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### **The Underpinning of the Protection of Fundamental Rights Provided by the Hungarian Constitution: Article 8 Paragraph (1)\*\***

**Abstract.** The study analyses the protection of fundamental rights in Hungary. Article 8 paragraph (1) of the Hungarian Constitution is the basis of the protection of fundamental rights. The paper shows how Art. 8 paragraph (1) evolved and explains how the Constitutional Court formed its content during the almost two decades after the transition. The content of the rule is explained by way of an item-by-item analysis of the terms of this paragraph. The analysis shows that the fact that the protection of fundamental rights is a primary obligation is not merely a declaration, but a regulative principle of constitutional democracy.

**Keywords:** constitutional law, fundamental rights, protection of rights

#### **Introduction**

This paper purports to review the system of the protection of rights provided by the Hungarian Constitution, with the aim of taking into account historical and theoretical considerations, as well as the practice of the Constitutional Court (hereinafter: CC), with special regard to the role of Article 8 paragraph (1) in constitutional protection. Article 8 states: (1) The Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State. (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the essential contents of fundamental rights. (3) repealed (4) During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights specified in Articles 54–56, Article 57 paragraphs (2)–(4), Article 60, Articles 66–69 and Article 70/E.

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What lends special importance to the issue is the fact that, pressed by the need to interpret specific constitutional decrees, theoreticians and practitioners of the field seldom have the opportunity to stop to meditate the all-important text, through which the constituents have set the framework for further decisions. The item-by-item analysis of the terms of this paragraph gives an overview of the constitutional foundations of the Hungarian system of fundamental rights protection.

### 1. The history of the provision

The preamble to Act I of 1946, which declared Hungary's new form of government, contained the first attempt at defining human rights standards in a way in which Article 8 of the Constitution does.<sup>1</sup> It stated that it is the Hungarian Republic that guarantees the natural and inalienable rights of all its citizens. The rights themselves appeared in the form of a list of examples. It also contained a clause of universal equality stipulating that rights apply equally to everyone. This provision also guaranteed that no citizen may be deprived of his or her rights without due legal procedure. The so-called "minor constitution" did not, however, take full effect. History, however, hindered his statute, also known as "the minor constitution," from taking full effect. The period between 1946 and 1949, with the liquidation of political parties, with unfair elections that were forced on the population etc. obliterated the democratic initiatives. Act XX of 1949, the present Constitution of Hungary, did not provide for the protection of human rights. Constitutional orders related to human rights first appeared, as a declaration, in the Constitution with the constitutional reform of 1972. This, however, did not result in any significant improvement in the field

<sup>1</sup> "The republic ensures for its citizens the natural and inalienable rights of mankind, for the Hungarian nation the regulated cooperation and the peaceful living.

The natural and inalienable rights of citizens: personal freedom, right to life without oppression, fear and deprivation, freedom of expression of thoughts and opinion, free exercise of religion, right to assembly, right to ownership, right to personal security, right to work and human standards of living, right to education and right to participation in the control of the life of the state and the municipalities.

No citizen may be deprived from these rights without due procedure, and the Hungarian State ensures these rights to each citizens without discrimination, within the confines of the democratic state order, equally and uniformly."

Cf. Sólyom, L.: Az Alkotmány emberi jogi generálklauzulájához vezető út [The road to the general human rights clause of the Constitution]. *Iustum, aequum, salutare* 1 (2005) 28–49, especially 28.

of fundamental rights protection, since the party-state did not attend to human rights any more than in the preceding years. Noteworthy change only arrived with the democratic revolution of 1989. It was then that the legal system for the protection of fundamental rights was established, and not merely as a declaration, but as an actual safeguard, with institutional foundations, guaranteed by the state, for every individual to exercise his or her rights, as regulated by the provisions of the Constitution.<sup>2</sup>

On 26. April 1972 the following rule was incorporated into the text of the Constitution:

Article 54 (1) The Peoples Republic of Hungary respects human rights. (2) In the Peoples Republic of Hungary citizens' rights shall be exercised in accordance with the interests of the socialist society; the exercise of rights is inseparable from the fulfilment of citizens' duties. (3) In the Peoples Republic of Hungary regulations pertaining to fundamental rights and duties of citizens are determined by laws.

The amendment restates the same rights that were once described as the rights of the workers<sup>3</sup> as the rights of all citizens.<sup>4</sup> It also states, generally, that the People's Republic of Hungary respects human rights. This version, in many respects, already conforms to the standards of the protection of rights in democratic countries, but the lack of will to implement, and the shortage of institutional background made it impossible for these regulations to take full effect. Moreover, the declarations themselves were part and parcel of the socialist system of the Kádár-era: exercising rights was inseparable from the fulfilment of obligations, and rights could only be exercised in harmony with the interests of the "socialist society." Which means that rights were conditional: they were rights exclusively for those who complied with their duties.

In the original, 1949 text of the Constitution, the general rules can be found, importantly, under the heading of "rights and obligations of the citizens," whereas the 1972 amendment of the constitution already talks about the fundamental rights and obligations of the citizens. It even uses the phrase 'human rights'. The change in terminology did not, however, imply a veritable

<sup>2</sup> On the history of human and citizens' rights in Hungary see: Sári, J.: *Alapjogok. Alkotmánytan II.* [Fundamental Rights, Constitutional Law II.]. Budapest, 2006. 25–27.

<sup>3</sup> Some claim that "workers" here implies a broader category than that of "citizens." Cf. Súlyom: Az Alkotmány emberi jogi generálklauzulájához vezető út. *op. cit.* 40.

<sup>4</sup> According to the official explanation, the original distinction lost its function, since with the hegemony of socialist methods of production, the annihilation of oppressive social classes was complete.

attempt, on the part of the leaders of the country, at enforcing human rights.<sup>5</sup> The Constitution remained one of those declarations that were never seriously meant to be implemented. The claim that rights can only be exercised as long as they are in harmony with the interests of socialist society amounted to a general restriction of rights.

Through the democratic transformation of 1989, when the need to respect and protect human rights was accentuated, the legislator created the legal foundations for the protection of human rights in Hungary. The paragraph of Act XXXI of 1989, which provided for the fundamental rights in general, was placed at the beginning of the normative text.

Article 8 (1) The Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State. (2) Regulations pertaining to fundamental rights and duties are determined by acts of constitutional force. (3) The exercise of fundamental rights may only be restricted by acts of constitutional force, if such restriction is necessary for the security of the state, public policy, public security, public health, public order or the protection of the fundamental rights or liberties of others. (4) During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights specified in Articles 54–56, Article 57 paragraphs (2)–(4), Article 60, Articles 66–69 and Article 70/E.

According to the ministerial explanation to the law, it emerged, while the amendment was in preparation, as a possibility that the acceptance of human rights as fundamental values might be expressed through structural changes to the Constitution (following the German example, the first part of the Constitution might have been devoted to the fundamental rights), but finally they decided that the urge of democratic transformation does not leave time for the restructuring.<sup>6</sup> The problem that stems from the provisory nature of the

<sup>5</sup> Cf. Takács, I.: Az emberi jogok garanciái [The guarantees of human rights]. In: Katonáné Soltész, M. (ed.): *Emberi jogok hazánkban* [Human rights in Hungary]. Budapest, 1988. 51.

<sup>6</sup> Cf. Bozóki, A. (et. al.): *A rendszerváltás forgatókönyve alkotmányos forradalom* [The script of the democratic transformation. Constitutional revolution]. Budapest, 2000. vol. 7; Farkas, G.: *A magyar köztársaság alkotmányi szintű alapjogi és alapjogvédelmi rendszerének születése* [The birth of the Hungarian system of fundamental rights and their protection in the Republic of Hungary], Pécs, 2006; Kulcsár, K.: *Koncepció az Alkotmány felülvizsgálatáról* [Proposal for the supervision of the Constitution]. Budapest, 1991; Kilényi G. (ed.): *Egy alkotmányelőkészítés dokumentumai. Kísérlet Magyarország új alkotmányának megalkotására* [The preparatory documents of the Constitution. An attempt at creating the new Constitution of Hungary]. Budapest, 1991; Sükösd, F.: *Az emberi és*

Constitution is that Article 8 is not regulated together with other fundamental rights, which are regulated in chapter XII. The constituent declared, among the general provisions, that the Republic of Hungary recognises the inviolable and inalienable human rights; it is a primary duty of the state to respect and protect them. The role of the regulation in the protection of fundamental rights is, nevertheless, clear: the CC has provided the bases for its interpretation by defining the way in which the regulation should affect the protection of fundamental rights.

An important constitutional safeguard of the fundamental rights and obligations is that the relevant rules could only be modified by the unanimous vote of the two-third of the MPs; in so-called acts of constitutional force.<sup>7</sup> The legislator purposed, in harmony with international treaties, to ensure that the fundamental rights be limited according to a very strict protocol. The amendment to the constitution specified the fundamental rights that could not be limited even under extraordinary circumstances.

The rule, however, which stipulated that fundamental rights be regulated only through laws of constitutional force, made governing difficult, since the Antall administration (the first democratically elected government after the transformation), did not possess a two-third majority in parliament. This state of affairs stemmed basically from decision 4/1990 (III. 4) of the CC, which made it a constitutional expectation that all rules related to fundamental rights and obligations be only defined by laws of constitutional force. When political consensus did arise, the further criteria of limitation could easily be satisfied, since the introduction of notions such as “public morals,” “public order” etc. left, in principle, ample opportunities for the limitation of fundamental rights. The task of the CC under such conditions would largely have been restricted to examining whether qualified two-thirds majority is necessary for the given decision. Some early decisions of the CC indeed show such a tendency. The CC did not undertake the interpretation of the notions listed in the Constitution. Nevertheless, it did state, for instance, that the modification of family law has—on the basis of the articles of the Constitution pertaining to marriage and the protection of the family—to take the form of a law of constitutional force [CC decision 4/1990. (III. 4), CCD 1990. 28.]. The first “interest-tax” law decision had to be regulated through a law of constitutional force due to the general and proportionate sharing of taxation [CC decision 5/1990 (IV. 9),

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állampolgári jogok, valamint az alapvető kötelességek [Human and citizens' rights, and the fundamental duties]. In: Kilényi, G. (ed.): *Alkotmányjogi füzetek 2*. Budapest, 1989.

