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The use of the precautionary principle and the non-refoulement principle in
public law – Or how far the boundaries of constitutional principles extend**

Abstract

In addition to interpreting the precautionary principle, the present article shows that this principle of environmental law applies to agricultural practice as well. In a separate chapter, we analyze the relationship between the non-refoulement (also known as non-derogation) principle and the precautionary principle in connection with the latest cases of the Hungarian Constitutional Court's practice. This article summarizes the counter-arguments of the constitutional judges against a strong interpretation of the precautionary principle and analyzes whether a strong interpretation of said principle prevails in the practice of the Deputy Ombudsman for Future Generations.

Keywords: non-refoulement, non-derogation, precautionary principle, precautionary principle as a principle outside environmental law, strong and weak concepts of the precautionary principle, Housing Act, the application of the precautionary principle in the Ombudsman for Future Generations' practice.

1. The meaning of the precautionary principle and other related principles

The precautionary principle, together with the prevention and the restoration principle determine human activity in relation to the environment. The three principles can actually be interpreted collectively, and are appraisable in their combined effect.¹ The precautionary principle concerns the most common human behaviour.² In this field, the relationship between the behaviour and the environment, those elements and its totality is not entirely clear yet. It cannot be shown exactly how human behaviour will affect the environment or certain elements of it. Therefore, human behaviour shall be considered something that inherently poses a potential danger to the elements of the environment, precisely for the total of them.

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1 Fodor 2014, Fodor 2003, 40–43.

2 O’Riordan & Cameron 1994.



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Therefore, until the specific danger is not shown, we need to manage human activity as a potentially endangering factor, while its specific risk is not predetermined.³ Regarding the application of the principle, Gyula Bándi highlights three important elements in his summary article written in 2013: 1. The protection of the environment, 2. The serious or irreversible damage, 3. The level of scientific certainty.⁴

For the purpose of the application of the precautionary principle, these elements shall be reached by the activity, which we have to survey regarding the precautionary principle. The activity, for which the principle arises, is not an environmental activities in the strict sense of the word,⁵ so it does not extend to the activity of the huge industrial emitters entailing together with noise, radiation, waste, but it extends to the fields of nature farming, plant and animal health and human health, where the impact of the environment applies as the part of a more general expectation, not as a general rule.⁶

The second element is the serious or irreversible damage. If the damage reaches this rate, the principle, which determines human behaviour, will be the prevention and after that the recovery. If it does not reach this rate detectably yet, we have to compare the rate of the profit available by the activity with the rate of the damage, which adversely affects the environment. If the damages exceed the rates of the available profit, then the facility is not allowed.⁷ The issue of irreversibility depends on which mode of action can be reconciled for the overcompensation of the particular effect.⁸ If the direct effects are much faster than the results inducible by the defense mechanisms, then the effect is irreversible, and measures of the principle of restoration shall be applied.⁹ Thirdly, if the negative effect reaches the scientifically demonstrated level, the human intervention shall be specific and preventive regarding the occurrence of the negative consequences of the concrete demonstrated negative effect or it shall be oriented to the restoration of the occurred damages and the balance of nature and other environment. While it is not detectable, in the meantime, the lawmaker and law enforcer need to do everything in order that the presumed, but non-established effects shall not occur.¹⁰

The principle has undergone significant development since 2013. Today, the precautionary principle is a principle that refers to an approach to the protection of the environment or human health that is based on taking precautionary measures even when there is no clear indication of harm or threat thereof,¹¹ so that we should treat

³ Bándi 2019.

⁴ Bándi 2013, 474–476.

⁵ Krämer 2012.

⁶ Douma 2003.

⁷ United Nations General Assembly, World Charter for Nature, A/RES/37/7, 48th plenary meeting, 28.10.1982.

⁸ See more: Bell, McGillivray & Pedersen 2013; Birnie, Boyle & Redgwell 2009.

⁹ Sands 1994, 300–301.

¹⁰ The constituent parts of precautionary principle, Factors triggering resources to precautionary principle, Communication for the Commission on precautionary principle, COM/2000/0001 Final.

¹¹ Bell, McGillivray & Pedersen 2013, 68.

human activity as a potential threat.¹² Gyula Bándi emphasizes the protection of the environment, serious or irreversible damage and the level of scientific certainty as the most important elements in the application of the principle.¹³ The starting point of the principle is that our knowledge of science is limited, therefore the time of protecting our environment must begin as soon as possible.¹⁴ As a result, the precautionary principle appears one step ahead of the prevention principle. As a result, the interests of the environment must be taken into account in the pre-construction planning phase, i.e. the assessment of potential threats must be carried out before certain measures are taken.¹⁵ The application of the precautionary principle may also be the result of a new situation and a new reassessment of the situation.¹⁶

