From Non-Derogation to the Duty to Progress

Key Elements of the Right to a Healthy Environment in the Case Law of the Hungarian Constitutional Court*

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Abstract

The Hungarian Constitutional Court's practice regarding the enforcement of the right to a healthy environment is of outstanding importance. This practice was launched by Decision No. 28/1994. (V. 20.) AB and by the principle of non-derogation (or non-retrogression) stated therein. Over time, the Constitutional Court also elevated the precautionary principle to constitutional rank and the Fundamental Law that entered into force in 2012 also enables the Constitutional Court to pay particular attention to the interests of future generations, as well as environmental and natural values as elements of the common heritage of the nation, in addition to the present generations' right to a healthy environment. This article examines how the principle of non-derogation (as a crucial part of the right to a healthy environment) is applied in the Hungarian Constitutional Court's practice and to what extent that principle may be used in the future to solve environmental problems (primarily the effects of climate change) faced by humanity.

Keywords: Constitutional Court of Hungary, right to environment, non-derogation, non-retrogression, duty to progress.

1. Introductory Remarks

According to scholarly literature, the Hungarian Constitutional Court's practice related to the right to a healthy environment originates from the well-known *Decision No. 28/1994. (V. 20.) AB*. It is beyond doubt that this decision may be considered the most influential decision of the Hungarian Constitutional Court from the period preceding the entry into force of the Fundamental Law. At the same time, it is little known that the Constitutional Court could have already expanded the constitutional content of the right to a healthy environment in its *Decision No. 996/G/1990. AB*. In the petitions leading to that decision, the Prime Minister and Parliament's Environmental Protection Committee asked the

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Constitutional Court to interpret the constitutional substance of the right to a healthy environment to ensure that the new Hungarian law on environmental protection would be drafted with due consideration to the Constitutional Court's statements of principle. In that case, the Constitutional Court finally came to the conclusion that the mere fact that Parliament intended to adopt a new law on environmental protection could not yet be considered a "specific constitutional problem" that could give rise to proceedings before the Constitutional Court.[1] However, in their dissenting opinion, justices Antal Ádám and János Zlinszky laid down the main framework for (their version of) the constitutional substance of the right to a healthy environment.

The fourth amendment to the Fundamental Law in 2013 declared that "Decisions of the Constitutional Court adopted before the entry into force of the Fundamental Law shall cease to be effective. This provision shall not affect the legal effects already exercised by such decisions." Accordingly, from 2013 the Constitutional Court could no longer automatically use its statements of principle contained in its previous decisions.

This article examines *(i)* how the content of the right to a healthy environment may be described based on the dissenting opinion of Justices Antal Ádám and János Zlinszky attached to *Decision No. 996/G/1990. AB*; *(ii)* how the principle of non-derogation developed in the Constitutional Court's practice and, in particular, in *Decision No. 28/1994. (V. 20.) AB* and *(iii)* how much the Constitutional Court's post-2012 practice has added to this jurisprudence, and finally, the possible directions for the future development of the right to a healthy environment. The article also attempts to outline a concept of the right to a healthy environment that may be applied to the latest challenges faced by humanity (*i.e.* above all, climate change).

2. The Right to a Healthy Environment in the Dissenting Opinion of justices Ádám and Zlinszky

Pursuant to Section 18 of the previous Constitution, "The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment.", while Section 70/D(1) reads as follows: "Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health." According to Section 70/D(2), the Hungarian State had the following obligation: "The Republic of Hungary shall implement this right […] through the protection of the urban and natural environment." From these provisions, Antal Ádám and János Zlinszky drew the following conclusions in their dissenting opinion to *Decision No. 996/G/1990. AB*. *(i)* Respecting and protecting the right to a healthy environment is the state's primary obligation. *(ii)* Ensuring the right to a healthy environment requires regulation at the level of a statute for which the State shall be responsible. *(iii)* It cannot be considered a classical 'defence' type of freedom (such as the right to assembly or freedom of religion), but it is also

