy: In the Pursuit of? Conflicting Objectives in Light of the Anthropocene,* Research Master in Law Research Master in Law Tilburg University, The Netherlands.
2. Amechi E P (2009) Socio Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples' Rights, *Law, Environment and Development Journal*, 5(1), pp. 58–72.
3. Banda M L (2018) Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, *American Journal of International Law,* 22(6)
4. Bándi Gy (2013) A környezethez való jog értelmezése a fenntartható fejlődési stratégia és az Alaptörvény fényében, *Acta Humana*, 2013/1., pp. 67–92.
5. Blackman A (2017) Titling Indigenous Communities Protects Forests in the Peruvian Amazon, *Proceedings of the National Academy of Sciences of the United States of America*, 114(16), pp. 4123–4128.
6. Burger J (1994) The Economic Rights of Indigenous Peoples, in: van Der Vilst L, szerk., *Voice of the Earth, Indigenous Peoples, New Partners and the Right to Self Determination in Practice*, Utrecht, The Netherlands Centre for Indigenous Peoples, pp. 195–207.
7. De Schutter O (2010) The Emerging Human Right to Land', *International Community Law Review*, 12(3), pp. 303–334.
8. De Schutter O (2011) The Green Rush: The Global Race for Farmland and the Rights of Land Users', *Harvard International Law Journal*, 52(2), pp. 503–560.
9. Dulitzky A E (2010) When Afro-Descendants Became Tribal Peoples: The InterAmerican Human Rights System and Rural Black Communities, *UCLA Journal of International Law and Foreign Affairs*, 15(1), pp. 29–82.
10. Feria-Tinta M & Milnes S C (2019) International Environmental Law for the 21st Century: The Constitutionalization of the Tight to a Healthy Environment in the Inter-American Court of Human Rights Advisory Opinion 23' *Anuario Colombiano de Derecho Internacional/ Colombian Yearbook of International Law,* 12., pp. 43–84.
11. Greksza V (2015) Questions of a Comprehensive Protection of the Right to a Healthy Environment in Strasbourg', *Pécs Journal of International and European Law*, 2015/1, pp. 16–27.
12. Hagen R V & Minter T (2020) Displacement in the Name of Development. How Indigenous Rights Legislation Fails to Protect Philippine Hunter-Gatherers', *Society & Natural Resources*, 33(1), pp. 65–82, doi: 10.1080/08941920.2019.1677970
13. Hermann V (2016a) *Az egészséges környezethez való jog átfogó védelme az Emberi Jogok Európai Bíróságának gyakorlatában*.' PhD Dissertation.
14. Hermann V (2016b) *Az egészséges környezethez való jog átfogó védelme az Emberi Jogok Európai Bíróságának gyakorlatában*, Thesis of the PhD Dissertation.

15. Hershey R A (2019) Paradigm Wars Revisited: New Eyes on Indigenous Peoples' Resistance to Globalization. Indigenous Peoples', *Journal of Law, Culture and Resistance*, 5(1), pp. 43–78.
16. Hojnyák D (2019) Az agrárszabályozási tárgyak megjelenése az EU tagállamainak alkotmányaiban, különös tekintettel a Magyar Alaptörvényben megjelenő agrárjogi szabályozási tárgyakra', *Miskolci Jogi Szemle*, 14(2), pp. 58–76.
17. Marinkás Gy (2012) Az őslakosok jogainak megjelenése az Amerikaközi Rendszerben: az őslakosok joga ősi földjeikre, különös tekintettel a Mayagna (Sumo) Awas Tingni kontra Nicaragua ügyre, in: Raisz A, szerk., *A nemzetközi környezetjog aktuális kihívásai,* Miskolci Egyetem, Miskolc.
18. Marinkás Gy (2013) A Saramaka emberek kontra Suriname ügy; avagy az Amerikaközi Bíróság, mint az őslakos népek jogainak élharcosa, in: Sáry P, szerk., *Publicationes Universitatis Miskolciensis Sectio Iuridica et Politica,* Tomus XXXI, Miskolc, Miskolci Egyetemi Kiadó.
19. Marinkás Gy (2013a) Az őslakosok jogainak védelme az Amerikaközi Bíróság joggyakorlatában, avagy elég hatékony-e a tulajdonhoz és a bírói védelemhez való jogra alapozott védelem?, in: P. Szabó B & Szemesi S, szerk., *Profectus in Litteris V. Előadások a 10. Debreceni állam- és jogtudományi doktoranduszkonferencián,* 2013. június 7., Lícium-Art, Debrecen.
20. Marinkás Gy (2014a) Az Ember és Népek Jogainak Afrikai Bizottságának őslakos népekkel kapcsolatos joggyakorlata, különös tekintettel az Ogoni-ügyre', *ProFuturo*, 4(1), pp. 127–144
21. Marinkás Gy (2014b) Az Endorois ügy, egy hosszú út eredménye – avagy az afrikai emberi jogvédelmi mechanizmus joggyakorlata és az őslakos népek jogainak védelme, *Debreceni Jogi Műhely*, 11(1).
22. Marinkás Gy (2015) A Hingitaq 53 és mások kontra Dánia ügy, avagy az őslakos népek át- és kitelepítésének kérdései az európai emberi jogvédelmi mechanizmus vonatkozásában, in: Szabó M, szerk., *Doktoranduszok Fóruma,* Miskolc, 2014. November 20., Az Állam- és Jogtudományi Kar szekció kiadványa, Miskolc, Miskolci Egyetemi Kiadó.
23. Marinkás Gy (2015a) Az őslakos népek földhöz való joga és egyes környezetjogi kérdések, in: Hallók Tamás, szerk., *Publicationes Universitatis Miskolciensis Sectio Iuridica et Politica,* Tomus XXXIII, Miskolc, Miskolci Egyetemi Kiadó, 2015, pp. 269–285.
24. Marinkás Gy (2018) *Az őslakos népek védelmének aktuális jogi kihívásai*, Monography, private edition, ISBN 978-615-00-3844-5
25. Mateo-Vega J (2017) Full and effective participation of indigenous peoples in forest monitoring for reducing emissions from deforestation and forest degradation (REDD +): trial in Panama's Darién, *Ecosphere*, 8(2), pp. 1–19.
26. Nagy Z (2013) *Környezeti adózás szabályozása a környezetpolitika rendszerében*, Miskolci Egyetem, Miskolc.
27. Orellana M A (2008) Saramaka People v. Suriname, *American Journal of International Law*, 102(4), pp. 841–847.
28. Poirier R & Ostergren D (2002) Evicting People from Nature: Indigenous Land Rights and National Parks in Australia, Russia, and the United States, *Natural Resources Journal*, 42(2), pp. 331–351.

29. Raisz A (2007) Hasonlóságok és különbségek a strasbourgi és a San José-i emberi jogi ítélkezésben; avagy mit tanulhatunk a latin-amerikaiaktól?, *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, 2007, Tomus XXV/2, pp. 431–445.
30. Raisz A (2008) Indigenous Communities before the Inter-American Court of Human Rights – New century? New Era?, *Miskolc Journal of International Law*, 5(2), pp. 35–51.
31. Raisz A (2009) Kölcsönhatás az Emberi Jogok Európai és Amerikaközi Bírósága között egyes emberi jogok tekintetében, *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica,* 2009, Tomus XXVII/2, pp. 361–387.
32. Raisz A (2010) *Az emberi jogok fejlődése az Emberi Jogok Európai és Amerikaközi Bíróságának kölcsönhatásában*, Novotni Kiadó, Miskolc.
33. Raisz A & Szilágyi J E (2017) Cross Border Issues of the Hungarian Water Resources, *Quarterly Journal of Environmental Law*, 2017/1, pp. 73–98.
34. Shue H (1980) *Basic Rights; Subsistence, Affluence and US Foreign Policy'*, New Jersey, Princeton University Press.
35. Szegedi L (2014a) Eltérő jogvédelmi mércék az Európai Unió Bíróságának gyakorlatában, avagy az Aarhusi Egyezmény többszintű európai átültetésének kompromisszumai', *Európai Jog,* 2014/5, pp. 1–12.
36. Szegedi L (2014b) The Eastern Way of Europeanisation in the Light of Environmental Policy Making? – Implementation Concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe, *ELTE Law Journal* 2014/1, pp. 117–134.
37. Szemesi S (2008) *A diszkrimináció tilalma az Emberi Jogok Európai Bíróságának gyakorlatában*, PhD Dissertation.
38. Szilágyi J E (2019) The Precautionary Principle's 'Strong Concept' in the Case Law of Constitutional Court of Hungary, *Lex ET Scientia International Journal,* 26(2).
39. Téglásiné Kovács J & Téglási A (2019) Felelősséget viselünk utódainkért, ezért anyagi, szellemi és természeti erőforrásaink gondos használatával védelmezzük az utánunk jövő nemzedékek életfeltételeit – A Nemzeti hitvallás környezet- és természetvédelmi tárgyú rendelkezései, in: Patyi A, szerk., *Rendhagyó kommentár egy rendhagyó preambulumról Magyarország Alaptörvénye, Nemzeti hitvallás,* Dialóg Campus Kiadó, Budapest.
40. Téglásiné Kovács J (2017) *Az élelemhez való jog társadalmi igénye és alkotmányjogi dogmatikája,* PhD Dissertation, Budapest.
41. Xanthaki A (2007) *Indigenous Rights and United Nations Standards. Self-Determination, Culture and Land,* Cambridge University Press, New York.

**Nemzetközi szerződések és Európai Uniós jogforrások**

1. Aarhusi Egyezmény (1998. június 25./2001.október 30.)
2. Az Ember és a Népek Jogainak Afrikai Chartája (aláírás: 1981. június 27., hatálybalépés: 1986. október 21.)
3. Az ENSZ Őslakos Népek Jogairól Szóló Deklarációja – Az ENSZ Közgyűlés 2007. október 2-i határozata (A/RES/61/295)
4. Az Európai Unió Alapjogi Chartája (HL C 326., 2012.10.26., 1. o. 391–407)

5. Az ILO 169. számú egyezménye a bennszülött és törzsi népekről a független országokban (aláírás: 1989. június 27.; hatály: 1991. szeptember 5.)
6. Emberi Jogok Amerikai Egyezménye (San José, 1969. május 23.)
7. Emberi Jogok és Kötelezettségek Amerikai Nyilatkozata (Bogotá, 1948)
8. San Salvador-i protokoll (San Salvador 1988. november 17.)
9. Stockholmi Nyilatkozat (1972. június 16.)

**Nemzetközi bíróságok és szervek döntései**

1. EJAB, OC-23/17 sz. tanácsadó vélemény az EJAE 4. cikk (1) és 5. cikk (1) értelmezése kapcsán, 2017. november 15. Ser. A. No. 23
2. EJEB, Hermann k. Németország (9300/07), Ítélet 2012. június 26.
3. ENJAB, ENJABiz k. Kenya, érdemi ítélet, 2017. május 26 (006/2012)
4. ENJABiz, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council kontra Kenya, 2009. november 25. (ügyszám: 276/2003)
5. ENJABiz, SERAC és mások k. Nigériai Szövetségi Köztársaság ügy, (155/96), 2001. október 27.
6. NB, Bős-Nagymaros ügy, Ítélet, 1997. szeptember 25.
7. Report of the Committee set up to examine the representation alleging non-observance by Denmark of the indigenous and Tribal Peoples Convention, 1989 (No. 169). Document No. (ILO): 162000DNK169

**Nemzeti bíróságok és egyéb fórumok döntései**

1. Ecuador Legfelsőbb Bírósága, ítélet 218-15EP-CC, 2015. július 9.
2. Kolumbia Alkotmánybírósága, Center for Social Justice Studies et. al. v. Presidency of the Republic et al. Judgment T-622/16 (November 10, 2016)
3. Kolumbiai Legfelsőbb Bírósága, STC 4360-2018 sz. ügy

**Jelentések és egyéb**

1. ATSIC, Native Title Amendment Bill 1997, Issues for Indigenous Peoples. ATSIC, Canberra, 1997
2. Az Indián Szerződési Tanács nyilatkozata az ENSZ Munkacsoport részére. (Report of the Commission Working Group, (UN Doc, E/CN.4/1997/102))
3. Internal Displacement Monitoring Centre: Global Overview of Trends and Developments in 2007. (April, 2008); UNHCR: 2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, 2009
4. UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD). FAO, UNDP, UNEP Framework Document, 2008. június 20.

**Online források**

1. Asbjørn Eide (2020) *The human right to adequate food and freedom from hunger*, in: http://www.fao.org/docrep/w9990e/w9990e03.htm [04.06.2020]
2. FAO, UNDP, UNEP Framework Document (2008) *UN REDD*, in: https://bit.ly/2JrOgky [04.06.2020]

3. Icelandic Human Rights Centre (2020) *The Concepts of Human Rights: An Introduction. Definitions and Classifications,* in: http://www.humanrights.is/en/humanrights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-humanrights/definitions-and-classifications [07.06.2020]
4. Indigenous and Tribal Peoples Rights in Practice (2009) *A Guide to ILO Convention No. 169. International Labour Standards Department,* in: https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_171810/lang--en/index.htm [07.06.2020]
5. Pikramenou N (2020) *Rights of Nature: Time to Shift the Paradigm in the EU? Earth Law Center,* in: https://www.earthlawcenter.org/nikolettas-ron-article#_edn1 [07.06.2020]
6. Robinson B E (2017) *Community land titles alone will not protect forests. Letter to the authors of the Titling Indigenous Communities Protects Forests in the Peruvian Amazon,* in: https://www.pnas.org/content/114/29/E5764 [07.06.2020]
7. Roesch R (2017) *The Ogiek Case of the African Court on Human and People's Rights: Not so Much News After All?,* in: https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all/ [07.06.2020]
8. OAS (2020) *Organization of American States*, in: http://www.oas.org/en/ [28.08.2020]

**Esther MUÑIZ ESPADA***

# Particular Rules on the Transfer of the Holding Farm in Spanish Law**

*Abstract*

*This article aims to provide a brief summary of Spanish law on the transfer of holding farms. After a general introduction, the author analyses the rules on leases and transfers. Subsequently, land access issues are discussed, particularly for young farmers and women. The author also addresses taxation on the transfer of agricultural land and mentions specific contract law provisions. The rules on mortis causa and inter-vivos access are discussed separately.*

**Keywords:** Spanish law, agricultural land, land transfer, holding farm transfers

## 1. General characteristics of the transfer of agricultural holding in Spanish law

With an awareness of the importance of maintaining agricultural assets to boost the competitiveness of this sector and for the dynamism of rural areas, Spanish legislation has special rules for farm continuity. These rules specifically ensure the entity of the farm itself, along with its conservation. Unfortunately, this legislation is not backed up by strong enforcement and protections in such areas. As a result, future reforms should consider strengthening the law and improving bureaucratic procedures, which are particularly crucial at the time of transfer for the future of agricultural enterprises. However, Spanish agricultural legislation is highly dispersed and fragmented. This is partly because of the particularities of the structure of the Spanish state, where 17 autonomous communities each have their own strengths and powers in agricultural matters, generating a variety of legislation and economic regimes.

This, therefore, reduces the efficiency of the Spanish agrarian sector, and the task is further complicated by a highly decentralised territorial organisation.

Spanish law contains rules on the transfer of agricultural holdings, in particular, granting tax benefits to facilitate the transfer. There are also specific rules for the transfer of a business, including farms, as an inheritance.

Thus, tax incentives are provided for the transfer of rural property through purchase, inheritance, or donation, in the case of the constitution or consolidation of farms. At the same time, special incentives are provided for the transfer of entire farms when transfers are carried out for the benefit of young farmers. To increase competitiveness, tax incentives are also provided for the transfer of small farms to larger ones.

Esther Muñiz Espada: Particular Rules on the Transfer of the Holding Farm in Spanish Law. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 171-183, https://doi.org/10.21029/JAEL.2020.29.171

* Full professor, University of Valladolid (Spain), e-mail: mariaesther.muniz@uva.es.

** *The research of this article was supported by the Ferenc Mádl Institute of Comparative Law.*



https://doi.org/10.21029/JAEL.2020.29.171

Since many farms are too small to be viable in the future, Spanish legislation provides for measures to stimulate the land market and allow easier access to ownership and leasing. In the enabling tools needed for the mobilisation of land to regulate the leasing of land, we see the phenomenon of the transfer of the agricultural enterprise. Through its regulations on terms and extensions, along with a reduction in the minimum duration of leases, it allows a substantial increase in the supply of land to be leased, as well as generating a more agile and open market.

With regard to access to property, high land prices make it difficult for farmers to acquire ownership of land for farming or indeed expand the area of land under cultivation. This rise in land prices threatens us with the possibility of a fixed rural population. It also brings the possibility of increasing the number of agricultural assets, as the trend towards increasing leased areas has disadvantaged landowners. To tackle these problems, some authors have proposed leasing with an option to buy (as we have seen in cities). However, the limited success we have witnessed for this project in relation to housing may indicate a similar lack of usefulness in the rural environment. If this were to be considered, more flexible rules would have to be in place than those foreseen for cities.

