The Public Trust Doctrine, the Non-Derogation Principle and the Protection of Future Generations

The Hungarian Constitutional Court's Review of the Forest Act*

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Abstract

This article analyzes the doctrinal findings of the Hungarian Constitutional Court with respect to the constitutional protection afforded to future generations in the Fundamental Law. It focuses on Decision No. 14/2020. (VII. 6.) AB in which the Constitutional Court abolished an amendment to the Forest Act for infringing the right to a healthy environment and the environmental interests of future generations as enshrined in Article P of the Fundamental Law. On this occasion, the Constitutional Court for the first time explicitly recognized that Article P embodies the public trust doctrine; and stressed that it confers fiduciary duties on the State to act as a trustee over the natural heritage of the nation for the benefit of future generations, which limits the executive's discretion to exploit and regulate such resources. This article puts the Hungarian constitutional public trust in a comparative perspective by exploring the origins, role and functioning of similar constitutional public trust provisions in other jurisdictions. This is followed by setting out the normative principles derived by the Hungarian Constitutional Court in its previous practice from Article P, such as the non-derogation principle, the principle of inter-generational equity, the imperative of long-term planning, economical use of resources and the precautionary principle. The article then sets out the legal bases featured in the ex post constitutional challenge brought against the amendment of the Forest Act by the Ombudsman, and the Constitutional Court's reasoning. It concludes with offering some wider lessons for the judicial enforcement of long-term environmental goals vis-á-vis short-term economic private interests.

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

* The views expressed in this article are solely of the author's and do not necessarily resemble the position of the institution she works for.

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1. Introduction

On 9 June 2020, the Hungarian Constitutional Court has struck down an amendment to the Forest Act in its *Decision No. 14/2020. (VII. 6.) AB* for infringing the right to a healthy environment and the provision stipulating an obligation to protect the forests for future generations. The Constitutional Court has also acknowledged that the latter provision creates a constitutional public trust, which confers fiduciary duties on the government to act as a trustee over the natural and cultural heritage of the nation for the benefit of future generations, and which therefore limits its discretion to exploit, manage, and regulate the use of such resources.

By adopting a broader scope, this study not only comments on the doctrinal aspects of this recent decision, but also explores the origins, role and functioning of similar constitutional public trust provisions in other jurisdictions. Section 2 will first provide an overview of the wider landscape of public trust provisions in foreign jurisdictions with a brief commentary on how this doctrine has been interpreted by domestic judicial bodies in resolving environmental conflicts. This will be followed by setting out the normative principles derived by the Hungarian Constitutional Court in its previous practice from the right to a healthy environment as well as Article P, the public trust provision of the Hungarian Fundamental Law. Section 3 will then address in detail the facts of the case and the legal bases featured in the *ex post* constitutional challenge brought against the amendment by the Ombudsman. The article will also assess the Constitutional Court's reasoning in finding the amendment to the Forest Act unconstitutional. It will conclude in Section 4 by offering some wider lessons for the judicial enforcement of long-term environmental goals *vis-á-vis* short-term economic private interests.

2. A Constitutional Public Trust Doctrine in Hungary: Normative Requirements Flowing From the Imperative to Protect the Interests of Future Generations

As a welcome development, provisions relating to environmental protection have become the norm in the constitutions of countries around the world.[1] The exact formulation and wording of such provisions vary to a great extent. While environmental human rights and provisions on sustainable development appear to be the most common formulations, there is an emerging trend of enshrining public trust provisions in national constitutions.[2] The Hungarian Fundamental Law, adopted in 2011, is the only European jurisdiction that contains such a

1 James R. May & Erin Daly, *Global Environmental Constitutionalism*, Cambridge University Press, Cambridge, 2015, for the wide acceptance of human rights to the environment in national constitutions *see* HRC 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Right to a Healthy Environment: Good Practices' (30 December 2019) UN Doc A/HRC/43/53.

2 May & Daly 2015, p. 267.

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provision in its Article P. Before delving into the normative content of this public trust provision in the practice of the Hungarian Constitutional Court, a brief overview is due on the origins, structure, and the various normative contents derived from this doctrine in other jurisdictions.

2.1. The Public Trust Doctrine in Constitutions and Laws of Various Jurisdictions

The *public trust doctrine* imposes fiduciary duties on States to preserve their natural resources as trust assets for the benefit of present and future generations. Having its roots in ancient Roman law[3] and English common-law,[4] public trust provisions now appear in the constitutions of several States in Africa, Asia and South America, more specifically Tanzania, Uganda, Ethiopia, Papua New Guinea, Ghana, Swaziland, Bhutan, Kenya, Brazil and Ecuador.[5] In Europe, only Hungary has adopted a public trust provision in its constitution. In Sri Lanka, courts have read the doctrine into the Constitution since the beginning of the 1990s.[6] In North America, several States of the US incorporated such provisions in their constitutions,[7] besides deriving it from common-law,[8] and having it enshrined in certain statutory laws, while Canada discerned trust obligations from common-law.[9] In India, the doctrine is regarded to be part of common-law,[10] while in the Philippines it was gleaned from the constitutionally enshrined right to a healthy environment.[11] South Africa enacted several statutes that codify public trust obligations.[12] The doctrine's wide recognition on the international arena has led some to suggest that *the doctrine became a general principle of international law*.[13]

At its core, *the public trust doctrine imposes fiduciary duties on the trustee, i.e.* the government, which therefore has an obligation to manage the trust's assets

3 The Institutes of Justinian declared that "the following things are by natural law common to all – the air, running water, the sea, and consequently the seashore." *Institutes of Justinian, Book II on the Law of Things, Title I of the Different Kinds of Things*, p. 1 (translated into English by J.B. Moyle, Oxford, 1913).

