3 The Case of the Hungarian Constitutional Court with Environmental Principles

From Non-Derogation to the Precautionary Approach

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Abstract
Principles influence legislation, implementation and enforcement of the law to a great extent. This is especially the case with those fields of law, which are relatively new and subject to constant changes, such as environmental law. Principles have legal value, among others to fill legal gaps or to assist proper interpretation. It is always expedient to have a high-level judicial forum for legal interpretation at national level this would be a constitutional court or a supreme court. Legal interpretation can be particularly tricky when principles are combined with human rights. Constitutional courts, such as the Hungarian Constitutional Court are the preferred choice for such legal interpretation, since human rights are normally enshrined in the constitutions. In Hungary both the previous (1989) Constitution and the currently effective Fundamental Law of 2011 contain express and rather similar provisions regarding the right to environment, the content of which need clarification. Beside this similarity, the Fundamental Law has several other additional provisions supporting interpretation in the interests of the environment. This paper only presents – as examples of necessary interpretation – two principles to illustrate what the right to environment actually means. These are the non-regression (non-derogation) and the precautionary principles, which will be described both in general and in light of their current Hungarian interpretation. Non-regression (non-derogation) basically represents a decent minimum that should not be contravened, while precautionary principle is more

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in flux, a moving target, focusing on likely consequences, with scientific uncertainty at its core. Both principles will be introduced through the decisions of the Hungarian Constitutional Court.

3.1 30 Years of the Constitutional Court, 25 Years of Highlighting Environmental Rights

2019 marks the 30th anniversary of the establishment of the Constitutional Court of Hungary. The 1949 Constitution was amended in October 1989 in order to create the foundations of democratic change, among others to insert this new institution into the system of public institutions and law. Act XXXII of 1989 on the Constitutional Court entered into force on 30 October 1989. The Court commenced its activity on 1 January 1990. Here I do not wish to discuss neither the history, nor case-law of the Court in detail, but restrict myself to analyzing its practice in the field of environmental rights. More specifically, I shall focus on two major legal principles emerging as constitutional principles of the past 25 years since the first environmental case of the Court was decided in 1994. These two principles aptly illustrate the vision of the Court in connection with the interpretation of the right to environment: *(i)* the non-derogation principle, which has been present already at the very beginning of Hungarian constitutional jurisprudence and still mentioned in almost all environmental related cases. This principle may also be articulated as the minimum, the baseline of requirements, a threshold not to be crossed. Meanwhile, *(ii)* the precautionary principle manifested in 1992 as Principle 15 of the Rio Declaration[1] and enshrined in Article 130r(2) of the Maastricht Treaty at the same year and emerges in the most recent cases of the Court. In contrast with the former principle, the precautionary approach represents a different vision, a moving target, requiring more activity, changing the well-known direction of legal interpretation.

3.2 The Value of Legal Principles in the Field of Environmental Protection

Before going into the details of the Court's practice regarding these principles, it is worth recalling in a nutshell, why legal principles are imperative in the field of environmental law. "The legal principles reflect an overarching concept that environmental protection is a matter of public or common concern."[2] Or from another perspective:

1 The Rio Declaration on Environment and Development, at www.unesco.org/education/pdf/RIO_E.PDF.

2 Alexandre Kiss & Dinah Shelton, *Manual of European Environmental Law*, Grotius Publications, 1993, p. 36.

> "[a] principle 'expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequences'."[3]

Certainly, the most intriguing question is the true legal character of these principles. Although doubts[4] may remain about the binding nature of principles, most legal scholars agree that

> "A principle is undoubtedly a candidate for legal effect, if it is contained in a law or sublegal norm. The legislator must however have intended to give the principle such effect."[5]

De Sadeleer takes a similar approach when considering the significance of principles: they have a guiding, orienting role, beyond their purpose as a theoretical backdrop.[6] The CJEU, placing a general emphasis on the role of principles in connection with the water framework directive, underlined the importance of principles of law in general, including principles of national law:[7]

> "34.[…] In particular, the existence of general principles of constitutional or administrative law may render superfluous transposition by specific legislative or regulatory measures provided, however, that those principles actually ensure the full application of the directive by the national authorities and that, where the relevant provision of the directive seeks to create rights for individuals, the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts."

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3 Philippe Sands, *Principles of International Environmental Law*, Cambridge 2003, p. 233. (referring to the *Gentini* case of 1903).

