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Commentary on Strasbourg Principle no. 32 (iv): principle of non-regression

The non-regression principle, as guaranteed under various domestic laws and listed among the Strasbourg Principles, serves as a binding principle guarding against regulatory rollbacks and intentional diluting of previously mandated protective restrictions under domestic environmental laws.

This brief commentary focuses on how this principle has been operationalized by the Hungarian Constitutional Court in its almost 30-year-long jurisprudence. Under Hungarian constitutional legal doctrine, the principle has been consistently understood as a prohibition for the legislature to weaken the stringency of protection provided under environmental laws in force at the relevant time, unless doing so is strictly necessary for enforcing a competing human right or a constitutional objective, and the weakening of protecting is proportionate to that legitimate aim.

The non-regression principle (sometimes also referred to as the non-retrogression or non-derogation principle) forms the main normative content not only of the right to a healthy environment, but more recently is also applicable under a constitutional public trust provision, which protects the interests of future generations under Article P) of the Fundamental Law.

In the judicial practice, the non-regression principle is vested with strong normative ‘bite’ as the Constitutional Court quashed several acts for running against the principle. High profile cases include a successful *ex ante* constitutional challenge of an amendment to the Water Management Act, which abolished permit for wells drilled for households’ water withdrawal purposes, which would have threatened the aquifers (Decision No. 13/2018. (IX.4.) AB); in addition, a successful *ex post* challenge of the Forest Act, which narrowed down the powers of environmental authorities to impose logging restrictions in privately-owned forests (Decision No. 14/2020 (VII. 6.) AB). Further important decisions halted the intended privatisation of Natura 2000 sites (Decision No. 28/2017. (X. 25.) AB), quashed a decree that exempted a Formula-1 racetrack from noise pollution standards (Decision No. 17/2018. (X. 10.) AB), and invalidated the Act, which would have carved out certain nature conservation sites from the land management rights of National Park Directorates (Decision No. 16/2015. (VI. 5.) AB).

In the Constitutional Court’s inquiry, the principle is operationalized through a two-step analysis. The Constitutional Court must first establish that the effectiveness of statutory guarantees has been decreased. Importantly, this review focuses on the efficiency of statutory guarantees, measured in light of actual realities rather than theoretical possibilities. In other words, a regulatory reform will be found off-limits if it leaves room for enforcing protective

standards on paper, yet in practice renders such protective interventions highly unlikely or more cumbersome for the competent authorities.

The first stage of the review focuses on a comparative assessment of legal guarantees as provided under the previous laws and the new provisions. If the Constitutional Court finds that the stringency of protection had been weakened, it may proceed to the second stage of its analysis. This comprises a legitimate aim and proportionality review, under which a particular amendment shall be found unconstitutional if the Constitutional Court establishes either the lack of a legitimate aim, or the unnecessary and disproportionate nature of the measure that lowered the level of environmental protection. Importantly, the scope of legitimate aims is narrowly defined, including only competing human rights and constitutional goals, but excluding other, frequently invoked rationales such as simplifying bureaucratic procedures and requirements.

Finally, the non-regression principle has a wide scope, as it applies not only to the protection afforded under substantive laws, but also extends to organisational and procedural laws. This means that the non-regression principle guards against even those regulatory reforms that leave environmental substantive laws unchanged, while they weaken the enforcement of those guarantees through enacting new organisational or procedural rules (Decision No. 3223/2017. (IX. 25.) AB).

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