Therefore, from various perspectives and in various ways, Spanish law offers options when a person is faced with a decisive moment for the evolution of agricultural activity, such as the moment of the transfer of the farm.

We will now specify what measures are provided when taking this decision.

## 2. Lease and transfer

The law on rural leases provides a preferential right of acquisition in the case of transfer. In other words, the landowner and transferor must notify the tenant in a reliable manner of his intention to sell and must indicate the essential elements of the contract. In this way, the tenant may exercise his/her rights and be granted preference in opting to acquire the property or development. The tenant shall have a term of 60 days from the date of receipt of the notification to exercise his/her right of first refusal (that is, to acquire the property in preference to a third party at the same price and conditions) and must notify the transferor thereof in an irrefutable manner.[1] In the absence of notice from the landlord, the tenant must have the right to withdraw for 60 days from the date on which (by whatever means) he/she became aware of the transfer.[2]

[1] See Pasquau Liaño 2005, 611.; Karrera Egialde 2006, 72.

[2] 1. The purchaser of the property, although covered by Article 34 of the Mortgage Law, will be subrogated to all the rights and obligations of the lessor, and must respect the remaining period of the minimum duration of the contract laid out in Article 12 or that of the tacit extension that is in progress in the case of the third mortgage holder. In other cases, he must respect the total duration agreed.

2. In all live transfers of leased rural property, including donations, contributions to companies, exchanges, awards in payment, or any other form other than purchase and sale, of their bare ownership, of a determined portion or of an undivided interest in them, the tenant who is a professional farmer or is one of the entities referred to in Article 9.2 shall have the right of first refusal. To this end, the transferor shall notify the tenant in a reliable manner of his intention to

It has been argued that to be effective, the law must enable certain tenants to increase their economic activity under equal conditions, and for this purpose, it introduces the mechanisms of right of first refusal that allow the tenant to access the ownership of new land.[3]

---

sell and shall indicate the essential elements of the contract and, in the absence of a price, an estimate of that considered fair in accordance with Article 11.1 and taking into account the criteria established in the second additional provision of this Act.

The lessee will have a period of 60 working days from the date of receipt of the notification to exercise his right to acquire the property at the same price and conditions and will notify the seller in an irrefutable manner. In the absence of notification from the landlord, the tenant will have the right to withdraw for 60 working days from the date on which, by whatever means, he became aware of the transfer.

If the contract is priceless and the tenant does not agree with the estimate made by the landlord, it will be determined by an independent expert appointed by mutual agreement between the parties, and, in the absence of agreement between them, by the civil jurisdiction in accordance with the valuation rules established by the compulsory purchase law.

3. In all cases, the deed of sale shall be notified in a reliable manner to the tenant, so that he may exercise his right of withdrawal or, if applicable, his right of acquisition, if the conditions of sale, the price or the person of the purchaser do not correspond exactly to those contained in the prior notification. The same right shall apply if the requirement for prior notification has not been complied with in due form. In this case, the withdrawal or right of first refusal may be exercised within 60 working days of notification.

4. In order to register the *inter vivos* acquisition titles of rented rural properties in the Land Registry, the notification practice established in the previous section must be justified.

5. Rights of pre-emption, withdrawal, and preferential acquisition will not apply in the following cases: (a) In transfers free of charge when the acquirer is a descendant or ascendant of the transferor, a relative up to the second degree of consanguinity or affinity, or his spouse. (b) In the exchange of rural properties when it is carried out to add one of the exchanged properties and provided that the properties exchanged are less than 10 hectares of dry land, or one hectare of irrigated land.

6. The rights established in this article shall be preferential to any other acquisition rights, except for the right of withdrawal of neighbouring properties established in Article 1523 of the Civil Code, which shall prevail over the latter when both the property under withdrawal and the neighbouring property on which it is based do not exceed one hectare.

7. In the case of properties with various uses granted to different tenants over the whole of the property, the right of refusal shall only be exercised by the person who is the owner of the main site. If there are several, then by the person who is a young farmer and, if there is more than one young farmer, by the oldest tenant.

8. When there are several tenants of different parts of the same farm, the notification obligations must be complied with for each one of them, and the right of first refusal may be exercised by each one for the portion they have leased. If any of them does not wish to exercise it, any of the others may do so, and the one with the status of young farmer shall be preferred, or in the event of several, the oldest.

9. In the case of properties of which only a part of the area has been leased, the rights regulated in the previous paragraphs shall be understood to be limited to the area leased. To this end, the document by which the transfer of the property is formalised must specify, where applicable, the amount of the total price corresponding to the portion given in the lease (clause 22).

[3] See De Castro Vitores 2008, 219.

Unfortunately, while this option or right is advantageous for the tenant, it limits the owner, or is a hindrance for the property that thus assumes restrictions and conditions. This would have discouraged landlords from renting. In any case, for the law to be an effective instrument, it must provide sufficient security to both tenants and landowners and be equally attractive to both.[4] As the preamble of the law itself justifies, it must favour the mobility of land and be scrupulously respectful of the relationship freely agreed upon by both. With respect to this contractual relationship, the law, except in the cases provided for therein, leaves it sufficiently open and flexible so that any cases that may arise are agreed upon by the parties.

## 3. Young farmers' access

On the other hand, taking into account that the ageing population of farm owners is one of the main brakes on the modernisation of agriculture, many strategies are in place to facilitate access of young people to farm ownership. There are measures to promote a role for young people in direction and management of farms, especially in the case of priority farms. These measures provide for tax relief on personal income tax, as well as more specifically advantageous treatment in other aid and tax benefits.

In this respect, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of November 2017 'The Future of Food and Farming' COM(2017) 713 final proposes that Member States adopt 'appropriate incentives to facilitate the exit of the older generation and increase land mobility' (emphasis in original text). The Communication further notes, 'there is a growing need to support actions that stimulate the transfer of knowledge among generations (through partnerships and other new business models) and facilitate succession planning (i.e. advisory services, mentoring and the development of 'farm succession plans')' (emphasis in original text). A discussion on technological development and digitisation in the same Communication observes the following:

Technological development and digitisation make possible big leaps in resource efficiency enhancing an environment and climate smart agriculture, which reduces the environment-/climate impact of farming, increase resilience and soil health and decrease costs for farmers. However, the uptake of new technologies in farming remains below expectations and unevenly spread throughout the EU, and there is a particular need to address small and medium-sized farms' access to technology. [emphasis in original]

[4] See Caballero Lozano 2009, 147–175; On a new type of professional in agricultural development, see also 'Modenización de la explotación y de la actividad agraria', Revista de Derecho agrario y alimentario, nº 31, p. 11.

## 4. Women and access to holdings

Likewise, Spanish law contains specific regulations to encourage the incorporation of women into the agricultural sector.[5] Law 35/2011 of 4 October takes into account the fact that men are in the majority in the rural world, and to modify this inertia, it adopts a series of incentives to favour female ownership of farms. The preamble to this law explains that within the scope of family farms in the rural environment, many women share agricultural tasks with men, taking on a large portion of them and contributing both assets and work; however, in most cases, the man appears as the sole owner of the farm. This makes it difficult to adequately value the participation of women in the rights and obligations derived from farm management.[6] In Spain, more than 70 percent of farm owners are men.

In Spain, women obviously face no legal limitations in access to agricultural property, nor in any other type of property (although, in reality, women usually own operations of small economic size and low profitability), but they face practical difficulties, as recognised by this law, in accessing credit or other intangible goods and rights. This is because these rights are linked not to ownership of the land but to its yield. Furthermore, traditional stereotypes are still in place in rural environments. Women's work continues to be understood more as a 'family allowance' to supplement the main income rather than as an actual economic contribution.

Despite the longstanding existence of corporate measures guaranteeing women the same civil and commercial legal rights as men, and women asserting these rights in the marketplace, the social reality is that women working on farms have not made use of such corporate measures. That is why the state intended (with this legal initiative) to adapt the legal framework to social reality.

This Act seeks to achieve these objectives through the legal measure of shared ownership. As is well known, a persistent demand in the agricultural environment has been to achieve a legal status for the collaborator or 'partner' of the farm, who in many cases is a wife. In France, attempts have been made to resolve this issue through the measure of 'salaire différé', and in Spain, through the measure of shared ownership.[7] This is not a major legal innovation, but simply a way of making women's work on the farm more visible by encouraging them to co-own farms alongside their husbands.[8] A shared-ownership agricultural holding is defined as an economic unit, without legal personality and liable to taxation, which is set up by a married couple or an unmarried partner for the joint management of agricultural holding.

The Law also regulates another mechanism for the recognition of the economic rights of women who carry out tasks on the farm. Thus, those who have participated in an effective and regular manner, who do not receive any payment or consideration for the work done, and who have not constituted a shared ownership with their spouses or civil partners will be entitled to financial compensation in the event of both the transfer of the farm and the dissolution of the marriage or civil partnership.

[5] Espin Alba 2009, 67–89.
[6] Rico Gonzalez 2008, 583–619.
[7] Bosse-Platèire 2019, *comm.* 97; Champenois 2012, 5.
[8] See Cosialls Ubach 2015, 102–105.; Muñiz Espada 2012, 103.

Shared ownership of agricultural holdings shall be extinguished (a) by annulment, separation, or dissolution of the marriage; (b) because of the break-up of the partnership, or the death or declaration of death of one of its members; (c) because of loss of ownership of agricultural holdings for any legally established reason; (d) because of the transfer of ownership of holding to third parties; (e) when the requirements set out in Article 3 of this law are no longer met by either of the two owners; or (f) by agreement between the owners of the jointly owned agricultural holding, expressed by personal appearance or electronic signature, before the jointly owned register regulated in Article 6 of this Law, Article 8.

## 5. Transfer and tax benefits

On the other hand, on the subject of the transfer of agricultural holdings, Law 19/1995, of 4 July 1995, on the Modernisation of Agricultural Holdings lays down particular rules in the various cases of transfer of agricultural holdings. In any case, it should be noted that this law is outdated and has already been largely superseded by many community regulations but is still in force.[9] It is grounded in an agricultural model that is essentially family-based and was designed to meet the difficult challenge of Spain's integration into the European Union and to adapt farms to a more complex and demanding agricultural policy by tackling a series of structural adjustments.[10]

This law uses, as a basic reference for action and for the concession of special benefits, the concept of priority agricultural exploitation, whether it is family or associative. This priority mode of exploitation is defined by subjective criteria linked to the owner, as well as other objective criteria, so that they ensure the economic viability of the operation and justify the possible granting of public support on a preferential basis.[11]

---

[9] About this law, see Amat Llombart 2003, 1–17.; 'La explotación agraria, sus elementos integrantes y tipos cualificados de explotación. La reforma legislativa pendiente', in *Tratado de derecho agrario*, La Ley Wolters Kluwer, Madrid, 2017, 157–205.; 'Mejoras en el funcionamiento de la cadena agroalimentaria en la Unión Europea y en España a partir del régimen jurídico de negociación y contratación: el contrato alimentario y el contrato tipo agroalimentario', *Revista de derecho Agrario y Alimentario*, nº. 66, 2015, 7–50.

[10] The purpose of this Act is to achieve the following aims: (a) To stimulate the formation of agricultural holdings of sufficient size to ensure their viability and which constitute the permanent basis of the family economy of their owners. (b) To define the agricultural holdings that are considered to be priority recipients of public support for agriculture and of the benefits established by this Act. (c) To encourage the incorporation of young farmers as owners of the priority farms. (d) To promote agricultural associations as a means of training or supporting agricultural holdings of sufficient size to ensure their viability and stability. (e) To prevent the excessive fragmentation of rural properties. (f) To increase mobility in the land market, both in terms of ownership and leasing. (g) To improve the professional qualifications of farmers, especially young people, to enable them to adapt to the needs of modern agriculture. (h) To facilitate access to credit for owners of farms seeking to modernise their farms. (Article 1).

[11] For a holding owned by a self-employed individual to be considered as a priority, it is required that the holding provides for the occupation of at least one agricultural work unit and that the unit labour income obtained from it is equal to or higher than 35 percent of the reference

This law basically contains tax benefits to encourage the transfer of agricultural holdings in the following cases: (a) The transfer or acquisition by any title, whether onerous or lucrative, inter vivos, or mortis causa, of full ownership or lifelong usufruct of an agricultural holding in its entirety, in favour of or by the owner of a separate priority holding;[12] (b) The transfer or acquisition of land by any title, onerous or lucrative, inter vivos, or mortis causa, which is carried out in order to complete under a single boundary the area sufficient to constitute a priority holding;[13] (c) In the case of the transfer or acquisition by any title, onerous or lucrative, inter vivos, or mortis causa, of the full ownership or lifelong usufruct of a rural property or part of an agricultural operation, in favour of a holder of a priority holding where this condition is reached as

income and less than 120 percent of the reference income, subject to the provisions of the single transitional provision. In addition, the holder must meet the following requirements: (a) Be a professional farmer as defined in Article 2(5) (b) Have a sufficient level of agricultural training, the determination of which shall be based on a combination of educational and professional experience. (c) Be at least 18 years old and under 65 years old. (d) Be registered in the Special Social Security Scheme for Own-Account or Self-Employed Workers or, as the case may be, in the Special System for Own-Account Agrarian Workers included in the said Scheme. Professional farmers who are not included in the above regime must comply with the requirements indicating their agricultural professionalism established for this purpose by the Autonomous Communities. (e) Residence in the region where the holding is located or in the bordering regions defined by the Autonomous Community legislation or territorial organisation. Failing this, the agricultural district established in the Agricultural Census of the National Institute of Statistics shall be taken into account. (Article 4).

[12] Art. 9: 1. The transfer or acquisition by any title, onerous or lucrative, 'inter vivos' or 'mortis causa', of the full ownership or lifelong usufruct of an agricultural holding in its entirety, either in favour of or by the owner of another holding (which is a priority), or that reaches this consideration as a consequence of the acquisition, shall receive a 90 percent reduction in the taxable base of the tax levied on the transfer or acquisition of the holding or its component elements, provided that, as a consequence of said transfer, the priority status of the acquirer's holding is not altered. The transfer of the holding must be effected by public deed. The reduction shall be 100 percent in the event of continuation of the holding by the surviving spouse. For the purposes indicated in the previous paragraph, it will be understood that there is a transfer of an entire agricultural holding, even if the dwelling is excluded.
2. In order for this reduction to be made, it will be recorded in the public deed of acquisition (and in the Property Register, if the transferred properties were registered), that if the acquired properties were sold, rented, or transferred during the following five years, the payment of the corresponding tax, or part of it, that had not been paid as a consequence of the reduction along with delayed interest, must be settled beforehand, except in cases of *force majeure*.

[13] Article 10: 1. The transfer or acquisition by any title, onerous or lucrative, 'inter vivos' or 'mortis causa', of land, which is carried out to complete under one single boundary the sufficient area to constitute a priority holding, shall be exempt from the tax on the transfer or acquisition, provided that the public deed of acquisition states the indivisibility of the resulting property during the period of five years, except in cases of *force majeure*. When the transfer or acquisition of the land is carried out by the owners of agricultural holdings with the intention of completing at least 50 percent of the area of a holding whose unit income from work is within the limits established in this Law for the purpose of granting tax benefits for priority holdings, a 50 percent reduction shall be applied to the taxable base of the tax charged on the transfer or acquisition. The application of the reduction shall be subject to the same requirements of indivisibility and public document of acquisition indicated in the previous paragraph.

a consequence of the acquisition.[14] (d) There are also tax benefits for voluntary exchanges of rural property, when the purpose of the exchange is to eliminate the rights of way or to restructure agricultural holdings, including, in this case, multiple exchanges to carry out private land consolidation.[15] (e) In addition, tax benefits are provided for in the case of transfer or acquisition by any means, whether for consideration or for profit, inter vivos or mortis causa, of full ownership or lifelong usufruct of an agricultural holding or part thereof or of a rural property, in favour of a young farmer.[16] (f) There is also tax relief for the transfer of rustic forestry areas.[17] (g) There are

[14] Article 11: In the transfer or acquisition, by any title, whether onerous or lucrative, 'inter vivos' or 'mortis causa', of the full ownership or lifelong usufruct of a rural property or part of an agricultural operation, in favour of a priority farm owner who does not lose or who reaches this condition as a result of the acquisition, a 75 percent reduction shall be applied to the taxable base of the taxes levied on the transfer or acquisition. For the application of the benefit, the transfer must be made in a public deed, and the provisions of Article 9(2) shall apply.