4 "As regards the principles of Art. 174(2.2) EC, they constitute, in my opinion, general guidelines for Community environmental policy, but not binding rules of law which apply to each individual Community measures; nor do they contain an obligation to take specific measures in favor of the environment." Ludwig Krämer, *EC Environmental Law*, Sixth Edition, Thomson-Sweet and Maxwell, London, 2007, p. 15.

5 Gerd Winter, 'The Legal Nature of Environmental Principle in International, EC and German Law', *in* Richard Macrory *et al.* (eds.), *Principles of European Environmental Law*, Europa Law Publishing, Groningen, 2004, p. 13.

6 Nicolas de Sadeleer, 'Environmental Principles, Modern and Post-modern Law', *in* Id. p. 232.

7 Judgment of 30 November 2006, *Case C-32/05, Commission v. Grand Duchy of Luxemburg*, ECLI:EU:C:2006:749.

3.3 From the 1989 Amendment of the Constitution to the Fundamental Law – The Non-Derogation Principle

After these brief introductory remarks, I come back to the right to environment, mentioned first as a potential human right in Hungary in the first environmental act – Act II of 1976. Section 2(2) reads: "Every citizen has the right to live in an environment worthy of man." This unprecedented provision had never been implemented before or even interpreted by any forum; yet it constitutes the first reference to such a human right in Hungary. Following many years of silence on this issue, the amended Constitution in 1989[8] provided for the right to environment in two separate articles: *(i)* Article 18 stated that "The Hungarian Republic recognizes and implements everybody's right to a healthy environment.", while *(ii)* Article 70/D(2) also mentioned environmental protection as an instrument for safeguarding the right to the highest level of mental and physical health, together with healthy working conditions, the management of the health care system and ensuring the conditions for regular physical training.

Due to their general phrasing, these articles had to be interpreted in order to give them teeth, *i.e.* enforceable legal consequences. The only forum empowered to interpret constitutional provisions such as the ones cited above, was the newly established Constitutional Court. The first and most important case, where the Court interpreted the right to a healthy environment was Decision No. 28/1994. (V. 20.) AB.[9] The case in question concerned a plea of unconstitutionality of statutory provisions that had the potential to curtail nature conservation areas. Furthermore, it threatened natural resources by opening up nature conservation areas for privatization without foreseeing any limitations or obligations to balance environmental interests. The Court stated that although private ownership of nature conservation areas in itself is legal, the act in question was lacking the necessary obligations and limitations on the use of such property.

A major argument was found in environmental rights. According to the Court the level of protection in the field of environment and nature conservation should not be restricted, unless the implementation of other constitutional values or fundamental rights are the issue. Thus, the Court held that there must be a balance between environmental rights and other constitutional values or fundamental rights. The entire decision hinged on the constitutional right for environment.

The decision states that the right to a healthy environment constitutes an obligation for the state to establish and maintain the specific system of institutions to protect this

8 *See* the English translation of the former Hungarian Constitution at www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex2.pdf.

9 Decision No. 28/1994. (V. 20.) AB, ABH 1994, 134, *see* in English at https://huncon-court.hu/uploads/sites/3/2017/11/en_0028_1994.pdf.

right. These legal and organizational institutions are necessary for the implementation of this right as the mere stipulation of the right is far from enough. The decision also emphasizes that the real subject of the right is humanity and nature. This very first environment-related decision also stresses that the level of protection is not at the discretion of the state, since this protection constitutes the foundations of human life and the harm to the environment is usually irreparable. The necessity of a certain level of protection requires a strict legal regime. Consequently, while the state is free to choose from the means and methods of protection, it enjoys no freedom in allowing for any form or even risk of environmental degradation.

One paragraph of the decision explains that prevention takes priority over sanctions in the field of environmental protection. Prevention as a requirement can only be effective in case the legal framework for effective protection is in place. The lack of such preventive measures was one of findings of the decision. As to the merits of the case, it meant that private ownership of nature conservation areas could not be considered unconstitutional in itself, but taken together with the lack of necessary legal institutions to replace the special protection regime guaranteed by the controlled and central management of state ownership, it may well contravene nature conservation interests. Sanctions and mere prohibitions in this situation are insufficient, however, since guarantees to help avoid environmental degradation are lacking. Limiting or risking the given level of protection through unclear privatization rules and property relations, without a system of preventive measures is unconstitutional. This is known as the prohibition of setback or step backwards (non-derogation principle).

