

# THE PROTECTION OF ARABLE LAND IN THE BASIC LAW OF HUNGARY WITH RESPECT TO THE EXPIRING MORATORIUM OF LAND ACQUISITION IN 2014

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## Abstract

The moratorium forbidding the purchase of arable land by foreign citizens and legal persons in Hungary expires in 2014. The Constitutional Court had examined the constitutionality of this regulation in 1994 and found it, however temporarily, in conformity to the Constitution being in force at that time. The paper surveys, if protection of arable land in the Constitution could be changed as the new Basic Law of Hungary comes into force on 1<sup>st</sup> January 2012.

## Key words

arable land, agricultural land, constitution, Basic Law of Hungary

## Összefoglalás

The moratorium forbidding the purchase of arable (agricultural) land by foreign citizens and legal persons in Hungary expires in 2014. The Constitutional Court had examined the constitutionality of this regulation (i.e. the prohibition of the acquisition of arable land for foreigners) in 1994 and found it, however temporarily, in conformity to the Constitution being in force at that time. Several questions arise, namely: whether the protection of arable land in the Constitution could be changed as the new Basic Law (or Fundamental Law) of Hungary comes into force on 1<sup>st</sup> January 2012; if so, what will be the extent of that change; and, whether the former jurisprudence of the Constitutional Court will remain valid after expiration of the moratorium.

On the 6<sup>th</sup> of April, 1994, two days before the termination of the first parliamentary period, the first freely elected Hungarian Parliament after the political transition adopted Law LV of the year 1994 concerning arable land. Since the publication of that Law, foreign citizens, legal entities (of any domicile) or any other organization without legal personality cannot acquire ownership of arable land or any natural reserve in Hungary except in some extraordinary circumstances<sup>1</sup>. In addition, even a Hungarian private person can

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<sup>1</sup> The prohibition against acquisition of arable land by a foreign citizen or entity does not apply (among other exceptions) if the arable land is to be acquired using proceeds

acquire such land only up to a maximum of 300 hectares or 6000 golden crowns (AK) of value. The Constitutional Court examined the provisions of the Act on arable land prior to its publication in its decision of N<sup>o</sup>. 35/1994. (VI. 24.) AB<sup>2</sup>. The Constitutional Court's process was initiated by the President of the Republic of Hungary, who exercised his constitutional right to veto<sup>3</sup> by sending the Act for preliminary constitutional review. The President of Republic founded his proposal, among other grounds, on the idea that such a limitation upon acquisition of property would result in a hindrance of effective operation of market laws and formation of prices according to the basic laws of economics, as well as (i) contravening the national understanding concerning the treatment of private property, (ii) diminishing the international competitiveness of Hungary, the formation of economical farms and the creation of international integrations, and (iii) infringing upon the principles laid down in article 9 para (1), article 13, 14, 56 and article 70/A para (1) of the previous Constitution of the Republic of Hungary.<sup>4</sup>

The Constitutional Court described the provisions limiting the acquisition of arable land under the Act on arable land in its decision of N<sup>o</sup> 35/1994. (VI. 24.) AB together with the exclusion of foreign individuals and legal entities from the acquiring such property in *conformance with the Constitution "as long as the reasonable grounds of the judged limitations exist according to an objective consideration"*.

It is questionable whether these grounds, which the Constitutional Court described as *reasonable according to the objective consideration* in 1994, still apply after the effective date of the new Basic Law of Hungary on 1<sup>st</sup> January 2012.<sup>5</sup>

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from an indemnification payment received for expropriation of another parcel of arable land owned at the time the Act on arable land became effective. [See the provisions in the Sections (3)-(5) of §5 of the Act on arable land]. The prohibition against acquisition of arable land for domestic legal entities does not apply to the acquisition of land by the Hungarian State, the local governments, the associations of forest ownership or those of pasture land ownership or public endowments, as well as land acquisitions by the church by virtue of a last will and testament, or a contract for keeping or care.

<sup>2</sup> See ABH 1994, 197. The summary of the decision can be found on the official homepage of the Constitutional Court of Hungary:

[www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1994-2-012?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1994-2-012?fn=document-frameset.htm$f=templates$3.0)

<sup>3</sup> For further details about the right to veto of the President of Hungary see: Csink, Lóránt: *Az államfő jogállása Európában és Magyarországon* [The Status of Head of State in Europe and Hungary]. Published by Pólay Elemér Alapítvány, Szeged, 2008. pp. 118–123.

<sup>4</sup> Article 9 para (1) stated that "Hungary has a market economy in which public and private property are to receive equal consideration and protection under the law." According to article 13 "The Republic of Hungary guarantees the right to property". Article 14 guarantees the right of inheritance. Article 56 said that "In the Republic of Hungary every human being has legal standing/capacity. Article 70/A par. (1) stated that "The Republic of Hungary guarantees for all persons in its territory human and civil rights without discrimination on account of race, colour, sex, language, religion, political or other views, national or social origins, ownership of assets, birth or on any other grounds."

<sup>5</sup> For the English translation of the Basic Law of Hungary (2011) and its first commentary see: Lóránt Csink, Balázs Schanda, András Zs. Varga (eds.): *The Basic Law of Hungary. A First Commentary*. Clarus Press, 2012. ISBN 978-1-905536-45-0, E-Book: 978-1-905536-46-7.

This issue is interesting today, not only because the Basic Law has become effective, but also because the expiration of the moratorium on acquisition of arable land is approaching. In 2010 the Minister of Agriculture and Rural Development initiated a request on behalf of the State of Hungary to the European Commission, in accordance with the request of the Hungarian Parliament of N<sup>o</sup> 2/2010. (II. 18.) OGY that the expiration time of transitory provisions on the acquisition of arable land estates defined originally as 1<sup>st</sup> May 2011 in the accession treaty should be postponed by 3 years i.e. until 30<sup>th</sup> April 2014<sup>6</sup>, which is approaching.

It is a matter of debate as to how all these facts will influence the protection of arable land in Hungary as established in the Basic Law and guaranteed by the Constitutional Court. In the Basic Law, as distinguished from the Constitution in force until 2011, *arable land* appears *expressis verbis* in Article P) in part “Foundation”. In Article P) of the Basic Law arable land is specified in connection with the protection of natural resources, together with forests, water resources, biological diversity, native species of plants and animals, as well as the cultural values and their protection, maintenance and conservation for the future generations is named as obligation for the State and every citizen. All these provisions will continue to improve the protection of arable land.

### **I. What protection does the Basic Law provide regarding arable land?**

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

Article 3 sec. a) of the Act LV of the year 1994 defines the various elements within the scope of arable land from a legal point of view. As so defined arable land is a piece of ground, which is recorded in the Land Registry, situated in the outskirts of a settlement and kept in record in the following land uses: as plough-land, vineyard, fruit-garden, garden, meadow, pasture (lawn), reedy area, forest, afforested area or fish-pond. The provisions relating to arable land should be applied to those pieces of interior land which are cultivated as an agricultural or forestry area (see article 2 of the Act on arable land). Additionally, arable land is regulated in a lot of other legislative enactments and is not easily defineable<sup>7</sup>. In the definition of arable land, the provisions of the Act take into consideration only the aspect

<sup>6</sup> See the letter of the Minister containing the grounds for prolongation of the moratorium on the web site:  
[www.fvm.gov.hu/doc/upload/201004/moratorium\\_anyag\\_100412.pdf](http://www.fvm.gov.hu/doc/upload/201004/moratorium_anyag_100412.pdf) (2012-08-14)

<sup>7</sup> *Pál Bobvos: A termőföldre vonatkozó elővásárlási jog szabályozása.* [The regulation of the right of preemption relating to arable land.] Acta Juridica et Politica, Tomus LXVI Fasc. 3. Edited by *Károly Tóth*, Szeged, 2004. pp. 3-4.

of cultivation and do not consider the size of the area. Only the “farm” is defined according to its territorial extent.<sup>8</sup>

At the same time, according to my point of view, apart from protection of arable land under the Basic Law, it appears inappropriate for legislative enactments by lower levels of government to attempt to precisely define the concept of arable land for constitutional purposes. The Constitutional law claims to define its own legal terms or concepts autonomously, independent from the other branches of law.<sup>9</sup> The autonomy of Constitutional Law in this respect is fundamental to enforcing constitutional guarantees against the legislative branch. This thesis is valid even in the case where the *definition of concepts of Constitutional Law* cannot become completely separated from the concepts and the system of individual branches of law.<sup>10</sup> On the other hand, if the definition of a legal term (e.g. the protection of property) in constitutional law and in any another branch of law were completely equal (i.e. the constitution protected the same “property” as the civil code), the amendment of the law of a lower level would result the amendment of the constitutional protection at the same time. This theory is proven by the fact that the Act on arable land ranks a forest within the concept of arable land, while Article P of the Basic Law differentiates between arable land and forests.