1 Decision No. 996/G/1990. AB, ABH 1993, 533, 538.

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not a 'basic service right' based on which the state would be obliged to operate some kind of institutional system (such as maintaining the health care system). *(iv)* The environment to be protected must be 'healthy'; however, without the exact substance of this being elaborated upon by the legislator. *(v)* In order to ensure a healthy environment, the state shall be obliged to establish quality indicators and thresholds, to check their compliance and, upon their violation, apply legal consequences and, if possible, restore the original state. *(vi)* Citizens have the right to information related to the environment. *(vii)* The actual substance of the right to a healthy environment may only be determined by taking into account obligations under international law. *(viii)* With reference to the right to the highest possible level of physical and mental health, individual grievances resulting from a damage to the environment may be brought to court and remedied.

In their dissenting opinion, Ádám and Zlinszky largely shaped the substance of the right to a healthy environment with an effect on the contemporary jurisprudence of the Hungarian Constitutional Court. However, the dissenting opinion failed to address one important issue: the true substance of the right to a healthy environment, that is, 'how' the state should fulfil its respective obligation.

3. Decision No. 28/1994. (V. 20.) AB: The Origins of the Principle of Non-Derogation

The well-known starting point of the Constitutional Court's concept of the right to a healthy environment is *Decision No. 28/1994. (V. 20.) AB* and the non-derogation principle contained therein. The Hungarian Constitutional Court was among the first in the world to take a position on the specific substantive obligations the right to a healthy environment imposes on the legislator. According to the decision,

> "It follows from both the object and the dogmatic particularity of the right to a healthy environment that the State must not lower the statutorily guaranteed degree of environmental protection unless it is necessary to enforce other constitutional rights or values. Even in the latter case, however, the degree of protection must not be reduced disproportionately with the goal set forth."[2]

A number of important conclusions may be drawn from the above definition of non-derogation, which, however, require further explanation. *(i)* The reference point for non-derogation is "the legislatively ensured degree of environmental protection". *(ii)* Pursuant to *Decision No. 28/1994. (V. 20.) AB*, non-derogation is applicable only to the state's conduct, but it requires that the state create "legal and institutional guarantees". *(iii)* Non-derogation is not "absolute in nature", it may be limited in line with the test of necessity and proportionality. At the same time, when protecting the natural foundations of life and remedying the often-irreversible damage caused to nature, "extraordinary resolve is called for in establishing legislative guarantees for the right to a healthy environment."

2 Decision No. 28/1994. (V. 20.) AB, ABH 1994, 137, 140.

Decision No. 28/1994. (V. 20.) AB represents the starting point (and not the completion) of the development of the non-derogation principle. The reason for this is not only to be found in the fact that the environmental conditions surrounding mankind have fundamentally changed over the almost 30 years since the decision was adopted, but also in that the powers of the Constitutional Court have been significantly transformed. Whereas in 1994, the Hungarian Constitutional Court's procedure primarily meant an *ex-post* constitutionality review, nowadays, the Constitutional Court must decide constitutional complaints submitted in specific, individual cases. This change of competence was particularly fortunate in the sense that while the Constitutional Court was able to expand the substance of the non-derogation enforceable against the legislator before 2012, the new practice emerging from 2012 onwards now also determines the substance of non-derogation enforceable against those applying the law.

4. To What Extent May the Constitutional Court's Practice before the Entry into Force of the Fundamental Law Be Cited in Connection with the Right to a Healthy Environment?