<sup>7</sup> Article 10 paragraph (3) of Act XXXI of 1989, on the amendment to the Constitution.

CCD 1990. 32, 35].<sup>8</sup> The political difficulties resulted in an amendment to the Constitution which annulled the category of a law of constitutional force; the Constitution, thenceforth, only prescribes that the two-third majority of the MPs present (not all of them, that is) have to pronounce a uniform opinion, and even that only in cases, which are seen as politically sensitive.<sup>9</sup>

After the first democratic elections, the need to modify the text of the Constitution that came into power with Act XXXI of 1989 was swift to emerge.<sup>10</sup> Article 8 of the Constitution was also affected by the introduction—in accordance with German practice—of the concept of “the essential content of fundamental rights” (*Wesensgehalt*) to replace earlier rules of limitation. This meant that the limitation of fundamental rights, which the law made possible, should not affect the essential content of the given fundamental right. This step did not, however, invalidate the earlier rule, since the list of reasons of the limitation of rights does not specify the extent to which the limitation is constitutional. Unlike the earlier version, the new normative text does not indicate when it is possible to limit fundamental rights; it only specifies the maximum of the limitation. This is probably the reason why it was so difficult to get the notion of “the essential content of fundamental rights” accepted in Parliament.<sup>11</sup>

Article 8 of the Constitution was put into effect by Act XL of 1990 on the amendment of the Constitution. There are, thus, vital differences between the current normative text and its 1989 precedent. The relaxation of the formal criteria related to the regulation of fundamental rights undeniably makes governing more effective. It is important to accentuate, nonetheless, that the change in the content of constitutionality was more significant than that,<sup>12</sup> and the most important element of that change is the incorporation of the idea of

<sup>8</sup> Balogh, Zs. et al.: *Az Alkotmány magyarázata* [The explanation of the Constitution]. Budapest, 2003.

<sup>9</sup> For the details see: Sólyom: *Az Alkotmány emberi jogi generálklauzulájához vezető út. op. cit.* 48. Even with regard to the limitation of fundamental rights, it was agreed that they would return to the concept of limitation defined by the Roundtable discussions, which was significantly different from the one later accepted by the Parliament.

<sup>10</sup> Concerning the amendments to and the new concept of the Constitution, see: Kukorelli, I.: *Alkotmánytan I.* [Constitutional law I.]. Budapest, 2007. 70–73.

<sup>11</sup> See the official minutes of the 18. June 1990 session of the Parliament, and Balogh et al.: *op. cit.* 206–210; also Halmai, G.–Tóth, G. A.: *Emberi jogok* [Human rights]. Budapest, 2003. 125.

<sup>12</sup> Tóth, G. A.: *Az eljárási alkotmányosság tartalma* [The content of procedural constitutionality]. *Fundamentum* 3 (2004) 5–33.

“essential content” into Article 8 paragraph (2), and the annulment of the list of reasons for limitation.<sup>13</sup>

## 2. Institutional protection of fundamental rights

Article 8 paragraph (1) is the foundation of the protection of fundamental rights. The most essential element of the paragraph is that the Republic of Hungary recognises the fundamental human rights: the Constitution declares, thus, that these rights exist independent of the Constitution. More than merely recognising these rights, the State respects them, and places them under its active protection, qualitatively transforming them thereby, through guarantees of the State. This legal concept is in harmony with international and European human rights standards.<sup>14</sup> Right hereby means that the State is specifically obliged to justify any departure from guaranteeing these entitlements.<sup>15</sup>

Fundamental rights can, therefore, be defined as that group of rights, which the national constitutions and international treaties recognise as such, and which thus form part of statutory law.<sup>16</sup> The safeguarding of fundamental rights consists, in the case of written constitutions, of two phases: the fundamental rights have to be incorporated into the text of the Constitution, and an effective institutional framework has to be provided for. Modern constitutions, therefore, do not merely declare the fundamental rights, but ensure the means of their protection.<sup>17</sup> The Hungarian Constitution includes fundamental rights, more specifically basic rights and constitutional rights, obligations, constitutional values and objectives. Article 8 paragraph (1) of the Constitution contains the general rules related to fundamental rights and obligations. This provision is the underpinning of the protection of fundamental rights in Hungary, since all further legal definitions have to be seen in unity with the contents of this paragraph. This rule led to the interpretation of the Constitution by the CC, which is basic-right-centred and protective of fundamental rights in outlook.

<sup>13</sup> Sólyom: Az Alkotmány emberi jogi generálklauzulájához vezető út. *op. cit.* 44.

<sup>14</sup> Klein, E.: Az alapjogok meghatározása az alkotmányban [The definition of fundamental rights in the Constitution]. In: Ádám A. (ed.): *Alkotmányfejlődés és jogállami gyakorlat* [The development of the Constitution and constitutional practice]. Budapest, 1994. 67.

<sup>15</sup> Dworkin, R.: *Taking Rights Seriously*. London, 1984. 191. Quoted by András Sajó. Sajó, A.: Az „emberi jogok” jogi haszontalanságairól és lehetetlenségeiről [Of the legal uselessness and impossibility of “human rights”]. *Világosság* 31 (1990) 578.

<sup>16</sup> Cf. Halmai-Tóth: *Emberi jogok. op. cit.* 28–29.

<sup>17</sup> Pikler, K.: *A burzsoá alkotmánybíráskodás* [Bourgeois constitutional practice]. Budapest, 1965. 212–213.

Fundamental rights are enforceable, and although originally one could only demand enforcement *vis-à-vis* the State, by now there is an increasing demand to render fundamental rights enforceable in certain horizontal legal relationships pertaining to private law.<sup>18</sup> Fundamental rights do not usually mean boundless rights, or liberties. The majority of rights can be limited, with the criteria of limitation fixed by the text of the constitution or/and the principles that have been propounded in the legal practice of the constitutional court. The content of human rights, protected by the State, can only be understood by examining fundamental rights, as codified in the constitution, together with the possibilities for their limitation.

One of the cardinal points as well as novelty of the system of human rights protection that arose in the years following World War II, and which Hungary adopted in the course of the democratic transformation, was that rights became gradually enforceable. Let us look at the origins of this development. Already in 1803 the Constitutional Court of the United States declared that regular courts do not have to apply unconstitutional laws.<sup>19</sup> In Europe, however, in accordance with the Kelsen-model, constitutional courts, as distinct from regular courts, only emerged in 1920, and in most countries, only after 1945.<sup>20</sup> Specifically and primarily human rights protection, enforceable by the court, and jointly European, only came into being in 1950, with the establishment of the European Court and Committee of Human Rights. In Hungary the first body to protect the constitution was set up on 2. January 1990. Although from 1984 there had been a Committee on Constitutionality surveying the constitutionality of legal regulations and legal directives, which was elected by the Parliament, and had the power to suspend the execution of unconstitutional provisions; it did not, however, amount to a real constitutional control over legal regulations, since the political aims of the party-state had paramount influence. The right to suspend execution did not extend to legal regulations codified by the Parliament or the Presidential Council of the Peoples' Republic; neither did it affect the principles of the Supreme Court or its theoretical decisions. The body made decisions in a limited number of cases, and its decisions were not legally binding.<sup>21</sup>

<sup>18</sup> See Sajó, A–Uitz, R.: *The constitution in private relations*. Maastricht, 2006.

<sup>19</sup> *Marbury v. Madison*, 5 U.S. 137.

<sup>20</sup> The first famous constitutional court was established in Austria, the operation of which was suspended between 1934–1945.

<sup>21</sup> Bihari, M.: *Alkotmányos rendszerváltás* [Constitutional transformation]. *Mindentudás Egyeteme*, VI. szemeszter, 13. előadás [University of Omniscience VI, lecture 13.], 2005. április 25. <http://origo.hu/attached/20050430bihari0.rtf>



The interpretation of Article 8 of the Constitution was elaborated in the first years of the CC,<sup>22</sup> and has remained essentially unchanged since then.<sup>23</sup> This is largely due to the model of western democracies and international treaties that the body could build on in its defence of the constitution. With the end of the socialist era the new democracies could take advantage of the legitimate practice of constitutional courts in other countries, as well as of the interpretative traditions of specific regulations in the courts of Western-Europe and the United States. The CC relied primarily on the accumulated experience of the German BVerfGE, because it found the arguments of this court the most satisfactory in interpreting the text of the Constitution. Although there are a number of unexpected parallels between the decisions of the German and the Hungarian Constitutional Court, and their respective justifications, there is no reason to impute this to direct copying of the foreign practice. The CC usually tried to adapt the lessons it learned from other courts to the Hungarian situation and to the traditions of the history of constitutionality in Hungary. Its intention was to create a coherent system, which, by clarifying the content of the normative text, creates a firm background for the protection of fundamental rights.

