4 The Precautionary Principle in the Fundamental Law of Hungary

Judicial Activism or an Inherent Fundamental Principle? An Evaluation of Constitutional Court Decision No. 13/2018. (IX. 4.) AB on the Protection of Groundwater

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Abstract
Acting upon the motion of the President of the Republic, the Constitutional Court of Hungary ruled in its Decision No. 13/2018. (IX. 4.) AB that the regulation which would have allowed establishing new wells up to the depth of 80m without a license or notification was contrary to the Fundamental Law. The Constitutional Court found in its decision that the regulation would endanger the volume and quality of underground water in a way that, considering the precautionary principle, was no longer compatible with the protection of natural resources and cultural artefacts forming the common heritage of the nation as laid down in Article P(1) of the Fundamental Law or Article XXI(1) of the same on the right to a healthy environment. It was in this decision that the Constitutional Court first outlined in detail the constitutional significance of the precautionary principle, with this principle forming the central part of the decision's reasoning. Within the framework of this study I examine whether this decision based on the precautionary principle can be considered the 'extraction' of what is inherently present in the Fundamental Law or on the contrary, whether it was an activist approach imposing the principle on the Fundamental Law.

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4.1 Antecedents of Decision No. 13/2018. (IX. 4.) AB – The Motion of the President of the Republic

On 20 July 2018 the Hungarian Parliament passed an amendment to Act LVII of 1995 on Water Management. The bill aimed to establish regulations that were to enable anyone to construct a well up to the depth of 80m without requiring a license from or a notification to authorities, in order to meet the water demand of their household. The President of the Republic did not sign the bill passed but initiated its preliminary constitutionality review by the Constitutional Court.[1] The President of the Republic was of the opinion that the bill was contrary to the obligation of the protection of water resources forming the common heritage of the nation as laid down in Article P(1) of the Fundamental Law. In particular, it was unconstitutional considering the prohibition of stepping back from an already achieved level of protection (violation of the principle of non-derogation) and the requirements following from the precautionary principle. The legislators failed to explain both in the wording of the bill and its reasoning why the legislation in force had to be amended. Likewise, they failed to formulate guarantees for the protection of drinking water or the preservation of the condition of the environment. The President of the Republic also noted in his motion that, in a statement of principle, the Ombudsman for Future Generations[2] argued against approving the regulation, in addition, eleven NGOs issued a common statement protesting against putting an end to the responsible management of water resources as well as the protection of underground waters.

4.2 The Protection of Environmental and Natural Values in the Fundamental Law

The Constitutional Court established already three years after the Fundamental Law had entered into force that the Fundamental Law further developed the environmental value system and approach of the previous Constitution.[3] According to the National Avowal of the Fundamental Law,

> "We commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear

1 *See* in Hungarian at http://public.mkab.hu/dev/dontesek.nsf/0/cbb2386065131e71c12582da004720cb/$FILE/I_1216_0_2018_ind%C3%ADtv%C3%A1ny.002.pdf/I_1216_0_2018_ind%C3%ADtv%C3%A1ny.pdf.

2 *See* in Hungarian at www.ajbh.hu/documents/10180/2704088/Elvi+%C3%A1ll%C3%A1sfoglal%C3%A1s+a+felsz%C3%ADn+alatti+vizek+v%C3%A9delm%C3%A9ben.pdf.

3 Decision No. 16/2015. (VI. 5.) AB, Reasoning [91].

> responsibility for our descendants; therefore, we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources."

In this respect, the National Avowal also points out that the Fundamental Law "shall be an alliance among Hungarians of the past, present and future." Thus, the National Avowal, too, underlines that the decisions made by governments today will also affect future generations, in view of which current government and legislative decisions must bear the interests of the coming generations in mind. This also means that the provision of the National Avowal cited above establishes an interpretative framework for the Fundamental Law and consequently, for the whole Hungarian legal system. This requires that while considering present needs, one must take into consideration the interests of future generations, too, with equal weight. Article P(1) of the Fundamental Law stipulates:

> "Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

In the case of the natural resources and cultural assets forming the common heritage of the nation[4] Article P(1) clearly specifies the conduct expected of "the State and everyone": their *(i)* protection, *(ii)* maintenance and *(iii)* preservation for future generations. In relation to the preservation of natural resources for future generations it is the responsibility of the current generation to preserve the opportunity of choice, preserve the opportunity of quality and preserve the opportunity of access.[5] These principles help evaluate the interests of current and future generations based on the same aspects and strike a balance between them. Article P(1) of the Fundamental Law is an extremely forward-looking provision in several respects. On the one hand, by taking the concept of common heritage of humanity as a basis it created the category of 'common heritage of the nation', which includes both natural and cultural values. On the other hand, it also set forth that the protection of these values was the responsibility of "the State and everyone", that is, also that of civil society and individual citizens.[6] While this obligation requires natural and legal persons only to respect the regulations in force, the state is expected to clearly identify legal obligations that both the state and private parties must observe to ensure the efficient protection of

4 Decision No. 3104/2017. (V. 8.) AB, Reasoning [37]-[39].
5 Decision No. 28/2017. (X. 25.) AB, Reasoning [33].
6 Decision No. 16/2015. (VI. 5.) AB, Reasoning [92].

values under Article P(1) and their implementation,[7] and finally, to guarantee and, where required, enforce compliance with these regulations.

> "Thus, from Article P of the Fundamental Law there also follows a content benchmark of an absolute nature on the state of natural resources, which sets objective requirements for the prevailing state activity."[8]

4.3 The Decision of the Constitutional Court

The Constitutional Court underlined in its Decision that the comprehensive water rights licensing system that was to be done away with by the law (opening up the opportunity to construct wells up to the depth of 80 meters without a license or notification) was indispensable for the quantitative and qualitative protection of underground waters. It serves the quantitative protection of underground waters that their use should be allowed by authorities only to the extent that does not endanger their regeneration *i.e.* does not result in their overuse. The qualitative protection of underground waters, on the other hand, is facilitated by the licensing system by ensuring the professional construction of individual wells.[9] Legislators mentioned the reduction of bureaucracy and superfluous administrative burden on citizens as the reasons underlying the regulation,[10] which argument was not considered by the Constitutional Court as a constitutional grounds which could justify a step back in the level of protection under Article I(3) of the Fundamental Law.

> "From Article P(1) of the Fundamental Law it follows that the state may manage underground waters as natural resources constituting parts of the common heritage of the nation only in a way that ensures that not only current but also future water use demands can be sustainably met. The water resources currently available can only remain available for future use provided that they are afforded quantitative and qualitative protection."[11]

The Constitutional Court underlined: by creating the opportunity to ignore provisions for the quantitative and qualitative protection of underground waters, the regulation creates a risk of deterioration which, pursuant to the precautionary principle, is incompatible with the Fundamental Law. It follows namely from the precautionary principle that the state

7 Decision No. 28/2017. (X. 25.) AB, Reasoning [30].
8 Id. Reasoning [32].
9 Decision No. 13/2018. (IX. 4.) AB, Reasoning [57]-[58].
10 Id. Reasoning [66].
11 Id. Reasoning [69].

must ensure that measures do not involve any deterioration of the environment as their consequence,[12] and the principle of prevention embodied in prior administrative licensing must have priority over the polluter pays principle, granting the opportunity of retrospective sanctioning.[13] The Constitutional Court found therefore that the contested regulation violated Article P(1) and Article XXI(1) of the Fundamental Law, as a result of which it could not be promulgated as an act.[14]

4.4 'Extraction' as a Technique of the Constitutional Court

Justice András Varga Zs. emphasized in his dissenting opinion that a significant element of the decision was 'extracting' the precautionary principle from the wording of the Fundamental Law.[15] The dissenting opinion establishes the following as regards extraction as a constitutional court technique:

> "There is no doubt that the wording of the Fundamental Law – like any other norm – requires interpretation. Through interpretation it is the obligation of the Constitutional Court to establish what the wording means in general as well as in a particular situation. The interpretation as a text is inevitably longer than the wording of the Fundamental Law. Therefore, it must be applied as restrictively as possible, expanding the original wording of the norm to the least possible extent. Thus, the interpretation may only contain new text elements (interpretation domains, principles) that are so closely related to the rights granted by or other regulations in the Fundamental Law that the wording would not prevail without these."[16]

The main difference of principle between justices of the Constitutional Court supporting the majority decision and those expressing dissenting opinions in relation to it is whether the precautionary principle is 'closely related' to Article P(1) of the Fundamental Law and/or the right to a healthy environment laid down under Article XXI(1), or the Constitutional Court in fact 'made an addition' to the Fundamental Law by its decision in an activist manner.

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12 Decision No. 27/2017. (X. 25.) AB, Reasoning [49].