[15] Article 12: Voluntary exchanges of rural property authorised by the Ministry of Agriculture, Fisheries, and Food or by the corresponding bodies of the Autonomous Communities with competence in this area, shall be exempt from the 'transfer of property for consideration' category of the Tax on Property Transfers and Documented Legal Acts or from Value Added Tax, provided that at least one of the exchangers is the owner of a priority agricultural operation, and the exchange, which must be carried out in a public deed, has one of the following purposes: (a) To eliminate interlocking plots of land, understood as those considered in the general legislation on agricultural reform and development. (b) To eliminate rights of way. (c) Restructuring of agricultural holdings, including in this case, the multiple exchanges which take place in order to carry out private land consolidation.

[16] Article 20: 1. The transfer or acquisition by any title, whether for consideration or for gain, *inter vivos* or *mortis causa*, of full ownership or lifelong usufruct of an agricultural holding or part thereof or of a rural property, in favour of a young farmer or an agricultural employee for his first installation on a priority holding, shall be exempt from the tax on the transfer or acquisition in question 2. The reductions in the taxable amount provided for in Articles 9 and 11 shall be increased by ten percentage points in each case if the acquirer is also a young farmer or an employed farmer and the transfer or acquisition takes place within five years of his first establishment. 3. In the cases referred to in paragraphs 1 and 2 of this Article, Article 9(2) shall apply. 4. The first copies of public deeds that document the constitution, modification, or cancellation of mortgage loans subject to Value Added Tax shall be exempt from the tax on Documented Legal Acts, when these are granted to young farmers or wage-earning agricultural workers to facilitate their first installation on a priority holding.

[17] Fourth additional provision. Tax relief on the transfer of rural areas dedicated to forestry: In the case of '*mortis causa'* transfers and comparable '*inter vivos'* donations of rural areas dedicated to forestry, both in full ownership and in bare ownership, a reduction will be made in the taxable base of the corresponding tax, according to the following scale: 90 percent for areas included in protection plans for reasons of natural interest approved by the competent body of the Autonomous Community or, where appropriate, by the corresponding body of the Ministry of Agriculture, Fisheries, and Food; 75 percent for areas with a Forest Management Plan or a Technical Plan for Forest Management and Improvement, or equivalent forest planning figures, approved by the competent Administration; 50 percent for other rustic areas dedicated to forestry, provided that, as a consequence of this transfer, the forestry nature of the property is not altered, and it is not transferred for '*inter vivos'* reasons, leased or assigned by the acquirer, during the five years following the acquisition. The same reduction will apply to the extinction of the usufruct that the transferor had reserved for himself. The tax relief regulated in this

reductions in personal income tax when the rural property or agricultural holdings transferred are used by the purchaser to set up or consolidate priority agricultural holdings or are acquired by the public authorities for integration into 'land banks' or similar bodies or for reasons of environmental protection.[18]

## 6. Mortis causa access holding

In the area of transfer mortis causa, the Spanish Civil Code contains some rules to maintain the company as a unit at the time of hereditary succession. Several articles relate to this, but the most significant would be articles 1056 and 1062 of the Civil Code.[19] Thus, the testator who, in order to maintain whatever kind of company the testator has, wants to keep it undivided may do so provided that the legitimate sum is paid in cash to the other co-heirs so that one will receive the company as a whole and the other co-heirs will receive their share of the inheritance in money. For this purpose, it will not be necessary to have sufficient cash in the inheritance for payment, and it will be possible to make the payment with extra-heritable cash and for the testator or the accountant-partner designated by him to establish a deferral, provided that this period does not exceed five years from the death of the testator. If the form of payment has not been established, any legitimate person may demand that the inheritance be legitimately paid.

Likewise, the unity of certain types of property is reinforced by establishing that when an item is indivisible or is very unworthy of division, it may be awarded to a co-heir, with the others being paid excess money. However, it will be enough for one of the heirs to ask for its sale in a public auction and, with the admission of foreign bidders, for this to be done – art. 1062 Civil Code.

Therefore, the following conclusions can be drawn from these precepts: the Civil Code itself contains a very generic and very weak provision on the undivided maintenance of economic exploitation, such as a farm. Likewise, the fact that an agricultural holding or any other enterprise is maintained as a unit depends on the will of the testator; it is a simple entitlement for him. In this regard, given the importance of primary sectors such as agriculture, the transfer of agricultural holdings at the time of

provision will apply, on the appropriate scale, to the entire agricultural holding where the area under forestry is more than 80 percent of the total area of the holding.

[18] Sixth additional provision. Tax benefits in the Personal Income Tax for the transfer of certain rural properties and farms: the net increases in assets that become evident during the five years following the entry into force of this Law, derived from the transfer of rural property or agricultural operations, will be included in the net income resulting from the application of the method of signs, indices, or modules of the objective estimation method of Personal Income Tax, in the amount established by regulation according to the period of time the assets remain as the assets of the taxpayer and provided that the transfers do not exceed the amount established by regulation. The application of the provisions of the previous paragraph shall require that the rural property or agricultural holdings transferred are used by the acquirer for the constitution or consolidation of priority agricultural holdings or are acquired by the public administrations for their integration into land banks or similar bodies or for reasons of protection of the natural environment. The requirements to be met by both transmitters and acquirers in order to apply this provision will be developed in a regulatory manner.

[19] See Cadenas Osuna 2020.

the death of the owner of the holding cannot depend on his will, as has already been expressed: 'the father cannot construe the right to distribute goods among his children as he wishes, as he must take into account not only his particular interest but also the general interest that is expressed in the regulations on the social function of property, specifically in Article 33 of the Spanish Constitution.' On the other hand, the provision states that in compensation for the attribution of the company to a single heir, the legitimate payment of monies must be made to other interested parties, but for this, it must be possible to make the payment with hereditary or extra-heritable cash, and reality shows that sometimes this requirement cannot be met. However, setting a period of time for the testator, or making the hereditary division comply with the payment in money to the other co-heirs (thus determining a deferral of payment) may also defeat the purpose of the provision. This is because the income of the farm during this period may not be sufficient for the successor to the farm to pay the other co-heirs, which may limit the likelihood that the succession to the farm is accepted. The provision is further complicated by the fact that if the method of payment has not been established, any legitimate claimant may demand that the inheritance be made.[20]

Therefore, a realistic rule for the unitary maintenance of agricultural holding at the time of transfer mortis causa should involve a policy of credits in favour of the successor to the holding, to guarantee legitimate payment to those who will not assume ownership of the agricultural undertaking, with the addition of other tax reductions.[21]

The salaire différé in French law is another system for this purpose. It benefits, at the time of succession, those who have taken part in the agricultural holding without having been remunerated beforehand and who do not pose any particular problems for payment to the other beneficiaries of the inheritance. Thus, the hereditary partition is the moment to compensate for the work done on agricultural holding without receipt of payment during the period of collaboration. A credit is thus generated with respect to the inheritance at the time of the death of the farm holder. However, this compensation could also be made upon cessation of the holder's agricultural activity.

Accordingly, one system in particular that of salaire différé, has generated a significant volume of contentious and conflicting assumptions. For some, it has been considered outdated, although there is no lack of supporters of the French doctrine who propose the extension of this system to organise the remuneration of other services performed by the heirs.

Despite this system of salaire différé, the objective is to enhance the value of agricultural work, to lighten the wage burden on farms, to prevent a rural exodus, and to facilitate the transfer of agricultural enterprises, even if this is a complex matter in terms of regulating the succession of farmers. It is, in any case, a response to a clear preference for family farms.

On the other hand, when dealing with the issue of transfer of the agricultural enterprise, mortis causa, another problem to consider is the capacity of the successor to ensure the best viability of the farm. The preference for professional farming descendants, or widowed spouses, was present in the Spanish rules. If there are several farming descendants, the scheme provided for the father to be succeeded by the

[20] Martinez Espin 2006, 1254–1258.
[21] Gonzalez Acebes 2005, 62.

beneficiary in his will or, failing that, by the one chosen by common agreement between them.

In the law on rural leases, preference is given to the young farmer when it comes to terminating the lease. The lease ends upon the death of the tenant, without prejudice to the rights of his legitimate successors. In this case, in the absence of an express designation by the testator, preference shall be given to the young farmer, and if there are several young farmers, the oldest should be given preference. If none of them has the status of young farmer, the successors will have to choose among them, by majority vote, to which the deceased tenant will be subrogated under the conditions and rights of the deceased. In the latter case, the landlord must be notified in writing within one year of death. This is related to one of the main concerns of this text, which is to establish some priorities in favour of the professional farmer and to contribute to the 'necessary generational renewal'. The fact remains that it is not easy to provide a fully satisfactory criterion for choosing a successor to ensure the profitable continuation of the agricultural enterprise.[22]

## 7. Specific contract law

It should also be pointed out that in Spanish territories that have a particular regulation in the field of inheritance law, the system of the Inheritance Act is considered as another means to guarantee the unitary transfer of the agricultural holding for the moment of the death of the owner of this holding. These agreements on succession have been defined as the mechanism for achieving cohesion of family farms. Inheritance agreements are permitted for special civil rights, such as in the Basque Country, Navarre, Galicia, Aragon, Catalonia, and the Balearic Islands (on some islands, but not all, specifically Mallorca, Ibiza, and Formentera). The Inheritance Act cannot be used in all Spain. Therefore, only people who have a civil neighbour in one of the aforementioned territories can grant valid inheritance pacts. The pact of succession is a contract by which a person undertakes with another or others, before his or her death, to hand over to them some property and/or rights when his or her death occurs. In this way, the manner of succession and the successor to take over the agricultural exploitation in the event of the holder's death could also be determined.[23]

## 8. Inter vivos access

Finally, with regard to the inter vivos transfer of agricultural holding, it should be said that the person who continues with the holding will usually need to make investments to modernise and make the agricultural holding more profitable, and the main criticism that could be made is that there is no possibility of providing a single guarantee for the entire agricultural holding. In other words, in the case of an application for a loan to make improvements on the farm, or on any other holding, as many mortgages or guarantees would have to be provided as there are types of assets on the agricultural enterprise.

[22] Muñiz Espada 2009, 161–183.; Muñiz Espada 2012, 167–224.
[23] Cerda Gimeno 2005; Cazorla González 1998; Cosialls Ubach 2018; On special rules in Basque country see Karrera Egialde 2016, 135.

This is economically inefficient for the profitability of the farm because modernisation of the farm and the challenges of applying new technologies require a great deal of credit, so specific guarantees are needed that are appropriate and adapted to the needs of the agricultural business environment.

## 9. Conclusion

It can be concluded from the aforementioned that, while from the point of view of tax law, with tax benefits, the transfer of the farm can be encouraged and made more dynamic in order to ensure the continuation of the farm, from the point of view of private civil or commercial law, other types of rules should be adopted to improve the conditions of transfer. This is especially true in times of crisis in which the profitability of the sector must be better promoted with legal rules rather than with a state economic budget. This must all be implemented under a new methodology that will simplify Spanish agricultural legislation in the same way as the French law, which is integrated under the same rural code.

## Bibliography

1. Amat Llombart P (2017) La explotación agraria, sus elementos integrantes y tipos cualificados de explotación. La reforma legislativa pendiente, in Muñiz Espada E, Amat Llombart P, eds., *Tratado de derecho agrario*, La Ley Wolters Kluwer, Madrid, pp. 157–205.
2. Amat Llombart P (2015) Mejoras en el funcionamiento de la cadena agroalimentaria en la Unión Europea y en España a partir del régimen jurídico de negociación y contratación: el contrato alimentario y el contrato tipo agroalimentario, *Revista de derecho Agrario y Alimentario*, 66/2015, pp. 7–50.
3. Caballero González JM (1982) *Los colaboradores en el proyecto de Ley del Estatuto de la explotación familiar agraria y de los jóvenes agricultores*, MAPA.
4. Caballero González JM "Modenización de la explotación y de la actividad agraria", *DAA*, no. 31.
5. Cadenas Osuna D (2020) *La transmisión mortis causa de la empresa familiar*, Dykinson, Madrid.
6. Cano Martínez De Velasco JI (2002) *La prohibición de los contratos sucesorios*, Bosch, Barcelona.
7. Cazorla González MJ (1998) *El Derecho agrario sucesorio español*, Comares, Granada.
8. Cosialls Ubach A (2018) La partición de la herencia y la libertad de testar, in Pons M, ed., *La libertad de testar y sus límites,* Barcelona.
9. Cosialls Ubach A (2018) La regulación de los contratos de cultivo e integración en el Código Civil de Cataluña, in Pons M, ed., *Estudios sobre el Libro Sexto del Código Civil de Cataluña*, Barcelona.
10. De Castro Vitores G (2008) La normativa de arrendamientos rústicos. Reflexión y propuestas para un nuevo debate", in Pons M, ed., *Homenaje a A. Ballarin Marcial*, Madrid.
11. De La Cuesta Saenz J (2019) En torno a las prácticas desleales en las relaciones entre empresas en la cadena alimentaria, *Revista de la Facultad de Derecho de la UNAM (México).*
12. De La Cuesta Saenz J (2018) Usucapión e inmatriculación de fincas, *Revista Jurídica del Notariado*, 106/2018.
13. Karrera Egialde M (2016) La sucesión agraria y la troncalidad vizcaína, *Revista de Derecho agrario y alimentario,* 32/2016.
14. Muñiz Espada E (2009) *La transmission de la empresa agraria*, Aranzadi, Navarra.
15. Muñiz Espada E (2012) Pactos sucesorios, pactos de familia y empresa agraria, *Revista jurídica del Notariado*, pp. 167–224.
16. Pasquau Liaño M (2005) *Ley de Arrendamientos Rústicos. Comentarios Doctrinales y Formularios*, Aranzadi, Pamplona.
17. Serrano De Nicolás A (2011) Pactos sucesorios de atribución particular: su relación con otras instituciones sucesorias del propio Código civil de Cataluña, *Rev. general de Derecho romano.*

**Flóra OROSZ***

# The protection of human rights in connection with working possibilities of special group of employees

*Abstract*

*The author intends to analyse the special protection of disadvantage people – in particular to disabled people and people with changed working ability. These people are often cut off from the labour market, therefore, they can not participate there and even in the society. However, human rights, regulated in the Fundamental Law of Hungary, provide the opportunity for these people as well to work. Thus, these rights are essential for these people in order to ensure their employment. Labour law and social law protection confirms this constitutional protection. The study examines these three areas of protection.*

**Keywords:** employment, human rights, protection, disabled people, people with changed working ability

## 1. Introduction

The concept of disadvantage situation is quite diverse. It can be interpreted in relation with individual persons, groups of people or territories, or in relation with children and adults (e.g. disabled people, low level of education, isolated and peripheral regions, regions of emigration, people with criminal record, etc.). There is no official concept of disadvantage situation but it means individuals and territories whose and which economic and social situation is less favourable than the average, that require active role from the state. However, if we consider the concept in connection with individuals, exactly in connection with children and adults (employees), the concept of disadvantage children is determined in Section 67/A of Child Protection Act[1] and the concept of disadvantage employee in determined in Section 57/B (4) point 1-2 of the Act on Employment[2]. In Hungary disadvantage situation is treated by three policies: by labour market, regional development and educational policy. This study focuses on people from a less privileged labour market background, exactly on disabled people and people with changed working ability. I examine those human rights that protect these people, ensure them equal opportunity and provide them the possibility to work.

Flóra Orosz: The protection of human rights in connection with working possibilities of special group of employees. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 184-198, https://doi.org/10.21029/JAEL.2020.29.184

* dr. jur., PhD student, Ferenc Deák Doctoral School of Law and State Sciences, University of Miskolc, Faculty of Law, Department of Agricultural and Labour Law, e-mail: oroszflora93@gmail.com.

[1] Act XXXI of 1997 on the care of children and the management of guardianship.

[2] Act IV of 1991 on the promotion of employment and the protection of unemployed (hereinafter referred to as: Act on employment).



https://doi.org/10.21029/JAEL.2020.29.184

The issue of examining the protection of human rights – in connection with labour market policy – of the above mentioned disadvantaged people is based on the topic of my PhD dissertation; within it I examine the operation of social farms. Disadvantaged people create the target group of social farms who have great unmet needs and they need care, support and who cannot make their life, employment situation better without help. Social farm is an innovative agricultural activity form which has important social and economic importance. Its social importance is based on that it improves the mental circumstances and employment possibilities of disadvantaged people. The aim of the farm is the social integration of these people and to help them get into/back to the labour market. Its economic importance is based on that the target group do agricultural activities on the farm which provides the employment of these people. Its economic importance is based on that the members of the target group do agricultural activities on the farm which realises their employment at the same time. The farm is the place where disadvantaged people can be actively involved. The target group of social farms is understood in a broad sense.[3] The farm provides opportunities for disadvantaged people who are unable to make their situation better without help. The target group consists of mainly people with some kind of disability or long-term illness and people with changed working ability, but addicts, the homeless, the long-term unemployed, prisoners, former prisoners, participants in criminal rehabilitation programs, Roma, refugees also appear in the target group.[4]

The study concentrates especially on disabled people and people with changed working ability and it examines the protection of their human rights. Since these people are in a less favourable situation than others, special treatment and law enforcement is required which is even more important in relation with their employment possibilities. Therefore, the prevail and enforcement of human rights, that ensure them to be a real part of the society and labour market, is really important – compared to other members of the society it may be more important. According to my hypotheses, human rights examined in the study and their protection prove that these people need for these rights at all to be part of the society and the labour market, and prove the importance of equality and employment of disabled people and people with changed working ability, furthermore. The protection of human rights in connection with disabled people is complex; it raises constitutional, labour and social law protection. The study analyses all three areas but the main focus is on the constitutional law protection as it is the source of the lower level of acts.