Several other decisions could also be mentioned from the Constitutional Court's jurisprudence, such as for example, Decision No. 48/1997. (X. 6.) AB.[10] This case was also related to nature conservation. The Court stated among others that the need to protect natural resources is based on objective conditions. Damage to nature may destroy finite resources, which often cannot be restored. As such, the lack of protection may trigger irreversible processes. Therefore, the qualitative or quantitative adaptation of protection to changing economic and social conditions is not permissible (in contrast with social and cultural rights, where temporary restrictions may later be remedied). The implementation of the right to environment requires not only that the present level of protection is maintained, but also that the state should never take a step backwards in the level of protection, *i.e.* towards liability-based protection instead of preventive measures.

An additional element enshrined in Decision No. 48/1998. (XI. 23.) AB[11] should also be mentioned, conveying the very same message. This decision dealt with the protection

10 Decision No. 48/1997. (X. 6.) AB, ABH 1997, 502.

11 Decision No. 48/1998. (XI. 23.) AB, ABH 1998, 333, *see* in English at https://huncon-court.hu/uploads/sites/3/2017/11/en_0048_1998.pdf.

of fetal life, but at the same time, it made comparisons with other human rights. The Constitutional Court referred to the right to environment as an analogue concept, which is also rooted in the right to life. According to the Court both the right to health and the right to a healthy environment serve the health of future generations. The right to a healthy environment sets forth the duty of the state as a constitutional right. These types of rights preclude any oscillation, unlike for example social rights, the implementation of which may well depend on the wealth and financial capacity of the state at any given time. Meanwhile, other rights, such as the right to environment, may not ebb and flow with changing circumstances.

Some decisions discussed the problems of conflicting human rights, such as the conflict between property rights and the right to environment. In its Decision No. 106/2007 (XII. 20.) AB,[12] the Court examined the possibilities for the constitutional limitation of human rights. The Court underlined that the proportionality/necessity test must be carried out in each and every case, where there is a likelihood of a limitation of a human right. The only constitutional justification for a limitation is the need to protect another fundamental right or to enforce another constitutional objective. An example would be the limitation of property rights, interpreted by the Court "not as an absolute right, since it may be limited in a proportionate way, if warranted by public interest."[13] Limiting property rights may prove to be necessary for the protection of nature conservation interests, as emphasized by the Court in Decision No. 33/2006. (VII. 13.) AB.[14]

3.4 The Non-Derogation Principle in a Comparative Perspective

Before turning to the next stage of Hungarian constitutional development, it is worth examining the principle of non-derogation in general. Pope Francis provided important theoretical underpinnings for this principle:

> "194. […] It is not enough to balance, in the medium term, the protection of nature with financial gain, or the preservation of the environment with progress. Halfway measures simply delay the inevitable disaster. Put simply, it is a matter of redefining our notion of progress. A technological and economic develop-

12 Decision No. 106/2007. (XII. 20.) AB, ABH 2007, 900.
13 Decision No. 64/1993. (XII. 22.) AB, ABH 1993, 373.
14 Decision No. 33/2006. (VII. 13.) AB, ABH 2006, 447.

> ment which does not leave in its wake a better world and an integrally higher quality of life cannot be considered progress. […]"[15]

Consequently, halfway legal measures are not acceptable either. The way forward is to combine the above moral concept with the interpretation of the right to environment, if we wish to come closer to the solution.

> "More than 100 constitutions throughout the world currently guarantee a right to a clean and healthy environment, impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources as a national goal."[16]

Thus, the right to a healthy environment as a fundamental concept provides the necessary legal basis for further action. However, it does not suffice to introduce the new right and monitor its implementation, we must also change the ethos of governance, our vision of the world. Environmental protection – and sustainable development in its wider context – may only be realized through the reform of existing governance and regulatory mechanisms. Human rights can only bolster this effort. And as we move towards a human rights concept, regression as a threat immediately comes into focus:

> "Framing environmental protection as a human right eliminates those trade-offs that would lead to retrogression from existing levels of environmental protection or would prevent states from providing a minimum core environmental quality. The human rights perspective thus adds legitimacy to the demand for making environmental protection the primary goal of policymaking. Moreover, there is an international human rights edifice that promotes awareness and offers the possibility of remedies to individuals deprived of these rights. The explicit recognition of a right to a healthy environment might therefore provide new tools for civil society to hold governments accountable for ensuring access to the right."[17]

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15 *Encyclical Letter Laudato Si' of the Holy Father Francis: On Care for Our Common Home*, 2015, at http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

16 Dinah Shelton, 'Whiplash and Backlash – Reflections on a Human Rights Approach to Environmental Protection', *Santa Clara Journal of International Law*, Vol. 13, Issue 1, 2015, p. 17.

