

*István I. Olajos, Ph.D., Associate Professor
University of Miskolc
Faculty of Law
civoliga@uni-miskolc.hu*

THE PRECAUTIONARY PRINCIPLE IN THE PRACTICE OF THE HUNGARIAN CONSTITUTIONAL COURT AND THE CONNECTED AGRICULTURAL INNOVATIONS*

Abstract: *The present article analyses the precautionary principle, which is one of the basic principles determines the basic human behavior applicable to environmental protection. The analysis happens in three perspectives.*

The first is the static perspective, which summarize, what do we mean under the definition of precautionary principle in the Environmental law. The author separates the precautionary principle from the two other related principles of human behaviour, which are the prevention and the recovery.

The second perspective analyses, how this principle can be used in the field of the two areas of agricultural innovations related directly to the environmental protection, which are the food chain and the genetic engineering activities. In this field the question to be examined is, whether the principle is suitable for the corroboration of such bioethics responses that the stem cell of the unborn embryo is usable for saving other people's lives.

The third perspective is a constitutional change of attitude, the practice of Constitutional Court of Hungary. The main questions are, according to which arguments should integrate the Constitutional Court of Hungary this difficulty interpretable principle for the purpose of the protection of natural resources named as the common heritage of the nation in the Fundamental Law of Hungary and where are the limits of the legal actions regarding this principle.

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1. THE PRECAUTIONARY PRINCIPLE AND ITS MEANING, OTHER RELATED PRINCIPLES

The precautionary principle, together with the prevention and the restoration principle determine the 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 on the most common human behaviour.² In this field, the relationship between the behaviour and the environment, those elements and its totality is not clear yet. It cannot be shown exactly, how the human behaviour will affect the environment or certain elements of it. Therefore, the human behaviour shall be considered, which is a potentially danger to the elements of environment, and for the total of them. Therefore, until the specific danger is not shown, we need to manage the human activity as a potentially endangering factor, while its specific risks 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 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

¹ László Fodor, *Környezetjog*, Debreceni Egyetemi Kiadó, Debrecen, 2014; László Fodor, "A környezetjog alapelvei", *Környezetjog* (ed. László Fodor), Bíbor Kiadó, Miskolc, 2003, 40-43.

² Timothy O'Riordan, James Cameron, *Interpreting the Precautionary Principle*, Earthscan, London, New York, 1994.

³ Gyula Bándi, "Az elővigyázatosság elvének mai értelmezése", *Új kutatási irányok az agrár- és környezetvédelmi jog területén*, conference organised by University of Szeged, Hungarian Association of Agricultural Law and Association of Hungarian Lawyers, 16 May 2019, Szeged.

⁴ Gyula Bándi, „Gondolatok az elővigyázatosság elvéről”, *Jogtudományi Közöny*, 10/2013, 474-476.

⁵ Ludwig Krämer, *EU Environmental Law*, Sweet & Maxwell, London, 2012.

⁶ Wybe Douma, *The Precautionary Principle Its Application in International, European and Dutch Law*, Rijksuniversiteit, Groningen, 2003.

The second element is the serious or irreversible damage. If the damage reaches this rate, the principle, which determines the 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 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 be occurred.¹⁰

Regarding the principle of prevention, if the damage is 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.¹¹

The principle of recovery means that if the environmental damage happened yet, the person responsible for the damage is not enough to compensate the caused

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

⁸ See more: Stuart Bell, Donald McGillivray, Ole W. Pedersen, Environmental Law, Oxford University Press, New York, 2013; Birnie, Patricia, Alan Boyle, Catherine Redgwell, International Law and the Environment, Oxford University Press, New York, 2009.

⁹ Phillippe Sands, The Greening of international Law: Emerging Principles and Rules, Indiana Journal of Global Legal Studies, 2/1994, 300-301.

¹⁰ The constituent parts of precautionary principle, Factors triggering recourse to precautionary principle, Communication for the Commission on precautionary principle, COM/2000/0001 Final, http://ec.europa.eu/dgs/health-Consumer/library/pub/pub07_3n.pdf

¹¹ Gyula Bándi, Orsolya Csapó, Luca Kovács-Végh, Bence Stágel, Szilvia Szilágyi, Az Európai Bíróság környezetjogi ítélezési gyakorlata, Szent István Társulat, Budapest, 2008.

damage, but this person, cooperating with 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.¹²

2. THE PRECAUTIONARY PRINCIPLE AND THE AGRICULTURAL DEVELOPMENTS

The precautionary principle first appeared in food law among the areas affected by agriculture. The most important report of the principle, that for the purpose of the protection of consumers' health protection, protection measures may be applied if suspicion exists 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.¹³ It indicates the persistence of the consumer protection approach in the establishment of European food policy.¹⁴ In applying the principle, the European food law considers the production process of the products and it does not solely take into account the characteristic of the final product.¹⁵ The result of the application of the principle led to the application of quasi moratorium against GMO products between 1998 and 2003.¹⁶ 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 estimate. 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.¹⁷ The whole decision

¹² Csilla Csák, "A felelőségről általában", *A környezetjogi felelősség magánjogi dogmatikája* (ed. Csilla Csák), Bíbor Kiadó, Miskolc, 2003, 40-43.