The CC relied on international traditions of human rights jurisdiction in establishing the national framework for the protection of fundamental rights. Human rights norms worldwide and in the EU, together with the precedents in the practice of the courts define the minimal standards that every member has to comply with in the field of the national protection of human rights. The work of the Hungarian CC is most heavily effected, besides the German (and in some cases American) example, by the ECHR; this tendency can be seen in the chapters of this commentary covering the fundamental rights.<sup>24</sup>

<sup>22</sup> There were a number of sceptics among the experts, who did not give much credit to the CC's development of fundamental rights. Béla Pokol believed, for instance, that fundamental rights are dynamites that are bound to cause harm eventually. "Activism, therefore, is harmful—not only to the legal system and to parliamentary democracy—but to the institution of constitutional jurisdiction itself." Pokol, B.: *Pénz és politika* [Money and politics]. Budapest, 1993. 115.

<sup>23</sup> László Sólyom claimed already in 1997 that the CC has established the framework of interpretation, and has made the fundamental decisions. Sólyom Lászlóval Tóth Gábor Attila beszélget [Discussion between László Sólyom and Gábor Attila Tóth]. In: Halmai, G. (ed.): *A Megtalált Alkotmány? A magyar alapjogi bíráskodás első kilenc éve* [Constitution found? The first nine years of constitutional jurisdiction in Hungary]. Budapest, 2000. 390.

<sup>24</sup> The situation is similar in most countries that are experiencing or have recently experienced the democratic transformation. Cf. *The protection of fundamental rights by the constitutional court*. Strasbourg, 1996.

The CC consequently defines itself and its responsibilities regarding the protection of fundamental rights:

„The Constitutional Court shall continue to state in its decisions the origins of the Constitution and the rights contained therein. These decisions shall form a coherent system, which—as an “invisible constitution”—serves as the standard of constitutionality, in a regime where the constitution is often amended due to daily political interests.

This could help to prevent contradiction with the probable new constitution or future constitutions. The Constitutional Court is free in this as long as it remains within the boundaries of constitutionality.” [23/1990 (X. 31) 99.<sup>25</sup>]

### 2.1 “Fundamental Human Rights”

The beginnings of modern constitutionality are marked by British acts and declarations regarding fundamental rights—the *Petition of Rights* (1628), the *Habeas Corpus Act* (1679) and the *Bill of Rights* (1689)—, together with the *Declaration of Rights* issued by the Philadelphian Congress in 1774, and the *American Declaration of Independence* (1776).<sup>26</sup> These declarations reformulated basic principles as human rights, without, however, endowing them with the enforceability which characterises legal norms; these were, nevertheless, to form the bases of modern catalogues of fundamental rights, and the very concept of fundamental rights.<sup>27</sup> *The Declaration of the Rights of Man and of*

<sup>25</sup> Some experts warn that the CC, in enforcing the invisible constitution, often transgresses its constitutionally prescribed domain, and endows certain fundamental rights with content that can hardly be justified on the basis of the text of the Constitution. Sajó, A.: A „láthatatlan alkotmány” apróbetűi: A magyar Alkotmánybíróság első ezerkét-száz napja [Deciphering the “invisible constitution:” the first 1200 days of the Hungarian Constitutional Court]. *Állam- és Jogtudomány* 35 (1993) 51. Béla Pokol also saw the CC as diverging from the text of the Constitution. According to him the breach set in with decision 8/1990, where the CC founded its case on the general practice of modern constitutional jurisdiction, even though the German example was followed by none of the traditional democracies. Pokol, B.: A törvényhozás alkotmányossága [The constitutionality of legislation]. *Világosság* 34 (1993) 42–43.

<sup>26</sup> Ádám, A.: Az alapjogokra vonatkozó alkotmányi rendelkezések továbbfejlesztésének lehetőségei [Possible directions in the further development of the constitutional provisions on fundamental rights]. In: Ádám: *Alkotmányfejlődés és jogállami gyakorlat. op. cit.* 9; and Péteri, Z.: Az emberi jogok a történelemben [The history of human rights]. In: Katonáné Soltész: *Emberi jogok hazánkban. op. cit.* 21.

<sup>27</sup> “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are insti-

*the Citizen* approved on 28. August 1789 by the National Assembly of France, treated in its 17 articles of “the natural, unalienable, and sacred rights of man.” This document was issued “in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all.”<sup>28</sup> By the 20th century all constitutional democracies provide for the protection of fundamental rights.

Article 8 of the Constitution recognises the fundamental human rights. It claims, thus, that there are certain fundamental rights<sup>29</sup> that every human being, from the moment it is born, merely by virtue of being human is entitled to.<sup>30</sup> According to the classical formulation: “Human dignity? This expression is meaningless if it does not reflect that based on natural law all men has the right to be respected, to be the subject of rights, to have rights. These are the rights that men are entitled to because they are men.”<sup>31</sup>

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tuted among Men” United States Declaration of Independence. The legal positivists believe, on the contrary, that “right is the child of law”, and is not derived from natural laws. Bentham, J.: *Anarchical Fallacies*. Edinburgh, 501. Quoted in Sajó, A.: *Az önkormányzó hatalom* [The self-limitation of power]. Budapest, 1995. 325.

<sup>28</sup> Ádám: *Alkotmányfejlődés és jogállami gyakorlat. op. cit.* 10.

<sup>29</sup> The Constitution thus aligns itself with the theory of Ronald Dworkin. He argues that the moral rights transformed in a constitution into fundamental rights, which flow from the idea of human dignity and equality, are superior. Consequently, no government can refuse them to anyone. Dworkin, R.: *Taking rights seriously*. Cambridge, Massachusetts, 1977. xi; See also: Halmai-Tóth: *Emberi jogok. op. cit.* 51. This right is further strengthened by the fact that the Constitution makes the protection of the fundamental rights into a primary obligation of the state.

<sup>30</sup> Of the origins and development of human rights in the twentieth century, see e.g.: Takács, P.: *Emberi jogok* [Human rights]. In: Szabó, M. (ed.): *Jogbölcseleti előadások* [Lectures on the philosophy of right]. Miskolc, 1998.

<sup>31</sup> Maritain, J.: *The rights of man*. London, 1944. 37. quoted in Sajó: *Az önkormányzó hatalom. op. cit.* 324. This is sharply opposed by the positivist concept of rights, according to which it is the state which gives rights to people, and in certain cases, to citizens. András Bagyova proposed that both theories are well-founded, and can even be harmonised. It is exactly this harmony that ensures the proper functioning of the state in the sphere of the fundamental rights. Human rights, consequently, can truly be seen as existing a priori, and due to human beings by the sheer virtue of being human. It is up to the state to decide the methods of enforcing the individual human rights. The Hungarian state undertook to respect and protect fundamental human rights. The category of fundamental rights is, however a legal category, the content of which it is the task of the state to determine. Bragyova, A.: *Az új alkotmány egy koncepciója* [A concept of the new constitution]. Budapest, 2005. 58.

Both theoretical considerations<sup>32</sup> and international legal practice justify such an interpretation of fundamental rights.<sup>33</sup> Judge László Sólyom, the first President of the Hungarian CC, formed at the end of the 20<sup>th</sup> century, believes that, limited in its activity by the text of the Constitution, the CC did not subscribe to any major theoretical trend in establishing its practice of the protection of fundamental rights, itself described as value-centred and elaborated in connection with the individual rights. The CC avoided basing the argument purely on natural and international law, or to objective values.<sup>34</sup> Article 7 paragraph (1) of the Constitution declares that Hungarian law conforms to the country's obligations resulting from international treaties; this does not, however, imply that it is international law that makes the protection of fundamental rights legitimate according to Hungarian understanding.

<sup>32</sup> Sólyom argues that the CC, instead of the system of values represented by the constitution, has elaborated legal concepts. Instead of ideologies or natural rights principles, it has adopted a limited form of constitutional positivism. "Legal security matters more than justice, which is always partial and subjective." [CC decision 11/1992. (II. 5), CCD 1992. 77, 82]. In a given historical context—in Sólyom's appraisal—"a neutral and objective standard has the power to create stability." Sólyom, L.: *Az emberi jogok az Alkotmánybíróság újabb gyakorlatában* [Human rights in the recent practice of the Constitutional Court]. *Világosság* 34 (1993) 16.

<sup>33</sup> Bragyova, A.: *Alapozhatók-e az emberi jogok a nemzetközi jogra? Avagy pótolhatja-e a nemzetközi jog a természetjogot?* [Is international law the proper foundation of human rights? Can international law replace natural law?] *Állam- és Jogtudomány* 32 (1990) 94.

<sup>34</sup> "The prime objective of the CC was to develop the Constitution into a coherent system, which requires a basic principle that ensures the coherence. It can be debated whether this is a moral principle. The CC has never stated that the supreme law presupposes a system of moral values. We wanted to avoid the German example, which—especially up until the mid-60s—usually referred to the system of values embodied by the constitution and its foundations in natural rights. There was no way to justify this on the basis of the Constitution, either in its history or in its present state. We have continually emphasised that the Constitution, especially since the 1990 modification, which extirpated all ideological references, is a neutral legal text. It is perfectly clear, nonetheless, that human rights are the legal equivalents of moral categories. The CC has elaborated the 'moral content' and 'moral reading' (in Dworkin's words) of the fundamental rights individually, according to the nature of the given fundamental right. There was no need, therefore, to refer to such abstractions as a 'constitutional system of values'. Moreover, this amounted to an instrumentalisation of moral ideas." Sólyom Lászlóval Tóth Gábor Attila beszélget. *op. cit.* 383. See further: Sólyom, L.: *Alkotmányértelmezés az új alkotmánybíróságok gyakorlatában* [The interpretation of the constitution in the practice of the new constitutional courts], *Fundamentum* 2 (2002) 25.

