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Constitutional protection of the environment with particular regard to the
Hungarian, German, Italian and Belgian constitutional regulation*****

Abstract

Environmental protection has become a burning issue which plays a more and more important role in the world. The aim of this study is to give a picture of the constitutional regulation of environmental protection which is the highest legal source of a nation. Besides the Hungarian Fundamental Law, the German, Italian and Belgian constitutions were examined in the study. On one hand, we looked into how environment is regulated in the constitutions, as a right (right to environment) or a state task or objective (protect the environment). On the other hand, we analysed how related regulatory subjects appear in the constitutions, such as natural recourses, future generations and sustainable development.

Keywords: constitutional regulation, environmental protection, the right to environment, protection of nature recourses, interest of future generation, sustainable development.

1. Introduction

Environmental protection is one of the most pressing and current questions in the world. It is one of the basic prerequisites for the overall development of any country in the world. If economic growth and development are to be established, and there is no country in the world that does not want to do so, today these may not be reached without taking care of the environment and using environmentally friendly solutions. As awareness of environmental protection is developed, human awareness is also developed and people recognise the need to preserve the environment by preventing adverse impacts on nature. In addition to practical, economic tasks, exercises and efforts, law also has significant role in implementing environmental

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protection. Within a state the highest legal source is the constitution which contains the primarily used provisions in connection to regulatory subjects such as environmental protection and which points us the most important principles and regulations. Furthermore, these constitutional regulations create the national basis of connected international and European environmental declarations. In this study we examine not only the provisions of the Hungarian Fundamental Law (the name of the Hungarian constitution) but some founder countries of the European integration, namely the German, Italian and Belgian constitution.

Between 31 October and 13 November was held the 26th UN Climate Change Conference in Glasgow¹ which summit brought parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change. The aim of the UN Climate Change Conferences is to “*review the implementation of the Convention and any other legal instruments that the COP (Conference of the Parties) adopts and take decisions necessary to promote the effective implementation of the Convention, including institutional and administrative arrangements.*”² The parties discussed this time as well the present situation of the environment and adopted common environmental protection agreements for the next years. On this occasion we thought to examine the regulatory situation in some European countries, focusing on only how the constitutions – as we mentioned above, the highest national legal source which provisions shall be primarily used and observed – regulate environmental protection and the connecting issues as regulatory subjects.

During the research we put emphasis on the following questions: Is there any special right which guarantee the right to environment protection as a fundamental right? Are natural resources protected in the constitution? Is ‘future generation’ regulated somehow in the constitution? Is sustainable development regulated in the constitution? Finally, related to the right to the environment is there an ombudsman or any other institution regulated in the constitution that protects environmental protection? First of all we analyse the Hungarian constitutional provisions, then followed by the other chosen countries.

2. The provisions of the Hungarian Fundamental Law

2.1. The right to a healthy environment

The right to environment and environmental protection creates an important part of the Hungarian constitutional value system, which serves as a kind of basis for the protection of other values and rights, such as the protection of natural resources, health and interests of future generations.³ More articles of the Fundamental Law shall be examined in connection to environmental protection, furthermore, already the National Avowal (considered to be the preamble of the constitution) contains relevant and important declarations.

¹ See more about the conference <<https://ukcop26.org/>>.

² United Nations Framework Convention on Climate Change.

³ Fodor 2015, 103.

As §18 of the previous Constitution, the Fundamental Law also provides the right to a healthy environment⁴ as a fundamental right in Article XXI. Article XXI (1) states that “*Hungary shall recognize and implement the right of all to a healthy environment.*” It is a specific fundamental right,⁵ which is one of the most important constitutional rights. It is not a subjective fundamental right⁶ but a so called third-generation fundamental right that shall be ensured by the state. The Hungarian Constitutional Court Decision (hereinafter referred to as: Decision CC) 28/1994. (V.20.) was the first which interpreted the right to environment. According to this statement, the ‘objective side’, which means ‘institutional protection’, is dominant of this human right.⁷ In this sense ‘objective’ means that the guarantees of environmental protection shall be defined by the state⁸ according to objective, general goals, in order to protect the natural basis of life. In this sense to meet subjective needs⁹ would be impossible.¹⁰ Thus this right requires active behaviour from the state in the form of legislation and by forming an adequate operational system for it.¹¹ Furthermore, the Hungarian Constitutional Court highlighted that the degree of institutional protection is not arbitrary. The state may not reduce the level of nature protection provided by law, unless it is necessary for the enforcement of another constitutional right or value. However, the extent of the reduction in the level of protection may not be disproportionate to the objective pursued.¹²

Beside the specific nature of the right to environment, it is of equal rank with other fundamental rights but takes precedence over other provisions considered to be state objective or task.¹³ Although, the subjective side of the right is missing, the Fundamental Law determines who has the right to the environment: it is a fundamental right for all, under which understood everyone, all natural persons regardless of nationality, place of residence or stay.¹⁴

In connection with the right to the environment, the Fundamental Law contains new provisions within Article XXI. These are the so called ‘polluter pays principle’¹⁵ and the prohibition to import pollutant waste to Hungary for the purpose of disposal.¹⁶

⁴ The right to a healthy environment was first interpreted by the Constitutional Court in its Decision 28/1994. (V.20.) CC that still prevails today.

⁵ Gergely Varga analyses in his article the fundamental right nature of the right to environment. See Varga 2014, 184–187.

⁶ Fodor 2015, 104.

⁷ Decision 28/1994. (V. 20.) CC [III. 2. a); III.3.].

⁸ Decision 996/G/1990 CC.

⁹ It means that individuals cannot sue for the state in order to satisfy their subjective environmental needs.

