

CASE NOTES

The Hungarian Constitutional Court's Decision on the Protection of Forests

Decision No. 14/2020. (VII. 6.) AB of the Constitutional Court of Hungary

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Abstract

In its decision delivered on 15 June 2020, the Hungarian Constitutional Court stated that several provisions of the 2017 amendment of the Act XXXVII of 2009 on Forest, Forest Protection and Forest Management are unconstitutional. The case was also an opportunity for the Constitutional Court to adopt another milestone decision on the interpretation and application of the environment-related provisions of the Fundamental Law and the “non-derogation principle”. The progressive decision of the Constitutional Court entrusts the Hungarian State with trustee duties. The present Case Note is an analysis of Decision No. 14/2020. (VII. 6.) AB of the Constitutional Court.

Keywords: public trust, non-derogation, Constitutional Court of Hungary, Article P, future generations.

1. Legal Background

In 2017 the Hungarian Parliament adopted Act LVI of 2017 on the amendment of Act XXXVII of 2009 on Forest, Forest Protection and Forest Management (Forest Act). According to the explanatory memorandum,¹ the aim of the amendment was to find a balance between the right to a healthy environment and the right to property. In reality, the amendment considerably weakened the achieved level of protection, tried to maximize the economic value of forest land areas, and prioritized mainly economic interest over nature conservation in forest management.

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1 See T/14461, available in Hungarian, at www.parlament.hu/irom40/14461/14461.pdf.

The proceedings of the Constitutional Court were initiated by the Commissioner for Fundamental Rights,² based on a complaint submitted by environmental NGOs.³ Before adopting its decision, the Constitutional Court had requested the Minister of Agriculture, the Minister of the Interior, the Minister of Defense, the National Council for Sustainable Development, the National Council for Environmental Protection, and the Pro Silva Hungaria Association. The environmental NGOs, the Hungarian Chamber of Agriculture (HCA/NAK), the National Agricultural Research and Innovation Center (NARIC/NAIK) and the Hungarian Association of Agricultural Machinery Manufacturers (MEGOSZ) filed *amicus curiae* briefings.

The *right to a healthy environment* was incorporated into the Hungarian Constitution in 1990. The Constitutional Court of Hungary then ruled that the State must not allow the already achieved level of environmental policy, legislation and conservation decline.⁴ This was the declaration of the famous '*non-derogation principle*' in *Decision No. 28/1994. (V. 20.) AB*. The right to a healthy environment, enshrined in the Fundamental Law, has a substantial element, namely that a specific level of protection, once achieved, should not be decreased. This prohibition of stepping back from the achieved level of protection is not an absolute ban; it shall be enforced in accordance with its function in the course of the protection of fundamental rights.

In 2011 the Hungarian Parliament established a direct link between environmental protection, the interests of future generations, and human rights at the constitutional level by stating that "agricultural land, forests and reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets are part of the nation's common heritage", and declared that "the State and everyone" is obliged to protect, maintain, and preserve them for future generations.⁵ This provision provides a *non-exhaustive list of the elements of common heritage of the nation*, thereby allowing for the extension of the list by further elements.

Under Article 38(1) of the Fundamental Law the property of the State and local governments shall be considered national assets, and the management and protection of national assets shall aim at serving public interests, meeting common needs and preserving natural resources, as well as taking into account the needs of future generations. In the present case, the Constitutional Court also reinforced its jurisprudence that in every case when the rules governing the

- 2 Under Article 24(2) of the Fundamental Law, the Commissioner for Fundamental Rights has the right to turn to the Constitutional Court in cases where there is a strong belief that a national or local piece of legislation is in violation of the Fundamental Law. The Deputy Commissioner for Future Generations can only propose that the General Commissioner for Fundamental Rights turn to the Constitutional Court.
- 3 World Wildlife Fund (WWF) Hungary, BirdLife Hungary (MME – the Hungarian Ornithological and Nature Conservation Society) and the National Society of Conservationists (MTVVSZ – Friends of the Earth Hungary).
- 4 László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, Michigan University Press, Ann Arbor, 2000, pp. 24-25, and 298-305.
- 5 See Article P of the Fundamental Law.

protection of the environment are amended, the principles of prevention and precaution should be taken into account, since the failure to protect the nature and the environment may induce irreversible processes.⁶

