

# HUNGARY: A PROGRESSIVE APPROACH TO THE PROTECTION OF THE ENVIRONMENT AND FUTURE GENERATIONS IN A TRADITIONAL CONSTITUTION



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## 1. Introduction

### *1.1. Constitutional framework in Hungary*

The Fundamental Law,<sup>1</sup> which was adopted by Parliament on April 18, 2011, and entered into force on January 1, 2012, is the currently effective constitution of Hungary. Its adoption brought a substantial change in Hungarian constitutional development: before the first written constitution – Act XX of 1949, which was based on the soviet model of 1936 – was passed, Hungary had a so-called ‘historical constitution’ connected to the symbol of the Holy Crown.<sup>2</sup> Act XX of 1949 served the creation of a totalitarian state system, which ended peacefully in 1989 with the establishment of the Republic. Act XXXI of 1989 declared independence, the democratic frames, and rule of law, although it was only an amendment to the former

1 The Fundamental Law of Hungary [Online]. Available at: <https://bit.ly/31xaomS> (Accessed: 9 May 2022).

2 Raisz, 2012, pp. 37–39.

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constitution that was intended to be replaced by a new basic law.<sup>3</sup> The new Fundamental Law expresses several value choices, declares that the identity of the nation is rooted in the historic constitution, and denies the recognition of the constitution of 1949.<sup>4</sup>

The Fundamental Law is based on a firm philosophy representing the importance of the protection of the environment,<sup>5</sup> which manifests in the high level of legal protection guaranteed by the constitutional provisions. One may observe that the constitutional regulation incorporates different approaches toward environmental protection: on the one hand, it declares the right to a healthy environment, thereby positioning the environment among the values of fundamental rights; on the other hand, its protection serves as a tool for the effective application of other fundamental rights, in the given case, of the right to physical and mental health. The influence of international tendencies concerning the interrelation of human rights and the environment is, therefore, tangible in the Hungarian constitutional approach.

Despite that the Fundamental Law does not provide an explicit definition for the environment, it may be inferred from the Preamble: “*we commit ourselves to promoting and safeguarding our heritage [...] along with all man-made and natural assets of the Carpathian Basin.*” Therefore, the fact that built and cultural heritage is included in environmental protection is undeniable and is also supported by the Constitutional Court.<sup>6</sup> Consequently, the protection of the environment encompasses more than the surrounding nature – the inclusion of the built and cultural heritage in the protection of the environment thus implies an anthropocentric approach.<sup>7</sup> Nevertheless, the Fundamental Law also provides a high level of protection for natural resources,<sup>8</sup> thereby expressing respect for their intrinsic value and thus creating a complex system of environmental protection that reflects the needs of both humankind and the planet.

3 Csink and Fröhlich, 2020, pp. 126–127.

4 National Avowal of the Fundamental Law: “[...] *We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State. We do not recognise the suspension of our historic constitution due to foreign occupations. We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship. We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we therefore proclaim it to be invalid. [...]*”

5 Antal, 2011, pp. 47–49.

6 See Decision no. 16/2015 (VI.5.) [83]: “*The Constitutional Court extended the right to a healthy environment to the protection of the built environment in its practice subsequent to the Decision of [28/1994.*” See also Decision no. 3104/2017 (V.8.); Decision no. 5/2022 (IV.14.); Decision no. 16/2022 (VII.14.).

7 Horváth, 2013, pp. 223–224.

8 See Article P (1) of the Fundamental Law: “*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.*”

## ***1.2. Protection of the environment in other branches of law***

The detailed rules of environmental protection can be found in Act LIII of 1995 on the general rules of environmental protection (further referred to as the Environmental Protection Act). It is considered a *lex specialis* in this field, defining the basic notions and principles of environmental protection, responsibilities, cooperation, state and local governmental tasks, and economic and administrative issues. According to this act, the environment encompasses environmental components themselves (earth, air, water, the living world, and the man-made artificial environment) as well as their systems, processes, and structure.<sup>9</sup> Therefore, this definition set out in the general act of the environment is in line with the above-mentioned constitutional framework. Furthermore, given that the Fundamental Law is also devoted to the protection of natural resources, Act LIII of 1996 on nature conservation should be mentioned. The act is dedicated to, among other issues, the protection of natural values and natural areas, such as landscape, wildlife, natural habitats, and geological values and lays down the rules of procedure for declaring protected status, the planning and organization system for nature conservation, and ownership rights and sanctions related to nature conservation. Further legal requirements are provided in numerous acts, such as the Water Management Act,<sup>10</sup> the Electricity Act,<sup>11</sup> or the Land Protection Act.<sup>12</sup>

The environmental dimension appears in several other fields of law: the Act V of the Civil Code of 2013, for instance, sets out a special liability system for hazardous activities providing that the person carrying out such activities shall be exempt from liability if they prove that the damage was caused by an inavertable event outside the scope of the hazardous activity (*vis maior*).<sup>13</sup> Furthermore, criminal law also has a role in the protection of the environment, although as a last resort:<sup>14</sup> Chapter XXIII of the new Criminal Code, Act C of 2012 ('Criminal offenses against the environment and nature') lists several criminal offenses against the environment and nature, namely environmental offenses, damaging the natural environment, cruelty to animals, poaching game, poaching fish, organization of illegal animal fights, violation of waste management regulations, criminal offenses with ozone-depleting substances, misappropriation of radioactive materials, illegal operation of nuclear installations, crimes in connection with nuclear energy, and prohibition from residing in a particular area.<sup>15</sup> It is a significant novelty of the new Hungarian Code that environmental crimes are regulated independently in one chapter: this method

9 Act LIII of 1995 on the general rules of environmental protection, Article 4 (1)–(2).

10 Act LVII of 1995 on water management.

11 Act LXXXVI of 2007 on electricity.

12 Act CXXIX of 2007 on the protection of arable land.

13 Act V of 2013 on the Civil Code, Article 6:535. For a detailed analysis on the dogmatics of environmental liability in civil law, see also Csák, 2013.

14 Görgényi, 2018, p. 66.

15 Act C of 2012 on the Criminal Code, Sec. 241–253.

expresses the growing need for the autonomous protection of the environment rather than the former regulation that incorporated environmental crimes as among the crimes against public health.<sup>16</sup>

Moreover, under Chapter XXXIV ('Criminal offense-related administrative procedures'), the violation of legal liabilities relating to genetically modified plant varieties is introduced.<sup>17</sup> The reconsideration of liability on genetically modified organisms occurred due to a concrete case – in 2011, it was found that on several thousands of hectares, soy and corn had been produced from seeds that contained GMOs as well. The violation of the constitutional provision on the prohibition of the use of GMOs<sup>18</sup> thus resulted in the incorporation of the aforementioned crime into the Criminal Code.<sup>19</sup>

### ***1.3. Administrative framework for the protection of the environment***

In the absence of a separate ministry for the environment, the management of environmental matters is shared among different ministries. The Ministry of Agriculture is responsible for nature protection, in the framework of which it prepares laws on the protection of natural values and areas, landscape conservation, Natura 2000 areas, wild organisms, and economic measures serving the protection of nature. The Minister also analyzes and evaluates the state of the environment and its protection, its impact on human health, the processes for the management of natural values and resources, and the experiences of nature protection, its regulated use, and its planned development. Further, they coordinate the information system of the measurement, monitoring, and evaluation of the state of nature.<sup>20</sup> Moreover, the Ministry of Technology and Industry is also competent in certain related fields, given that the portfolio encompasses the protection of the environment, the development of a circular economy, and waste management and energy policy, including climate policy. Within the framework of the protection of the environment, the

16 Nagy, 2019, p. 146.

17 See Act C of 2012 on the Criminal Code, Section 362: "Any person who:

- a) unlawfully imports, stores, transports or places on the market in the territory of Hungary the propagating materials of genetically modified plant varieties which have not been authorized in the European Union, or releases such into the environment;
- b) unlawfully releases into the environment the propagating materials of genetically modified plant varieties which have not been authorized in the European Union for cultivation purposes;
- c) violates the prohibitive measures imposed for the duration of the safeguard procedure in connection with the import, production, storage, transport, placing on the market or use of propagating materials of genetically modified plant varieties which has been authorized in the European Union for cultivation purposes; is guilty of a misdemeanor punishable by imprisonment not exceeding two years."

18 See Article XX (2) of the Fundamental Law: "Hungary shall promote the effective application of the right [to physical and mental health] through agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water [...]"

19 Raisz and Szilágyi, 2012, pp. 110–112.

20 183/2022 (V.24.) Government Decree on the Modification of Certain Government Decrees on Determining the Duties and Powers of the Members of the Government, Article 62

Minister drafts laws on general rules of environmental protection, related economic measures, air protection, and protection against the harmful impact of noise and vibration, inter alia.<sup>21</sup> Additionally, the Ministry of Interior also has environment-related competencies related to water supply and the governance of water management bodies.<sup>22</sup> Local authorities for the protection of nature and the environment are integrated into the system of the government offices of the counties, the capital, and, in some cases, the municipalities. Their tasks cover data collection and publication as well as exercising competencies of environmental authorities, such as providing authorization for using the environment or taking part in the construction and authorization procedure.<sup>23</sup> Furthermore, municipalities can also play an important role in environmental policymaking owing to their competency to issue decrees. The most topical fields of regulation on a local level are related to air protection, noise protection, waste management, the protection of wildlife, the protection of the built environment, soil and water protection, water management, energy, and traffic. In regard to the regulatory framework of local authorities, that the characteristics and particularities of the environment of these entities are always reflected in the regulations should be emphasized.<sup>24</sup> Hence, the analysis of these pieces of legislation would exceed the limits of the present study.

#### ***1.4. International jurisdiction concerning environmental matters in relation to Hungary***

In addition to the national legislative framework, which guarantees a high level of protection for the environment and the interests of future generations, Hungary is also famous for its involvement in the first great trial of environmental law in front of the International Court of Justice (further referred to as the ICJ): the Gabčíkovo-Nagymaros Project (Hungary/Slovakia).<sup>25</sup> A bilateral agreement in 1977 on the construction of a hydroelectric power plant on the Danube River formed the basis of the dispute.<sup>26</sup> Considering the fact that environmental aspects had not been taken into account during the drafting of the agreement, Hungary ceased the building projects around the change of the regime and unilaterally denounced the treaty.<sup>27</sup> The essential argumentative basis of the dispute was founded upon environmental legal

21 183/2022 (V.24.) Government Decree on the Modification of Certain Government Decrees on Determining the Duties and Powers of the Members of the Government, Article 160; 164 (1) f); 165

22 183/2022 (V.24.) Government Decree on the Modification of Certain Government Decrees on Determining the Duties and Powers of the Members of the Government, Article 66, 21–23.

23 Fodor, 2015, pp. 117–120.

24 Fodor: 2019, p. 247.; p. 236. For a comprehensive analysis of the environmental regulatory activities of municipalities, see Fodor, 2019.

25 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997.

26 A detailed analysis of the case exceeds the limits of the present chapter; the author only aimed at touching upon certain aspects relevant for the present chapter. For further information, see Herczegh, 2004, pp. 1–20.