Although, according to Gyula Bándi, there are three possible ways in which this principle may have developed,¹⁷ we do not have accurate information about its antecedents and origins,¹⁸ but it is certain that it has appeared in more and more international legal documents since the 1990s.¹⁹ In terms of its international application, I must mention that both principles have been applied to this day. The precautionary principle has first been invoked in the case law of the Court of Justice of the European Union in Cases C-157/96²⁰ and C-180/96.²¹ Precaution itself appears differently in different contexts, has a different meaning,²² and its role and effect in different legal systems is different.²³ In Hungary, the strong enforcement of the principle is typical.²⁴

Regarding the principle of prevention, it is used if the damage has not occurred yet, but in connection with the activity related to the preservation of the direct environment, analysing the impact mechanisms analyzed, the damage is likely to happen. The occurrence has not appeared from nowhere, but the occurrence is certainty based on the natural laws and the scientific conclusions. That's why, regarding such activities, the user of the environment shall calculate with the measures for the protection of environment during the design, and these measures shall be suitable to avoid the occurrence of serious or irreversible environmental damages. During the design of human activity, the technologies, which aim is to avoid the damages, are the parts of construction and their main purpose is to avoid greater damages.²⁵

¹² Bándi 2019.

¹³ Bándi 2013, 474-476.

¹⁴ Fodor 2007, 48.

¹⁵ Bobvos 2011, 31-41.

¹⁶ Fodor 2019, 39.

¹⁷ Bándi 2019.

¹⁸ Krämer 2012, 22.

¹⁹ Cooney 2005, 12-24.

²⁰ Case C-157/96, 1998, 63-64.

²¹ Case C-180/96, 1998, 99-100.

²² Birnie, Boyle & Redgwell, 2009, 155.

²³ Vermeule 2012, 181.

²⁴ Szilágyi 2019, 89.

²⁵ Bándi et al. 2008.

The principle of recovery means that if the environmental damage has already happened, the person responsible for the damage should not only compensate for the caused damage, but this person, cooperating with the environmental protection organisation system, shall promote such mechanisms, which are suitable for the recovery of the disrupted environmental balance. Therefore the law, as the equipment of recovery, shall take action not only with the liability forms applicable in individual branches, but also as the set of legal liability, as the equipment of recovery. Regarding the caused environmental damages, the administrative, criminal and civil liability applies together with their impact mechanism.²⁶

Another related principle is the non-derogation principle, which we will use under the name ‘non-refoulement’ principle. This is a change we decided to make honouring Gyula Bándi’s wishes, who advised using the term non-refoulement.

2. The precautionary principles and the agricultural developments

The precautionary principle first appeared in food law among the areas affected by agriculture. The most important aspect of the principle is that for the purpose of the protection of consumers’ health protection, protection measures may be applied if suspicion arises that the consumption of some foods would be previously not known risk, but these could not be corroborated with scientific evidence. The introduction of this principle was established by the concerns of the customers regarding the spongiform encephalopathy of bovine.²⁷ It indicates the persistence of the consumer protection approach in the establishment of European food policy.²⁸ In applying the principle, the European food law considers the production process of the products and it does not solely take into account the characteristics of the final product.²⁹ The result of the application of the principle led to the application of a quasi moratorium against GMO products between 1998 and 2003.³⁰ In the present case, in the first round the Panel did not accept the Union’s argument that they based the authorisation procedure on the risk estimation procedure applied for the protection of plant, animal or human health. As they forbade the distribution of all investigated GMO products, so it did not talk about general risk estimates. In its final argument, the Panel accepts the reference to the effects expressed to the animal, plant and human health, if it is supported by an investigation, which is effective and built by similar principles.³¹ The whole decision mechanism of the WTO confirms the approach of the drug and food control organization of the U.S. (FDA, *Food and Drug Administration*), that the risk estimate procedure is built by the characteristics of the final product, not the process of the

²⁶ Csák 2012, 18–19.

²⁷ de Sadeleer 2000, 144–151.

²⁸ Cooney 2005.

²⁹ Bánáti 2007, 32–33.

³⁰ McMahon 2007, 322.

³¹ Szilágyi 2010, 122–123.

production. This approach excludes the application of precautionary principle in case of WTO, which promotes free trade.³²

However, the approach is still not too far from the thinking of the European Union.³³ It is very well illustrated by the welcome of the Hungarian position regarding the case of MON 810 maize. In the union proceeding, after the notification of the member state, the risk estimate mechanism and the authorisation are the competence of the European Commission.³⁴ The Commission, based on the result of the impact assessment, carried out in its own country authorised the public cultivation of MON 810 maize variety in the area of the European Union. In order to prevent the domestic public cultivation of this maize variety contained in the community variety catalogue from 2004, Hungary initiated a safeguard clause procedure. The procedure was essentially established on the basis of the precautionary principle, which is both the settled principle of food law and environment law. Hungary argued that the test results performed in the maize area of US are not clearly adopted to the Pannonian geographical region, where the most mixed climate elements prevail within Europe (because this region is affected by dry and humid continental, oceanic and mediterranean influences) and in complementarity with the basin effect caused by Carpathian Basin. In such areas, the risk of gene absconding proved the dry continental climate could not be verified, therefore, the environmental and flora fauna, furthermore the human health is not scientifically proven, but it lives in the assumable protection with the opportunity of safeguard clause. The argument of Hungary was not accepted by the Commission, but it was accepted by the Council decided in the framework of safeguard clause procedure with qualified majority.³⁵