2. The Importance of Forest Protection

Forests form an essential part of the unique natural heritage of Hungary; therefore, the responsible management of forests is of primary importance.⁷ Based on the data taken from the National Forest Inventory, more than 22% of the total area of Hungary (approximately 2 million hectares of land) is covered by forest lands, including forests as well as forest roads and other areas serving forest management practices but actually not covered by trees.⁸

In recent decades, the social (public welfare) function and the environmental role of forests have increased.⁹ Therefore, the proportion of forest areas designated for protective purposes has increased,¹⁰ and there are further 70 so-called 'forest reserves' in the country. Forest operations in these reserves are limited to buffer zones, which surround the core zones where no traditional operation is conducted whatsoever.¹¹ All protected forests are also included in the coherent Natura 2000 ecological network of special areas of conservation to which various protection measures under Union law apply.¹²

Forests provide important ecosystem services to society like fresh air, and they have value as an exploitable reservoir of timber and fuel, as a source of food, as a habitat rich in wildlife, and as a major reservoir of biodiversity. In addition, the forestry sector is a carbon sink because of the huge carbon uptake of forests, thanks to ongoing afforestation efforts and sustainable forest management.¹³ Hungary is located in an area gravely vulnerable to the consequences of climate change and logging is one of the major contributors of greenhouse gas emissions.

Planned forest management has a long history in Hungary. After the political transition about 40% of Hungarian forests were privatized. In 2009 the Forest Act closed the transition related to the ownership structure, emphasized the importance of sustainable forest management, provided more opportunities for

6 Decision No. 14/2020. (VII. 6.) AB, Reasoning [38].

7 Id. Reasoning [24].

8 Forest is basically defined as land spanning more than 0.5 hectares with trees higher than 5 meters and a canopy of over more than 30%, or trees able to reach these thresholds *in situ*; see Tamás Tobisch & Péter Kottek (eds.), *Global Forest Resources Assessment 2020, Report (Hungary)*, Rome, 2020, p. 9.

9 It was in 1939, when an area, part of the Great Forest of Debrecen, was declared protected in Hungary for the first time.

10 In Hungary, forests in protected natural areas must always be state-owned forests, and the proportion of these forests was more than 18% in 2018.

11 *National Inventory Report for 1985-2018*, Hungarian Meteorological Service, Unit of National Emissions Inventories, 2020, p. 484.

12 All Natura 2000 site types (Birds Directive Sites and Habitats Directive sites) can be found on the European Environment Agency's Natura 2000 Network Viewer, at <https://natura2000.eea.europa.eu/>.

13 *National Inventory Report for 1985-2018*, p. 10.

members of the public to participate in forest planning, and introduced the quantitative definition of naturalness as a qualitative parameter of forest management.¹⁴ The Forest Act also created a legal basis for transitioning from clear-cutting and the shelterwood system to selection, in addition, the interest in close-to-nature forestry has also been introduced into the forest management practice.

The duty of forest planning is performed in the framework of district forest management planning. Forest management planning activities cover the entire forest area of Hungary. The plans are normally drafted for a period of 10 years covering all of the country's forest land areas,¹⁵ forming the basis for managing forests legally and sustainably, in harmony with societal interests, and with a view to economic and ecological balance. Each forest manager receives his or her forest management plan, which describes his or her rights and responsibilities.

A long-term, future-oriented perspective is crucial in forest management. In Hungary, an unfavorable overall conservation status of forests is largely due to excessive human destruction (e.g. deforestation, removal of dead trees which provide food and shelter for forest-dependent species), and the introduction of invasive non-native species associated with forest degradation processes, ultimately displacing native species, thereby completely altering the original forest landscape.¹⁶ The Constitutional Court underlined in its decision that, according to Article P(1) of the Fundamental Law, *the State manages as a kind of trustee for future generations the natural and cultural assets entrusted to it and belonging to the common heritage of the nation.*¹⁷ Therefore, the right of the present generations to use and exploit these resources is not unlimited. These rights shall only be of such extent that does not jeopardize either the natural values themselves. These values must be protected individually or through the safeguarding of the interests of future generations. This general standard *can be considered as a part of newly established and consolidated universal customary law*,¹⁸ and it is also applicable to the constitutional review of the rules governing forests, as natural values that form part of the nation's common heritage according to Article P(1) of the Fundamental Law.

3. Weighing of Competing Interests

The common heritage status of forests imposes responsibilities on forest owners (including the Hungarian State), forest managers and recreational users alike.