13 Decision No. 13/2018. (IX. 4.) AB, Reasoning [72].

14 About the decision *see* (in Hungarian) János Ede Szilágyi, 'Az elővigyázatosság elve és a magyar alkotmánybírósági gyakorlat – Szellem a palackból avagy alkotmánybírósági magas labda az alkotmányrevízióhoz', *Miskolci Jogi Szemle*, Vol. 13, Issue 2, 2018, pp. 76-91.

15 Decision No. 13/2018. (IX. 4.) AB, dissenting opinion by András Varga Zs., [133].

16 Id. [134].

The extraction technique of constitutional interpretation in the practice of the Constitutional Court is summarized in the dissenting opinion of Béla Pokol to Decision No. 8/2014. (III. 20.) AB as follows:

> "if the extraction technique was used only for making certain abstract constitutional values or fundamental principles more specific (*i.e.* more specific content was fleshed out from abstract values and principles while the scope was not enlarged by adding new areas), no fault could be found with it."[17]

At the same time, Pokol finds the statement in the Decision "[t]he question what rights should be understood as 'rights enshrined in the Fundamental Law' shall be determined by the case-law of the Constitutional Court"[18] unacceptable as, in his view, after the Fundamental Law took effect the Constitutional Court may only interpret the Fundamental Law but cannot not add to it and, in particular, it cannot declare any rights 'constitutionally enshrined' in case these are not explicitly included or specified in the Fundamental Law as such.

There are five major areas of constitutional activism specified in scholarly literature: *(i)* striking down arguably constitutional actions of other branches of power; *(ii)* ignoring precedent; *(iii)* judicial legislation; *(iv)* departure from accepted interpretive methodology; and *(v)* result-oriented judging.[19] Based on these areas, it is worth considering the Constitutional Court's approach to the precautionary principle. Is Decision No. 13/2018. (IX. 4.) AB in fact activist, as outlined in the dissenting opinions to the decision, or on the contrary: did it merely flesh out content clearly inherent in the Fundamental Law, making it apparent to everyone?

4.4.1 Striking Down Arguably Constitutional Actions of Other Branches of Power

In my view, the decision of another branch of power (be it the legislative or the judiciary) may be considered 'arguably constitutional' if even in the opinion of a reasonable person it violates some provision of the Fundamental Law beyond doubt.[20] In this context it is worth quoting the dissenting opinion of Antonin Scalia in *Casey*,[21] according to which:

17 Decision No. 8/2014. (III. 20.) AB, dissenting opinion by Béla Pokol, [146].
18 Id. Reasoning [64]
19 Keenan D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"', *California Law Review*, Vol. 92, Issue 5, 2004, pp. 1463-1476.
20 From the practice of the US Supreme Court *see e.g. Lochner v. New York*, dissenting opinion by Oliver Wendell Holmes, 198 U.S. 45, 75-76.
21 505 U.S. 833.

> "A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a »liberty« in the absolute sense."[22]

In this respect the benchmark before the Constitutional Court is the test of unconstitutionality 'beyond doubt'. The consistent case-law of the Constitutional Court obviously meets this test on the whole and in every case where the Court sees the opportunity to do so, it acts by 'keeping the law in force'.[23] Where, however, a legal provision can be interpreted both in compliance with and contrary to the constitution (Fundamental Law), the Constitutional Court establishes by virtue of Section 46(3) of the Act on the Constitutional Court in a constitutional requirement

> "those constitutional requirements which originate from the regulation of the Fundamental Law and which enforce the constitutional requirements of the Fundamental Law with which the application of the examined legal regulation or the legal regulation applicable in court proceedings must comply."

In cases where the regulation under scrutiny violates the constitution (Fundamental Law) not because of its substance but because of its clearly identifiable defects, the Constitutional Court may by virtue of Section 46(1) of the Act on the Constitutional Court declare an omission on the part of the lawmaker. This means a violation of the Fundamental Law, and the Constitutional Court shall call upon the body that had committed the omission to perform its task, setting a deadline for adopting the new regulation.

In my view, this was not the case in the case in question, which is clearly laid down in the decision.

> "Considering namely the findings with regard to the significance of underground waters and the [role] of the licensing procedure [related to] the quantitative and qualitative protection of underground waters, it is not doing away with the licensing system but its absolute retention and efficient implementation that can be considered indispensable for the implementation of the right laid down under Articles P(1) and XXI(1) of the Fundamental Law. It follows namely from Article P(1) of the Fundamental Law that the state may manage underground waters as natural resources forming the common heritage of the nation only in a way that ensures the sustainable meeting of not only current water needs but those that may arise in the future as well. And the water resources

22 505 U.S. 980.

