THE PRECAUTIONARY PRINCIPLE'S 'STRONG CONCEPT' IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF HUNGARY*

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Abstract

The present article focuses on the application and interpretation of the precautionary principle by the Constitutional Court of Hungary, especially concentrating on Decision 13/2018. (IX.4.) of the Constitutional Court of Hungary, in which the Constitutional Court of Hungary developed a considerably strong concept of the precautionary principle. In this article, the so-called strong concept of the precautionary principle in the case law of the Constitutional Court of Hungary means that the proper implementation of the precautionary principle is a strict condition for the Hungarian lawmakers. Namely, if the Hungarian lawmakers (e.g. parliament, government, ministers) do not take the precautionary principle into account in an appropriate way during the adoption of a legal provision, this situation shall cause a lack of conformity with the Hungarian constitution (i.e. the so-called Fundamental Law) and the Constitutional Court of Hungary shall annul the affected legal provision. In this article, the case law of the Constitutional Court of Hungary is assessed in the context of the genesis and development of the precautionary principle at international, European and Hungarian levels.

Keywords: *precautionary principle, non-derogation principle, Hungarian constitutional law, environmental law, Constitutional Court of Hungary (CCH).*

1. Introduction

"Although there are a number of different interpretations of the precautionary principle, it generally describes an approach to the protection of the environment or human health that is based around taking precautions even if there is no clear evidence of harm or risk of harm from an activity or substance. […] In other words, the principle provides a framework for any discussion about how to 'trade off' the risk of environmental harm as against other considerations, but it does not necessarily provide any 'right' answer."[1]

In environmental law, the so-called 'precautionary principle' and the 'prevention principle' are not the same; namely, the precautionary principle is different from the prevention principle, because the precautionary principle delivers the level of sureness and confidence of the expected consequences of a human activity from certainty to scientific uncertainty or

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[1] Stuart Bell, Donald McGillivray, and Ole W. Pedersen, *Environmental Law* (New York: Oxford University Press, 2013), 68.

probability.[2] In law, the principles of environmental protection have different effects. Some of them merely orientate and help the interpretation of legal norms; others include binding rules. Additionally, their effects and roles also vary from country to country and from international level to national level. As for the precautionary principle, the situation is the same: "the concept of precaution appears to mean different things in different contexts".[3] Nowadays, there are numerous types of the precautionary principle at both international and national levels. However, in the present article concentrating especially on the Hungarian national law, the author deals with a quite unusual and extraordinary type of precautionary principle, which determines rigorous requirements for the Hungarian lawmakers.[4]

The present article particularly focuses on the Constitutional Court of Hungary (hereinafter referred to as CCH) Decision 13/2018. (IX.4.) (hereinafter referred to as CCH Decision 13/2018). The precautionary-principle-aspects of CCH Decision 13/2018 have numerous antecedents in Hungarian law and in the case law of the CCH, however, before CCH Decision 13/2018, the CCH has not previously interpreted the precautionary principle in detail, and the CCH has never based its decision at this rate on the precautionary principle. Additionally, CCH Decision 13/2018 determined a quite 'strong' concept and version[5] of the precautionary principle.

As for the content of the present article, firstly, the genesis and development of the precautionary principle is analysed; secondly, the Hungarian aspects, especially the CCH case law is assessed. As far as the international and European levels are concerned, the article does not endeavour to present and interpret the precautionary principle in detail, but to provide a minimum comparative nexus for the assessment of the Hungarian case.

2. The genesis of the precautionary principle in international law and in EU law

In connection with the origin of the principle, *Ludwig Krämer* notices that the "[o]rigin and content of the precautionary principle are unclear."[6] Besides, some authors emphasize the difference between 'precautionary principle', 'precautionary

[2] Bándi Gyula, "Gondolatok az elővigyázatosság elvéről," *Jogtudományi Közlöny* 68, no. 10 (2013): 479. Fodor László, *Környezetjog* (Debrecen: Debreceni Egyetemi Kiadó, 2014), 86. See furthermore Farkas Csamangó Erika, *Környezetjogi szabályozások* (Szeged: SZTE ÁJK ÜJI, 2017), 43–44 and 47–48.

[3] Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (New York: Oxford University Press, 2009), 155. C.f. James Cameron and Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, Boston College International and Comparative Law Review 14, no. 1 (2000): 2.; Rosie Cooney, *Biodiversity and the Precautionary Principle: Risk and Uncertainty in Conservation and Sustainable Use* (Gland – Cambridge: IUCN, 2005), ix.; Elizabeth Fisher, *Precaution, Precaution Everywhere: Developing a 'Common Understanding' of the Precautionary Principle in the European Community*, Journal of European and Comparative Law 9, no. 1 (2002): 7–8, 13.; Nicolas de Sadeleer, "The Enforcement of the Precautionary Principle by German, French and Belgian Courts," *Reciel* 9, no. 2 (2000): 144–51.; Peter H. Sand, *The Precautionary Principle: A European Perspective*, *Human and Ecological Risk Assessment* 6, no. 3 (2000): 445–52.

[4] On the constitutional law aspects of the precautionary principle in the US law, see in detail Adrian Vermeule, "Precautionary Principles in Constitutional Law," *Journal of Legal Analysis* 4, no. 1 (2012): 181–222.

[5] This approach of the precautionary principle might also be called as a 'more extreme', 'highly prohibitive', 'restrictive' or 'protectionist' version of precaution (the "when in doubt, don't" approach); the opposite approach of the principle is the so-called 'weak' version of the principle; Cooney, *Biodiversity and the Precautionary*, x, 6–8.

[6] Ludwig Krämer, *EU Environmental Law* (London: Sweet & Maxwell, 2012), 22.

approach' and 'precautionary measures': "European treaties and the EC law generally refer to the precautionary principle, whereas global agreements more often refer to the precautionary approach or precautionary measures"[7]. At the beginning of the 1990s (e.g. in the Rio Declaration), the "'precautionary approach' was […] preferred, in the belief that the 'approach' offers greater flexibility and will be less potentially restrictive than the 'principle'. Few commentators regard the difference in terminology as significant, although one view is that the precautionary *principle* applies in situations of high uncertainty with a risk of irreversible harm entailing high cost, whereas precautionary *approach* is more appropriate, it is argued, where the level of uncertainty and potential costs are merely significant, and the harm is less likely to be irreversible. However, actual use of the terms in treaties contradicts any such distinction".[8]

As far as the origin of the precautionary principle is concerned, *Gyula Bándi*[9] calculates with a minimum of three opportunities: first, the German national law and environmental policy of the 1970s and 1980s (i.e. the development of the so-called *Vorsorgeprinzip*); second, in the 1970s and 1980s, the international laws and regulations concerning marine environment and dangerous substantives; third, a natural response of humankind to the industrial revolution from about the XVIIIth century.[10] As to the German[11] Vorsorgeprinzip, Mr Bándi emphasizes that, by virtue of the concept of the German principle, decision makers needed to move in the direction of minimizing environmental damage. Referring to the Vorsorgeprinzip, the German government was also able to defend its policy of stricter environmental regulations. The Vorsorgeprinzip also includes the application of the best available technology (BAT).[12]

In this part of the article, the author deals with the genesis of the precautionary principle, on the one hand, in the political and legal documents of international law and European Union (EU) law, and on the other hand, in the international and European case

[7] Birnie, Boyle and Redgwell, *International Law*, 155.

[8] Birnie, Boyle and Redgwell, *International Law*, 155. C.f. Bell, McGillivray and Pedersen, *Environmental Law*, 69–70.; Cooney, *Biodiversity and the Precautionary*, 6.; See furthermore opinion of Judge Laing at the International Tribunal for the Law of the Sea, Case New Zealand v Japan; Australia v Japan [2001] ILR 148 (i.e. the Southern Bluefish Tuna case).

[9] Professor Gyula Bándi is the *doyen* of the Hungarian environmental jurisprudence and the Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations, who had a great effect on the development of the precautionary principle in the case law of the Constitutional Court of Hungary; see Bándi Gyula, "Az elővigyázatosság elvének mai értelmezése," presentation, in *Új kutatási irányok az agrár- és környezetvédelmi jog területén*, organised by University of Szeged, Hungarian Association of Agricultural Law and Association of Hungarian Lawyers, 16.05.2019, Szeged, University of Szeged.