27 Raisz and Szilágyi, 2017, pp. 91–93.

considerations (Hungary) versus the principle of *pacta sunt servanda* (Slovakia).<sup>28</sup> Although the Court did not exploit the possibilities of evaluating environmental aspects to the maximum extent, the importance of the judgment lies in being the first in the practice of the ICJ when the use of environmental principles emerged,<sup>29</sup> and it is often cited as being the most significant international environmental decision from the Central European region.<sup>30</sup>

Hungarian cases occasionally appear in front of the European Court of Human Rights (further referred to as the ECHR)<sup>31</sup> in relation to the environment; the most cited are *Deés v. Hungary* (no. 2345/06) and *Bor v. Hungary* (no 50474/08). In both cases, the ECHR held the violation of Article 8 and Article 6 of the European Convention on Human Rights in relation to the nuisance caused by heavy road or railway traffic noise near the applicants' residence.<sup>32</sup> In the absence of an explicit right to a healthy environment in the Convention, the Court often links environmental matters to other human rights; in the above-mentioned cases, the issue at hand was linked to the right to respect for private and family life or the right to a fair trial.<sup>33</sup> The two judgments are embedded in a broader jurisdictional tendency, which established the violation of Article 8 based on environmental harms: *Taşkin and others v. Turkey*, *Fadeyeva v. Russia*, *Giacomelli v. Italy*, and *Tatar v. Romania* are among the most significant examples.<sup>34</sup>

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## 2. Actors in the formation of constitutional law and constitutional jurisdiction related to the protection of future generations and especially the environment

### 2.1. The role of the classical actors of constitutional law

The Environmental Protection Act lays down the obligations of state actors concerning environmental protection. The National Assembly has a wide range of tasks in this matter: first, it ensures that the interests of the protection of the environment are taken into account during the legislation; second, it decides on the government's report on the state of the environment, defines the environmental tasks of the federal

28 Kecskés, 2015, p. 65.

29 Raisz, 2015, pp. 262-264. For further interpretation of certain environmental considerations in the judgment, see Bányai, 2011.

30 Raisz, 2017, p. 452.

31 For the interpretation of human rights from an environmental perspective in the practice of the ECHR, see Sulyok, 2014; for further analysis on the practice of regional human rights courts in environmental matters, see Marinkás, 2020.

32 Case of *Deés v. Hungary* (Application no. 2345/06) Judgment, Strasbourg, November 9, 2010, 18–27. See also the case of *Bor v. Hungary* (Application no. 50474/08) Judgment, Strasbourg, June 18, 2013.

33 Fodor, 2011, pp. 90–91.

34 Kecskés, 2021, p. 216.

and local governments, and approves resources for the solution of environmental tasks and controls their utilization. Furthermore, the National Assembly adopts the National Environmental Program and evaluates its implementation every two years. The National Environmental Program serves as a basis for planning environmental protection for six years. The Program is drafted and presented by the Government, which – in the framework of its environmental tasks – fulfills the obligations, exercises rights arising from international treaties, and promotes the implementation and dissemination of environmentally friendly products, technologies, and establishments.<sup>35</sup> Regarding the legislative duties related to environmental protection, the National Environmental Protection Council supports the work of the government with proposals, recommendations, and comments, and it is responsible for the social, scientific, and professional foundations of the protection of the environment.<sup>36</sup> The importance of its work for well-founded environmental regulations was also emphasized by the Constitutional Court.<sup>37</sup> In addition, the Committee on Sustainable Development operates as one of the 20 Parliamentary Committees, which are entitled to initiate measures, express opinions, put forth proposals, and monitor the work of the government. In addition to sustainable development, their portfolio covers climate policy, the protection of natural resources, public health, and EU subsidies for environmental protection.<sup>38</sup>

The role of the Constitutional Court in the interpretation of the constitutional provisions concerning the protection of the environment and future generations is of paramount importance in Hungary.<sup>39</sup> The pioneer decision of environmental jurisprudence was Decision no. 28/1994 (V.20.), which interpreted the right to a healthy environment and elaborated on the non-derogation principle.<sup>40</sup> It is worth noting that the Court adjudicated on the basis of the provisions of the former Constitution: Article 18 of Act XX of 1949 – as a result of the amendments of 1989 – declared everyone’s right to a healthy environment. According to the fourth amendment of the Fundamental Law, the decisions before its entry into force were repealed,<sup>41</sup> but given that the text of the Fundamental Law is identical to the text of the Constitution regarding the right to a healthy environment, in its Decision no. 3068/2013 (III.14.), the Constitutional Court rendered its former findings applicable in the interpretation of

35 Act LIII of 1995 on the general rules of environmental protection, Article 39–41.

36 Act LIII of 1995 on the general rules of environmental protection, Article 45.

37 Decision no. 30/2000 (X.11.) III. 2-3.

38 Parliament Resolution 11/2022 (V.2.) on the establishment and election of the members of the Parliamentary Committees, 1. b).

39 Szilágyi, 2021a, pp. 133–136.

40 The non-derogation principle is also referred to as the non-regression principle by Gyula Bándi. See: Bándi, 2020a, 19.

41 The Fundamental Law of Hungary, Closing and Miscellaneous Provisions, 5.: *“The decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions.”*

the right to a healthy environment.<sup>42</sup> In addition to explicitly confirming the findings of the former Constitutional Court practice in this field,<sup>43</sup> Decision no. 16/2015 (VI.5.) put the interpretation of the right to a healthy environment in the context of the new constitutional framework and further developed the non-derogation principle. The other strong principle elaborated by the Court is the precautionary principle, which, by Decision no. 13/2018 (IX.4.), was raised to a constitutional criterion for the benefit of the interest of future generations.<sup>44</sup> Therefore, the Constitutional Court has an outstanding role in the establishment of the dogmatics of the right to a healthy environment, the principles of environmental protection, and their interpretation and position in Hungarian constitutional practice. Moreover, the Court has a special feature in its environmental adjudication: in some cases, the panel conducted a technical or factual evidentiary hearing and provided solutions not only to the legislation under examination but also to the situations and conflicts that had arisen, thus stepping out from its conventional role as a court of law to be, in some aspects, a court of facts.<sup>45</sup> The importance of its findings, the great number of Constitutional Court decisions on environmental issues, and the change of its ordinary form are a few examples that illustrate the fundamental role of the Hungarian Constitutional Court in shaping the constitutional framework for the protection of future generations and the environment.

Environmental issues may appear before the ordinary courts as well; however, these cases may also involve civil, criminal, or other legal questions, as the courts do not interpret the constitutional provisions but do interpret lower-level legal instruments. There are several environment-related cases in the practice of the courts that received significant media attention. The cyanide spill on the river Tisza in 2000, which was labeled “*the worst environmental disaster since the Chernobyl nuclear leak in 1986*,”<sup>46</sup> was adjudicated by the Budapest Court of Appeal<sup>47</sup> and ended without effective reparation, as the Romanian-Australian company liable for the leak was dissolved without a legal successor, which rendered compensation impossible.<sup>48</sup> Moreover, certain issues reached the Supreme Court (the Curia): in the red sludge spill case of 2010,<sup>49</sup> the Curia held the violation of personal rights, such as the right to physical integrity, health, a healthy environment, and human dignity. The first instance court considered the use of the toxic red sludge to be a hazardous activity and held the company liable for the

42 Decision no. 3068/2013 (III.4.), [46]. The application of the findings of the Constitutional Court prior to the entry into force of the Fundamental Law in general was first confirmed by Decision no. 13/2013 (VI.17.) [32].

43 Decision no. 16/2015 (VI.5.) [80].

44 Decision no. 13/2018 (IX.4.) [13]–[14]; [20].

45 Fodor, 2006, p. 162.

46 BBC, 2000.

47 In addition to this case, several legal procedures were connected to the disaster; for instance, the above-mentioned case from the practice of the ECHR, *Tatar v. Romania*, was related to this issue.

48 Élő Bolygónk, 2020.

49 Similar to the cyanide spill on the Tisza, the red sludge spill also resulted in different civil and criminal procedures.



disaster.<sup>50</sup> The issue of the expansion of the nuclear power plant in Paks is also worth mentioning; in this case, the Curia rejected the initiative for referendum:<sup>51</sup> considering that the expansion was based on an international treaty established with the Russian Federation, the Curia noted that it is contrary to the Fundamental Law to hold a referendum on an obligation arising from such a treaty.<sup>52</sup> Compared to the Constitutional Court, the Curia does not play a particularly leading role in shaping environmental protection; the cases that appear in the practice of the ordinary courts are instead adjudicated on the basis of other branches of law.

The President of the Republic does not have a constitutional obligation toward environmental protection. However, former President János Áder, for instance, had a major role in the development of the case law of the Constitutional Court: both Decisions no. 15/2015 (VI.5.) and 13/2018 (IX.4.) were submitted to the Court upon his initiative.<sup>53</sup> In his reasoning, the President firmly based his argumentation on the principle of non-derogation and the precautionary principle, which, according to his initiative, could be inferred from the constitutional provisions guaranteeing the high level of protection of natural resources and the right to a healthy environment.<sup>54</sup> Moreover, during his term in office, President Áder often voiced his opinions regarding environmental matters: he established a foundation for the protection of the environment (*Kék Bolygó Alapítvány – Blue Planet Foundation*) and launched a podcast on the current issues of sustainable development, climate change, and water crisis.<sup>55</sup> He held notable speeches at various United Nations events on climate change and sustainability, such as in 2015 at the UN Climate Change Conference in Paris, and is a member of the Water and Climate Management Board of the UN.<sup>56</sup> However, the involvement of the President in environmental matters is not without precedent in Hungary: László Sólyom, the president from 2005–2010, had an important role in the establishment of the office of the green ombudsman. As early as in 2000,<sup>57</sup> Sólyom introduced the idea of a separate ombudsman for future generations, which – as presented below – came to fruition during his incumbency.

## ***2.2. The role of special organizations of constitutional law***

The institutional protection of fundamental rights is performed by the Commissioner for Fundamental Rights (the Ombudsman) and his Deputies. The work and mandate of the Commissioner and their Office are based on Article 30 of the

50 Kőműves, 2020, pp. 125–127.

51 Resolution Knc.IV.37.178/2014/3.

52 See Article 8 (3) of the Fundamental Law: “No national referendum may be held on: [...] d) any obligation arising from international treaties [...]”

53 Szilágyi, 2021a, p. 131.

54 Szilágyi, 2018a, pp. 84–85.

55 Kék Bolygó Alapítvány, 2022; Kék Bolygó Podcast, 2022.

56 Budapest Climate Summit, 2021.

57 See Jávor and Sólyom, 2000, pp. 37–46.

Fundamental Law: as a defender of fundamental rights, they shall investigate violations related to fundamental rights that come to their knowledge or shall initiate general or specific measures to remedy such violations. The detailed rules for the competencies, election, mandate, and procedures of the Commissioner are set out in Act CXI of 2011 on the Commissioner for Fundamental Rights. The Commissioner and his Deputies are elected by the Parliament for 6-year terms. Any Hungarian citizen may be elected if they hold a law degree, have the right to stand as a candidate in elections of Members of Parliament, and have outstanding theoretical knowledge or at least 10 years of professional experience; furthermore, they must have reached the age of 35 years and have considerable experience conducting or supervising proceedings concerning fundamental rights.<sup>58</sup>

According to Article 1 (2) of this act, the Commissioner pays special attention to the protection of the rights of children, the rights of nationalities living in Hungary, the rights of the most vulnerable social groups, and the values determined in Article P of the Fundamental Law (i.e., the interests of future generations). Moreover, the legislator guarantees a high level of protection of the rights of nationalities and the interests of future generations by designating Deputy Commissioners for these two issues. The constitutional mandate of the Deputy Commissioner for Future Generations (also called the Advocate of Future Generations [AFG]) is based on three main pillars: the human right to a healthy environment, the right to physical and mental health, and a novel provision under Article P stipulating the “*common heritage of the nation.*”<sup>59</sup> The concept of the common heritage of the nation is elaborated at a later point, but at this point, it is necessary to mention that natural resources – which fall under this category – shall be preserved, maintained, and protected for the benefit of future generations according to the text of the Fundamental Law. Consequently, in the practice of the AFG, the interests of future generations are understood as issues mainly related to protecting the environment and cultural heritage. The AFG has a wide range of competencies in relation to the enforcement of the interests of future generations, including the power to investigate maladministration complaints and environmental nuisance claims; to draw the attention of the Commissioner to the danger of the infringement of the rights of a larger group of natural persons, especially of future generations; to participate in the inquiries of the Commissioner; to propose that the Commissioner institute proceedings *ex officio*; and to propose that the Commissioner turn to the Constitutional Court or submit legislative proposals to the legislature suggesting new laws or the amendment of existing ones.<sup>60</sup> The latter two competencies are considerably strong: in Decision no. 14/2020 (VII.6.), which was initiated by the Commissioner for Fundamental Rights upon the request of the AFG, the Constitutional Court stated that “[...] *the Commissioner for Fundamental*

58 Act CXI of 2011 on the Commissioner for Fundamental Rights, Article 4–5.

59 Bándi, 2020a, pp. 9–11.

60 Summary of the Hungarian NHRI’s engagement with the SDGs, Promoting Ambitious National Implementation of the SDGs by the Hungarian Ombudsman for Future Generations, 2018, p. 1.