23 *See e.g.* Decision No. 20/2019. (VI. 26.) AB, Reasoning [66].

> currently available will remain usable also in the future provided they are given quantitative and qualitative protection. Regulation making it possible in the case of an unspecified range of use of underground waters that use may proceed without the official notification of or control by authorities, does not meet this requirement […]."[24]

All this means that the Constitutional Court provided, in my view, a straightforward reasoning in its decision as to why they considered the regulation to be unconstitutional beyond doubt and why there was no room for either setting a constitutional requirement or declaring an omission on the part of the lawmaker.

4.4.2 Ignoring Precedent

Provisions of the Fundamental Law – due to their concise nature in the first place – often allow for several different interpretations. In such cases it is a reasonable expectation that the (constitutional) judicial body concerned should interpret the same norm the same way in similar cases later on, or in the case they deviate from their consistent interpretation, should clearly and explicitly state the reasons for such a departure. Predictable decision-making not only enhances the prestige of the body concerned but is also an expectation following from the principles of constitutionality and legal certainty and the rule of law [as laid down under Article B(1) of the Fundamental Law of Hungary].

Formally the Hungarian Constitutional Court is not a precedent-court, but in practice (similarly to other courts) in the course of its decision-making it takes its earlier decisions into account. This is also supported by Section 41(6) of the Rules of Procedure of the Constitutional Court: "The rapporteur shall indicate any intention to deter from the established judicial practice of the Constitutional Court and justify its necessity." The same conclusion can be drawn from the fourth amendment of the Fundamental Law, which stipulates the following:

> "The decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions."

By way of this provision the constitution-making power intended to avoid that in the process of interpreting the new Fundamental Law the Constitutional Court be bound by statements of principle made in relation to the former Constitution. According to the

24 Decision No. 13/2018. (IX. 4.) AB, Reasoning [69].

scholarly literature precedent-based decision-making involves a justification obligation for the decision-making forum: *(i)* if there is a precedent rule applicable in the case concerned, it must be applied; and *(ii)* the intention to refrain from applying the precedent rule for any reason involves the obligation to provide justification for it.[25] The reason for deviating from precedent may either be to overrule it or the case concerned is in fact in essential aspects different from the precedent case and the precedent rule is therefore not applicable. As long as it is part of everyday (constitutional) judicial practice to establish that the earlier rule is not applicable in the latter case due to significant factual differences between the two cases, explicit deviation from the earlier precedent invariably amounts to judicial activism. Probably the best-known example of deviating from earlier precedent would be the segregation practice of the US Supreme Court. In the *Plessy v. Ferguson* case[26] in 1896 the Supreme Court explicitly stipulated that the separate but equal doctrine was in compliance with the Constitution. In the *Brown v. Board of Education*[27] case of 1954, however, the Supreme Court explicitly stipulated that racial segregation at public schools in itself involved unequal opportunities and thereby violated the 14th Amendment to the Constitution.

In its Decision No. 13/2018. (IX. 4.) AB the Constitutional Court did not ignore its own earlier practice, for two reasons. On the one hand, the mere fact that the body bases its decision on a principle that it did not explicitly take into consideration previously would mean deviation from earlier precedent only if the Constitutional Court had explicitly stipulated that the precautionary principle had no constitutional relevance. On the other hand, although it is undoubtedly true that the Constitutional Court evaluated the precautionary principle in its entirety only in this decision, it in fact already made mention of the precautionary principle in previous cases concerning similar subjects.

The substance of the precautionary principle already appeared in Decision No. 16/2015. (VI. 5.) AB where the Constitutional Court found:

> "The circumstance that certain earlier prevailing and clearly identifiable scopes of authority granted by legal provisions are now missing from the regulatory environment and because of that certain duties remain unperformed results in a reduced level of legislative protection even if this involves 'only' a risk of deterioration in nature."[28]

25 Frederick Schauer, 'Precedent', *Stanford Law Review*, Vol. 39, Issue 3, 1987, pp. 580-581.
26 *Plessy v. Ferguson*, 163 U.S. 537.
27 *Brown v. Board of Education*, 347 U.S. 483.
28 Decision No. 16/2015. (VI. 5.) AB, Reasoning [110].