¹⁰ Fodor 2007, 7–9.

¹¹ Decision 28/1994. (V. 20.) CC [III.3/b].

¹² Decision 28/1994. (V. 20.) CC [IV].

¹³ Fodor 2015, 104.

¹⁴ Fodor 2007, 9.; Fodor 2015, 106.

¹⁵ Article XXI (2).

¹⁶ Article XXI (3).

The polluter pays principle¹⁷ is an important principle deriving from the provisions of the EU and the OECD, existing in Hungary as well but raised to constitutional status by the Fundamental Law. In Hungary the details of this principle are found in the act of environmental protection,¹⁸ furthermore, the Deputy Commissioner for Fundamental Rights who is responsible for future generations interprets this principle. This principle determines the responsibility of the individuals related to environmental protection. The prohibition of waste importation directly prohibits waste importation in order to dispose, however waste importation in order to utilise is permitted.

In connection with the right to environment, two specific regulations - basically principles - shall be mentioned, namely non-derogation principle and precautionary principle. These are relevant provisions developed by the Hungarian Constitutional Court with normative content – as these principles are not explicitly regulated in the Fundamental Law – that play important role in environmental protection. The non-derogation principle was developed by the Hungarian Constitutional Court in its Decision in 1994 from § 18 of the Constitution which stated that “*the state does not enjoy freedom to allow the deterioration of the environment or the risk of deterioration*”, so the Constitutional Court derives this principle from the features of the right to environment determined in its mentioned Decision.^{19,20} The principle has three aspects, however, initially only the substantive and procedural aspects were interpreted by the Constitutional Court: it means that *the level of protection achieved by legislation cannot be reduced by the state* (substantive provision)²¹ and *the application of constitutional requirement must be examined* (procedural provision)²². After a long break the Hungarian Constitutional Court interpreted the non-derogation principle in 2015²³ which decision firstly interpreted the third, organisational aspect of this right²⁴ (in the concrete case the Constitutional Court wished to transfer nature conservation competence from national parks to the agricultural land fund).²⁵ The Constitutional Court Decision in 2018²⁶ confirmed that non-derogation principle derives directly from the Fundamental Law and relates to Article P and XXI.²⁷ The precautionary principle²⁸ can be described as an approach to the protection of environment or human health that is based on precautions even if there is no real harm or risk of harm according to the uncertainty of

¹⁷ About the polluter pays principle read more in Csák 2014.; Sulyok 2018.

¹⁸ Act LIII of 1995 on the General Rules of Environmental Protection § 102.

¹⁹ Decision 28/1994. (V. 20.) CC [IV.1.].

²⁰ Bándi 2017, 173.

²¹ Decision 28/1994. (V. 20.) CC [1.]; Fodor 2005, 256.; Fodor 2006b, 116.

²² Bándi 2017, 176.; Decision 30/2000. (X. 11.) [III.3.].

²³ Decision 16/2015. (VI.5.) CC.

²⁴ Szilágyi 2018, 79.

²⁵ About the three aspects of non-derogation principle László Fodor already wrote in his article in 2007, see Fodor 2007, 15.

²⁶ Decision 13/2018. (IX.4.) CC.

²⁷ Decision 13/2018. (IX.4.) CC [20].

²⁸ This principle is also not explicitly regulated in the Hungarian constitution, however, it is the part of the environmental protection act and the Act CLXXXV of 202 on Waste.

science.²⁹ This principle shall not be confused with the prevention principle, these two principles has not the same meaning. The Hungarian Constitutional Court firstly interpreted this principle in detail³⁰ within the Decision³¹ 13/2018. (IX.4.)³² describing as a quite strong concept and version.³³ It determined the elementary constitutional components of the principle according to which “*The responsibility deriving from the Fundamental Law for future generations requires the legislator to assess and calculate the expected impact of its actions on the basis of scientific knowledge, in accordance with the precautionary principle and the principle of prevention*”³⁴. Furthermore, it defined the two types of the right: one connected to the non-derogation principle and one independent from that^{35,36}

In relation with the right to the environment some other constitutional provisions shall be also mentioned. The protection of natural resources contributes to the protection of environmental elements – examined in the next chapter. The state promotes the right to physical and mental health (Article XX (1)) – as environmental protection is understood as the instrument of health preservation – by providing the access to healthy food and drinking water, and the GMO-free agriculture.

2.2. Regulatory subjects related to environmental protection

2.2.1. The protection of natural resources

As mentioned above, the protection of natural resources closely relates to environmental protection, since it serves the protection of environmental elements (such as arable land, forests and water resources) that directly contributes to the healthy environment. The Fundamental Law compared to the previous Constitution, introduced the protection of natural resources as a new regulatory subject. The importance of natural resources, environmental elements is derivable from the fact³⁷ that already the National Avowal of the constitution mention the protection of them and it is explicitly determined in Article P and 38. The National Avowal states that “*we shall strive to use our natural resources prudently so as to protect the living conditions of*

²⁹ Szilágyi 2019, 88.; Decision 13/2018. (IX.4.) CC [82].

³⁰ There were previous Constitutional Court Decisions as well that interpreted precautionary principle, but the first significant decision was Decision 13/2018. (IX.4.) CC.

³¹ The Constitutional Court took into account and referred to the viewpoints of the Ombudsman and the President of Hungary in connection to the precautionary principle - Decision 13/2018. (IX.4.) CC [4.,49.].

³² About the background of the case see Szilágyi 2018, 82-89.; Szilágyi 2019, 105–106.

³³ Szilágyi 2019, 89.

³⁴ Decision 13/2018. (IX.4.) CC [13].