## 2. Conceptual basis

Before analysing the protection of disabled people and people with changed working ability, it is important to determine the concept of them. These definitions play a significant role mainly in relation to the issues of their employment.

[3] Disadvantage people create the primary target group of social farms. However, social farms have a secondary target group to which pupils of difference educational institutions belong. For them social farm is the place of awareness-raising and enables them acquiring practical knowledge. The examination of this secondary group is beyond the scope.
[4] Dr. Gazsi, Jakubinyi & Matthew 2015, 37–45.

These two concepts are often used as synonyms both in practice and theory, however, their meaning is different. The national terminology distinguishes between the concept of disabled people and people with changed working ability contrary to other Member States of the European Union where the concept of disabled people is used for both expressions. The connection between the two concepts is special. The group of disabled people creates a bigger category (set) and the group of people with changed working ability belongs to this bigger category as a smaller one (subset).[5] Disabled people are 'outsiders' within the society and the labour market because of their disability. People with changed working ability have problem in work and have difficulties in the labour market because of their impairments.[6]

International law, the law of Member States and the Hungarian law determines the concept of disabled people differently. Article 1 of the Unites Nations' Convention on the Rights of Persons with Disabilities determines the concept of disabled people as follows: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". This definition covers all kind of health damages as an umbrella term. In connection with the terminology of the Member States Nóra Jakab and Edit Kajtár established in the so called 'Empower Project' that the law of the surrounding Eastern and Western European countries use the concept of persons with disabilities.[7] Contrary to the law of the Member States the Hungarian law distinguishes between the concept of (a) disabled people and (b) people with changed working ability. The Act XXVI of 1998[8] determines the concept of disabled people, who are "persons with-long-term or permanent sensory, mental, physical, communicational impairments which confine or hinder their equal participation in society."[9]

The Act on employment determines the concept of people with changed working ability which says that "on the basis of the current classification of the rehabilitation authority or its predecessor people (a) whose health status is reduced to 60% or lower by the complex classification of the rehabilitation authority, (b) whose health status reduced by 40% on the basis of expert's report, opinion of a competent medical authority or official certificate, (c) whose work ability reduced by 50-100%; or who is exempted from the complex qualification on the basis of a provision of law during the period of payment of invalidity benefits".[10]

It can be stated in relation with the two definitions that the chance of people with changed working ability is lower on the labour market, who relates to a category of insurance, meanwhile, most disabled people are not part of the labour market and thus, they do not have any insurance.[11]

[5] Jakab 2017, 205–209.
[6] Prugberger & Jakab 2016, 172–173.
[7] Jakab & Kajtár 2013, 1–10.
[8] Act XXVI of 1998 on the rights of disabled people and ensuring their equal opportunity (hereinafter referred to as: Act on disabled people).
[9] Section 4 point a) of the Act on disabled people.
[10] Section 58 (5) point m).
[11] Jakab 2015, 33–35.

## 3. Constitutional protection

After determining the definition of the target group (disabled people and people with changed working ability) in this chapter I examine the constitutional protection of these people. It is appropriate to begin the examination of human rights protection with the highest source of law, the Fundamental Law of Hungary, as it creates the basis of labour and social law protective measures, so the constitution determines the frame of protection.[12] More articles of the Fundamental Law contain relevant human rights to which disabled people and people with changed working ability are (also) entitled. These rights are the right to equal treatment (prohibition of discrimination) which is a first-generation human right and the right to social security and work which are second-generation human rights.

First-generation human rights – so called classical human rights – deal essentially with liberty and participation in political life; they are fundamentally civil and political in nature. They serve negatively to protect the individual from excesses of the state. First-generation rights include, among others, the right to equal treatment that ensures the equality of citizens. This right enjoys constitutional protection (as all first-generation human rights).[13]

Second-generation human rights are fundamentally economic, social, and cultural in nature which were recognized in the second half of the XIX century and got fundamental protection in the XX century. They guarantee different members of the citizenry equal conditions and treatment in connection with economic, social, and cultural area – so these rights ensure to get a job, to get support in case of unemployment, to bargain collectively, express oneself free in scientific and art life, etc. These rights differ from first-generation human rights in that they depend on the economic performance of the state. If the state is doing economically well, it can guarantee social rights more widely.[14] Other difference is that they impose upon the government the duty to respect and promote and fulfil them, so the duty of the government is the realization of these positive rights. Beside the legal guarantee of the constitution and the lower level of legal sources, an adequate financial guarantee - institutional network for providing social rights, the conditions of entitlement of social institutions and financial support – is also required for these rights.[15] In connection with the duty of the state the Constitutional Court stated in its Decision no. 25/2016 (XII. 21.) that "…the obligation of the state is, on one hand, to establish an institutional network through which human rights can prevail, on the other hand, to determine the conditions of entitlements of social institutions". The regulation of social rights in the Fundamental Law serves not only as protective measures of human rights – first of all in relation with the target group is this study – but the legislation and the users of the law shall consider them. Thus, neither the legislator may legislate contrary to the rights guaranteed by the constitution, nor the users of the law may break to law.

[12] Zaccari 2015, 40–48.
[13] Sári & Somody 2008.
[14] Balogh 2011b, 307–308.
[15] Téglási 2011, 3–4.; Kiss 2016, 358.

This is completed and confirmed by the Constitutional Court that may interpret and determine the exact content of the rights.[16] Although, the second-generation human rights provide important human rights for the citizens which are confirmed by international and EU documents – the examination of these document is beyond the scope -, they are not considered as strong individual rights as first-generation rights. Consequently this means that the constitutional protection of second-generation human rights is also lower.[17] When we analyse the constitutional protection of social rights, it shall be mentioned that social rights can be categorized into three groups according to their constitutional protection. This categorization is relevant for the above mentioned two social rights as well as they belong to different groups and have different characteristics. There three groups are a) fundamental rights, b) constitutional rights other than fundamental rights and c) state objectives.[18] The characteristics of the categories are determined in more detailed later at each right.

Apart from the lower constitutional protection, the right to social security and work equally plays a significant role for disabled people and people with changed working ability as the right to equal treatment. The reason of it is that these people need more support, care and help than people without disabilities. Positive discrimination shall be applied in these people's case because of their limited equality and work ability. According to these facts, the examination of the above mentioned three human rights is essential.

### 3.1. The right to equal treatment

Article XV of Fundamental Law provides the principle of equality and non-discrimination that plays an important role in terms of rights and protected interests of employees as discrimination occurs in labour law quite often. Fundamental Law similarly to the Constitution[19] approaches equality from two directions: a) on one hand, it states that everyone is equal before the law,[20] b) on the other hand, it prohibits discrimination,[21] so it guarantees human rights to everyone without any discrimination.[22] It is necessary to highlight that equality in social life shall be distinguish from the principle of equality in the legal sense. While the previous sense can not be interpreted from a constitutional point of view, in the latter sense equality is protected by constitutional law.[23] According to the aim of the study, the latter sense has

[16] Zaccaria 2015, 48–50.
[17] In connection with the protection of constitutional rights, two models can be distinguished: (a) social rights should not be regulated within the constitution, or if they are regulated they do not provide individual rights; (b) classical human rights and social rights are interdependent, they are indivisible. See more details Balogh 2011b, 305-306.; Balogh 2006, 25–37.
[18] Balogh 2011b, 308.
[19] The previous constitution of Hungary was called Constitution. Since the adoption of the constitution in 2011, it is called Fundamental Law.
[20] Although, the Constitution did not contain the provision of 'everybody is equal,' Article XV (1) of Fundamental Law contains that.
[21] Constitutional Court Decision no. 45/2000. (XII.8.).
[22] Constitutional Court Decision no. 9/2016. (IV.6.).
[23] Kiss 2003, 5–6.

significance. The infringement of the principle of equality (in the legal sense) may be interpreted in relation to a right or obligation: "discrimination means the deprivation of a right or the imposition of an obligation."[24] Article XV (2) lists, in illustrative list, the cases when distinction constitutes to discrimination. In connection with the illustrative list, point [27] of the Constitutional Court Decision no. 3206/2014. (VII.21.) states that "…listed characteristics - race, colour, gender, disability, national or social origin, etc. – are immutable characteristics of a person that can not be influenced, that is why the prohibition of discrimination serves the protection of these people." Disability is listed within the illustrative list as a personal quality that is considered to be a protected characteristic in the frame of the principle of equality. Disabled people shall live together with their disability, they are not able to change that, however, they are also entitled to human rights. Furthermore, Article XV (4)-(5) highlights disabled people as a group requiring special care and protection in order to whose equality and social inclusion Hungary shall help by means of separate measures. Such measure was e.g. the establishment of Secretary of State for Social Inclusion within the Ministry of Human Resources and a separate institution, the Equal Treatment Authority[25] for providing effective legal protection against discrimination.[26]

It shall note that discrimination may be not only prejudicial that is prohibited by the Fundamental Law but may be positive as well. Exceptionally, it is possible to derogate from the general prohibition but only if that constitutes positive discrimination for achieving equality. Therefore, not every distinction is prohibited but only discrimination without reason and which violates human dignity.[27] This state was confirmed by the Constitutional Court Decision no. 9/1990. (IV.25.) that determines that "… the prohibition of discrimination does not mean that every discrimination is prohibited. The prohibition of discrimination means that the law shall treat everybody equally (as persons of equal dignity), thus the criteria for entitlements and benefits should be determined with equal regard to individual needs… But if a social aim or constitutional right can be enforced by equality in the narrow sense, then such positive discrimination can not be declared unconstitutional."

### 3.2. Right to social security

Article XIX of Fundamental Law regulates the right to social security. Social security means that life situation when subsistence is ensured and the quality of life presumes welfare. According to Albert Takács "… social security is a quality of life that relates to welfare."[28] Social security shall be applied when the work, the income deriving from that and the work ability itself is temporarily or consistently being

[24] Constitutional Court Decision no. 45/2000. (XII.8.), point [3.2.].
[25] The authority was established according to the Act CXXV of 2003 on equal treatment and the promotion of equal opportunity which task is to very whether the requirement of equal treatment prevails.
[26] Explanatory memorandum to Article XV of the Fundamental Law; commentary on this article of Complex Law Library; opinion of the case law analysis group of the Supreme Court.
[27] Balogh 2011a, 137–140.
[28] Takács 2011, 79.

restricted, suspended or permanently being terminated due to unforeseen circumstance or risk. József Hajdú says that right to social security is subsidiary to the right to work,[29] so the right to social security becomes relevant when the right to work terminates.

The right to social security belongs to the second group regarding the intensity of constitutional protection, so it is a constitutional right other than fundamental rights. The characteristic of this category is that these rights are not individual rights, they can not be enforced on the basis of the constitution but they shall be ensured by further regulation.[30]

It shall note that Article XIX resulted change and a new approach compared to Section 70/E of the (previous) Constitution.[31] Article XIX (1) determines the intention of Hungary to provide social security for every Hungarian citizen. This regulation brought one of the most significant changes by making clear that the Fundamental Law regulates the right to social security not as a right – social security as a human right was disputed previously and the Constitutional Court did not considered it as a real human right that was expressed is several Constitutional Court Decision – but 'only' as a state objective[32]. Instead the regulation of Section 70/E of the Constitution "Citizen of the Hungarian Republic have right to social security…", the Fundamental Law states that the state shall only strive to provide social security to its citizen.[33] According to others, this change is a withdrawal compared to the regulation of the previous Constitution which derogates the importance of this right. However, taking into account that the Constitutional Court did not consider the right to social security as real human right in its previous interpretation, therefore, this change can not consider as a withdrawal. This right was considered as a state objective so far and it is regulated as such in the Fundamental Law,[34] thus it is considered that the previous interpretation of the Constitutional Court was codified. Furthermore, the fact that the Fundamental Law still regulates social security proves the importance of this right. However, there is no doubt that the regulation as a state objective provides more possibilities - within constitutional framework - for the state to establish and operate the social security system. Invalidity, disability and involuntary unemployment are listed in the exhaustive list[35] according to which individuals are entitled to statutory support. The legislator is free to decide the form and the details of the subsidy. According to Article XIX (2) the state establishes social security in Hungary by the system of social institutions and measures. The Fundamental Law brought change in the instruments of social security.

[29] Hajdú 2015, 34.
[30] Balogh 2011b, 309.
[31] The Constitutional Court Decision no. 23/2013. (IX. 25.), ABH 2013, 692 treated firstly with the new regulation. See the regulatory changes Rácz 2016, 535–542.; Téglási 2011.
[32] The Constitutional Court in its following Decisions, formulated after adopting the Fundamental Law, treated with the classification of the right to social security as a state goal: 40/2012. (XII. 6.), 3217/2014. (IX.22.), 28/2015. (IX. 24.), 9/2016. (IV.6.).
[33] See more details Juhász 2012, 44–48.; Téglási 2019.
[34] Jakab A 2011, 215.
[35] Compared to the Constitution, the subject scope of the right to social security in the Fundamental Law has also changed. While the Constitution has listed the range of beneficiaries in an exemplary manner, the Fundamental Law guarantees the right to social security only for the subjects included in the exhaustive list.

While the Constitution determined social insurance and the system of social institutions within the instruments of social security, the instruments of Fundamental Law no longer include social insurance but social institutions remained among them and social instruments was expanded with social measures. The abandonment of the instrument of social insurance raises the problem that Hungary breaches the obligations deriving from international documents - Article 9 of International Covenant on Economic, Social and Cultural Rights and ILO Convention no. 102 – and the Article 12 of European Social Charta.[36]

With respect to the statement of András Téglási and István Hoffman, Article XIX did not result a significantly different conception in relation to the constitutional protection of social security comparing the practice of the Constitutional Court before and after Fundamental Law came into force.

Based on the above mentioned facts, the right to social security constitutes to be essential – despite the new approach and change of Fundamental Law - as it important both for disabled people and people with changed working ability to maintain and provide their subsistence and the subsidies to facilitate it.

### 3.3. Right to work

Finally, Article XII of Fundamental Law regulates the right to work. This social right belongs to the first category of social rights so it constitutes to be a fundamental right. Fundamental rights are originated from a first-generation human right. In this case the right to work is originated from the individual action autonomy. The protection of these social rights is equivalent with the protection of first-generation human rights that can only be restricted on the basis of necessity and proportionality test.[37] On this basis the right to work constitutes to be a stronger human right than the right t social security but in my opinion both rights are of particular importance for the target group.

Article XII (1) provides right and prescribes 'obligation' for citizen as well in a complex way. Accordingly, everyone has right to pursue a freely chosen work and occupation (and to conduct a business) but everyone is obliged to work according to his/her abilities and possibilities – with regulation is new in the Fundamental Law. The regulation of this right in the Fundamental Law also brought changes, similarly to the right of social security, in accordance with the practice of the Constitutional Court. Previously, Section 70/B of the Constitution regulated in one sentence both the positive (right to engage in work as a social right) and negative (right to pursue a freely chosen occupation) aspects of the right to work, of which Constitutional Court recognised only the negative aspect as an individual right and granted for that constitutional protection.[38] The re-regulation of the right to work confirmed the practice of the Constitutional Court and Fundamental Law regulates in Article XII only the negative aspect of this right as an individual right.

[36] Rácz 2016, 538–539.
[37] Balogh 2011b, 308.
[38] Constitutional Court Decision no. 21/1994. (IV.16.) and the commentary of Wolters Kluwer Law Library in connection with Article XII.

However, the legislator defines work not only as a right but also as an expectation for providing the operation of the state.[39] Article XII (2) determines the positive aspect of the right as a state objective according to which the state shall strive to create the conditions of work – appropriate employment policy, job creation.[40]

With regard to the subject of the right to work, it is worth nothing that a distinction shall be made between the employment of disabled people and the employment of incapacitated people. We would think that a disabled person is incapable in the same time, which is true in many cases but not necessarily in all cases. So somebody will not be automatically incapable because he/she has some kind of disability. The Constitutional Court examined in its Decision no. 39/2011. (V.31.) that how guarantees of the right to work prevail in relation to incapacitated adult because of disability. While the Constitution provided only the right to pursue a freely chosen occupation, the Fundamental Law determines the obligation to work according to one's abilities and possibilities. Therefore, if a disabled person or incapacitated adult because of disability is able or would like to work, he/she has the right to do so – and he/she is even obliges to work according to the Fundamental law –, so it is appropriate to permit. The Constitutional Court in its Decision no. 39/2011. (V.31.), point [1.1] determined that "... complete exclusion of incapacitated people from employment may raise constitutional concerns." Consequently, my statement according to which the opportunity to work shall be provided for incapacitated people who are able and willing to work, is justified. Furthermore, the Constitutional Court also determined that legislation shall seek to increase the employment opportunities of incapacitated people. Hungary seeks to fulfil this provision by regulation of Article XII (2) of the Fundamental Law "...all people who have the ability to work and want to work to get work."