The precautionary principle is of paramount importance for food safety. The obligation of states includes, as a minimum, the obligation to ensure freedom from starvation and minimum access to essential foods of adequate nutritional value and safety.³⁶ According to the legal definition, the state resulting from the fulfillment of food safety is a level of safety that is based on the knowledge and recognition of health risks according to science.³⁷ Where there is a risk of harm to health, all necessary measures must be taken to eliminate the risk, even if insufficient scientific evidence is available to demonstrate this.³⁸ The precautionary principle is therefore an important principle of food safety, with traceability and proper risk analysis, as well as clearly defined responsibilities.³⁹

In the European Union, the precautionary principle has been reaffirmed in the case law of the Court of Justice of the European Union (CJEU) on the prohibition of the use of neonicotinoids on plants attractive to bees.⁴⁰

³² Bánáti 2007, 32.

³³ Fisher 2002, 7–28.

³⁴ Foster, Vecchia & Repacholi 1991, 979–981.

³⁵ Szilágyi 2010, 118–119.

³⁶ Wernaart 2013, 63.

³⁷ Horváth 2015.

³⁸ Téglásiné 2017, 179.

³⁹ Szabó 2014, 28.

⁴⁰ Horváth 2015.

In 2005, it was found that the presence of genetically modified organisms in pollen and some of its honey samples offered for sale as a dietary supplement by Karl Heinz Bablok and his beekeepers was detected. Due to the presence of GMOs, their products have become unsuitable for placing on the market.⁴¹ According to Bablok, pollen is not a GMO under Regulation (EC) No 1829/2003 because it was no longer suitable for specific and individual reproduction when it entered honey.⁴² In its judgment, the CJEU reflected that even if pollen could not be regarded as an organism and therefore as a GMO, the product could still be withdrawn from the market because it was found containing ingredients produced from GMOs.⁴³ By opting for a broad interpretation, the CJEU confirmed that all foods containing a genetically modified organism should be included in the scope of Regulation (EC) No 1829/2003.⁴⁴ This also means applying the precautionary principle from a food safety point of view.⁴⁵ It follows from the principle that, where the existence or extent of risks is uncertain, in particular with regard to risks to the environment, protective measures may be taken without having to wait for full proof of the reality and severity of those risks.⁴⁶

The role of the precautionary principle in food safety is different on an international level. The US interpretation is contrary to EU practice, as in their view the precautionary approach has an intolerable economic blocking effect.⁴⁷ Under U.S. law, when assessing the health risk of a GM plant or product made from it, its chemical composition should be compared to that of the non-GM product, but to that of the closest conventional plant.⁴⁸ In the case of Argentina, progress has been made in recent years in applying the principle, with the province of Santa Fe including in its law on nature and land management declaring land covered by the law to be ‘common natural assets’ to be managed and developed in a precautionary manner.⁴⁹ In Bulgaria, in addition to Regulation (EC) No 1829/2003 of the European Parliament and of the Council and related legislation, legislation on GMOs aims to transpose the precautionary principle from EU law to some extent, thus ensuring an adequate level of food safety.⁵⁰ Finnish legislation refers several times to the precautionary principle from the point of view of food safety, and the reference to this principle also appears before their courts.⁵¹ In the case of Poland, the application of the precautionary principle with regard to GMO-free status is also a priority as a public obligation.⁵²

⁴¹ Szabó 2014, 25.

⁴² C-442/09 (44).

⁴³ 1829/2003/EK Article 3.

⁴⁴ Szabó 2014, 26–27.

⁴⁵ Olajos, Nagy & Csirszki 2019, 3.

⁴⁶ Horváth 2015.

⁴⁷ Horváth 2015.

⁴⁸ Raisz 2021, 144.

⁴⁹ Victoria & Malanos 2019, 3.

⁵⁰ Bulgarian Paper 2019, 5.

⁵¹ Anttila 2019, 3–15.

⁵² Czechowski 2019, 8–20.

It can be said, therefore, that the practice of states generally adopts the precautionary principle as the basis of food security. The focus of the European Union's genetic engineering regulations is not on the product itself, but on the technology by which it is produced.⁵³

The precautionary principle has arisen as the solution of the general philosophy problem in the German legal literature. Is it ethical to use the stem cells of unborn embryos in order to save the health of living people with them?⁵⁴ The author is looking for argument systems for the purpose of protection of unborn human life. One of the basics of his argument system is the precautionary principle, while he determines two examples known from philosophy as the confirmation of this argument. The debate is based on general human assumptions, in the spirit of this, he defines the precautionary principle with the equipment of philosophy in such a way: “[...] *in situations with good doubts whether a being falls within in the scope of a moral norm, it has to be assumed that this is the case, if the opposite assumption and its possible positive outcomes do not stand in an acceptable proportion to the moral harm that would be caused if the assumption is denied.*”⁵⁵

For defending this argument, they themselves must hold the opinion that embryos do not possess the worth-conferring property in question but have a certain connection – that of numeric identity and potentiality – to a being worthy of protection.⁵⁶

The first analogon is provided by reference to the example of a hunter.