³⁵ Decision 13/2018. (IX.4.) CC [20].

³⁶ Szilágyi 2019, 107.; Szilágyi 2021a, 227.

³⁷ I agree with János Ede Szilágyi who considers that the provisions of the National Avowal contributes to the interpretation of other articles of the constitution. The Article R (3) confirms this statement.

*future generations.*³⁸ Article P determines natural resources which comprise the nation's common heritage that shall be preserved, protected and maintained – it is a so called task triple.³⁹ Emphasising the relevance of this task, this constitutional obligation is not just the obligation of the state but everybody, so every person and legal entity shall make a commitment.⁴⁰ However, it shall be mentioned that the list of natural resources is not exhaustive as the Fundamental Law uses the expression of 'particularly', but give some examples. This provision may be interpreted as the most important protected natural resources, environmental elements – however, it is worth noticing that e.g. air is not the part of the list which is also a really important environmental element – but at least important natural resources. Article 38 also state the protection of natural resources but in another context, according to which “*national assets shall be managed and protected for the purpose of [...] preserving natural resources*”. This provision aims to protect finite natural resources that are part of the national assets.⁴¹ The state shall ensure the protection of natural resources in order to the public interest when making decisions.⁴²

2.2.2. The protection of future generations

The interest of future generations and the protection of them are closely linked to the issue of environmental protection, as without a healthy, preserved environment and environmental elements we cannot talk about the proper living conditions of future generations. Therefore, the Fundamental Law is dedicated to protecting the future generations and their interest which is proved by the number of articles of the constitution related to it. The interest of future generations appears mainly in connection with the protection of natural resources (National Avowal, Article P and 38) that shall be preserved for their benefit. So the protection and preservation of natural resources is addressed to the future generations. The Hungarian Constitutional Court determined in its Decision 28/1994. (V.20.) [III.1.] in relation to the right to life that “*the State's objective obligation extends to human life in general that includes ensuring the living conditions of future generations*”.⁴³ At the same time it shall be highlighted that it does not mean that the preservation of natural resources serves only the benefit of the future generations but the present generations as well. Furthermore, the Article 38 mentions the needs of future generations in connection to the protection of national assets.

³⁸ András Jakab considers that the protection of natural resources determines environmental value according to which they shall be protected and preserved. See Jakab 2011, 180.

³⁹ A Jövő Nemzedékek Szószólójának munkatársai szerkesztésében 2021, 533.; T. Kovács & Téglási 2019, 174.

⁴⁰ Decision 16/2015. (VI.5.) CC [92]; Decision 13/2018. (IX.4.) CC [13].

⁴¹ See it in the reasoning of Article 38 of the Fundamental Law.

⁴² A Jövő Nemzedékek Szószólójának munkatársai szerkesztésében 2021, 534.

⁴³ T. Kovács & Téglási 2019, 175.

2.2.3. Sustainable development

The right to the environment, the protection of natural resources are in inseparable contact with sustainable development.⁴⁴ According to Gyula Bándi “*Environmental protection is at centre of sustainable development.*”⁴⁵ Although, the National Avowal does not mention it expressis verbis, it may be derivable from the 7th part of it: Hungary is committed to preserve the natural and man-made environment of the Carpathian Basin, and careful use of material, intellectual and natural resources. These provisions may be interpreted as the economic, social and environmental⁴⁶ dimensions of sustainable development. Furthermore, Article N, P and Q, XVII and 38 contain related provisions.

2.2.4. The Deputy of the Commissioner for Fundamental Rights

In the case when constitutional provisions are examined in relation to environmental protection, we cannot ignore the roll and task of the Commissioner for Fundamental Rights (often called as Ombudsman). Already, before the adoption of the Fundamental Law, existed his/her previous institutions (four Parliamentary Commissioners)⁴⁷ but the Fundamental Law changed their names and system – one Ombudsman and his/her deputies.⁴⁸ Article 30 contains provisions on the Ombudsman determining his/her activities⁴⁹ that aim to protect fundamental rights like the right to a healthy environment. One of the deputies, whose previous institution also existed before the Fundamental Law, but the Fundamental Law was that explicitly name the Deputy of the Commissioner for Fundamental Rights. This provision is considered to be exemplary in international level. He/she has a significant role in environmental protection and the protection of future generation.

3. The provisions of the German constitution

In the case of Germany the examination of constitutional protection of environment requires a two-level analysis: the examination of a) the Federal German Constitution (Grundgesetz)⁵⁰ and b) the constitutions of the states (Bundesländer). Firstly, we analyse the provisions of the federal level, then the states.

⁴⁴ About sustainable development see more Bándi 2013, Bándi 2016.

⁴⁵ Bándi 2013c, 1120.

⁴⁶ About environmental sustainability see Csák & Nagy 2020, 38–46.

⁴⁷ About the activities of Parliamentary Commissioner in connection to environmental protection see Szilágyi 2021b, 457–460.

⁴⁸ A Jövő Nemzedékek Szószólójának munkatársai szerkesztésében 2021, 527.; Szilágyi 2021a, 225.

⁴⁹ About the activities of the Deputy of the Commissioner for Fundamental Rights see Szilágyi 2021b, 460–464.

⁵⁰ Grundgesetz für die Bundesrepublik Deutschland.