*Rights together with the Deputy Commissioner responsible for the interests of future generations plays a crucial institutional role in the protection of natural and cultural assets [...]”* and pointed out that the natural and cultural values stipulated in Article P (1) shall be protected per se for future generations, even if doing so acts against the actual economic interest of current generations.<sup>61</sup> Furthermore, based on their power to prepare legislative proposals, the AFG issued a comprehensive proposal on environmental liability in 2019<sup>62</sup> and on the protection of groundwater resources in 2020.<sup>63</sup>

Moreover, the AFG also frequently issues opinions, recommendations, or awareness-raising reports on various topics related to the interests of future generations, such as the preservation of national parks,<sup>64</sup> protected species,<sup>65</sup> certain elements of the nature (including soil<sup>66</sup> and groundwater resources<sup>67</sup>) the landscape,<sup>68</sup> or waste management.<sup>69</sup> His review on the implementation of sustainable development goals in Hungary has been cited internationally, as it was published as an annex to the document issued at the High-Level Political Forum on Sustainable Development 2018 in New York.<sup>70</sup> The review provided an in-depth analysis of the implementation of certain sustainable development goals, namely Goal 6 (ensure availability and sustainable management of water and sanitation for all), Goal 7 (ensure access to affordable, reliable, sustainable, and modern energy for all), Goal 11 (make cities and human settlements inclusive, safe, resilient, and sustainable), Goal 12 (ensure sustainable consumption and production patterns), and Goal 15 (protect, restore, and promote the sustainable use of terrestrial ecosystems). The AFG articulated several recommendations as to the steps needed on the basis of the Ombudsman’s practice: the review pointed out that the individual cases have a concrete, detailed, and specific nature similar to the implementation steps, and thus, the recommendations of the Ombudsman may serve the concretization of broad and abstract goals.<sup>71</sup>

Finally, it is worth mentioning that the current ombudsman structure (one Ombudsman with two Deputies) was introduced by the Fundamental Law:<sup>72</sup> before its

61 Decision no. 14/2020 (VII.6.) [35].

62 Legislative proposal of the Advocate of Future Generations on the effective implementation of environmental liability, 2019.

63 Legislative proposal of the Advocate of Future Generations on the protection of groundwater resources, 2020.

64 National parks as the guardians of natural and cultural values for future generations, 2014.

65 The preservation of *Nannospalax (leucodon) montanosyrmienensis* for future generations, 2015.

66 The protection of soil, 2016.

67 The protection of groundwater resources, 2017.

68 The fundamental legal aspects of the landscape and the protection, management, and planning of landscape, 2021.

69 The problems regarding the functioning of the waste management public service, 2018.

70 Voluntary National Review of Hungary on the Sustainable Development Goals of the 2030 Agenda, 2018.

71 Voluntary National Review of Hungary on the Sustainable Development Goals of the 2030 Agenda, 2018, p. 6.

72 Csink, 2016, p. 602.

adoption, four separate ombudsmen were operating independently, one of them being the Ombudsman for Future Generations established in 2007.<sup>73</sup> In addition to the subject matter of its office, the specificity of the so-called ‘green ombudsman’ existed in his competencies: in addition to the general powers of an ombudsman – such as activities related to control over authorities concerning fundamental rights – this person could control the activities of a broader scope of subjects, that is, not only in relation to authorities but also in relation to private persons and organizations using the environment.<sup>74</sup> According to the law establishing the institution of the green ombudsman, they had the right to oblige the person or organization illegally threatening, polluting, or damaging the environment to discontinue such activities, while this power is missing from the competencies of the current AFG.<sup>75</sup> The introduction of the new ombudsman model was heavily debated among state actors: the incumbent green ombudsman at the time, Sándor Fülöp, issued an opinion concerning the ombudsman structure during the process of drafting the Fundamental Law:<sup>76</sup> he argued that the dissolution of the separate ombudsman’s office would result in the derogation of the previously achieved level of institutional protection. According to him, given that the protection of the environment requires a wide range of interdisciplinary expertise, including different fields of law and policies (traffic, spacial planning, rural development, energy policy, etc.), its complexity may not be analyzed properly in a system in which the respective ombudsman is integrated into a hierarchical structure.<sup>77</sup> Due to his power of initiating Constitutional Court proceedings, the green ombudsman also initiated an ex-post norm control for the dissolution of the former ombudsman system; however, given the fact that its legal successor, the Commissioner for Fundamental Rights, did not intend to continue the procedure, the Court rejected the motion.<sup>78</sup> Although the Explanatory Memorandum of Article 30 of the Fundamental Law does not clarify why such a comprehensive structural change was necessary, the literature points out that the establishment of newer ombudsmen would result in fragmentation and may lead to different interpretations and, consequently, major conflicts among the ombudsmen.<sup>79</sup> The institutional development of the ombudsman’s office brought greater independence for the deputies within the monocratic model, which is shown by the extension of competencies,<sup>80</sup> the changes in the internal structure (i.e., the establishment of the Secretariat of the Deputy

73 Act CXLV of 2007 on the modification of Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights, Article 10.

74 Fodor, 2008, pp. 47–50.

75 Cf. Act CXLV of 2007, Article 27/B (3) a to Act CXI of 2011, Article 3 (1).

76 It is worth noting that the former Parliamentary Commissioner for Future Generations issued several opinions and recommendations for the environment-related provisions of the Fundamental Law, which will be presented in the upcoming subchapters.

77 Opinion of the Parliamentary Commissioner for Future Generations in connection with the operation of the ombudsman structure, 2010.

78 Order no. 3002/2012. (VI. 21.) [44], [47].

79 Varga Zs., 2012, pp. 136–137.

80 See Act CCXXIII of 2013 on the modification of Act CXI of 2011.

Commissioners),<sup>81</sup> and the growing number of employees and their increased media representation in the last few years.<sup>82</sup>

In conclusion, Hungary guarantees the institutional protection of human rights on a high level, with a special focus on the right to a healthy environment and the protection of natural resources, which are strongly intertwined with the interests of future generations. The office of the Deputy Commissioner for Future Generations underwent fundamental changes after the adoption of the Fundamental Law, which aimed at establishing centralized fundamental rights protection to avoid fragmentation and misunderstandings among the different commissioners. The question of whether the new system is contrary to the non-derogation principle may arise, especially considering the right to address natural and legal persons for illegally causing damage to the environment, which was guaranteed for the former green ombudsman. Nevertheless, the growing independence of the AFG and their international recognition show that the interests of future generations are still represented at a high level in Hungary.

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### **3. Basis of fundamental rights**

#### ***3.1. The human right to a healthy environment***

The approach of the Fundamental Law toward the protection of the environment is complex. On the one hand, the right to a healthy environment is explicitly guaranteed at the constitutional level, and the link between the environment and other human rights is also expressed either expressis verbis in other provisions of the Fundamental Law (the right to health) or by the interpretation of the Constitutional Court (the right to life). On the other hand, the protection of the environment also appears as a state task, which emerges from the specific nature of the environment, reflecting both its intrinsic value and its potential to benefit humans.

Article XXI of the Fundamental Law is dedicated to the protection of a healthy environment in the fundamental rights framework. Paragraph (1) declares that *“Hungary shall recognise and endorse the right of everyone to a healthy environment.”* As previously mentioned, the constitutional amendment of 1989 introduced this right in Article 18 of the Constitution,<sup>83</sup> which was thoroughly analyzed by the Con-

81 Order no. 1/2012 (I.6.) of the Commissioner for Fundamental Rights.

82 Csink: 2016, pp. 603–605.

83 It is worth noting that the right to live in a dignified environment first appeared in Act II of 1976 on the protection of the human environment (Article 2 (2)); however, as the right was not enshrined in the Constitution at the time, it was not implemented into practice. Nevertheless, the regulation was certainly progressive as it was based on the philosophy of the Stockholm Conference. See Bándi, 2011, p. 72.

stitutional Court in its Decision no. 28/1994 (V.20).<sup>84</sup> The Court interpreted the right to a healthy environment as a third-generation fundamental right, with the *differentia specifica* of having a stronger objective, institutional side, which is ensured by the state's obligation to recognize and endorse the framework for the protection of the environment. The scope of the subjects of this right is unidentifiable as it encompasses the entirety of humankind as well as nature. Contrary to social rights, in the case of which the subjects can be concretized, these subjects – similar to animals, plants, or 'unborn generations' – may not be able to stand up for their own rights.<sup>85</sup> Consequently, the right to a healthy environment may not be interpreted in a way that individuals can directly establish a claim before the court, demanding such environmental conditions that would correspond to their subjective perception.<sup>86</sup>

This is the reason why the protection of the environment also appears as a state task, and active behavior of the State is thus required. However, this obligation is more than a mere task as – in comparison to other state tasks – as the State does not enjoy complete freedom in choosing the tools for its realization,<sup>87</sup> which is reflected in the principle of non-derogation. The principle could be considered a limitation to state activities, as it establishes the prohibition of the derogation from the previously achieved level of protection via three aspects: first, in substantial norms, which would manifest in, for instance, the release of the protective measures of nature, the extenuation of threshold limits, or the reduction of protective zones; second, the non-derogation principle may apply in case of the modification of procedural norms – the abolition of the obligation of authorization or the restriction of the right to remedy would certainly be contrary to the principle; And finally, Decision no. 16/2015 (VI.5.) interpreted the non-derogation principle in the context of the re-regulation of organizational and administrative structures:<sup>88</sup> the previously achieved level of protection is also guaranteed by the institutional structure for the protection of the environment.<sup>89</sup> The reason behind the application of the principle is the strong connection between the extenuation of protective measures and irreversible environmental damage. The derogation is only allowed in case other fundamental rights are also subject to restrictions if it is unavoidably necessary. Pure economic reasons or the vindication of property rights are, for instance, not solid reasons for derogation. Therefore, the application of the principle in practice is a sensitive issue: as Gyula Bándi, a current AFG, points out, the remodeling of the organizational framework of environmental protection may serve the simplification and transparency of the

84 The first – unsuccessful – attempt at the interpretation of the right to a healthy environment emerged soon after the adoption of the constitutional amendment of 1989: the Prime Minister and the President of the Committee for Environmental Protection of the National Assembly requested that the Constitutional Court interpret the right, but the Court refused to deliver an abstract norm control.