[10] Bándi Gyula, "Gondolatok," 472. C.f. Timothy O´Riordan and James Cameron, ed., *Interpreting the Precautionary Principle* (London – New York: Earthscan, 1994), 16–18.; Alexander Kiss and Dinah Shelton, *International Environmental Law* (Ardsley, New York: Transnational Publishers, 2004), 207.; Poul Harremoes et al, eds, *Late lessons from early warnings: the precautionary principle 1896-2000* (Copenhagen: European Environment Agency, 2001), 11–16.; Kenneth R. Foster, Paolo Vecchia and Michael H. Repacholi, "Science and the Precautionary Principle," *Science* 288, no. 5468 (1991): 979 and 981.

[11] Beside German national law, other authors also note the Swedish environmental law and policy as a national origin of the precautionary principle; see Birnie, Boyle and Redgwell, *International Law*, 154. C.f. Jan H. Jans and Hans H.B. Vedder, *European Environmental Law: After Lisbon* (Groningen: Europa Law Publishing, 2012), 43.; McIntyre, Owen, and Thomas Mosedale. *The Precautionary Principle as a Norm of Customary International Law*. Journal of Environmental Law 9, no. 2 (1997), 221.

[12] Bándi, "Gondolatok," 472. C.f. Bell, McGillivray and Pedersen, *Environmental Law*, 68.

law (i.e. in connection with the application of the principle by the legal practice).

2.1. The genesis of the precautionary principle in political and legal documents

Below, the history of the precautionary principle at international level and at EU level will be detailed in a chronological order.

The *World Charter for Nature*[13], adopted in 1982, is merely a soft law document, however, it determined an essential aspect of the precautionary principle in a non-explicit (i.e. non-*expressis verbis*) way[14] in its Chapter 11: "Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed."

As for the origin of the precautionary principle in international law, numerous authors also mention the 1984 *Bremen Declaration* adopted by a conference on the North Sea.[15]

One of the first hard laws (i.e. as an international treaty) referring explicitly to the precautionary principle is the *Vienna Convention for the Protection of the Ozone Layer* (Vienna, 22 March 1985), however, it is worth emphasizing that merely the preamble of the Convention refers to the so-called 'precautionary measures': "Mindful also of the precautionary measures for the protection of the ozone layer which have already been taken at the national and international levels".[16] Namely, this part (i.e. the preamble) of the Convention is mostly a help in the interpretation of the main, binding part of the Convention.

Undisputedly, the Rio Declaration adopted on the Rio Conference of the United Nations (UN) had an essential role in connection with the acceptance of the precautionary principle in environmental policy at international level. In advance of the Rio Conference (1992), there was a series of regional meetings among which the 1990 *Bergen Conference* on Sustainable Development attended by the environment ministers of 34 countries and the European Community's Commissioner for the Environment had a significant status to determine important aspects of the precautionary principle: "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[17] Some authors[18] also regard a *European Community's initial draft*[19] as an important antecedent of the Rio Declaration. Taking the experience of the Bergen Conference

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

[14] Bándi, "Gondolatok," 472. It is worth noticing that in Chapter 12, the World Charter for Nature applies 'precaution' connected to discharge of radioactive or toxic wastes in a quite narrow sense.

[15] See Kiss and Shelton, *International*, 207.; Birnie, Boyle and Redgwell, *International Law*, 154.; Bell, McGillivray and Pedersen, *Environmental law*, 68–69.

[16] Gyula Bándi noticed that the Hungarian translation of the preamble refers only to 'preventive measures', namely, the Hungarian version of the Convention is not correct in this sense; Bándi, "Gondolatok," 473.

[17] Bergen Declaration, Principle 7, 15 May 1990; cited by Kiss and Shelton, *International*, 207.

[18] Birnie, Boyle and Redgwell, *International Law*, 154.

[19] See UN Doc A/Conf 151/PC/WG 111/L 8/Rev 1 (1991).

into consideration, *Principle 15 of the Rio Declaration* provides: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[20] As to the legal status[21] of the precautionary principle determined by the Rio Declaration, some authors stress the 'complex' feature of the principle, that is the precautionary principle is not merely a scientific or a legal issue but also a political one: "As formulated in Principle 15 of the Rio Declaration, the precautionary approach helps us identify whether a legally significant risk exists by addressing the role of scientific uncertainty, but it says nothing about how to control that risk, or about what level of risk is socially acceptable. Those are policy questions which in most societies are best answered by politicians and by society as a whole, rather than by courts or scientists."[22] "[D]etermining whether or how to apply 'precautionary measures', states have evidently taken account of their own capabilities , their economic and social priorities, the cost-effectiveness of proposed measures, and the nature and degree of the environmental risk when deciding what preventive measure to adopt. They have in other words value judgements about how to respond to environmental risk, and have been more willing to be more precautionary about ozone depletion, […] than about fishing".[23]

Since 1990 the precautionary principle has been adopted by a growing number of international treaties, dealing with marine pollution, international watercourses, persistent organic pollutants, air pollution and climate change, transboundary trade in hazardous waste and endangered species, biosafety, furthermore the conservation of biological diversity and marine living resources.[24] "[H]owever, each convention tends to contain a slightly different formulation of the principle, which makes it difficult to identify an interpretation with which all states can be said to agree implicitly as a matter of binding international law."[25] "While extensive analysis has focussed on whether the precautionary principle has "crystallized" into a principle of customary international law, it may conservatively be said that while it is not unequivocally accepted as having the status of customary international law (e.g. Marceau, 2002), it can probably be described as customary international law in some sectors (Gehring and Cordonnier-Segger, 2002".[26]

As to the European Union, the precautionary principle was incorporated in

[20] United Nations General Assembly, *Rio Declaration on Environment and Development*. Annex I of the Report of The United Nations Conference on Environment and Development. A/CONF.151/26 (Vol. I), 12.08.1992. On the interpretation of the Principle 15, see furthermore: Cooney, *Biodiversity and the Precautionary*, 7–8.

[21] About the interpretation of the Principle 15 of Rio Declaration, see "Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development," Geneva, Switzerland, 26-28 September 1995.; Bándi, "Gondolatok," 471.

[22] Birnie, Boyle and Redgwell, *International Law*, 161.

[23] Birnie, Boyle and Redgwell, *International Law*, 163.

[24] Birnie, Boyle and Redgwell, *International Law*, 157. C.f. Cooney, *Biodiversity and the Precautionary*, 12–24.; James E. Hickey and Vern R. Walker, "Refining the Precautionary Principle in International Environmental Law," *Virginia Environmental Law Journal* 14, no. 3 (Spring 1995): 424, 431–36.; Sand, "The Precautionary Principle," 445–46.

[25] Bell, McGillivray and Pedersen, *Environmental Law*, 69.

[26] Cooney, Biodiversity and the Precautionary, 12.

the primary law of the EU by the Maastricht Treaty[27] in 1992, determining that Community policy on the environment shall be based on the precautionary principle. Nowadays, Article 191(2) of the Treaty on the Functioning of the EU (TFEU) is the legal basis of the principle. "Since no definition exists in the Treaties, the principle is open to broad interpretation."[28] Because of this uncertainty, the European Commission's communication[29] concerning the interpretation of the precautionary principle has a great significance. According to this communication, "The precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication. The precautionary principle is particularly relevant to the management of risk […]. The precautionary principle, which is essentially used by decision-makers in the management of risk, should not be confused with the element of caution that scientists apply in their assessment of scientific data […]. Judging what is an 'acceptable' level of risk for society is an eminently political responsibility. Decision-makers faced an unacceptable risk, scientific uncertainty and public concerns have a duty to find answers. Therefore, all these factors have to be taken into consideration […]. Where action is deemed necessary, measures based on the precautionary principle should be, inter alia: proportional to the chosen level of protection, non-discriminatory in their application, consistent with similar measures already taken, based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis), subject to review, in the light of new scientific data, and capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment."[30]

As to the interpretation of Article 191(2) TFEU, Ludwig Krämer has a quite characteristic opinion. He highlights: "[s]ometimes it is argued that the adoption of the precautionary principle requires a scientific assessment of risks. This argument seems to stem more from political efforts to reduce the field of application of this principle as far as possible; indeed, art. 191(2) TFEU does not contain any such condition and the abovementioned examples show the political character of these arguments: if for precautionary measures a scientific risk assessment is necessary, it would be necessary for any measures. However, such a requirement could only be introduced by way of legislation. Similar considerations apply to other requests to limiting the application of the precautionary principle to cases where there is the

[27] Gary E. Marchant and Kenneth L. Mossman, Arbitrary and Capricious: The Precautionary Principle in the European Union Courts (London: International Policy Press, 2005), pp. 21, 25.