Usually, regulations related to fundamental rights in the Constitution can be described as general, as far as the wording of the contents and limitations of individual rights are concerned, and more specific, whenever the text of international treaties is adopted. The treatment of, civil, political, economic, cultural and social rights is homogeneous. Certain fundamental rights are placed as principles and national objectives among the general provisions of the Constitution. It is the concept of human rights, not that of the rights of the citizens that is accepted as a basic principle. The legal regulation of a number of basic rights is dependent on two-thirds majority; and it is also declared that no essential contents can be limited. The Constitution creates a wide range of institutions for the safeguarding of human rights.<sup>35</sup>

Terminological distinctions of fundamental rights are problematic, since both the texts of the CC rulings and the relevant legal literature present a number of diverse definitions and distinctions: there is simply no consensus or generally accepted practice in this respect.<sup>36</sup> For the purposes of this commentary, based on the text of the Constitution, the following terminology has been applied. Chapter XII of the Constitution, entitled “Fundamental Rights and Obligations” provides for the fundamental rights and obligations, but there are other parts of the Constitution that also discuss fundamental rights (e.g. the right to private property).<sup>37</sup> The CC applies the following categories: basic rights (e.g. the right to human dignity) and other constitutional rights (e.g. the freedom of contract), obligations (e.g. contribution to rates and taxes). The category of fundamental rights includes constitutional objectives (e.g. public peace and order) and values

<sup>35</sup> Kardos, G.: Az új alkotmány emberi jogi fejezete [The human rights chapter of the new constitution], in: Ádám, A. (ed.): *Alapjogok és alkotmányozás* [Fundamental rights and the making of the constitution]. Budapest, 1996. 20.

<sup>36</sup> An influential university textbook describes “fundamental rights” and “basic rights” as synonyms, and “constitutional rights” often turn up as further synonyms, but this usage is mistaken, since “every right, including civil rights, can be described as constitutional, which is based on the constitution, hence, those as well, which are not the constitutional versions of human rights (e.g. the rights of MPs).” Halmai-Tóth: *Emberi jogok. op. cit.* 29.

<sup>37</sup> The Hungarian Constitution uses the expression “fundamental rights,” where the European Convention on Human Rights speaks about human rights and liberties. This does not mean that the catalogues of rights coincide, this only underlines that certain rights set out in treaties have been included in the Hungarian Constitution as fundamental rights. Bárd, K.–Bán, T.: Az Emberi Jogok Európai Egyezménye és a magyar jog [The European convention on human rights and Hungarian law]. *Acta Humana* 6–7 (1992) 9.

(e.g. the protection of the country, the creation of proportionate taxing).<sup>38</sup> Article 8 of the Constitution is the foundation of all these “rights”.<sup>39</sup>

The CC, thus, differentiates between the categories of constitutionality, and established distinct status, function and level of protection for each of the “fundamental rights” enumerated in the Constitution. Constitutional rights are less protected and can more easily be limited. It is the rights declared basic rights by the CC that enjoy stronger protection *vis-à-vis* state power.<sup>40</sup> These rights include the basic liberties as well. The liberties of the individual are also legal in nature, since the demand can arise that the state protect the right of the

<sup>38</sup> Géza Kilényi uses a more detailed system including: principles, fundamental values, declarations, rules related to power, fundamental rights, guarantees of fundamental rights, other normatives included in the constitution. Kilényi, G.: *Az Alkotmány egyes (alapelvi, alapjogi) rendelkezéseinek jogi jellege* [The legal qualities of certain provisions of the Constitution, in the field of principles and fundamental rights]. *Társadalmi Szemle* 11 (1995) 40. Concerning the other legal sources of fundamental rights see: Rácz, A.: *Alapvető jogok és jogforrások* [Fundamental rights and legislations]. In: Petréttei, J. (ed.): *Emlékkönyv Ádám Antal egyetemi tanár születésének 70. évfordulójára* [Studies presented to professor Antal Ádám on his 70th birthday]. Budapest–Pécs, 2000. 181. Nóra Chronowski claims that the CC uses three categories: „there are fundamental rights, constitutional fundamental rights and constitutional rights. Fundamental civil rights usually demand no conditions to be fulfilled, the law pertains widely, it guarantees all possibilities for action, can be asserted in courts, can only be limited in accordance with Article 8 paragraph (2), and is to be tried by the general test (the right to free speech, freedom of conscience, personal liberty, the right to chose profession). Fundamental constitutional rights permit action only if a number of objective criteria are satisfied, they cannot be directly asserted in courts, but civil rights do flow from them. They are usually limited in accordance with Article 8 paragraph (2), but extra-legal issues may be taken into consideration as well (e.g. state economy), the test of public interest can be used (work, profession, the right to services, the right to rest etc.). Constitutional rights are recognised and protected by the Constitution, but they are neither fundamental, nor civil rights. They are merely related to fundamental rights; often the two presuppose each-other. They can be limited through the use of the accessory test (e.g. the right to enter contracts).” Chronowski, N.: *Integrálódó alkotmányjog* [The integration of constitutional law]. Budapest–Pécs, 2005. 209.

<sup>39</sup> Cf. Halmai–Tóth: *Emberi jogok. op. cit.* 28–29.

<sup>40</sup> It was in German constitutional legislation that the concept of fundamental rights first emerged to denote the most important human and citizens rights. The constitution of the German Empire (*Paulskirchen-Verfassung*) was the first to provide for fundamental rights. The constitution of 11. August 1919, the so-called Weimar Constitution examined, in its second part, “the fundamental rights and obligations of the Germans.” The first chapter of the constitution declared on 23. May 1949, which was intended to be provisory, is entitled “Fundamental rights.” Ádám, A.: *Alkotmányi értékek és alkotmánybíráskodás* [Constitutional values, constitutional jurisdiction]. Budapest, 1998. 45–46.

individual to enjoy this freedom, according to constitutional standards. Liberty, then, appears as an enforceable right. A liberty becoming a basic right turns it into much more than a liberty, or a nationally accepted freedom to act: in the case of a basic right, the state is obliged to actively create the possibility for exercising that liberty.<sup>41</sup>

Constitutional objectives and values are used almost synonymously in CC parlance, and at times even the notion of constitutional principle emerges with a similar meaning attached to it.<sup>42</sup> Objectives usually appear as abstract constitutional values. Such divergent qualities are placed here as legal security, public peace or the principle of the separation of powers [CC decision 58/1994 (XI. 01), CC decision 30/1992 (V. 26)].<sup>43</sup> Constitutional objectives influence the limitation of fundamental rights and the constitutional surveillance of limitations. If the CC finds that the objective of the regulation indicated by the legislator can be seen as a constitutional objective, then the necessary and proportionate limitation can take place, in order to attain the objective. There is no such catalogue of the constitutional objectives as that of the rights. This is why it takes special precaution to establish the method apt for the assessment of the objectives.

Constitutional values appear in comparison as a more specifically defined category in CC practice. The CC, in treating the constitutional values as distinct from the constitutional objectives, associates the notion of value with the objective side of basic rights and obligations. The defence of the nation or the proportionate sharing of taxation, for instance, appear on the institutional side as a constitutional value in CC rulings. CC ruling 47/2007, which interpreted the right of the President of the Republic to award decorations, declares that the Constitution is a system of values in itself, and it is the responsibility of the State to safeguard its enforcement. Fundamental rights are, in this sense, values as well, which have to be protected.<sup>44</sup> All this means that fundamental

<sup>41</sup> Sajó: *Az önkorlátozó hatalom. op. cit.* 348.

<sup>42</sup> Géza Kilényi finds that in specific cases the nature of the norms is unclear. The term “constitutional principle” carries different meanings in different contexts. The distinction between principles and values is ad hoc as well [CC decision 11/1992 (III. 5.)]. Kilényi: *Az Alkotmány egyes (alapelvi, alapjogi) rendelkezéseinek... op. cit.* 41.

<sup>43</sup> In the case of each second and third generational right, fundamental rights should be distinguished from constitutional objectives, the definitions of the purposes of the state. Halmai, G.: *Az alkotmány mint norma* [The constitution as norm]. In: Erdei, Á. (ed.): *Második magyar jogászgyűlés* [The second lawyers’ convention]. Budapest, 1994. 168.

<sup>44</sup> Antal Ádám, for instance, is of the opinion that “fundamental rights guarantee the basic intellectual, moral, political interests of humans, citizens and societies, together with the protection of their life and health, their social services and material possibilities, and

rights *qua* values can serve as reasons for the limitation of fundamental rights according to the test regarding the limitation of fundamental rights introduced by the CC.

CC decision 47/2007 (VII. 3) orders that „Some values, which serve as a basis for honours are values listed in the Constitution or values derived from them. The major standard for the worthiness is the constitutional value order of the Republic of Hungary. The constitutional value order consists of the values listed in or derived from the Constitution.”

It is important to mention, nonetheless, that the system of values discussed in this decision is not a fiction that precedes the decisions, but a constantly evolving system that finds its origins in the individual rulings of the CC, in which the position of the given values is a function of the way in which constitutional crises are resolved. The temporary condition of the system of values can be reconstructed only after the decisions; it is not an a priori existent. This ruling, moreover, also suggests that the CC does not necessarily distinguish between the values encoded in the Constitution, and the abstract objectives that are merely derived from it.

The fundamental rights encoded in the Constitution are summarily called the fundamental rights catalogue. The fundamental rights catalogue is necessary in order that the legislator may not make an arbitrary decision according to its temporary needs concerning the range and content of fundamental rights regulations.<sup>45</sup> In the Hungarian Constitution, however, it is very difficult to define the fundamental rights catalogue, since the abstract nature<sup>46</sup> of Article 8 paragraph (2) of the constitution and certain fundamental rights regulations led to the CC introducing new rights on the basis of already existing constitutional rules.<sup>47</sup>

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thus, unquestionably are among the fundamental values.” Ádám, A.: Az alkotmányi értékek fejlődési irányairól [The development of constitutional values]. *Jura* 1 (2002) 11.