In its *Decision No. 22/2012. (V. 11.) AB*, the Constitutional Court clarified to what extent the Constitutional Court's findings in connection with the previously effective Constitution are applicable after the entry into force of the Fundamental Law. According to that decision,

> "The Constitutional Court can apply in the new cases the arguments connected to the questions of constitutional law decided in the past and contained in its decisions adopted before the Fundamental Law entered into force, provided that it is possible on the basis of the concrete provisions – having the same or similar substances as that of the previous Constitution – and of the rules of interpretation of the Fundamental Law."[3]

This substantive correspondence required by *Decision No. 22/2012. (V. 11.) AB* undoubtedly exists when it comes to the new constitutional formulation of the right to a healthy environment. According to *Decision No. 3068/2013. (III. 14.) AB*,

> "The wording of the Fundamental Law concerning the right to a healthy environment corresponds to the wording of the Constitution, therefore, statements made by the Constitutional Court in its previous decisions should be considered as guiding principles in the interpretation of the right to a healthy environment."[4]

3 Decision No. 22/2012. (V. 11.) AB, Reasoning [40].
4 Decision No. 3068/2013. (III. 14.) AB, Reasoning [46].

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Decision No. 16/2015. (VI. 5.) AB went even further concerning the practice attached to the previous Constitution and the Fundamental Law regarding the right to a healthy environment when it stated clearly that

> "the Fundamental Law not only preserved the level of protection of the fundamental constitutional right to a healthy environment, but also contains significantly more extensive provisions in this area than the Constitution. The Fundamental Law therefore further developed the set of environmental values and the environmental approach of the Constitution and the Constitutional Court."[5]

Let's take a closer look at what exactly this further development mentioned in *Decision No. 16/2015. (VI. 5.) AB* referred to. On the one hand, the National Avowal of the Fundamental Law states that

> "we commit ourselves to promoting and safeguarding our heritage, [...] all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources."

On the other hand, the Fundamental Law also contains a completely new provision compared to the previous Constitution, namely Article P, according to which

> "Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, 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."

Finally, another important difference compared to the provisions of the previous Constitution is that Article XIII(1) of the Fundamental Law now establishes the right to property and stipulates that "Property shall entail social responsibility."

Based on the provisions integrating and detailing, in a certain sense, the above-mentioned right to a healthy environment as set out in Article XXI of the Fundamental Law, it can be safely concluded that the Fundamental Law has indeed further developed the environmental protection values enshrined in the previous Constitution which are reflected in particular in the following elements.

On the one hand, as long as the right to a healthy environment necessarily creates a right or prescribes the objective obligation of the state to protect institutions only in relation to certain elements of the current generation, the National Avowal and Article P of the Fundamental Law extend that obligation to future generations as well. This is all the more true because the Fundamental Law shall also "be an alliance among Hungarians of the past, present and future." Taking

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

into account the interests of future generations in itself necessarily assumes a different approach by the legislator and those enforcing the law, which basically affects the application of the test of necessity and proportionality laid down in Article I(3) of the Fundamental Law. When the Constitutional Court has to evaluate whether specific legislation is in accordance with the Fundamental Law, it must necessarily take into account whether the legislator or those implementing the law have evaluated the effects the given legislation shall have on future generations. In this context, it is of particular importance that the Hungarian legal system includes public actors (namely the Deputy Commissioner for Fundamental Rights responsible for the protection of the interests of future generations) whose clearly defined task is also to take the interests of future generations into account. The Commissioner for Fundamental Rights (and the Deputy Commissioner for Fundamental Rights) have already initiated the procedure of the Constitutional Court[6] and explaining their legal position upon the Constitutional Court's request.[7]

On the other hand, Article P of the Fundamental Law now made it possible for the Constitutional Court to consider the protection of environmental and natural values not only to from the perspective of human society, but also for their own sake. In this context, the Constitutional Court stated clearly that the obligation to preserve biological diversity is "an unconditionally applicable rule of international law that reflects the will of the international community as a whole."[8]

In this decision, the Constitutional Court essentially stated that the obligation to preserve biological diversity may be considered a *jus cogens* rule of international law; however, according to the consistent practice of the Constitutional Court, when interpreting the Fundamental Law, "the Constitutional Court takes into account the obligations binding Hungary on the basis of its membership in the European Union and under international treaties."[9]

The Constitutional Court had already applied this approach in practice *e.g.* when the legislator amended certain rules for the protection of forests in accordance with the current interests of forest managers.[10] At the same time, according to the consistent practice of the Constitutional Court, Article P of the Fundamental Law does not contain a right guaranteed by the Fundamental Law in terms of deciding constitutional complaints; that is, the Constitutional Court may only examine violations of Article P in its other procedures (primarily in the context of a preliminary or *ex-post* review of a law's constitutionality, as well as in the case of a judicial initiative) or *ex officio*.