3.1. Environmental related provisions of the German Federal Constitution

Article 20a of the Federal German Constitutional is the cornerstone of environmental protection. However, the constitution does not use the expression of ‘environmental protection’, does not generally protect the environment but use the expression of ‘natural basis of life’⁵¹ (natürlichen Lebensgrundlagen)⁵² which provision embodies environmental protection⁵³. Under it shall be understood the minimum set of conditions without which the survival of life (not only human life but animal and plant life too, also including biodiversity) is permanently impossible.⁵⁴ The protection of natural basis of life (and animals) regulated in Article 20a that provides the followings: *“The State shall also, within its responsibility for the future generations, protect the natural basis of life and animals within the framework of the constitutional order by means of legislation and, in accordance with law, by means of executive power and justice.”* Compare this provisions to the Hungarian constitutional regulation, the protection of natural basis of life is not regulated in the Federal German Constitution as a fundamental right, so it is not considered to be that but it is a state objective⁵⁵. This state objective is a binding, constitutional requirement that does not give freedom for the state whether or not to comply with this objective. However, the state has freedom of choice in the means by which achieving its objective. The specificity of the environmental state objective is that not an environmental condition to be achieved but rather the integrity of the environment is to be protected and maintained, i.e. man-made damage is to be avoided or restored.⁵⁶ Therefore, it is stated that the environmental protection provision of the German constitutions is closer to fundamental rights than to state objective.⁵⁷ The addressee of this state objective is the state, under which not only the federation (Bundesrepublik Deutschland) understood but the federal states and the local governments as well.

⁵¹ In our opinion this expression is quite misleading, especially comparing it with the expression used in international law (and in the Hungarian law) and the commonly known expression.

⁵² BeckOK Grundgesetz Huster&Rux Kommentar Art. 20a Rn. 9-17a.

⁵³ BeckOK Grundgesetz Huster&Rux Kommentar Art. 20a.

⁵⁴ Kloepfer 1996, 76.

⁵⁵ Environmental protection (in order to preserve the natural basis of life) has always been one of the state's fundamental tasks. The obligation of the state is to ensure at least the minimum level of ecological subsistence, that already derives from the objective requirement of protection – protection of life and limb – provided in Article 2 (1) 1th sentence of the constitution. In this respect, it is not necessary to provide for a specific constitutional definition of the correspondent state objective in order to derive the corresponding obligations of state bodies. From this viewpoint, however, only the absolute obligation of the state bodies can be deduced to protect the natural basis of life for the current inhabitants of Germany. Hence the need for an explicit provision in the constitution made it clear that public bodies are obliged to protect the natural basis of life (and the animals) in order for the responsibility for the future generations. See BeckOK GG/Huster/Rux GG Art. 20a Rn. 7, 8.

⁵⁶ Fodor 2006a, 78–79.

⁵⁷ Murswiek 1996, 223–224.

The primary addressee is the legislator who shall give concrete expression to the state objective and who has big degrees of freedom to determine the state tasks.⁵⁸

Similar to the Hungarian Fundamental Law, the Federal German Constitution also contains provision in connection to the future generations. It is specially regulated within Article 20a relating to the protection of natural basis of life, according to which the “*state within its responsibility for the future generations protects the natural basis of life and animal.*” It clearly implies the long-term responsibility of the state, so the state shall protect and preserve the natural basis of life not only against current consequences but also against future impacts. Although, the legislator not exactly mention sustainable development but according to the commentary of this Article, the responsibility for the future generations goes hand in hand with the principle of sustainable development. With this provision, the legislator has incorporated the principle of sustainability into the constitution, according to which (economic) development and the use of natural resources shall be designed to meet the needs of the present generation without compromising the ability of future generations to meet their own needs. The obligation of prudent management of natural resources, in particular of non-renewable resources derives from this. It is quite difficult to determine what exactly relevant needs means but that is certain that the long-term risks shall always be taken into account when considering. This is particularly the case when interventions into the environment entail significant long-term risks.⁵⁹ The long-term risk to the environment was examined by the constitutional court (*Bundesverfassungsgericht, BVerfG*) in its decision in 2021.⁶⁰ In its decision the BVerfG emphasized the importance of the natural basis of life for safeguarding freedom, as it gives individuals the opportunity to exercise their rights of freedom. It corresponds to the objective-legal function of fundamental rights: The objective-legal protection deriving from the Article 20a of the Federal German Constitution includes the need to treat natural basis of life with such care and to leave them in such a condition for the future generations to be able to continue the preservation of them.

The issue of natural recourses is regulated in the constitution only in one article, among competing legislative competences. According to this article “*the transfer of land, natural resources and means of production into common ownership or other forms of common economy*” belongs to competing legislative competences.⁶¹ The protection of the natural basis of life can be interpreted as elements belonging to nature recourses. About ombudsman for the protection of environment and future generation no provisions can be found in the constitution.

3.2. Environmental related provisions of some federal states’ Constitution

After the analyses of the federal constitution let’s see the situation in the states, we chose three of them. German states can be divided into two groups in terms of the

⁵⁸ BeckOK Grundgesetz Huster&Rux Art. 20a Rn. 10-15.

⁵⁹ BeckOK Grundgesetz Huster&Rux Art. 20a Rn. 16-17a.

⁶⁰ BVerfG 24.3.2021.

⁶¹ Federal Fundamental Law Article 74 (1) 15.

constitutional regulation of environmental protection: (a) the states regulating environmental protection in a narrowly defined manner, similarly to the federal constitution, and (b) the ones regulating it in detail. These later are mostly the former GDR states.⁶²

3.2.1. Bavaria

Article 3 and 141 of the Constitution of the Free State of Bavaria⁶³ includes provisions on environmental protection. Article 3 (2) of the Bavarian constitution declares in general terms that *“The state shall protect the natural basis of life and cultural traditions”*. We can see that the right to a clean and healthy environment is not explicitly mentioned in the normative text, it is considered to be a state objective. The state objective set out in Article 3 is given substance by Article 141, which provides for the protection of the natural basis of life.