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

Arable land is, on the one hand, an instrument of production, fixed assets or “estate” in the terms of economy, on the other hand, the base of the existence of society, the object of property ownership (as real estate), in the terms of Civil Law, and also a part of the territory of the State. The Constitutional Court, while defining the characteristics of arable land, also considers the specific natural attributes and those relating to land as a species of property. The Constitutional Court defined, in connection with the former, land – also within the scope of the former Constitution – as a natural object or natural resource being available to a limited extent, as a “limited estate”, which cannot be increased nor substituted by another object.<sup>11</sup>

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

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<sup>8</sup> Kozma, Ágota: Zsebszerződések veszélyei. [The dangers of pocket contracts] Magyar Jog (Hungarian Law) 2012/6. p. 350.

<sup>9</sup> This type of autonomy has particular importance with respect to the jurisprudence of the European Convention of Human Rights, where the autonomy of concepts of the Convention in relation to the national systems of law is an essential condition for efficient legal protection. See Frowein Jochen Abraham – Peukert Wolfgang: Europäische Menschenrechtskonvention ERMK Kommentar, Strasbourg, Arlington. Kehl. quoted by Pál Sonnevend: A tulajdonhoz való jog. [The right to property.] In: Gábor Halmai – Gábor Attila Tóth (editors): Emberi jogok [Human rights], Osiris, 2003, 641, footnote 6.

<sup>10</sup> See Sonnevend op. cit. 641

<sup>11</sup> See the Decision of the Constitutional Court of N° 35/1994. (VI. 24) AB, ABH 1994, 197, 201.

## II. The jurisprudence of the Hungarian Constitutional Court concerning protection of arable land

### *1. The constitutionality of the restrictions of the Act on arable land – a provisional protection (?)*

As it was mentioned in the Introduction, the Constitutional Court declared in its Decision N° 35/1994 (VI. 24.) AB<sup>12</sup> that the upper limit of the acquisition of arable land and the exclusion of foreign citizens and legal persons from the acquisition of arable land is *temporarily* not unconstitutional, *as long as the reasonable grounds of this restriction exist according to an impartial consideration*. In order to consider whether such reasonable grounds still exist after the Basic Law became effective, it is necessary to survey the main reasons for the 1994 Decision of the Constitutional Court.

#### *1.1. The constitutional reasons for setting the upper limit on ownership of arable land*

The provisions of the Act on arable land examined by the Constitutional Court declared that a Hungarian private person can acquire arable land of a maximum of 300 hectares or 6000 golden crowns (AK) of value.

While examining these provisions, the Constitutional Court first indicated to the fact that the Constitution is neutral from the point of view of economic policy and neither the extent of the intervention by the State, nor the prohibition against State intervention in the economy cannot be directly derived from the Constitution.<sup>13</sup>

<sup>12</sup> See ABH 1994, 197, 201.

<sup>13</sup> See the Decision of N° 33/1993 (IV. 23.) AB of the Constitutional Court, ABH 1993, 249. The Constitutional Court took over this position neutral from the viewpoint of the economic policy from the initial position of the German practice, although the current prevailing opinion is that the Constitution does not bind itself to any model with any content of the market economy [see the Decisions 33/1993. (V. 28) AB, ABH 1993, 153, 158.; 915/B/1993. AB, ABH 1994, 619, 621. The indication to the neutrality see also in the Decision 963/B/1993. AB, ABH, 1996, 437, 440.; Decision 19/2004. (V. 26.) AB, ABH 2004, 321, 339. A more detailed description relating to the neutrality to the economic policy of the Constitution see also: Tímea Drinóczi: *Gazdasági alkotmány és gazdasági alapjogok*. [The economic constitution and economic fundamental rights.] Published by Dialóg Campus. Budapest-Pécs, 2007, pp. 75-80. The declaration itself, that the Constitution is economically neutral, could mean that the Constitutional Court should keep silence about the current matter,

Considering the constitutionality of the limitation relating to the extent or the value of arable land to be acquired, the Constitutional Court started from the fact that the unconstitutionality of a prejudicial discrimination between persons or other limitation relating to a right, other than a fundamental right, can be established only where the infringement is connected to any fundamental right, finally to the general personal right of human dignity<sup>14</sup>, and the discrimination or the limitation has no reasonable ground according to an impartial consideration, i. e. that is arbitrary.

The Constitutional Court took into consideration the specific natural and pecuniary characteristics of arable land, i. e. arable land is a limited estate, and as a natural object, it is available to a limited extent. In other words, it cannot be increased nor substituted by another object. Furthermore arable land is indispensable, able to renew, particularly sensitive to the risk and low profit rate. All these characteristics of arable land give the reason for its particular *social obligation*.<sup>15</sup> All these circumstances can justify the enforcement of a public interest restricting property rights. The Constitutional Court has earlier declared that it is reasonable to legitimately treat arable land differently from other property because of its specific characteristics<sup>16</sup>. As arable land is a limited estate, social obligations of property relating to it are necessarily connected to its physical condition, territorial scope and value. The adequate market price of arable land could not have evolved at that time because of the artificial hindrance of trade in arable land during a long period. Consequently, unconstitutionality cannot be established with respect to the evolution of the market for arable land and the dispersion of arable land ownership amongst the citizenry promoting it, as constitutional purpose indicated even in the preamble of the bill, because of all the

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because there is no norm either previous to or above the Constitution or any other norm to be involved in any way in the Constitution, which relates to the current question. The practice shows, however, the matter in another way: the formula of economic neutrality does not determine namely the issue of a decision, but it is only one from among the multitude of viewpoints considered by the Court. This position is only a more detailed description of the fact that the Constitution is not neutral or not completely neutral to the economy. The economy is namely not an isolated entity existing in itself, from which the constitutional problems can unambiguously separated. As the different courts find themselves face to face with the relation of Constitution to the economy in different systems of fundamental rights and division of powers, their definitions should be different, as well. According to the general opinion, there is a significant difference between the practices of new Constitutional Courts of Eastern Europe and those of Western Europe and mainly that of the Supreme Court of the United States of America, as regards to the extent of the intervention of a judge into economic law making. See *Salát, Orsolya*: Fórum a gazdasági alkotmányosságról. [Forum about the constitutionality of economy], *Fundamentum* 2005/4, pp. 84-90.

<sup>14</sup> See the Decision 8/1990 (IV. 23.) AB of the Constitutional Court, ABH 1990, 44. See its critique in the article of *Pokol, Béla*: Gondolatok az alkotmánybírói döntések elvi alapjaihoz. [Reflections to the fundamental principles of the decisions of the Constitutional Court]. *Jogelméleti Szemle* [Journal of Legal Theory, see: <http://jesz.ajk.elte.hu/>] 2012/1, pp. 163-166.

<sup>15</sup> For the social obligation of property ownership in the jurisprudence of the German Constitutional Court (*Sozialpflicht*) and in the U.S. Law see: *Lubens, Rebecca*: The social obligation of property ownership: a comparison of German and U.S. Law. *Arizona Journal of International & Comparative Law* 2007/2., pp. 389-449.