It says that a hunter is not allowed to fire at a living being that moves in the undergrowth if he is uncertain whether the beings are deer or playing children. This prohibition is meant to be valid even if the hunter's family feels the pinch of hunger and accordingly the shooting of deer would realize an ethical good of high rank. The conclusion drawn from this example is that we are in the same situation as the hunter. As long as there are good doubts concerning the moral status of the embryo, we ought to treat them (the doubts) in the same way as the beings in the undergrowth, i.e. abstain from killing them.⁵⁷

The other example is the example of slaves: The slavery, as an institution, was already convicted by several people in ancient times on the basis that it breaks out live and clever people from society.⁵⁸ Whatever justifies the outstanding moral status of human beings – be it the ability to form life plans and to lead the life as a person, be it some sort of recognition, be it the ability to perform certain abilities or the possession of certain properties or faculties – there is no doubt that slaves possessed these abilities as they are ordinary human beings. Furthermore, slaves themselves are able to claim recognition.⁵⁹

⁵³ Raisz 2021, 144.

⁵⁴ Fodor 2018, 42–64.

⁵⁵ Damschen & Schönecker 2002, 187–267.

⁵⁶ Düber 2012, 159–169.

⁵⁷ Düber 2012, 164.

⁵⁸ Damschen & Schönecker 2002, 251.

⁵⁹ Düber 2012, 165.

Approving Dübner argument, it can be said that precautionary principle can be used as an additional principle to the protection of human health and environment until we have confidence in the existence of the presumed danger. We have to do this in order to the vulnerable and protected groups,⁶⁰ furthermore the protection of the environment to be protected. This approach is strengthened by the role of the law in the environmental protection and the equipment-nature of the law. However, the equipment used in the solution of the environmental and food chain problems could not be used as the solution of general ethical and philosophical problems, if it could not be confirmed by logical argument.

3. The precautionary principle in the practice of the Constitutional Court of Hungary. Regarding the implementation of Act LXXVIII of 1993 (Housing Act) at World Heritage Sites

The President of the Republic – pursuant to Article 6 (4) and Article 9 (3) (i) of the Fundamental Law – requested a preliminary norm control procedure pursuant to Section 23 (1) of Abtv, regarding certain rules concerning the lease and alienation of flats and premises in Act LXXVIII of 1993 (Housing Act), which was adopted by the Parliament on 15 June 2021, as well as Section 1 of the Amending Act of Act CXCVI of 2011 on National Assets (Bill no. T/16223), and the closely related Articles 2–3 of the same Act, in order to examine its compliance with the Fundamental Law.

The purpose of the law affected by the procedure is to enable the tenants of apartments in a building listed as part of the World Heritage Sites, which were previously excluded from the right to purchase state and municipal housing prior to the change to acquire ownership of the apartments they rented. Accordingly, Section 1 of the Act – Act LXXVIII of 1993 on certain rules concerning the lease of apartments and premises and their alienation (hereinafter the Decision) with the amendment of the Housing Act – on 31 December 2020, in the case of a lease, establishes the right of purchase on the municipal and state-owned real estate in the listed building on the World Heritage Site and in the protected area. It also establishes the right of purchase, the rules for calculating the lease underlying the right to purchase and the detailed rules for determining the purchase price.

The Constitutional Court ruled on the motion of the President of the Republic that the provisions of the Act adopted by the Parliament but not yet promulgated, which would have granted buying option right to the tenants who have rented a state-owned or municipally-owned apartment in a national heritage building for not more than 25 years, are contrary to the Fundamental Law. In its decision, the Constitutional Court also ruled as a constitutional requirement that in the case of the exercise of the right of option granted to the tenants of flats in a national heritage building, the heritage protection authority must give its consent to the sale by taking into account the aspects of national heritage protection. The procedure of the Constitutional Court was based on a motion by the President of the Republic, in which he requested an examination of the conformity with the Fundamental Law of Sections 1 to 3 of the Act

⁶⁰ Harnócz 2018, 81–106.

amending the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises and the Act CXCVI of 2011 on National Assets.

The purpose of the provisions of the Act affected by the motion is to enable the tenants to acquire ownership of the flats they rent, provided that these flats are located in national heritage buildings previously excluded from the right of option applicable to state and municipal flats in the context of the privatization of exclusive state property prior to the change of the regime. In the view of the President of the Republic, the legislative objective and the right of option established in the contested draft amendment to the Act are incompatible with the constitutional requirement to protect and preserve the built environment as part of the cultural heritage, in particular the buildings under national heritage protection.