In the following, I examine the legislation ensuring the enforcement and further protection of these three human rights that creates the labour and social law dimension of the protection.

## 4. Labour and social law protection

### 4.1. Protection provided by the Act on equal treatment and the promotion of equal opportunities

Beside the provisions of the Fundamental Law, the Act on Equal Treatment[41] and the promotion of Equal Opportunities (hereinafter referred to as: Act on Equal Treatment) contains the most important sectoral level of protection in relation to disabled people and people with changed working ability. The aim of protection is determined already in the beginning of the Act on Equal Treatment, within the legislative purposes according to which "The Parliament, acknowledging every person's right to live as a person of equal dignity, intending to provide effective legal aid to those suffering from negative discrimination, declaring that the promotion of equal

[39] According to the explanatory memorandum to the Act of Article XII.
[40] Juhász 2012, 35–37.; Balogh 2011b, 313–315.
[41] Act CXXV of 2003 on equal treatment and the promotion of equal opportunities.

opportunities is principally the duty of the State, having regard to Articles II and XV of the Fundamental Law, the international obligations of the Republic and the legal acts of the European Union" enacts the Act.

The Act on Equal Treatment defines the cases that constitute the violation of equal treatment, thereby causing direct and indirect discrimination.[42] In relation to these cases, the Act declares the instruments that the person who has suffered discrimination may use, so it determines the legal consequences of violating the provisions of the Act.[43] Among infringements the Act separately defines the infringements in the field of employment[44] and social security.[45] In the field of employment, the employer infringes the requirement of equal treatment, in particular, if he/she does so in connection with access to employment, the establishment or the existence of an employment relationship, or in connection with working conditions. In the field of social security, infringement against the target group may take place with regard to claiming or providing social benefits. With regard to the examined group of persons, the violation of the requirement of equal treatment occurs most frequently in these cases.

### 4.2. Protective provisions of the Labour Code concerning the target group

After the Act on Equal Treatment, I examine those provisions of the Labour Code[46] that provide the target group some kind of guarantee and protection[47] in connection with the employment of them. However, the Labour Code contains only a certain number of relevant provisions contrary to the Act on Equal Treatment.

Section 51 (5) of the Labour Code states that "In the employment of persons with disabilities appropriate steps shall be taken to ensure that reasonable accommodation is provided." However, the Labour Code does not define exactly what it means under 'reasonable accommodation,' thus its meaning hall be developed in the judicial practice.

Section 53 (3) point d) states that "An employee may not be transferred to work at another location without the employee's consent if having suffered a degree of health impairment of at least fifty per cent as diagnosed by the body of rehabilitation experts." According to this provision, employment of a person with changed working ability other than determined in the employment contract is limited, it can be applied without the consent of the employee.

Section 66 (7) contains the next relevant provision that ensures protection against dismissal for people with changed working ability. It states that "The employer may terminate by notice the employment relationship of a worker who is receiving rehabilitation treatment or rehabilitation benefits due to the worker's capacity related to medical reasons if the worker can no longer be employed in his/her original position and no other job is available that is considered appropriate for his/her medical

[42] Section 8–9 of Act on Equal Treatment.
[43] Section 12-17/D of Act on Equal Treatment.
[44] Section 21-23 of Act on Equal Treatment.
[45] Section 24 of Act on Equal Treatment.
[46] Act I of 2012 on the Labour Code.
[47] See more about the regulation of the tare group within the Labour Code Jakab 2015, 205–209.

condition, or if the employee refuses to accept a job offered by the employer without good reason." The protection against dismissal considered to be dismissal limitation that provides protection only against dismissal on the grounds of health problem. This limitation means at the same time important protection, as someone is still able to work after the impairment, the employer must provide for him/her the opportunity to work.

Finally, Section 212 has relevance in relation with disabled people when disability also affects their capacity. Section 212 states that: "(1) Incapacitated workers may conclude employment relationships only for jobs which they are capable to handle on a stable and continuous basis in the light of their medical condition. (2) The functions of the employee's job shall be determined by definition of the related responsibilities in detail. The employee's medical examination shall cover the employee's ability to handle the functions of the job. (3) The employee's work shall be supervised continuously so as to ensure that the requirements of occupational safety and health are satisfied. (4) The provisions of Chapter XIV shall not apply to such employees; furthermore, the provisions pertaining to young workers shall apply." With this provision the legislator creates the opportunity of employment for mentally impaired people. In order to guarantee employment of these workers under the appropriate conditions, the legislator provides that the tasks to be carried out by the worker must be defined in detail and the appropriate working conditions and their monitoring should be ensured.

Although the Labour Code contains less provision in relation with the target group but these provisions are also important. However, I agree with Nóra Jakab who says that the non-coherent definition of these two categories of people, which, in some cases, seems to be justified, however, e.g. the requirement of reasonable accommodation should be apply to both subjects.

Over the Act on Equal Treatment and the Labour Code there are more acts that were adopted to ensure human rights deriving for the Fundamental Law.

The Act on Social Administration and Social Benefits[48] determines the forms and organization of certain social benefits provided by the state in order to create and maintain social security, the conditions of entitlement to social benefits and the guarantees of their enforcement.

The Act on the Rights and Equal Opportunities of Disabled People[49] serves in the interest of disabled people the alleviation of their disadvantages, the establishment of equal opportunity and forming the attitude of the society. The aim of the act is to determine the rights of disabled people and instruments of enforcing rights, furthermore, the regulation of complex rehabilitation of these people and as a result ensuring equal opportunity, independent lifestyle and active participation in social life.

[48] Act III of 1992 on social administration and social benefits.
[49] Act XXVI of 1998 on the rights and equal opportunities of disabled people.

Finally, the Act on the Care of Persons with Disabilities[50] regulates protective provisions in connection with people with changed working ability. The purpose of this act is to promote the reintegration, employment and employment-centered rehabilitation of these people on the basis of their remaining and improvable capacities and to replace earning due to the lost of income.

## 5. The role of social farm

Following the above-mentioned legal protection, a brief introduction shall be made of the special protection – social farm services – afforded by social farms to the subject of the study, which was the basis for the study.

The concept of social farm can be defined as a multifunctional agricultural activity form that performs important social and ecological function as well in addition to traditional agricultural activities (economic function).[51] It is necessary to emphasize that it is not a separate organizational form but an activity form that may be operated basically in any organizational form.[52] Multifunctional farms differ from traditional farms in several aspects. They broaden, deepen and lay their activities and relationships on a new basis. The social role of agriculture extends for many other functions in addition to agricultural activities. For example, it provides employment, integrates disadvantage (from social land employment aspects) people, maintains traditions, care for rural landscape, etc.[53] This means the system and essence of social farm service. The model of social farm is based on two pillars: on agricultural activities and on care and support. The farm itself is the basis of the model that provides skills development, rehabilitation and integration for the users of the social farm service by agricultural activities. By all this the aim of the farm is to employ the target group, to provide them job opportunities and, through this, to enable these people to become active, full-fledged members of the society and the labour market.

In connection with the target group of the social farm it can be stated specially about disabled people and people with changed working ability and about disabled situation in general, that these people are different, their situation results in different condition, circumstance. However, it does not mean that the life of these people is worth less than other's life but they are different. Therefore, they need help, even if not in all areas of life but in many aspects. Deriving from the right to social security, the state is responsible for establishing the system of social institutional and to operate that. Furthermore, it is also the task of the state in connection with the right to work to provide working conditions for all people who are able and willing to work. However, there are areas where social care is inadequate or is missing or the possibility of work is limited. Such area is the integration (both from social land employment aspect) of disabled people and people with changed working ability. It causes problem and difficulties for them to find a job and in many cases they do not get opportunity for it

[50] Act CXCI of 2011 on the care of people with changed working ability and on Amendment to Certain Laws.
[51] Orosz 2018, 221.
[52] See more about the possible operational form of social farms Orosz 2019, 416–432.
[53] Csák 2015, 1–10.; Csák & Kenderes 2016, 145–152.; Csák & Kenderes 2016, 1–11.

at all. Social farm is intend to fill this gap and help these people (as well) by providing them appropriate mental development and work opportunities. As it was mentioned before, social farm activity is based on two pillars: on agricultural activities and on care and support. The central element of the farm activity is the farm itself that ensure the two pillars, so the development of skills, rehabilitation and integration.[54] Integration is equivalent to the support service of the farm that creates the essence of the farm. So the primary aim of the farm is the integration of the target group and the secondary aim is employment, providing work opportunity. The farm tries to achieve these aims by agricultural activities.

Overall, people (target group) may feel themselves as useful members and they may become useful members of the society thanks to social farm service that provides significant developments.[55] So the farm ensures the target group the right to social security and work.

## 6. Closing thoughts

Disadvantages people, including disabled people and people with changed working ability are also the members of our society, even if they are different from other people. These people are also entitled to constitutional human rights, from which certain rights play significant role in their case, namely the right to equal treatment, the right to social security and work. These rights guarantee them that they also entitled to well-being and adequate living conditions, as well as the right to pursue a freely chosen work without discrimination. In their cases, positive discrimination can be applied if that is justified and their rights can be enforced in this way.

Social farm is a model that seeks to fill the gap that affects disadvantaged people. Thus, the farm intends to solve their problems, so discrimination, social exclusion, from labour market, significant restriction of employment opportunities by integrating them, providing them supportive farm service through agricultural activities.

[54] Leck, Evans & Upton 2014, 313–314.; Lanfranchi, Giannetto & Abbate & Dimitrova 2015, 711.
[55] Orosz 2018, 222–223.

## Bibliography

1. Balogh Zs (2006) Az értelmezés hatalma – szociális jogok az Alkotmányban, in: Hajas Barnabás & Schanda Balázs (eds.) *Formtori Iuris Publici. Ünnepi Kötet Kilényi Géza professzor hetvenedik születésnapjára,* Szent István Társulat, Budapest, pp.25-37.
2. Balogh Zs (2011a) A diszkrimináció tilalma, in: Schanda B & Balogh Zs (ed.) *Alkotmányjog – Alapjogok*, PPKE JÁK, Budapest, pp. 123-140.
3. Balogh Zs (2011b) Szociális jogok, in: Schanda B & Balogh Zs (eds.) *Alkotmány – Alapjogok,* PPKE JÁK, Budapest, pp. 301-326.
4. Csák Cs (2015) Szociális inklúzió megvalósulása a szociális farmrendszer keretei között, in: Veresné Somosi M & Lipták K (eds.) *„Mérleg és Kihívások" IX. Nemzetközi Tudományos Konferencia. A Gazdaságtudományi Kar megalapításának 25. évfordulója alkalmából*, Konferencia Kiadvány, Miskolc-Lillafüred, pp.1-10.
5. Csák Cs & Kenderes Gy (2016a) Hátrányos helyzetű személyek foglalkoztatási lehetőségei és annak bizonytalanságai a mezőgazdaságban, in: Homoki-Nagy M & Hajdú J (eds.) *Ünnepi kötet Dr. Czucz Ottó egyetemi tanár 70. születésnapjára*, Acta Universitas Szegediensis. Acta Juridica et Politica, pp. 141-152.
6. Csák Cs & Kenderes Gy (2016b) New organizational and employment opportunities of the multifunctional agriculture, in: Kékesi T (ed.) *The Publications of the MultiScience - XXX. microCAD International Multidisciplinary Scientific Conference*, University of Miskolc, pp. 1-11.
7. Dr. Gazsi A, Jakubinyi L & Matthew H (2015) Célcsoportok - a szociális farm-szolgáltatások igénybevevői, in: Kajner P & Jakubinyi L (eds.) *Szociális farmok létrehozása Magyarországon,* Szimbiózis Alapítvány, Miskolc, pp. 37-45.
8. Hajdú J (2015) A szociális biztonság jelentése és védelme az Alaptörvényben, in: Balogh E (ed.) *A történeti alkotmánytól az Alaptörvényig,* Pólay Elemér Alapítvány Jurisperitus Betéti Társasága, Szeged.
9. Jakab A (2011) *Az új Alaptörvény keletkezése és gyakorlati következményei*, HVG-ORAC, Budapest.
10. Jakab N (2015) *A munkavállalói jogalanyiság munkajogi és szociális jogi kérdései, különös tekintettel a megváltozott munkaképességű és fogyatékos személyekre*, Bíbor Kiadó, Miskolc.
11. Jakab N (2017) A fogyatékosság szociálpolitikai összefüggései, in: Mélypataki G (ed.) *A szociálpolitika jogi alapjai a XXI. század társadalmi kihívásainak tükrében,* Bíbor Kiadó, Miskolc, pp. 203–221.
12. Jakab N & Kajtár E (2013) *Empower Project Questionnaire Hungary*. 1–10. A kérdőív a Visegrad Fund által támogatott Empower Project keretében készült, http://empower.hu/publications/category/4-filled-in-questioners
13. Jakab N, Mélypataki G & Szekeres B (2017) *A szociálpolitika jogi alapjai a XXI. század társadalmi kihívásainak tükrében*, Bíbor Kiadó, Miskolc.
14. Juhász G (2012) A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben, *Fundementum*, 16(1), pp. 35-49.
15. Kiss B (2016) A szociális biztonság alkotmányjogi megítélése Magyarországon a rendszerváltozást követően, *Acta Universitatis Szegediensis: Acta juridica et politica*, (1), pp. 357-362.

16. Kiss B (2003) Az egyenlő bánásmód elvének és a hátrányos megkülönböztetés tilalmának jogi szabályozása, *Acta Universitas Szegediensis: Acta Juridica et Politica,* (12), pp. 3-38.
17. Lanfranchi M, Giannetto C, Abbate T & Dimitrova V (2015) Agriculture and the social farm: Expression of the multifunctional model of agriculture as a solution to the economic crisis in rural areas, *Bulgarian Journal of Agricultural Science*, 21(4), 711-718.
18. Leck C, Evans N & Upton D (2014) Agriculture- who cares? An investigation of 'care farming' in the UK. *Journal of Rural Studies*. 34(Apr.), pp. 313–325. https://doi.org/10.1016/j.jrurstud.2014.01.012
19. Orosz F (2018) Társadalmi felelősségvállalás a mezőgazdaság keretei között – különös tekintettel a nyugat-európai megoldásokra, in: Haffner T (ed.) *IV. Fiatalok Európában Konferencia – Tanulmánykötet*, Sopianae Kulturális Egyesület, Pécs, pp. 219-230.
20. Orosz F (2019) A mezőgazdasági tevékenység végzésének feltételei és korlátai – szervezeti és pénzügyi keretek, *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, 37(2), pp. 416-432. Orosz F (2018) Társadalmi felelősségvállalás a mezőgazdaság keretei között – különös tekintettel a nyugat-európai megoldásokra, in: Haffner T (ed.) *IV. Fiatalok Európában Konferencia – Tanulmánykötet*, Sopianae Kulturális Egyesület, Pécs, pp. 219-230.
21. Prugberger T & Jakab N (2016) *A foglalkoztatás elősegítés és igazgatás joga*, Bíbor Kiadó, Miskolc.
22. Rácz Z (2016) A szociális biztonsághoz való jog Magyarországon a rendszerváltozás óta eltelt időszakban, *SZTE,* Szeged, pp.535-542.
23. Sári J & Somody B (2008) *Alapjogok, Alkotmányjog II,* Osiris Kiadó, Budapest, Digitális Tankönyvtár https://regi.tankonyvtar.hu/hu/tartalom/tamop425/2011_0001_520_alapjogok_alkotmanytan_ii/ch01s02.html [11.10.2020.]
24. Takács A (2011) Szociális jogok az Alkotmányban és a munka alkotmányjogi szerepe, in: Molnár B & Gyombolai Zs & Téglási A (eds.) *Gazdasági alapjogok és az új magyar Alkotmány*, Kiadta az Országgyűlés Emberi jogi, kisebbségi, civil- és vallásügyi bizottsága. Budapest, pp. 76-86.
25. Téglási A (2011) A szociális állam „erodálása" vagy megmentése? – avagy a szociális biztonság az új Alaptörvényben, *Jogelméleti szemle,* (4).
26. Téglási A (2019) A szociális biztonság alkotmányos védelme az Alaptörvény hatálybalépése előtt és után, *Acta Humana*, (2), 85-106. doi: 10.32566/ah.2019.2.5
27. Zaccaria M L (2015) *Az egyenlő bánásmód elvének érvényesülése a munkajog területén a magyar joggyakorlatba,* HVG-ORAC Lap- és Könyvkiadó, Budapest.