4 Alexandra B. Klass, 'Modern Public Trust Principles: Recognizing Rights and Integrating Standards', *Notre Dame Law Review*, Vol. 82, Issue 2, 2006, p. 702.

5 Michael C. Blumm & Rachel D Guthrie, 'Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision', *UCD Law Review*, Vol. 45, 2011, p. 783.

6 Dinesha Samararatne, *Public Trust Doctrine the Sri Lankan Version*, International Centre for Ethnic Studies 2010, p. 26.

7 *E.g.* State constitutions of Hawaii, Pennsylvania, North Dakota, Montana, Alaska, and Texas have trust-like provisions.

8 Robin Kundis Craig, 'A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust', *Ecology Law Quarterly*, Vol. 37, Issue 1, 2010, p. 58.

9 Blumm & Guthrie 2011, pp. 801-802.

10 Id. p. 760. A leading case is the Supreme Court of India's decision in *M.C. Mehta v Kamal Nath*, (1997) 1. SCC 388.

11 Id. p. 771.

12 Elmarie Van der Schyff, 'Unpacking the Public Trust Doctrine: A Journey into Foreign Territory', *PER: Potchefstroomse Elektroniese Regsblad*, Vol. 13, Issue 41, 2010, p. 122.

13 Blumm & Guthrie 2011, p. 750; Catherine Redgwell, 'Principles and Emerging Norms in International Law Intra- and Inter-Generational Equity', *in* Kevin R. Gray *et al*. (eds.), *The Oxford Handbook on International Climate Change Law*, Oxford University Press, Oxford, 2016.

for the beneficiaries of the trust, typically the public and future generations. Traditional trust law concerns the management of financial assets and defines certain obligations for the trustee owed to present and future beneficiaries of the trust.[14] By way of analogy, rules applicable to financial trusts are invoked in relation to public trusts as well.[15] Such obligations traditionally include a duty to protect the assets from damage, and to prevent waste to the trust assets.[16] As a consequence, in a public trust context, fiduciary obligations entail that a public trustee cannot allow the trust assets to "fall into ruin on his watch",[17] and the trustee should exercise supervision over the assets concerned.[18]

We may witness a wide range of obligations conferred upon sovereign trustees across respective jurisdictions in relation to managing natural resources and ecosystems. Essentially, *the doctrine imposes limitations on State policies regarding the use, exploitation and transfer of ownership over the trust assets*. The scope of constitutional public trust provisions varies across the different States, yet they tend to be widely defined.[19]

The following list of domestic court decisions showcases the doctrine's diverse possible contents applied in the context of protecting ecosystems and managing natural resources. US courts discerned from the doctrine a restraint on the State's ability to alienate trust assets.[20] The Pennsylvania Supreme Court used the public trust provision enshrined in the State constitution to ban hydraulic fracking.[21] In California, courts relied on it to prevent a private landowner from filling a tideland, which was regarded as a trust asset, as filling the area would have threatened the ecological integrity of an important habitat.[22] Similarly, in the famous *Mono Lake* case, the California Supreme Court compelled an agency to reconsider the allocation of the water of Mono Lake, in order to protect the stability of the fragile ecosystem dependent upon the lake, even to the detriment of the City of Los Angeles, which drew a significant amount of water from the tributaries of Mono Lake to satisfy its increasing water demand.[23]

Sri Lankan courts employed the doctrine to put a limit on the government's discretionary power, when they suspected that the divestiture of public land did

14 *Kelsey Cascadia Rose Juliana et al. v United States of America, et al.*, No. 6:15-cv-1517, No. 6:15-cv-01517-TC (D. Or. Nov. 10, 2016).

15 Mary Christina Wood, 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance', *Environmental Law*, Vol. 39, Issue 1, 2009, pp. 94-96.

16 Id. pp. 94-95.

17 *United States v White Mountain Apache Tribe*, 537 U.S. 465, 475 (2002). *See* in more detail Mary Christina Wood & Dan Galpern, 'Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System', *Environmental Law*, Vol. 45, Issue 2, 2015, pp. 282-283.

18 Id.

19 Blumm & Guthrie 2011, p. 748.

20 Craig 2010, p. 69; *Illinois Central Railroad Co. v Illinois*, 146 U.S. 387, 460 (1892); *Scott v Chicago Park District*, 360 N.E.2d 773 (Ill. 1977).

21 *Robinson Township et al. v Commonwealth of Pennsylvania*, 147 A.3d 536 (Pa. 2016).

22 California Supreme Court's decision in *Marks v Whitney*, 491 P.2d 374, 378 (Cal. 1971).

23 *Mono Lake*, 658 P.2d 709, 711 (Cal. 1983).