Article 141 (3) defines fundamental rights pertaining to the environment, nevertheless, László Fodor points out in his analysis of the related constitutional court practice, that *“[...]These rights, however, in their content are not really directed to the protection of the environment, but to enjoy the beauty of nature [...]”*.⁶⁴

In the field of the protection of natural resources, the protection of soil, water, air and forests as the natural basis of life is expressly mentioned as a priority task of the state and local authorities.

Future generations are also explicitly mentioned in the normative text: the protection of the natural basis of life was entrusted to the special care of each and every individual and of the state union, with a view to the responsibility towards future generations.⁶⁵

Under the forms of environmental protection, the Bavarian legislation establishes the protection of the environment as a responsibility of the state (and local governments) and as a citizen’s duty. Thus, jurisdictional rules can also be derived from the normative text. The protection of natural resources and the responsibility for future generations are also declared in the Bavarian constitution.

3.2.2. Brandenburg

Article 3 and 39 of the Constitution of the Land of Brandenburg⁶⁶ contain provisions regarding the protection of the environment.

⁶² Fodor 2006a, 92.

⁶³ Verfassung des Freistaates Bayern in der Fassung der Bekanntmachung vom 15. Dezember 1998 (GVBl. S. 991, 992), available at <https://www.bayern.landtag.de/fileadmin/Internet_Dokumente/Sonstiges_P/BV_Verfassung_Englisch_formatiert_14-12-16.pdf>

⁶⁴ Fodor 2006a, 92.

⁶⁵ See Article 141 (1), first sentence.

⁶⁶ Verfassung des Landes Brandenburg vom 20. August 1992 (GVBl.I/92, S.298) zuletzt geändert durch Gesetz vom 16. Mai 2019 (GVBl.I/19, [Nr.16]), available at <https://www.landtag.brandenburg.de/media_fast/5701/Landesverfassung-BB-Sept2019-englisch.pdf>

Article 2 (1) of the constitution of Brandenburg defines the protection of the natural environment as a state objective. In line with the Federal German Constitution, Article 39 lays down *provisions for the natural basis of life*. The right to health and a clean and healthy environment is not explicitly mentioned in this fundamental law, the regulation focuses on the protection of the environment as a state objective. In his monograph, László Fodor points out that this constitution establishes a fundamental right as well of which constitutional guarantees are the right to environmental information [Article 39 (7)] and the right of civil society organizations to participate and initiate actions in the public interest [Article 39 (8)].⁶⁷

The term ‘natural resource’ is not expressly stated in the Brandenburg constitution. Instead, specific natural resources are identified (mountains, forests, lakes, rivers), access to which is the responsibility of the state, the municipalities and the associations of municipalities.

Future generations are expressly mentioned in Article 40(1). In using land and water, everyone has a particular duty to serve the community and future generations.

In examining its various forms, the constitution of Brandenburg lays down a special regulation regarding environmental protection which declares it both as a fundamental right and a state responsibility. Segment rights of environmental protection inherent in political liberties (environmental information and participation rights) are also defined, as well as the protection of certain natural resources, the declaration of responsibility for future generations, and the reference to rules of jurisdiction.

3.2.3. Lower Saxony

Article 1 (2), 6 and 25 of the Constitution of Lower Saxony⁶⁸ contain relevant provisions.

Article 1 (2) of the constitution declares the protection of the natural basis of life. The right to a clean and healthy environment and the right to health are not explicitly mentioned in this constitution either; the regulation focuses on the protection of the environment as a state objective.

The term ‘natural resource’ is not expressly stated in the Brandenburg constitution, just like the protection of certain resources is not stipulated either. In relation to the environment, Article 6c sets provisions in connection to climate protection.

The protection of future generations is expressly declared in Article 6c: “*By taking responsibility for future generations, the country is protecting the climate and mitigating the consequences of climate change.*” When examining the forms of environmental protection, the Constitution of Lower Saxony can be classified as one of the constitutions in which

⁶⁷ Fodor 2006a, 93.

⁶⁸ Niedersächsische Verfassung Vom 19. Mai 1993. Nds. GVBl. 1993, 107, available at <<https://www.voris.niedersachsen.de/jportal/portal/page/bsvorisprod.psml?showdoccase=1&doc.id=jl-VerfNDV3Art57&doc.part=X#jl-VerfNDpArt1>>.

environmental protection is declared in the form of responsibility for future generations.

As we could see, the situation is not always the same in Germany in federal and states level environmental protection is regulated as a state objective by the federal constitution and most states' constitution but e.g. the constitution of Brandenburg is other. The protection of future generations and natural recourses are in in some way regulated both in the federal and states's constitution.

4. The provisions of the Italian constitution

Environmental law in its modern form does not necessarily sit firmly within traditional ideas of public and private understandings of law. Historically it might be said that environmental law was primarily 'private' in the sense that those seeking to facilitate what we would today brand environmental protection, in the absence of regulatory initiatives, forced to rely on private law actions, such as nuisance and trespass. Today, however, it seems trite to observe that modern environmental law is increasingly regulatory: the environmental norms take the form of explicit control, directing and guiding mechanisms. The onset of the administrative state and its rapid expansion throughout the twentieth century resulted in a host of regulatory controls aimed at protecting human health and the environment.⁶⁹ This part of the study introduces Italy, as a semi-regulator, where primarily only legal analogies can be used in order to ameliorate the environmental protection in practice.

4.1. The concept of environmental protection in the Italian constitution

The Italian constitution⁷⁰ considers it a state task to protect the environment and the ecosystem, but in addition, we do not find any central, constitutional regulatory elements in the subject.