85 Decision no. 28/1994 (V.20.) III.

86 László Fodor: *Környezetjog*, Debrecen, 2015, pp. 104–105.

87 Decision no. 28/1994 (V.20.) IV.1.

88 Decision no. 16/2015 (VI.5.) [109].

89 Fodor, 2007, pp. 14–16.

administration on the one hand, but the classification of environmental interests below or in parallel to other interests may instead be considered derogation.<sup>90</sup>

In addition to the principle of non-derogation, another significant postulate is the precautionary principle, which was elaborated by the Constitutional Court in the greatest detail in Decision no. 13/2018 (IX.4.).<sup>91</sup> The Constitutional Court noted that the precautionary principle may be applicable in two ways: (a) jointly with the non-derogation principle or (b) independent of it.<sup>92</sup> In the first case, when a regulation or measure may affect the state of the environment, the legislator should verify that the regulation is not a step back, that this approach does not cause any irreversible damage, and that it does not provide any ground in principle for causing such damage. The independent application of the precautionary principle may apply with regard to measures that are not formally implemented as a step back, that is, in cases not previously regulated but that still influence the condition of the environment, the legislator shall be constitutionally bound to weigh and take into account in its decision-making the risks that may occur with a high probability.<sup>93</sup> As János Ede Szilágyi notes, the application of the principle may give the possibility of ruling on the rules of new and risky technologies; the outcome of the hypothetical cases would have been interesting if nuclear technology, genetic engineering, or mobile technology had been introduced after the adoption of the above-mentioned Decision from 2018.<sup>94</sup>

Third, the principle of prevention should be mentioned. The fundamental difference between the principle of prevention and that of precaution is that the principle of precaution reduces the level of evidence of the expected consequences from certainty to scientific uncertainty or probability but does not reach the level of unfoundedness,<sup>95</sup> while prevention is relevant in the selection of measures: it is aimed at integrating environmental aspects into the decisions rather than posterior sanctions, which may realize derogation.<sup>96</sup> Although other principles of environmental law were also named by the Constitutional Court (the principle of proportionality, the principle of integration)<sup>97</sup> or by scholars (the principle of state responsibility, the principle of participation, cooperation, and publicity),<sup>98</sup> the strongest environmental postulates in Hungarian constitutional law remain the principles of non-derogation and precaution.

The fact that the right to a healthy environment and the responsibility of the State in this matter are formulated in the same provision – Article XXI (1) – reflects that the institutional side of this right is more decisive. However, in addition to state

90 Bándi, 2017, pp. 180–181.

91 However, the precautionary principle appeared in the case law of the Constitutional Court even before this decision. See Decision no. 3223/2017 (IX.25.); Decision no. 27/2017 (X.25.); Decision no. 28/2017 (X.25.).

92 Szilágyi, 2018a, pp. 87–88.

93 Decision no. 13/2018 (IX.4.) [20].

94 Szilágyi, 2021b, pp. 227–228.

95 Fodor, 2014, p. 86.

96 Fodor, 2005, pp. 256–258.

97 Decision no. 16/2015 (VI.5.) [80–83].

98 Fodor, 2007, p. 18.

responsibility, other legal subjects also have a legal duty regarding the protection of the environment. Article XXI (2) establishes this responsibility, providing that “*Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act.*” The interpretation of this provision will be elaborated later; at this point, we only emphasize that Paragraph (2) is the sanction for the non-conformity with Paragraph (1): on the one hand, the right to a healthy environment is declared as a right everyone is entitled to, while on the other, the individual shall also be responsible for its protection.

The Fundamental Law also links proper waste management to the right to a healthy environment: according to Article XXI (3), “*The transport of pollutant waste into the territory of Hungary for the purpose of disposal shall be prohibited.*” The provision is the expression of the public will regarding a concrete case: illegal waste import from Germany in 2006.<sup>99</sup> Nearly 4000 tons of pollutant (‘amber’) waste was shipped without notification to or permission from the German and Hungarian authorities, breaching the respective EU rules in force at the time (Regulation (EC) No 1013/2006). The dispute was resolved through negotiations, resulting in the delivery of more than half of the waste back to Germany.<sup>100</sup> However, the placement of this rule at a constitutional level is disputed. First, Hungarian environmental law does not operate with notions such as ‘disposal of waste’ or ‘pollutant waste,’<sup>101</sup> and it is thus questionable how they would fit into the conceptual system of the new Waste Act.<sup>102</sup> Second, the rule may pose a restriction on the free movement of goods, as waste in EU law is qualified as such.<sup>103</sup> Therefore, it may only be applied in cases that are reconcilable with the derogations of the respective EU rules.<sup>104</sup> Nevertheless, the prohibition serves as a guiding principle for lower-level pieces of legislation and shows the commitment of the constitution maker to ensuring that such harmful practices of the past do not occur in the future.<sup>105</sup>

### ***3.2. Other fundamental rights intertwined with the protection of the environment***

In addition to the right to a healthy environment, environmental protection explicitly or implicitly appears in relation to other fundamental rights. First and foremost, the Constitutional Court declared that the right to a healthy environment had the strongest linkage to the right to life among the constitutional rights, as the obligation of the State to maintain the physical conditions of human life is thereby

<sup>99</sup> Horváth, 2013, p. 231.

<sup>100</sup> Csák, 2014, p. 34.

<sup>101</sup> Bándi, 2013a, p. 87.

<sup>102</sup> Act CLXXXV of 2012 on Waste.

<sup>103</sup> Fodor, 2015, p. 113. For a detailed analysis of the problem of the compatibility of this provision with EU law, see Fodor, 2012.

<sup>104</sup> Csink and T. Kovács, 2013, pp. 52–53.

<sup>105</sup> Szilágyi, 2021a, pp. 137–138.



named as an independent ‘right.’<sup>106</sup> Another characteristic of the right to a healthy environment that links it with the right to life is that, as was noted above, the quantitative and qualitative guarantees may not be exposed to economic and social conditions.<sup>107</sup> Thus, even if the Fundamental Law itself does not pronounce the direct link between the environment and the right to life, the Constitutional Court clearly established and defined their relationship with one another.

Second, the protection of the environment explicitly appears as an instrument for the realization of the right to physical and mental health, which is enshrined in Article XX (1) of the Fundamental Law. The special content of this right is that according to Paragraph (2), “*Hungary shall promote the effective application of this right through agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision and by supporting sports and regular physical exercise as well as by ensuring the protection of the environment.*” Although the relationship between means other than the protection of the environment and the right to health is indirect,<sup>108</sup> it is worth mentioning that the quality of the environment also influences the quality of food. According to the explanation of the provision, GMO-free products<sup>109</sup> and clean drinking water are the most important conditions for maintaining health, as more than 70% of harmful substances reach the organism through food and water.<sup>110</sup> Moreover, it is worth mentioning that the former Constitution also provided a link between the right to life and environmental protection via Article 70/D, declaring the right to the highest attainable standard of physical and mental health (Paragraph 1), which “*shall be ensured through [...] the protection of the built and natural environment.*” The explicit link between the right to health and the environment and the declaration of the right to a healthy environment are the two constitutional provisions that were included in the former Constitution and further broadened by the Fundamental Law.

Third, it is important to mention that the rights guaranteed under the Aarhus Convention<sup>111</sup> also form part of Hungarian law, as is declared in Act LXXXI of 2001 on the ratification of the Aarhus Convention. Namely, access to information, public participation in decision-making, and access to justice in environmental matters are undoubtedly regulated on the level of ordinary acts<sup>112</sup>; however, some of them may even be linked to certain rights enshrined in the Fundamental Law, and consequently, some aspects of them may appear in the practice of the Constitutional Court

106 Decision no. 28/1994 (V.20.) III.3.c).

107 Bándi, 2013a, pp. 80–83.

108 Bándi, 2020a, pp. 15–16.

109 For further information on the interpretation of GMO-free agriculture in the Fundamental Law, see Szilágyi, Raisz, and Kocsis, 2017, pp. 167–175.; Raisz, 2022, pp. 192–194.

110 T. Kovács, 2015, pp. 308–309.

111 For a comprehensive overview on the implementation of the Aarhus Convention, see Pánovics, 2010.

112 In addition to Act LXXXI of 2001 on the ratification of the Aarhus Convention, the above-mentioned Act LIII of 1995 on the general rules of environmental protection as well as Governmental Decree no. 314/2005 (XII.25.) regulate certain civil and political rights in relation to the environment, such as public participation in environmental matters and access to environmental information.

or the Ombudsman. For instance, Article XXVIII (1) guarantees the right to a fair trial<sup>113</sup>; however, it is not explicitly linked to environmental matters. Nevertheless, the Constitutional Court interpreted the constitutional right to a fair trial from an environmental perspective several times, notably in Decision no. 4/2019 (III.7.).<sup>114</sup> Moreover, although the Fundamental Law does not provide a general provision on the right to information as such,<sup>115</sup> the Deputy Commissioner for Fundamental Rights raised his voice in relation to this right, pointing out that state guarantees to access to environmental information are crucial for the realization of the protection of the environment enshrined in Article P, XX and XXI of the Fundamental Law; in other words, access and disclosure of such information are prerequisites and form part of the constitutional right to a healthy environment.<sup>116</sup> Furthermore, the Deputy Commissioner noted that the failure of the disclosure of environmental information violated the principle of rule of law and legal certainty.<sup>117</sup>

In practice, civil and political rights may also be used as a tool for the protection of the environment: in 2004, on the initiative of green activists, the civil society successfully hindered the construction of an environmentally harmful NATO radar on Zengő Mountain in southwestern Hungary. In this case, the collision of two constitutional values emerged: national defense and the protection of the environment. The Ministry of Defense argued that environmental aspects shall not surpass the interests of national defense and that the construction would not cause irreversible damage to the environment; however, the impact assessments have shown that although the operation of the establishment would not have led to the complete destruction of the fauna and flora, it would have realized a regression in the level of protection, which is contrary to the non-derogation principle.<sup>118</sup> The ombudsman and the Constitutional Court were also asked to deliver their opinion on the issue,<sup>119</sup> but it was due to the efforts of civil society that the government finally decided to resign from the

113 “Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.”

114 Decision no. 4/2019 (III.7.) concluded that an authority responsible for nature and environmental protection shall not subordinate environmental aspects to other aspects in its decision-making process. [66] Apropos of this decision, the Deputy Commissioner drew the attention to the fact that the right to a fair trial is applicable to any public proceedings, regardless of their denomination, and that the procedural guarantees of the environmental impact assessment shall not be overlooked during the organizational transformation. See Awareness-raising report from the Deputy Commissioner regarding the Constitutional Court Decision no. 4/2019 (III.7.), AJB-4950/2019, pp. 3–4.

115 However, the right to access to information in environmental matters is guaranteed by Article 4 of Act LXXXI of 2001 and by Article 12 (2) of Act LIII of 1995, which declare the right to environmental information to be data of public interest. The definition of data of public interest is set out in Article 3 (5) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.

116 Gyula Bándi, 2020b, pp. 22–23.

117 Report on the dismantling of the asbestine cement factory of Lőrinci, AJBH 2373/2018, p.57, p. 67.

118 Fodor, 2004, pp. 238–241.

119 See the Report of the Ombudsman regarding the case OBH 3631/2003 and Constitutional Court Decision no. 521/B/2003.

project. In addition to the annulment of the construction of the radar, the importance of the case also lies in showing how the enjoyment of civil and political rights may be used for the benefit of the environment.<sup>120</sup>

Furthermore, the relationship between the right to a healthy environment and other fundamental rights should also be observed from the perspective of the restriction of certain rights with reference to the protection of the environment. With regard to the mandatory membership in a water management association, the Constitutional Court pronounced that the obligation does not violate the right of association because the environmental protection services performed by such associations can be regarded as public tasks.<sup>121</sup> Moreover, according to the Fundamental Law,<sup>122</sup> the right to property may be subject to restrictions for reasons of public interest, and – as the Court confirmed – the vindication of the right to a healthy environment is a public task. In addition, property including arable land may also be restricted with reference to environmental and agricultural policy reasons.<sup>123</sup>

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## 4. Responsibility for environmental protection in the Fundamental Law

The Fundamental Law regulates responsibility for the protection of the environment in terms of two aspects: as a general duty of making prudent use of natural resources provided in the Preamble and as liability for environmental damage enshrined in Article XXI (2).