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not serve the "public good".[24] The courts also emphasized that conservation measures should be guided by "a long term view of such [assets] being conserved for intergenerational use".[25] The doctrine may require agencies to adopt particular management measures to protect the trust's assets.[26] The Louisiana Court of Appeals ordered a state agency to reduce the level of organic matters in a lake in order to improve its ecological health.[27] In the Philippines, the public trust doctrine served as an action-forcing tool compelling governmental measures to restore the trust assets. In *Manila Bay*, the Supreme Court of the Philippines relied on the doctrine to order the government agency to take various actions, such as constructing a sewage treatment facility, restocking indigenous fish species and fostering environmental education of local people.[28]

2.2. Future Generations and the Public Trust Doctrine in the Hungarian Fundamental Law

The Hungarian Constitution as revised in 1989 already stipulated a right to a healthy environment, which has been later included in the new Fundamental Law as well in Article XXI.[29] In addition, the Fundamental Law also enshrines Article P, which creates an idiosyncratic heritage concept, the *'common heritage of the nation'*, and confers an obligation on the State and everyone to preserve the assets of that heritage for posterity. Article P provides that

> "all natural resources, including arable land, forests and water resources, as well as biological diversity, in particular native plant and animal species together with cultural heritage shall comprise the nation's common heritage; the responsibility to protect, maintain and preserve such a heritage for future generations lies with the State and every individual."

Ever since the late 1990s, the Hungarian Constitutional Court has been particularly active in affording in its interpretations the right to a healthy environment a normative 'bite' and has struck down several laws on the basis of infringing the right to a healthy environment. Since 2015, when the first environmental case was brought to the Constitutional Court under the Fundamental Law, the Constitutional Court also interpreted Article P as a normative rule as opposed to a mere symbolic obligation on the part of the State. This resulted in an extensive environmental case-law, rich in normative principles

24 Samararatne 2010, p. 27, citing decision in case *De Silva v Atukorale* [1993] 1. Sri. L.R. 283.

25 *Watte Gedara Wijebanda v Conservator General of Forests and others*, cited by Samararatne 2010, p. 33.

26 Wood 2009, p. 115.

27 *Lake Bistineau Preservation Society, Inc. v Wildlife & Fisheries Commission*, 895 So 2d 821, 191.

28 *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay*, G. R. Nos. 171947-48, 574 S.C.R.A. 661 (S.C., Dec. 18, 2008).

29 "Article XXI(1) Hungary shall recognize and implement the right of all to a healthy environment. (2) Any environmental damage shall as a priority be rectified at source in accordance with the relevant legislation and the principle that the polluter shall pay. (3) It is prohibited to import waste to Hungary for the purpose of disposal."

derived from Article XXI and Article P. These principles have supplied the basis of the *Forest decision*. Hence, before turning to discussing this particular decision, we shall briefly recall the doctrinal principles governing the constitutional protection of the environment under the Fundamental Law.

2.3. Intergenerational Equity in Article P of the Fundamental Law

The Constitutional Court has emphasized that Article P stipulates objective and substantive obligations for the State in terms of preserving the natural capital and cultural heritage for future generations.[30] In particular, the Constitutional Court opined that the decline in biodiversity is contrary to Article P,[31] and stressed that bequeathing the common heritage of the nation in a deteriorated state to later generations would in fact hollow out the government's obligations under Article P.[32] Echoing *the pillars of intergenerational equity* in international law, as articulated by Edith Brown Weiss in her seminal book,[33] the Constitutional Court stipulated three basic duties owed by present generations towards posterity: *(i)* the conservation of options; *(ii)* the conservation of quality of resources; and *(iii)* the conservation of access to such resources. In the Constitutional Court's reading, this ensures that present stakeholders' decisions do not create path dependencies for future generations. The Constitutional Court also articulated that natural resources could be freely exploited by present generations as long as they respect the equitable needs of future generations.[34] In an *ex ante* constitutional review proceedings concerning whether the act allowing increased water withdrawals for households from groundwater resources was in conformity with Article P and Article XXI, the Constitutional Court invoked the duty to conserve the quality of resources and opined that present generations "must aim to pass down the natural environment to future generations in a no less favorable state in which it was received".[35] As a result, it declared a provision to be contrary to Article P, which did not provide adequate protection against polluting finite groundwater resources.[36]

In essence, Article P imposes limits on the discretion of the sovereign to utilize natural resources.[37] As the Constitutional Court noted in its *Forest decision*,

> "the State shall act as a sovereign trustee and shall manage natural and cultural heritage entrusted to its care for the benefit of the trust's beneficiaries, *i.e*. future generations. This means that it can only allow the exhaustion of such resources for present generations until it does not

30 Decision No. 28/2017. (X. 25.) AB, Reasoning [32]; Decision No. 17/2018. (X. 10.) AB, Reasoning [85].
31 Decision No. 28/2017. (X. 25.) AB, Reasoning [74].
32 Id. Reasoning [32].
33 Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, The United Nations University and Transnational Publishers, 1988.
34 Decision No. 28/2017. (X. 25.) AB, Reasoning [33].
35 Decision No. 13/2018. (IX. 4.) AB, Reasoning [71].
36 Id. Reasoning [72].
37 Decision No. 28/2017. (X. 25.) AB, Reasoning [43].