14 Forestry-related Databases of the Hungarian Forestry Directorate, 8 October 2013, p. 3.

15 About one tenth of the forest area is subject to forest management planning each year.

16 Bálint Dobi & Annamária Holes (eds.), *State of the Environment in Hungary*, Herman Ottó Institute Nonprofit Ltd., Budapest, 2020, at www.hermanottointezet.hu/sites/default/files/mka_2020_digi_en_jav.pdf, p. 56.

17 The idea of using the public trust doctrine to influence the management of public resources is not new in other States. See e.g. John Meyer, 'Using the Public Trust Doctrine to Ensure the National Forests Protect the Public from Climate Change', *Hastings Environmental Law Journal*, Vol. 16, Issue 1, 2010, p. 198.

18 Decision No. 14/2020. (VII. 6.) AB, Reasoning [22].

Based on Article P of the Fundamental Law, all these parties must follow the rules of sustainable forest management. The amendment changed the definition of the Natura 2000 protection purpose due to which a significant part of the forest areas classified as such have lost their Natura 2000 protection purpose, making the assertion of economic considerations to the maximum extent the sole purpose of forest management. The Constitutional Court found it to be in conflict with the Fundamental Law and annulled those provisions that allowed the designation of an economic purpose in respect of forests in protected natural areas.¹⁹

Natura 2000 areas are of EU significance and any damage to these areas may result in an infringement procedure at Union level. The Constitutional Court pointed out that the very reason an area belongs to the Natura 2000 network is because species of plants and animals in need of special protection live there. Natura 2000 areas can also be farming territories where (in the interest of protecting the species of plants and animals living there) agricultural activity can only be performed under significant restrictions to comply with specific environmental protection and nature conservation rules. Where, in the light of the best scientific knowledge in the field, there is reasonable doubt that human activity will not have adverse effects on the conservation of habitats and protected species, that activity cannot be authorized.²⁰

The Constitutional Court therefore held that *the right of private forest owners to property shall not justify the prioritization of economic interests against the protection of natural values* and that forest managers do not have a constitutionally protected right to obtain, in the forests bearing natural values, additional rights of economic management to the detriment of the enforcement of nature conservation. The Constitutional Court therefore annulled the relevant provisions of the 2017 amendment concerning Natura 2000 areas.²¹

According to the reasoning of the decision, the Constitutional Court had declared in several earlier decisions that the right to property is a fundamental right guaranteed by the Fundamental Law,²² which may only be restricted in exceptional cases in such circumstances and manner as stipulated by an act. The state is obliged to set up a system of guarantees that renders the right to property operational. While a restriction of the right to property may be necessary in the public interest, such a restriction shall require reasonable grounds. Following its earlier practice, the Constitutional Court expressed that the possibility for

19 Id. Reasoning [50].

20 See e.g. Judgment of 7 September 2004, *Case C-127/02, Waddenvereniging and Vogelbeschermingsvereniging*, ECLI:EU:C:2004:482, para. 44; Judgment of 8 November 2016, *C-243/15, Lesoochranárske zoskupenie VLK*. ECLI:EU:C:2016:838, para. 66; Judgment of 17 April 2018, *C-441/17, Commission v Poland (Białowieża Forest)*. ECLI:EU:C:2018:255, para. 117. Those judgments concerned Article 6 of the Habitats Directive in so far as it establishes that a plan or project not directly connected with or necessary for the management of a Natura 2000 site but likely to have significant effect on that site can be authorized only to the extent that the competent authority has satisfied itself that the plan or project will not adversely affect the integrity of that site.

21 Decision No. 14/2020. (VII. 6.) AB, Reasoning [66].

22 Article XIII of the Fundamental Law.

constitutional review regarding the restriction of the right to property (compared with other fundamental rights) is relatively narrow, since the Constitutional Court shall not examine whether the restriction was inevitably necessary but focuses only on whether it is justifiable by the public interest.