17 Rebecca M. Bratspies, 'Do We Need a Human Right to a Healthy Environment?', *Santa Clara Journal of International Law*, Vol. 13, Issue 1, 2015, p. 36.

But what does regression exactly mean and what are its possible consequences? Originally, this principle was not conceived for environmental purposes, but as a principle of constitutional law.[18]

> "The principle of non-derogation holds that there is a core of fundamental rights that may not be infringed or limited, even in an emergency. Although it is often conceded in many constitutions, as it is in international human rights instruments, that the state may derogate from its obligations in an emergency, it is also acknowledged that certain essential protections and rights cannot be derogated from (*i.e.* those protections/obligations are non-derogable). First instance, the right against torture is generally regarded as a principle of *ius cogens* […]"[19]

Turning now to environmental interests, the Report of the Special Rapporteur on the human right to safe drinking water and sanitation[20] may be cited as an example. It reads:

> "14. A retrogressive measure is one that, directly or indirectly, leads to backward steps in the enjoyment of human rights […] 7. There is a clear link between non-regression and sustainability. […] retrogressive steps will perpetuate unsustainable practices and create a constant threat to the full realization of economic, social and cultural rights in general and the rights to water and sanitation in particular."[21]

Non-derogation may also be considered from a more general perspective, that is, the limitation of any right – as set forth, among others, in the EU Charter of Fundamental Rights.[22]

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18 *See e.g.* John C. Jeffries Jr. & Daryl J. Levinson, 'The Non-regression Principle in Constitutional Law', *California Law Review*, Vol. 86, Issue 6, 1998, pp. 1211-1250.

19 Mark Tushnet *et al.* (eds.), *Routledge Handbook of Constitutional Law*, Routledge, 2013, p. 91.

20 Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, A/HRC/24/44, at www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-44_en.pdf.

21 The same report provides a summary of the conditions and the constraints: "15. From a human rights standpoint, retrogressive measures are prohibited if they deliberately interfere with the progressive realization of rights. States must justify such measures according the following criteria: *(a)* There must be a reasonable justification for the steps taken and the subsequent regression in the implementation of rights. The measure must be necessary and proportionate […]; *(b)* In addition to meeting core obligations as a matter of priority, maximum available resources must be fully used to progressively realize all levels of human rights in a way that guards against retrogressive steps or impacts and/or maintaining the status quo […]; *(c)* Measures must not be discriminatory […]; *(d)* Meaningful participation of affected groups and individuals […]; *(e)* Retrogressive measures should be temporary and short term in nature […]; *(f)* There should be accountability mechanisms in place […]; *(g)* The State has the burden of proof regarding compliance with the above criteria."

22 *See* Article 52.

Several similar conditions are listed in the Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR (2001)[23] which may be referred to in the ambit of environmental rights. Finally, similar conditions are enshrined in the Guide on Article 15 ECHR – Derogation in time of emergency.[24]

Prieur made several efforts to elaborate on the merits of non-regression in environmental law. According to Prieur, environmental law is under numerous threats coming from politics, the economy or human nature. The latter means that the huge scope of environmental standards is complex and difficult to understand. Also, regression takes many forms:

> "Internationally, it can take the form of refusing to adhere to universal environmental treaties, boycotting their implementation, or even denouncing them. […] In EU environmental legislation, regression is diffuse and appears the most when certain directives are revised. National environmental legislation is subject to increasing and often insidious regression: changing procedures so as to curtail the rights of the public on the pretext of simplification; repealing or amending environmental rules, thus reducing means of protection or rendering them ineffective. […]"[25]

In Hungarian literature Fodor describes the different types of non-derogation as follows: changes of substantial norms, changes of procedural provisions and changes to organizational structures.[26] In addition, we may also mention a fourth approach, namely, the order of priority. This means that we understand environmental interests as taking priority over other – political, economic, social – interests.

3.5 The Fundamental Law of 2011 and the Environmental Values Enshrined in It

Turning to the current era of the constitutional interpretation of the non-derogation principle, it is worth introducing the new constitutional provision reflecting this principle.

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23 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984), at www.uio.no/studier/emner/jus/human-rights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf.

24 *Guide on Article 15 of the European Convention on Human Rights, Derogation in Time of Emergency*, 2019, at www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf.

25 *See e.g.* Michel Prieur, 'Non-regression in Environmental Law', *Surveys and Perspectives Integrating Environment and Society*, Vol. 5, Issue 2, 2012, pp. 53-54.

26 László Fodor, 'A környezethez való jog dogmatikája napjaink kihívásai tükrében' *Miskolci Jogi Szemle*, Vol. 2, Issue 1, 2007, pp. 5-19.