While under the current legislation, a flat in a national heritage building can only be sold with the consent of the heritage protection authority, in accordance with the provisions of a specific law, the new provisions laid down in the proposed Act would establish a right of option to the entire range of state- and municipality-owned national heritage properties in the World Heritage Area and its protection zone.

According to the President of the Republic, this is contrary to non-refoulement, which guarantees the protection and preservation of cultural values, and the need for such a restriction on municipality ownership is unjustified and disproportionate.

In relation to the restriction of the right to property, the Constitutional Court explained that the right of option may result in the termination of the right to property, which is a heavy burden and requires compensation. The municipality must receive a consideration for the flats lost due to the right of option that keeps in its assets a value commensurate with the value of the flats it owned. The method of securing the proportionality of values must be formed by the legislature. Any variation or amendment to the existing provisions satisfying the constitutional condition that the principle of proportionality is respected is possible. The Act has defined three categories of persons entitled to the right of option: those who have been renting the flat for between 5 and 15 years, those who have been renting it for between 15 and 25 years and those who have been renting it for more than 25 years. According to the reasoning, the law-maker considered the conditions under which tenants – who had previously acquired a right of option – in a similar situation to the tenants concerned now, could exercise it under the statutory and municipal rules established in the 1990s, to be the relevant conditions.

However, in the Constitutional Court's view, the provisions of the Act are only consistent with the law-maker's objective in the case of tenants whose tenancy exceeds 25 years. Moreover, the exceptional nature – as required by the Fundamental Law – of the regulatory solution concerning the other two categories of subjects has not been justified by the law-maker. The Constitutional Court has therefore declared the provisions of the Act relating to the right of option of the tenants who have been in a tenancy for less than 25 years to be contrary to the Fundamental Law.

The Constitutional Court further explained in its decision that the requirement of non-refoulement previously established in relation to the right to a healthy environment is constitutionally applicable to the obligation undertaken by the State in the context of the protection of national heritage buildings.

Its essential aim is to ensure that the level of protection once achieved is not lowered. It is a constitutional requirement that, in the case of the sale of national heritage buildings, the State should provide appropriate guarantees to ensure that the relevant building is managed after the change of ownership in accordance with its level of national heritage protection. This is a particularly important guarantee in the case of the flats covered by the Act under review, most of which are being taken out of state or municipal ownership for the first time.

The Constitutional Court has therefore stressed that the State has a duty to incorporate into its legislation guarantees that contribute to maintaining the level of protection, even in the case of legal transactions concerning national heritage buildings. Therefore, the Constitutional Court established as a constitutional requirement under Article P (1) of the Fundamental Law that the agency exercising the regulatory right to protect national heritage buildings should not subordinate the interests of the protection of heritage buildings to other aspects in its decision-making, and thus it should give consent to the sale, as a precondition of exercising the right of option, by taking into account the aspects of the protection of national heritage buildings.

The prohibition of withdrawal is now interpreted in accordance with the precautionary principle and the prevention principle, as well as with the first paragraph of Article P and Article XXI.⁶¹ In addition, the legislator must take into account the principles of caution and prevention in all cases where legislation on the protection of the environment is reformed, since failure to protect nature and environmental protection can lead to irreversible processes.

The Constitutional Court, in its decision CCH 4/2019. (III.7.), presented a summary of the constitutional interpretation of the principle of non-refoulement. It confirmed the interpretation that the prohibition of withdrawal is a fundamental aspect of the right to a healthy environment. Its limitation may be determined in accordance with the third paragraph of Article 1 of the Fundamental Law.⁶²

The Constitutional Court therefore pointed out that the right to a healthy environment is not an absolute right, it can also be limited according to the fundamental rights test laid down by the Fundamental Law. In the interpretation of the body, it follows from the subject matter of the right to the environment and its dogmatical characteristics that the level guaranteed by nature conservation legislation cannot be reduced by the State, unless this is unavoidable to the effect of other constitutional law or value.

The level of reduction of the level of protection is not disproportionate to the objective pursued. In the practice of the Constitutional Court, non-refoulement applies, not optically, but according to its function, to the application of the fundamental rights test. According to the test laid down in the decision of the Constitutional Court of 4/2019, it must be examined that the motion was submitted: (1) whether they are subject to the right to a healthy environment, (2) a non-refoulement at the level of protection can be established, and yes, (3) whether the non-refoulement can be justified by Article I of the Fundamental Law 1 (3) (adapted) Depending on paragraph 1 of this

⁶¹ CCH 25/2021. (VIII.11.) (56).

⁶² CCH 4/2019. (III.7.) (57).