In this case the Constitutional Court had to evaluate the regulation according to which the right to manage nature protection areas was transferred from national parks (*i.e.* institutions operating with nature conservation purposes specifically) to the National Land Fund operating on a business basis. The Constitutional Court found that the amendment itself involved the risk that the level of environmental protection would be reduced by becoming less efficient compared to the former level – which basically corresponds with the precautionary principle. Furthermore, the precautionary principle was clearly formulated in Decision No. 3292/2017. (XI. 20.) and Order No. 3374/2017. (XII. 22.) AB, while Decision No. 3223/2017. (IX. 25.) AB stated that

> "The primary justification for non-derogation as a regulatory benchmark is that the failure to protect nature and the environment may launch irreversible processes, and thus legislation on environment protection is only possible by considering the principles of precaution and prevention."[29]

Similar definitions were included in Decisions No. 27/2017. (X. 25.) AB and No. 28/2017. (X. 25.) AB, according to which

> "For the sake of the protection of the environment […] legislators must also keep the precautionary principle in mind, by virtue of which the state must certify – also taking scientific uncertainty into consideration – that a certain measure will by no means involve a deterioration in the condition of the environment as a consequence."[30]

In my view it can clearly be established on the basis of these examples that Decision No. 13/2018. (IX. 4.) AB only completed the 'extraction' of the precautionary principle, and by no means departed from the earlier case law of the Constitutional Court.

4.4.3 Judicial Legislation

In a certain sense, judicial legislation may be considered as the opposite of "striking down arguably constitutional actions". While, however, striking down arguably constitutional actions on the part of the Constitutional Court has negative effects (it results in the annulment of some legislative act or judicial decision), the direction of judicial legislation

29 Decision No. 3223/2017. (IX. 25.) AB, Reasoning [27].
30 Decision No. 28/2017. (X. 25.) AB, Reasoning [75].

is inevitably positive, and as a result of the Constitutional Court decision the norm concerned is given a new meaning that it did not have before.

Judicial legislation may emerge in two respects in Constitutional Court proceedings. On the one hand, when the Constitutional Court adopts a constitutional requirement or when it uses the instrument of so-called mosaic annulment. When the Constitutional Court establishes – primarily in relation to Article XV of the Fundamental Law – the discriminative nature of a provision, it is difficult to draw the line between judicial legislation meaning activism or interpretation by the Constitutional Court. It was in 2019, for instance, that the Constitutional Court dealt with the requirements of old-age benefits for permanent carers as a specific Hungarian provision of social security law. It is pensioners who cared for their permanently ill or seriously disabled child in their own households for at least 20 years who are entitled to the benefit. The Constitutional Court established in its decision that the legislator's exclusion from the benefit of carers who have more than one disabled child and cared for them for less than 20 years individually but for at least 20 years altogether was contrary to the Fundamental Law. The Constitutional Court also ruled that the provision which excluded carers from the benefit who, due to the date of birth or death of their disabled child, were unable to use certain state provisions that did not actually exist at the time concerned, violated the Fundamental Law.[31] Based on a rigid interpretation of the Constitutional Court's jurisdiction, the Court would only have had jurisdiction in this case to choose between the absolute annulment of the rule (abolishing thereby the old-age benefit for permanent carers) or the violation of the Fundamental Law manifested in the omission. According to the dissenting opinion of justice András Varga Zs.

> "The Constitutional Court may annul an existing regulation due to its violation of the Fundamental Law, may establish that the legislator caused a violation of the Fundamental Law manifested in an omission or where applicable establish in the course of the implementation of a regulation the requirements following from the Fundamental Law, which is binding for courts. It may, on the other hand, not stipulate what a regulation must be like and it may in particular not change the substance of a regulation by including provisions reflecting to its own conviction. […] A requirement may not become a new rule."[32]

While I fully agree with this statement, it is a question of principle regarding jurisdiction whether the Constitutional Court has the authority to annul elements of a regulation violating the Fundamental Law, and at the same time render the rest of the regulation in force constitutional. In my view, the jurisdiction of the Constitutional Court should be examined

31 Decision No. 25/2019. (VII. 23.) AB.

32 Id. dissenting opinion by András Varga Zs., [98]-[99].

case by case in this respect. If the regulation that stays in force as a result of the Constitutional Court decision is in harmony with the objective specified by the legislator which is clearly identifiable, the Constitutional Court does not in fact make new law but only remedies the 'legislative error', as was the case in Decision No. 25/2019. (VII. 23.) AB. Similarly if in the field of environmental law, in compliance with the principle of non-derogation directly following from the Fundamental Law, the Constitutional Court keeps the new regulation in force either by mosaic annulment or by applying a constitutional requirement in a way essentially applying *restitutio in integrum*. This way, the Constitutional Court restores an earlier status of the regulation, which is once again not a case of making a new law.