[28] Krämer, EU Environmental Law, 22. C.f. Theofanis Christoforou, "The precautionary principle and democratizing expertise: a European legal perspective," Science and Public Policy 30, no. 3 (2003): 206. About the numerous ways of the interpretation of the principle, see Jans and Vedder, European Environmental Law, p. 43.; Marchant and Mossman, Arbitrary and Capricious, p. 25.

[29] COM (2000)1, Communication from the Commission on the precautionary principle, Brussels 2.2.2000. Later, this communication was endorsed by the Nice European Council Resolution on the precautionary principle 7-10. December 2000.

[30] COM (2001)1, points 4–6. C.f. Council of the European Union, Review of the EU Sustainable Development Strategy (EU SDS), document 10917 of 26 June 2006, 5. In the opinion of Gyula Bándi taking the CJEU case law into consideration, the precautionary principle determined in the Article can be considered as a real legal principle, not merely a political one, because the precautionary principle became a real legal background in the practice of the CJEU for a long while; see Bándi, "Gondolatok," p. 477.

possibility of an extreme, irreversible hazard, where there is a need to adopt measures urgently or to limit it to provisional measures only. None of these conditions are found in art. 191(2) TFEU, which demonstrates the political rather than legal character of these arguments."[31]

In secondary law of the EU, the precautionary principle could be found in numerous legal provisions; for example in Directive 2001/18 on genetically modified organisms,[32] Directive 2010/75 on industrial emissions,[33] etc.[34]

2.2. The genesis of the precautionary principle in the case law

At the beginning of this chapter, it is worth noticing that some authors emphasize the great differences in the interpretation of the principle by the international courts, tribunals and other dispute settlement bodies. In the opinion of these authors, the differences occur because "there is no consistent application of the principle in international conventions (there are differing obligations and formulations of the principle) and partly because, as a *principle*, it is, by nature, incapable of being prescribed as anything other than a general guide to action. Another factor is likely to be the specific nature of some of the courts and tribunals interpreting the principle and the often specific context in which they deliver their decisions and judgements. […] The application of the principle depends largely on evidence about the nature of the risk and the correct 'trigger' point or standard at which it is invoked."[35] In the present chapter, primarily,[36] the case law of the International Court of Justice (ICJ), the dispute settlement body (DSB) of the World Trade Organisation (WTO) and the Court of Justice of the EU (CJEU; previously called as the European Court of Justice, ECJ) will be presented.

2.2.1. The case law of the ICJ and the precautionary principle

First of all it is worth noticing that, in connection with the case law affecting the application of the precautionary principle, some authors notice: "[l]ike sustainable development, precaution has found only limited judicial support so far in international law, this despite many commentators arguing that it has reached the status of a principle of customary international law."[37]

In the present subsection, the following ICJ-cases connected to the precautionary principle are highlighted.

[31] Krämer, EU Environmental Law, p. 23.

[32] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms.

[33] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

[34] C.f. Andrada Truşcă, *Documents Preceding the Adoption of Directive 2004/35/EC Transposed in the Romanian Law by Government Emergency Ordinance no. 68/2007 on Environmental Liability*, Lex et Scientia 17, no. 2 (2010):p. 83.

[35] Bell, McGillivray and Pedersen, Environmental Law, p. 69.

[36] On the relevant cases of other courts and tribunals, e.g. the Southern Bluefin Tuna case (at the International Tribunal for the Law of the Sea; hereinafter referred to as ITLOS) and the MOX Plant case (at the ITLOS), see Bell, McGillivray and Pedersen, Environmental Law, 70–71. Note: the MOX Plant case is not the same as the MOX Plant Arbitration; the latter was ruled by the Permanent Court of Arbitration. In connection with the case law of the European Court of Human Rights, see Kiss and Shelton, International, p. 211.

[37] Bell, McGillivray and Pedersen, Environmental Law, pp. 69–70.

In a dissenting opinion[38] connected to the *New Zealand v France* case challenging the right of France to implement nuclear tests close to New Zealand (i.e. in the South Pacific), judge *Weeramantry* considered the precautionary principle as "a principle which is gaining increasing support as part of the international law of the environment",[39] and the judge also stated that "New Zealand has placed materials before the Court to the best of its ability, but France is in possession of the actual information. The principle then springs into operation to give the Court the basic rationale for considering New Zealand's request and not postponing the application of such means as are available to the Court to prevent, on a provisional basis, the threatened environmental degradation, until such time as the full scientific evidence becomes available in refutation of the New Zealand contention."[40]

As to the *Gabçikovo-Nagymaros* case,[41] in which Hungary and Slovakia had a debate connected to a hydropower dam system rejected by Hungary on the ground of environmental harm, *Kiss* and *Shelton* stress that „the International Court of Justice [ICJ] did not accept Hungary's argument that a state of necessity could arise from application of the precautionary principle".[42] The author of the present article also shares the above mentioned opinion of Kiss and Shelton, and this conclusion of the ICJ's judgement is elementary in connection with the interpretation of CCH Decision 13/2018.

Both the judgement and a separate opinion of the so-called *Pulp Mills* case[43] have a great importance in connection with the precautionary principle. The judgement links the precautionary principle and the burden of proof, furthermore, the ICJ considers the environmental impact assessment to be a practical application of the principle.[44] As to the separate opinion of Judge *Trindade*, the outstanding judge and professor considered the precautionary principle as a 'general principle of international *environmental* law'.[45]

[38] International Court of Justice, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Dissenting Opinion of Judge Weeramantry, I.C.J. Reports 1995, p. 317.

[39] New Zealand v France case, Dissenting Opinion of Judge Weeramantry, p. 342.

[40] New Zealand v France case, Dissenting Opinion of Judge Weeramantry, p. 343.

[41] International Court of Justice, Case concerning the Gabçikovo-Nagymaros Project (Hungary/Slovakia), Judgement, I.C.J. Reports 1997, p. 7. See paras. 97 and 113 of the judgement.

[42] Kiss and Shelton, *International*, p. 210.

[43] International Court of Justice, Case concerning Pulp Mills on the River Uruguay (Argentine c. Uruguay), Judgement, I.C.J. Reports 2010, p. 14.

[44] In the case, "Argentina brought a complaint alleging that the authorization and construction of two pulp mills on the Uruguayan side of the Uruguay River was a breach of a bilateral treaty […] [T]he complaint primarily centred on a lack of prior notification and impact assessments […] Argentina contended that the treaty adopted a precautionary approach which meant that the burden of proof was on Uruguay to establish that the mills would not cause harm to the river and the environment. This claim was in general terms contrary to the established procedures before the Court whereby the burden of proof usually falls on the party seeking to assert a particular claim. The Court held that 'while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof'." Bell, McGillivray and Pedersen, *Environmental Law*, 71.

[45] International Court of Justice, Case concerning Pulp Mills on the River Uruguay (Argentine v. Uruguay), Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2010, p. 135. See paras. 62–92 of the separate opinion.

2.2.2. The case law of the DSB of the WTO and the precautionary principle

As for the WTO case law, especially Articles 3.3 and 5.7 of the Agreement on Sanitary and Phytosanitary Measures (SPS), Articles 2.2 and 5.4 of the Agreement on Technical Barriers to Trade (TBT), Articles III and XX of the General Agreement on Tariffs and Trade 1994 (GATT) and Article XIV of the General Agreement on Trade in Services (GATS) provide the proper 'gateway'[46] for the interpretation of the precautionary principle.