¹³ Nicolas de Sadeleer, "The Enforcement of the Precautionary Principle by German, French and Belgian Courts", *Reciel*, 2/2000, 144-151.

¹⁴ Rosie Cooney, *Biodiversity and the Precautionary Principle: Risk and Uncertainty in Conservation and Sustainable Use*, Gland, Cambridge, IUCN, 2005.

¹⁵ Diána Bánáti, "Az EU élelmiszer politikájának változása", *Élelmiszerbiztonság a nemzetközi kereskedelem területén* (eds. Diána Bánáti, József Popp), AKI Tanulmányok, Budapest, 2007, 32-33.

¹⁶ Joseph A. McMahon, *EU Agricultural Law*, Oxford University Press, Oxford, 2007, 322.

¹⁷ János Ede Szilágyi, "A géntechnológia jogi szabályozása", *Környezetjog II. kötet – Tanulmányok a környezetjogi gondolkodás köréből*, (ed. János Ede Szilágyi), Novotni kiadó, Miskolc, 2010, 122-123.

mechanism of the WTO confirms the approach of the drug and food control organization of 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 production. This approach excludes the application of precautionary principle in case of WTO, which promotes the free trade.¹⁸

However, the approach is still not too far from the thinking of the European Union.¹⁹ It is very well illustrated by the welcome of the Hungarian position regarding in 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.²⁰ 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 at the area of the European Union. In order to prevent the domestic public cultivation of this maize variety contained 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 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.²¹

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?²² The author is looking for argument systems for the purpose of protection of unborn human life. One of their basic of his argument system is the precautionary principle, while he determines two example known from philosophy as the confirmation

¹⁸ Diána Bánáti (2007), 32.

¹⁹ Elizabeth Fisher, „Precaution, Precaution Everywhere: Developing a ‘Common Understanding’ of the Precautionary Principle in the European Community”, *Journal of European and Comparative Law*, 1/2002, 7-28.

²⁰ Kenneth R. Foster, Paolo Vecchia, Michael H. Repacholi, „Science and the Precautionary Principle”, *Science*, 5468/1991, 979-981.

²¹ János Ede Szilágyi (2010), 118-119.

²² László Fodor, „A precíziós genomszerkesztés mezőgazdasági alkalmazásának szabályozási alapkérdései és az elővigyázatosság elve”, *Pro Futuro*, 2/2018, 42-64.

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 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.”²³

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.²⁴

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.²⁵

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.²⁶ 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.²⁷

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,²⁸ furthermore the

²³ G. Damschen, D. Schönecker, In dubio pro embryone. Neue Argumente zum moralischen Status menschlicher Embryonen, Der moralische Status menschlicher Embryonen. Pro und contra Spezies-, Kontinuums-, Identitäts-, und Potentialitätsargument, Walter de Gruyter, Berlin, New York, 2002, 187-267.

²⁴ Domonik Düber, The Morality of Embryo Use and the Argument for Precaution, Meditor, 1-2/2012, 159-169.

²⁵ Dominik Düber (2012), 164.

²⁶ G. Damschen, D. Schönecker (2002) 251.

²⁷ Dominik, Düber (2012), 165.

²⁸ Dorina Harnócz, „New plant breeding techniques and genetic engineering: legal approach”, Journal of Agricultural and Environmental Law, 25/2018, 81-106.

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 PRACTISE OF THE CONSTITUTIONAL COURT OF HUNGARY

The precautionary principle, as the environmental principle, is on the focus of the interest of the Constitutional Court of Hungary from the fourth revision²⁹ of the Fundamental Law of Hungary.³⁰ The Constitutional Court of Hungary interpreted the precautionary principle firstly regarding the analysed prohibition of regression³¹ and the prevention principle³² in connection with the ad hoc decision in 2017. A rejected constitutional complaint can be considered as the direct prelude of the case.

Regarding the precautionary principle, the Constitutional Court of Hungary states in the Constitutional Court of Hungary Decision no. 3223/2017 Point 27, that *„the reason of the prohibition of regression (non-derogation), as a regulatory line rate, primarily is that the omission of the protection of nature and environment may start irreversible processes, thus with regard to the precautionary and the prevention principle, it is only possible the creating of the regulation on environmental protection.”*³³

This position is developed by the following conclusion of the Constitutional Court of Hungary Decision no. 27/2017 on the precautionary principle: *„according to the precautionary principle generally accepted in environmental law, the state*

²⁹ See on the constitutional analysis of the principle: Adrian Vermeule, „Precautionary Principles in Constitutional Law”, *Journal of Legal Analysis*, 1/2012, 181-222.

³⁰ Gergely Horváth, „The renewed constitutional level of environmental law in Hungary”, *Acta Juridica Hungarica*, 4/2015, 302-316.