<sup>16</sup> See the Decisions 16/1991. (IV. 20.) AB, ABH 1991, 62; 64/1993. (XII. 22.) AB, ABH 1993, 381 of the Constitutional Court.

above mentioned objective conditions, circumstances and connections.<sup>17</sup>

The Constitutional Court declared that *the maximum of arable land restricts the right of disposition by the land owner only to such a small extent, that is not disproportionate in relation to its constitutional purpose*. The upper limit on ownership of arable land does not affect the fundamental right to property of those who want to acquire property because *the fundamental right to property does not include the acquisition of property*.

This conclusion of the Constitutional Court is in accordance with the jurisprudence of the European Court of Human Rights that has already declared in several decisions, that the European Convention on Human Rights does not guarantee the right to *acquire* property, only the protection of the acquired property<sup>18</sup>. The Court of Strasbourg excluded in this way the application of the Article 1 of the first protocol to the Convention in the case of *Marckx*<sup>19</sup>, declaring that it guarantees exclusively the protection of existing property and so the guarantees provided by the Convention do not cover the acquisition of any property, they guarantee to everybody the peaceful enjoyment of his or her “owned” possessions. This declaration of the Court of Strasbourg was unfavorable at that time for the former land owners, whose land was nationalized before the democratic transformation, since this statement of the Strasbourg Court meant for the ex-socialist states – among them for Hungary – that Article 1 of the first protocol of the European Convention on Human Rights (ECHR) does not create such obligations for the concerned States requiring that they return property which was nationalized before the Convention became effective<sup>20</sup>. Nevertheless, this statement of the Strasbourg Court can “save” the Hungarian arable land in Strasbourg against the claims of other EU-member state citizens after expiration of the moratorium on ownership of arable land.

Consequently, the right to acquire property is not a fundamental right, neither pronounced by the Hungarian Constitutional Court, nor as determined by the ECHR. According to the Constitutional Court, the acquisition of property does not concern even a fundamental right of legal capacity guaranteed by the Constitution. That means the State is not obliged to assist anyone in acquiring land<sup>21</sup> and, consequently the State is not obliged to make its own property available for purchase or to help anyone acquire such property<sup>22</sup>.

According to the Constitutional Court, this is not a restriction on a fundamental right of “buyers” because neither the ability to acquire

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<sup>17</sup> See the Decision 35/1994 (VI. 24.) AB, ABH 1994, 197 of the Constitutional Court

<sup>18</sup> See *Rook, Deborah*: Property Law and Human Rights. Blackstone Press, London, 2001, p. 5.

<sup>19</sup> The case of *Marckx v. Belgium*, Judgment of 13 June 1979, Serie A no 31, para 50; Grád, András: Kézikönyv a strasbourgi emberi jogi ítélekezésről. [Handbook on the judgment of human rights of Strasbourg.] HVG-Orac. 2000. p. 448.

<sup>20</sup> See the case of *Jantner v. Slovakia*, the judgment of the Court on 4th March 2003.

<sup>21</sup> See the Decision 936/D/1997. AB of the Constitutional Court.

<sup>22</sup> See *Tanka, Endre*: Várható-e rendszerváltás a magyar birtokpolitikában? [Can one expect a political transformation in the policy of arable land?] In: *Rixer, Ádám* (editor): *De iuris peritorum meritis* 6. *Studia in honorem Lajos Lőrincz*. Published by the University of Károli Gáspár of the Protestant Church, Faculty of Law and Political Science. Budapest, 2010. pp. 164–165.

property nor the freedom of contract are fundamental rights. The restriction of these rights, which are not classified as basic rights, should be found unconstitutional only if the limitation, would have no reasonable justification based on an impartial assessment. *The reasons for the limitation on ownership of arable land, is to establish a “healthy structure of land properties”, as well as to prevent the concentration of arable land until realistic market prices can be developed.* Consequently the “healthy structure of land properties” should be understood in this time frame and in relation to the lack of well developed markets. According to the Constitutional Court, the upper limit on ownership of arable land is the means by which the State fulfills its constitutional mandate to establish a market economy.<sup>23</sup>

The Constitutional Court emphasized that the Parliament and the Government has the right to define the policy regarding ownership, use or transfer of arable land, just as they are empowered to define housing policy or general economic policy. The Constitutional Court can intervene in addition to the situation involving of infringement of a fundamental right, if such a policy regarding agricultural land “would exclude conceptually and obviously the existence of market economy”<sup>24</sup>, or it limits another right without any reasonable ground according considered impartially. The limitation on the acquisition of arable land in the examined case was characterized as an intervention of the State, which was justified by the transition to a market economy (from the former socialist economy). The Constitutional Court also found reasonable the method by which the Act *limits the ownership of arable land*.

The Act on arable land, by precisely expressing an *upper limit on ownership of such land*, what the Parliament considers a “healthy structure of real estate properties” in light of the current circumstances of transition. This avoids those difficulties, which arise when the law defines only the aim of a legal policy, with consideration of every individual case being entrusted to the authorities. It is undeniable, however, that the legislature also gave up the possibility that the legal practice could treat the measure of the accomplishment in adaptable way, it approximately perpetuates the temporarily necessary situation, since any change is possible only by an amendment of the law.

*Consequently, the Constitutional Court accepted that establishment of a “healthy structure” of arable land and prevention of a concentration of arable land are constitutionally justifiable reasons.* The U.S. Supreme Court reached a nearly identical result on the basis of a similar principle when it upheld the scheme to eliminate a concentration of real property ownership as being in the public interest in the case of Hawaii Housing Authority v. Midkiff<sup>25</sup>. The background of that case involved the Hawaiian legislature, in 1967, passing a law that obligated land owners in that State to sell their land for adequate compensation, because of the excessive concentration of land ownership in the hands of relatively few people – namely, only

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<sup>23</sup> See the Decision 35/1994. (VI. 24.) AB of the Constitutional Court, ABH 1994, 197, 201

<sup>24</sup> See the Decision 21/1994. (IV. 16.) AB of the Constitutional Court, ABK, April, 1994 170

<sup>25</sup> See the case Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)



72 land owners controlled 47% of the entire acreage within the State. This high concentration was considered harmful to the market economy. There were no real estate transfers and, consequently, no market in real estate at that time. There were some land owners who regarded “the drastic intervention of the State” into their right to own property as unconstitutional. The Supreme Court of the State of Hawaii agreed. Nevertheless, the U. S. Supreme Court found the Act constitutional believing the law satisfied a public interest because the use of the effectively dispossessed real estate freed up the badly functioning real estate market. The Supreme Court also pointed out to the fact that the legislature can appropriately judge conformity of mandatory dispossession of real estate with the public interest better than the court.

Consequently, the Constitutional Court of Hungary did not find any constitutional prohibition against the temporary *upper limit on ownership of arable land* prescribed in the Law. However, the Court emphasized, that the *upper limit on ownership of arable land* is constitutional only so long as reasonable grounds exist for the restriction, and so long as it is only *temporary*, so as to be connected to the existence of the reasonable grounds. Up to now the Constitutional Court decided the constitutionality of similar limitations, which are regarded as temporarily necessary, using the criterion of proportionality. In case of prohibitions upon the sale or burdening of real estate, the Court has consistently required that the time period of the limitation should be calculable for the purpose of proportionality<sup>26</sup>.

Nevertheless, the Constitutional Court declared that *it could not estimate the time necessary for the formation of realistic market values for arable land*. If it obligated the legislature to define an exact time limit, the Parliament could prolong it without any misgiving, if reasonable market values were not yet formed at any point in time. As the question was put to the Court, would the Act be voidable if the limitation remains in force for a time longer than is reasonable. The Constitutional Court answered in the affirmative. *Consequently, when the reasonable grounds supporting the limitation do no longer exist, the limiting provisions of the Law on arable land become voidable*.

### *1.2. The constitutionality of the Law's exclusion of foreign individuals and legal entities from acquiring agricultural land*

The Act on arable land precludes foreign citizens from the acquiring arable land and nature conservancy areas, except in very extraordinary circumstances. The Constitutional Court declared that all the positions previously mentioned with respect to Hungarian private parties shall apply to the right of foreign citizens to acquire Hungarian real estate because there is no distinction in terms of fundamental rights. One may question whether it is arbitrary to not only limit the amount of agricultural land a foreign citizen may own but also to preclude such citizens altogether from acquiring

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<sup>26</sup> See the Decisions 7/1991. (II. 28.) AB and 24/1992. (IV. 21.) AB of the Constitutional Court in ABH 1991, 27. and ABH 1992, 126, 129.

agricultural property and natural conservation areas (except in very limited circumstances).