Article, i.e. whether the necessity is constitutional according to the proportionality criteria.⁶³

In its later practice, the Constitutional Court extended the right to a healthy environment to protect the built environment. In the Constitutional Court's Decision 27/1995. (VII.25.), the Constitutional Court stated that it follows from the right to the environment that the level of protection of the built environment in its legislation cannot be reduced by unbinding administrative decisions.⁶⁴

According to the practice of the Constitutional Court, the right to a healthy environment, the basic law, in a small way, covers the protection of monuments in a synchronised manner. In the CCH 3104/2017 (V.8.), the State therefore commits, in the context of the protection of monuments, to the values it intends to retain for future generations, which, in constitutional terms, shares the withdrawal ban established in the area of the right to a healthy environment.⁶⁵

According to CCH 3104/2017 (V.8.), Article P) (1) is a pillar of the institutional guarantees of the fundamental right to a healthy environment, which establishes the protection, maintenance and preservation of the values of the natural and built environment, of the common natural and cultural heritage of the nation and of future generations as a general constitutional responsibility of the State and of everyone and makes it an obligation under the Fundamental Law.⁶⁶ The maintenance of the level of protection is a constitutional requirement for monuments, especially when international world heritage protection is associated with the regulation not only for preservation and control aid bodies but also for other legal acts outside public law.⁶⁷ The rules for the general protection of monuments in the separate chapter of the Environmental Protection Act. The municipal enforcement regulation lays down the material and formal rules necessary to guarantee our professional protection in this regulation, as well as the designation of the historic authorities.⁶⁸

In regards to maintenance and use, the Environmental Act provides for additional rules compared to the Civil Code. This additional rule does not mean supplementing the rights of ownership, but contains rules on compliance with the obligations arising from ownership. For example, it is not enough for monuments to meet only the requirements of well-known, universally prescribed normal use. Among the ownership sub-licenses, the environmental law highlights the right to use and names the maintenance obligation as an obligation to do so.⁶⁹

This also indicates that the owners of monuments are faced with several obligations arising from these rights. In line with the general rules on the maintenance of the elements of the built environment, the basic obligation of maintenance rests with the owner of the monument.

⁶³ CCH 4/2019. (III.7.) (58).

⁶⁴ CCH 27/1995. (VII.25.) (59).

⁶⁵ CCH 3104/2017 (V.8.) (60).

⁶⁶ CCH 3104/2017 (V.8.) (61).

⁶⁷ CCH 3104/2017 (V.8.) (83).

⁶⁸ CCH 3104/2017 (V.8.) (84).

⁶⁹ CCH 3104/2017 (V.8.) (85).

However, it is not always possible to be satisfied with the maintenance of the existing state, since the preservation of monument values is also an essential element of the protection of monuments. According to Section 41 of the Environmental Act, the owner or the owner of the property rights must ensure the maintenance and good maintenance of the monuments. The monument must be maintained intact and without changing its nature. The maintenance and good maintenance obligation also covers the architectural, training and art components and accessories that form the specific values of the monument. The requirement of the first paragraph of the basic law to ensure compliance with its obligation to maintain the law by enforcing the conditions laid down by law that can be examined individually. The Environmental Protection Act is 42. § (1). According to paragraph 1 of this Article, the identity, residence and place of residence of the owner of the monument is unknown, and the preservation and good maintenance of the monument is ensured by the authority at the expense of the owner, i.e. the State obligation to preserve the value also exists in the underlying way in the case of a privately owned monument.⁷⁰

4. Extensive application of the precautionary principle and its constitutional criticism

In the practice of the Hungarian Constitutional Court, after the previous antecedents, the so-called principle of the precautionary principle first appeared more strongly in Decision 13/2018 (IX. 4.) on declaring that Section 1 and Section 4 of the Act on Amending, with respect to water abstractions, the Act LVII of 1995 on Water Management. In the given case, the government's intention to relinquish its goal of exempting the owners of wells drilled over 80 meters from the notification and licensing obligation as non-refoulement came to the attention of the Constitutional Court.

Section 45 (7) (s) of Act LVII of 1995 (Water Management Act) would allow the government to exempt existing owners of the use of groundwater from the obligation to permit and notify existing water law practices throughout the current water law practice, almost legally providing them with agricultural utilization of water resources above 80 meters.

Groundwater is state-owned, so it is up to the authorities to authorize it for agricultural purposes, and under the current provisions, water abstraction requires notification and a permit for the survival of a private water facility. The majority view is therefore that unauthorized authorization of unlicensed and unreported private use of state-owned water resources would deprive future generations of water use rights and the possibility of public management, thus complementing the precautionary principle.

Justices dr. Ágnes Czine, dr. Balázs Schanda and dr. István Stumpf attached concurring reasonings to the Decision, while Justices dr. Egon Dienes-Oehm, dr. Imre Juhász, dr. Béla Pokol, dr. Mária Szívós and dr. András Varga Zs. attached dissenting opinions to the decision.

⁷⁰ CCH 3104/2017 (V.8.) (87).