One of the first reports in which the Appellate Body assessed the precautionary principle on the merits is the so-called *Beef Hormones* case.[47] In this case, the Appellate Body analysed whether the precautionary principle or approach has become a part of customary international law. The Appellate Body stated that "[t]he status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it is widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question."[48] In its interpretation, the Appellate Body also referred to the Gabçikovo-Nagymaros case of the ICJ.[49]

In the *Japan – Agricultural Products II* case,[50] the Appellate Body determined the application way of the precautionary principle in its practice. The interpretation was summarized in a proper way by Kiss and Shelton: "dispute settlement panels have agreed that in case where it is not possible to conduct a proper risk assessment, Article 5(7) of the […] SPS […] Agreement allows members to adopt and maintain a provisional or precautionary SPS measure. According to the GATT Panel and Appellate Body, this provision incorporates the precautionary principle to a limited extent, when four cumulative criteria are met: (1) the relevant scientific information must be insufficient; (2) the measure should be adopted on the basis of available pertinent information; (3) the member must seek to obtain the additional information necessary for a more objective assessment of risk; (4) the member must review the measure accordingly within a reasonable period of time established on a case by case basis depending on the specific circumstances, including the difficulty of obtaining additional information needed for

[46] Ilona Cheyne, *Gateways to the Precautionary Principle in WTO Law*, Journal of Environmental Law 19, no. 2 (2007): 157–58.

[47] On the summary of the case, see Bell, McGillivray and Pedersen, *Environmental Law*, 70. C.f. Kiss and Shelton, *International*, 211.

[48] WTO DSB Appellate Body, European Communities – Measures Concerning Meat and Meat Products [Beef Hormones case], WTO Doc. WT/DS/26/AB/R and WT/DS/48/AB/R (18.08.1997), para. 123.

[49] "In [*Gabçikovo-Nagymaros* case, the ICJ] recognized that in the field of environmental protection `… new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight …´ However, we note that the Court did not identify the precautionary principle as one of those recently developed norms. It also declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary". WT/DS/26/AB/R and WT/DS/48/AB/R (18.08.1997), footnote 93.

[50] WTO DSB Appellate Body, Japan – Varietals, Measures Affecting Agricultural Products, WTO Doc. WT/DS76/AB/R (22.02.1999), paras. 92-93.

review and the characteristics of the SPS measures".[51]

2.2.3. The case law of the CJEU/ECJ and the precautionary principle

At the EU level,[52] the *Sandoz* case of the European Court of Justice (ECJ; nowadays: Court of Justice of the European Union, CJEU) might be the first case in which the ECJ referred to certain aspects of the precautionary principle. According to the judgement of the ECJ: "It appears from the file that vitamins are not in themselves harmful substances but on the contrary are recognized by modern science as necessary for the human organism. Nevertheless, excessive consumption of them over a prolonged period may have harmful effects […]. According to the observations submitted to the court, however, scientific research does not appear to be sufficiently advanced to be able to determine with certainty the critical quantities and the precise effects […]. Those principles also apply to substances such as vitamins which are not as a general rule harmful in themselves but may have special harmful effects solely if taken to excess as part of the general nutrition, the composition of which is unforeseeable and cannot be monitored. In view of the uncertainties inherent in the scientific assessment, national rules prohibiting, without prior authorization, the marketing of foodstuffs to which vitamins have been added are justified on principle within the meaning of article 36 of the treaty on grounds of the protection of human health."[53]

The importance of the *Bettati* case[54] is that the ECJ has established the role of the principle in law-making.[55] Nevertheless, some authors stated that the Bettati case "did little to define what the principle might mean in European law."[56]

The first judgements in which ECJ explicitly referred to the precautionary principle might be cases C-157/96[57] and C-180/96[58] (the latter one is the so-called *mad cow disease* case); "though the English version referred to the prevention principle only, whereas the German and other languages mentioned the precautionary and prevention principles".[59] In the mad cow disease case, the European Commission banned the export of the British beef, among others, because of the possible link between the *bovine spongiform encephalopathy* (BSE or mad cow disease) and a human disease (i.e. *Creutzfeldt-Jakob* disease): "Although there is no direct evidence of a link, on current data and in the absence of any credible alternative the most likely explanation at present is that these cases are linked to exposure to BSE".[60] The ECJ held that, "[h]aving regard, first, to the uncertainty as to the adequacy and effectiveness of the measures previously

[51] Kiss and Shelton, *International*, 211.

[52] In connection with the European Free Trade Association, see Case-E-3/00; see furthermore Kiss and Shelton, *International*, 209.

[53] European Court of Justice, Case 174/82, Criminal proceedings against Sandoz BV [1983] ECR 2445, paras. 11, 17.

[54] European Court of Justice, Case C-341/95, Bettati v Safety Hi-Tech Srl [1998] ECR I-4355.

[55] On similar situation, see Case C-318/98, *Fornasar et al. v. Italy*, 2000 E.C.R. I-4785 (2000), furthermore on the assessment of this case, see Marchant and Mossman, *Arbitrary and Capricious*, 49–51.

[56] Bell, McGillivray and Pedersen, *Environmental Law*, 72.

[57] European Court of Justice, Case C-157/96, The Queen v Ministry of Agriculture, Fisheries and Food [1998] ECR I-2211, paras. 63–64.

[58] European Court of Justice, Case C-180/96, United Kingdom v. Commission [1998] ECR I-2265, paras. 99–100.

[59] Krämer, *EU Environmental Law*, 23.

[60] Case C-180/96, para. 9.

adopted by the United Kingdom and the Community and, second, to the risks regarded as a serious hazard to public health (see paragraph 63 of the order of 12 July 1996 in Case C-180/96 R United Kingdom v Commission, cited above), the Commission did not clearly exceed the bounds of its discretion in seeking to contain the disease within the territory of the United Kingdom by banning the export from that territory to other Member States and to third countries of bovine animals, meat of bovine animals and derived products." [61] The court added that "the reasons for the export ban were sufficiently demonstrated by the uncertainty as to the risk, by the urgency and by the provisional nature of the measure".[62]

The more detailed assessment of the precautionary principle by the ECJ can be found in the *Pfizer* case.[63] The background of the Pfizer case is that, utilizing a scientific analysis, the European Commission banned the use of antibiotics as additives in animal feed on the grounds that there was a risk of increasing resistance to antibiotics both in animals and humans. In its judgement, the ECJ stressed that "where there is scientific uncertainty as to the existence or extent of risks to human health, the Community institutions may, by reason of the precautionary principle, take protective measures without having to wait until the reality and seriousness of those risks become fully apparent".[64] In other words, "under the precautionary principle the Community institutions are entitled, in the interests of human health to adopt, on the basis of as yet incomplete scientific knowledge, protective measures which may seriously harm legally protected positions, and they enjoy a broad discretion in that regard."[65] A "preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified[. … A] preventive measure may be taken only if the risk, although the reality and extent thereof have not been `fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken."[66] "The precautionary principle can therefore apply only in situations in which there is a risk, notably to human health, which, although it is not founded on mere hypotheses that have not been scientifically confirmed, has not yet been fully demonstrated."[67] "Consequently, […] the purpose of a risk assessment is to assess the degree of probability of a certain product or procedure having adverse effects on human health and the seriousness of any such adverse effects."[68]

In connection with the Pfizer case, some authors emphasized that "[w]hile the decision in Pfizer was an important step towards defining the parameters of the application of the [p]recautionary [p]rinciple, it leaves a lot of issues undetermined, in particular, there is the problem of the trigger point for the application of the principle. It is clear that it

[61] Case C-180/96, para. 62.
[62] Case C-180/96, para. 73. See furthermore paras. 98-100 of case C-180/96; c.f. Kiss and Shelton, *International*, 208–209.; Bándi, "Gondolatok," 477–478.
[63] Court of the First Instance, Case T-13/99, Pfizer Animal Health SA v Council of the European Union [2002] ECR II-3305. See Bándi, "Gondolatok," 478.
[64] Case T-13/99, para. 139.
[65] Case T-13/99, para. 170.
[66] Case T-13/99, paras. 143–144.
[67] Case T-13/99, para. 146.
[68] Case T-13/99, para. 148.

applies in cases in which there is more than 'zero' risk; what was not made clear in the judgement was the point at which uncertainty would demand a precautionary response. In addition, […] the European courts have been stretching the margins of precaution, from applying it to scientifically established risk to using it in relation to unquantifiable uncertainties that cannot be ruled out".[69]

As a next level of the interpretation concerning the precautionary principle, the "General Court considered it a 'general principle of Community law'"[70] in the *Artegodan* case.[71] Namely, "although the precautionary principle is mentioned in the Treaty only in connection with environmental policy, it is broader in scope. It is intended to be applied in order to ensure a high level of protection of health, consumer safety and the environment in all the Community's spheres of activity. […] It follows that the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests. Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the precautionary principle can be regarded as an autonomous principle stemming from the abovementioned Treaty provisions."[72]

Beside cases concerning pharmaceutics and human health, more and more cases connected to the precautionary principle from other fields, for example related to genetic modified organisms (GMOs).[73]

In case C-333/08,[74] the Court determines the so-called '*correct application of the precautionary principle*', namely: "A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of processing aids, and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of

[69] Bell, McGillivray and Pedersen, *Environmental Law*, 73.