The Preamble provides that

We commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of national minorities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.

This guidance is strongly related to the protection of natural resources; thus, it is analyzed in the next section. Regarding responsibility, it should be emphasized that

120 For further information on the involvement of civil society in environmental matters, see Pánovics, 2020.

121 Decision no. 26/2001 (VI.29.) [3.2.].

122 See Article XIII of the Fundamental Law: “(1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility. (2) Property may only be expropriated exceptionally, in the public interest and in those cases and ways provided for by an Act, subject to full, unconditional and immediate compensation.”

123 Decision no. 35/1994 (VI.24.) [III.2.].

the protection, maintenance, and preservation of natural resources for future generations is the responsibility of the State and everyone. The State has active (legislation, the establishment of the administrative framework, guaranteeing protection) and passive obligations (recognition of the rights of future generations, respect for these objective rights, non-impairment of the rights), while other legal subjects are responsible for the gentle use of these natural resources.<sup>124</sup>

The above-mentioned Article XXI (2) establishes the liability for causing damage to the environment for non-state actors: “*Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act.*” Although this provision is often interpreted as the constitutional guarantee of the polluter pays principle,<sup>125</sup> it can instead be regarded as a narrow understanding of this principle. As Gyula Bándi points out, the principle should be interpreted in a complex mode, as according to the OECD report issued in 1972,<sup>126</sup> the polluter pays principle implies that it is for the polluter to meet the costs of pollution control and prevention measures. Thus, given that the provision does not refer to prevention or precaution, Article XXI (2) in this form represents only one aspect of the polluter pays principle.<sup>127</sup> The former green ombudsman also expressed his opinion during the process of drafting the Fundamental Law: in his proposal, Sándor Fülöp suggested the expressis verbis formulation of the principle of precaution, prevention, integration, and the polluter pays principle in the constitutional text,<sup>128</sup> but ultimately, it was not included in the Fundamental Law.

Furthermore, the current AFG issued a legislative proposal<sup>129</sup> in which he presented several solutions for the proper implementation of the polluter pays principle and pointed out that this principle is a broader concept than liability, as it encompasses the entirety of the behavior of the polluter, and thus, their responsibility manifests not only at the time of the occurrence of the damage but from the beginning of using the environment until the elimination of the dangers and damages.<sup>130</sup> It is also worth mentioning that the former green ombudsman expressed a similar opinion on the day of the adoption of the Fundamental Law, highlighting that *one side* of the polluter pays principle was raised to a constitutional level with Article XXI (2).<sup>131</sup> In addition, according to László Fodor, this provision merely refers to the framework of environmental liability.<sup>132</sup> Thus, one may conclude that the perception of the pol-

124 Horváth, 2013, p. 232.

125 See, for instance, Decision no. 16/2015 (VI.5.), Separate Opinion of Judge Imre Juhász [139].

126 Guiding principles concerning international economic aspects of environmental policies C (72), 128.

127 Bándi, 2020a, p. 16.

128 Amendment proposals for the draft law no. T/2627 on the Fundamental Law of Hungary, pp. 1–2.

129 Legislative proposal of the Advocate of Future Generations for the effective implementation of environmental liability, 2019, p. 5.

130 Bándi, 2020b, pp. 20–21.

131 Resolution of the Parliamentary Commissioner for Future Generations on the state responsibility arising from the provisions of the new Fundamental Law on the protection of the environment and sustainability, JNO-258/2011, pp. 3–4.

132 Fodor, 2014, p. 114.

luter pays principle at the constitutional level is a topic of discussion in the scientific literature.

Another problematic issue with Article XXI (2) is the scope of subjects: it is not clear who exactly shall be understood by the term ‘*anyone*.’ The comparison of the competencies of the former green ombudsman and of the current AFG may help in the clarification of the problem. Contrary to the former constitutional framework, in which the green ombudsman was entitled to investigate and take action against natural and legal persons illegally damaging the environment, the current AFG does not have this competency. Consequently, it is questionable whether the scope of liable subjects would encompass the State or legal persons. Nevertheless, the provision reflects the polluter pays principle to a certain extent; however, its interpretation still needs to be clarified.

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## 5. High protection of natural resources

The protection of natural resources is of utmost importance in the Hungarian Constitutional Law: according to the Fundamental Law, it is not only a state task but also the obligation of the citizens. Notably, the Preamble declares responsibility for future generations through making prudent use of material, intellectual, and natural resources. Furthermore, Article P (1) provides a few examples of what forms the common heritage of the nation:

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.

The term “*common heritage of the nation*”<sup>133</sup> is a unique concept of the Hungarian Constitutional Law that encompasses natural and cultural values that define national identity<sup>134</sup> and that should not be separated from the national self-image.<sup>135</sup> According

133 It should be emphasized that there is a conceptual difference between the term ‘*common heritage of mankind*’ used in Public International Law and the above mentioned notion, as the common heritage of mankind, refers to areas that are incapable of national appropriation and where the principle of sovereignty is not applicable (for instance, the seabed and the deep ocean floor or outer space), while national heritage encompasses resources that belong to a certain entity, namely to the nation. See Shaw, 2017, pp. 396–397.; Kovács, 2016, p. 442.; Cf. Szilágyi (ed.), 2017, p. 32.

134 The analysis of the constitutional approach to ‘*nation*’ exceeds the limits of the present work; however, without claim for completeness, it shall be highlighted that the Fundamental Law perceives ‘*nation*’ as a mixture of political and cultural nation, which belong together within and beyond the borders of Hungary. See Article D of the Fundamental Law; Kukorelli, 2013, pp. 11–12.

135 Awareness-raising report from the Deputy Commissioner regarding the protection of cultural monuments forming part of the common heritage of the nation, AJB-7304/2020, p. 2.

to the AFG, all cultural elements that appear in the built environment – such as unique urban planning solutions, urban images, buildings as architectural pieces, or other unique pieces – form part of the common heritage of the nation.<sup>136</sup> Furthermore, the fact that natural resources are qualified as ‘heritage’ implies that (a) the present generation shall bequeath them to future generations, who can be regarded as the beneficiaries, and (b) the quality of this bequest shall not deteriorate with the passage of time, as was confirmed by the Constitutional Court in relation with the non-derogation principle.<sup>137</sup> The classification of natural resources as national heritage also implies that the constitution maker does not merely regard them as subjects of commerce but takes into account their other vital functions as well as intergenerational aspects.<sup>138</sup>

The definition of natural resources is not exhaustive in the Fundamental Law, but a common characteristic among them is their usability to satisfy social needs, as is set out in the Environmental Protection Act.<sup>139</sup> Moreover, the text of the provision is slightly ambiguous in the sense that it may not be clear whether biodiversity and its elements (native plant and animal species) fall within the scope of natural resources or whether it should be treated as a different category. János Ede Szilágyi<sup>140</sup> – based on the categorization of G. J. Cano<sup>141</sup> – as well as the Constitutional Court practice, principally Decision no. 28/2017 (X.25.), consider biological resources (plants and animals; i.e., biodiversity) to be categorized as natural resources. The issue of whether certain elements form part of natural resources is particularly important in terms of their protection; therefore, their preservation is desirable not only because they might be utilized by humans but also because they are valuable per se,<sup>142</sup> as biodiversity is a harmonious and dynamic unit of plants, animals, and microorganisms that complement and rely on each other.<sup>143</sup> The above-mentioned decision pointed out the complexity of the legal protection of biodiversity: in addition to its ecological function (e.g., the production of goods such as water, food, or fuel; the natural self-regulation of rainfall or climatic processes; photosynthesis, soil formation, or the circulation of nutrients), biodiversity should be protected on the basis of natural law as well, which is the starting point for the Christian interpretation of environmental protection.<sup>144</sup> Thus, the Constitutional Court explicitly states that the obligation toward the conservation and protection of biodiversity is founded on the intrinsic value of the diversity of species in addition to their utility for humans.<sup>145</sup> In the author’s opinion, this constitutional approach to biodiversity is

136 Report on the activity of the Commissioner for Fundamental Rights and their Deputies, 2019, p. 130.

137 See, for instance, Decision no. 28/1994 (V.20.) [IV.1.]; Decision no. 16/2015 (VI.5.) [110]; Decision no. 28/2017 (X.25.) [25–26].

138 Szilágyi, 2016, p. 47.

139 Act LIII of 1995 on the general rules of environmental protection, Article 4 (3).

140 Szilágyi, 2018b, pp. 290–291.

141 Cano, 1975, p. 30.

142 Decision no. 28/2017 (X.25.) [35].

143 Decision no. 28/2017 (X.25.) [20].

144 Decision no. 28/2017 (X.25.) [36]; Cf. Pope Francis, 2015; Ecumenical Patriarch Bartholomew, 2012.

145 Decision no. 28/2017 (X.25.) [35].

certainly promising, as in addition to the commonly spread anthropocentric viewpoint, it seems to implement an ecocentric approach, which gives intrinsic value to the environment without expecting any benefit from it for humans,<sup>146</sup> as was undoubtedly confirmed by the above-mentioned Constitutional Court decision.<sup>147</sup> Moreover, the constitutional recognition of the protection of biodiversity is a novelty of the Fundamental Law, as the previous Constitution<sup>148</sup> – although it declared everyone’s right to a healthy environment in Article 18 – did not refer to natural resources or to biodiversity.

In addition to the exemplificative list of natural resources of Article P (1), the Fundamental Law refers to certain components of such resources elsewhere. First, regarding forests, Article P (2) provides that the acquisition of ownership and the use of arable land and forests are regulated in a cardinal act; thus, the Hungarian Constitutional law gives special importance to these assets. According to the Constitutional Court, forests have the status of the ‘common heritage of the nation,’ which, in their case, means that their protection is the task of the State, forest owners, forest farmers, and even free users of forests. They are the main subjects of the obligations arising from Article P (2) of the Fundamental Law, in a sense that rather than their free and unconditional use, the requirement of their responsible and sustainable use is preferred, which also takes into account the interest of future generations. Their qualification as part of the “*common heritage of the nation*” also implies that the economic interests of their users may not have priority over their preservation for future generations.<sup>149</sup> As was pointed out by the Deputy Commissioner, the reasoning of the Constitutional Court implies that the protection of natural values is a social norm that derives from the Fundamental Law.<sup>150</sup>

Second, in relation to the right to physical and mental health, Article XX (2) provides certain means through which the effective application of this right shall be ensured by the State. These means are, inter alia, “*access to healthy food and drinking water [...] and the protection of the environment.*” Although the protection of water has appeared above in the Fundamental Law, there is a conceptual difference between the two provisions with reference to ‘water.’ In Article P (1), ‘reserves of water’ appears as a component of natural resources and thus encompasses a broader category, which includes the totality of water resources in the country that could serve not only social but other – for example, ecological – purposes.<sup>151</sup> Therefore, the constitutional obligation to preserve them for future generations represents the future

146 Gagnon Thompson and Barton, 1994, pp. 149–150.

147 Szabó, 2019, pp. 98–101.

148 I.e., Act XXXI of 1989 on the modification of the Constitution of the Hungarian People’s Republic (Act XX of 1949).

149 Decision no. 14/2020 (VII.6.) [23]; [31].

150 Awareness-raising report from the Deputy Commissioner regarding the duties arising from the Constitutional Court decision on the protection of the biodiversity and natural value of forests, AJB-5960-1/2020, p. 7.