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> threaten the long-term existence of the natural and cultural assets that are worthy of being protected on account of their inherent values."[38]

2.4. The Non-Derogation Principle in Hungarian Constitutional Doctrine

Ever since the first major environmental decision of the Constitutional Court in 1994, the most significant normative requirement flowing from the right to a healthy environment has been the *non-derogation principle*.[39] According to this doctrinal principle, the legislature cannot go below the level of statutory protection existing in the environmental law sector unless it is strictly necessary for realizing a competing human right or constitutional goal and the measure is proportionate to that aim.[40] The principle has been interpreted as a substantive criterion requiring the maintenance of the efficiency of legislative protection across procedural, institutional and substantive laws.[41] In other words, the legislature has no discretion to lower the stringency of environmental protection measures that exist under laws in force at any given time. The requirement has been upheld under the Fundamental Law as well under the right to a health environment,[42] and importantly, the Constitutional Court has read this principle into Article P as well.[43] The principle has been functioning as a strict normative criterion, leading the Constitutional Court to quash several acts that were found to be in contravention of the non-derogation principle.[44]

2.5. Prevention and Precaution

Under the *preventive action principle*, the State must not impair the natural environment or enact legislative measures that would cause irreversible environmental harm,[45] and also has a positive duty to prevent such damage through adopting relevant measures and legislative acts.[46] The Constitutional Court has also read the precautionary principle into the guarantees flowing from the Fundamental Law.[47] In line with the principle, the legislature bears the burden of proving with a high level of certainty, on the basis of uncertain scientific evidence, that a particular measure will not deteriorate the state of the

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

39 For an overview of the early environmental decisions of the Constitutional Court and an evaluation of the role of the principle in the Constitutional Court's case-law, *see* Gyula Bándi, 'The Case of the Hungarian Constitutional Court with Environmental Principles – From Non-Derogation to the Precautionary Approach', *Hungarian Yearbook of International and European Law*, Vol. 7, 2019, pp. 49-66.

40 Decision No. 28/1994. (V. 20.) AB.

41 Decision No. 17/2018. (X. 10.) AB, Reasoning [97].

42 Decision No. 16/2015. (VI. 5.) AB.

43 Decision No. 3104/2017. (V. 8.) AB, Reasoning [40].

44 Decisions No. 28/1994. (V. 20.) AB, 16/2015. (VI. 5.) AB, 13/2018. (IX. 4.) AB, 17/2018. (X. 10.) AB, 4/2020. (VII. 6.) AB.

45 Decision No. 13/2018. (IX. 4.) AB, Reasoning [62].

46 Decision No. 28/2017. (X. 25.) AB, Reasoning [44].

47 In more details *see* Marcel Szabó, 'The Precautionary Principle in the Fundamental Law of Hungary', *Hungarian Yearbook of International and European Law*, Vol. 7, 2019, pp. 67-83.

natural environment.[48] Even tolerating the risks of such an impairment runs counter to the State's obligation flowing from Article XXI and Article P.[49] Such an interpretation of the duties of the public trustee squares well with international trends, signaling that courts increasingly use the public trust doctrine as a vehicle to establish precautionary fiduciary obligations for the sovereign trustees.[50]

2.6. The Imperatives of Long-Term Planning and the Economical Use of Natural Resources

As a further requirement under Article P, the Constitutional Court stressed that in order to respect the long-term needs of future generations, the legislature in its decision-making processes "must engage in long-term planning over several governmental cycles."[51] The constitutional mandate to protect the common heritage of the nation must be translated into "cross-sectoral policies and long-term strategies as well as into concrete legislative measures implementing them".[52]

Moreover, the State must utilize natural resources in an economical manner and must also incentivize such use by private actors through adopting appropriate legislative measures. The piece of legislation, which did not prevent private persons from a wasteful use of groundwater resources was found to be in breach of Article P.[53]

3. The Ex Post Constitutional Review of the Forest Act: Facts of the Case, Legal Grounds, and the Constitutional Court's Reasoning

The most recent environmental decision of the Constitutional Court regarding the constitutionality of the 2017 Amendment to the Forest Act is worth closer examination for doctrinal reasons as well as considering its transformative impact on the reach and depth of environmental protective tools in the forestry industry in Hungary. In essence, the Constitutional Court's *ex ante* constitutional review decision successfully restored important powers of the public authority to prescribe mandatory limits on logging by private land-owners and forest managers, which powers were significantly curtailed by the 2017 Amendment of the Forest Act.[54]

48 Decision No. 28/2017. (X. 25.) AB, Reasoning [75].
49 Decision No. 16/2015. (VI. 5.) AB, Reasoning [110].
50 For a more detailed discussion, *see* Katalin Sulyok, 'Scientific Uncertainty as A Key Obstacle to Efficient Legal Protection of the Environmental Interests of Future Generations', *in* Marie-Claire Cordonier Segger *et al.* (eds.), *Intergenerational Justice in Sustainable Development Treaty Implementation*, Cambridge University Press, Cambridge, 2021, pp. 295-314.
51 Decision No. 28/2017. (X. 25.) AB, Reasoning [34].
52 Id. Reasoning [45].
53 Decision No. 13/2018. (IX. 4.) AB, Reasoning [71].
54 The piece of legislation subject to constitutional review was the 2017 Amendment of the Forest Act as accepted in Act LVI of 2017, which modified the Act XXXVII of 2009 on forests and forestry (Forest Act).