The Constitutional Court explicated, that *taking into account the prices of arable land and the capital strength in foreign countries*, the increased protection against foreign ownership is reasonable on an objective basis. Because the Act almost totally deprives a foreign citizen from being able to acquire agricultural and nature conservancy lands, it is questionable whether the underlying rationality conforms with the practice of the Constitutional Court requiring exact time limits in such cases. The Constitutional Court answered this question by saying *that it cannot be precisely determined in advance when the reasonable grounds for a nearly total exclusion of foreign ownership cease to exist*. On the basis of all the above mentioned positions by the Constitutional Court, the temporary prohibition against foreign individuals and legal entities acquiring agricultural and nature conservancy lands is not unconstitutional because the motives for doing so are reasonable on the basis of an impartial examination.

The Constitutional Court considered the different prices of arable land as a reasonable motive for such limitation in the case of foreign citizens. In the case of legal entities the Court considered the potential of illegal transfers to foreign individuals as a reasonable motive of that limitation.

## 2. The „survival” of the Decision 35/1994 AB (?)

As mentioned above, the Constitutional Court in 1994 unambiguously pronounced that *as soon as reasonable motivations supporting the limitations on ownership of agricultural land no longer exist, this normative Act can be challenged before the Constitutional Court*.

In my view, there are two fundamental questions that should be addressed regarding that holding:

1) First, *is the 1994 decision of the Constitutional Court still effective insofar as those limitations are concerned?*

2) And if so, *do the reasonable motivations identified by the Court supporting the ownership limitations still exist today?*

I do not wish – and it is not my obligation – to anticipate the future decisions of the Constitutional Court either as to the timing or substance of such decisions.

With respect to question no. 1, one can surely argue that the Constitutional Court would use the same rationale included in its earlier decision which preceded the effective date of the Basic Law by more than a decade, in connection with determining the constitutionality of this law. This supposition seems plausible in light of the fact the provisions and rules of interpretation to be applied to a future analysis would be similar or identical in content with those of the former Constitution<sup>27</sup>. The determinations of the Constitutional Court relating to those fundamental values, human rights and basic freedoms, as well as to the constitutional institutions, which have not

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<sup>27</sup> See Decision 22/2012. (V. 11.) AB, Hungarian Official Gazette, issue 57 of the year 2012, 9737, 9737-9740, see the description of the decision *Naszladi, Georgina: Eldőlt a korábbi alkotmánybíróági határozatok jogi sorsa*. [The legal fate of the former decisions of the Constitutional Court has been decided.] *Közjogi Szemle*. [Review of the Public Law Review] 2012/2. p. 60

been changed fundamentally in the new Basic Law, should remain in force. Those pronouncements of conceptual significance, as embodied in the earlier decisions of the Constitutional Court, which were founded on the former Constitution, remain a model in other decisions interpreting the Basic Law by the Constitutional Court. This position, however, does not mean that the determinations expressed in the earlier decisions based on the former Constitution should be adopted mechanically, without investigation. Instead, they require a thorough comparison of the respective provisions of the former Constitution with those of the Basic Law. If the comparison produces a result to the effect that the legal standards applicable to constitutional Law are unchanged or significantly similar, then there is no obstacle to the Court's adoption of the same conclusion as before. On the other hand, if it is found there is a significant discord between the contents of individual provisions of the former Constitution and the Basic Law, one should conclude there is no sound reason for adoption of the legal principles enunciated in the former decision of the Constitutional Court, but rather for their rejection<sup>28</sup>.

As regards the comparison of individual provisions of the former Constitution and the Basic Law and at the same time the possible answer to question no. 2, it can be clearly seen, that Article P) makes obligatory for the State and everyone else to protect, maintain and preserve arable land for future generations, as a natural resource. It is a new provision, in comparison to the former Constitution. *The National Avowal (National Credo)* of the Basic Law points to the obligation to protect living conditions for the future generations through careful usage of our natural resources. It is relevant, because according to Paragraph (3) of Article R), provisions of the Basic Law should be interpreted in conformity with their aims and the included *National Avowal and achievements of the historical constitution*.<sup>29</sup> There is still a significant debate in the Hungarian constitutional literature as to whether it was reasonable to incorporate the "achievements of the Hungarian historical constitution" into the Basic Law<sup>30</sup>. It seems, however, that the Constitutional Court does not shrink from referencing the achievements of the historical constitution. It is clearly indicated in the reasoning employed in decision no. 33/2012. (VII. 17.) AB with respect to the retirement of the judges.<sup>31</sup> The Court established that the *independence of judges*

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<sup>28</sup> See Decision 22/2012 (V. 11.) AB, Hungarian Official Gazette, issue 57 of the year 2012, 9737, 9737-9740.

<sup>29</sup> Historically, there have been two types of constitutions in Hungary: the historical constitution and the written constitution. The Kingdom of Hungary, like the United Kingdom, did not have a written constitution until 1949, aside from the short-lived constitution of the 1919 Hungarian Council's Republic. The constitution of Hungary consisted of different organic laws. László Trócsányi: *The Creation of the Basic Law of Hungary*. in: Lóránt Csink, Balázs Schanda, András Zs. Varga (eds.): *The Basic Law of Hungary. A First Commentary*. Clarus Press, 2012. p. 2. (ISBN 978-1-905536-45-0, E-Book: 978-1-905536-46-7.)

<sup>30</sup> See the most recent comprehensive analysis of the historical constitution *Rixer, Ádám: A történeti alkotmány lehetséges jelentéstartalmái*. [The possible denotational contents of the historical constitution.] *Jogelméleti Szemle [Journal of Legal Theory]* 2011/3.

<sup>31</sup> According to the contested provisions, the legal status of all the court judges ceases to exist as long as they reach the age of the general retirement (62-65) instead of the age of 70 (which had been in force before for more than a century).

and their resulting *immobility* are not only statutory provisions of the Basic Law, but belong to the achievements of the historical constitution as well, so it is such a basic principle of interpretation according to the prescription of the Basic Law, which is obligatory for everybody, and which should be applied while revealing the possible contents of other provisions of the Basic Law<sup>32</sup>. The Constitutional Court ruled that Paragraph (3) Article R) of the Basic Law emphasizes, instead of the historical constitution itself, the importance of its achievements. It is the task of the Constitutional Court to determine what belongs to the achievements from the historical constitution according to the Basic Law<sup>33</sup>.

It will be an important question of constitutional law whether the Constitutional Court wishes to reply upon the achievements of the historical constitution in the interpretation and, if it does, how will it accomplish that in connection with the protection of arable land. It is encouraging that the Constitutional Court declared in its cited Decision that “the minimum of consolidated interpretation of the Hungarian historical constitution is, that the laws founding the bourgeois transition in the 19<sup>th</sup> century constitute part of the historical constitution.” These laws created the solid foundation for legal institutions – after some precedents of not minor importance – including the modern State having been built upon the rule of law. While the Basic Law opens quasi the window to the historical dimension of the Hungarian public law, it draws the attention to those precedents of the history of institutions, our present relations of public law and our whole juridical culture in general would be without roots. The Constitutional Court has extraordinary historical responsibility in this situation: it is obliged to include the relevant sources of the history of institutions into its critical horizon while examining specific cases.<sup>34</sup>

According to this reasoning of the Constitutional Court, the Constitution created by the constitutional revolution of March 1848 constitutes part of the achievements of the Hungarian historical constitution. It should be regarded as first one in civil sense<sup>35</sup>, which created, in addition to other fundamental rights, liberated and full private ownership rights to land. Act IX of the year 1848 provided that “*the services, (villeinage), levy and financial payments having been in practice up to now on the basis of statute labor and the contracts substituting it, should cease to exist forever following the publication of this Act*“. The peasantry thereby became the owner of land which they cultivated. The Statute provided compensation against that: “*The legislature puts the compensation of the private landowners under the aegis of the public honor of the nation.*”<sup>36</sup> It was the emperor’s order

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<sup>32</sup> See the Reasoning at [80] to the Decision 33/2012. (VII. 17.) AB of the Constitutional Court

<sup>33</sup> See the Reasoning at [74] to the Decision 33/2012 (VII. 17.) AB of the Constitutional Court

<sup>34</sup> See the Reasoning at [75] to the Decision 33/2012 (VII. 17.) AB of the Constitutional Court

<sup>35</sup> Compare to *Kukorelli, István: Tradíció és modernizáció a magyar alkotmányjogban* [Tradition and modernization in the Hungarian constitutional law.] Published by Századvég, Budapest, 2006. p. 12.