<sup>45</sup> Sajó: *Az önkorlátozó hatalom. op. cit.* 336; 319–362.

<sup>46</sup> The text of the Constitution is nevertheless more detailed than that of certain civil and political rights, since it relies on the UN treaty on civil and political rights. Third generational rights turn up mostly as values, in the case of which it is unclear who the legal entity is and who the obligee, what the right is and what the obligation connected to it.

<sup>47</sup> The CC does not regard the fundamental rights catalogue as a closed system. So much so, that through its jurisdiction it has established new constitutional rights. The process is partially directed at the enrichment of certain rights. An example of this was the CC's pronouncing that from general personal rights the right to the free development of personality and the personal integrity can be deduced [CC decision 74/1992 (XII. 28), CC decision 4/1993 (II. 12)]. The CC has also created independent fundamental rights, e.g. in deducing the right to a private sphere from general personality rights [CC decision



Everyday parlance regarding right is multifarious, the concept of fundamental rights, however, has a very special meaning in the Constitution.<sup>48</sup> “Rights in the sense of civil, subjective rights due to every individual are basic categories of human intercourse and social thinking, since our rights define or may define our social liberties, our possibilities for action; which, in turn are guaranteed ultimately by the legal system—and thus the state—, which has the power to create and defend these possibilities.”<sup>49</sup> The separation of the clusters of the fundamental rights catalogue, the interpretation of their legal character, as regards both their original content and their limitation, is a challenge that faces legal practice. This is due to the fact that in the case of fundamental rights regulations, in defining their content and the possibilities of their limitation, legal considerations are inseparable from moral, political and other concerns.<sup>50</sup>

In socialist state-law there was barely an example of even mentioning fundamental rights without fundamental obligations.<sup>51</sup> Rights could be exercised as long as obligations were fulfilled.<sup>52</sup> This, however, changed with the 1989 amendment to the Constitution: rights have become independent of obligations.

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20/1990 (X. 4)]. The CC has also decided that even if the right to a healthy environment were not present in the Constitution, it could be deduced from the right to live [CC decision 28/1994 (V. 20)]. The right to work, moreover, follows from the right to human dignity [CC decision 21/1994. (IV. 16)]. Géza Kilényi is of the opinion that with this the CC has transgressed its jurisdiction, since, by this logic, it would suffice to name just a handful of rights in the Constitution and let the CC deduce the rest from those. Kilényi: *Az Alkotmány egyes (alapelvi, alapjogi) rendelkezéseinek... op. cit.* 44–45.

<sup>48</sup> Pokol, B.: Az alapjogok és az „alapjogi” bírászkodás [Fundamental rights and fundamental rights jurisdiction]. *Társadalmi Szemle* 5 (1991) 56.

<sup>49</sup> Bragyova: Alapozhatók-e az emberi jogok a nemzetközi jogra? *op. cit.* 94.

<sup>50</sup> “In the fundamental rights cluster of the Constitution [...] the interpretation of the text is impossible without first answering the question: what is the best political interpretation of this political morality.” Kis, J.: A semlegesség megközelítései [Approaches to neutrality]. *Politikatudományi Szemle* 1 (1994) 158.

<sup>51</sup> Sári, J.: Jogok és kötelességek [Rights and obligations]. In: Katonáné Soltész: *Emberi jogok hazánkban. op. cit.* 378–385. For a general overview of socialist rights and obligations see: Halász, J.–Kovács, I.–Szabó I. (eds.): *Az állampolgárok alapjogai és kötelességei* [The fundamental rights and obligations of the citizens]. Budapest, 1965.

<sup>52</sup> Conjoining rights and obligations is alien to British, American or German law, although there are examples of it in the French constitution. The ultimate source, however, was Marx’s dictum: “no rights without duties, no duties without rights.” Quoted in Sári: *Jogok és kötelességek. op. cit.* 383.

The dogmatic revolution is unchanged by the fact that rights and obligations are still treated side by side in the Constitution.<sup>53</sup>

As human beings and as citizens we all have several obligations that we have to fulfil in the interests of social coexistence.<sup>54</sup> Only few of these, however, are among those fundamental obligations that are listed in Article 8 of the Constitution.<sup>55</sup> The Constitution establishes four basic obligations: the obligation to defend the country (Article 70/H.), the obligation to contribute to public revenues on the basis of income and wealth (Article 70/I.), the obligation to ensure the education of young children (Article 70/J.), and the obligation to abide by the laws [Article 77 paragraph (2)]. Out of these, the obligation to defend the country is defined as an obligation of the citizen, while abiding by the other rules are human obligations.

Article 8 paragraph (2) of the Constitution guarantees that rules regarding fundamental obligations are codified as laws. The Constitution further declares that it is possible to place members of the society under constitutional obligations through laws. There are certain constitutional rights, values and objectives, for the attainment of which the legislator is endowed with the right to declare new obligations, and to use the state's powers to enforce these obligations. Since the fulfilment of one's constitutional duties always coincides with the limitation of one or other of the fundamental rights, criteria of limitation refer to the regulation of obligations as well.

### *2.1.1 The subject of fundamental rights, or the interpretation of the word "human"*

Article 8 of the Constitution uses the word "human" in defining the holder of fundamental rights. The subject of fundamental rights, historically and primarily, is truly humankind. This implies an abstract level of entitlement, since there are certain fundamental rights that are restricted to citizens or other specific groups.<sup>56</sup>

<sup>53</sup> There is no such expression in the German constitution, which in many ways is markedly similar to this part of the Hungarian constitution.

<sup>54</sup> The European Convention on Human Rights states that "the individual has obligations with respect to the society, which is the only possible milieu for the full and free development of a personality" (article 29).

<sup>55</sup> Petrétei J. (szerk.): *Magyar alkotmányjog III.* [Hungarian constitutional law III.] Budapest–Pécs, 2006. 608.

<sup>56</sup> Antal Ádám argues that constitutional values oblige everyone: every citizen, the organs of legislation and execution, all natural and legal persons, and all human communities must comply with them. Ádám, A.: A jogrendszer alkotmányosodása és erkölcsösödése [Rendering the legal system constitutional and moral]. *Jogtudományi Közlemény* 10 (1998)

In a number of cases the Constitution claims that “everyone” has the right to something [e.g. Article 55 paragraph (1)], or that no one can be denied their rights [e.g. Article 54 paragraph (2)].<sup>57</sup> There are certain provisions that concern citizens [e.g. Article 69 paragraph (2); Article 70/F]. There are also rights that refer to those who live within the Hungarian Republic (Article 70/D). There are further some rights to which everyone who works in the country is entitled [Article 70/B paragraph (2)–(3)]. Others are for everyone within the borders of the Republic of Hungary.<sup>58</sup>

The original version of the 1949 Constitution held that rights are granted by the State, therefore it is the State who decides about who it confers them on.<sup>59</sup> Already before the political transformation, however, there have been voices arguing that the State merely recognises already existing rights, and thus it is the individual who enjoys priority, and not the state. Following this logic, though, every human being should be entitled to these rights, and the rights should refer exclusively to human beings.

The CC has extended human rights to legal entities as well. The different arguments led to different fundamental rights with different contents in the case of legal entities, which have no inviolable essences, by virtue of which they would be entitled to rights independent of state recognition. This is what distinguishes between them and human beings as far as human rights are concerned. László Sólyom argued, at an early date, in his parallel statement on CC decision 23/1990 (X. 31.), which annulled capital punishment in Hungary, that „the right to human dignity embodies two functions. On the one hand it expresses that there is an absolute boundary and the power of the state or other

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352. The CC, however, as we have seen, does not grant such a broad range of meanings to the concept of value.

<sup>57</sup> The concepts of “legal entity” and “legal capacity” have to be sharply distinguished. According to Article 56 of the constitution every human being has legal capacity. See: Sári, J.: Jogképesség az alkotmányjogban, az alapjogi jogképesség [Legal capacity in constitutional law, fundamental right legal capacity]. In: Bragyova, A. (ed.): *Ünnepi tanulmányok Holló András 60. születésnapjára* [Studies presented to András Holló on his 60th birthday]. Miskolc, 2003. 378.

<sup>58</sup> There are certain rights, then, which the constitution defines as human rights, but can only be exercised when they become laws (the right to work or the right to found a party). In others, it is described as a civil right, but foreigners may exercise it as well (the right to social security, the right to culture), and there are citizens’ rights that not every citizen has a right to exercise (the right to vote, the protection of diplomats), since these rights are limited already by the text of the constitution. See: Petréttei: *Magyar alkotmányjog III. op. cit.* 24.

<sup>59</sup> The origins of this idea can be found e.g. in: Hobbes’s *Leviathan*, Locke’s *Treatise on Government* and Rousseau’s *Social Contract*.

people may not go beyond this. This is the core of autonomy or self-deterrence. This is reflected by the concept also followed by the CC, stating that the right to human dignity is the origin of other liberties which constantly guarantees autonomy against (state) regulation. This concept of the right to human dignity differentiates men from legal persons, which can be fully regulated and has no untouchable essence” (CCD 1990. 88, 103).