Probably the most interesting and by far the most significant element of the recent development of the Hungarian legal system is the new Fundamental Law, which entered into force on 1 January 2012. The new Fundamental Law contains more environmental references and a more positive theoretical foundation for the protection of environmental interests than the previous constitutions. The National Avowal (preamble) sets forth three major concepts that are essential from the point of view of the environment: *(i)* national assets or national heritage, extended not only to assets within the boundaries of Hungary, but also in the whole Carpathian basin – there is a certain similarity between the concepts of "common heritage of mankind" and "common concern of humanity"; *(ii)* mention is made of future generations and *(iii)* human dignity, as these may best be protected together with the natural environment and environmental protection in a wider context. One cannot separate human dignity from the fact that humanity forms a part of nature.

The next chapter of the Fundamental Law is entitled "Foundation" including Article P providing a very complex summary of heritage, using the definition in a broad context and referring yet again to future generations:

> "All natural resources, especially arable land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation's common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations."

This article provides a list of the elements of our common heritage, without it being exhaustive, allowing for further elements to be added to the list. A vital question here is whether this legal basis gives rise to obligations or is merely a reference to rights.

"Freedom and Responsibility" is the human rights chapter of the Fundamental Law, containing general civil rights, from among which I would like to mention those which may considered as environmental rights. There are two articles focusing on the right to environment, similar to the provisions of the previous constitution. Article XX is formulated less directly, connecting the protection of the environment to public health. Here, environmental protection is understood as a tool for safeguarding public health. Article XXI is the specific article on environmental rights, the first paragraph of which until recently has been the major legal basis for environmental protection cited by the Constitutional Court: "Hungary shall recognize and enforce the right of every person to a healthy environment." According to the fourth amendment of the Fundamental Law

> "Those decisions of the Constitutional Court which had been issued before the entering into force of the Fundamental Law are repealed. This provision does not have an effect on those legal consequences, evolved by these decisions."

In fact, this means that the Constitutional Court may not legitimately and formally refer to its own reasoning laid down in the abovementioned remarkable decisions, unless a close link between the former and the current constitutional provision is proven. Fortunately, the continuity in the wording of environmental rights is clear and easy to prove. In what follows, I evaluate some new decisions of the Constitutional Court demonstrating this textual relationship.

3.6 The Non-Derogation Principle and the Jurisprudence of the Constitutional Court after 2011

An important environmental decision of the Constitutional Court is Decision No. 16/2015. (VI. 5.) AB, underlining primarily that the level of environmental protection hinges on the efficiency of legal guarantees. According to the decision, even the risk of derogation from the original level of protection is unconstitutional. There are several other elements of the judgment that are worth mentioning, such as the possibility of limiting property rights or the strong interrelationship between the protection of life and the environment. The issue at the core of the case was the use of state-owned land in harmony with nature conservation interests. Normally, agricultural uses are given priority over nature conservation aspects, with no effective guarantee for the latter. In Reasoning [104] the Court pointed out the unbalanced situation, *i.e.* that property interests can receive an immediate and direct protection, while nature conservation interests may only be protected in a reactive, posterior way.

In connection with the non-derogation principle the Court emphasized[27] that the lack of effective implementation or even disregard for nature conservation interests may result in long-term negative externalities, cause expenses or even damage for society, contrary to what is stipulated by Article P(1) and Article XXI(1) of the Fundamental Law.

> "When the legislator gives nature conservation tasks to such an organ which is primarily business oriented, special substantial and procedural guarantees shall also be defined in order to avoid putting nature conservation aims second to primarily profit-making functions."

The Constitutional Court, while a bit hesitant on certain other issues, is relatively active in interpreting the cases involving the right to a healthy environment and is broadening its approach to cover even more aspects than before.

27 Decision No. 16/2015. (VI. 5.) AB, Reasoning [104].

The next in the line of this new trend in Constitutional Court decisions is Decision No. 28/2017. (X. 25.) AB, related again to nature conservation, more specifically to Natura 2000 protection *versus* agricultural uses. According to the Court, some new provisions facilitating agricultural uses limited the opportunities and the efficiency of nature conservation. Meanwhile, these new measures did not mean to set forth any necessary conditions or prerequisites for the protection of other fundamental human rights or constitutional values. The Court did not intervene directly in the regulatory process but restated that the legislator made an omission. Nevertheless, the Court listed several important references, which may be invoked to bolster similar legal arguments. The Court underlined the significance of biodiversity, the special status of Natura 2000 sites, referred to the common heritage of the nation and emphasized yet again the non-regression (or in other words, non-derogation) principle. According to the Court, while environmental protection places an obligation on everyone, the responsibility of the state is much greater, as the state is in a position to create the underlying legal conditions for effective environmental protection.