<sup>36</sup> See the Act III of the year 1848 on the transformation of the Hungarian independent and responsible Ministry, § 1.

of the year 1853 that gave detailed provisions governing such compensation.<sup>37</sup>

The thousand year old Hungarian State dealt practically with the problem of proprietorship, how the landless peasants can become so-called “peasant-citizens”, equal to the established landowners. In this respect, the repartition of property and achievement of middle-class status can be appreciated as an achievement of the historical constitution. In other words in the process of the repartition of land of the year 1945 – ordered by the Provisional National Government established in December 1944 in Debrecen in its Decree 600/1945 M. E.<sup>38</sup> – more than 600,000 people received land, thereby bestowing property, a job and indirectly the security of a habitat for themselves and their families.<sup>39</sup> The repartition of land had enormous significance from the point of view of the people who received land, providing food for the country and reconstruction of the entire national economy. However, its historic importance far surpasses all these facts.<sup>40</sup> It is obvious to everyone how significant the repartition of land was in terms of the quality of life for those people who received land, in addition to providing the country with food and reconstruction of the national economy. Nevertheless, its historical significance actually surpasses in no small measure all these uncontroversial facts. This is clear from the fact the Provisional National Assembly solemnly put into statutory effect the Governmental Decree on the cessation of the system of large estates, granting land to the agricultural citizens half year later, on 11 September 1945. Each speaker participating in the discussion in the National Assembly emphasized this historical importance. Yet, as *Barnabás Lenkovics* described, *Imre Kovács*, the leader of the Peasants’ Party, summarized the matter saying: “The crying injustice has been ceased. It was very properly named as a lawsuit of a thousand years, the great fight of the Hungarian people for land. The long lawsuit has come to an end, that is the historical importance of the agrarian reform. I dare to say, that its political importance is even greater. In Hungary, the basis of the political power was the land during thousand years. The owner of larger land had greater political power and greater political influence; the Hungarian system of domination was named feudal for this reason. As a result of the agrarian reform, the political power passed to the people, as well. The political power was also divided into plots.”<sup>41</sup>

The Constitutional Court emphasized in 1994 that *the upper limit on ownership of arable land is part of the constitutional task directed*

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<sup>37</sup> According to the patent, the landowners received stocks issued by the state for the paying off the burdens of the land, which should be drawn during 40 years. The paying off began in 1857. While a part of the owners of vast estates received the payment before the time limit, and they could receive major mortgage credits from Austrian banks, the rate of usurious interest of the credits paid for the medium landowners reached even 80 to 100%. In addition to that, if the medium landowner wished to obtain capital necessary for the agricultural cultivation in another way, they had the possibility to sell their stocks issued by the state below the real price.

<sup>38</sup> See the Hungarian Official Gazette, issue 10 1945.

<sup>39</sup> *Lenkovics, Barnabás: Ember és tulajdon. Rendszerváltó gondolatok. [Man and property. Thoughts for political transition.]* Manuscript, Budapest, 2012. p. 3.

<sup>40</sup> *Lenkovics: Man and property op. cit. p. 131.*

<sup>41</sup> *Lenkovics: Man and property op. cit. p. 132.*

to the establishment of a market economy.<sup>42</sup> I think, that the constitutional task to establish a market economy is not included in the Basic Law. In the 21th century mankind is forced to suddenly realize that the categories of income and profit, which has been identified as value and development up to now, should be reconsidered, and such concepts, as nature, environment and health, i.e. the chances of future generations should be put into foreground. According to Barnabás Lenkovics, they are “tokens” not only of the quality of our life but also of our survival at the same time.<sup>43</sup> According to *Lenkovics*, the recognition, arisen under the joint effect of phenomena society and of nature (such as the waves of global financial crisis of the years 2008-2009 and economic crises developed as their consequence on the one hand, as well as the series of catastrophes of the nature connected to the global climate change on the other hand), that everything, which has been named “development”, has become unsustainable<sup>44</sup>, become step by step more worrying. The Basic Law points to *the conservation of natural resources*<sup>45</sup> as the *aim of the treatment and protection of the national wealth*, in addition to the above mentioned matters, as well as taking into consideration the service of public interest, the fulfillment of common needs, as well as the consideration of the needs of the future generations. All these impose additional obligations upon the State and local governments to preserve arable land as a national asset.<sup>46</sup>

The protection of natural resources – among them agricultural land – is connected to the right to physical and mental health as declared by the Basic Law, i. e. Hungary is obligated to promote the enforcement of this right – among others – by means of an agriculture free of genetically modified living beings,<sup>47</sup> assuring the access to the healthy food products and potable water, as well as assuring the protection of environment. Nevertheless, arable land has a prominent role both in providing food products and potable water. One cannot reasonably dispute the fact that land, as a primary natural element with its capability for food production is a decisive element determining the survival of any population in the future.<sup>48</sup>

I am of the opinion, by reason of the above, that a number of reasonable and constitutional motivations can be identified favoring the maintenance of the restrictive provisions of the Act on arable land by the above mentioned articles of the Basic Law – from the National Avowal up to Articles P) and R). Therefore – according to my *opinion* – even the formation of adequate land market prices itself should not necessarily result in the ceasing of this “provisional” protection.

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<sup>42</sup> See Decision 35/1994 (VI. 24.) AB of the Constitutional Court. ABH 1994, 197, 201.

<sup>43</sup> *Lenkovics, Barnabás*: Ptk. és Alkotmány, ember- és társadalomkép. [The Hungarian Civil Code and the Constitution, Models of Man and Society] Alkotmánybírószági Szemle [Constitutional Court Review]. 2011/2., pp. 59–63.

<sup>44</sup> *Lenkovics*: *ibid.*

<sup>45</sup> See Fundamental Law, Article 38 Paragraph (1)

<sup>46</sup> See Fundamental Law, Article 38 Paragraphs (3), (4)

<sup>47</sup> See a more detailed description about this in Kovács, Júlia Marianna: *Egészség-es /és környezet az Alaptörvényben* [Health-*y*/and environment in the Basic Law]. In: *Állam és közösség*. [State and society]. Published by the Univesity of Gáspár Károli, Budapest, 2012, pp. 256–259.

<sup>48</sup> *Tanka*: *op. cit.* p. 159.

### 3. The right to preemption

In connection with arable land one should necessarily say a few words about the right to preemption regulated by legislative enactments, as one of the possible limitations on the right to property, even for that very reason, that the right to preemption by the State can be one of the tools to protect the Hungarian arable land against acquisition by foreigners.

By regulating who is entitled to preemption, the legislation indicates, to whom it wishes to provide arable land necessary for farming. On the other hand, these rules indicate, for whom the legislature makes it more difficult to acquire or flatly prevents from acquiring arable land<sup>49</sup>.