Thirdly, by expressly stating that property also entails social responsibility, Article XIII(1) of the Fundamental Law established the constitutional basis for the

6 The petition forming the basis of Decision No. 14/2020. (VII. 6.) AB was submitted by the Commissioner for Fundamental Rights in the protection of forests.

7 Thus, for example, the Deputy Commissioner explained his professional position concerning the legal status of lands belonging to the Natura 2000 network prior to the adoption of Decision No. 28/2017. (X. 25.) AB and in connection with the protection of underground waters prior to the adoption of Decision No. 13/2018. (IX. 4.) AB.

8 Decision No. 28/2017. (VII. 25.) AB, Reasoning [38].

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

10 Decision No. 14/2020. (VII. 6.) AB.

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restriction of the right to property for the purposes of environmental protection (including this time, the interests of future generations and the importance of protecting environmental values for their own sake). This is of particular relevance because, according to the consistent practice of the Constitutional Court, the restrictions on the right to property shall not be subject to the necessity-proportionality test set out in Article I(3) of the Fundamental Law, but to a specific public interest test. However, the protection of environmental and natural values for their own sake, as well as the protection of the interests of future generations, may clearly be considered as matters in the public interest.

5. Which Areas Are Covered by Non-Derogation?

Decision No. 28/1994. (V. 20.) AB (in its original wording) found the principle of non-derogation to be applicable to the field of the protection of nature. However, taking into account that the decision is also about the right to a healthy environment in general, and the subject of the case was specifically the constitutionality of legislation concerning the legal status of protected natural areas, it seems a correct approach that it does not follow from the decision that non-derogation applies *exclusively* to the protection of nature, but rather that the principle certainly applies to the area of nature conservation. This is also supported by the fact that shortly after the adoption of *Decision No. 28/1994. (V. 20.) AB*, in *Decision No. 27/1995. (V. 15.) AB*, the Constitutional Court stated that "The level of protection of the built environment guaranteed by law cannot be reduced by legally non-binding official decisions." This is because "The State shall enforce the right to a healthy environment. One of the means of enforcement is the protection of the built environment."

It can be clearly deduced from the Constitutional Court's practice in the period following the entry into force of the Fundamental Law, that the scope of non-derogation does not primarily depend on the subject of the legislation under scrutiny (that is, whether it is legislation on environmental or nature protection or monument protection), but rather on what effect the given legislation has on the right to a healthy environment, as well as on Article P(1) of the Fundamental Law. Accordingly, there is no obstacle to the application of non-derogation to any area that concerns the values listed in Article P(1) of the Fundamental Law and which belong to the common heritage of the nation.[11] The post-2012 practice of the Constitutional Court undoubtedly supports this finding. According to the Constitutional Court, non-derogation applies equally to areas belonging to the Natura 2000 network,[12] to the natural values specifically named in Article P and to the common heritage of the nation such as forests,[13] groundwaters,[14] state land

11 Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts.