The CC afterwards reaffirmed in its decision number 34/1994 (VI. 24) [summarising the conclusions of CC decision 21/1990 (X. 4), (CCD 1990, 77), CC decision 7/1991 (II. 28) (CCD 1991, 25) and CC decision 28/1991 (VI. 3) (CCD 1991, 114)] that fundamental rights—for different reasons—usually refer to legal entities as well.<sup>60</sup> What makes the status of legal entities special is that they are created in order to serve the interests of natural persons.<sup>61</sup> Even though modern law recognises the concept of even the criminal responsibility of legal entities, they are still qualitatively different from human beings (in civil law terminology: natural persons) as far as the applicability of fundamental rights go. The practice of the CC follows the German GG, where it has even been written into the normative text [GG Article 19 paragraph (3)]. According to this idea, it is the State, which safeguards the recognition and protection of those fundamental rights that legal entities are entitled to. This does not, however, imply that legal entities should have original rights; it simply means that the State constitutes a law.

The CC distinguishes between two types of legal entities: that are legal entities according to public and according to private law.<sup>62</sup> The existence of public law legal entities is heavily problematic.<sup>63</sup> It means, in effect, a legal entity with even more limited fundamental rights than the private law legal entity.<sup>64</sup> The CC declared that State organs have no fundamental rights *vis-à-vis* the State [50/1998. (CC decision XI. 27), CCD 1998, 387, 402]. German constitutional dogmatics has elaborated and recognised the ability of legal entities forming part of the State or exercising powers endowed by the State to

<sup>60</sup> The Constitutional Court examined in this decision how far the provisions on the protection of data about natural persons can be applied to data about legal entities [34/1994 (VI. 24) *Constitutional Court Decision* 1994, 177, 183].

<sup>61</sup> The example already describes public bodies and institutions as public law persons. This is elaborated in the part meaning of the “Republic of Hungary.” Cf. Stern, K.: *Das Staatsrecht der Bundesrepublik Deutschland*, München, 1988 vol. III/1. 1112. Quoted in Petrétei et al.: *Magyar alkotmányjog III. op. cit.* 27.

<sup>62</sup> A legal entity is public law legal entity, according to the classic, functional definition, if with its ceasing to be, it would be the duty of the state to take over its function.

<sup>63</sup> Martin Pagenkopf in: Sachs, M. (Hrsg.): *Grundgesetz*. München, 4. Aufl. 2007, 104.

<sup>64</sup> Sári, J.: *Alapjogok. Alkotmánytan II. op. cit.* 378.

be entitled to procedural rights;<sup>65</sup> in their relationships pertaining to private law other fundamental rights may also be due to them.<sup>66</sup> The fundamental rights of public law legal entities have been elaborated to the greatest detail in the case of the rights of local governments, which, however, form a special group, since they have rights, but they are also obliged to respect and serve basic rights. This is due to the fact that the government—according to the Constitution and the laws—has duties, which it fulfils as part of the state. CC practice regarding legal capacity is not coherent, though [CC decision 4/1993 (II. 12), CCD 1993, 48, 69; CC decision 37/1994 (VI. 24), CCD 1994, 238, 244; CC decision 56/1996 (XII. 12), CCD 1996, 204, 207]. What is clear, though, is that local governments can be the subjects of fundamental rights. In the case of governmental fundamental rights, we have the right of self-government to which all voters are entitled (by the general test of fundamental rights protection) and the rights of the governments, which are best seen as jurisdictional authorities [CC decision 4/1993 (II. 19), CCD 1993, 48, 69]. In the latter case the CC does not apply the general test of necessity and proportionality; rather it examines whether the regulation that was the object of the complaint would effectively hinder the work of the government.<sup>67</sup>

The Constitution places public bodies into a similar position to the local governments. Economic, labour and professional unions are historically connected to the right of congregation,<sup>68</sup> but today, in certain cases, they are endowed with executive power.<sup>69</sup> They are entitled to the fundamental rights of legal entities, but they also exercise executive power in cases when they, like the State, are responsible for the respect for fundamental rights.

### 2.1.2 *The inviolability and inalienability of basic rights*

This phrase (inviolability and inalienability) is a remnant of Act I of 1946, and a term also from international treaties. Those who negotiated at the Round

<sup>65</sup> In certain cases, even to the content of rights, e.g. in the case of the radio or TV, the liberty of the media; or, with the universities, the freedom of science. Klein 73, and also 67 on the German context.

<sup>66</sup> Stern, K.: *Das Staatsrecht der Bundesrepublik Deutschland*. Band III/1. Allgemeine Lehren der Grundrechte. München, 1988. 1061–1066. quoted in Petrétei et al.: *Magyar alkotmányjog III. op. cit.* 27.

<sup>67</sup> Sári: *Alapjogok. Alkotmánytan II. op. cit.* 389.

<sup>68</sup> *Ibid.* 53.

<sup>69</sup> Public bodies have tasks related to their members or the activities of their members. E.g. The Hungarian Academy of Sciences, economic or professional chambers. Cf. *Ibid.* 390.

Table on the eve on the democratic transformation returned to this document in order to make up for the shortages in respecting human rights.<sup>70</sup>

In the great declaration of the French Revolution (*Déclaration de droit de l'homme et du citoyen*) the inalienability of rights simply meant that human beings cannot renounce their rights.<sup>71</sup> Historically and politically both concepts have had mostly declarative values, they nevertheless have a basic significance as far as positive law is concerned. The notions of inalienability and inviolability have their roots in the philosophy of human rights; their positive meaning in constitutional law indicates the type of force human rights have. These notions imply that neither the constituent nor the legislator have power over the fundamental rights. The two concepts are not synonymous. Inalienability does not imply inviolability: inalienability is a lesser form of protection, as regards grievances, than inviolability. The latter meaning that the right can not only not be withdrawn, but it cannot be violated either.

The two adjectives, however, appear as one in the hermeneutic practice of the CC; they are applied without distinctions, and they add nothing to the criteria of limiting rights set out in Article 8 paragraph (2), they are seen rather as their explanation and their foundation. One way of interpreting their role is by seeing the provision regarding essential content in Article 8 paragraph (2) as flowing from the provision for inviolability and inalienability in Article 8 paragraph (1).<sup>72</sup> Fundamental rights, in this interpretation, are limitable, as long as the limitation does not withdraw their essential content; rights, thus, are inalienable, and cannot be withdrawn altogether.

The other way of reading the adjectives in Article 8 paragraph (1) suggests that the human rights defined in this paragraph do not refer, immediately, to the limited right, but to the human right recognized by the Constitution (as inviolable and inalienable) in its originality and fullness. Article 8 paragraph (2) of the Constitution, then narrows the content of Article 8 paragraph (1). The disparity between Article 8 paragraph (1) and (2) can be resolved by separating the recognition of the full (inviolable and inalienable) human rights

<sup>70</sup> Sólyom: Az Alkotmány emberi jogi generálklauzulájához vezető út. *op. cit.* 43. He believes that this wording is reminiscent of the European Convention on Human Rights (inherent rights) as well, and clearly points to the roots in natural rights. Article 8 coincides with the wording of the GG as well, although there is no proof that it would have been a direct influence.

<sup>71</sup> Sajó: *Az önkorlátozó hatalom. op. cit.* 338. fn.

<sup>72</sup> Bragyova, A.: Vannak-e megváltoztathatatlan normák az alkotmányban? [Are there unchangeable norms in the Constitution?] In: Bragyova (ed.): *Ünnepi Tanulmányok Holló András... op. cit.* 82–84.

from the thesis according to which human rights are usually limited, when they become full rights, codified by the State.

The seeming disparity between Article 8 paragraphs (1) and (2) of the Constitution (the problem that human rights are, on the one hand, inviolable and inalienable, and on the other subject to limitations, with the exception of the essential content) can be resolved. Whichever above interpretation is accepted, the criteria of the inviolability and inalienability of human rights has, apart from its declarative value, positive legal content.

Article 8 paragraph (1) of the Constitution contains the expressions “The Republic of Hungary,” and “the State,” both of which are used in a loose sense in CC practice. All bodies endowed with executive power are parts of the State, and are consequently obliged by constitutional law to recognise and protect the fundamental rights.

German legal literature suggests that executive bodies can only interfere with interests protected by basic rights, if they are legal authorised to do so. This applies both to (governmental) decisions following legal regulations, and norm-creation by public authorities. The Constitution’s orders that protect basic rights can only have direct implications for the work of the executive bodies, if the formal-legal authorisation leaves space for action, in which they have to comply independently with the requirements related to the limitation of fundamental rights.<sup>73</sup>

The commentary to the German constitution suggests that the same norms apply at the courts and in the executive. In limiting fundamental rights they have to respect—as part of the general requirements—the guarantee of essential contents. The legal principles elaborated in the process of law-development, irrespective of the treatment of the fundamental-rights-limiting “judge’s right,” are restricted in the same way as procedural rights-creation is, thus, the guarantee of essential contents applies in the same way too.<sup>74</sup> The utmost limits of fundamental rights limitation accordingly refer indirectly to judicature as well, since all laws infringing on essential content are classified as unconstitutional. Disregarding the effects of the breach of the constitution on the judicature, the really significant possibility is that through the interpretation of the constitution the court should avoid altering the essential contents of a fundamental right. The same applies to the obligation of the protection of institutions through the constitution.<sup>75</sup>

<sup>73</sup> Pagenkopf 733.

<sup>74</sup> *Ibid.* para 37. 733–734.

<sup>75</sup> *Ibid.* para 38. 734.

All considered, the CC has unambiguously declared that it is not merely the State, abstractly considered, that is obliged to respect the basic rights, but all its organs, and every member of the executive have to comply with the constitutional obligations regarding basic rights.<sup>76</sup> The CC claims that it is through these organs that the State fulfils its constitutional duties.