The Constitutional Court also annulled the relevant provisions of the 2017 amendment that made the registration of the protection purpose of protected natural areas of local significance subject to the prior consent of the forest manager. It also annulled certain rules on leaving seed-trees or dead trees in the forest.²³ Nevertheless, certain amendments were not declared to be unconstitutional, such as with regard to changing the order of the protection purpose of certain forests, according to which flood protection and national defense purposes precede the purpose of nature conservation.²⁴

The decision also reflected the public sensitivity and general opposition to the forestry practices of clear-cutting. The Constitutional Court also annulled legal provisions which essentially made the practice clear-cutting widespread in state-owned forests.²⁵ It was found that clear-cutting causes extremely severe and irreversible damage to the ecosystem, which, in the case of state-owned forests, cannot be substantiated by any opposing fundamental right or constitutional value; therefore, such practice cannot be constitutionally justified.²⁶

To mitigate the unnecessary burden of forest owners and forest managers, the Constitutional Court also annulled the provisions that introduced a notification obligation to the forestry authority to replace the previous procedure of obtaining nature conservation permits to allow activities in forests in protected natural areas. Prior permissions not only provide authorities with information but are capable of directly influencing the living conditions of future generations as well. Rules establishing posterior control by the authority instead of the process of issuing preliminary permissions introduced with the purpose of decreasing the level of bureaucracy is a step-back compared to the level of protection already achieved; therefore, it is contrary to the Fundamental Law. It is worth noting that this was the reason why four members of the Constitutional Court²⁷ attached dissenting opinions to the decision. They argued that the distinction between permission and notification is unconstitutional, since there is no difference in their legal effects, and they highlighted the importance of public trust in the administration.²⁸

23 Decision No. 14/2020. (VII. 6.) AB, Reasoning [81]-[83] and [154].

24 *Id.* Reasoning [98]-[106].

25 Clear-cutting or clear-felling is a logging practice: the removal of most or all trees from an area chosen for harvesting. In some areas clear-cutting can be an appropriate harvest method for certain tree species, because new seedlings need direct sunlight to grow quickly.

26 Decision No. 14/2020. (VII. 6.) AB, Reasoning [130]-[132].

27 Justices Tünde Handó, Béla Pokol, Mária Szívós and András Varga Zs.

28 Decision No. 14/2020. (VII. 6.) AB, Reasoning [196]-[204].

4. Conclusions

The decision confirms that while a bit hesitant in certain other issues, the Constitutional Court is still relatively active in interpreting cases in connection with the right to a healthy environment and other environment-related provisions of the Fundamental Law, and is widening its approach to cover even more aspects than its earlier case-law.²⁹ This case also demonstrates that the Deputy Commissioner, together with the Commissioner for Fundamental Rights is a strong advocate for combining the representation of the interests of future generations with the protection of national heritage as established in the Fundamental Law.³⁰ In my opinion, the decision also stresses the importance of public participation in environmental matters and the role of environmental NGOs.

The sustainability of the natural support systems of society and the quality of the human environment takes priority over economic growth,³¹ and the public interest of nature conservation prevails over the private interests of forest owners and managers. I agree with the Constitutional Court that *economic interests cannot have automatic precedence over environmental interests*: the interests of forest owners and forest managers do not have primacy over nature conservation interests.

The decision of the Constitutional Court reinforced its settled case-law,³² emphasizing that it is the primary obligation of the State, laid down in the Fundamental law, to regulate forest protection and forest management by also taking into account the interests of present and future generations, for the purpose of protecting the environment.³³ In response to scientific findings, public concerns and advanced forest management practices, the decision clearly implies that those in charge are obliged to ensure that the natural heritage is preserved for future generations, and allows the forestry and nature conservation authorities to prescribe, in all forests, the implementation of measures necessary for the protection of the particular natural values of the forest concerned.

29 Gyula Bándi, 'Interests of Future Generations, Environmental Protection and the Fundamental Law', *Journal of Agricultural and Environmental Law*, Vol. 15, Issue 29, 2020, p. 17.

30 *Guarding Our Future: How to Include Future Generations in Policy Making*, World Future Council Foundation, March 2019, p. 9.

31 László Sólyom 'Governing for Sustainability', *Asia Europe Journal*, Vol. 6, Issue 2, 2008, p. 188.

32 See e.g. Decision No. 3068/2013. (III. 14.) AB, Decision No. 16/2015. (VI. 15.) AB, Decision No. 3223/2017. (IX. 25.) AB, Decision No. 27/2017. (X. 25.) AB, Decision No. 3292/2017. (XI. 20.) AB, Decision No. 28/2017. (X. 25.) AB, and Decision No. 13/2018. (IX. 4.) AB.

33 Decision No. 14/2020. (VII. 6.) AB, Reasoning [22].