Italy, though it is a member of the United Nations, does not completely follow the Sustainable Development Goals that focus on social and environmental targets in the next decade.⁷¹ There is evidence of growing awareness of the environmental impact of actions and states increasingly focusing on the topic from a fundamental rights perspective. It is not a surprise that nowadays we keep talking about the future generations, because environmental challenges are to make their lives truly difficult. The 1972 Stockholm Declaration – adopted by the United Nations Conference on the Human Environment – stipulates that *“Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generation.”*

⁶⁹ Lees & Viñuales 2019, 1073–1074.

⁷⁰ Senato della Repubblica. Constitution of the Italian Republic, available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

⁷¹ United Nations.

In contrast, the Italian constitution does not name the legal protection of future generations. The provisions of Article 2 could possibly be interpreted as a provision aimed at protecting future generations, but it is a really weak protectional clause and can be used in this matter only with legal interpretation in a widened sense: “*The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.*”

Whilst many countries experience rapid development and strong economic growth – especially in South Asia –, other countries – like in Europe – still struggle to address the fallout from the financial crisis of 2007/8. Many governments have been faced with falling banks, bankrupted political authorities, collapsing corporations and falling economic ratings. Italy has not escaped this process either, so like several other countries, the priority was to reduce the likelihood of the country going into recession or in order to address the falls in the country’s economic stability ratings.⁷² The coronavirus-pandemic also not helping much with focusing on the next generation’s rights and it seems that sustainable development and environmental considerations have not really moved the Italian legislature yet, though environmental rights – originally restricted to the African Charter on Human and People’s Rights – are now gaining general international recognition.

Especially goals 7, 11, 13-15 are related to environmental consequences, for example the 6th and 7th goals are to ensure availability and sustainable management of water and sanitation for all and to ensure access to affordable, reliable, sustainable and modern energy for all. The 14th goal is to conserve and sustainably use the oceans, seas and marine resources for sustainable development. By comparison, the reference to natural resources is found in the Italian constitution to the extent that the *state may restrict the freedom to dispose of private property in order to make reasonable use of the land*. The protection of air⁷³ and the protection of water⁷⁴ appear specifically in constitutional court practice. The Italian constitution does not name the concept of sustainable development at all.

Is it a problem, though – one could ask the obvious. It would appear that environmental rights are collective rights and these still are in their infancy.⁷⁵ More to say, in contrast to the right of development, environmental rights have been enforced in certain circumstances through invocation of existing rights – this process can be observed in Italy, when we reflect on different, even indirect connections between environmental protection and the constitutional rights. From this perspective it can be stated that the constitutional court has even a more significant role in development of rights, as this is the body which can set the boundaries. Ombudsmen are also major players in this game, as they are the intermediary actors between state and people in terms of fundamental – and consequently environmental – rights protection.

⁷² Smith 2018, 412.

⁷³ Harmful emissions, electromagnetic pollution, acoustic effects.

⁷⁴ General pollution, mode of use, water supply, hydrogeological risks.

⁷⁵ Smith 2018, 414.

There can be little doubt that the need for a more precautionary approach⁷⁶ to international risk management now underpins an increasing number of multilateral environmental agreements. In that sense precautionary principle has become one of the central concepts for organizing, influencing, and explaining contemporary national and international environmental law and policy.⁷⁷ Since Italy – according to its current legislation niveau – has not a pioneering role in state-level environmental policy, it is worth to summarize the country from the international engagement. Presently the country is party to twenty-eight different international agreements and signed, but not ratified two conventions.⁷⁸

4.2. Environment-related fundamental rights

Articles 9, 32 and 42-44 of the Italian constitution provides for principles relating to the interests of future generations and the protection of the environment. Article 9 of the constitution states the responsibility of the state for the protection of the environment: “(2) [The Republic] safeguards natural landscape and the historical and artistic heritage of the Nation.”^{79, 80}

Article 32 shows only an indirect link with the protection of future generations and the environment, as it states: “The Republic safeguards health as a fundamental right of the individual and as a collective interest [...]” In the literature, this type of provision is usually interpreted extensively to environmental protection.⁸¹

Articles 42-44 are about the protection of property, and the latter one contains the most important provision on the subject: “(1) For the purpose of ensuring the rational use of land and equitable social relationships, the law imposes obligations and constraints on private ownership of land; it sets limitations to the size of property according to the region and the agricultural area; encourages and imposes land reclamation, the conversion of latifundia and the reorganisation of farm units; and assists small and medium-sized properties.” The article seeks to recognize the social function of ownership over arable land.

The constitution also states in Article 117 that the protection of the environment, the ecosystem and the cultural heritage is the exclusive competence of the state with regard to the division of competences of the European Union. The constitution interprets this issue as a regulatory area shared with the regions, as a result of which, except for the principles, legislative power is transferred to the regions.

⁷⁶ The precautionary principle has also had an impact on the way treaties and other rules of law are interpreted and applied. Here, it is a principle with a genuine place in international legal discourse, whether in interstate relations or in international litigation. See Birnie, Boyle & Redgwell 2009, 164.

⁷⁷ Birnie, Boyle & Redgwell 2009, 164.

⁷⁸ CIA 2021.

⁷⁹ Senato della Repubblica. Constitution of the Italian Republic.

⁸⁰ Lees & Viñuales 2019, 168.

⁸¹ Fodor 2006a, 34.