In this decision the Court also interpreted what the obligation towards future generations means, as articulated in the preamble and Article P of the Fundamental Law. This encompasses a threefold obligation: *(i)* to ensure the chance for having options, *(ii)* to maintain the quality of the environment and *(iii)* to provide the chance for access. All three together shall be interpreted in a way as to protect the interest of future generations. In the given case this meant that a purely economic approach towards the utilization of Natura 2000 sites cannot be accepted. Finally, the Court clearly stated that the state, when making various decisions in connection with nature conservation, must consider the *precautionary principle.* The precautionary principle has been considered as forming part of the constitutional right to a healthy environment. We shall come back to the precautionary principle below.

The next decision worth mentioning is Decision No. 3223/2017. (IX. 25.) AB. While rejecting the motion itself, the Court interpreted the principle of non-derogation or non-derogation in the most comprehensive way. What are the major lessons learnt from more than 20 years of Court's case-law?[28] *(i)* From the very beginning (1994) the core element is the clear duty of the state, not to reduce the level of protection, unless such reduction is unavoidable in order to enforce other constitutional rights or interests; *(ii)* the possible reduction must be tested for proportionality and it must also be necessary for the protection of other constitutional rights; *(iii)* the reason for such requirements is mostly based on the fact that the failure to protect the environment and nature may trigger irreversible processes; *(iv)* therefore, the principles of prevention and precaution must also be taken into consideration, when legal rules are designed; *(v)* the requirement may cover substantive, procedural and organizational provisions, one-by-one or in any combination; *(vi)* the legislator

28 Id. Reasoning [27]-[28].

and those tasked with enforcement must share this long-term vision, reflecting the quality of the given living conditions, extending from codification to planning to cover the different legislative or governance periods; and *(vii)* the principle also governs individual enforcement and administrative actions taken by public authorities.

One of the most recent decisions, Decision No. 13/2018. (IX. 4.) AB is based upon the constitutionality initiative of the President of the Republic, referring to a large extent to the arguments of the Ombudsman for Future Generations. The main issue is water management, more specifically, the unlimited drilling and use of groundwater wells, down to a depth of 80 meters. The ensuing decision combined the references to future generations and the right to environment with the questions of state property or with a growing number of national assets[29] – such as water resources belonging to this scope.

The non-derogation principle is underlined yet again, as being based on the provisions of the Fundamental Law, combined with the precautionary principle. The necessity-proportionality test must be applied in both cases, with the protection of the environment converging towards the protection of various other human rights. Since the proposed law aimed to eliminate the permitting or notification requirements for wells without replacing this with other guarantees, the Court could not accept this regression of protection. The Court also drew attention to the fact that the protection of water resources is a strategic task of the state. The legislator could not point to any other human rights or constitutional interests which could justify the limitation of environmental rights.

3.7 The Precautionary Principle in the Decisions of the Constitutional Court

From the very beginning, prevention has always formed part of the Constitutional Court's environmental jurisprudence, but the precautionary approach has become more prevalent in the past years, after the 2015 revitalization of the case-law of the Court.

The precautionary principle is undoubtedly the most defining principle of environmental protection. It brought about a conceptual change in the general perception reactive legal measures. It was the UNCED in 1992 and Principle 15 of the Rio Declaration[30] that summarized the essence of the precautionary approach:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be

29 Article 38 of the Fundamental Law of Hungary.

30 *See* www.unesco.org/education/pdf/RIO_E.PDF.

> used as a reason for postponing cost-effective measures to prevent environmental degradation."

It is worth stressing that the precautionary principle was already applied by the CJEU in practice[31] before it was officially included in the text of the Maastricht Treaty. Article 130r(2) enshrined the principle, without providing any further guidance.

I do not wish to introduce the complete range of cases and views related to this principle, nevertheless a few basic comments are justified. Perhaps the most well-known case was the so-called *BSE* case,[32] the main consideration underlying it being the likely connection between the BSE-disease of cows and the Creutzfeldt-Jakob disease appearing in humans. The United Kingdom considered the limitation measures of the Commission (export ban) to be extreme. Concisely put:

> "61. In the present case, the publication of new scientific information had established a probable link between a disease affecting cattle in the United Kingdom and a fatal disease affecting humans for which no known cure yet exists.
> […]
> 98. At the time when the contested decision was adopted, there was great uncertainty as to the risks posed by live animals, bovine meat and derived products.
> 99. Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent."