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3.1. Factual Background and the Legal Grounds for the Constitutional Challenge

The *ex post* review proceedings were initiated by the Hungarian Commissioner for Fundamental Rights together with his deputy, the Ombudsman for Future Generations. The Commissioner is granted with the power under relevant laws to challenge acts before the Constitutional Court that are believed to run counter to constitutional safeguards; in this instance, the right to a healthy environment and the protection of interests of future generations as guaranteed under Article P. Notably, *Hungary is among the very few countries in the world, which have a dedicated spokesperson to represent and advocate for the environmental interests of future generations*.[55]

Prior to passing the 2017 Amendment, several attempts were made to amend the Forest Act on account of the lobby of private forest managers, which were all ultimately abandoned due to concerns for environmental protection goals voiced by civil society organizations and the Ombudsman for Future Generations. The 2017 Amendment was nevertheless adopted despite the opposition of green NGOs and the public statements of the Ombudsman for Future Generations.

The petition submitted to the Constitutional Court outlined several concerns in relation to breaches of the right to a healthy environment and Article P on account of the substantial modifications of the 2017 Amendment. The overarching concern lay in the fact that the Amendment appeared to foster the financial interests of private land-owners and forest managers by narrowing down the possibilities of state authorities to intervene and impose temporal and spatial restrictions on for-profit logging. The new rules of the Amendment relaxed previous statutory safeguards for the environment to such an extent that allowed private interests to prevail over environmental protection goals in several respects. In particular, the Commissioner and its Deputy pointed out seven main reasons to argue that the Amendment breaches the non-derogation principle as flowing from Article P and Article XXI of the Fundamental Law.[56] *(i)* First, the Amendment narrowed down the spatial scope in which the forestry authority could impose limitations on logging in forests under Natura 2000 protection, by restricting the applicability of Natura 2000 rules as envisaged by the Habitats Directive[57] and the relevant domestic transposing legislation, only to a portion of Natura 2000 forests. In particular, protective limitation under the Amendment could only be imposed with respect to Natura 2000 forests representing priority forest habitats, if they were designated as Natura 2000 sites for the habitat they

55 For an overview of existing national institutions articulating and safeguarding the needs of posterity *see* Cordonier Segger *et al*. 2021. For a recent summary on the legal mandate and activities of the Hungarian Ombudsman for Future Generations, *see e.g.* Gyula Bándi, 'Interests of Future Generations, Environmental Protection and the Fundamental Law', *Journal of Agricultural and Environmental Law*, Vol. 15, Issue 29, 2020, pp. 7-22; Kinga Debisso & Marcel Szabó, 'An Institution for a Sustainable Future: The Hungarian Ombudsman for Future Generations', *Hungarian Yearbook of International Law and European Law*, Vol. 9, 2021.

56 The Ombudsman's petition (in Hungarian) is available on the Constitutional Court's website at http://public.mkab.hu/dev/dontesek.nsf/0/e7ebea823ab5fcd4c1258392005f8646/$FILE/II_201_0_2019_ind%C3%ADtv%C3%A1ny_anonim.pdf.

57 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

represented, and not on account of Natura 2000 species present in the area. Furthermore, Natura 2000 restrictions were applicable, in contrast with the previously applicable legal rules, only with respect to forests categorized as 'natural' forests, but not to those where the combination of species present was slightly altered by human intervention or the presence of invasive species. This markedly reduced the spatial scope of forests, where rules flowing from the Habitats Directive could actually be applied, and hence where competent state authorities could unilaterally impose, on their own motion, limitations on logging for environmental protection purposes. *(ii)* Second, the amended rules required the explicit consent of the private landowner or forest manager to designate their forests for nature conservation purposes, even if the respective forest habitat has already been declared protected in a decree of the local authority. The purpose to which a particular forest has been designated under the Forest Act is of utmost importance in the domestic legal regime governing forestry activities, since it is the purpose that defines the aims that can be legitimately pursued by the forest management activity in a given forest. Hence, environmental safeguards will not be fully applicable in forests under nature conservation measures, if the area cannot be designated for the purpose of nature conservation. Importantly, prior to the Amendment, the local authority could initiate such a designation in an *ex officio* procedure with respect to protected forests. *(iii)* Third, the Amendment also enabled the designation of protected forests for economic uses, contrary to the previous clear prohibition to designate protected forests for such a secondary purpose once they had been designated primarily for nature conservation purposes. Pursuant to the Amendment, only strictly protected forests that make up 80% of all protected forests cannot be designated for economic purposes. By contrast, previously applicable rules ensured that for-profit logging could not be pursued in protected forests: a ban that has effectively been removed by the Amendment. In addition, pursuant to the Amendment, any limitations on logging in protected forests designated for secondary economic use could only be imposed by the forestry authority if the respective private forest owner explicitly consented to such a limitation. By contrast, under the previous rules, such limitations could be imposed unilaterally by the authorities. *(iv)* Fourth, the petition voiced concerns in relation to a new rule which made it possible to designate protected and Natura 2000 forests for primarily flood protection and military defense purposes, which had priority over the nature conservation purposes of such forests. This amendment conferred wider powers on the flood protection authority as well as the Ministry of Defense to order the felling of trees in protected forests with reference to military and flood security interests. *(v)* Fifth, the Amendment broadened the scope of exceptions under the prohibition of clearance of forests and included forests designated primarily for Natura 2000, nature conservation, or public use purposes. Under the Amendment, the clearance is only prohibited in such forests if they are fully owned by the State, opening the possibility of clearance on all privately owned forests. *(vi)* Sixth, the complaint of the Commissioner also related to narrowing down the temporal and spatial scope in which the authorities could restrict logging activity. Specifically, the new rules reduced the minimum volume of dead