However, the Italian Constitutional Court refined this provision in its decision No. 2002/407:⁸² *“Legislative developments and constitutional practice preclude the possibility of identifying in a technical sense a matter which can be classified as ‘environmental protection’, as the concept does not appear to be strictly defined. Thus, the issue is inextricably intertwined with other interests and areas, so it does not fit exactly into the shared competencies.”*

In order to resolve the problem, the Italian Constitutional Court held that the intention of the legislature was to reserve to the state the right to set uniform standards of protection throughout the country without, however, excluding regional competence for performing in the sector. Therefore, provided that a regional intervention complies with the central legislative guidelines, there is nothing to prevent the establishment and implementation of such local provisions.⁸³ The issue was still dealt with by the Constitutional Court in its decisions No. 2003/222⁸⁴ and 2006/214.⁸⁵

Incidentally, the Italian Constitutional Court touched on the fundamental rights related to the protection of the environment in an almost innumerable decision and interpreted the constitutional provisions related to the protection of the environment.⁸⁶ Among other things, we found in the decisions of the Constitutional Court that the *“recognition and protection of the environment as an organic being is a public interest of primary and absolute constitutional value.”*⁸⁷

4.3. Ombudsmen for environmental protection

There is an increasing convergence between human rights and the environment and this phenomenon lies in the fact that the environment, broadly conceived, affects virtually all aspects of being human. Although it may seem obvious, the law does not always seem to appreciate the extent to which a healthy environment conducive to human health and well-being is necessary for people to live fulfilling and dignified lives in equal measure in relation to one another. It is therefore considered entirely appropriate to use human rights to protect the core conditions of human life.⁸⁸ As a result of this approach we start to introduce Italian environmental rights protection from the institute of ombudsman.

⁸² Corte Costituzionale Sentenza 407/2002, available at <<https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2002&numero=407>>

⁸³ Il riordino del diritto ambientale – Giurisprudenza costituzionale, available at <https://www.camera.it/cartellecomuni/leg14/RapportoAttivitaCommissioni/testi/08/08_cap02_sch01.htm>

⁸⁴ Corte Costituzionale, Sentenza, available at <222/2013, <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=222>>

⁸⁵ Corte Costituzionale, Sentenza, available at <214/2006, <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2006&numero=214>>

⁸⁶ Corte Costituzionale: Servizio Studi – La tutela dell’ambiente, dell’ecosistema e dei beni culturali nei giudizi di legittimità costituzionale in via principale, available at <2002-2015. https://www.cortecostituzionale.it/documenti/convegni_seminari/stu_279.pdf>

⁸⁷ Corte Costituzionale, Sentenza 246/2013, available at <<https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=246>>

⁸⁸ Ibid. 1049.

The ombudsman enjoys a large measure of independence and personal responsibility and is primarily a guardian of correct behaviour. His function is to safeguard the interests of citizens by ensuring administration according to law, discovering instances of maladministration, and eliminating defects in administration. Methods of enforcement include bringing pressure to bear on the responsible authority, publicizing a refusal to rectify injustice or a defective administrative practice, bringing the matter to the attention of the legislature, and instigating a criminal prosecution or disciplinary action.⁸⁹

Although the legal institution of the ombudsman is widely recognized in fundamental levels, it is not mentioned in the Italian Constitution, the legal basis for its existence is Article 97: “*Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration.*” It is the job of ombudsman to reassure citizens that this provision is enforced.⁹⁰ Contrary to the general international practice, there is no national ombudsman in the state, but several regional ombudsmen (*difensore civico*). The legal institution was formally incorporated into the Italian legal system by Law No. 142 on the organisation of local authorities of 8 June 1990, although some Italian regions had previously known it in their own regulations.

Ombudsman act on the basis of local regulations (see Legislative Decree No. 2000/267 on the organization of local authorities) in environmental matters, *ex officio* or on the basis of reports of various forms of acoustic, aquatic, atmospheric and electromagnetic pollution.

According to the Italian constitution environmental protection is a state task, however, it contains more provision in connection with it and the related regulatory subjects.

5. The provisions of the Belgian constitution

5.1. Environment-related fundamental rights

Under Article 23 of Title II ‘On Belgians and their rights’, the Federal Constitution of Belgium⁹¹ (*La Constitution coordonnée*)⁹² adopted in 1994 affirms that “*Everyone has the right to lead a life in keeping with human dignity.*”⁹³ For this purpose, the laws shall ‘guarantee economic, social and cultural rights’. The same article enshrines and specifies six such rights: 1. the right to employment (upon which the text elaborates further so as to include the right to the free choice of an occupation, the right to fair terms of employment as well as the right to fair remuneration, etc.); 2. the right to

⁸⁹ Britannica.

⁹⁰ HandyLex II *Difensore civico*, available at <<http://www.handylex.org/schede/difensore.shtml>>.

⁹¹ For the English translation of the Belgian Constitution see the homepage of the Chamber of Representatives, available at <https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf>.

⁹² See the Belgium constitution.

⁹³ Chacun a le droit de mener une vie conforme à la dignité humaine.

social security, to health care and to social, medical and legal aid; 3. the right to decent accommodation; 4. the right to the protection of a healthy environment; 5. the right to cultural and social fulfilment; 6. the right to family allowances.

It is not easy to answer the question whether the above mentioned provisions of Article 23 have normative or declaratory force. It can be assumed that the purpose of this article was not to impose on the legislative or executive power of the state the task of implementing these provisions through immediate and concrete measures. This interpretation can be underpinned by the parliamentary debate preceding the adoption of the Constitutional text in question and by the nearly unanimous case law of the Belgian high courts. Nor do these paragraphs intend to establish subjective rights.⁹⁴ Indeed, the second paragraph of Article 23 only requires that the legislator take these rights – including that to the protection of a healthy environment – into account.⁹⁵ Yet, they are of course not without consequences for further legislation. They exercise the effect of a *standstill* or *non-retour* clause or principle, barring the legislator from lowering the level of protection already achieved. The Belgian case law, however, is not unanimous in defining what should be regarded as a level achieved: should it be the status quo at the time of the adoption of Article 23, a minimum standard of which no legislation can fall short; or should it rather be a reference level allowed to move upward only. In sum, standstill clause vs. the cliquet principle. The case law of the Council of the State (Conseil d'Etat) tends towards the latter.