Another aspect of judicial legislation may arise in relation to Decision No. 13/2018. (IX. 4.) AB, namely that the Constitutional Court 'extracted' the precautionary principle from the Fundamental Law in a way that was actually not included in the law. In this approach the argumentation that the Constitutional Court only 'completed' the extraction of the principle does not hold water either, since the problem arose in connection with the Constitutional Court's approach to the wording of the Fundamental Law rather than to its own earlier decisions. Thus, the question is whether by 'extracting' the precautionary principle the Constitutional Court actually derived a new right from the Fundamental Law (for which it had no jurisdiction), or whether it performed the constitutional interpretation within the boundaries of its jurisdiction. In its already cited Decision No. 28/2017. (X. 25.) AB the Constitutional Court established with reference to the precautionary principle that

> "The precautionary principle is recognized and applied in international law (thus especially the Convention on Biological Diversity, the United Nations Framework Agreement on Climate Change promulgated by Act LXXXII of 1995, the Cartagena Protocol of the Convention on Biological Diversity promulgated by Act CIX of 2004), in international case law [ECHR, *Tatar v. Romania* (67021/01), 27 January 2009)], in EU law (especially Article 191 TFEU) as well as in Hungarian law (Act LIII of 1995 on the General Rules of Environmental Protection)."[33]

It is not mentioned in the Constitutional Court decision, but the EU practice related to the precautionary principle is especially significant.[34] Environmental law itself means the totality of norms that target the precautionary use of the environment and the prevention,

33 Decision No. 28/2017. (X. 25.) AB, Reasoning [75].

34 *See e.g.* Judgment of 11 September 2002, *Case T-13/99, Pfizer Animal Health SA v. Council of the European Union*, ECLI:EU:T:2002:209; Judgment of 26 November 2002, *Case T-74/00, Artegodan GmbH v. Commission*, ECLI:EU:T:2002:283.

mitigation and remedy of the consequences of human activity (or inactivity), as well as the improvement of the condition of the environment.[35]

In relation to Article P(1) of the Fundamental Law reference should be made to the reasoning of the Fundamental Law in order to directly identify the legislator's intention. According to this, Article P

> "[d]eclares that Hungary shall protect and preserve the healthy environment. Thereby it includes as a new element in the Fundamental Law the requirement of sustainability, which sets a course for the state and the economy for the responsible management of environmental values. It specifically highlights Hungary's own environmental values as well as the values of Hungarian culture, making the protection of which everybody's obligation for the sake of preservation for future generations."

The preservation for future generations of resources forming the common heritage of the nation (including underground waters) can only be realized if, as a result of the current generation's decisions resources remain available in sufficient quantity and quality for future generations. This means that respect for the fair interests of future generations sets absolute restrictions on the management of resources.[36] This is only possible if the legislator evaluates and considers "the expected impact of their respective measures on the basis of scientific knowledge, in compliance with the principles of precaution and prevention".[37] All this means at the same time that the precautionary principle undoubtedly forms a part of Article P(1) and thus, in relation to Article P, the Constitutional Court did not actually make new law by 'extracting' the precautionary principle from this article.

The situation is similar in the case of the right to a healthy environment under Article XXI(1). Already in its Decision No. 28/1994. (V. 20.) AB, the Constitutional Court pointed out that

> "the right to environment protection […] is primarily independent institutional protection in its own right, *i.e.* a specific fundamental right whose objective, institutional protection element is overwhelming and decisive. The right to the environment raises the guarantees for the performance of the state's environment protection obligations, including setting conditions for cutting back the attained level of protection of the environment, to the level of fundamental

35 Gergely Horváth, 'Az Alaptörvény környezetjogi előírásai', *in* Katalin Szoboszlai-Kiss & Gergely Deli (eds.), *Tanulmányok a 70 éves Bihari Mihály tiszteletére*, Győr, 2013, p. 225.