„The democratic functioning of the state includes through the activities of the state and its organs that it fulfils its constitutional obligation to respect and protect fundamental rights. Besides the protection of rights, the obligation of the state is to establish and maintain the functioning of the certain institutions so that they can guarantee fundamental rights irrespective of the claim of the individuals. The breach of the fundamental rights, therefore, cannot be separated from the functioning of the institution.” [36/1992 (VI. 10) CC decision, CCD 1992. 210, 215, 216.]

Primarily it is the task of the legislature, naturally, to actively safeguard the fundamental rights, as the basic rules regarding fundamental rights have to be fixed as laws. Respecting and actively protecting these laws is the part of all organs of the executive.

The strictest liberal concept of the state claims that the state has no other obligation regarding fundamental rights as that of abstaining; what matters is that the organs of the state should in no way infringe upon fundamental rights. More recent constitutional thinking holds, on the contrary, that the state has to actively protect fundamental rights. The institutional concept of fundamental rights, a third option, insists that the protection of fundamental rights has to be present in all areas of the legal system.<sup>77</sup> This last theory sees an all-encompassing institutional framework as the guarantee of the protection of individual fundamental rights. Article 8 paragraph (1) of the Hungarian Constitution declares the obligation to respect and safeguard fundamental rights. CC practice shows, moreover, that the state is objectively obliged, on the basis of

<sup>76</sup> Article 8 paragraph (2) of the Constitution states, unlike its German counterpart, that the requirement of preserving the essential content only refers to fundamental rights regulations set out as laws. Grammatically considered, this suggests, in opposition to the complex interpretation above, that the Constitution restricts, *ab ovo*, the protection of fundamental rights to the activity of the legislative. Béla Pokol believes that the wording of the Constitution is ambiguous here: there is no guideline to what the limitation of fundamental rights refers to, which causes legal uncertainties. Pokol: *Pénz és politika. op. cit.* 115–117.

<sup>77</sup> In almost 90% of the cases the CC decides on the basis of fundamental rights regulations, and only in approximately 10% of the cases does it decide about questions related to the structure of the state. Ádám: *Alkotmányfejlődés és jogállami gyakorlat. op. cit.* 5.



the same paragraph, to protect the institutions, which realises the protection, not subjective, but institutional, of these rights.

The most important fact about Article 8 paragraph (1) of the Constitution is that the state recognises the fundamental human rights. This is where the normative text establishes that these laws exist independently of the state, but are hereby also confirmed by the state. CC practice—analysed above—has not decided whether this recognition is merely a declaration, or whether any specific conclusions flow from it, as regards the obligations of the state. The recognition does refer, nonetheless, to the origins of the fundamental rights, and does thus provide for the possibilities of their limitation by the state. The fact that the state recognises the fundamental rights implies that the system of fundamental rights can in no way be annulled by the state. (See the explication of the expression “inviolable and inalienable” above.)

Not even through a constitutional procedure can the bases of the system of fundamental rights be withdrawn. Although the procedures of the amendment of the constitution are provided for in the Constitution itself [Article 24 paragraph (2)], the 1990s saw major debates regarding the nature of constitutional amendments (summarised as CC decision 1260/B/1997, CCD 1998, 816, 819–826). The majority of the CC claim that the law regarding amendments to the Constitution is special insofar as the CC has no right to examine its content; it can only declare about its (un)constitutionality. The CC decided that the Constitution contains no provision that would make any other provision unchangeable or incapable of losing its effect. (CC decision 39/1996 (IX. 25), CCD 1996, 134, 138).<sup>78</sup> This ruling of the CC notwithstanding, the interpretation—that appeared as a dissenting opinion then—, which sees the first clause of Article 8 paragraph (1) of the Constitution as unchangeable in content is still more convincing.<sup>79</sup> Recognition by the state means that in the relationship between the state and the individual it is always the latter that has priority. The inviolable and inalienable fundamental human rights have to be recognised under whatever circumstances; the amendment that would leave an individual defenceless from the state is unconstitutional.

The essence of these debates can be summarised as follows. Article 77 paragraph (3) of the German GG, which was used as an example in the wording of the Constitution, and which regulates amendments to the constitution, states that in the field of fundamental rights GG Article 1, related to human dignity and the protection of human rights cannot be altered, even through an amend-

<sup>78</sup> Of this debate, see: Bragyova: Vannak-e megváltoztathatatlan normák az alkotmányban? *op. cit.* 65–67.

<sup>79</sup> Cf.: *Ibid.* 77.

ment to the constitution. The German Constitution, in other words, declares that the human right to dignity, an essential element in human rights protection, can under no circumstances be violated. The Hungarian Constitution does not contain this safeguarding passage, and therefore, technically, one could conjecture that every provision can be altered, limited or annulled through an amendment to the Constitution. Even without any explicit constitutional provision, however, what follows from CC practice and its stance regarding essential contents is that the right to life and human dignity cannot be withdrawn; not even through an amendment to the constitution. The recognition of human rights, therefore, results in rendering the essential content of fundamental rights (itself deducible from Article 8 paragraph (1) of the Constitution) in their totality unalterable even to constitutional power.

### 3. From classic restraint to active protection

The second point made in Article 8 paragraph (1) of the Constitution regarding obligations is that the state respects fundamental human rights. Originally and historically, in the constitutional concepts of fundamental rights, this signifies that content, which was the first to appear, namely that the state and the executive organs (placed under obligation by the fundamental rights) must not, either actively or through their passive behaviour, limit fundamental rights. One of the reasons why constitutions and the organs for the protection of fundamental rights came into being was that it needed to be ensured that the Parliament and the other organs endowed with the power of the state do not abuse their prerogatives.<sup>80</sup>

Respect, guaranteed by the state, also means non-interference. Non-interference, in this case implies that the state does not, for its own interests, influence interpersonal relationships, and does not regulate individual behaviour. This does not mean that the state should protect the individual from being limited in his or her rights by another individual: this only means that the state does not limit anyone's rights through interfering with relationships between private persons or legal entities.

<sup>80</sup> In the early phase of modern constitutionality it was held that human rights do not create concrete right for the citizens, it is only a mere promise that these aspects will be taken into account when the laws relating to citizens are enacted. Waldron, J.: *Rights and Majorities: Rousseau Revisited in Majorities and Minorities*. New York, 1990. 52. Quoted in Sajó: *Az önkorlátozó hatalom. op. cit.* 334.

### 3.1 Active “protection” of fundamental rights: subjective protection of rights and the state’s obligation to protect institutions

CC has deduced from Article 8 paragraph (1) of the Constitution that apart from the classic constitutional content, the obligation of restraint, the state has active obligations as well in the fields of fundamental rights protection.<sup>81</sup> This obligation to protect has two parts: (1) to actively guarantee the prevalence of civil rights, and (2) to establish and protect the fundamental right as a legal institution that manifests the prevalence of constitutional values. This second obligation has two parts as well: (1) the creation of the institutional framework for the rights, and (2) making the prevalence of fundamental rights systematic and harmonious.

An important difference between the two aspects of fundamental rights is that the subjective side—whether it demands restraint or action—entails that the individual has a legal claim on the state, whereas the objective side, which ensures the prevalence of values, does not mean that the individual could, in specific cases, demand that the state fulfil its obligation of institutional protection.

State activity is necessary in order that the fundamental rights prevail. This means that civil rights are realised only if the state creates and maintains an institutional framework: first, in terms of the creation of normative provisions on equal position in life, and second, the system of organs, which these provisions bring into being.<sup>82</sup>

In German dogmatics, regarded as exemplary by the CC, basic rights create not merely civil rights, but (using terminology introduced by Carl Schmitt) the objective protection of—as institution-protection (*Institutionsgarantie*)—private

<sup>81</sup> “The question about the roots of the obligation of the state to protect institutions finds its answer in the constitutional concept of the state, and also in the extent to which the functioning of the society and presupposes the services of the state. In the early XIXth century, the formation of the market-economy demanded the restriction of the state with its powers to confer or withhold monopolies. Constitutions that were born in these times clearly object to the state’s and especially the executive’s, recently overcome, interference with economic and private affairs. The Supreme Court of the US originally held that the state has no duty of active protection; though it has altered this view since then. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195–196 (1989) (...) Easter-European countries no longer wanted to eliminate the central role of the state; there would have been nothing, on the short term, to replace state services, anyway. The protective ‘services’ of the state usually survived in the form of constitutional expectations.” Sajó: *Az önkorlátozó hatalom. op. cit.* 349–350.

<sup>82</sup> Cf. Farkas, Z.: Az intézmény fogalma, fedezete és formalitása [The concept, the background and the formality of the institution]. *Miskolci Jogi Szemle* 2 (2007) 33.

law and—as institutional protection (*institutionelle Garantie*)—public law institutions, hence removing these from under the free, unlimited provision of the legislator. The constitutional protection of marriage, family, property and inheritance are good examples. It has to be decided case-by-case whether certain provisions related to fundamental rights provide objective institutional protection.<sup>83</sup> According to Carl Schmitt the state protects certain institutions (both in public and in private law) through constitutional regulation. The aim of the regulation is to make it impossible for these institutions to be annulled by simple laws. Schmitt underlined that institutional protection is not the same as the basic civil rights. These guarantees are structured differently. Basic rights presuppose an individual, whose sphere of liberties is, in principle, unbounded. There is no such presupposition in the case of institutions.<sup>84</sup>

A good example for the CC's understanding of the active obligation of the state can be found in CC decision 64/1991 (XII. 17), which provided for the constitutionality of abortions. This was the first occasion on which the CC stated that the state's obligation to respect and protect fundamental rights means, apart from refraining to violate them, that it is obliged to provide for the conditions in which they can prevail. This implies a complex obligation, manifested above all by duties of legislation.