[70] Krämer, *EU Environmental Law*, 23.; Bándi, "Gondolatok,"paras. 478–479.

[71] Court of the First Instance, Joined Cases T-74/00, 76/00, 83/00, 84/00, 85/00, 132/00, 137/00 and 141/00, Artegodan GmbH and others v Commission [2002] ECR II-4945.

[72] Cases T-74/00 and others, paras. 183–184.

[73] One of the first cases was: European Court of Justice, Case C-236/01, Monsanto Agricoltura Italia and Others v Presidenza del Consiglio dei Ministri [2003] ECR I-8105; c.f. Bándi, "Gondolatok," 479. In another GMO case, the precautionary principle was called as a 'fundamental principle' of environmental protection; see European Court of Justice, Case C-121/07, France v. Commission [2008] ECR I-9159, para. 74; c.f. Jans and Vedder, *European Environmental Law*, 44. In one of the topical GMO-cases, the CJEU interpreted the precautionary principle in order to extend the existing legislation to the genome editing applied in agriculture; see Court of Justice of the European Union, Case C-528/16, Confédération paysanne and Others v Premier ministre and Ministre de l'agriculture, de l'agroalimentaire et de la forêt, ECLI:EU:C:2018:583; c.f. Fodor László, "A precíziós genomszerkesztés mezőgazdasági alkalmazásának szabályozási alapkérdései és az elővigyázatosság elve," *Pro Futuro* 8, no. 2 (2018): 57–62. C.f. Harnócz Dorina, *New plant breeding techniques and genetic engineering: legal approach*, Journal of Agricultural and Environmental Law 13, no. 25 (2018), 85–90, https://doi.org/ 10.21029/JAEL.2018.25.81;

[74] Court of Justice of the European Union, Case C-333/08, Commission v. France [2010] ECR I-0757, para. 92. The antecedent of this interpretation: European Court of Justice, Case C-192/01, Commission v. Denmark [2003] ECR I-9693, para. 51.

international research." In case C-77/09,[75] the CJEU concluded "[w]here it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective".

Some authors draw the attention to the importance of the CJEU's case law even in connection with the interpretation of Article 191(3) TFEU. The first sentence of Article 191(3) TFEU "provides that in preparing its policy on the environment, the Union shall take account of 'available scientific and technical data'. In the 'old' days, this could easily have been used by the Union as a ground for not acting until there was absolute proof of the causes of certain undesirable environmental effects. Such an interpretation would now be at odds with the precautionary principle."[76] Taking the ECJ/CJEU case law into consideration,[77] the authors also emphasize the relationship between the precautionary principle and the safeguard clauses: "the Court also acknowledge the importance of the precautionary principle in applying so-called 'safeguard clauses' in directives."[78] In the opinion of *Jans* and *Vedder*, "[t]he case law on the precautionary principle is also relevant with respect to the application of Article 114(5) TFEU. This provision requires 'new scientific evidence' in order to accept Member States' introducing environmental legislation derogating from internal market measures. Article 114 TFEU should be interpreted in the light of the precautionary principle."[79] Nevertheless, referring to the case law of the ECJ,[80] the authors also notice that "of course, this does not mean that the precautionary principle implies that the conditions for application of that provisions do not have to be met at all." [81]

2.3. Some features of the precautionary principle

Taking the above mentioned documents and juridical practice into consideration, consequently, some of the elementary aspects[82] of the interpretation and application of the precautionary principle are the following: (a) the scope of the principle (e.g. whether concentrating merely on environmental issues); (b) the characteristic and determination of harm; (c) level of scientific certainty; (d) the nature of applicable measures; (e) the burden of proving whether a risk exists or not; (f) the legal and / or the political status of the precautionary principle.

[75] Court of Justice of the European Union, Case C-77/09, Govan Comérció Internacional e Servicos [2010] ECR I-13533, para. 76. C.f. Case C-333/08, para. 93. C.f. European Court of Justice, Case C-192/01, Commission v. Denmark [2003] ECR I-9693, paras. 52–53.

[76] Jans and Vedder, European Environmental Law, para. 44.

[77] E.g. Case C-236/01, paras. 112–113.

[78] Jans and Vedder, European Environmental Law, para. 44.

[79] Jans and Vedder, European Environmental Law, para. 45–46.

[80] Court of the First Instance, Joined Cases T-366/03 and T-235/04, Land Oberösterreich and Austria v Commission [2005] ECR II-4005, para. 71.

[81] Jans and Vedder, European Environmental Law, para. 46.

[82] Birnie, Boyle and Redgwell, *International Law*, paras. 158–160.; Bándi, "Gondolatok,", paras. 474–476, 479–480.; etc.

3. The precautionary principle in the Hungarian law

In the present chapter, the relation of Hungarian law to the precautionary principle will be analysed. On the one hand, the legislation will be presented, on the other hand, the case law of the Constitutional Court of Hungary (CCH) will be assessed.

3.1. The precautionary principle in the Hungarian legislation

The precautionary principle has been an organic part of the Hungarian law expressis verbis for a long while. It can be found in Act LIII of 1995 on the General Rules of Environmental Protection as a 'basic principle for the protection of the environment', namely: "The environment shall be used by observing the principle of precaution, by respecting and efficiently using environmental components, by reducing the generation of wastes and by making every effort to recycle and re-use natural and manufactured materials."[83] As to this section of the Act, it is worth noticing that Act LIII of 1995 stipulates an obligation concerning the precautionary principle merely for the users of environment, but not for the decision-makers. The precautionary principle is explicitly regulated also, for example, in Act CLXXXV of 2012 on Waste in connection with the so-called 'life-cycle thinking'[84] and the content of the so-called 'waste management permit'.[85] In a non-explicit way, the precautionary principle also has an effect on other regulations, for example on the Hungarian GMO-rules.

However, the precautionary principle is not explicitly regulated in the Hungarian constitution[86] (i.e. the so-called Fundamental Law of Hungary), in the opinion of the author of the present article, the 'GMO-free-agriculture' concept[87] of the Fundamental Law of Hungary can be interpreted as a kind of constitutional manifestation of the precautionary principle. A similar interpretation was issued by the Parliamentary Commissioner for the Future Generation as well: "The Hungarian Constitution declares with the clear prohibition of agricultural use of genetically modified organisms that – according to the precautionary principle – it does not aim at turning the country and its inhabitants into a test-site, especially with regard to the fact that the results of these experiments may

[83] § 6(2) of Act LIII of 1995.

[84] "'Life-cycle thinking' shall mean a comparative approach in the prevention and management of waste designed for the assessment of the overall environmental, human health, economic and social impacts taking into account the general environmental protection principles of precaution and sustainability, technical feasibility and economic viability, as well as the protection of resources"; § 2(1) of Act CLXXXV of 2012.

[85] "The waste management permit issued by the environmental protection authority shall *inter alia* contain the following information: […] *e)* the requirements for the safety and precautionary measures to be taken"; § 80(1) of Act CLXXXV of 2012.

[86] On the environmental aspects of the Hungarian constitution, see Horváth Gergely, "The renewed constitutional level of environmental law in Hungary," 56, no. 4 (2015): 302–316, https://doi.org/10.1556/026.2015.56.4.5; Raisz Anikó, "A Constitution's Environment, Environment in the Constitution," *Est Europa* special edition 1 (2012): 37–70.