12 Decision No. 28/2017. (X. 25.) AB.

13 Decision No. 14/2020. (VII. 6.) AB.

14 Decision No. 13/2018. (IX. 4.) AB.

assets[15] and biological diversity,[16] the protection of the built environment,[17] including especially the waterfront areas of Lake Balaton,[18] the monument protection legislation[19] and the protection of cultural heritage in general.[20] The scope of application of the principle also covers activities traditionally linked to protecting the environment and nature, such as, for example, the system of noise protection rules.[21]

At the same time, additional requirements of fundamental importance regarding the scope of non-derogation may be derived from the recent practice of the Constitutional Court. *Decision No. 3223/2017. (IX. 25.) AB* (in which the Constitutional Court had to decide in a case related to a construction affecting the habitat of a locally protected swamp cypress) extended the above-mentioned 'classical' interpretation of non-derogation in two respects.

On the one hand, the decision made it clear that non-derogation applies equally to the substantive, procedural and organizational legislation concerning the protection of the environment and nature, since these may only ensure the full application of the principle when taken together. According to the decision,

> "The principle of non-derogation may therefore be violated even where the substantive legislation remains unchanged, but the organizational or procedural legislation ensuring the enforcement of the substantive law is weakened. The principle of non-derogation may also be violated where the legal situation of the subject matter of the legislation changes unfavorably in terms of environmental protection, even if the substantive legislation remains unchanged."[22]

The above means that, in certain cases, it may also lead to unconstitutionality in case the legislator leaves the legislation applicable in an individual case unchanged, but adversely changes either the legal consequences to be applied by the proceeding authority or the provisions governing the conduct of the procedure,[23] or weakens the organization of the proceeding authority.[24] At the same time, it is at least questionable whether a legal provision that reduces the budget of a proceeding authority or does not increase it to the extent requested may be considered unconstitutional, since such a provision does not formally protect the environment and nature, but concerns the budget of the Hungarian State. Formally, the Hungarian Constitutional Court does not have the competence to deal with issues

15 Decision No. 16/2015. (VI. 5.) AB.
16 Decision No. 28/2017. (X. 25.) AB.
17 Decision No. 3068/2013. (III. 14.) AB.
18 Decision No. 16/2022. (VII. 14.) AB.
19 Decision No. 3104/2017. (V. 8.) AB.
20 Decision No. 25/2021. (VIII. 11.) AB.
21 Decision No. 17/2018. (X. 10.) AB.
22 Decision No. 3223/2017. (IX. 25.) AB, Reasoning [28].
23 Accordingly, in Decision No. 13/2018. (IX. 4.) AB, the Constitutional Court came to the conclusion that the replacement of an authorization system with a notification system violates (also) the principle of non-derogation.
24 Decision No. 4/2019. (III. 7.) AB.

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related to the central budget, since pursuant to Article 37(4) of the Fundamental Law

> "As long as government debt exceeds half of the total gross domestic product, the Constitutional Court may [...] review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights."

At the same time, in my view, the above-mentioned 'restriction of competence' set forth in the Fundamental Law does not constitute an absolute procedural inhibition for the Constitutional Court, in two respects. On the one hand, nothing precludes the Constitutional Court from reviewing within the framework of an assessment of a conflict with an international treaty as defined in Section 32 of the Constitutional Court Act, the constitutionality of the provision setting the budget of a body responsible for the protection of the environment and nature. The Constitutional Court may establish that the budgetary provision is in conflict with an international treaty. On the other hand, the Constitutional Court, in a given case, could also repeat the finding made in *Decision No. 28/1994. (V. 20.) AB*, according to which

> "the right to a healthy environment is, in fact, a part of the objective, institutional aspect of the right to life. The responsibility of the State to maintain the natural basis of human life is isolated and named as a separate constitutional 'right'."