**Pál SÁRY***

# The legal protection of environment in ancient Rome

*Abstract*

*The paper wants to give an overview of the moral and legal rules which protected the natural and built environment in ancient Rome. These rules prove that environment protection is not a modern invention. A bonus et diligens pater familias was morally obliged to cultivate his own agricultural land carefully. Both air and water pollution was legally sanctioned. A house-owner had to keep his own building in good condition. Each person was to keep the street outside his own house in repair and clean. Demolition of both private and public buildings was strictly restricted. It is true that in ancient Rome environment protection was not full scope (e.g., animal protection was absent from Roman law), but many elements of environment were legally protected.*

**Keywords:** environment protection, Roman law, agriculture, silviculture, air pollution, water pollution, waste, road repairs, maintenance, demolition, protection of monuments

## 1. Protection of agricultural lands and forests

Behaviour of the Roman citizens was regulated by legal, religious and moral rules. The moral rules primarily regulated how a pater familias had to act at home, in his own house, in his own land. Consequently, these rules described the characteristics of a good father, a good husband, a good slave-holder, a good farmer. The keeping of the moral rules was supervised by the censors. Moreover, the censors made lists of the different groups of the citizens. This latter activity of them was combined with the moral control: the censors could delete the name of any immoral senator from the list of the senate, the name of any immoral knight from the list of the equestrian order, and the name of any immoral citizen from the list of the centuries and the tribes. The citizens who were excluded from the centuries and the tribes got into the group of the aerarians. The legal capacity of the aerarians was limited: they could not be present at the assemblies, they had neither active nor passive right to vote, they could not serve in the army, and they had to pay a special poll-tax.

According to the ancient moral rules of the Roman society, the farmers had to cultivate carefully their ploughlands, vineyards and fruit-gardens.[1] It was also supervised by the censors who put the careless farmers on the list of the aerarians. In his work entitled Noctes Atticae, Aulus Gellius writes the following: "Si quis agrum suum passus fuerat sordescere eumque indiligenter curabat ac neque araverat neque purgaverat, sive quis arborem suam vineamque habuerat derelictui, non id sine poena fuit, sed erat opus

Pál Sáry: The legal protection of environment in ancient Rome. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 199-216, https://doi.org/10.21029/JAEL.2020.29.199

* dr. jur., PhD, dr. habil., full professor, Department of Roman Law, Faculty of Law, University of Miskolc, e-mail: jogsary@uni-miskolc.hu.

[1] Cf. Astin 1988, 22.; Baltrusch 1989, 17.; El Beheiri 2012, 120, 151.



https://doi.org/10.21029/JAEL.2020.29.199

censorium, censoresque aerarium faciebant." ("If anyone had allowed his land to run to waste and was not giving it sufficient attention, if he had neither ploughed nor weeded it, or if anyone had neglected his orchard or vineyard, such conduct did not go unpunished, but it was taken up by the censors, who reduced such a man to the lowest class of citizens.")[2]

Pliny the Elder also confirms that careless cultivation of the land was regarded an offence by the censors: 'agrum male colere censorium probrum iudicabatur.'[3] Consequently, ownership of agricultural land involved certain obligations, and the state imposed sanctions for neglect of these duties. In other words, the rights of the owner of an agricultural land were restricted by the obligation of careful cultivation.

Of course, the usufructuary, the lessee and the emphyteuta were also obliged to cultivate the land carefully. The usufructuary had to cultivate the land in the proper way. Ulpian writes the following: "Item si fundi usus fructus sit legatus, quidquid in fundo nascitur, quidquid inde percipi potest, ipsius fructus est, sic tamen ut boni viri arbitratu fruatur. Nam et Celsus libro octavo decimo digestorum scribit cogi eum posse recte colere." ("Similary, if a usufruct of land is left by way of legacy, whatever is produced on the land, whatever can be taken from it, counts as fruits of the land, providing, however, that the usufructuary takes them in the way that a careful man would think right. Indeed, Celsus states in the eighteenth book of his Digest that he can be compelled to cultivate the land in the proper way.")[4]

We know from Ulpian that the usufructuary was not allowed to cut down fruit trees.[5] Moreover, as Paul writes, he had to plant other trees in place of those that had died.[6] According to the opinion of Ulpian, the usufructuary can open mines, providing that this activity do not prejudice the cultivation of the land.[7]

We can find similar rules in the Justinianic Institutes: "Sed si gregis usumfructum quis habeat, in locum demortuorum capitum ex fetu fructuarius summittere debet, ut et Iuliano visum est, et in vinearum demortuarum vel arborum locum alias debet substituere. Recte enim colere debet et quasi bonus paterfamilias uti." ("The usufructuary of a flock, as Julian held, ought to replace any of the animals which die from the young of the rest, and, if his usufruct be of land, to replace dead vines or trees; for it is his duty to cultivate according to law and use them like a careful head of a family.")[8]

The Romans differentiated between coppice-woods (silva caedua) and not coppice-woods (silva non caedua). According to Gaius, "Silva caedua est, ut quidam putant, quae in hoc habetur, ut caederetur. Servius eam esse, quae succisa rursus ex stirpibus aut radicibus renascitur." ("'Wood for timber' is as some people think a wood

[2] Gell. NA 4,12 (tr. J. C. Rolfe).
[3] Plin. NH 18,3,11.
[4] Ulp. D. 7,1,9 pr. (tr. D. Fergus).
[5] Ulp. D. 7,1,13,4.
[6] Paul. D. 7,1,18.
[7] Ulp. D. 7,1,13,5.
[8] Inst. 2,1,38 (tr. J. B. Moyle).

which is owned for this purpose, namely to be felled. Servius thinks that it is a wood which grows again from the stock or the root when it is cut.") [9]

If the object of the usufruct was a wood, the rights of the usufructuary depended on the type of the wood. Pomponius writes the following: "Ex silva caedua pedamenta et ramos ex arbore usufructuarium sumpturum: ex non caedua in vineam sumpturum, dum ne fundum deteriorem faciat." ("The usufructuary may take props and branches from trees from coppice-wood. From a wood which is not a coppice-wood he may take what he needs for his vineyard, as long as he does not impoverish the estate.")[10]

The lessee also was obliged to cultivate the agricultural land carefully. In his comprehensive treatise entitled The Roman Colonate, Clausing states that "The most important obligation of the tenant was the proper cultivation of the soil."[11] With regard to the obligations of the lessee, Gaius writes the following: "Conductor omnia secundum legem conductionis facere debet. Et ante omnia colonus curare debet, ut opera rustica suo quoque tempore faciat, ne intempestiva cultura deteriorem fundum faceret." ("The lessee should perform everything in accord with the clauses of the lease. Above all, the tenant farmer should see to it that he does farm work during his term as well, so that he did not make the farm worth less by his unseasonable cultivation.")[12]

If a farm was leased with rental payments spread over a five-year period, the owner, as Paul writes, could bring an action at once if the farm tenant abandoned the cultivation of the farm: "Si […] fundus in quinquennium pensionibus locatus sit, potest dominus, si deserueret […] fundi culturam colonus vel inquilinus, cum eis statim agere."[13] As Du Plessis pointed out on the basis of further textes of the Digest, "a conductor of agricultural land was contractually obliged to cultivate it to preserve its fertility and failure to do so constituted grounds for the termination of the contract."[14]

In case of lease of a woodland, the lessee had to conserve the condition of the wood. For the sake of it, he had to arrange also for proper guarding of the forest. We are told the following by Alfenus: "In lege locationis scriptum erat: 'Redemptor silvam ne caedito neve cingito neve deurito neve quem cingere caedere urere sinito.' Quaerebatur, utrum redemptor, si quem quid earum rerum facere vidisset, prohibere deberet an etiam ita silvam custodire, ne quis id facere possit. Respondi verbum sinere utramque habere significationem, sed locatorem potius id videri voluisse, ut redemptor non solum, si quem casu vidisset silvam caedere, prohiberet, sed uti curaret et daret operam, ne quis caederet." ("A lease clause stated: 'The lessee of public land shall not fell nor bark nor burn the woodland, nor allow anyone to back or fell or burn.' Should the lessee stop someone if he saw him doing one of this things, or should he in addition guard the woodland to prevent anyone's being able to do it? I responded that the word 'allow' has both meanings, but that on the whole the lessor seems to have desired not

[9] Gai. D. 50,16,30 pr. (tr. M. Crawford).
[10] Pomp. D. 7,1,10 (tr. D. Fergus).
[11] Clausing 1925, 263.
[12] Gai. D. 19,2,25,3 (tr. B. Frier).
[13] Paul. D. 19,2,24,2.
[14] Du Plessis 2005, 139. Cf. Iav. D. 19,2,51 pr.; Paul. D. 19,2,54,1.

only that the lessee stop someone if he chanced to see him felling the woodland but also that he take care and make an active effort to prevent someone's felling it.")[15]

The term emphyteusis derived from the Greek verb emphuteuein (to plant in). It indicates us that the emphyteuta was bound to plant and improve the agricultural land.[16] As we can read in the Novels of Justinian, the emphyteuta might lose all of his rights by damaging the land.[17]

It is worth adding that the illegal cutting down of the trees of somebody else realized a private delict. According to Pliny the Elder, "Fuit et arborum cura legibus priscis, cautumque est XII tabulis ut, qui iniuria cecidisset alienas, lueret in singulas aeris XXV." ("The ancient laws also took the trees under their protection; and by the Twelve Tables it was enacted, that he who should wrongfully cut down trees belonging to another person, should pay twenty-five asses for each.")[18] At the interpretation of the law, this rule was extended by the pontifices to the case of cutting down of vine-stocks.[19]

The action of the Twelve Tables obtained the name actio de arboribus succisis, as mentioned by Gaius.[20] Later, another action, the actio arborum furtim caesarum was introduced by the praetor.[21] This praetorian innovation was necessary, because the legal fact regulated by the Twelve Tables was too narrow and the penalty of 25 asses became too low in the second half of the Republic.[22]

According to Gaius, "Si colonus sit, qui ceciderit arbores, etiam ex locato cum eo agi potest. Plane una actione contentus esse debet actor." ("If it be an agricultural tenant who felled the trees, he will also be liable to the action on letting. But, of course, the plaintiff will have to be content with one action.")[23] It means that a lessee who cut the trees could be sued by both the actio arborum furtim caesarum and the actio locati, but the lessor had to choose between the two actions.

In the classical period cutting down another person's trees or vine-stocks became a public crime. This conclusion can be drawn from the following words of Gaius: "Sciendum est autem eos, qui arbores et maxime vites ceciderint, etiam tamquam latrones puniri." ("But it should be known that those who cut down trees, especially vines, are punishable also as brigands.")[24]

Finally, we may mention that in case of cutting trees the interdictum quod vi aut clam could also be used. This interdict, as Berger writes, was issued against a person who forcibly (vi) or secretly (clam) did a 'work' on the claimant's land. The work (opus) was here conceived in the broadest sense of any act done which changes the state of

[15] Alf. D. 19,2,29 (tr. B. Frier).
[16] Cf. Johnston 1940, 323.
[17] Cf. Nov. 7,3,2; 120,8.
[18] Plin. NH 17,1,7 (tr. J. Bostock & H. T. Riley). According to Pólay, the illegal eradication (succissio) of the most valuable things of the farming plot (olive-trees, vine-stocks) constituted an iniuria-delict against the head of the house-community. See Pólay 1986, 71.
[19] Cf. Gai. 4,11; Ulp. D. 47,7,3 pr.
[20] Gai. 4,11.
[21] Cf. D. 47,7.
[22] Cf. Lenel 1927, 337.
[23] Gai. D. 47,7,9 (tr. J. A. C. Thomas).
[24] Gai. D. 47,7,2 (tr. J. A. C. Thomas).

the land or its surface, such as cutting trees. The aim of the interdict was restoration to the former state by the defendant himself or at his expense.[25] If the trees provided some amenity, their value for pleasure could also be counted. Paul writes the following: "Si quis vi aut clam arbores non frugiferas ceciderit, veluti cupressos, domino dumtaxat competit interdictum. sed si amoenitas quaedam ex huiusmodi arboribus praestetur, potest dici et fructuarii interesse propter voluptatem et gestationem et esse huic interdicto locum." ("If anyone by force or stealth cuts trees that bear no fruit, such as cypresses, the owner will still be able to have recourse to the interdict. But if some amenity is also provided by these trees, it can be said that the usufructuary has an interest too on account of their value for pleasure and promenades and that the interdict is available to him also.")[26]

## 2. Protection of the purity of air and water

The emission of smoke is the most typical form of the air pollution. In the Digest of Justinian we can read about a case in which a certain Cerellius Vitalis complained about smoke emitted by a cheese shop (taberna casiaria) that was situated just below his estate. Ulpian reports the following: "Aristo Cerellio Vitali respondit non putare se ex taberna casiaria fumum in superiora aedificia iure immitti posse, nisi ei rei servitutem talem admittit. […] Posse igitur superiorem cum inferiore agere ius illi non esse id ita facere. […] Dicit igitur Aristo eum, qui tabernam casiariam a minturnensibus conduxit, a superiore prohiberi posse fumum immittere…" ("Aristo states in an opinion given to Cerellius Vitalis that he does not think that smoke can lawfully be discharged from a cheese shop onto the buildings above it, unless they are subject to a servitude to this effect, and this is admitted. […] Thus, the owner of the upper property can bring an action against the owner of the lower, asserting that the latter does not have the right to act in this way. […] Hence, Aristo holds that the man who leased a cheese shop from the authorities of Minturnae, can be prevented from discharging smoke by the owner of the building above it…")[27]

Consequently, as among others Wacke states, the owner of the upper property could by way of an actio negatoria assert that the cheese shop did not have the right to discharge the smoke.[28] Ulpian adds a further note to the case: "Sed et interdictum uti possidetis poterit locum habere, si quis prohibeatur, qualiter velit, suo uti." ("Further, the interdict for the possession of land may be employed, if a man is prevented from using his own land in the way he wishes.") Thus, the owner of the upper land was able to use also the interdictum uti possidetis, by which remedy the magistrate could prohibit the emission of smoke.

In certain cases emission of smoke constituted a delict. According to the opinion of Javolenus, the person who emitted smoke to the land of his neighbour with the intention to insult (iniuriae faciendae causa) could be sued in the action for injury (actio iniuriarum). He writes the following: "Si inferiorum dominus aedium superioris

[25] Berger 1953, 511.
[26] Paul. D. 43,24,16,1 (tr. T. Braun).
[27] Ulp. D. 8,5,8,5 (tr. D. Fergus).
[28] Wacke 2002, 7.

vicini fumigandi causa fumum faceret…, negat Labeo iniuriarum agi posse: quod falsum puto, si tamen iniuriae faciendae causa immittitur." ("If the owner of the lower premises create smoke to fumigate those of his neighbour above…, Labeo says that the action for insult does not lie. I think this wrong, if it were done with the intention to insult.")[29]

Smoke could cause the death of bees. The person who killed another's bees by smoking committed the delict of 'loss wrongfully caused' (damnum iniuria datum), and for this reason he could be sued in an actio in factum legis Aquiliae. According to Ulpian, "Si quis fumo facto apes alienas fugaverit vel etiam necaverit, magis causam mortis praestitisse videtur quam occidisse, et ideo in factum actione tenebitur." ("If someone drives away, or even kills, another's bees by making smoke, he seems rather to have provided the cause of their death than directly to have killed them, and so he will be liable to an action in factum.")[30]

Finally, in connection with the emission of smoke, it is worth to mention the question of cremation. As we know, the Twelve Tables prohibited burials and cremations within the city walls.[31] On the basis of the words of Isidore of Seville,[32] Van Den Bergh considers that these prohibitions were for purposes of prevention of pollution.[33]

We can add to this that the mentioned provisions of the Twelve Tables had not only hygienic purposes. As Robinson writes, these prohibitions of the law were for aims of keeping 'land free for building or public places in the developing City,' and fire prevention.[34] Quoting the words of the Twelve Tables, Cicero himself notes that cremation is prohibited because of the danger of fire.[35]

According to the testimony of an inscription, at around 80 BC the praetor urbanus prohibited to make places for cremation, and to throw out excrements or dead animals in he city and vicinity of Rome. The text of the inscription is as follows: "L[ucius] Sentius C[ai] f[ilius] pr[aetor] de sen[atus] sent[entia] loca terminanda coer[avit] b[onum] f[actum] nei quis intra terminos propius urbem ustrinam fecisse velit neive stercus cadaver iniecisse velit." ("L. Sentius, son of Gaius, praetor, in accordance with a motion of the senate supervised the marking off of this area with boundary-stones. A deed well done! Let no-one be minded to make a cremation-place or cast dung or a carcass within the boundary-stones on the side nearer to the city.")[36]

[29] Iav. D. 47,10,44 (tr. J. A. C. Thomas). Cf. Pólay 1986, 164–165.
[30] Ulp. D. 9,2,49 pr. (tr. C. Kolbert).
[31] Cf. Cic. leg. 2,23,58 (= XII tab. 10,1): "Hominem mortuum … in urbe ne sepelito neve urito." ("A dead man … shall not be buried or burned inside the city.")
[32] Isid. etym. 15,11,1: "Prius autem quisque in domo suo sepeliebatur. Postea vetitum est legibus, ne foetore ipso corpora viventium contacta inficerentur." ("Originally people were buried in their own homes. Later this was prohibited by law, so that the bodies of the living would not be infected by contact with the stench.").
[33] Van Den Bergh 1999, 505.
[34] Robinson 1975, 176.
[35] Cic. leg. 2,23,58: "Credo vel propter ignis periculum." ("I suppose the latter is on account of danger of fire.").
[36] ILS 8208. Cf. Robinson, 1992, 108; Salomies 2015, 161–162.