³¹ See on the interpretation of the principle: Gyula Bándi, „Környezeti értékek, valamint a visszalépés tilalmának értelmezése”, *Iustum Aequum Salutare*, 2/2017, 159-181; Gyula Bándi, „A visszalépés tilalma és a környezetvédelem”, *Honori et virtuti, Iurisperitus*, Szeged, 2017, 9-23.; László Fodor, „A visszalépés tilalmának értelmezése a környezetvédelmi szabályozás körében”, *Collectio Iuridica Universitatis Debreceniensis*, 6/2006, 109-131.; László Fodor, *Környezetvédelem az Alkotmányban*, Gondolat Kiadó, Budapest, 2006.

³² Anikó Raisz, „A Constitution’s Environment, Environment in the Constitution”, *Est Europa* 1/2012, 37-70.; Anikó Raisz, „A környezetvédelem helye a nemzetközi jog rendszerében”, *Miskolci Jogi Szemle*, 1/2011, 99-108.; Anikó Raisz, János Ede Szilágyi, „Development of agricultural law and related fields (environmental law, water law, social law, tax law) in the EU, in countries and in the WTO”, *Journal of Agricultural and Environmental Law*, 7/2012, 107-148.

³³ Constitutional Court of Hungary Decision no. 3223/2017 Point 31.

shall ensure that the degradation of the environment does not happen as the result of a given measure."³⁴

Regarding the conclusion, it can be said that the Constitutional Court of Hungary raises the function of the environmental assessment required in connection with the environmental regulations to constitutional level and makes the evaluation of the specific impact of the regulation on the environment to the obligation of the state.³⁵ Regarding the evaluation, however, it does not exceed the level ensured in the principle of prohibition of regression, as Szilágyi also determines in his article.³⁶

The appearance of the precautionary principle became on priority status and received interpretation because of a submitted constitutional veto presented by president regarding the bill no. T/15373 brought before the Constitutional Court of Hungary. The lawmaker would make possible in the proposal that in a later created decree, in case of the creation of pits not deeper than 80 meters, there would be neither announcement, nor water rights authorisation procedure.

The president criticised Section 1 and 4 of the accepted, but not published Act brought before the new parliament under no. T/384. Section 1 regulated the activities carried out without water rights licences, while Section 4 would have given a mandate to accept the abovementioned implementing decree. In the explanation of his veto, the president considered the harm of the Fundamental Law of Hungary Article P) (1)³⁷ and Article XXI. In his explanation, he states as follows: *„In my opinion, the Act Section 1, which is not supported professionally, and not proved by impact assessments, which permits a creation of an aquatic facility – whether up to a depth of 80 m – without licences, as well as water use without quantitative restriction and any control, does not comply with the obligation of the state arisen from the Fundamental Law of Hungary Article P) (1) in particular with regard to the prohibition of the regression from the already achieved protection and the requirements arising from the precautionary principle.*"³⁸

³⁴ Constitutional Court of Hungary Decision no. 27/2017 Point 49.

³⁵ István Olajos, „The special asset management right of nature conservation areas, the principal of the prohibition of regression and the conflict with the ownership right in connection with the management of state-owned areas”, *Journal of Agricultural and Environmental Law*, 25/2018, 157-189.; Katalin Sulyok, „Az Alkotmánybíróság előzetes normakontroll döntése a nemzeti park igazgatóságok vagyonkezelői jogkörének csorbitása tárgyában”, *Jogesetek Magyarázata*, 4/2015, 17-26.

³⁶ János Ede Szilágyi, „Az elővigyázatosság elve és a magyar alkotmánybírói gyakorlat – Szellem a palackból, avagy alkotmánybírói magas labda az alkotmányrevízióhoz”, *Miskolci Jogi Szemle*, 1/2018, 76-90.

³⁷ See on the analysis of Article P): János Ede Szilágyi, Anikó Raisz, Bianka Enikő Kocsis, „New dimensions of the Hungarian agricultural law in respect of food sovereignty”, *Journal of Agricultural and Environmental Law*, 22/2017, 160-201.; Csilla Csák, Zsófia Hornyák, István Olajos, „Az Alkotmánybíróság határozata a mezőgazdasági földek végintézkedés útján történő örökléséről”, *Jogesetek Magyarázata*, 1/2018, 5-19.

³⁸ The application of President János Áder, Budapest, 05.07.2018, 5. (constitutional number of the resolution: I-1216/2018/0)

Szilágyi determines the reference to Article P) as a novum in his excellent article.³⁹ This is not appeared so far on the ombudsman's resolution, who dealt with this topic and built the precautionary principle in his resolution. This resolution summarised the activities of Constitutional Court of Hungary as follows: „*the Fundamental Law of Hungary guarantees the continuity of the last twenty years' environmental statutory interpretation with the maintenance of its basics: first and foremost the acknowledgement and confirmation of the right to a healthy environment. It primarily means the conservation of this constitutional and ombudsman-nature legal practise, furthermore the well-established content of the right to a healthy environment and its principles and requirements. It guarantees that all environmental principles (prevention, precautionary, integration, etc.) remain valid with unchanged content.*”⁴⁰