151 Fodor, 2013, pp. 338.

dimension of water protection. The importance of the explicit reference to water as a component of natural resources lies in that, as János Ede Szilágyi points out, water, especially groundwater resources, may not belong to the category of ‘common heritage of mankind,’ which allows other States to access these non-renewable resources and thereby limits the sovereignty of the State.<sup>152</sup> On the other hand, the concept of drinking water takes a pragmatic approach to the right to water, as it could be regarded as a prerequisite for life and thus for the enjoyment of the right to life enshrined in Article II of the Fundamental Law; that being so, access to drinking water constitutes the present dimension of water protection.<sup>153</sup> In light of Article XX (2), water can only fulfill its physiological function if it meets certain qualitative and quantitative requirements,<sup>154</sup> which also proves that access to drinking water – together with access to healthy food – forms part of the right to health,<sup>155</sup> and in this sense, it could be perceived as an implicit declaration of the right to (drinking) water. However, as Anikó Raisz points out, the provision in this phrasing expresses a narrow concept of the right to drinking water, as several other components of this right are not understood by it, such as public healthcare services, the requirement of the affordability of drinking water, and the use of water for other purposes in households or agriculture.<sup>156</sup> Nevertheless, the recognition of the right to water on the constitutional level is certainly forward-looking – considering that the international recognition of the right as such is not well-developed – and it may serve as a basis for other water-related regulations, for instance, the regulation of water utility services.<sup>157</sup>

In addition to the above-mentioned provisions, which guarantee the general protection of natural resources, their preservation appears in relation to the protection of natural assets<sup>158</sup> in Article 38 (1), which states that “*The management and protection of national assets shall aim at serving the public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations.*” It is worth noting that the Hungarian constitutional approach to natural resources is founded on their relevance for future generations:<sup>159</sup> the ultimate aim of their preservation and protection is to hand them down to the next generations to ensure equity for future generations in line with the equity for current generations.<sup>160</sup>

152 Szilágyi, 2013, p. 142.

153 Raisz, 2012b, pp. 156–157.

154 Fodor, 2013, pp. 336–338.

155 Decision no. 3196/2020. (VI. 11.) [11]–[12].

156 Raisz, 2012b, pp. 156–157.

157 Szilágyi, 2018c, p. 266.

158 The relationship between national assets and natural resources also appears in the Preamble of Act LIII of 1995, which states that natural heritage and environmental values constitute part of the national assets.

159 For further and more detailed analysis on environmental protection for future generations, see Part VII of the present chapter.

160 Bándi, 2020a, p. 12.



## 6. Reference to future generations

The concept of endowing future generations with the common heritage of the nation is a significant novelty of the Fundamental Law.<sup>161</sup> As noted above, the Preamble confers the responsibility of the protection of the living conditions for future generations to the present generation (i.e., ‘us’). Additionally, at a later point, the Preamble states that “*the Fundamental Law [...] shall be an alliance among Hungarians of the past, present, and future,*” which is an interesting statement as it implies that future generations also mean future Hungarians. Moreover, it should be mentioned that the definition of ‘future generations’ could not be found in legal texts; the Constitutional Court referred to “*future fellow humans who are not born yet,*”<sup>162</sup> but given that it is only mentioned in the Decision, this does not necessarily mean that only unborn people are understood by the term. Furthermore, the formerly operating Ombudsman for Future Generations referred to “*children and unborn generations*” in his first annual report,<sup>163</sup> which, again, does not imply whether already born children are included in the category of future generations. Nevertheless, the constitutional position, that is, the alliance between past, present, and future Hungarians, is particularly important when considering the decreasing Hungarian population and the challenges it can raise for the existence of the nation. However, the fact that the rate of consumption of natural resources is increasing despite the decreasing population poses further challenges to the issue. This is particularly true for non-renewable resources as crude oil, natural gas, and coal.<sup>164</sup> Therefore, striking the balance between the prevention of depopulation and the maintenance of the availability of natural resources is an acute challenge in Hungary in the 21st century.

The distinction between the subjects of present and future generations is crucial for determining their rights and obligations: in line with the Preamble, the primary responsibility of the present generations is to protect the living conditions for future generations, which is strongly intertwined with Article P and its interpretation, which are to be analyzed below. One may think that future generations appear as holders of certain rights, as the environmental responsibility of present generations points to the interests or needs of future generations. However, the problem with the concept of future generations in legal texts is that they encompass a hypothetical, not yet existing group of people, who, owing to this quality, cannot become real holders

161 However, it should be noted that despite the fact that the previous Constitution (Act XXXI of 1989 on the modification of the Constitution of the Hungarian People’s Republic) did not contain explicit reference to future generations, the State’s institutional obligation to protect the living conditions of future generations was already pronounced by the Constitutional Court in relation to the artificial termination of pregnancy. Thus, responsibility for generations not born yet has been present in the past three decades in the Hungarian constitutional thinking. See Decision no. 64/1991 (XII.17.) C) 3.c).

162 Decision no. 16/2015 (VI.5.) [152].

163 Annual report of the ombudsman for future generations, 2008–2009, p. 159.

164 Pánovics, 2010, p. 10.

of rights until they become living generations, that is, when they are born.<sup>165</sup> The dilemma of whether they can be holders of certain rights stems from the question of whether they can have legal personality or, in the absence thereof, they only have hypothetical interests<sup>166</sup> that can be taken into account but cannot be defended in front of a court. Nonetheless, the debatable term ‘rights of future generations’ is not reflected in the Fundamental Law, as it refers to the interests or needs of future generations.

Article P (1), which had been mentioned several times, links the protection, maintenance, and preservation of natural resources, biodiversity, and cultural artifacts (i.e., the ‘common heritage of the nation’) for future generations, who appear as the beneficiaries of this obligation.<sup>167</sup> The text clearly designates the responsibility of the present generations in addition to State responsibility (“[...] *it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations*”). In contrast to the right to a healthy environment, in the case of which the obligation of the State is more heavily emphasized,<sup>168</sup> present generations also have a triple obligation in light of Article P (1), which was interpreted by the Constitutional Court in Decisions no. 16/2015 (VI.5.) and no. 28/2017 (X.25.):<sup>169</sup> the protection, maintenance, and preservation of such elements of the common heritage of the nation, therefore, are the obligation of the State and everyone. Therefore, the protection of the environment is amended via the obligation of maintenance, which could be interpreted as the maintenance of the previous level of protection but also as the harmonization of environmental protection and sustainable development.<sup>170</sup> Furthermore, the Constitutional Court interpreted the obligation of preservation as the obligation to preserve the possibility of choice, quality, and access.<sup>171</sup> The possibility of choice is based on the reasoning that the living conditions of future generations could be ensured if the bequeathed natural heritage gives future generations the possibility of choice in relation to their problems without being trapped by the decisions of present generations. According to the requirement of the possibility of quality, natural heritage shall be handed down to future generations in the state in which it was handed down to the current generation at a minimum. This requirement is closely related to the precautionary principle and the principle of non-derogation, which can be regarded as the core principles of environmental protection in the Hungarian Constitutional Law.<sup>172</sup> Furthermore, the requirement of ensuring access to natural resources means that the present generation has access to the available

165 Weiss, 1990, p. 201.

166 Tattay, 2016, pp. 109–110.

167 Decision no. 14/2020 (VII.6.) [22].

168 Decision no. 28/1994 (V.20.) [III.3.].

169 The following reasoning was also confirmed by Decision no. 13/2018 (IX.4.) [13].

170 Decision no. 16/2015 (VI.5.) [152].

171 The Constitutional Court based its reasoning on the generally accepted theory of intergenerational equity of Weiss. See Weiss, 1989, pp. 22–23.

172 Bándi, 2020c, pp. 1194–1199.

resources until they can respect the equitable interest of future generations<sup>173</sup> and does not jeopardize the long-term subsistence of the elements of the common heritage of the nation.<sup>174</sup> Regarding Article P, the Constitutional Court further declared the constitutional manifestation of the public trust doctrine, conferring fiduciary duties on the State to act as a trustee over the natural heritage of the nation for the benefit of future generations to the extent that it does not jeopardize the long-term existence of the natural and cultural assets that are worthy of being protected on account of their inherent value.<sup>175</sup> In other words, based on the public trust doctrine, the State has an obligation to manage the trust's assets for the future beneficiaries of the trust; the doctrine thereby imposes limitations on State policies regarding use, exploitation, and transfer of ownership over these assets.<sup>176</sup>

According to the Constitutional Court, the protection of the interest of future generations can be deduced not only from the Preamble and Article P but also from Article 38 (1).<sup>177</sup> Therefore, the protection of the interest of future generations can be linked to two main fields of Constitutional Law: environmental protection and public finances.<sup>178</sup> In contrast to Article P, the starting point of which is the fact that natural resources will always be important, Article 38 (1) is based on the importance of material, that is, financial resources, for the upcoming generations.<sup>179</sup> There is a conceptual difference in the wording of the two provisions as well: Article P clearly designates the interest of future generations, that is, the protection, maintenance, and preservation of the common heritage of the nation, while the 'needs' of future generations in relation to public finances is less concrete.<sup>180</sup> The hypothesis of the author is that such needs imply financial sustainability, which is reflected in Article 36 of the Fundamental Law.<sup>181</sup>

Finally, for the sake of completeness, the previously described Article 30 should be mentioned, as it establishes the institution of the Commissioner for Fundamental Rights and designates its two Deputies. According to Article 30 (3), one Deputy Commissioner shall protect the interests of future generations. As noted above, the institutional protection of future generations is not new in Hungarian Constitutional Law: the scope of the competence of the previously functioning green ombudsman can even be considered broader in certain aspects. Nevertheless, the interests of future generations had not been mentioned in the previous Constitution,<sup>182</sup> on the

173 Decision no. 28/2017 (X.25.) [33].

174 Decision no. 14/2020 (VII.6.) [21].

175 Decision no. 14/2020 (VII.6.) [22].

176 Sulyok, 2021, pp. 361–362.

177 Decision no. 13/2018 (IX.4.) [15].

178 A detailed analysis of the interrelation of the interest of future generations with financial issues (as well as financial sustainability) is provided in Parts X–XI.

179 Bándi, 2021, p. 346.

180 Antal, 2012, p. 17.

181 For a detailed analysis of financial sustainability, see Part VII.

182 Act XXXI of 1989 on the modification of the Constitution of the Hungarian People's Republic (Act XX of 1949).

basis of which the green ombudsman had been operating, while the Fundamental Law clearly refers to them in relation to the protection of the common heritage of the nation, environment, and public finances. Therefore, one can conclude that the representation of the interests of future generations was symbolic in the previous ombudsman system, and the ombudsman could be considered the defender of the right to a healthy environment enshrined in Article 18 of the previous Constitution.<sup>183</sup> In the author's view, the fact that the Fundamental Law explicitly refers to the interests of future generations may result in the direct (and not indirect) protection of future generations by the current Deputy Commissioner. However, the question of whether the integration of the ombudsman for future generations under the general ombudsman's office falls under the scope of the principle of non-derogation – which is a fundamental principle set out by the Constitutional Court in Decision no. 16/2015 – remains left unanswered. Nonetheless, one may argue that there is a contradiction between the acknowledgment of the interest of future generations at a constitutional level and the dissolution of an independent institution responsible for future generations.