36 Decision No. 28/2017. (X. 25.) AB, Reasoning [33].

37 Decision No. 13/2018. (IX. 4.) AB, Reasoning [13].

> rights. Owing to the specific features of this right, all the duties that the state performs through the vehicle of protecting substantive rights in other areas must be met in this field by way legislative and organizational guarantees."[38]

After the Fundamental Law entered into force, in Decision No. 3068/2013. (III. 14.) AB the Constitutional Court established that

> "[t]he wording of the Fundamental Law with respect to the right to a healthy environment is identical with the wording of the Constitution, therefore in the interpretation of the right to a healthy environment the statements made in previous decisions of the Constitutional Court in the course of interpreting the right to a healthy environment shall be regarded as authoritative."[39]

This also means that the Constitutional Court has a consistent practice with respect to the fact that the precautionary principle as an element of performing the state obligation of environmental protection constitutes in accordance with the consistent practice of the Constitutional Court, by virtue of Article XXI(1), a part of the right to a healthy environment. Its 'extraction' from Article XXI(1) cannot be considered as an introduction of a new obligation formerly not included in the Fundamental Law, because it constitutes an integral part of the state obligation of environmental protection. A regulation that ignores the major fundamental rules governing environmental protection cannot be suitable for the preservation of the environment or for meeting the objective obligations of the state directly arising from the Fundamental Law.

Considering all these aspects it can be established that the explicit emergence of the precautionary principle in the reasoning of Decision No. 13/2018. (IX. 4.) AB cannot be considered as legislation by the Constitutional Court relative to the wording of the Fundamental Law.

4.4.4 Departure from Accepted Interpretative Methodology

Several studies in scholarly literature analyze what 'accepted interpretative methodologies' are.[40] While the respective authors' approaches vary already in the number of the interpre-

38 Decision No. 28/1994. (V. 20.) AB, ABH 1994, 134, 138.

39 Decision No. 3068/2013. (III. 14.) AB, Reasoning [46].

40 *See e.g.* Carl Friedrich von Savigny, *Das System des hautigen Römischen Rechts*, Veit, Berlin, 1840, pp. 213-214; Robert Samuel Summers & Michele Taruffo, 'Interpretation and Comparative Analysis', *in* Donald Neil McCormick & Robert Samuel Summers (eds.), *Interpreting Statutes*, Dartmouth, Aldershot, 1991, pp. 464-465; from the Hungarian literature *see e.g.* Béla Pokol, *Jogelmélet. Társadalomtudományi trilógia II.*, Századvég, Budapest, 2005; András Jakab, 'A bírói jogértelmezés az Alaptörvény tükrében', *Jogesetek Mag-*

tative methodologies, it can be pointed out in general that the grammatical, historical, logical, systematic, teleological and practical interpretations are all considered as generally accepted interpretative methods in the scientific literature.

Article 28 of the Fundamental Law of Hungary stipulates:

> "In the course of the application of law, courts shall interpret the text of legal regulations primarily in accordance with their purposes and with the Fundamental Law. When establishing the purpose of a legal regulation, the preamble of the legal regulation and the reasoning of the motion for establishing or amending the law shall be considered. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good."

In its Decision No. 2/2019. (III. 5.) AB the Constitutional Court also underlined in relation to the interpretation of the Fundamental Law that "In the course of the interpretation of the Fundamental Law the Constitutional Court also keeps in mind the obligations following from EU membership as well as international agreements."[41]

The above also means that in the course of interpreting the Fundamental Law and on the basis of regulations in force grammatical, logical, systematic and teleological interpretations certainly qualify as 'accepted interpretative methodologies', which means that the application of these interpretative methods amount to constitutional activism only in absolutely extreme cases.

In relation to the precautionary principle, in its Decision No. 13/2018. (IX. 4.) AB the Constitutional Court referred to its reasoning related to the draft and reasoning of the Fundamental Law[42] (teleological and historical interpretation), the meaning of the precautionary principle in international law, EU law and Hungarian law[43] (systematic interpretation), as well as the earlier case-law of the Constitutional Court as regards the precautionary principle[44] (practical interpretation), in view of which we cannot speak of activism, in my opinion, with reference to either the 'extraction' of the precautionary principle or the meaning assigned to this principle. On the contrary: the Constitutional Court did in fact

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yarázata, 2011/4, pp. 86-94; Zoltán Tóth J., 'A dogmatikai, a logikai és a jogirodalmi értelmezés a magyar felsőbírósági gyakorlatban', *MTA Law Working Papers*, 2015/17.

41 Decision No. 2/2019. (III. 5.) AB, Reasoning [38].

42 Decision No. 13/2018. (IX. 4.) AB, Reasoning [13].

43 Decision No. 28/2017. (X. 25.) AB, Reasoning [75]; Decision No. 13/2018. (IX. 4.) AB, concurring opinion by Ágnes Czine, [83].