[87] In connection with the so-called *green (a.k.a. agricultural) genetic engineering regulation*, the conception of 'GMO-free-agriculture' was defined in Article XX of the Hungarian constitution (a.k.a. Fundamental Law). According to Article XX of the Fundamental Law, Hungary shall facilitate the enforcement of the right to physical and mental health by – beside many other ways – *ascertaining that the agricultural sector is free of all genetically modified organisms*. About a more detailed interpretation of the concept, see Szilágyi János Ede, Raisz Anikó, and Kocsis Bianka Enikő, "New dimensions of the Hungarian agricultural law in respect of food sovereignty," *Journal of Agricultural and Environmental Law* 12, no. 22 (2017):, paras. 167–175.

only become visible after decades."[88] It is worth emphasizing that, in this statement, the Parliamentary Commissioner for the Future Generation essentially derived the precautionary principle from Article XX in the Fundamental Law of Hungary concerning the right to physical and mental health. Article XX includes the GMO-free-agriculture concept as well.

3.2. The genesis of the precautionary principle in the case law of the CCH

In the present subsection, the case law of the CCH will be presented in the following aspects. First, the so-called 'non-derogation' principle as the core environmental principle of the CCH will be analysed. Second, the first expressis verbis appearance of the precautionary principle in the CCH case law will be assessed. Third, the article details CCH Decision 13/2018 which determined a quite strong concept and version of the precautionary principle. Finally, the afterlife of CCH Decision 13/2018 will be interpreted.

Before the above-mentioned presentation, it is worth noticing that the CCH was established in 1989 and it is a guarantee of the rule of law by practicing the constitutional review of legal provisions. The CCH performs both posterior and ex ante constitutional review. Other important competences are the examination of legislative omissions and the interpretation of the constitution. In 2011, Hungary adopted a new constitution: the Fundamental Law. It entered into force on 1st January 2012. The Fundamental Law and the new Act on the Constitutional Court (Act CLI of 2011) have introduced significant changes. After the fourth amendment of the Fundamental Law, which entered into force on 1 April 2013, the CCH was, in a certain sense, forced to revise its previous legal practice, i.e. the previous case law shall not automatically be applied in a new case unless the CCH reinforces and verifies the previous practice.

3.2.1. Antecedent: the non-derogation principle

In environmental cases, the CCH typically bases the reasoning of the CCH decisions on the principle of non-derogation.[89] The original non-derogation principle was developed by CCH Decision 28/1994. (V.20.) on the ground of Articles 18 and 70/D of the Hungarian Constitution which was in force until 2011.[90] The non-derogation principle means that the law-maker (e.g. parliament, government) shall not adopt a legal provision which is capable to decrease the existing protection level of the environment. Until the adoption of CCH Decision 16/2015. (VI.5.), the CCH had applied the non-derogation principle merely in connection with substantive and procedural norms. After a deep reinterpretation of the non-derogation principle, CCH Decision 16/2015 was the

[88] Statement no. 258/2011 of April 25, 2011 on state responsibility resulting from the new Constitution's provisions on environmental protection and sustainability, point 7; translated by: Raisz Anikó, and Szilágyi János Ede, "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* 12, no. 7 (2012): 111, 137.

[89] About the detailed assessment of the principle, see Bándi Gyula, "Környezeti értékek, valamint a visszalépés tilalmának értelmezése," *Iustum Aequum Salutare* 13, no. 2 (2017): 159–181.; Bándi Gyula, "A visszalépés tilalma és a környezetvédelem," in *Honori et virtuti*, ed. Gellén Klára (Szeged: Iurisperitus, 2017), 9–23.; Fodor László, "A visszalépés tilalmának értelmezése a környezetvédelmi szabályozás körében," *Collectio Iuridica Universitatis Debreceniensis* 6 (2006):paras. 109–31.

[90] On the environmental assessment of the CCH case law based on the previous Hungarian Constitution, see Fodor László, *Környezetvédelem az Alkotmányban* (Budapest: Gondolat – Debreceni Egyetem, 2006).

first case when the CCH also based its decision on the non-derogation principle connected to an organisation-determining norm (in the concrete case the decision-maker endeavoured to transfer a nature conservation competence from national parks to the agricultural land fund). The non-derogation principle is a '*sine qua non*' concept of the CCH practice and jurisdiction in environmental cases.

3.2.2. The first appearance of the precautionary principle in the CCH case law

As for the first appearance of the precautionary principle in the CCH case law, CCH Decision 3223/2017 (IX.25.), CCH Decision 27/2017 (X.25.) and, furthermore, CCH Decision 28/2017 (X.25.) shall be analysed.[91]

In CCH Decision 3223/2017, the CCH noted that "essentially, the explanation of the non-derogation [principle] as the rule of law-making is that failure to characterize nature and the environment can lead to irreversible processes; therefore, during the adoption of an environmental protection regulation, the precautionary and prevention principles shall be taken into account."[92] Here already appears the precautionary principle as a requirement for environmental protection legislation. Nevertheless, the phrase 'shall be taken into account' does not automatically mean that the adopted law shall completely meet all requirements of the precautionary principle. The legislator shall merely take the precautionary principle into consideration but shall not rigorously follow it.

As far as CCH Decision 27/2017 is concerned, the CCH stated that "according to the precautionary principle which is considered as a generally-accepted principle of environmental law, the state shall provide that a certain measure would not cause derogation in the topical status of the environment."[93] Thus, the cited paragraph of the decision defines the precautionary principle as a 'generally-accepted principle in environmental law'. However, this decision confuses and intermingles the precautionary principle and the non-derogation principle.[94]

As for CCH Decision 28/2017, first, the CCH repeated its opinion adopted in CCH Decision 3223/2017, namely that during the adoption of an environmental protection regulation, the precautionary principle shall be taken into consideration.[95] Second, as a new aspect, the CCH created a kind of constitutional definition concerning

[91] It should be noted that, beside CCH Decision 16/2015, CCH Decision 27/2017 and CCH Decision 28/2017 also connected to the land transfer issues. In connection with the assessment of these decisions, see Olajos István, "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* 13, no. 25 (2018): 157–173, https://doi.org/10.21029/JAEL.2018.25.157; Csák Csilla, "Constitutional issues of land transactions regulation," *Journal of Agricultural and Environmental Law* 13, no. 24 (2018): 15–18, https://doi.org/10.21029/JAEL.2018.24.5; Sulyok Katalin, "Az Alkotmánybíróság előzetes normakontroll döntése a nemzeti park igazgatóságok vagyonkezelői jogkörének csorbítása tárgyában," *Jogesetek Magyarázata* 6, no. 4 (2015): 17–26.; Csák Csilla, Hornyák Zsófia, and Olajos Isván, "Az Alkotmánybíróság határozata a mezőgazdasági földek végintézkedés útján történő örökléséről," *Jogesetek Magyarázata* 9, no. 1 (2018): 5–19.

[92] CCH Decision 3223/2017, para. 27.

[93] CCH Decision 27/2017, para. 49.

[94] Szilágyi János Ede, "Az elővigyázatosság elve és a magyar alkotmánybírósági gyakorlat," *Miskolci Jogi Szemle* 13, no. 2/2 (2018): 79–80. In the opinion of Gyula Bándi, the definition of the precautionary principle determined in CCH Decision 27/2017 would rather fit the prevention principle; see Bándi, „Az elővigyázatosság".

[95] CCH Decision 28/2017, para. 75.

the precautionary principle: "taking the scientific uncertainty into account as well, the state shall prove that a certain measure will not cause the degradation of environment".[96] Third, the CCH referred to the legal sources[97] in which, in the opinion of the CCH, the precautionary principle was accepted or applied. These cited legal sources are the following.

CCH Decision 28/2017 refers to some examples of the international legal sources. Namely, the Convention on Biological Diversity, the Framework Convention on Climate Change and the Cartagena Protocol on Biosafety. It is quite interesting that, as to the international case law, CCH Decision 28/2017 did not refer to the jurisdiction of universal forums but merely to a regional case, namely the *Tatar v. Romania* case[98] of the European Court of Human Rights (ECHR). In connection with the *Tatar v. Romania* case, it is worth noticing the following. First, the primary legal ground of the ECHR, namely the European Convention on Human Rights, does not explicitly determine the right to environment (neither the precautionary principle). Taking this fact into consideration, the environmental jurisdiction of the ECHR is a consequence of the own activity of the ECHR[99] significantly based on Recommendation No R 1614 (2003) on Environment and human rights adopted by the Parliamentary Assembly of the Council of Europe. Second, it should be noted how the ECHR identified the precautionary principle in its practice. Previously, the ECHR also referred to other outside legal sources, namely, to the Rio Declaration, which itself is a non-binding document, to the Gabçikovo-Nagymaros case of the ICJ, in which the ICJ did not accept Hungary's argument that a state of necessity could arise from application of the precautionary principle, and, finally, to the Romanian national law.