On the other hand, the decision also made it clear that non-derogation applies not only to legislation. Instead,

> "those applying the law and acting in individual cases must also take into account the enforcement of this principle deriving from the Fundamental Law during the application of legislation, thus the level of protection of the environment and nature guaranteed by legislation cannot be impaired by an individual official decision."[25]

The Constitutional Court also made it clear that the persons applying the law must always enforce non-derogation within the framework of the existing legal

25 Decision No. 3223/2017. (IX. 25.) AB, Reasoning [29]. The Constitutional Court came to the conclusion that the contested judicial decision was not unconstitutional because "The court hearing the case also sought expert evidence, obtained the expert opinion of wildlife protection experts and architectural forensic experts, and heard the assigned experts, following which it established, that the design documentation provides a suitable solution for wood for a long period of several decades." Reasoning [32].

environment, partly by observing and enforcing the legislation in force and partly by taking environmental and natural aspects into account in the case of legislation allowing for multiple decisions. The importance of the decision is well illustrated by the changes in the competencies of the Constitutional Court following the entry into force of the Fundamental Law. The vast majority of the Constitutional Court's cases before 2012 covered an abstract *ex-post* review of constitutionality which anyone could initiate (*actio popularis*), while the Constitutional Court could only decide constitutional complaints in very exceptional cases, and the Constitutional Court's scrutiny only covered the constitutionality of the legal provision applied in the individual case.[26] On the other hand, following the Fundamental Law's entry into force, the Constitutional Court's competencies also changed. Today, the vast majority of cases brought before the Hungarian Constitutional Court are constitutional complaints. It is now the *ex-post* abstract constitutionality review of legislation (owing to the significant narrowing down of the scope of eligible petitioners)[27] that is exceptional. Therefore, we cannot say that the Constitutional Court previously refrained from extending non-derogation to the application of the law, instead, it is more accurate to say that before 2012 no case was brought before the Constitutional Court where it could have assessed the relationship between non-derogation and the application of law.

6. Natural Limits of Non-Derogation

The natural limit for the scope of application of the non-derogation principle are determinations made regarding the regulatory level, since non-derogation may necessarily only be found in relation to already existing laws. Of course, this does not mean that the state shall not be obliged to create the legal framework to govern a certain regulatory area, nor can this be interpreted as meaning that the state enjoys unlimited freedom in creating the legal environment for a certain area. This is because

> "The right to a healthy environment simultaneously represents the individual's fundamental right (whose subject is everyone) and the State's objective obligation to protect institutions. For this very reason, the State must proceed with particular care when adopting, observing and enforcing legislation on environmental protection which individuals may invoke against the State in accordance with Article XXI of the Fundamental Law."[28]

26 The previously effective Act XXXII of 1989 on the Constitutional Court, Section 48.

27 Pursuant to Act CLI of 2011 on the Constitutional Court and Article 24(2)(e) of the Fundamental Law, the procedure may only be initiated by the Government, one quarter of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. For the sake of completeness, it is worth mentioning that based on Article 6(2) and (4) of the Fundamental Law, Parliament and the President of the Republic may also initiate a preliminary constitutional review of the legislation, while under Section 25(1) of the Constitutional Court Act, the judge acting in an individual case shall also be entitled to request a constitutional review of the legislation applicable to the case pending before it.

28 Decision No. 5/2022. (IV. 14.) AB, Reasoning [88].

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Should the State fail to adopt legislation of fundamental importance regarding environmental and nature protection, the principle of non-derogation would formally not be violated. In such a case, non-derogation would just be one (and not the only) element of the right to a healthy environment. Here, the Constitutional Court could (*ex officio*) establish the unconstitutionality caused by the legislator's omission and, by setting a deadline, call upon the legislator to adopt the (missing) legislation. Pursuant to Section 46(2)(c) of the Constitutional Court Act, it is amounts to a failure of the legislative duty when "the essential substance of the legislation derivable from the Fundamental Law is incomplete." The situation is similar even if the rule is created for the first time and either has significant shortcomings or is fundamentally contrary to the constitutional substance of the right to a healthy environment (*e.g.* it violates the principles of precaution, prevention, or the 'polluter pays' principle). Accordingly, although the principle of non-derogation cannot be invoked in such cases, this does not mean that the right to a healthy environment (or Article P of the Fundamental Law, if applicable) cannot be established.