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wood that ought to be left in the forests, and the minimum number of trees left standing after logging. Furthermore, it mandated universally applicable periods in which temporary bans on logging could be introduced for nature conservation purposes, *e.g.* to preserve the nesting place of protected birds in the area. The Amendment also universally capped the spatial scope of imposing limitations on logging due to the presence of protected species in 50 meters. Previously, the authorities enjoyed discretion to set the time period and the spatial scope of restrictions as they deemed fit under the specific circumstances. The Commissioner and the Ombudsman pointed out that the time period set in law by the Amendment did not have a scientific foundation as it did not match the nesting period of several bird species. Another problematic point lay in the fact that any restrictions going beyond the maximum limits as set in law, could only be imposed by the authority based on an agreement concluded with the private landowner. *(vii)* Seventh, the Amendment abolished the requirement for forest managers to obtain a permit from the environmental authority as a condition for pursuing any activities during restriction periods. It only required a unilateral, *ex post* notification of the manager to the forestry authority. Such a modification not only excluded the environmental authority from the decision-making process but also enabled taking any protective intervention only after the activity concerned had already begun.

3.2. The Constitutional Court's Reasoning

The significant implications of the Amendment for nature conservation, as well as for the possibilities of private forest owners is aptly signaled by the fact that the Constitutional Court received a large number of *amicus* briefs. Specifically, from the Hungarian branches of the World Wildlife Fund, Friends of the Earth and Birdlife International, the National Council for Agriculture and the Association of Private Forest Owners. The Constitutional Court also sought the positions of relevant ministries, the Pro Silva forestry NGO, the National Council for Sustainable Development, which is the advisory body of the Parliament, and the National Committee for Environmental Protection, the advisory body of the government.

The Constitutional Court agreed with all but one challenge and found unconstitutional the derogation from previously applicable levels of statutory protection with respect to all accounts, expect for the one concerning the possibility to designate protected forests primarily for military and flood protection purposes.[58] In all other respects, the Constitutional Court agreed with the Ombudsman's petition that *the Amendment lowered the level of stringency* with which public authorities could unilaterally intervene in order to enforce environmental protection goals and interests, without meeting the legitimate aim and proportionality requirements. The Constitutional Court therefore quashed the challenged provisions of the 2017 Amendment.

58 In this latter respect, the Constitutional Court found a derogation from previously applicable statutory protection, yet it found it to be proportionate to the legitimate aims pursued, and thus, declared it to be in conformity with the Fundamental Law.

The point of departure for the Constitutional Court's inquiry was the constitutional public trust provision of the Fundamental Law. *The Constitutional Court explicitly declared for the first time* that Article P shall be regarded as a *constitutional manifestation of the public trust doctrine*, which embodies an emerging rule of international law.[59] The Constitutional Court stressed that Article P posits natural and cultural heritage "as having inherent value, which is worthy of protection even against the (momentary financial) interests of present stakeholders for the benefit of future generations, which are not subjects of rights."[60]

The Constitutional Court also underlined the special significance that forests bear among the assets of the national heritage to be preserved for posterity. Due to the numerous ecosystem services[61] forests provide "they shall be protected and maintained for the public interest", which imposes obligations on private forest owners, managers and any other forest users as well.[62] Accordingly,

> "the unfettered discretion of forest owners and managers in exploiting the forests' resources shall be replaced by a constitutional obligation of responsible, sustainable management, and to use of forests in a way, which accommodates the interests of future generations."[63]

Under Hungarian constitutional law doctrine, in order to find a breach of the non-derogation principle, the Constitutional Court must first establish *whether the efficiency of statutory protection has decreased*. If this requirement is met based on a comparative assessment of the substantive, procedural and institutional legal guarantees as provided under the previous laws and those in force at the relevant time, the Constitutional Court may proceed to the second step of its analysis. The second arm of the review comprises *a legitimate aim and proportionality analysis*, under which a particular amendment is found to be unconstitutional if the Constitutional Court establishes either the lack of competing human rights that may justify a derogation from the obligation to protect the common heritage of the nation, or the unnecessary and disproportionate nature of such a measure.

As to the first arm of the review, the Constitutional Court agreed with the petition of the Ombudsman and found a retrogression from previously mandated environmental protection standards with respect to all provisions complained of. Under the second arm of the review, the Constitutional Court investigated whether private landowners and forest managers' right to property and their freedom to conduct business may serve as a legitimate aim justifying the Amendment's provisions narrowing the scope of environmental protection measures. The right to property and the freedom of business are guaranteed

59 Decision No. 14/2020. (VI. 9.) AB, Reasoning [22].
60 Id. Reasoning [35].
61 For the concept of ecosystem services *see* Robert Costanza *et. al.*, 'The value of the world's ecosystem services and natural capital', *Nature*, Vol. 387, 1987, pp. 253-260.
62 Decision No. 14/2020. (VI. 9.) AB, Reasoning [23].
63 Id.