It is also interesting that CCH Decision 28/2017 refers to Article 191 TFEU but not to the case law of the CJEU, which has a significant practice connected to the precautionary principle.[100] Finally, in CCH Decision 28/2017, the CCH cites the definition of the precautionary principle determined in the Hungarian Act LIII of 1995 on the General Rules of Environmental Protection. It has to be repeatedly stated that this Act does not stipulates a rigorous constitutional obligation for the decision-makers in connection with the precautionary principle.

3.2.3. CCH Decision 13/2018: the precautionary principle as a strict constitutional condition

In this subsection, the background and the precautionary-principle-aspects of the CCH decision are analysed. Before the presentation of these, on the one hand, the author of the present paper intends to emphasize that the author agrees with the conclusion of the CCH Decision 13/2018, namely that, in an ex ante constitutional review, the CCH annulled some paragraphs of the amendment of Act LVII of 1995 (on water management) on the ground that the amendment, which was adopted by the Hungarian parliament, but not promulgated

[96] CCH Decision 28/2017, para. 75.
[97] CCH Decision 28/2017, para. 75.
[98] European Court of Human Rights, Tatar v. Romania case (application no. 67021/01), 27 January 2009.
[99] Raisz Anikó, "A környezetvédelem helye a nemzetközi jog rendszerében," *Miskolci Jogi Szemle* 6, no. 1 (2011): 103–06.
[100] See also Bándi Gyula, Csapó Orsolya, Kovács-Végh Luca, Stágel Bence and Szilágyi Szilvia, *Az Európai Bíróság környezetjogi ítélkezési gyakorlata* (Budapest: Szent István Társulat, 2008).

by the president of Hungary, had violated the following Article of the Fundamental Law: Article P) on the protection of natural resources,[101] and Article XXI on the right to environment.[102] In the author's opinion,[103] it would have been sufficient if the CCH had based its opinion merely on the violation of the non-derogation principle in the reasoning of the decision. On the other hand, the author of the present article also a supporter[104] of a stricter application of the precautionary principle taking the serious global and local environmental problems into account. Besides, the author speculates in the present paper whether the establishment of the strong constitutional concept of the precautionary principle by the CCH was necessary to annul the amendment of the Act LVII of 1995, and what might be the consequences of CCH Decision 13/2018 in the long run.

3.2.3.1. The background of the case

The affected legal document, namely the amendment of Act LVII of 1995 on water management (hereinafter referred to as Amendment), was submitted by the Hungarian Government with the original number 'T/15373' at the Hungarian Parliament in 2017. After the parliamentary election in 2018, the Amendment got a new number, i.e. 'T/384'. The Amendment essentially affected the status of groundwater.

The protection of groundwater is a rather new field of the Hungarian water protection law.[105] In 2009, there was a significant debate connected to the re-injection of energy-related thermal waters into groundwater, in which debate the president of the Hungarian Republic initiated higher standards serving the sustainable development more properly.[106] However, finally, the president merely sent the accepted act back to the Hungarian parliament for a reassessment of the law and not to the CCH for an ex ante constitutional review.

As to the present case, according to the Amendment, the decision-maker endeavoured "to establish a regulation that does not require authorization or notification procedures for wells up to a depth of 80 m."[107] In the opinion of groundwater-experts, *Péter Szűcs* and *Csaba Ilyés*, "[i]f this were to happen, no set-up information would be available for the shallow groundwater that are above than 80 meters or the operation and impact of the wells. Expected negative impacts may affect the relevant groundwater resources in

[101] "Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations." Fundamental Law, Article P) (1).

[102] "Hungary shall recognise and endorse the right of everyone to a healthy environment." Fundamental Law, Article XXI (1).

[103] The author of the present paper had previously published his opinion; see Szilágyi János Ede, *Vízszemléletű kormányzás – vízpolitika – vízjog* (Miskolc: Miskolci Egyetemi Kiadó, 2018): 180 and 194–96; Szilágyi János Ede, Baranyai Gábor and Szűcs Péter, "A felszín alatti vízkivételek liberalizálása az Alaptörvény és az európai uniós jog tükrében," *Hidrológiai Közlöny* 97, no. 4 (2017): 17–19 and 22–23.

[104] See Szilágyi János Ede, "A zöld géntechnológiai szabályozás fejlődésének egyes aktuális kérdéseiről," *Miskolci Jogi Szemle* 6, no. 2 (2011): 36–54. See furthermore Szilágyi, "Az elővigyázatosság elve," 76–77.

[105] Among others, the topical legal basis of the groundwater's protection is 219/2004. Government decree.

[106] The number of the initiative of the president of the Hungarian Republic: no. T/9194/8 parliamentary document, Budapest, 1 July 2009.

[107] Szűcs Péter, and Ilyés Csaba, *Groundwater – an invisible natural resources*, Journal of Agricultural and Environmental Law 14, no. 26 (2019), 303, https://doi.org/10.21029/JAEL.2019.26.299.

quantitative and qualitative terms. It would render reliable river basin management planning impossible and abolish groundwater resource management. It would endanger the world-famous drinking water of our country today."[108] Due to this problematic Amendment, the Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations issued a statement concerning the protection of groundwater on 24 May 2017. Although, in his statement, the ombudsman also noticed the importance of the precautionary principle, the ombudsman finally determined the constitutional objection concerning the Amendment on the ground of violation of the non-derogation principle. Afterwards, in 2018, the Hungarian parliament adopted the Amendment, and the parliament sent the Amendment to the President of Hungary for promulgation. The President of Hungary also assessed the Amendment and, on 30 July 2018, he noted that, in his opinion, the Act had not been professionally substantiated, it had not been verified by impact studies and the president stated that the Amendment "violated the Article P) (1) of the Fundamental Law especially taking the requirements derive from the non-derogation principle and the precautionary principle into account." With this, the president initiated an ex ante constitutional review procedure at the CCH.[109] A novelty of the president argument was that he derived the precautionary principle from the Article P) (1) of the Fundamental Law. In his constitutional interpretation concerning the precautionary principle, the president also referred to the above-mentioned CCH Decision 28/2017. It is worth noticing that CCH Decision 28/2017 originally did not link the precautionary principle to the Article P) (1) of the Fundamental Law, therefore the president's interpretation was quite progressive in this sense. Before its decision, the CCH requested the scientific position of the Hungarian Academy of Sciences (HAS). The HAS drew the attention to the risk and uncertainties connected to the Amendment.[110]

3.2.3.2. The assessment of the case taking the precautionary principle into account

After the above-mentioned antecedent, the Constitutional Court adopted CCH Decision 13/2018, in which the CCH established a strong constitutional concept of the precautionary principle. The most significant aspects of this strong constitutional concept are the following.

a) The CCH referred to the precautionary-principle-viewpoints of the Ombudsman[111] and the President of Hungary,[112] and furthermore, to the previous jurisdiction of the CCH, namely CCH Decisions 3223/2017,[113] 27/2017[114] and 28/2017.[115]
b) In the reasoning of the CCH Decision 13/2018, the CCH interpreted the so-called National Avowal of the Fundamental Law (that is the name of the preamble of the Hungarian

[108] Szűcs, and Ilyés, "Groundwater," 303.
[109] The number of the president's proposition at the CCH: I-1216/2018/0.
[110] The number (at the CCH) of the HAS position adopted on 7 August 2018: I-1216/2018/9.
[111] CCH Decision 13/2018, para. 49.
[112] CCH Decision 13/2018, para. 4.
[113] For example CCH Decision 13/2018, paras. 19–20.
[114] For example CCH Decision 13/2018, paras. 20, 62, 72.
[115] For example CCH Decision 13/2018, paras. 13–14, 15, 71–72.

constitution), Article P) and Article XXI of the Fundamental Law. As for Article P) (1) of the Fundamental Law, similarly to CCH Decision 28/2017, the CCH determined the three main obligations of the present generations to protect and preserve the natural resources. According to these obligations, "in the context of preserving natural resources for future generations, the present generation is bound to preserve choice, preserve the quality potential and preserve access."[116] The CCH determined the constitutional components of the precautionary principle connected to the detailed three obligations as well.