To summarize the Hungarian constitutional approach to future generations, the author concludes that the exact subject scope of 'future generations' is not yet clearly defined. What is certain is that the term also refers to future Hungarians, not only future humankind, by highlighting the alliance between past, present, and future Hungarians. In this sense, it is problematic to grant them concrete rights as they may not be subjects under the law. However, their hypothetical interest could and shall be taken into account in relation to the preservation of the common heritage of the nation, environmental protection, and management of national assets.

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## 7. Reference to sustainable development

The interrelation of sustainable development and the protection of the environment as well as intergenerational equity is undeniable.<sup>184</sup> However, it is embedded in a larger concept: the concept of sustainability.<sup>185</sup> According to the generally accepted classification enshrined in the Johannesburg Declaration, the three pillars of sustainable development are economic development, social development, and environmental protection.<sup>186</sup> The first pillar is manifested in Article N, Article XVII (1), and Article 38 of the Fundamental Law, which are analyzed in the upcoming subchapters. Article P embodies environmental sustainability, while sustainable

183 Fodor, 2008, pp. 47–48.

184 Bándi, 2013b, pp. 11–12.

185 For a detailed analysis of sustainable development in law, see Bányai, 2014.

186 See the Johannesburg Declaration on Sustainable Development, 2002.

development as a broader concept is *expressis verbis* mentioned in Article Q (1): “*in order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.*” This provision is in line with the approach of the so-called Brundtland Report,<sup>187</sup> which, as one of the principles for environmental protection and sustainable development, proposes the general obligation to cooperate with other States to preserve biodiversity and natural resources.<sup>188</sup> The fact that sustainable development could not be maintained or achieved individually by the States and that international cooperation is thus crucial is also proven by the fact that it was mentioned in the same Article, which ensures the conformity of Hungarian law with international law<sup>189</sup> and which provides the obligation to accept the generally recognized rules of international law.<sup>190</sup> The wording of Article Q also implies that sustainable development is an integral part of any endeavor for peace<sup>191</sup> and undoubtedly reflects Article 2 (5) of the Lisbon Treaty.<sup>192</sup> In this context, we can conclude that sustainable development is primarily a state responsibility in relation to foreign affairs and – as presented in the upcoming subchapters – budgetary issues.

The Fundamental Law, however, does not define the notion of sustainable development, but it can be observed in the National Framework Strategy on Sustainable Development, which refers back to the definition set out by the Brundtland Report:

[...] sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.<sup>193</sup>

Similar to the concept of the protection of the interest of future generations, sustainable development did not appear in the text of the previous Constitution – this is unsurprising, however, as the concept of sustainable development began to evolve

187 Although the Report is not a legally binding document for States, its importance and impact are significant in defining sustainable development. See *Our Common Future: Report of the World Commission on Environment and Development*, Oxford University Press, 1987.

188 Szabó, 2012, pp. 161–163.

189 Article Q (2): “*In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law.*”

190 Article Q (3): “*Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in laws.*”

191 Gyula Bándi, 2013a, p. 86.

192 In its relations with the wider world, the Union shall uphold and promote its values and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, the eradication of poverty, and the protection of human rights, in particular the rights of the child, as well as to the strict observance and development of international law, including respect for the principles of the United Nations Charter.

193 Parliamentary Resolution no. 18/2013. (III. 28.) on the National Framework Strategy for Sustainable Development, 3.1.

and spread after the adoption of the Constitutional Amendment of 1989.<sup>194</sup> Moreover, one of the greatest milestones in forming the concept of sustainable development occurred in relation to the aforementioned Gabčíkovo-Nagymaros Project. The judgment of the International Court of Justice (hereinafter referred to as ICJ) from 1997 recognized the importance of taking into account the principle of sustainable development in the dispute.<sup>195</sup> Furthermore, the Separate Opinion of Vice-President Weeramantry contained several observations concerning sustainable development, which contributed to a deeper understanding of its perception in international law. According to Weeramantry, sustainable development is more than a mere concept; rather, it should be considered a principle that is an integral part of modern international law even if not all States recognized it explicitly.<sup>196</sup> The case is of particular importance for Hungary partly because it was the first time the ICJ ruled over an environmental dispute and the first occasion on which sustainable development received attention in the jurisprudence of the Court.<sup>197</sup> Given that Hungary based its argumentation on the protection of the environment and sustainable development rather than economic advancement at any cost,<sup>198</sup> the author concludes that the concept of sustainable development had been prevalent in Hungarian legal thought even before it appeared in the constitutional text.

Similar to the definition of sustainable development in the Brundtland Report, the Constitutional Court stated that “*the development is sustainable if the development of the economy results in social prosperity within the limits of ecological capacity, preserving natural resources for future generations.*”<sup>199</sup> The cornerstone of both definitions is the balance between the needs of present and future generations while taking ecological aspects into account. Although the Constitutional Court did not explicitly address the constitutional perception of sustainable development, it referred to the above-mentioned National Framework Strategy on Sustainable Development,<sup>200</sup> of which the Introduction provides that the Fundamental Law has a prominent role in the field of sustainability, and outlined fundamental values, namely the principle of sustainable development.<sup>201</sup> Therefore, the strategy that was

194 For instance, the Rio Declaration on Environment and Development was signed in 1992, similar to the United Nations Framework Convention on Climate Change (UNFCCC) and Agenda 21. Furthermore, the New Delhi Declaration of Principles of International Law Relating to Sustainable Development, which was a milestone in the development of the perception of the concept in international law, was adopted in 2002.

195 “*This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.*” See Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, 140.

196 Separate Opinion of Vice-President Weeramantry, pp. 91–92.

197 Separate Opinion of Vice-President Weeramantry, pp. 85.

198 See Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Memorial of the Republic of Hungary, Volume I, 2 May 1994.

199 Decision no. 16/2015 (VI.5.) [77].

200 Decision no. 28/2017 (X.25.) [45].

201 Parliamentary Resolution no. 18/2013. (III. 28.) on the National Framework Strategy for Sustainable Development, Introduction.

adopted by Parliament, the same body that adopted the Fundamental Law, can be regarded as a credible interpreter of the constitutional text. Considering this interpretation, sustainable development in the Hungarian Constitutional Law is both a principle and a value, which implicitly appears in the previously cited formula of the National Avowal.<sup>202</sup> The fact that the commitment to preserve the man-made and natural assets of the Carpathian Basin is to be achieved within the framework of sustainable development was confirmed by the Constitutional Court as well.<sup>203</sup> In the author's opinion, the constitutional approach to sustainable development is reconcilable with Justice Weeramantry's perception: it is more than a principle – it has an inherent normative value that pervades the overall of the constitutional provisions; the Fundamental Law can thus be said to incorporate a holistic approach to sustainable development.<sup>204</sup>

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## 8. Other values relevant to the protection of the environment and future generations in the Fundamental Law

Among the values reflected in the Fundamental Law, Christianity and family protection can be viewed as connected to the interests of future generations and the environment. Respect for Christianity and Hungary's pertinence to the Christian culture are mentioned at several points in the constitutional text: first and foremost, the Preamble declares that Saint Stephen made the Hungarian state a part of Christian Europe and that Christianity has an essential role in preserving nationhood.<sup>205</sup> Furthermore, Article R, which addresses the legal nature of the Fundamental Law and its position in the Hungarian legal system, also establishes the obligation of state organs to protect the constitutional identity and Christian culture of Hungary.<sup>206</sup> However, Christian culture does not necessarily mean Christian religion or faith; rather, the legislator intended to express the protection of a cultural reality created

202 *"We commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of national minorities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources."*

203 Decision no. 16/2015 (VI.5.) [146].

204 Baranyai and Csernus (eds.), 2018, pp. 189–190.

205 See the Preamble of the Fundamental Law: *"We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago."* *"[...] We recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country."*

206 See Article R (4) of the Fundamental Law: *"The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State."*

by faith throughout generations and its permeation in society.<sup>207</sup> Christian theory considers the values of the environment and the responsibility of humans for its protection as part of human dignity. Numerous religious leaders have expressed their concerns regarding the sustainability of the planet and the created world, including Pope John Paul II, Benedict XVI, and Pope Francis as well as Bartholomew of Constantinople.<sup>208</sup> The affirmations of the Encyclical Letter *Laudato Si'* issued by Pope Francis and the ecological views of Bartholomew were explicitly referred to by the Constitutional Court in Decision no. 28/2017 (X.25.).<sup>209</sup> In conclusion, the Hungarian constitutional approach to the protection of the environment and future generations fits within the scope of Christian axiology.

The protection of family and children can also be viewed as connected to the interest of future generations, especially through the encouragement to include children in Article L (2), which pronounces that *“Hungary shall support the commitment to have children.”* In the author’s opinion, this provision refers to future generations who are not born yet rather than to already-born children. In this sense, the Fundamental Law expresses a concrete rule for the responsibility to future generations that is declared by the Preamble in general terms.<sup>210</sup> However, encouragement to bear children is a broader category than the protection of family or marriage, as it supports the birth of children regardless of whether they are born in wedlock.<sup>211</sup> As Article L (1) states, family is the basis of the survival of the nation, which – similar to what is reflected in the Preamble<sup>212</sup> – shows the legislator’s commitment to the protection of future Hungarians. In addition to these provisions, the Fundamental Law contains several other declarations on the protection of family and children. However, their link is less direct and less evident in relation to the interests of future generations or the environment. Regarding the protection of children, Article XVI (1) declares the State’s obligation to *“ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country,”* which expresses the interrelation between the preservation of Christian values and future generations. Therefore, the two values are strongly related to each other as well as to the protection of the environment and the interests of future generations.

207 Schanda, 2022, pp. 196–197.

208 Bándi, 2013a, p. 84. For a detailed analysis on the moral considerations of environmental protection, see Bándi, 2006; Bándi, 2020c.

209 Decision no. 28/2017 (X.25.) [36].

210 See the Preamble of the Fundamental Law: *“[...] We bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.”*

211 Schanda, 2012, pp. 77–78.

212 See the Preamble of the Fundamental Law: *“We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength.”*  
*“[The Fundamental Law] shall be an alliance among Hungarians of the past, present and future.”*



## 9. Financial sustainability

The three main pillars of sustainability are the ecological, social, and economic systems.<sup>213</sup> Therefore, public finances, which are a determining issue in the economic system, should also be regulated in a way that represents sustainability. This approach prevails in the constitutional regulation of the state budget:<sup>214</sup> according to Article N (1), “*Hungary shall observe the principle of balanced, transparent and sustainable budget management.*” This principle can be considered a general one because – as was also noted in the Explanatory Memorandum of this provision – the realization of fundamental rights and the effective functioning of the State can be guaranteed only if the social and economic balance of the country is not threatened by budgetary problems. In the principle, balance refers to the predictable functioning of the State; transparency requires the participation of well-informed and responsible citizens in the democratic public life, while sustainability serves the responsibility for future generations.<sup>215</sup> This responsibility for descendants also appears in the often-cited provision of the Preamble, which states that the protection of the living conditions of future generations shall also be ensured by making prudent use of material (as well as intellectual and natural) resources.