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under Article XII and XIII of the Fundamental Law, and hence in principle may justify limitations on environmental rights and obligations under Hungarian constitutional law doctrine.

The Constitutional Court *generally accepted that these competing rights may serve as legitimate aims* to curtail the extent to which logging may be limited for environmental protection purposes. *Yet it firmly announced that the restrictions set forth by the Amendment are disproportionate*. To reach this conclusion, it attached great weight to the unequally stronger bargaining position granted by the Amendment to private landowners and forest managers *vis-à-vis* state authorities.[64] As mentioned above, mandating unilateral restrictions on logging for environmental protection purposes have been precluded by the Amendment in many instances, as state authorities could only impose such restrictive measures in excess of those mandated by law if the private forest owners or managers explicitly consented to such restrictions, which is highly unlikely with a view to the considerable level of profits foregone by decreasing the extent of logging.

In justifying its conclusion regarding *the appropriate balance between the rights and accompanying economic interests of present stakeholders* on the one hand, *and the interests of future constituencies* on the other hand, the Constitutional Court relied on its previous finding regarding the special significance of the principles included in the Parliament's long-term strategies. The Constitutional Court cited the 2016-2030 National Strategy of Forests, which clearly stipulates that "legal regulation of forestry shall serve the goal that the people use and exploit forests in a sustainable way".[65] From this statement, the Constitutional Court inferred "that monetary interests of forest owners and managers cannot prevail over the imperative of preserving the forest for future generations."[66]

4. Some Lessons Learnt Regarding the Judicial Protection of Long-term Public Interests Vis-à-vis Short-Term Individual Interests

What remains to be addressed in levelling this case commentary is to draw some wider lessons for the judicial enforcement of long-term environmental goals in the face of competing financial interests and sometimes even rival human rights guarantees. Some of the reasoning techniques applied by the Constitutional Court in the *Forest decision* may be operationalized under different constitutional and legal settings as well in resolving inherent and pervasive conflicts between economic and environmental policies. The forthcoming remarks therefore seek to highlight some judicial tools that may prove to be useful in legally articulating the interests of posterity, and in enforcing such interests with a normative force, even though they are often couched in vague and symbolic terms. The *Forest decision* bespeaks of judicial strategies enabling the Constitutional Court to carve

64 *See e.g.* Id. Reasoning [77]-[85], [135] and [161]-[167].
65 Id. Reasoning [31].
66 Id.

out certain terrains from the policy choices that are otherwise at the disposal of incumbent political and economic stakeholders.

4.1. Non-Derogation Principle: Restraints on the Present to Preserve Assets for the Future

It is apparent from the Constitutional Court's analysis that under the Hungarian constitutional doctrine, *the non-derogation principle marks the red line of unconstitutional environmentally harmful (economic) policies*. As seen above, this principle also forms an inseverable part of the public trust provision enshrined in Article P and is conducive to a strict judicial overview of any legislative changes seeking to relax regulatory standards in the field of environmental law. This test enables the Constitutional Court to focus its review on the efficiency of environmental safeguards, turning abstract legal constructions, such as the efficacy of powers conferred on environmental authorities, into the object of the right to environment, the preservation of which lies at the core of obligations imposed on the sovereign trustee. The non-derogation principle functions as a strict and substantive test, as the efficiency of tools vested in environmental authorities is measured in light of actual realities rather than theoretical possibilities. Such a reading of the principle is capable of singling out those regulatory reforms, which on paper leave room for enforcing nature conservation goals, yet in practice render such interventions highly unlikely. In the material case, the non-derogation principle has led the Constitutional Court to find that the legislature cannot replace direct and *ex officio* interventions of authorities with measures conditioned upon the consent of the adversely affected forest owner. Notably, nothing in the Amendment precluded the imposition of environmental restrictions, the new rules only drastically reduced such an outcome.

In light of the more than 30-year-long jurisprudence of the Constitutional Court, the non-derogation principle strikes as a particularly efficient way of preserving the legal safeguards of environmental assets, which have been under constant pressure and challenge, *inter alia*, by the lobby of industrial interests groups, the ever increasing need for resource extraction and the expansion of anthropogenic land use, the restructuring of competent governmental authorities, and the abolition of environmental licensing requirements under the aegis of eliminating unnecessary bureaucratic hurdles. It comes as no surprise that the principle can be seen as imposing the perhaps most tangible limits under Article P, delineating what the sovereign is allowed to do with its natural and cultural heritage in complying with its public trust obligation. Under Hungarian constitutional doctrine, the interests of posterity are captured as an obligation of present stakeholders not to deteriorate the quality of the heritage to be passed onto their descendants.