c) The CCH defined the elementary constitutional components of the precautionary principle. Namely, "The responsibility deriving from the Fundamental Law for future generations requires *the legislator to assess and calculate the expected impact of its actions on the basis of scientific knowledge*, in accordance with the precautionary principle and the principle of prevention."[117] And similarly, "in Article P) (1), the Fundamental Law also explicitly mentions the obligation to preserve the common heritage of the nation for future generations, and in general expects the law to take into account not only the individual and collective needs of the present generation when legislating, but also the living conditions of future generations; and, when considering the expected impact of each decision, *it should act in accordance with the precautionary and preventive approach, based on the current state of science*."[118] Consequently, in CCH Decision 13/2018, the CCH required a legislative activity in accordance with the precautionary principle, and not merely taking the precautionary principle into account. The CCH derived this obligation from the obligation 'to preserve the common heritage of the nation for future generations' of Article P) (1) of the Fundamental Law. Additionally, according to the CCH's interpretation, the application of the precautionary principle is beyond the narrow-sense field of the environmental protection, and the interpretation shall be applied, beyond Article XXI (1) of the Fundamental law, in general.[119]

d) The CCH determined *two types of the precautionary principle*. The first is connected to the non-derogation principle, contrarily, the other one is autonomous and independent from the non-derogation principle: "As a result of the precautionary principle, if a regulation or measure could affect the state of the environment, the legislator must prove that the regulation does not constitute a retrograde step and, as a result, does not cause irreversible damage or the opportunity of such damage. When regulating previously unregulated cases, the precautionary principle is not only applied in the context of the non-derogation principle but also independently. Thus, in the case of measures that do not formally cause derogation, but may affect the state of

[116] For example CCH Decision 13/2018, para. 13
[117] CCH Decision 13/2018, para. 13.
[118] CCH Decision 13/2018, para. 14.
[119] CCH Decision 13/2018, para. 14.

the environment, the measure is also limited to the precautionary principle, in the context of which the legislator has a constitutional obligation to take into account, in the scientific viewpoint, risks with a high probability or certainty when making a decision. Contrarily, the prevention principle connotes the obligation to act before the pollution occurs at the source of the potential pollution, that is, to ensure that processes that may harm the environment do not occur."[120]

e) The CCH also dealt with the *burden of proof*. In CCH Decision 27/2017, the CCH had already stated: "the state shall provide that a certain measure would not cause derogation in the topical status of the environment."[121] As a novelty, in CCH Decision 13/2018, the CCH added that "the legislator must prove that a planned regulation does not constitute a retrograde step and thus does not cause irreparable damage or the possibility of such damage in principle."[122] As far as 'the possibility of such damage in principle' is concerned, referring to the CCH Decision 16/2015, the CCH declared that "in line with the precautionary principle, violation of the non-derogation principle may be founded not only on the actual worsening of the state of the environment, but even on the risk of it."[123]

f) In connection with the precautionary principle, the CCH attached great importance to national strategic documents, for example the National Environmental Protection Program, the National Water Strategy, the National Rural Development Strategy. These 'public law regulatory instruments' "oblige their decision-maker, and these are also the starting points for medium- and long-term planning and predictable legislation, taking into account the precautionary principle and the prevention principles, especially in the case of components of the common heritage of the nation regulated in the Article P) (1) of the Fundamental Law. Accordingly, ignoring these professional content strategies in the constitutional review procedure of a law-amendment should be assessed separately for regulatory subject affecting the nation's common heritage."[124] Otherwise, the CCH also considered the position of the HAS on a scientific basis to be of great importance.[125]

Finally, in connection with the Amendment the CCH found that by establishing the possibility of unauthorized extraction of groundwater it violates the principle of non-derogation, and furthermore, Article P) (1) and Article XXI (1) of the Fundamental Law. It is worth noticing that, in this final conclusion, the CCH did not refer to the precautionary principle. Despite this, in CCH Decision 13/2018, the CCH created the strong constitutional concept of the precautionary principle as a rigorous constitutional obligation for the law-maker. It should be noted that some judges (e.g. *András Varga*

[120] CCH Decision 13/2018, para. See furthermore CCH Decision 13/2018, para. 21.
[121] CCH Decision 27/2017, para. 49.
[122] CCH Decision 13/2018, para. 62.
[123] CCH Decision 13/2018, para. 65.
[124] CCH Decision 13/2018, para. 40.
[125] CCH Decision 13/2018, para. 59.

Zs.) attached their dissenting opinions in which these judges, among others, drew attention to the logical difficulty of incorporating the precautionary principle into constitutional law.[126]

3.2.4. The afterlife of CCH Decision 13/2018 in the case law of the CCH

It seems that the strong constitutional concept established in CCH Decision 13/2018 has a serious effect on the further jurisdiction of the CCH. The CCH also applied the precautionary principle in connection with the protection against noise and vibration in CCH Decision 17/2018,[127] and in connection with the procedure before authorities affecting environmental protection and nature conservation issues in CCH Decision 4/2019.[128] In the opinion of *István Olajos*, the "annulment of certain parts of the Regulation reviewed in CCH Decision 17/2018 could be based on the non-derogation principle, and the non-derogation principle could be supported by the principles of prevention and precautionary."[129]

4. Conclusions

In its decisions, the CCH created a strong constitutional concept of the precautionary principle. This raises the question whether the CCH can consequently insist on its new precedent in future cases, taking into account the numerous new and risky technologies (genetically modified organisms, artificial intelligence, self-driving cars, etc.) and, moreover, the uncertain economic,[130] environmental[131] and social situations of the XXIst century;[132] namely, under these circumstances, a lot of situations may raise the question of the application of the precautionary principle. Besides, if the CCH did not properly apply the strong constitutional concept of the precautionary principle, the principle could become the new instrument of a double standard. Apart from the determination of the precautionary principle by the CCH merely in its jurisdiction, of course, there is an opportunity to define the precautionary principle in the constitution itself. In other words, a further question that can be raised on the ground of the separation of powers is whether the Hungarian Constitutional Court exceeded its competence and power to interpret the text of the constitution and whether it grabbed a law-making power in CCH Decision 13/2018. Otherwise, the debates also showed that the precautionary principle is neither a merely political issue nor a legal one but an ambiguous mixture of them. However, it is worth noticing that the other constitutional concept of the Hungarian environmental law, i.e. the non-derogation principle, exists alone in the practice of the CCH without an explicit definition or mention in the Hungarian constitution. In the opinion of the present article's author, a certain combination of the CCH-juridical and the Fundamental-Law-determined types of the precautionary principle is also imaginable.

[126] CCH Decision 13/2018, paras. 107–142.
[127] CCH Decision 17/2018, paras. 87–92.
[128] CCH Decision 4/2019, paras. 69, 74, 79, 93, 99–100, 123.
[129] Olajos István, *The precautionary principle in the practice of the Hungarian Constitutional Court and connected agricultural innovations*, under review at Zbornik radova Pravnog fakulteta Novi Sad.
[130] See Nagy Zoltán, "Energy Taxation and Its Problems of Regulation," *Curentul Juridic* 18, no. 1 (2015): 128–148.
[131] E.g. the climate change; see Nagy Zoltán, and Beáta Gergely, "The Hungarian Regulation on the Emission Trading system," *Lex et Scientia* 24, no. 1 (2017): 70–78.
[132] See Nagy Zoltán, *Környezeti adózás szabályozása a környezetpolitika rendszerében* (Miskolc: Miskolci Egyetem, 2013), 8–35.

In 2018, the Hungarian prime minister announced the revision of the Fundamental Law. In the opinion of the author of the present paper, this ongoing constitutional revision even means an outstanding opportunity for the decision-makers to consider the expressis verbis determination of the precautionary principle in the Fundamental Law. If so, several questions may be raised: where to define the precautionary principle in the present text and context of the Fundamental Law; which concept of the precautionary principle (by way of explanation, a strong, a weak or a transitional concept) should be defined; whether the constitution-based concept should focus merely on the environmental and human health fields or should concentrate on a more general scope; which components of the precautionary principle should be determined in the constitution; or whether different kinds of the precautionary principle should be determined for different situations?

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