The emission of bed smell is another frequent form of the air pollution. The bed smell is often caused by rotting organic refuses which are dangerous to health. We can read about such problems in the ancient sources. The Younger Pliny as a governor wrote the following to the emperor Trajan: "The city of Amastris, Sir, which is both elegantly and finely built, boasts among its most striking features a very beautiful and lengthy street, down one side of which, to its full extent, runs what is called a river, but it is really a sewer of the foulest kind. This is not only an eyesore because it is so disgusting to look at, but it is a danger to health from its shocking smells. For these reasons, both for the sake of health and appearance, it ought to be covered over, and this will be done if you give leave, while we will take care that the money shall be forthcoming for so important and necessary a work."[37] Trajan gave permission to have the stream covered if it was a danger to health, but left it to Pliny to find the money to pay for the work: "It stands to reason, my dear Pliny, that the stream which flows through the city of Amastris should be covered over, if by remaining uncovered it endangers the public health. I feel certain that, with your usual diligence, you will take care that the money for the work will be forthcoming."[38]

The Romans knew well that the filth of the sewers seriously endangered the public health. The person who was hindered by force from repairing or cleaning of a sewer could claim from the praetor to issue the interdictum de cloacis. In this case the magistratus drew up as follows: "Quo minus illi cloacam quae ex aedibus eius in tuas pertinet, qua de agitur, purgare reficere liceat, vim fieri veto." ("I forbid the use of force to prevent you from cleaning and repairing the drain in question, which reaches from his house to yours.")[39]

There were two interdicta de cloacis: one for prohibition, the other for restitution.[40] According to the comment of Ulpian, "Curavit autem praetor per haec interdicta, ut cloacae et purgentur et reficiantur, quorum utrumque et ad salubritatem civitatium et ad tutelam pertinet: nam et caelum pestilens et ruinas minantur immunditiae cloacarum, si non reficiantur." ("The praetor has taken care by means of these interdicts for the cleaning and the repair of drains. Both pertain to the health of civitates and to safety. For drains choked with filth threaten pestilence of the atmosphere and ruin, if they are not repaired.")[41]

We can find some cases in the Digest, which are related to water pollution. Ulpian writes the following: "Apud Trebatium relatum est eum, in cuius fundo aqua oritur, fullonicas circa fontem instituisse et ex his aquam in fundum vicini immittere coepisse: ait ergo non teneri eum aquae pluviae arcendae actione. Si tamen aquam conrivat vel si spurcam quis immittat, posse eum impediri plerisque placuit." ("It is recorded in Trebatius that someone who had a spring on his land established a fuller's shop at it and began to cause the water there to flow onto his neighbour's property. Trebatius says that he is not liable to an action to ward off rainwater.

[37] Plin. ep. 10,98 (tr. Firth J B).
[38] Plin. ep. 10,99 (tr. Firth J B). Cf. Liebeschuetz 2015, 13; Havlíček & Morcinek 2016, 41–42; Fiorentini 2018, 326–327.
[39] Ulp. D. 43,23,1 pr. (tr. T. Braun).
[40] Cf. Ulp. D. 43,23,1,1.
[41] Ulp. D. 43,23,1,2 (tr. T. Braun).

However, many authorities accept that if he channeled the water into one stream or introduced any dirt into it, he can be restrained.")[42] Consequently, as Flohr states on the basis of this text, the owner of a fullery could get into trouble when the wastewater from his workshop was too dirty and caused pollution on a neighbouring property; the owner of a fullery could in such cases be obliged to take measures to prevent it.[43]

As we know, the fullers (fullones) were employed in washing and cleaning dirty garments. They worked with urine, by which the dirt was more easily separated from the clothes, and which they got from the public toilets (latrinae).[44] In the course of this work a large quantity of wastewater was producted. According to the above-cited text, the fullers were not allowed to introduce any dirt into the water which flowed onto the neighbour's land. The jurist do not tell us which action could be brought in such a case of pollution. The actio aquae pluviae arcendae could not be used, because this action, as Ulpian writes, was available when someone caused rainwater (aqua pluvia) to flow elsewhere than in its natural course, for example, if by allowing it to run, he maked the flow greater or faster or stronger than usual or if by blocking the flow he caused an overflow.[45] According to Wacke, the injured neighbour could bring an actio negatoria to prevent the fullers from the further water pollution.[46] I think this opinion is acceptable, but I would add to it again that the injured party was able to use also the interdictum uti possidetis, by which remedy he could achieve his aim in a more quickly and simply way.

The interdictum quod vi aut clam was the most comprehensive legal remedy available for asserting rights against a neighbour.[47] This interdict could be issued when someone poured something into his neighbour's well in order to pollute the water.[48] Ulpian writes the following: "Is qui in puteum vicini aliquid effuderit, ut hoc facto aquam corrumperet, ait Labeo interdicto quod vi aut clam eum teneri: portio enim agri videtur aqua viva, quemadmodum si quid operis in aqua fecisset." ("Labeo says that anyone who pours something into the well of his neighbour, in order to spoil the water by doing so, will be liable under the interdict quod vi aut clam, because living water is considered to constitute part of the land, and this is just as if he had constructed a new work in the water.")[49]

In imperial times, the affronts contrary good morals were treated as extraordinary crimes (crimina extraordinaria) and prosecuted through public accusation. Since water pollution was also regarded such an injury, it was submitted to criminal prosecution. We are told by Paul the following: "Fit iniuria contra bonos mores, veluti si quis fimo corrupto aliquem perfuderit, caeno luto oblinierit, aquas spurcaverit, fistulas lacus quidve aliud ad iniuriam publicam contaminaverit: in quos graviter animadverti solet." ("It is an affront contrary to sound morals when a person showers

[42] Ulp. D. 39,3,3 pr. (tr. S. Jameson).
[43] Flohr 2013, 186.
[44] Cf. Robinson 1992, 105.
[45] Ulp. D. 39,3,1,1. Cf. Sáry 2019, 232.
[46] Wacke 2002, 10.
[47] Cf. Hausmaninger & Gamauf 2012, 236.
[48] Cf. Hausmaninger & Gamauf 2012, 243.
[49] Ulp. D. 43,24,11 pr. (tr. S. P. Scott). Cf. Alburquerque 2017, 33; id. 2018, 68, 76.

another with excrement, smears him with mud and filth, defiles waters, water pipes, or a lake, or contaminates anything to the detriment of the public; against such persons, stern action is taken.")[50]

For protection of the purity of water, the springs and aqueducts had to be cleaned. The person who had right to draw water in another's land or to lead cattles to another's land to water could clean and repair the spring (fons). These servitudes (servitus aquae haustus and servitus pecoris ad aquam appulsus) were protected by the interdictum de fonte. When it was issued, the praetor, among others, said: "Quo minus fontem, quo de agitur, purges reficias, ut aquam coercere utique ea possis, dum ne aliter utaris, atque uti hoc anno non vi non clam non precario ab illo usus es, vim fieri veto." ("I forbid the use of force to prevent you from cleaning and repairing the spring in question, so that you may extract water from it and use it, provided that you use it in no other way than you did this year not by force, stealth, or precarium.")[51]

The person who had right to lead water (in other words, who had a servitus aquaeductus) could repair and clean the bed (rivus) of the water: this right was protected by the interdictum de rivis. Granting this legal remedy the praetor said: "Rivos specus septa reficere purgare aquae ducendae causa quo minus liceat illi, dum ne aliter aquam ducat, quam uti priore aestate non vi non clam non precario a te duxit, vim fieri veto." ("I forbid the use of force to prevent such a one from repairing or cleaning for the purpose of drawing off water, watercourses, culverts, or sluices, provided that he does not draw off water in any other way than he drew from you last summer not by force, stealth, or precarium.")[52]

Special rules were applied to the public aqueducts. We are told by Frontinus that some laws enacted as follows: "Ne quis aquam oletato dolo malo, ubi publice saliet. Si quis oletarit, sestertiorum decem milium multa esto." ("No one shall with malice pollute the waters where they issue publicly. Should any one pollute them, his fine shall be ten thousand sestertii.")[53] Those over whose land a public aqueduct passed were obliged to clean the aqueduct regularly. Those who omitted this duty were to be punished by confiscation of their land.[54]

## 3. Protection of built environment

According to the lex Iulia municipalis of Julius Caesar, the administration of the repair and maintenance of the public roads of the city of Rome (and within one mile of the capital) belonged to the aediles.[55] The owner of a building fronting on any road had to maintain that road to the satisfaction of the aedile to whom that part of the city had been assigned.[56] If the owner had failed to do his duty the aedile was to set a contract for the maintenance of that road. The aedile made the contract publicly in the forum

[50] Paul. D. 47,11,1,1 (tr. J. A. C. Thomas). Cf. Pólay 1986, 185.
[51] Ulp. D. 43,22,1,6 (tr. T. Braun).
[52] Ulp. D. 43,21,1 pr. (tr. T. Braun).
[53] Front. aq. 2,97 (tr. C. E. Bennett). Cf. Alburquerque 2017, 32–33; id. 2018, 67.
[54] Cf. CTh 15,2,1 = C. 11,43(42),1.
[55] Tab. Heracl. 24–28.
[56] Tab. Heracl. 20–21.

through the urban quaestor (or whoever was in charge of the treasury). The owner had to pay a fixed sum to the contractor within a certain period, otherwise he had to pay one and a half times that sum to him.[57]

According to the same law, the aediles and their subordinates – the four men for cleaning the roads within the city of Rome (quattuorviri viis in urbe purgandis) and the two men for cleaning the roads within one mile of the capital (duoviri viis extra urbem purgandis) – was to see to the cleaning of the public roads and had full authority in such matter.[58] The owner of a building fronting on a footpath (semita) had to keep that footpath paved with continuous stone slabs along his frontage to the satisfaction of the competent aedile.[59]

Cassius Dio tells us that in 33 BC Agrippa as aedile "without taking anything from the public treasury repaired all the public buildings and all the streets, cleaned out the sewers, and sailed through them underground into the Tiber."[60] Under Caligula still the aediles were in charge of keeping the roads and alleys of the city of Rome clean. According to Suetonius, "when Vespasian was aedile, Gaius Caesar, incensed at his neglect of his duty of cleaning the streets, ordered that he be covered with mud, which the soldiers accordingly heaped into the bosom of his purple-bordered toga…"[61] Suetonius further informs us that Caligula "was so lazy and luxurious that he was carried in a litter by eight bearers, requiring the inhabitants of the towns through which he passed to sweep the roads for him and sprinkle them to lay the dust."[62] We can come to know from a letter of Trajan that those who were condemned to public works (ad opera publica) had 'to clean out the sewers, and to repair the roads and streets.'[63]

During the later centuries, the obligations of the urban house-owners gradually increased. First of all, they had to repair their own houses. According to Ulpian, "Praeses provinciae inspectis aedificiis dominos eorum causa cognita reficere ea compellat et adversus detractantem competenti remedio deformitati auxilium ferat." ("A provincial governor ought to compel owners to repair buildings, sufficient ground having been shown on inspection of them. If they refuse, he should by the use of some competent remedy against them patch up the unsightly appearance of the buildings.")[64]

Moreover, the owners had to keep the parts of the streets opposite to their houses clean. Papinian writes as follows: "Vias autem publicas unumquemque iuxta domum suam reficere oportet et canales ex subdiali repurgare et reficere ita, ut vehiculum recte ibi iter facere possit. Qui in conducto habitant, si dominus non reficit, ipse reficiunto et quod impenderint a mercede deducunto." ("Each person is to keep the public street outside his own house in repair and clean out the open gutters and ensure that no vehicle is prevented from access. Occupiers of rented accomodation

[57] Tab. Heracl. 32–45. Cf. Robinson, 1992, 51–52; Liebeschuetz 2015, 8.
[58] Tab. Heracl. 50–52. Cf. Robinson, 1992, 59–60; Havlíček & Morcinek 2016, 37.
[59] Tab. Heracl. 53–55.
[60] Dio 49,43 (tr. E. Cary). Cf. Robinson 1992, 53.
[61] Suet. Vesp. 5 (tr. J. C. Rolfe). Dio also tells this story (59,12). Cf. Robinson, 1992, 54.
[62] Suet. Cal. 43 (tr. J. C. Rolfe).
[63] Plin. ep. 10,32 (tr. J. B. Firth). Cf. Liebeshuetz 2015, 7.
[64] Ulp. D. 1,18,7 (tr. D. N. MacCormick). Cf. Salcedo 2018, 175.

must carry out these repairs themselves if the owner fails to do so and deduct their expenses from the rent.")[65]

To the Italian and provincial cities special officials (curatores rei publicae) were sent by the emperors for the supervision and administration of municipal finances. One of the specified functions of these officials was a responsibility for ensuring that derelict houses were rebuilt. We are told the following by Paul: "Ad curatoris rei publicae officium spectat, ut dirutae domus a dominis extruantur. Domum sumptu publico exstructam, si dominus ad tempus pecuniam impensam cum usuris restituere noluerit, iure eam res publica distrahit." ("The functions of the curator of the respublica include seeing to it that derelict houses are re-erected by their owners. When a house has been re-erected at public expense, the respublica can legally sell it if the owner refuses to return the sum expended plus interest at the proper time.")[66]

In the cities of the Greek-speaking east, the officers charged with the oversight of the streets were called astunomikoi (in Latin translation of Mommsen: curatores urbium). Their duties were summarized by Papinian. The Latin translation of his Greek words is as follows: "Item curam agant, parietes privati quaeve alia circa domus viam attingunt vitiosa ne sint, ut domini aedium sic ut oportet eas commundent et reficiant. Quod si non commundabunt vel non reficient, multanto eos, donec ea firma reddant. Item curam agant, ne quis in viis fodiat neve eas obruat neve quicquam in viis aedificet […] Ne sinunto autem neque pugnari in viis nec stercus proici nec cadavera nec pelles eo conici." ("And they are to take care that private walls and enclosure walls of houses facing the street are not in bed repair, so that the owners should clean and refurbish them as necessary. If they do not clean or refurbish them, they are to fine them until they make them safe. They are to take care that nobody digs holes in the streets, encumbers them, or builds anything on them. […] They are not to allow anyone to fight in the streets, or to fling dung, or to throw out any dead animals or skins.")[67]

Public places were protected by the interdictum ne quid in loco publico fiat. According to Ulpian, the praetor said: "Ne quid in loco publico facias inve eum locum immittas, qua ex re quid illi damni detur, praeterquam quod lege senatus consulto edicto decretove principum tibi concessum est." ("You are not to do anything in a public place, or introduce anything into it, which could cause any damage to such a one, except for what has been permitted to you by statute, senatus consultum, or edict, or decree of the emperor.")[68]

In connection with this interdictum prohibitorium, Ulpian mentions many interesting rules. For example, we can know from him that disfigurement of the city was to be avoided. The jurist writes the following: "Si quis nemine prohibente in publico aedificaverit, non esse eum cogendum tollere, ne ruinis urbs deformetur, et quia prohibitorium est interdictum, non restitutorium. Si tamen obstet id aedificium publico usui, utique is, qui operibus publicis procurat, debebit id deponere, aut si non obstet, solarium ei imponere…" ("If someone builds in a public place and nobody prevents

[65] Pap. D. 43,10,1,3 (tr. T. Braun). This fragment of the Digest is Greek; the quoted Latin text is the translation of Theodor Mommsen.
[66] Paul. D. 39,2,46 (tr. S. Jameson). Cf. Salcedo 2018, 175.
[67] Pap. D. 43,10,1,1–2.5 (tr. T. Braun). Cf. Robinson 1992, 57–58; Kamińska 2012, 179.
[68] Ulp. D. 43,8,2 pr. (tr. T. Braun). Cf. Alburquerque 2017, 37.

him, he cannot then be compelled to demolish, for fear of ruins disfiguring the city and because the interdict is for prohibition, not restitution. But if his building obstructs public use, it must certainly be demolished by the official in charge of public works. If it does not, he must impose a solarium [grount-rent] on it.")[69]