44 Decision No. 13/2018. (IX. 4.) AB, Reasoning [20].

use the accepted interpretative methodologies with reference to both Article P(1) and Article XXI(1).

4.4.5 Result-Oriented Judging

In several respects result-oriented adjudication may be the most suitable category for evaluating the activism of a constitutional or a regular court.[45] Result-oriented adjudication is characterized by the proceeding court establishing its jurisdiction or lack of jurisdiction in a case in view of the result to be attained. Result-oriented adjudication can only be interpreted in relation to activism in the so-called 'twilight zone',[46] *i.e.* in cases where both the Fundamental Law and the Act on the Constitutional Court are silent on whether the Constitutional Court has jurisdiction in a case or what legal consequences the Constitutional Court may establish. In relation to cases where the Fundamental Law or the Act on the Constitutional Court clearly lay down the framework of the proceedings, activism does not come arise.

From the case-law of the Hungarian Constitutional Court prior to the entry into force of the Fundamental Law, an example for result-oriented adjudication is Decision No. 42/2005. (XI. 14.) AB where the Constitutional Court established its jurisdiction for reviewing decisions on the uniformity of law made by the Supreme Court of Hungary despite the fact that its jurisdiction had not been specified either in the former Constitution or in the former Act on the Constitutional Court.[47] From among the decisions after the Fundamental Law took effect, the Constitutional Court's interpretation of its jurisdiction in relation to EU law may be mentioned as an example for result-oriented adjudication. Although neither the Fundamental Law, nor the Act on the Constitutional Court empowers the Constitutional Court to examine EU law, "the Founding Treaties qualify as Hungary's international obligations"[48] and thus, via these international law commitments the Constitutional Court has, at least on a theoretical level, the power to examine certain issues related to EU law.

At the same time, Decision No. 13/2018. (IX. 4.) AB can hardly be regarded as an example for result-oriented adjudication, as there are no doubts surrounding either the jurisdictional rule constituting the basis of the decision or the legal consequence applied. Consequently, the Constitutional Court was not forced to embark upon an activist interpretation in order to attain the desired result.

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45 András Molnár, 'Szempontok a bírói aktivizmus definiálásához', *Jogelméleti Szemle*, 2012/3, p. 76.

46 László Blutman, 'Szürkületi zóna: az Alaptörvény és az uniós jog viszonya', *Közjogi Szemle*, 2017/1, pp. 1-14.

47 Decision No. 42/2005. (XI. 14.) AB, ABH 2005, 504.

48 Decision No. 2/2019. (III. 2.) AB, Reasoning [18].

4.5 Conclusions

The significance of Constitutional Court Decision No. 13/2018. (IX. 4.) AB lies exactly in the fact that the main substance of the decision – namely the almost absolute 'extraction' of the precautionary principle from the wording of the Fundamental Law – is not a result of Constitutional Court activism. In the course of making this decision the Constitutional Court, while using the major achievements of international law, EU law and Hungarian law, did nothing else but attach the precautionary principle to the Fundamental Law. The latter being a constitution that in fact includes extremely forward-looking provisions as regards environmental protection, leaving no doubt for legislators and practitioners as to the intention of the constitution-makers. The true significance of the decision is that it clearly connected Article P(1) and Article XXI(1) of the Fundamental Law by laying down that

> "Article P(1) […] can be regarded simultaneously as the fundamental human rights guarantee under Article XXI(1) and a *sui generis* obligation prescribing the protection of the common heritage of the nation that has general relevance beyond Article XXI(1)."[49]

Article P(1) stipulates "it shall be the obligation of the State and everyone to protect and maintain, and to preserve for future generations" the natural and cultural assets forming the common heritage of the nation. The Constitutional Court in fact performed an act of major significance: it established beyond doubt that the precautionary principle was a part of the Fundamental Law, which the state and everyone must always consider in the course of legislation and legal practice. The efficient consideration of the interests of future generations is only possible, at the same time, if the legislator "makes long-term considerations beyond governing cycles in the course of their decision-making."[50] It is the latter to which the decision drew attention, serving also as an example for other national law enforcement forums outside Hungary by demonstrating how a national institution may facilitate and, where necessary, strike down in the interest of future generations legislation implementing short-term political considerations.

49 Decision No. 13/2018. (IX. 4.) AB, Reasoning [14].
50 Decision No. 28/2017. (X. 25.) AB, Reasoning [34].