The principle of sustainable budget management is concretized in Article 36 of the Fundamental Law, which defines the general and special rules of government debt. As Paragraph (4) states, “*the National Assembly may only adopt an Act on the central budget as a result of which government debt would exceed half of the total gross domestic product.*” If the government debt exceeds this limit, “*the National Assembly may only adopt an Act on the central budget which provides for a reduction of the ratio of government debt to the total gross domestic product.*” These rules implicitly protect the interests of future generations by aiming to avoid indebtedness that would pose an intolerable burden on them by giving excessive priority to current needs of interest.<sup>216</sup> Present generations thereby express their responsibility to future generations. The literature points out, however, that the practical realization of this provision is highly problematic: at the time of the adoption of the Fundamental Law, the government debt exceeded 80%.<sup>217</sup> Nevertheless, later rules provide exceptions in the case of a special legal order or an enduring and significant national economic recession.<sup>218</sup>

213 Kuslits, 2011, p. 217.

214 For an overview of the financial provisions of the Fundamental Law, see Simon, 2019.

215 Csák and Nagy, 2020, pp. 46–47.

216 Explanatory Memorandum of Article 36 of the Fundamental Law.

217 Domokos and Gyula Pulay, 2020, pp. 35–36.

218 See Article 36 (6) of the Fundamental Law: “*Any derogation from the provisions of paragraphs (4) and (5) shall only be allowed during a special legal order and to the extent necessary to mitigate the consequences of the circumstances triggering the special legal order, or, in the event of an enduring and significant national economic recession, to the extent necessary to restore the balance of the national economy.*”

Regarding budgetary planning, the legislative activity of the National Assembly is supported by the Fiscal Council, which takes part in the preparation of the Act on the central budget. The members of the Fiscal Council are the President of the Fiscal Council, the Governor of the Hungarian National Bank, and the President of the State Audit Office. The Council has a major role in observing the requirements set out in Article 36 (4) and (5): its prior consent is required for the adoption of the central budget.<sup>219</sup> The Council is a professional body independent from the executive branch and thus monitors compliance with the government debt rule. Therefore, it can be concluded that safeguarding the interests of future generations is an outstanding priority in the constitutional regulation of public finances in Hungary: first, the sustainability of budget management is set out as a general principle in Article N in the chapter ‘Foundation’; second, a concrete rule on the optimal ratio of government debt is regulated in Article 36, which was introduced to avoid the indebtedness of the upcoming generations and thus expresses the responsibility of present generations to them; and finally, Article 44 introduces procedural guarantees for the adoption of the central budget, which has a strong impact on the government debt ratio.

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## 10. The protection of national assets

National assets may be connected to the protection of the environment and the interests of future generations from two aspects: first, the category of national assets may encompass natural resources, and second, the preservation of natural resources and taking into account the needs of future generations are among the aims of the protection of national assets.

According to Article 38 (1), national assets encompass the property of the State and local governments. Their management and protection aim at the following: serving the public interest, meeting common needs, preserving natural resources, and taking into account the needs of future generations. As previously mentioned, the Constitutional Court also confirmed that the protection of the interests of future

219 See Article 44 of the Fundamental Law: “(1) As an organ supporting the legislative activity of the National Assembly, the Fiscal Council shall examine the feasibility of the central budget.

(2) The Fiscal Council shall take part in the preparation of the Act on the central budget, as provided for by an Act.

(3) In order to meet the requirements set out in Article 36 (4) and (5), prior consent of the Fiscal Council shall be required for the adoption of the Act on the central budget.

(4) The members of the Fiscal Council shall be the President of the Fiscal Council, the Governor of the Hungarian National Bank and the President of the State Audit Office. The President of the Fiscal Council shall be appointed for six years by the President of the Republic.

(5) The detailed rules for the operation of the Fiscal Council shall be laid down in a cardinal Act.”

generations may be deduced not only from Article P and the Preamble but also from Article 38 (1).<sup>220</sup>

National assets and national resources are not the same concept. National assets can be considered a broader category: the Preamble of the Nature Protection Act declares that natural values and natural areas are unique and irreplaceable parts of national assets. This provision was quoted by the Constitutional Court in its Decision no. 28/2017 (X.25.).<sup>221</sup> Therefore, it can be concluded that this perception applies to the constitutional provisions as well. The overlap was tangible in Decision no. 13/2018 (IX.4.), which was based on the constitutionality initiative of the President of the Republic using the arguments of the *amicus curiae* submitted by the AFG.<sup>222</sup> The Constitutional Court pronounced the unconstitutionality of a regulation allowing unlimited drilling and use of groundwater wells: given that groundwater resources belong to the exclusive property of the State, as well as the common heritage of the nation, the Court stated that such a regulation would violate the non-derogation principle and, consequently, the protection of natural resources and the right to a healthy environment enshrined in Articles P (1) and XXI (1).<sup>223</sup> The reasoning of the Court was strongly influenced by the arguments of the AFG, which also shows the important role of the Ombudsman's work in shaping the interpretation of constitutional provisions related to the interests of future generations.

The fact that part of the protected natural values of Hungary belongs to the exclusive property of the State also place an obligation on the State to take into account the protection of those values as well as the interests of future generations in the legislation-making process. Concerning the State's obligations arising from Article 38 (1), the AFG expressed his opinion in several concrete questions. For instance, in the case of repealing the protection of a cave of the lime pit in Dorog, the AFG highlighted that caves are the exclusive property of the State, and all decisions concerning them are thus simultaneously decisions on national assets. Therefore, environmental impact assessment in these cases is of crucial importance. Furthermore, regarding the division of the Hortobágy National Park into zones, the AFG drew the decision-makers' attention to the fact that the changes may not lead to the reduction of the protected areas. According to the report, the changes are to be indicated on a map; otherwise, it would be impossible to assess whether the new division violates the non-derogation principle. Further, in relation to the construction of a small train in a protected area, the AFG noted that in protected natural areas, only nature protection investments may be carried out and that the State shall contract with such companies that fulfill the requirements of the protection of nature set by the State.<sup>224</sup>

220 Decision no. 13/2018 (IX.4.) [15].

221 Decision no. 28/2017 (X.25.) [46].

222 Bándi, 2020a, pp. 18–19.

223 Decision no. 13/2018 (IX.4.) [73].

224 Report on the activity of the Commissioner for Fundamental Rights and his Deputies, 2019, pp. 362–363.

## 11. Good practices and *de lege ferenda* proposals

The Hungarian Fundamental Law is highly committed to the protection of the environment and the interests of future generations. These values appear directly or indirectly in several constitutional provisions as well as in the declarations of the Preamble. One of the key provisions in this matter is the explicit declaration of the right to a healthy environment in Article XXI (1), which is supplemented by additional rules on liability for damage to the environment and prohibition of the transport of pollutant waste to the territory of Hungary. The *expressis verbis* declaration of the right to a healthy environment is certainly a progressive step, especially considering that there is as yet no consensus on the recognition of such a right in international human rights law. The right to a healthy environment is connected to several other fundamental rights; the strongest link is with the right to physical and mental health guaranteed in Article XX, which is supported by several state tasks, such as GMO-free agriculture, access to healthy food and drinking water, and the protection of the environment.

The Hungarian Constitutional Court plays a prominent role in shaping environmental law – in addition to the interpretation of the environment-related fundamental rights, the Court established strict requirements for the legislator, most importantly the principle of non-derogation and the precautionary principle. Moreover, in addition to the adjudication of legal matters, the Court conducts procedures on proof of facts, particularly in environmental cases. Furthermore, the activity of the Deputy Commissioner for Future Generations or the Advocate of Future Generations should be mentioned as a ‘good practice’ of the institutional protection of the interests of future generations and the environment. The Advocate often issues opinions and recommendations and represents the Hungarian viewpoint on the international level. Moreover, they significantly contribute to the jurisprudence of the Constitutional Court by initiating procedures and submitting *amicus curiae* for the cases. In the author’s opinion, the establishment of a special ombudsman who is responsible for safeguarding the interests of future generations is an outstanding element of the constitutional framework for environmental protection, as the fact that the issue is represented by a separate office within the ombudsman system shows that the preservation of the environment for future generations should be a priority topic in national human rights law. Therefore, the Hungarian model can surely serve as an example for other countries seeking to place more emphasis on the institutional protection of the environment.

Third, apart from the protection of fundamental rights and institutional guarantees, the protection of natural resources also appears in Article P as an obligation of the State and everyone. The provision gives a non-exhaustive list of natural resources including biodiversity, which is clearly based on the ecocentric approach to environmental protection, meaning that the Hungarian legislator recognizes the intrinsic value of nature and protects for reasons beyond its usability for humans. This complex approach to the protection of the environment – the preservation for future

generations, that is, for humans, as well as the protection per se – is also progressive in constitutional law, given that most of the regulations protect the environment for what it can offer for mankind: food, drinking water, clean air, renewable energy, etc. The common heritage of the nation – including natural resources and cultural artifacts – is also a unique concept of constitutional law as it implies the preservation of its elements for the future generations of the nation. Consequently, the Fundamental Law is devoted to the responsibility of the present generation to future generations in several matters: apart from the protection of natural resources, responsibility can also be inferred from the rules on government debt by setting a certain limit – 50% of the GDP – as the optimal ratio. The legislator thereby seeks to implement financial sustainability and sustainable development in practice and thus avoid the indebtedness of the next generations.

The overall Hungarian constitutional framework for the protection of the environment and future generations is forward-looking and progressive; however, some provisions are subject to strong criticism in the scientific literature. First, liability for damage caused to the environment and the prohibition of the transport of pollutant waste to the territory of Hungary are declared in the same article as the right to a healthy environment. The attempt to regulate liability at the constitutional level will surely be welcomed. However, the adopted provision raises a number of problematic issues: as previously mentioned, the provision incorporates some aspects but not the entirety of the polluter pays principle, as there is no reference to prevention and precaution. In addition, who is the subject matter of the obligation is unclear – the State, non-state actors, such as multinational companies, or only natural persons. Therefore, it is necessary to clarify the scope of responsible persons or entities to address the issue with concrete rules in lower-level legislative instruments. The *expressis verbis* inclusion of the polluter pays principle in the constitutional text, as proposed by the green ombudsman at the time of the drafting of the Fundamental Law, could be another solution, and it would also create an opportunity for the Constitutional Court to thoroughly interpret the principle. Second, the prohibition of the transport of pollutant waste is also disputable in several aspects: first, certain authors argue that such a provision would not fit in a constitutional act at all and that it would be satisfactory to regulate it in lower-level acts. Furthermore, although it is a declarative provision, its realization must be in conformity with the EU law, as the issue of the transport of goods is also regulated by the EU in the frame of the common market. Nevertheless, the provision now forms part of the Hungarian constitutional text, and its repeal would certainly raise the question of non-regression, particularly because it is closely related to the right to a healthy environment.

Furthermore, although the objective, institutional side of the right to a healthy environment is decisive, certain subjective rights can also be linked to this fundamental right, though this does not appear explicitly in the constitutional text. The framework for participatory rights in relation to environmental protection is guaranteed to some extent in the Fundamental Law: the right to a fair trial, for instance, is set out as a general rule, and the right to information can also be deduced from

the provisions; however, in the author's opinion, the link between these rights and environmental matters is distant in the current constitutional regulation. The rights guaranteed by the Aarhus Convention are implemented in lower-level acts, and the Deputy Commissioner declared that the State shall ensure access to information in environmental matters for the effective realization of the right to a healthy environment and the right to health; however, taking into account the growing number of national constitutions that enshrine such participatory rights as well as the willingness of the public to be involved in environmental decisions, these links may not be directly deducible purely from the constitutional provisions. Moreover, as one may conclude from the example of the construction of a radar on Mount Zengő, the participation of civil society may and shall have a strong impact on policymaking as its members are the ultimate endurers of the consequences of environmental harms. Therefore, the inclusion of the right to information regarding the state of the environment in the constitutional text as well as access to justice and, most importantly, public participation in the decision-making specifically in environmental matters is certainly worth considering for the legislator, particularly considering that these fundamental rights have already been recognized by several other Central European constitutions.

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