Yet, the non-derogation principle remains a unique conceptualization of the right to a healthy environment and the public trust doctrine both on the international landscape of environmental human rights protection and with respect to constitutional safeguards for the environment, albeit the idea embodied in the principle is not alien to general international human rights law

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and international investment and trade law.[67] The principle has been also included in Article 17 of the Global Pact for the Environment as the principle on non-regression,[68] an ambitious proposal drafted by the *Club des juristes*, aspiring to be a binding international environmental treaty.[69]

4.2. Imposing Limits on the Right to Property under the Public Trust Doctrine

Humanity by now has reached a point where environmental conflicts present themselves as marked intergenerational problems. Our fundamental detrimental impact on the Earth's resources and the functionality of its systems turn environmental challenges to zero-sum games between present and future generations. Such distributional dilemmas will ultimately permeate and shape constitutional legal doctrine as well. Any judicial attempt at striking a fair balance between utilizing natural resources in the present and the preservation of access to such resources for the future gives rise to a need for organizing principles guiding the reconciliation of conflicting human rights claims. It appears that courts may resolve such tensions by either setting a hierarchy between the fundamental rights of contemporaries, as the Hungarian Constitutional Court did in its *Forest decision*, or by extending the temporal scope of individual freedoms of future rights holders, as the German *Bundesverfassungsgericht* did in its recent climate law decision.[70] Common to both approaches is that they seek to level the playing field for claims raised in the name of, or for the benefit of, future constituencies.

The most frequent rival to environmental protection goals, which is couched as a fundamental rights claim, lies in private ownership. Individual property rights, which form the very basis of our economies, often inhibit and sometimes even preclude mandating strict protective measures for common resources, such as clean air, water, biodiversity and natural ecosystems. Calling for a critical evaluation of how property rights could be reconciled with much needed respect for the public interest both in intra-generational and inter-generational contexts appears to be timely.[71] Judicial bodies have long faced dilemmas of discerning limits on the exercise of individual freedoms if those impair the rights of others or the public interest.

The wording of the Fundamental Law envisages certain constraints on the owners' freedom by stressing that property entails social responsibility.[72] But how to detect socially irresponsible forms of using one's own property? The

67 Michel Prieur, 'Non-regression', *in* Yann Aguila & Jorge Vinuales (eds.), *Global Pact for the Environment: Legal Foundations*, C-EENRG Report, 2019-1, p. 144.

68 Article 17 reads as follows: "The Parties and their sub-national entities refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law."

69 For more details on the initiative, which is currently ongoing, *see* https://globalpactenvironment.org/en/.

70 Decision of 24 March 2021 – 1 BvR 2656/18.

71 For a scholarly proposal on how to "*make property law ecologically responsive*", *see* Péter D. Szigeti, 'A Sketch of Ecological Property: Toward A Law of Biogeochemical Cycles', *Environmental Law Review*, Vol. 51, Issue 1, 2021, pp. 41-87.

72 Article XII of the Fundamental Law.

Constitutional Court based its inquiry on the public trust doctrine, by emphasizing that Article P compels the legislature to allow the *exercise of property rights only to the extent that it does not jeopardize the long-term viability of the natural and cultural heritage*.[73] The Constitutional Court went on to find that the unlimited freedom of forest owners and managers shall be replaced by the requirement of pursuing sustainable forestry.[74] The public trust doctrine was also interpreted as entailing an obligation for the lawmaker to account for the interests of both future and present generations in designing laws governing the use of the common heritage of the nation.[75]

4.3. Giving Normative Weight to Non-Binding Long-Term Strategies

The key obstacle to accounting and advocating for the environmental needs of future (and present) generations usually lies not in the lack of a proper scientific understanding of the risks or the absence of agreed overarching goals or principles. The latter are frequently set out in non-binding political statements on the domestic and the international level as well. Rather, the problem lies in watering down ambitious long-term strategic goals in binding laws and regulations.

Against this background, a third respect in which the Constitutional Court's reasoning may potentially serve as a source of inspiration for other jurisdictions is the way in which it *gave a normative reading to the otherwise non-binding political strategy adopted by the legislature*. Such long-term sectoral policy documents can provide particular apt foundations for judicial findings, because they reflect the necessary political and scientific consensus on the measures deemed necessary to protect legitimate interests of the future in a particular sector. Put differently, long-term policy strategies of the legislature provide courts with objective, non-arbitrary benchmarks to articulate and identify what lies in the interests of future generations.

To conclude this assessment of the Hungarian constitutional public trust doctrine, it is worth pointing out that the *Forest decision* of the Hungarian Constitutional Court can be seen as a success of environmental protection goals over short-term policies – yet altogether it is a bittersweet victory. Somewhat paradoxically, the very existence of the decision signals the greatest weakness of the functioning of the public trust doctrine as enshrined in Article P of the Fundamental Law. Namely, that a public trust provision can only reach its full potential, and fulfil the ideals it aspires to, if embraced by the sovereign trustee, *i.e*. the government and the legislature, and not (only) by judicial bodies. The ultimate role of the public trust doctrine lies in appealing to the ethical sense of obligations of governmental stakeholders to guide decisions taken at all levels of the executive and the legislative branch.[76] Only if the fiduciary obligations under the constitutional public trust doctrine are taken seriously by political

73 Decision No. 14/2020. (VI. 9.) AB, Reasoning [22].
74 Id. Reasoning [23].
75 Id. Reasoning [22].
76 Wood 2009, p. 103.

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stakeholders of the present can this constitutional imperative efficiently guard against sliding back on, and diluting stringent environmental protection measures for the sake of securing short-term profits at the expense of the natural capital and heritage.