The Belgian Constitutional Court has referred to the right to a healthy environment in a number of its decisions. It also made use of a third principle, namely *precautionary principle*. Here we mention two examples for the application of the *precaution* and the *standstill* principles:

By its Decision C.C. n° 34/2020, 5 mars 2020 the Court annulled a law that would have provided for the legal basis of an energetic infrastructural project, potentially endangering the habitat of a rare bird species. Applying the principle de precaution,⁹⁶ the Court shifted the burden of proof and ruled that it was the legislator's and the investor's responsibility to demonstrate the absence of environmental risks and they failed to do it.

The subject of Decision C.C. n° 6/2021, 21 janvier 2021⁹⁷ was a decree of the Municipality of Brussels concerning the building of parking lots. The norm in question would have resulted in the watering down of some environmental requirements. In fact, it would have raised the hurdle above which a full, prior impact study is required to 401 parking places, below which a simplified impact study would have henceforth sufficed. The Constitutional Court struck down the norm on the grounds that it was violating the standstill principle inherent in Article 23 of the Constitution. Furthermore,

⁹⁴ This term, widely used in the continental legal terminology, might be confusing for an English native speaker who is more familiar with the common law tradition and verbiage. The equivalent could be 'entitlement'.

⁹⁵ Haumont 2005, 41–52.

⁹⁶ See the Belgian Constitution Court Decision(a)

⁹⁷ See the Belgian Constitution Court Decision(b).

the Court could not identify any other significant public interest that would have justified an exemption from the existing environmental requirements.

Let us take a moment to examine whether the Constitution has something to say about future generations. Under Article 7bis, “*in the exercise of their respective competences, the Federal State, the Communities and the Regions pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations.*”⁹⁸ Therefore, there is no explicit mention of future generations. Yet, if we consider that under-age children have no direct, personal political representation in decision making and have but limited say in the shaping of their own future, then we have reason to believe that this article has the purpose to oblige all state institutions to take their interests as well into account. Thus, solidarity between generations includes the future generations. This reading is supported by the context, namely that the principle of solidarity between the generations is collocated with the objectives of sustainable development.

The institution of Ombudsman as such is not provided for in the Federal Constitution. A Belgian federal law established the institution of Ombudsman in 1995 under the name of Federal Mediator (*médiateur fédéral*).⁹⁹ In reality, the law set up a two-member college of a Dutch and a French speaking Federal Mediator. They have the role and power to deal with complaints against measures taken by the public administration at federal level. Besides, in the Belgian system there are a number of other institutions, agencies or offices called ‘ombudsman’. These are a fairly loose and heterogeneous ensemble of independent public services set up to represent the interest of certain social categories or consumer groups.¹⁰⁰

The concept of sustainable development (*développement durable*) appears in article 7 bis as quoted above, together with solidarity between the generations. However, other regulatory subjects related to environmental protection are not mentioned in the Belgian Constitution.

Summing up, environmental protection is not featured as a separate, *sui generis* value but it is presented in the context of economic, social and cultural rights, bound up with the right to health, one of the objectives being a healthy environment to whose protection people have an – albeit not subjective and directly enforceable – right. The conclusions to which László Fodor came in his study about the differences between the Flemish and the Walloon approaches to environmental protection still apply.¹⁰¹ The overly complex constitutional and institutional structure of the Belgian state does not make it easier for anyone to fully grasp the relevant legislation. It may be sufficient here to remark that while Wallonia has adopted a Code on the Environment,¹⁰² Flanders has not.

⁹⁸ „...l’Etat fédéral, les communautés et les régions poursuivent les objectifs d’un développement durable, dans ses dimensions sociale, économique et environnementale, en tenant compte de la solidarité entre les générations.”

⁹⁹ Loi du 22 mars 1995 instituant des médiateurs fédéraux.

¹⁰⁰ About it: Ombudsman.

¹⁰¹ Fodor 2006a, 31.

¹⁰² Code on the Environment.

7. Closing thoughts

According to the analysed and compared constitutional provisions and regulations, we consider that the Hungarian Fundamental Law is really detailed and concrete. It provides not only the right to a healthy environment but it regulates several relating regulatory subjects as well, such as the protection of nature recourses, the interest of future generation, sustainable development and a special and unique institution in connection with environmental protection and the protection of future generation, the institution of ombudsman.

In contrast, in Germany, Italy and Belgium environmental protection is regulated in the constitution but in another way. In Germany we can meet with a special 'solution', since environmental protection is provided by the federal and federal states' constitution but under the name of 'natural basis of life' which constitutes to be a state objective. In Italy environmental protection is especially mentioned by the constitution, however, is considered to be 'only' a state task. Thus, in these two countries it is not regulated as a fundamental right. Although, in Belgium environmental protection is provided as a right, but not as a separate one, it is mentioned within economic, social and cultural rights. Furthermore, the examined related regulatory subjects are more or less not mentioned or only relating provisions can be found. It can be stated that the constitutional regulation of the institution of ombudsman is absolutely unique in Hungary compared to the other examined countries.

After all we can see and summarize that there are big differences between the constitutional regulation of Hungary and the examined countries. While the Hungarian Fundamental Law puts big emphasis on the provisions in connection with environmental protection and is committed to it, until the other countries' constitution put less emphasis on it.

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