Institutional protection often appears in the decisions on its own. The CC stated in the ruling on abortion as well that if the embryo is not seen as a human being, then objective, institutional right to live is contrasted with the autonomy of the mother. In the case of the right to a healthy environment, the CC pronounced, likewise, that the fundamental right's institution protecting side is guaranteed, but is not a basis for subjective basic rights. If, in a given case, it is only the state's duty to protect rights that is weighed, then a unique standard is applied, which is given in the text of the specific basic rights. More often, however, what is emphasised is the state's duty to create minimal protection for the legal institution, so that the existence of the institution is never imperilled.<sup>85</sup>

“The constitutional requisite (standard) of institutional protection is not necessity and proportionality, but it serves the constitutional tasks of the institution.” [52/1997 (X. 14) CC Decision, CCD 1997, 333, 344.]

<sup>83</sup> Pieroth, B–Bernhard, Sch.: *Staatsrecht II. Grundrechte*, 19. Aufl., Heideberg, 2003. 19.

<sup>84</sup> Schmitt, C.: *Verfassungslehre*, 9. Aufl. Berlin, 2003. 170–174.

<sup>85</sup> Sólyom, L: *Az alkotmánybíráskodás kezdetei Magyarországon* [The beginnings of constitutional jurisdiction in Hungary]. Budapest, 2001. 422.

The CC believes, in accordance with the German concept of institutional guarantee,<sup>86</sup> that just because a private civil right is not imperilled, that does not mean that fundamental right as an institution is not in danger.<sup>87</sup> The following decisions demonstrate the developing sophistication of this thought. The objective obligation of the state to protect the institutions is usually elaborated without specific reference to Article 8 of the Constitution; it is described, rather, as the content of the given fundamental right. The obligation flows, however, from Article 8 paragraph (1) in the case of all basic rights. In the early decisions of the CC, reference is often made to Article 8 (the source of fundamental rights and the protection of institutions), [CC decision 33/1992 (V. 28), CCD 1992. 188, 190], later on, however, it has increasingly disappeared, and the CC decisions have lived a life of their own.

An early version of the concept of the protection of institutions can be found in CC decision 15/1991 (IV. 13), which states that it follows from the obligation of the state to protect fundamental rights that the risk to personal rights has to be kept to the minimum [CCD 1991. 40, 52]. The obligation of the state to protect the institutions flows, hence, from its obligation to protect fundamental rights. This does not only mean that the state has to refrain from infringing on those rights, but it has to provide for the conditions in which they can prevail. The state has to create the institutional (objective) guarantee of the subjective rights. According to the CC, the guarantee of the prevalence of subjective fundamental rights is the objective obligation to protect the institutions. The CC first declared that in its decision 64/1991 (XII. 10), (CCD 1991. 297, 302–303), and then reaffirmed it in the explanation to the second decision on abortion 48/1998 (XI. 23), (CCD 1998. 333, 340).<sup>88</sup>

<sup>86</sup> “The existence of institutional guarantees is a relatively recent phenomenon only with regard to constitutional rights—the constitution itself, in its totality, is an institutional guarantee with respect to the state—, but there it has a very significant role to play, since many constitutional rights are essentially institutional guarantees (among other things), such as the right to property or the constitutional protection of the family or marriage. It is indifferent, here, whether or not the constitution *explicitly* calls them so.” Bragyova: Vannak-e megváltoztathatatlan normák az alkotmányban? *op. cit.* 69. Emphasis in the original.

<sup>87</sup> In the case of expropriation, for instance, even if the specific decisions fulfil the criteria set out in the constitution, and violate no fundamental right, such decisions may reach a point where they begin to endanger a legal institution, in this case, the right to property. Holló, A.: *Az alkotmányvédelem kialakulása Magyarországon* [The development of the protection of the constitution in Hungary]. Miskolc, 1997. 167.

<sup>88</sup> Balogh, Zs–Holló, A.: *Az értelmezett Alkotmány* [Constitution interpreted]. Budapest, 2005. 207.

It was in connection with the freedom of speech that the CC further elaborated its stance on the objective protection of institutions. The argument is special, but the general concept clearly shines through. The CC stated that

“In addition to the right of the individual to the freedom of expression, Article 61 of the Constitution imposes the duty on the State to secure the conditions for the creation and maintenance of a democratic public opinion. The objective, institutional aspect of the right to the freedom of expression relates not only to the freedom of the press, freedom of education and so on, but also to that aspect of the system of institutions which places the freedom of expression, as a general value, among the other protected values. For this reason, the constitutional boundary of the freedom of expression must be drawn in such a way that in addition to the person's subjective right to the freedom of expression, the formation of public opinion, and its free development—being indispensable values for a democracy—are also considered.” [30/1992 (V. 26) CC Decision, CCD 1992. 167, 171–172.]

The state is obliged, therefore, to harmonise subjective, personal rights, and to protect situations in life in their own complexity. The state is obliged to uphold and manage the whole constitutional order. Only the state can so arrange the laws regulating individual behaviour, that all the legal and institutional conditions of the safeguarding of basic rights are fulfilled, while, at the same time the regulations are in harmony with all the fundamental rights, without the state losing its ability to accomplish all its constitutional tasks. In doing so, the state has to resolve conflicts of interest and harmonise various legal practices. The subjective, personal side of certain fundamental rights is not necessarily correlated with its objective content. The objective protection may extend beyond the subjective right that every citizen enjoys. [CC decision 64/1991 (XII. 17) CCD 1991. 296, 302.]

It is a peculiar phenomenon in Hungarian CC practice that the state's obligation to protect the institutions is conjoined with the protection of values. Nevertheless, as was seen in the explication of the concept of value, there is no such pre-defined system of values as in the German BVerfGE: the objective side of the fundamental rights that connected with the protection of institutions is often identified by the CC with the concept of constitutional value, which the state is obliged to implement. The objective side of specific fundamental rights is, in short, the constitutional value, which cannot be enforced as a subjective (claim) right, but which it is the task of the state to guarantee. There are no constitutional values as separate from the Constitution itself: the objective and subjective sides of the fundamental rights together—as separate

rights and as a unified system—can be called constitutional value, or, alternatively a dynamic system of values.<sup>89</sup>

German constitutional law made a great impact on CC practice in this respect. The BVerfGE strictly separates the subjective and objective elements of fundamental rights. BVerfGE practice shows that the definite, objective system of values, which is manifested by the fundamental rights, and which must prevail in the complete legal system, results in an obligation on the part of the state not only to recognise fundamental human rights in individual cases, but to guarantee their prevalence in general as well. Every single measure of the state—be it legislative or executive—has to respect human rights. The objective side of fundamental rights is not only connected to private rights, it also protects the institutions of constitutionality. The state, for instance, is not only obliged to respect the right to marriage, it also has to protect the institution of marriage. Institution-protection extends, among other things, to property, to the press, to scientific institutions, and to the churches as well. According to the German concept, then, fundamental rights have a double role to play. 1) To protect, as private fundamental rights, certain exceptionally imperilled areas of human liberty. 2) To oblige, as objective principles, the state to generally and institutionally ensure that the conditions of the prevalence of these rights are fulfilled, even in the absence of individual legal grievances.<sup>90</sup> This understanding had a formative influence on Hungarian CC practice as well.

## Summary

Article 8 paragraph (1) makes the protection of fundamental rights a primary obligation. This is not merely a declaration: this rule is the regulative principle of constitutional democracy. This obligation is manifested, for instance, in the CC's elaboration of the specific rules for the limitation of fundamental rights—the coherent system of the protection of fundamental rights—, and in the Constitution's providing, in Article 8 paragraph (4), the standards of declaring a state of emergency. In both cases the respecting and protection of fundamental rights is the dominant factor. The primacy of the obligation means that all other considerations—public interests related to the organisation of the state—are only valid if they do not hinder the state in fulfilling its primary obligation. The protection of fundamental rights being a primary obligation of the state

<sup>89</sup> Constitutional Court decision 47/2007 (VII. 3), *Constitutional Court Decision* July 2007.

<sup>90</sup> Halmai-Tóth: *op. cit.* 103–104.

means, therefore, that fundamental rights are seen as the basic values of the legal system, while constitutional considerations concerning the efficacy of the organs of the state are only secondary.<sup>91</sup>

The CC constantly reaffirms that the state has to establish the conditions suitable for the protection of fundamental rights in such a way as to comply with Article 8 paragraph (1) of the Constitution. This is what makes the adaptation to international standards possible, as well as the creation and preservation of the constitutional state, set out in Article 2 paragraph (1). The CC deduced from the provision on constitutionality that the state has to create the most suitable conditions for the prevalence of the fundamental rights [CC decision 34/1992 (VI. 1), CCD 1992, 192, 201]. This being the primary obligation of the state, the CC's criteria for the limitation of fundamental rights have to conform to the constitutional norms. Further restriction of the limitation of fundamental rights, based on the interpretation of the text of the Constitution, has become necessary, in order that the primacy of fundamental rights remain unaltered. It was in the light of Article 8 paragraph (1) that paragraph (2) had to be interpreted, which excluded seeing the possibility of limiting fundamental rights (until their essential content remains unharmed) as legitimating their unbounded limitation; that would be in conflict with the primary obligation of the state to protect fundamental rights. This is why the CC interpreted the regulation on the limiting of fundamental rights in such a way as to enable the state to limit fundamental rights, only on condition that there is no other way to protect or enforce other fundamental rights, liberties, or constitutional values.

<sup>91</sup> Pokol, B.: Az alapjogok és az „alapjogi” bírászkodás [Fundamental rights and fundamental rights jurisdiction]. *Társadalmi Szemle* 5 (1991) 56–57.