7. The Point of Reference for Derogation (or What Do we Derogate from?)

Based on the Constitutional Court's relevant practice, when reviewing derogation, the starting point shall be that "the State shall ensure that the deterioration of the environment does not occur as a consequence of a specific measure."[29] Accordingly, when examining a potential violation of the principle of non-derogation, the Constitutional Court must simultaneously evaluate two aspects: *(i)* on the one hand, whether there is a derogation at the regulatory level (objective element), and *(ii)* on the other hand, whether the environment and nature are or may be deteriorated as a result of the derogation (subjective element).

As far as the objective element (the issue of derogation at the regulatory level) is concerned, as of yet, the Constitutional Court has not established a violation of non-derogation where the legislation under scrutiny was not changed prior to the Constitutional Court's examination. The reason for this is to be found on the one hand in the fact that (as I have mentioned above) the principle of non-derogation is conceptually inapplicable when designating the regulatory level for the first time. In principle, however, it cannot be ruled out that the unchanged regulatory level ultimately violates the right to a healthy environment if the legislator fails to adapt the legislation under scrutiny to the needs of the environment and nature. However, this already amounts to a general violation of the right to a healthy environment and not specifically a violation of the non-derogation principle. In this context, it is also worth mentioning that although the principle of *res iudicata* set out in Section 31 of the Constitutional Court Act formally applies (according to the wording of the Constitutional Court Act) only in the case of a constitutional complaint or a judicial initiative, it is hard to imagine a case where the Constitutional Court does not apply the principle in other (first of all, *ex-post* constitutionality

29 Decision No. 27/2017. (VII. 25.) AB, Reasoning [49].

review) procedures as well. At the same time, however, the Constitutional Court Act also sets out that an issue may only be considered *res iudicata* where "the circumstances have not fundamentally changed". However, it cannot be ruled out that the deterioration of the environment and nature, as well as the progress of science, for the purposes of the Constitutional Court's scrutiny amount to a significant change in circumstances. This may also apply where a legal provision had been in effect for such a such a long time with an unchanged substance and has clearly become outdated.

The following should be highlighted regarding the subjective element of review (the environment and nature deteriorates or may deteriorate). According to the Constitutional Court's practice, the principle of non-derogation

> "only prohibits a derogation that may result in irreparable damage to nature or the environment. Based on the principle of precaution and prevention, the question is whether there is a chance of damage."[30]

However, the burden of proof in this regard is of a special significance. The essence of the precautionary principle is precisely that the petitioner alleging a violation of the precautionary principle does not have to prove that damage to the environment and nature will certainly result or may result from the legislation; the petitioner merely needs to demonstrate its probability for the Constitutional Court to proceed. Let us suppose the petitioner cannot substantiate their claim in any form. In that case, based on the principle of being bound to the petition, the Constitutional Court may only find that the motion is unsuitable for substantive evaluation.[31] However, in case the petitioner meets this formal requirement (which is a prerequisite for the Constitutional Court to proceed with the assessment on the merits of the case), the burden of proof is reversed:

> "when a regulation or measure may affect the state of the environment, the legislator should verify that the regulation is not a step backwards and this way it does not cause any irreversible damage as the case may be, and it does not provide any grounds in principle for causing such damage."[32]

Accordingly, "even the risk of deterioration (or the failure or disregard of the obligation to assess the risk of deterioration) justifies the finding of unconstitutionality."[33]

The constitutional substance of the precautionary principle (and its link with the principle of non-derogation) is recorded in *Decision No. 13/2018. (IX. 4.) AB*. In the summer of 2018, the Hungarian Parliament amended the legislation on water

30 Decision No. 16/2022. (VII. 14.) AB, Reasoning [46].

31 Pursuant to Section 52(1b)(e) of the Constitutional Court Act, for example, the petition must contain a justification as to why the contested legal provision or judicial decision violates the precautionary principle. In the absence of such a justification, the Constitutional Court may only establish the ineligibility of the motion to be evaluated on its merits.