4. THE FIRST EFFECTIVE INTERPRETATION OF THE PRECAUTIONARY PRINCIPLE IN THE CONSTITUTIONAL COURT OF HUNGARY DECISION NO. 18/2018

After such preludes, the Constitutional Court of Hungary gives the relevant interpretation of the precautionary principle in its Constitutional Court of Hungary Decision no. 13/2018:⁴¹ *“The liability against the future generation arising from the Fundamental Law of Hungary requires from the lawmaker that it assesses and considers the expected impact of its measures based on the scientific knowledge and according to the precautionary and prevention principles.”*⁴² *The Fundamental Law of Hungary specifically mentions the obligation of the preservation of national common heritage for the future generations in its Article P) (1) and in general, it sets the requirement against legislation that at the time of the legislation, not only the present generation's individual and joint needs should be considered, but also it should take into account the insurance of the living conditions of the future generations, and in case of the consideration of the expected impact of the certain decisions, it has to act based on the eternal scientific knowledge and according to the precautionary and prevention principles”*⁴³

³⁹ János Ede Szilágyi (2018), 85.

⁴⁰ Resolution no. JNO 258/2011. (25.04.2011) on the state responsibility arising from the provisions of the environmental protection and sustainability of the new Fundamental Law of Hungary Point 11.

⁴¹ See on the analysis of the water right question of the decision: János Ede Szilágyi, *Vízszemléletű kormányzás – vízpolitika – vízjog*, Miskolci Egyetemi Kiadó, Miskolc, 2018; János Ede Szilágyi, Gábor Baranyai, Péter Szűcs, „A felszín alatti vízkivételek liberalizálása az Alaptörvény és az európai uniós jog tükrében”, *Hidrológiai Közlöny*, 4/2017, 14-23.

⁴² Constitutional Court of Hungary Decision no. 13/2018 Point 13.

⁴³ Constitutional Court of Hungary Decision no. 13/2018 Point 14.

The decision is unique from the point of view that it interprets the relationships between the definitions of precautionary, prevention and prohibition of regression highlighted in this present article with a scientific claim, according to the following provision: „*It follows from the the precautionary principle, therefore in the case if a regulation or a measure may affect the condition of the environment, the lawmaker must demonstrate that the regulation does not mean a regression and thereby not cause in a particular case irreversible damage and not create theoretical opportunity of such a damage. In case of the regulation of previously non-regulated cases, the precautionary principle prevails not only with the context of the prohibition of regression, but also independently: in case of such measures, which do not formally achieve a regression, but may affect the condition of environment, the limitation of the measure is also the precautionary principle, in connection with which, the constitutional obligation of the lawmaker, according to the knowledge of science, to take into consideration the probably or certainly forthcoming risks with the proper weight in case of its decision making. In contrast, the principle of prevention means the obligation of the action at the sources of the potential pollution, but before the occurrence of the pollution: ensuring to avoid the potentially harmful processes of the environment. The Constitutional Court of Hungary finally indicates, that if in case of a regulation, it cannot be proven unequivocally, that the regulation does not achieve regression, the constitutionality of the regression shall be examined according to the Fundamental Law of Hungary Article I (3) in such a way that taking into the precautionary principle, with regard to the necessity and proportionality, the state has to explain the regression from the already achieved environmental level, with the emergence of other fundamental right, compared with this emergence.*”⁴⁴

Analyzing the referred section, it can be stated that the prohibition of regression is not an absolute right, the state may differ from it. However, the state can do it with proportionate reasons supported by the public interest. The derogation does not cause any unjustified and disproportionate damage for other environment users. Regarding the determination of the damage, the damage, which is deducible from the precautionary principle and not proved scientifically, may be qualified as a relevant damage.

This aspect is strengthened by the Point 59 of the explanation, when it strengthens the environmental impact of the strategic plans, documents and political programmes, estimated the legal institution of the completed strategic impact assessment regarding such documents as the promotional equipment of the precautionary: „*The issuer is bounded, at the same time, however, the medium and long-term planning and predictable legislation are such professional starting points, which taking into account, regarding the precautionary and prevention*

⁴⁴ Constitutional Court of Hungary Decision no. 13/2018 Point 20 and 21.

principle, is particularly important in case of the elements of the national common heritage named in the Fundamental Law of Hungary Article P) (I). Accordingly, the disregard of these professional strategies in case of the examination of the fundamental unlawfulness of a change in legislation should be specifically considered, according to the Fundamental Law of Hungary Article P) (I) in case of the preserving regulatory objects for the future generations, which affect the common heritage of the nation.”⁴⁵

Regarding the case, the lack of the scientific certainty, attacked in the second chapter of this present article and ensuing from the precautionary principle, and the nature of the assumed environmental damage encouraged several constitutional judges to create dissenting opinions.