The Constitutional Court has reviewed the constitutionality of the right to preemption in some of its decisions and established that the right to preemption regulated by legislative enactments is undoubtedly a limitation on the right of disposition which originates from the basic right to property. The right to preemption – as the Constitutional Court expressed in its Decision 18/1992. (III. 30.) AB<sup>50</sup> □ “provides the owner of this right the power” to enter a contract for purchase and sale by itself through a unilateral declaration, as opposed to merely offering to purchase property from an owner wishes to sell it. Consequently the owner of the right to preemption has a priority right to purchase an object, to which the right to preemption was granted by law. This means the limitation on the right to dispose of property normally ascribed to the proprietor (seller) – as the Constitutional Court explained it, by referring back to its former Decision 7/1991. (II. 28.) AB<sup>51</sup>. According to the 1991 decision, the right of disposition is an attribute of property ownership, including the freedom to decide related issues about that property. Therefore the restriction on property rights is unconstitutional only if it is not unavoidable i. e. if it takes place without a justifiable motivation and the impact of the limitation is not proportionate to the intended reach of the limitation. As the Constitutional Court has pointed out in its various decisions that the right to property is not absolute free of possible restrictions because Section (2) of Paragraph 8 of the former Constitution allowed limitations on fundamental rights by law. Thus, the prohibition against disposition of property i. e. the entire limitation of the right of disposal is obviously closer to the injury of the essential content than the provision of the right to preemption for a third person. According to the Constitutional Court the right of preemption provided by law<sup>52</sup>

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<sup>49</sup> See the dissenting opinion of Constitutional Court judge Éva Vasadi Tersztyánszkyné to the Decision 7/2006 (II. 22.) AB of the Constitutional Court (ABH 2006, 181, 217.)

<sup>50</sup> See ABH 1992, 110, 112.

<sup>51</sup> See ABH 1991, 22.

<sup>52</sup> In connection with the decision the proposers found Paragraph 27 of the Act no. 1 of the year 1987 (law on the land) – the law preceding the present law on arable land □ prejudicial, according to that „In case of sale and purchase of a farm and a piece of land between private persons, the right of preemption is due to the big farm, in the territory thereof the farm and the piece of land is situated. It cannot designate any other person to exercise this right.”

does not limit the freedom of disposition by an owner, as the owner can determine freely, with what content and under what conditions he or she wishes to exercise this right. *The limitation touches exclusively upon the freedom of choice of purchaser, provided that the owner of the right of preemption is ready to conclude the contract with the same content and under the same conditions as the purchaser.* Undoubtedly, says the Constitutional Court, the right of a prospective purchaser to acquire property is also a restriction against the owner of that property as a result of the right of preemption. This limitation on the right of acquiring property is accompanied with a restriction upon a purchaser who is only able to purchase the object if the owner of the right of preemption does not want to conclude the transaction under conditions which the purchaser accepted. According to the Constitutional Court, the limitation upon the right to acquire property by this law does not infringe the essential content of the right to property in the same way as the limitation does not relate either to the untouchable essence, as regards to the seller. This limitation upon the acquisition of property exists only in relation to the objects which are subject to the power; nevertheless it does not mean a general limitation on the right of acquisition, *so it does not infringe the essential elements of the right to property*<sup>53</sup>.

It is to be noted that the Constitutional Court did not recognize the difference – clearly explained by *Imre Vörös*<sup>54</sup> □ between *property ownership* under the civil law and the *right to property* in the sense of constitutional law as a fundamental (human) right.

The Constitutional Court examined the constitutionality of the right of preemption relating to arable land first from the point of view of an owner's right to property as ensured in the Section (1) Paragraph 13 of the previous Constitution. Legislative enactments can establish a right of preemption only in the case, where the limitation on an owner's right to dispose of his property is necessary and proportionate in order to achieve a constitutional objective. While considering the necessity of a limitation on the right to property, Section (2) Paragraph 13 of the Constitution should also be taken into account, requiring only the existence of a public interest taking private property rights. A necessity more severe than this, is not a constitutional requirement for limiting one's property rights. While considering the nature of the public interest, the Constitutional Court should also take into account that a taking or restriction upon private property rights often "deals directly with the benefit of other private persons (and with the benefit of the "community" through solving social problems) – as, for example, in many instances of city-planning, agrarian reforms or protection of tenants".<sup>55</sup>

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<sup>53</sup> See Decision 18/1992 (III. 30.) AB of the Constitutional Court, ABH 1992, 110, 112.

<sup>54</sup> See the parallel opinion of the Constitutional Court judge *Imre Vörös* added to the Decision 64/1993. (XII. 22.) AB of the Constitutional Court ABH 1993, 373, 394, and in addition *Imre Vörös*: A tulajdonhoz való jog az alkotmányban [The right to property in the Constitution], Acta Humana 1995/18-19, p. 157.

<sup>55</sup> See Decision 64/1993. (XII. 22.) AB of the Constitutional Court ABH 1993, 373, 381-382.



In the Decision 7/2006. (II. 22.) AB<sup>56</sup> of the Constitutional Court, the judge in charge of that legal inquiry was István Kukorelli. He examined Paragraph 10 of the Act on arable land, being valid at the time of the 2006 decision, wherein the range of persons entitled to preemption was regulated. In 2001 the Act on arable land gave preference to the so-called family entrepreneur in case of the sale and purchase of a parcel of land adjoining to that which he or she cultivated. He or she was followed by a family member residing in the same house, a neighbor residing in the same locality on another non-adjacent parcel and the initial owner of the parcel is followed by any other person living in the same locality. The right of preemption by the Hungarian State was the fifth in turn in case of alienation of any arable land. On the last place among those who were entitled to preemption were leaseholders, sharecroppers and laborers paid in proportion to crop yield – that is, an actual user of the land. The legislature amended the regulation in 2002<sup>57</sup>. In case of contracts filed with the registry of title deeds after 2<sup>nd</sup> September 2002, a leaseholder, sharecropper or laborer paid in proportion to yield received the first place in regard to preemption rights related to arable land which such person leased from an owner. The law included several guarantee in order to that no one could misuse this right. The next person in the queue was an adjoining neighbor residing in the same locality and then anyone living in the same locality, following in third place. There was an internal order within the category of the neighbor and other persons living in the same locality. Accordingly, the family agriculturist, the individual agricultural entrepreneur or the primary producer received first place in the hierarchy. Finally, the Hungarian State was in last place in the queue regarding preemption rights on the basis of the Law on the national land fund<sup>58</sup>. The Constitutional Court established in Decision 7/2006. (II. 22.) AB that these provisions are not unconstitutional from the viewpoint of the owner of arable land, nor from the viewpoint of a party having no preemption right on the other side of the legal transaction. The Constitutional Court did not find related objections to the proposal well-grounded regarding the order of preemptive rights being arbitrary or the range of owners' rights being unreasonably broad, because *the definition of the precedence of the rights of preemption itself cannot be objectionable from the viewpoint of constitutional law*<sup>59</sup>. The Constitutional Court did not find the provision that the State's preemption rights as specified in that order of precedence as defined in the Act on arable land unconstitutionally limiting the right of a land owner to dispose of arable land insofar as originating from the fundamental right to property. On the basis of the validity of preemption rights guaranteed to the State in the clause d) Section (1) Paragraph 10 of the Act on arable land in 2006, where those ahead of it in the queue of

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<sup>56</sup> See ABH 2006, 181.

<sup>57</sup> The Act on arable land was amended in connection with the amendment of the budgets of the years 2001 and 2002 of the Republic of Hungary.

<sup>58</sup> According to the section (1) Paragraph 10 of the Law on the arable land (Ftv) valid since 2010 in case of selling a piece of arable land – unless other provision is made by the law – the right of preemption is due to the State of Hungary on the first place, according to those as stated in the Law on the national land fund.

<sup>59</sup> See Decision 39/1992. (VII. 16.) of the Constitutional Court, ABH 1992, 235, 239.

preemptive rights, such as leaseholders, sharecroppers, laborers paid in proportion to crop yield, neighbors living in the same locality or another person living in the same locality could not conclude a contract fulfilling the terms offered by the person claiming to be purchaser, the arable land became part of the National Land Fund after the conclusion of contract with the State or with the National Land Fund Organization acting on behalf of the State. According to the Constitutional Court, the limitation regarding public interest was proportional to the underlying objective of the measure because *the owner concluded the contract of sale and purchase with the same conditions, because he has the same duties, whether the purchaser chosen by the owner or the National Land Fund having a right to preemption was on the other side of the transaction. Additionally, the right of preemption provided to the State is not unconstitutional from the point of view of the prospective purchaser (i.e. the potential buyer) either*, according to that expounded above.