The general nature of the precautionary principle was first pronounced in the *Artegodan* case, referring to it as a general principle,

> "requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests."[33]

31 Judgment of 14 July 1983, *Case C-174/82, Criminal proceedings against Sandoz BV*, ECLI:EU:C:1983:213.
32 Judgment of 5 May 1998, *Case C-180/96, United Kingdom v. Commission*, ECLI:EU:C:1998:192.
33 Judgment of 26 November 2002, *Joint Cases T-74,76,83-85,132,137 & 141/00, Artegodan GmbH and Others v. Commission*, ECLI:EU:T:2002:283, para. 184.

The main reasons underlying the wide use of the precautionary principle are the following:[34]

> "According to the principle, when there are credible threats of harm, precautionary action should be taken, even when full understanding of the effects of a proposed activity is lacking. In other words, the precautionary principle combines the ethical notion of duty to prevent harm with the realities of the limits of scientific understanding. […] The principle is based on recognizing that people have a responsibility to prevent harm and to preserve the natural foundations of life, now and into the future. The needs of future generations of people and other species and the integrity of ecosystems are recognized as being worthy of care and respect. […] Precaution gives priority to protecting these vulnerable systems and requires gratitude, empathy, restraint, humility, respect and compassion."

The major elements of precautionary principle or approach are the following. *(i)* The situation has the potential for a high risk of adverse effects, endangering interests that are commonly accepted to take priority (*e.g.* human health, environment, animal health, or similar); *(ii)* these adverse effects must be serious with the potential for being irreversible; *(iii)* there is a scientific probability, but a lack of full scientific certainty, justifying the need for a risk assessment; *(iv)* the necessary measures should not be unreasonable or discriminatory, but must be effective and proportionate; *(v)* finally, the burden of proof is reversed, the person wishing to carry out an activity must prove that it does not cause harm.

The precautionary principle has been better articulated in Decision No. 27/2017. (X. 25.) AB, strictly connected with its counterpart,[35] both related to issues of land use. Here the Court clearly stated:

> "According to the precautionary principle – widely accepted in environmental law – the state must guarantee that the state of environment is not deteriorated as a consequence of a given measure […]."[36]

Decision No. 13/2018. (IX. 4.) AB has also been discussed above. Here too, as in its earlier decisions, the Court referred to the Fundamental Law, taking its reference to sustainable development seriously, underlining that the state has a great responsibility when dealing with the environmental resources and interests. The Court claims:

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34 Ted Schettler & Carolyn Raffensperger, 'Why Is a Precautionary Approach Needed?', *in* Marco Martuzzi & Joel A. Tickner (eds.), *The Precautionary Principle: Protecting Public Health, The Environment and The Future of Our Children*, WHO Europe, 2004, p. 66.

35 *See* Decision No. 28/2017. (X. 25.) AB.

36 Id. Reasoning [49].

> "The responsibility towards future generations, following from the provisions of the Fundamental Law requires that the legislator evaluate and consider the likely consequences of its measures on the basis of scientific information, according to the principles of prevention and precaution."[37]

According to the Court the non-derogation principle, together with the precautionary principle and prevention have their foundations in the Fundamental Law.

> „[…] in case of measures which formally do not constitute a derogation, but which may influence the state of the environment, the measure is limited by the precautionary principle, according to which it is the constitutional obligation of the legislator to take into consideration when making its decisions those risks which are likely to or will definitely arise […]"[38]

The state shall consider non-derogation on the basis of proportionality and necessity, balanced with the possible enforcement of other rights. The Court also underlined that the repeal of authorization for, or notification of the drilling of wells is only a tool and not the purpose of protection. Consequently, the restriction of the right to a healthy environment was not necessary for the protection of other constitutional rights.[39] The main message in connection with water management is that the state should only manage the underground water supplies, belonging to the common heritage of the nation, in a way that not only the water demand of today, but also that of the future be guaranteed in a sustainable way. "The available water resources can only remain accessible in the future, in case qualitative and quantitative protection is provided for."[40]

The Hungaroring (a racetrack made for Formula 1 races) is a major attraction in Hungary, however, it has several unfavorable consequences for the people living in the neighborhood. The legal background of noise abatement was the subject matter of Decision No. 17/2018. (X. 10.) AB, first summarizing the non-derogation principle.[41] According to the decision, the principle should be interpreted together – 'in unity' – with the principles of precaution and prevention. The Court also foresees that the legislator implements these principles when the possibility of restricting the right to a healthy environment arises. The Court underlined that the principle of non-derogation prohibits those derogations which may lead to the irreversible damage of the environment or nature, while the precautionary principle and prevention examines the risk, *i.e.* the likelihood of any such damage. "The

37 Id. Reasoning [13].
38 Id. Reasoning [20].
39 Id. Reasoning [50].
40 Id. Reasoning [69].
41 Id. Reasoning [87].

constitutional protection of the environment and nature have common roots: both protect the conditions of (human) life."[42] Noise should be understood as a longer process the consequence of which may be the irreparable harm.