Among these, the most significant opinion is from András Varga Zs., which interprets the integration of this dangerous principle to the practise of the Constitutional Court of Hungary as the swing-over activity of the Constitutional Court of Hungary to legislative role:

“In case of the interpretation of any provision of the Fundamental Law of Hungary, it should be kept in mind that the Fundamental Law of Hungary, as the basic of the legal system, is not a technical regulation.⁴⁶ The question is – in general and in the present case, too –, according to the certain logical or real knowledge of one provisions of the Fundamental Law of Hungary, what is a forthcoming injury of a standard or criteria, which overthrow the presumption of the constitutionality of a regulation, the certain level probability of the injury or the mere possibility of the injury. I think that an occurred (in case of a constitutional complaint), or certainly occurring (in case of in other norm control cases) injuries of a provision always overthrow the presumption of constitutionality. However the mere possibility of the injury does not overthrow the presumption.”⁴⁷

5. THE EFFECTIVENESS OF THE PRECAUTIONARY PRINCIPLE IN THE CONSTITUTIONAL COURT OF HUNGARY DECISION NO. 17/2018 (X.10.)

The Decision is based on a case, wherein the plot-owners living in Mogyoród, next to the highway to the Hungarian Formula 1 circle appealed to the Buda-area District Court. In their action, they asked the statement of the breach of the noise pollution and the right to a healthy environment, furthermore the suspension of the operation of the highway until the operator takes effective measures to reduce

⁴⁵ Constitutional Court of Hungary Decision no. 13/2018 Point 59.

⁴⁶ Constitutional Court of Hungary Decision no. 13/2018 Point 136.

⁴⁷ Constitutional Court of Hungary Decision no. 13/2018 Point 138.

noise pollution. The purpose of their action is the creation of the legal basis of a later claim for compensation.

The judge of the case suspended the procedure and turned to the Constitutional Court of Hungary and asked the assessment of the conflict of the Fundamental Law of Hungary in connection with the annexes of the Ministry of Agriculture Decree no. 91/2015. (XII.23.) on the modification of the Ministry of Environmental Protection and Water Management and Ministry of Health Decree no. 27/2008. (XII.3.) on the determination of the limits of environmental noise and vibration emission (hereinafter referred to as Decree) and the Act LIII of 1995 on the General Rules of Environmental Protection Section 110 (6a).

The relevant section of the Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter referred to as Act) says that noise emissions by cultural, recreational or sports events and other gatherings of large crowds which are considered to be of particular importance for national economy reasons or for touristic considerations shall not be construed as trespassing and/or unnecessary disturbance of others, especially neighbours or jeopardizing the exercise of their rights, if it does not exceed the noise emission limit prescribed by the relevant legislation, or provided for in the official permit granted therefor.

The Decree determined the limit of noise emission in 50Db in general, and the amendment of the Decree from 2016 raises the limit of noise emission in 65Db for 30 days and 70 Db for 10 day in connection with the operator of Hungarian Formula 1 races.

According to the initiative court: *„The consequence of the noise emission, as the noise behaviour threatened to the environment, had a specified level under the scope of the Decree, before the amendment of the Decree entered into force. The increase of the noise emission limit meant the decrease of the achieved protection limit, which raises the possible harm of the Fundamental Law of Hungary Article XXI (1). The requirement is, that the lawmaker only recedes from the protection level with such conditions, which are suitable for the explanation of the limitation of subjective fundamental right. In the case, according to the defendant's defense, the positive effect of the defendant's operation to the national economy faces up to the plaintiffs' fundamental right to healthy environment.”*⁴⁸

According to the initiative court, the referred provision of the Act abstracts the right of the injured parties to access to the court, nonetheless the possibility of impartial judicial discretion, as follows: *„The effective judicial legal protection depends on what the court may review. Among other thing, it is to be highlighted, that not only the regulation can be unconstitutional, which expressly excludes the judicial review beyond the legal issue or leaves little space against the administrative discretion, that we cannot talk about the substantive evaluation of the case*

⁴⁸ Constitutional Court of Hungary Decision no. 17/2018 Point 13.

between the appropriate constitutional guarantees, but also such regulation, which giving unlimited discretion right to administration does not contain any legality measure for the decision of the judge.”⁴⁹

In its decision, the Constitutional Court of Hungary nullified the relevant provisions of the amendment of the Decree contained multiple exceptions beyond keeping in force the relevant provision of the Act and determining the actual new provisions of the amendment of the Decree. In its explanation, regarding the creation of the regulation and its actual enforcement, the Constitutional Court of Hungary determined: *”According to the complex examination, which was done taking into account all elements of the regulation, the Constitutional Court concluded that the noise emission regulation arising from the race tracks had international licences entails a step backward compared to the provisions in force before 1 February 2016. Overall, therefore, the protection level against noise, as an environmental harm decreased. It’s not a short-term decrease, since the injurious regulation applies to the whole year, which is further aggravated by the exemption system.”⁵⁰*