A special praetorian interdict, the interdictum de via publica protected the public rural roads. We are told by Ulpian that the praetor said: "In via publica itinereve publico facere immittere quid, quo ea via idve iter deterius sit fiat, veto." ("I forbid doing or introducing anything in a public road or way by which that road or way is or shall be made worse.")[70] According to the comment of the jurist, "Deteriorem autem viam fieri sic accipiendum est, si usus eius ad commeandum corrumpatur, hoc est ad eundum vel agendum, ut, cum plane fuerit, clivosa fiat vel ex molli aspera aut angustior ex latiore aut palustris ex sicca." ("Making a road worse is to be understood to mean impairing its usefulness for traffic, that is, for walking or driving, as when it was level and is made steep, or when it is turned from smooth to rough, from broader to narrower, or from dry to muddy.")[71]

A public road could be deteriorated in many ways. Ulpian mentions a lot of cases: "Si quis cloacam in viam publicam immitteret exque ea re minus habilis via per cloacam fiat, teneri eum Labeo scribit: immisisse enim eum videri. Proinde et si fossam quis in fundo suo fecerit, ut ibi aqua collecta in viam decurrat, hoc interdicto tenebitur: immissum enim habere etiam hunc videri. […] Hoc interdictum etiam ad ea, quae pascuntur in via publica itinereve publico et deteriorem faciant viam, locum habet." ("If anyone should bring down a drain into a public road and because of this the road is made less fit for use, Labeo writes that he is liable; for he is held to have introduced [something to make the road worse]. So if anyone digs a cutting in his farm, so that water collects there and runs down into the road, his is liable under this edict; for he too is held to have introduced something. […] This interdict also applies to damage to the road done by animals grazing in a public road or public way.")[72]

According to Ulpian, this interdictum prohibitorium was completed by the praetor with an interdictum restitutorium: "Quod in via publica itinereve publico factum immissum habes, quo ea via idve iter deterius sit fiat, restituas." ("You are to make good whatever you have, that is, done or introduced in a public road or way by which that road or way is or shall be made worse.")[73] As the jurist writes, "Restituere videtur, qui in pristinum statum reducit: quod fit, sive quis tollit id quod factum est vel reponat quod sublatum est." ("To make good is to restore to its original condition. This is done by removing what has been constracted or replacing what has been removed…")[74]

[69] Ulp. D. 43,8,2,17 (tr. T. Braun).
[70] Ulp. D. 43,8,2,20 (tr. T. Braun).
[71] Ulp. D. 43,8,2,32 (tr. T. Braun).
[72] Ulp. D. 43,8,2,26–27.30 (tr. T. Braun).
[73] Ulp. D. 43,8,2,35 (tr. T. Braun). Cf. Alburquerque 2017, 39.
[74] Ulp. D. 43,8,2,43 (tr. T. Braun).

The praetor protected those who wanted to repair a public road or way. Ulpian quotes the words of the praetor: "Quo minus illi viam publicam iterve publicum aperire reficere liceat, dum ne ea via idve iter deterius fiat, vim fieri veto." ("I forbid the use of force to prevent such a one from opening up or repairing a public road or way, as long as that road or way is not made worse.")[75] The jurist comments these words as follows: "Viam aperire est ad veterem altitudinem latitudinemque restituere. Sed et purgare refectionis portio est: purgare autem proprie dicitur ad libramentum proprium redigere sublato eo quod super eam esset. Reficit enim et qui aperit et qui purgat et omnes omnino, qui in pristinum statum reducunt." ("To open up a road is to restore it to its old depth and breadth. It is a part of its repair to clean it. Cleaning it is, properly speaking, to reduce it to its proper level by clearing away all that is upon it. Repair includes opening it up and cleaning it and everything that is done to restore it to its original state.")[76]

Sacred places were protected by the interdictum ne quid in loco sacro fiat. We are told by Ulpian that the praetor said: "In loco sacro facere inve eum immittere quid veto." ("I forbid doing anything in a sacred place, or introducing anything into it.")[77] According to the comment of the jusrist, "Quod ait praetor, ne quid in loco sacro fiat, non ad hoc pertinet, quod ornamenti causa fit, sed quod deformitatis vel incommodi." ("The praetor's words forbidding the doing of anything in a sacred place apply not to what is done to embellish it, but to its defacement and to nuisance.")[78]

The walls and gates of a town, as inviolable things (res sanctae), also belonged to the things under divine law (res divini iuris). According to Hermogenian, "In muris itemque portis et aliis sanctis locis aliquid facere, ex quo damnum aut incommodum irrogetur, non permittitur." ("To do anything to the walls, doors, and other sacred places that will cause damage or nuisance is not permitted.")[79] A fire hazard was especially to be avoided in these places. As Paul writes, "Neque muri neque portae habitari sine permissu principis propter fortuita incendia possunt." ("The walls and doors may not be used for habitation without permission of the emperor because of the danger of chance fires.")[80]

In the later Roman Empire the compulsory public services (munera publica) were an integral part of the tax system. The repairing of roads and bridges (viarum et pontium sollicitudo) was among these services.[81]

In the Roman Empire demolition of buildings was prohibited or at least restricted by a lot of legal rules. The municipal charter of Terentum (89–62 BC) contained the following provisions: "Nei quis in oppido quod eius municipi e[r]it aedificium detegito neive dem[olito] neive disturbato, nisei quod non deterius restiturus erit, nisei d[e] s[enatus] s[ententia]. Sei quis adversus ea faxit, quant[i] id aedificium f[u]erit, tantam pequni[a]m municipio dare damnas esto, eiusque pequniae [que]i volet

[75] Ulp. D. 43,8,11,1 pr. (tr. T. Braun).
[76] Ulp. D. 43,8,11,1,1 (tr. T. Braun).
[77] Ulp. D. 43,6,1 pr (tr. T. Braun).
[78] Ulp. D. 43,6,1,2 (tr. T. Braun).
[79] Herm. D. 43,6,2 (tr. T. Braun).
[80] Paul. D. 43,6,3 (tr. T. Braun).
[81] Cf. CTh 11,16,15.18; 15,3,6.

petiti[o] esto." ("No person within the town of the said municipium of Tarentum shall unroof or demolish or dismantle any house without a decree of the senate, unless he shall intend to restore such house to its former condition. Any person acting in violation of this prohibition shall be liable to pay to the municipium a sum of money equivalent to the value of the said house, and may be sued at will by any person for that amount.")[82]

The senatus consultum Hosidianum of AD 44 forbade the purchase of buildings with the intention of destroying them for profit (diruendo plus adquirere) from selling the materials. Such a transaction was void, and the buyer had to pay double the price to the fisc as a penalty.[83] This prohibition was restated by the senatus consultum Volusianum of AD 56.[84]

Demolition of houses was restricted also by the emperor Hadrian. According to his biography, "he ruled that in no community should any house be demolished for the purpose of transporting any building-materials to another city."[85] We are told by Marcian that the senate prohibited to leave houses for demolition as a legatum or fideicommissum: "Aedes destruendae neque legari neque per fideicommissum relinqui possunt: et ita senatus censuit."[86]

In the later Roman Empire the use of spoils from older, unused buildings in new constructions became common. After the victory of Christianity this practice of cannibalizing old buildings included the pagan temples and other ancient monuments of Rome. The officials of the City conceded upon petition the use for construction of stones recovered from demolition of ancient public buildings. This vandalism had to be stopped. In 458 the emperor Majorian forbade the destruction of ancient monuments for the sake of their materials. The constitution, which was addressed to Aemilianus, prefect of Rome, stated the facts: "Aedes si quidem publicas, in quibus omnis Romanae civitatis consistit ornatus, passim dirui plectenda urbani officii suggestione manifestum est. Dum necessaria publico operi saxa finguntur, antiquarum aedium dissipatur speciosa constructio et ut parvum aliquid reparetur, magna diruuntur." ("Indeed, it is manifest that the public buildings, in which the adornment of the entire City of Rome consists are being destroyed everywhere by the punishable recommendation of the office of the prefect of the City. While it is peretended that the stones are necessary for public works, the beautiful structures of the ancient buildings are being scattered, and in order that something small may be repaired, great things are being destroyed.")

In this situation the emperor ordered as follows: "Idcirco generali lege sancimus cuncta aedificia quaeve in templis aliisque monumentis a veteribus condita propter usum vel amoenitatem publicam subrexerunt, ita a nullo destrui…" ("Therefore, by this general law We sanction that all the buildings that have been founded by the ancients as temples and as other monuments and that were constructed for the public use or pleasure shall not be destroyed by any person…") The punishment for judges who had

[82] Lex Tar. 32–35 (tr. E. G. Hardy). See FIRA, 121; Hardy 1911, 108. Cf. Robinson 1992, 36; Cappelletti 2017, 62; Barker & Marano 2017, 840; Salcedo 2018, 177.
[83] See FIRA 200. Cf. Barker & Marano 2017, 841–842; Cappelletti 2017, 64.
[84] See FIRA 201. Cf. Barker & Marano 2017, 842; Cappelletti 2017, 64.
[85] SHA Hadr. 18 (tr. D. Magie).
[86] Marci. D. 30,114,9 (tr. T. Braun). Cf. Robinson 1992, 38.

allowed the destruction of ancient public buildings was fifty pounds of gold, while their subordinates were whipped and had both hands amputated. Those who had removed materials from public buildings were to return them. The ancient monuments could be pulled down under very strict conditions, with the permission of the senate and the emperor.[87]

## 4. Summary

In ancient Rome the owners could not be obliged by laws to cultivate their own farms carefully. However, moral rules specified that every farmer was to cultivate his own land with due care. Against those who broke their moral duties the censors applied strict sanctions.

The usufructuaries, lessees and emphyteutas were not only morally but also legally obliged to cultivate the agricultural lands carefully. Although these rules protected basically the rights of the owners, they indirectly served also the protection of the natural environment.

Illegal cutting down of trees of somebody else constituted a delict. The committer could be sued originally by the actio de arboribus succisis of the Law of the Twelve Tables, later by the actio arborum furtim caesarum of the praetorian edict. In such a case the interdictum quod vi aut clam was also appliable; it was aimed at restitution of the former state of things. In imperial law the illegal cutting down of trees or vine-stocks was regarded as a public crime. Basically these rules protected the private ownership, but they indirectly served the protection of the trees, too.

Against the neighbour who emitted thick smoke many kinds of legal remedies (actio negatoria, interdictum uti possidetis, actio iniuriarum, actio in factum legis Aquiliae) could be used, depending on the circumstances of the case. It was prohibited to cremate corpses within the city boundaries. Against the neighbour who continuously polluted the running water also could be applied different types of legal remedies (actio negatoria, interdictum uti possidetis). In case of polluting of a well the interdictum quod vi aut clam could be issued. The person who was prevented from cleaning of a spring, a bed of a water course, or a sewer could use different interdicts (interdictum de fonte, interdictum de rivis, interdictum de cloacis). The owners were obliged to clean the public aqueduct passed over their lands. Those who polluted the water of the aqueduct could receive heavy monetary punishment.

The house-owners were obliged to maintain their own buildings, as well as to repair and clean the part of the street in front of them. To take part in maintaining of the roads and bridges was a public obligation. The sewers were usually cleaned by those who were condemned to public works. Within the town to throw out excrements, dead animals or skins to a public area was prohibited. Public areas, public roads and sacred places were protected by different interdicts (interdictum ne quid in loco publico fiat, interdictum de via publica, interdictum ne quid in loco sacro fiat).

[87] NMaj 4,1 (tr. C. Pharr). Cf. Alchermes 1994, 176–178.

Demolition of houses was tied to strict conditions by municipal charters (as, for example, the lex Tarentina). The SC Hosidianum and the SC Volusianum forbade the purchase of houses to demolish them and obtain profit from selling the building materials. A special decree of the emperor Maiorian prohibited demolition of the monuments of Rome.

Consequently, Roman law protected both the natural and built environment by many devices. This protection, however, was not full-scope: animal protection, for example, was wholly missing from the Roman ideas.[88]

[88] It is true that some imperial decrees restricted hunting of lions (cf. CTh 15,11,1), but they did it only to ensure that enough lion would remain for animal fights, in which public shows a huge crowd of wild animals was killed.

## Bibliography

1. Alburquerque J M (2017) Algunus fundamentos y convergencias de la experiencia administrativa romana sobre el medio ambiente, los recursos naturales y res publicae, *Glossae* 14, pp. 28–53.
2. Alburquerque J M (2018) Provisions of Rules of the Roman Administration in Defense of Natural Resources, Res Publicae and the Environment, *Ius Romanum* 4(1), pp. 62–81.
3. Alchermes J (1994) Spolia in Roman Cities of the Late Empire. Legislative Rationales and Architectural Reuse, *Dumbarton Oaks Papers* 48, pp. 167–178, doi: 10.2307/1291726.
4. Astin A E (1988) Regimen Morum, *The Journal of Roman Studies* 78, pp. 14–34, doi: 10.2307/301448.
5. Baltrusch E (1989) *Regimen morum. Die Reglementierung des Privatlebens der Senatoren und Ritter in der römischen Republik und frühen Kaiserzeit*, Verlag C. H. Beck, München.
6. Barker S J & Marano Y A (2017) Demolition laws in archaeological context. Legislation and architectural re-use in the Roman building industry, in: Pensabene P, Milella M, Caprioli F (eds.) *Decor. Decorazione e architettura nel mondo romano*, Roma, pp. 833–850.
7. Berger A (1953) *Encyclopedic Dictionary of Roman Law*, The American Philosophical Society, Philadelphia, doi: 10.2307/1005773.
8. Cappelletti L (2017) Norme per la tutela degli edifici negli statuti locali (secoli I a.C. – I d.C.), *Bullettino dell'istituto di diritto romano* 111, pp. 53–74.
9. Clausing R (1925) *The Roman Colonate. The Theories of its Origin*, Columbia University, New York.
10. Du Plessis P (2005) Subletting and the Roman law of letting and hiring Interpreting C.4.65.6, *Revue internationale des droits de l'antiquité* 52, pp. 131–144.
11. El Beheiri N (2012) *Das »regimen morum« der Zensoren. Die Konstruktion des römischen Gemeinwesens*, Duncker & Humblot, https://doi.org/10.3790/978-3-428-53789-1.
12. Fiorentini M (2018) Cloache e sanità urbana nello specchio del diritto, *Index* 46, pp. 320– 343.
13. Flohr M (2013) *The World of the Fullo. Work, Economy, and Society in Roman Italy*, Oxford University Press, Oxford.
14. Hardy E G (1911) *Six Roman Laws*, The Clarendon Press, Oxford.
15. Hausmaninger H & Gamauf R (2012) *A Casebook on Roman Property Law*, Oxford University Press, Oxford.
16. Havlíček F & Morcinek M (2016) Waste and Pollution in the Ancient Roman Empire, *Journal of Landscape Ecology* 9(3), pp. 33–49, doi: 10.1515/jlecol-2016-0013.
17. Johnston W R (1940) Emphyteusis. A Roman 'Perpetual' Tenure, *The University of Toronto Law Journal* 3(2), pp. 323–347, doi: 10.2307/824317.
18. Kamińska R (2012) 'Totam urbem tuendam esse commissam' (Cic., In Verr. 2,5,36). The aediles as guardians of order in Republican Rome, *Zeszyty Prawnicze* 12(3), pp. 177–198, doi: 10.21697/zp.2012.12.3.08
19. Lenel O (1927) *Das Edictum perpetuum*, 3. Aufl., Verlag B. Tauchnitz, Leipzig.

20. Liebeschuetz W (2015) Rubbish disposal in Greek and Roman cities, in: *East and West in Late Antiquity: Invasion, Settlement, Ethnogenesis and Conflicts of Religion*, Brill, Leiden, pp. 3–18, https://doi.org/10.1163/9789004289529_002.
21. Pólay E (1986) *Iniuria Types in Roman Law*, Akadémiai Kiadó, Budapest.
22. Robinson O (1975) The Roman Law on Burials and Burial Grounds, *The Irish Jurist* 10(1), pp. 175–186.
23. Robinson O F (1992) *Ancient Rome. City Planning and Administration*, Routledge, London–New York.
24. Salcedo M C J (2018) Initiatives of the Roman Administration and Urban Environment, *Ius Romanum* 4(1), pp. 162–183.
25. Salomies O (2015) The Roman Republic, in: Bruun C & Edmondson J (eds.) *The Oxford Handbook of Roman Epigraphy*, Oxford University Press, Oxford, pp. 153–177, doi: 10.1093/oxfordhb/9780195336467.013.009.
26. Sáry P (2019) Water law rules in ancient Rome, *Journal of Agricultural and Environmental Law* 14(26), pp. 219–236, https://doi.org/10.21029/JAEL.2019.26.219
27. Van Den Bergh R (1999) Roman origins of environmental law?, *Journal of South African Law* 24(3), pp. 495–507.
28. Wacke A (2002) Protection of the Environment in Roman Law?, *Roman Legal Tradition* 1, pp. 1–24.