In her concurring reasoning, Justice Dr. Ágnes Czine states that while she agrees with both the decision and the reasoning itself, she feels it necessary to point out the impact of Article P) (1) of the Fundamental Law and quite a few Decisions' impact on this topic. The right to a healthy environment requires legal protection of an attitude different from that of other fundamental rights. The reason for this is that the failure to protect nature and the environment may induce irreversible processes.⁷¹ Prevention and the precautionary principle play a decisive role in the protection system of the right to a healthy environment.⁷² She holds that with regard to the precautionary principle the Constitutional Court had to explore the environmental risks implied in the regulation challenged by the petition, and the scientific background of the problem had to be examined as well.⁷³ She thinks it was verifiable beyond doubt that interventions into the aquifers without permission or reporting bear the real risk of contamination and thus the reduction of drinking water reserves.⁷⁴ In her opinion, the legislative reasoning of the challenged normative text should not be left unnoticed, and it clearly indicates the content of the government decree to be adopted in the future on the detailed rules.⁷⁵ She states that maintaining the water right licensing procedure is an important guarantee of preserving the quantity and the quality of the stocks of sub-surface waters.⁷⁶

In his concurring reasoning, Justice Dr. Balázs Schanda references the National Avowal of the Fundamental Law.⁷⁷ He also states that the reduction of the level of protection is unconstitutional unless it is made necessary by the enforcement of another fundamental right or constitutional value. However, the non-refoulement should be assessed in the complete regulatory context, rather than in itself.⁷⁸

The concurring reasoning by Justice Dr. István Stumpf references the National Avowal and Article P) (1) of the Fundamental Law.⁷⁹ He holds that conflict with the Fundamental Law can be identified in the fact that – by reducing the guarantees of statutory level – the amendment opens up the possibility for regulating the issue with a government decree, reducing the former level of protection of the stock of water, which is against the requirement of precaution and it is contrary to the State's obligation of carefully protecting the nation's natural heritage and of preserving it for the future generations.⁸⁰

⁷¹ CCH 13/2018 (IX.4.) (78)–(79).

⁷² CCH 13/2018 (IX.4.) (81).

⁷³ CCH 13/2018 (IX.4.) (84).

⁷⁴ CCH 13/2018 (IX.4.) (85).

⁷⁵ CCH 13/2018 (IX.4.) (93).

⁷⁶ CCH 13/2018 (IX.4.) (96).

⁷⁷ CCH 13/2018 (IX.4.) (98).

⁷⁸ CCH 13/2018 (IX.4.) (99).

⁷⁹ CCH 13/2018 (IX.4.) (100).

⁸⁰ CCH 13/2018 (IX.4.) (106).

Justice Dr. Egon Dienes-Oehm stated in his dissenting opinion that the majority decision makes an attempt to support with a new and legally questionable argument the prohibition of reducing the level of protection, which is, in itself, disputable and disputed.⁸¹ He thinks that the reporting obligation as well as the obtaining of other water right permits necessary for a water project, together with more severe supervision and with the consistent application of misdemeanour sanctions would be suitable for guaranteeing the protection of nature as a prominent subject of protection under the Fundamental Law.⁸² Justices Dr. Mária Szívós and Dr. András Varga Zs. both agreed with this dissenting opinion.

Justice Dr. Imre Juhász had a different dissenting opinion, in which he holds that the decision shall erode the principle of the separation of the branches of power, actually taking away the competence of the executive power when it declares that the statutory provisions are contrary to the Fundamental Law. Before the Government had an opportunity to adopt this decree, the majority decision deprived it of the chance to implement the Act. He thinks we should have been granted the opportunity to know the government decree in order to be in a position to assess which option would serve the purpose of protecting our waters.⁸³

The dissenting opinion of Justice Dr. Béla Pokol is one that Justices Dr. Mária Szívós and Dr. András Varga Zs. both agreed with. Leaving out in the past the constitutional right of ownership from the questions discussed here may also raise a problem about arguing with the principle of ‘non-derogation’ widely used by environmentalists and also referred to several times in the majority decision.⁸⁴ The concerns raised in the petition with regard to the government decree-level regulation to be issued in the future could have been remedied by placing a constitutional warning in the reasoning of the decision.⁸⁵

The dissenting opinion by Justice Dr. Mária Szívós states that the decision failed to adequately determine the level of protection achieved, as it examined the question only from formal aspects, i.e. it is based on the normative text of the legal provisions presented in detail in the decision. By examining the issue in details, it is beyond doubt that – in line with the concerns that have been expressed by the professional organisations for a long time – the cause of the problem is indeed the fact that as much as 90% of the relevant wells have been established illegally, i.e. their establishment is not preceded by licensing procedure and the authorities in charge of providing supervision have no information about these wells. This is because the State has failed, for a long time, to enforce (through the competent organs) the level of protection ensured.⁸⁶

⁸¹ CCH 13/2018 (IX.4.) (109).

⁸² CCH 13/2018 (IX.4.) (110).

⁸³ CCH 13/2018 (IX.4.) (115).

⁸⁴ CCH 13/2018 (IX.4.) (121).

⁸⁵ CCH 13/2018 (IX.4.) (122).

⁸⁶ CCH 13/2018 (IX.4.) (127).