The Constitutional Court confirmed in this Decision 7/2006. (II. 22.) AB that nobody has a constitutional right to acquire certain real estate, but generally the freedom to contract conclusion allows plenty of opportunities. It also declared that *the provision regarding the right of preemption is not unconstitutional up to the point that it does not lead to elimination of the right to dispose of property which it characterized as “rendering empty” and rendering freedom of contract impossible*.

*The Constitutional Court judged as a “rendering empty” the property disposition provision of Act CXII of the year 2000 regarding the Plan of Country planning of the Preeminent Holiday Resort of Balaton and the determination of the Rules of Country planning limiting the right of disposition by an owner of real estate declaring: it is only the State of Hungary and the local governments, who can exclusively obtain the ownership of these real properties in order to accomplish public tasks.<sup>60</sup> According to the Constitutional Court, the debatable regulation restricted the right to dispose of an owner’s real estate and as a consequence the real estate – in case of lack of the intention by the State or a local government to acquire it – became nonnegotiable for an undefined time period and such a regulation constitutes a very serious intervention – nearly as serious as expropriation – into the autonomy of the owner.<sup>61</sup> The Constitutional Court declared – as it has done in several prior decisions – that the limitation upon the right to property ensured in the Constitution for constitutional purposes can be regarded as completely constitutional only in the case where the provisional and transitional character of the restriction is provided for in an exact, calculable and verifiable way by law.<sup>62</sup>*

#### *4. The specific social obligation of arable land*

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<sup>60</sup> See Clause d), Paragraph 6 of the Law about Balaton (Btv.)

<sup>61</sup> See Decision 94/2011. (XI. 17.) AB of the Constitutional Court, ABH 2011, 421

<sup>62</sup> See Decisions 7/1991. (II. 28.) AB; 13/1992. (III. 25.) AB and 13/1998. (IV. 30) AB of the Constitutional Court, ABH 1991, 26-27., ABH 1992, 98. and ABH 1998, 429, 434.

The Constitutional Court – as it was mentioned above – declared in its Decision 35/1994. (VI. 24.) AB that a *specific social obligation upon real estate can justify the enforcement of public interest against the owner's rights*.

The social obligation of property appeared earlier in the Decision 64/1993. (XII. 22.) AB considered as a “milestone” of constitutional protection for property rights. In this 1993 Decision the Court emphasized that under the Constitution “*property is the traditional material basis of individual autonomy of action. Consequently, in the case where the protection of individual autonomy is concerned, the protection of the right to property as fundamental right extends also to the property rights, as well as to the rights based on public law taking over the such former role of the property, which ensure individual autonomy.*”<sup>63</sup> The Constitutional Court also pointed out in that decision that the social obligations of property constitutionally allow the extensive limitation of a proprietor's autonomy.<sup>64</sup>

The remaining open questions are what the specific social obligation of arable land means and what can be regarded as a public interest that provides a constitutional foundation for limiting the proprietor's autonomy.

#### *4.1. Public interest as the basis for restrictions upon property rights, especially regarding arable land as determined by the Constitutional Court*

The foreign charters concerning basic rights and constitutions permit restrictions on a number of other bases beyond public interest, although public interest solely appears as a constitutional foundation for limiting property rights. .

It can be rather difficult to interpret public interest constitutionally – and generally for that matter – because the definitional limits of the public interest continuously change depending on the social order existing at any point in time, the circumstances of awareness, and the technical development.<sup>65</sup>

Both the legislature and the courts have substantial tasks – however not to an equal extent – in terms of defining what is otherwise an uncertain meaning of public interest among the quickly changing social conditions. Nevertheless, all the greater burden and responsibility perhaps falls within the scope of judicial control (specifically, of judges of the Constitutional Court) with respect to this relationship, particularly in the situation where basic rights might be

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<sup>63</sup> See Decision 64/1993. (XII. 22.) AB of the Constitutional Court, ABH 1993, 373, 380.

<sup>64</sup> See ABH 1993, 373, 380.

<sup>65</sup> *Temesi, István*: Szemelvények a közérdek fogalma meghatározásának köréből [Selected works from the domain of the definition of the concept of public interest] In: Szamel, Katalin (editor): *Közérdek és Közigazgatás* [Public interest and public administration.] Institute for Jurisprudence of the Hungarian Academy of Sciences (MTA) Budapest, 2008. p. 108.

limited on behalf of public interest. At the same time, both international legislation and judicial practice missed the particular examination regarding the content of public interest and related concepts up to present days in the domain of basic rights.<sup>66</sup> The concerned authorities give explication to all this that they wish to thereby respect the democratic legitimacy of the legislature in the case where the court (the Court of Strasbourg, as well as the Constitutional Court) does not wish to replace the definition of public interest with its own opinion, because that is the task of the Parliament. The Hungarian Constitutional Court announced just such a position back in 1993 and since that time it performed – in this connection – only an examination for the justification of the reference to public interest.<sup>67</sup> All this does not mean that the Court would have deemphasized or ignored the importance of the role of public interest among other factors in the Decision 35/1994 (VI. 24.) AB cited several times above.<sup>68</sup> Here I would like to discuss the rationale of one or two decisions which can be closely connected to issues surrounding arable land.

In Decision 143/D/2004. AB, the Constitutional Court pointed out – among other conclusions – the practice of collective farming on contiguous areas of pasture or forest land existing for several centuries, as well as the tradition of legislation known in this domain and, taking into consideration the characteristic of proprietary rights in specific objects, the Constitutional Court did not find disproportionate or unconstitutional the fact *that the regulation prescribes collective farming for an indefinite time in case of forest and pasture land to be preserved in unity*. The Constitutional Court took a stand that the contested provision “did not introduce a new system but prescribed a management structure consistent with the object of property rights, which was accompanied with the traditional limitation upon property rights in favor of the interests of the community”.

The Constitutional Court found *the claim for enlargement of green areas for public usage* also conforms to the public interest standard, which – constitutionally – provides the justification for the law prescribing restrictions upon property rights for the *enlargement of green areas for public usage* on areas where that cannot be accomplished with respect to areas of public ownership.<sup>69</sup>

It is worth reminding the concurring opinion of Judge Mrs. *Éva Vasady Tersztyánszky*, former judge of the Constitutional Court, annexed to the Decision 7/2006. (II. 22.) AB, who, taking into consideration the specific characteristics of arable land as an object of ownership, accepts the aim of public interest substantiating the constitutionality of the restrictions regarding arable land *in addition to the formation of appropriate sizes of estates, the promotion of the*

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<sup>66</sup> Kiss, Barnabás: Az alapjogok korlátozása és a közérdek [The restriction of fundamental rights and public interest]. In op. cit. of Szamel p. 171.

<sup>67</sup> See Decisions 27/1998. (VI. 16.) AB and 53/1996. (XI. 22.) AB of the Constitutional Court, ABH 1998, 197. and ABH 1996, 169.; Súlyom, László: Az alkotmánybíráskodás kezdetei Magyarországon [The first steps of the Constitutional Court judgment]. Publisher Osiris, Budapest, 2001, 406.

<sup>68</sup> See also the Decisions 1347/B/1996. AB, 8/2000. (III. 31.) AB and 143/D/2004. AB of the Constitutional Court in ABH 1998, 662, 666., ABH 2000, 56, 58. and ABH 2004, 1817.

<sup>69</sup> See Decision 94/2011. (XI. 17.) AB of the Constitutional Court, ABH 2011, 421.

*main occupation in rural areas and professionally performed agricultural activity among others as elements of the social motive, in addition to hindering speculation with respect to parcels of land.*<sup>70</sup>

Two other current office holders of judicial positions on the Constitutional Court *Elemér Balogh* and *Péter Kovács* agreed with Judge Mrs. Terszyánszky.