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

33 Decision No. 16/2015. (VI. 5.) AB, Reasoning [110].

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management in a way that would have allowed anyone to have wells drilled to meet domestic water needs up to a depth of 80 meters, even without an official permit or notification obligation. According to the Constitutional Court's decision, the precautionary principle and non-derogation may be applied together and separately. *(i)* In the area already covered by legal rules, the precautionary principle broadens the scope of application of non-derogation to make it effective (*effet utile*). It is not only the legislation which constitutes a derogation beyond doubt that violates the principle of non-derogation, but also the legislation which carries the risk of deterioration taking place in the environment and nature.[34] In this case, the Constitutional Court deemed the legislation allowing anyone to establish wells without an official permit or notification obligation which, in the absence of sufficient expertise or in the case of wells established in an inappropriate place and manner, potentially carries the risk of contaminating the drinking water base. *(ii)* In areas not yet regulated by law (that is, with the adoption of the first legislation in an area of law where conceptually we cannot even speak of derogation), the precautionary principle also applies independently. Taking it into account the precautionary principle is the constitutional obligation of the legislator.[35]

In view of the above, it can be said that non-derogation is not a principle that may be applied mechanically but requires a specific approach of legislators and persons applying the law geared towards the effective enforcement of the legislation:

> "it is essential to have a legislative and law enforcement approach that, in contrast to a short-term often economic approach, enforces a longer-term continuous codification and planning activity that often spans government cycles, resulting from the particularities of the living conditions involved."[36]

8. Duty to Progress? Instead of Conclusions

The principle of non-derogation (if only following from the competencies of the Constitutional Court) may extend to the constitutionality review of legislation adopted, which may exceptionally include the possibility of assessing the legislator's failure to adapt such legislation to circumstances that have changed over time. Although in the Constitutional Court's practice, the finding of a legislator's omission falls within the scope of exceptional legal consequences that are applicable *ex officio*, in many cases in connection with the enforcement of the right to a healthy environment, the deficiency or obsolescence of legislation may cause serious damage to the nature and the environment, thereby violating the right to a healthy environment or Article P(1) of the Fundamental Law. This is so, because the condition of the environment and nature is fundamentally not static: from time to time, the legislator must face new challenges to which the legal system must provide answers that are in line with the letter and spirit of the Fundamental Law.

34 Decision No. 13/2018. (IX. 4.) AB, Reasoning [65].
35 Decision No. 13/2018. (IX. 4.) AB, Reasoning [20].
36 Decision No. 3223/2017. (IX. 25.) AB, Reasoning [28].

However, as it has been already pointed out, in addition to protecting the rights of the current generations, the Fundamental Law requires the consideration of the interests of future generations (primarily based on the National Avowal and Article P of the Fundamental Law), as well as the protection of environmental and natural values as elements of the nation's common heritage 'for their own sake'. This also means that the Fundamental Law ultimately establishes an interpretative framework for the Hungarian legal system as a whole, which generally requires the consideration of the interests of future generations in parallel with evaluating the current needs. The above statements particularly hold true in the context of the fight against climate change: those measures that seem appropriate at a given moment in time can very quickly become insufficient. In that case, the legislation formally does not derogate (that is, the principle of non-derogation cannot be applied). Nevertheless, the obsolescence of the legislation means that the legal system is no longer capable of protecting the condition of the environment and nature. The legislator has an objective obligation to protect 'institutions' such as the environment and nature. In such cases, the Constitutional Court can hardly establish that the legislation under scrutiny is unconstitutional, for paradoxically, the annulment of the legislation would actually result in further weakening the level of protection. However, based on Section 46(1) of the Constitutional Court Act it may establish unconstitutionality caused by the legislator's omission. The Constitutional Court can do this also because, according to Section 2 of the Constitutional Court Act, "The Constitutional Court is the main body for the protection of the Fundamental Law."

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