Justice Dr. András Varga Zs.'s dissenting opinion contains the idea that the rejection of the petition and prescribing a regulatory requirement about the government decree to be adopted could have been deductible from the Fundamental Law.⁸⁷ He thinks the main question is the standard (or criterion) that can overturn the presumption about the constitutionality of a law. Is it a certain injury of one of the Constitutional Court's provisions that takes place logically, on the basis of our knowledge of the reality, or is it a certain degree of probability of such an injury, or the mere possibility of the injury.⁸⁸ I hold that the presumption of constitutionality is always turned over by the injury of a provision that has taken place (in case of a constitutional complaint) or that is to take place assuredly (in case of other norm controls).⁸⁹

Regarding this Decision, Ede János Szilágyi states that the Constitutional Court of Hungary developed a considerably strong concept of the precautionary principle. According to him, this concept means that the proper implementation of the precautionary principle is a strict condition for the Hungarian lawmakers. Namely, if the Hungarian lawmakers do not take the precautionary principle into account in an appropriate way during the adoption of a legal provision, this will cause a lack of conformity with the Hungarian constitution. Thus the Constitutional Court of Hungary shall annul the affected legal provision.⁹⁰ Apart from the determination of the precautionary principle by the CCH merely in its jurisdiction, there is an opportunity - and nowadays, a push - to define the precautionary principle in the constitution itself.⁹¹ The authors of this article do not agree with the possibility of defining this principle in the Fundamental Law itself for several reasons, which we will further explain.

5. Analysis of the precautionary principle in light of the practice of the Ombudsman for Future Generations

Examining the practice of the Ombudsman for Future Generations,⁹² we can see that although environmental reports do not provide the majority of all annual reports, they do occur every year. The precautionary principle does not appear in every report, motion or resolution. Sometimes the reference base is only Article XX and Article XXI of the Fundamental Law.⁹³ If the non-refoulement appears in the report, this may be in the light of the interpretation of the Constitutional Court.⁹⁴ The decisions and interpretation of the Constitutional Court also play a role in the reference base of joint reports.⁹⁵

⁸⁷ CCH 13/2018 (IX.4.) (140).

⁸⁸ See more. Szilágyi 2021(9) 211–215.

⁸⁹ CCH 13/2018 (IX.4.) (138).

⁹⁰ Szilágyi 2019, 88.

⁹¹ Szilágyi 2019, 109.

⁹² Szilágyi 2021, 132–133.

⁹³ AJB-4642/2020, 2–3.

⁹⁴ AJB-94/2020, 8.; AJB-1100/2020, 6.

⁹⁵ AJB-1100/2020, 6.

Acting in the activities of the Deputy Commissioner, CCH 13/2018. (IX.4.), since it directly refers to the fact that *“the responsibility for future generations arising out of the Fundamental Law requires the legislator to assess the expected impact of its measures on the basis of scientific knowledge, in accordance with the principles of precaution and prevention. evaluate and consider.”*⁹⁶ Based on the precautionary principle, the Ombudsman's legislative proposal also addressed the issue of enforcing environmental liability and reforming the system of sanctions.⁹⁷ The decisions of the Constitutional Court are cited in many places in all available annual reports on the activities of the Commissioner for Fundamental Rights, which show the depth of the relationship between the two bodies and justify a joint examination of Constitutional Court decisions and reports by the Commissioner for Future Generations. In the examination of the activities of the Deputy Commissioner for the Protection of the Interests of Future Generations, the precautionary principle has been invoked in 17 of the last 27 years, a total of 42 times. Since 2012, the application of the principle has grown exponentially, appearing every year.⁹⁸

Regarding environmental administrative issues, the need for a broad interpretation is clearly visible, AJBH would prefer the interpretation as a constitutional principle. According to Gyula Bárdi, the precautionary principle is not only an environmental principle, but also a constitutional principle.⁹⁹ According to him, this principle can be applied not only in environmental law, but also in constitutional law as a whole. The proportionality test would be applied here in terms of whether an activity has a significant impact on the environment.

Despite this objective, we have not found any examples of a broad interpretation in the specific documents, only the objectives and interpretive activity of the accounts support the application of the principles at the constitutional level.

6. Summary

To sum up, we can state that even the Ombudsman for Future Generations' practice raises questions about the applicability of the strong concept of the precautionary principle. Therefore, supported by the data available as well as following Justice Dr. Imre Juhász's dissenting opinion, in which he holds that CCH 13/2018 shall erode the principle of the separation of the branches of power, actually taking away the competence of the executive power, we do not stand by the strong concept of the precautionary principle. We believe that while the precautionary principle is absolutely necessary in environmental law, its inclusion into the Fundamental Law would have devastating consequences. We do not support the powers of the Constitutional Court of Hungary spreading so far that it diminishes the powers of the executive branch.

⁹⁶ AJB-2037/2020, 13.

⁹⁷ AJB-2037/2020, 22.

⁹⁸ Mercz 2021, 19.

⁹⁹ AJB-3658-2/2018, 4.

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