The interpretation determined by the Constitutional Court of Hungary Decision no. 13/2018 regarding the case, taking into account to the characteristic of the environmental protection role, was expanded with the following conclusion: *„Because of the the precautionary and prevention principle the question is whether there is a risk the occurrence of damage. In this regard, the constitutional protection of the nature and the environment is originated from a functionally similar source: it protects the conditions of human life. The incurable damage of the environment is typically the result of long-term processes. The scale may not be generally fixed: a few decades, a lifetime, a century, or even longer time may be necessary to the occurrence of certain environmental damages. However, the damage of the nature may happen even in the short term. This is the difference between the constitutional protection of the nature and the environment interpreting of the Fundamental Law of Hungary Article XXI (1).”⁵¹*

The prohibition of regression does not concern to the designation of the protection level, but it applies when the lawmaker derogates the already established limits of the environmental impact in such a way, that incurable environmentally destructive processes may be started. The reduction of the protection against continuous noise emission prevailing through a long period, taking into account to the precautionary and the prevention principles is included in the abovementioned things.⁵² The Constitutional Court of Hungary also points out that the prohibition of regression, which is the fundamental law projection thus

⁴⁹ Constitutional Court of Hungary Decision no. 17/2018 Point 11.

⁵⁰ Constitutional Court of Hungary Decision no. 17/2018 Point 80.

⁵¹ Constitutional Court of Hungary Decision no. 17/2018 Point 91.

⁵² Constitutional Court of Hungary Decision no. 17/2018 Point 92.

the fundamental subjective side of the right to healthy environment that goes beyond the objective institutional protection side, determines requirements against the limitation of the protection level ensured by the law, according to the Fundamental Law of Hungary Article I (3).’’⁵³

The lesson that can be drawn from the case that if the lawmaker would like to reduce the nature conservation’s relevant standards and the already achieved level of the protection in a case, it is possible only in order to a reasonable and legitimate public issue, which is similar to the injured standards of nature conservation and concerned more people. This kind of case, for example, the right of spectators on the races for the abovementioned purpose and the right of business freedom for entrepreneurs, who live from the spectators. It follows from the permanent nature of the restriction, the lawmaker should have balanced these aspects in the framework of the measurement of the standard’s impact to be created in a visible manner, and however, clearly, it was not happened during the creation of the amendment of the Decree.

6. THE ROLE OF THE PRECAUTIONARY PRINCIPLE IN THE CONSTITUTIONAL COURT OF HUNGARY DECISION NO. 4/2019 (II.7.)

The prelude of the Decision is the conversion of the Hungarian environmental protection institution system and following from it, the environmental protection licensing system. The existing individual environmental protection organisational system built into the system of government offices, as an individual authority department. In that period, the Environmental Inspectorate, as a solid second-degree authority, as already remained. During the further conversion of the system, the environmental and transport authorities were merged in the so-called super district authorities (authorities with district level competence and county-nature jurisdiction) in each county. Because of the termination of the Inspectorate, the second-degree authorisation right came within the competence of the Government Office of Pest County. In addition, the independent authorities regarding environmental licensing procedures (Land Offices, Water Management Directorate, Palnt and Soil Protection Stations, Transport Inspectorate) operate as the subordinate body of government offices.⁵⁴ In the second phase of the impact assessment pro-

⁵³ Constitutional Court of Hungary Decision no. 17/2018 Point 93.

⁵⁴ See: Act VIII of 2015 on the Modification of Acts on the Conversion of the Territorial State Administration Body System Section 24 (6); Governmental Decree no. 71/2015. (III.30.) on the Designation of Bodies Dealing with Environmental and Nature Conservation Authority and Administrative Tasks Section 9 (1) Point b) and d), (2), (3) Point a) and b), Section 13 (1) Point b) and c), (2), (3) Point a) and b), Section 17 (1) Point a) and b), Section 20 (1) Point c) and d), (2),

cedure, the authorization contribution of these bodies was necessary to make the authorising decision. Without this, the competent first-degree environmental authority should have had to make a negative decision. As a consequence of the changes, the authorisation power of the partner authorities was terminated. The environmental authority makes the decision individually, after asking the expert report of the other authorities.⁵⁵

Regarding the case, fifty-two Members of Parliament initiated the evaluation of unconstitutionality of the Act LIII of 1995 on the General Rules of Environmental Protection Section 66/A, 92. § (1a) and 110/A Point a), ae), b), bb); Act LIII of 1996 on the Nature Conservation Section 38/A, 39 (1) and 85 (1) Point 13; Act VIII of 2015 on the Modification of Acts on the Conversion of the Territorial State Administration Body System Section 24 (6); Governmental Decree no. 71/2015. (III.30.) on the Designation of Bodies Dealing with Environmental and Nature Conservation Authority and Administrative Tasks Section 9 (1) Point b) and d), (2), (3) Point a) and b), Section 13 (1) Point b) and c), (2), (3) Point a) and b), Section 17 (1) Point a) and b), Section 20 (1) Point c) and d), (2), Section 22 Point b), Section 23, 26 (1) Point a) and b), (2), Section 27 (1) Point b) and c), (2) Subtitle 11–14, Section 38 (3)-(4), Section 39 and Annex no. 3-4.