### **III. The restrictions regarding arable land in the case law of the European Court of Justice**

The social obligation of property ownership, especially those regarding arable land, also appeared in the decisions connected with the protection of fundamental rights by the European Court of Justice. In the *Hauer case*<sup>71</sup> a German vineyard owner contested a Decree restricting and, in fact, prohibiting the planting of vineyard plantations on the basis that it infringed upon her right to property. A Council Regulation in May 1976<sup>72</sup> inhibiting the planting of new vine-stocks for three years was in the background of the case. This measure meant that there was no planting of new vine-stocks allowed in the whole territory of the European Communities. The overproduction of wine was the underlying concern behind this measure which sought to achieve a production restraint in order to restore balance to the market. The legal dispute from a factual perspective emerged in the first step of the process in Germany, where *Liselotte Hauer*, a German vineyard owner wished to plant new vine-stocks. The German authorities, however, refused her request for two reasons. The planting of new wine-stocks was prohibited by legislation on the one hand while, on the other hand, the land area was unsuitable for wine-production. *Hauer*, the plaintiff, requested the grant of a permit by reason of the fact that the Council Regulation became effective long after her permit request was initially filed, so that it should not be applied in her case. The second reason was that Article 2 of the Regulation was contrary to both her right to property and with the free choice of a profession as guaranteed to her by the Articles 12 and 14 of the German Basic Law (*Grundgesetz*). The German Court of public administration refused her request, so *Hauer* had recourse available to the European Court. In its eventual judgment, the European Court referred back to the *Internationale Handelsgesellschaft case* and the *Nold case*, as well as Article 1 of the first protocol to the European Convention on Human rights, making a distinction – similar to that of the Court of Strasbourg – between the *taking of property* and *restrictions upon the exercise of a specific property right*. First of all, the judgment established that, at least in this case, the regulation meant only the *restriction upon exercising a right to property*. Then the Court commenced examination of whether the limitation is acceptable in light of the public interest. The Court deemed the justification for the limitation

<sup>70</sup> See ABH 2006, 181, 217–218.

<sup>71</sup> *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, In Reports of Cases before the Court. 1979, 3727.

<sup>72</sup> See Article 2 of the Decree 1162/76 of May 1976 of the Council.

sufficient because, in order to maintain the efficiency of the common market, wine production in greater volumes could cause a significant danger regarding such efficiency of the market. The Court referred to the “common constitutional traditions of the Member-States”, as well, as a basis for the limitation upon the rights to property regarding agriculture as is generally accepted in all the Member-States. The Court of Luxembourg reached its conclusion on this basis – namely, that the limitation by means of the prohibition upon planting new vineyard acreage for a defined time period is justified by the aims of public interest as followed by the Communities and it does not infringe upon the essence of the right to property as recognized and ensured in the legal system of the Communities. Consequently, the European Court also reinforced the social function of property in this decision.

The European Court emphasized the social function in relation to basic rights as a general rule in the *Wachauf case* while it established that fundamental rights are not absolute and need to be considered in light of their social function. Consequently, the exercise of basic rights can be limited, especially in connection with the common organization of the market – supposing, of course, that these limitations correspond to the aims of general interest envisaged by the Communities and do not constitute such a disproportionate and unjustified intervention with respect to the envisaged aim which could endanger the essential content<sup>73</sup>.

#### IV. Summary

From all matters discussed in this essay the following summary conclusions can be drawn.

In 1994, the Constitutional Court deemed the exclusion of foreign citizens and legal entities from acquiring arable land, as well as the upper limit upon acquisitions of arable land, as *temporarily* constitutional. The Constitutional Court identified as the primary motive for its position – in conformity with the practice of the Court of Strasbourg – that no infringement of fundamental rights can be found on the side of “purchasers” because the ability to obtain property and the freedom to enter and conclude real estate contracts cannot be described as fundamental rights, meaning that no one has a constitutional right to acquire a particular parcel of land. The restriction of these rights, which cannot be regarded as basic rights, would be unconstitutional according to the Constitutional Court, only if the limitation would have no reasonable ground impartially considered. The Constitutional Court accepted the formation of a “healthy structure” of arable land, as well as the hindrance associated

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<sup>73</sup> „The fundamental rights recognized by the Court are not absolute, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.” case 5/88 of Hubert Wachauf kontra Bundesamt für Ernährung und Forstwirtschaft. EBHT 1989, 2609; see also the judgment in the case of Karlsson of N° 292/97. on 13 April 2000. [EBHT 2000., 2737.]

with a concentration of such land prior to the evolution of a realistic market price for the land, as a reasonable motive for the upper limit upon acquisition of agricultural real property. According to the Constitutional Court, this upper limit constitutes, in this relation, part of *the execution of the constitutional task relating to establishment of a market economy*.<sup>74</sup> The Basic Law, however, does not regard the establishment of a true market economy as its primary task. This is not only because it does not even mention “market economy”<sup>75</sup> in its text, but it puts other values into the foreground, such as natural resources, including forests, water resources, biological diversity and the protection of arable land, in addition to native species of plants and animals, the protection and preservation of cultural values for the future, making them an obligation not only of the State, but also of all its residents.

In this author’s point of view, the reasonable grounds intrinsic to the validity of limitations embodied in the Act on arable land according to an impartial consideration still exist following the effective date of the Basic Law and following the 2014 expiration of the moratorium forbidding the purchase of arable land by foreign citizens and legal persons in Hungary. This position is supported not only by the provisions of Article P) of the Basic Law but also by the achievements of our historical Constitution providing a framework for such an interpretation of the Basic Law.

Consequently the upper limit upon acquisition of arable land can be retained in the light of the individual and social functions of real property even considering the fact that the particular social obligation of arable land and the public interest limitation upon arable land rights – especially in the interests of agriculture – are recognized by both the Constitutional Court and the Court of Luxembourg. The judgments regarding a specific problem can differ due to the fact that any resolution will essentially depend upon whose interests are being considered to comprise the public interest associated with a given “community”? The central issue remains as to whether the public interest should be viewed as the interest of a local community, such as the interest of a given property owner and the community of people immediately surrounding him, or whether it should be defined as the interests of small farmers as opposed to those of owners of large estates or, as a third alternative, it should be determined on the basis

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<sup>74</sup> See Decision 35/1994. (VI. 24.) AB of the Constitutional Court, ABH 1994, 197, 201.

<sup>75</sup> Article M) of the Basic Law defines the economic policy of the State differently from the former one not as market economy, but it determinates a scale of values relating to the grounds of the economy saying that “The economy of Hungary is based on work, which produces values and on the freedom of undertaking”. Independently of that one can deduce that the order of the Basic Law stands on the ground of market economy. The fundamental mode of the existence of market economy is competition, the interests of vital importance of the social and economic order based on market economy are the putting forth and the protection of economic competition. See Decision 19/1991. (IV. 23.) AB of the Constitutional Court ABH 1991, 401, 402; *Tóth, András: Magyarország gazdasági rendje az Alaptörvény és a piaci verseny viszonyára tekintettel.* [The economic order of Hungary taking in regard the relation of the Basic Law and market competition.] In: Rixer, Ádám (editor): [Állam és közösség]. State and community. Published by the University of Károli Gáspár of the Protestant Church.

of interests of the entire Hungarian nation in relation to those of the Union (the Communities)?

We can logically draw a conclusion using basic deduction from the judgments of the European Court described above to the effect that the Court of Luxembourg does not broadly construe protection of property rights. On the contrary, if even the slightest possibility exists for interjecting consideration of the interest of the Union, the Court will do so, leaving out any consideration of requirements for necessity and proportionality.

The question is therefore open, whether *this practice of the European Court of Justice* will not lead – sooner or later – *back to the same danger associated with the Solange doctrine*<sup>76</sup>, which means that *the Constitutional Courts prohibit the application of certain EU regulations on the basis, that the level of protection of fundamental rights is lower according to the EU Law than that of the Member States law.*

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<sup>76</sup> See 37 BVerfGE, 271 (Solange I); compare to *Vörös, Imre*: Néhány gondolat az uniós polgárság intézményéről. [Some reflections about the institution of the European Union citizenship.] *Jogelméleti Szemle* [Journal of Legal Theory]. vol. 2012/2. pp. 240–241.