Finally, the Court had to deal with the reorganization of the system and competences of public authorities in its Decision No. 4/2019. (III. 7.) AB. This was raised by MPs in 2015, and in my capacity as an ombudsman I also issued a 13-page statement *(amicus curiae)* in 2018, trying to influence the decision. In my opinion the Court did not want to decide against the restructuring, referring to the primary responsibility of the Government to design public administration and applicable procedural provisions. Still, the major question was, how these changes affect the right to a healthy environment, with due consideration the principles of prevention ad precaution.[43]

What is really missing, according to the Court is the lack of a clear reference in the public authorities' decisions to those environmental considerations, which have been taken into account during the procedure.[44] In fact, when all bodies entrusted with protecting the environment are dissolved and integrated into a huge administrative structure, leaving these special interests without specific protection, the necessary momentum may be lost. Thus, the decisions taken must at least refer to environmental interests. The Court took this to be an omission of the legislator, which must be resolved by mid-2019. The legislator must therefore enact provisions governing public authorities' decisions which make it clear that considerations related to the protection of environmental interests or natural resources were examined.[45]

3.8 Concluding Remarks

Principles influence legislation, implementation and enforcement to a great extent, primarily in those fields of law, which are relatively new and subject to constant change – such as environmental law. Principles thus have a legal value, a legal consequence, not only to fill the gaps, but also to assist proper interpretation. It is even more the case if the subject of interpretation is again a relatively wide field itself, a new fundamental right: the right to environment. Principles and human rights require a high-level forum of interpretation, which may either be an international forum – such as the ECtHR or the CJEU – or a national constitutional court or a supreme court. Constitutional courts are preferable, since human rights are generally enshrined in constitutions.

42 Id. Reasoning [91].
43 Id. Reasoning [74].
44 Id. Reasoning [79].
45 Id. Reasoning [93].

The same is true for the Hungarian Constitutional Court, which has a strong mandate, since both the previous (1989) Constitution and the current Fundamental Law contain direct references to the right to environment, the substance of which needs clarification. Also, it is an imperative point that the current constitutional provisions stipulate similar requirements as the former rules, thus, a continuity may easily be proven. Besides this similarity, the Fundamental Law has several other additional references which support interpretation in the interest of the environment.

In this paper I did not want to present all aspects of constitutional interpretation but wanted to focus only on the two extremes of protection: non-derogation on the one hand and precaution on the other. While the first has a longer, 25-year history in Hungarian constitutional jurisprudence, the latter is relatively new, going back only to the second half of the present decade.

Non-derogation represents a decent minimum in this respect, as the main idea is not to allow the actual level of protection to be reduced, or if so, with at least some guarantees, which do not tolerate too much flexibility. Reducing the level or protection must be the exception and should only be done for the sake of other and equal constitutional rights, always in a proportionate manner. So not unrestricted backsliding is allowed. This principle also differentiates between constitutional rights (and the reference to equal rights above substantiates this view): property rights or freedom of enterprise shall not be taken into consideration, as the right to environment is more closely connected to the right to life than to social rights, for example. All this has been unfolded by the Constitutional Court in the past quarter of a century. Still, it does not entail the need for improving the current level of protection. As such, non-derogation is not an active principle, does not constitute a great challenge.

By comparison, the precautionary principle is a much more active principle with a moving target. The limitations of scientific evidence or certainty are always changing. Risk assessments are always improving, tools, methods and experiences are constantly developing. Here those wishing to take risky or potentially dangerous steps, must bear the burden of proof. The precautionary principle as a legal principle is defining for contemporary environmental law, its practical application covering all areas, where the likelihood of extended risk requires intervention. The principle seems to enshrine a 'presumption of guilt' when it comes to risky undertakings. It requires the clarification of underlying conditions and guarantees, with a view to increase the balance between different interests, with the proper application of the principle proportionality. Finally, in the above presented cases, the burden of proof is on the state. With the Constitutional Court taking its first steps into that direction, we may expect a more active role for the Court in protecting the environment in the near future.