Rejecting the proposals, the Constitutional Court of Hungary determined – ex officio – that there is unconstitutionality caused with negligence arising from the Fundamental Law of Hungary Article P (1) and Article XXI (1), since the legislation in force does not require that the competent administrative authority has to make an expressed conclusion in the dispositional part of the decision on the impact of the environmental protection and nature conservation. The Constitutional Court of Hungary called the Parliament to comply with its legislative exercise until 30 June 2019.

Interpreting the new administrative organization system and procedure system, the court determined that in the new organization system, regarding the operation of environmental and nature conservation authorities, competence absorption did not happen. In the new organization system, they deal with the same tasks as their legal predecessors. Regarding the licensing procedures, the Court determined that in the new organization system, all decisions were made by the government delegate's signature. The expert activity of previous bodies dealt with the administrative tasks prevails effectively in the frame of the procedure. In this organisational framework, the coordination of the authorisation tasks within the organisation is materialized, for which the government delegate is the responsible

Section 22 Point b), Section 23, 26 (1) Point a) and b), (2), Section 27 (1) Point b) and c), (2) Subtitle 11-14, Section 38 (3)-(4), Section 39 and Annex no. 3-4.

⁵⁵ Act LIII of 1995 on the General Rules of Environmental Protection Section 66/A, 92. § (1a) and 110/A Point a), ae), b), bb); Act LIII of 1996 on the Nature Conservation Section 38/A, 39 (1) and 85 (1) Point 13.

person. During the procedure, the Constitutional Court of Hungary considers all the time the characteristic specificity of the right to healthy environment attached to both aspects, which follows from the Fundamental Law of Hungary Article P (1) and Article XXI (1). It can be summarised that in the field of the right to healthy environment, the precautionary principle and prevention principle have significant role.

Thereby, the Fundamental Law of Hungary specifically mentions the obligation of the preservation of national common heritage for the future generations in its Article P (1) and in general, it sets the requirement against legislation that at the time of the legislation, not only the present generation's individual and joint needs should be considered, but also it should take into account the insurance of the living conditions of the future generations.⁵⁶

In this context it is also necessary to point out that according to the rules of the Act CL of 2016 on General Public Administration Procedures, the authority requires to clarify the statement of facts in accordance with the principle of free evidence (Act CL of 2016 Section 62). The fact of statements established in such a way is contained by the explanation and not the dispositional part of the decision (Act CL of 2016 Section 81 (1)). As the Court referred to in the explanation of the present decision Point V.1.2., in the light of the the precautionary and prevention principle, which is the part of the Fundamental Law of Hungary Article P (1) and Article XXI (1), the existing legislation raises constitutional concerns, because it's not about that in the dispositional part of the licensing decision of the government office affecting the nature and the environment it is binding to specifically determine, that the fulfilment of the content of the decision – in case of licensing – should not endanger or damage natural value and environmental compartment.⁵⁷

It needs to refer to that the special issue does not mean expert issue. Therefore, the organisational unit of authority dealing with environmental and nature conservation does not issue an expert opinion, when it participates in decision-making. Therefore, the internal record of the relevant department should be considered as the part of the establishment of the fact, which does not exclude that the authority, if it is necessary, uses any proof included in the Act CL of 2016 on General Public Administration Procedures.⁵⁸

On these grounds, based on the Act CLI of 2011 on the Constitutional Court of Hungary Section 46 (2) Point c), in the dispositional part Point 2, the Constitutional Court of Hungary determined that the relevant content of the current procedural legislation is incomplete. It does not say that the acting administrative authority has to make an expressed determination in the dispositional part of its

⁵⁶ Constitutional Court of Hungary Decision no. 4/2019 Point 74.

⁵⁷ Constitutional Court of Hungary Decision no. 4/2019 Point 79.

⁵⁸ Constitutional Court of Hungary Decision no. 4/2019 Point 80.

decision on the environmental and nature conservation impact of the activity expressed based on a license. The content of the right to a healthy environment derived from the Fundamental Law of Hungary Article P (1) and Article XXI (1) (the precautionary and prevention principle), strengthening with the Fundamental Law of Hungary Article XXIV (A) and Article XXVIII (1) and (7), it imposes an objective requirement for lawmaker to regulate with explicit provisions in the Act CL of 2016 on General Public Administration Procedures or in sector-specific acts how it is necessary to show the conclusion on the nature value or environmental compartment in the dispositional part of the authorisation decision.⁵⁹

In the given case, the majority of the Constitutional Court of Hungary find, referring to the the precautionary principle and the liability of government delegate and enrolling the summary evaluation of the impacts on the relevant environment to their Decision, the new organizational and procedural system of the environmental and nature conservation organisational system satisfactory.

Along similar lines, Ágnes Czine concluded the following conclusions in her dissenting opinion, contrary to the majority of the Constitutional Court of Hungary: *"The prepared statements in this case highlight that in the frame of the integrated state administrative system, the particularly problems are the following: (i) the organizational and procedural guarantees for required taking into account of the ecological constraints were terminated; (ii) there is no guarantee for the enforceability of single legal practise; (iii) the customers' procedural privileges became limited and shaped depending on the practise of the authority; (iv) it divides the completeness of the registration of the single environmental authority; (v) the clients' ability of the society organisations became uncertain; (vi) the opportunity of the social control was narrowed."*⁶⁰

She summarized his conclusion as follows: *"The Constitutional Court of Hungary should have had to call the lawmaker to create the warranty rules simultaneously with the installation of the competence of the individual environmental and nature conservation authorities to the integrated administrative system, which – taking into account to the above referred statements – are necessary to the preserving of the protection level achieved by the environment."*

László Salamon creates a similar significant opinion as his summary of his dissenting opinion: *„It is significantly more widely guarantees to be created, which could ensure the preservation of the protection level achieved earlier by the environmental protection. In my opinion, the the precautionary principle would be key role regarding the determination of them; the creation of such decision-making mechanism which does not allow the marginalisation of the aspects of the environmental and nature conservation, and which is also suitable for the*

⁵⁹ Constitutional Court of Hungary Decision no. 4/2019 Point 93.

⁶⁰ Constitutional Court of Hungary Decision no. 4/2019 Point 105.

prevention of irreversible damages, provides the possibility of an effective remedy against administrative decisions, which potentially contravene the environment and nature conservation values

Regarding the decision, mainly the practise of integrated environment, which has already developed in Hungarian law, is infringed. In this context, I agree with the opinions of constitutional judges, who prepared their dissenting opinions and stand on the side of strong precautionary. The special authorisation procedure was similar to the authorisation veto. The explanation of the special authority, which disagreed with the decision, prepared its opinion and confirmed its explanation with arguments according to the regulations, was implemented by the authority. These were the reasons of the rejection of the application. These arguments were disproven in the appeal proceedings, but in the same proceeding, the designer was entitled to the submission of amended plans considering the aspects of the authority, which led to the granting of the license. In my opinion, the protection of soil, arable land or surface water is not so powerful aspects, which lead to the rejection of the application, if the aspects are not exclusively connected to the first-degree proceeding in the form of non-binding expert opinion. The liability of the signatory governmental delegate has not confirmed the emergence of the abovementioned aspects. So the Constitutional Court drew conclusions interpreting a legally existing possibility regarding the actual legal practise in such a way that it did not confirmed by an actual research.

7. SUMMARY

The conversion of the precautionary principle theoretical level to a constitutional question happened in the practise of the Constitutional Court of Hungary, the principles and interpretation of it are more and more consistent. The questions deductible to the all jurisprudence, agree with the conclusions of Szilágyi⁶¹, are the following: is it worth increasing this principle to the level of the Fundamental Law of Hungary, or does the Constitutional Court of Hungary remain on the ground of common law? Does the precautionary principle play a role as a confirmatory principle of the prohibition of regression in the interpretation continuously or do we consider it as a stronger, separate principle? Regarding the second chapter, we have to take sides in the future whether the principle stays as a principle usable at the area of environmental protection and closely related areas of it, or we will also meet this principle in the political and philosophical debates.

⁶¹ János Ede Szilágyi, "The precautionary principle's 'strong concept' in the case law of the Constitutional Court of Hungary", under review at *Lex ET Scientia International Journal*, 2019.

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*Dr Istvan I. Olajoš, vanredni profesor
Univerzitet u Miškolcu
Pravni fakultet
civoliga@uni-miskolc.hu*

Princip predostrožnosti u praksi mađarskog Ustavnog suda i povezane poljoprivredne inovacije

Sažetak: *Ovaj rad analizira princip predostrožnosti, koji je jedan od osnovnih principa koji određuju osnovno ponašanje čoveka u odnosu prema zaštiti životne sredine. Analiza se sprovodi u tri perspektive.*

Prva je statična perspektiva, koja rezimira šta podrazumevamo pod definicijom principa predostrožnosti u pravu životne sredine. Autor odvaja princip predostrožnosti od druga dva principa ljudskog ponašanja, kao što su prevencija i oporavak.

Druga perspektiva analizira kako ovaj princip može biti upotrebljen u polju dve oblasti poljoprivrednih inovacija koje se direktno odnose na zaštitu životne sredine, kao što su lanac ishrane i aktivnosti genetskog inženjeringa. U ovoj oblasti se razmatra pitanje da li je princip pogodan za potkrepljivanje bioetičkih odgovora da je matična ćelija nerođenog embriona korisna za spašavanje života drugih ljudi.

Treća perspektiva je ustavna promena stava, praksa ustavnog suda Mađarske. Osnovna pitanja su, u skladu sa kojim obrazloženjem bi Ustavni sud Mađarske trebalo da integriše ovaj teško tumačiv princip u svrhu zaštite nacionalnih resursa označenih kao zajedničko kulturno nasleđe nacije u Osnovnom zakonu Mađarske kao i gde su granice pravnog delovanja u vezi sa ovim principom.

Ključne reči: *princip predostrožnosti, prevencija i oporavak, zabrana regresije, pravo na žalbu sudskom organu, organizacija sistema zaštite životne sredine.*

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