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A tartalomból – Contents

Krisztina BÁNYAI*

Thoughts on the principle of ne bis in idem in the light of administrative and criminal sanctions for the legal protection of animals**

Abstract

According to the well-developed interpretation of the principle of the ne bis in idem in the case law of the Court of Justice of the European Union and the European Court of Human Rights, the same conduct cannot be the subject of two proceedings or santions with similar functions and purposes. In Hungary the Constitutional Court has interpreted the rules of the ne bis in idem in administrative and criminal procedure for animal welfare fine and sanctions for cruelty to animals in Decision 8/2017. (IV.18) AB and the legislator settled its rules in Act on administrative sanctions which came into effect from the 1st of January, 2021. The recent study through practical issues approaches how principle prevails, its problems and possible solutions in the field of unlawful conduct in animal welfare, in particular regarding the role of the prosecutor.

Keywords: the principle of the the ne bis in idem, twofold assessment, prohibiton of double proceedings, identity of facts, parallel procedure, administrative procedure, administrative fine, animal welfare fine, criminal procedure, cruelty to animals, aggregation of sanctions, the role of prosecutor in the field of animal protection.

1. Introduction

Animal welfare in one of the European Union's priorities,[1] and the Trety of Lisbon recognizes animals as sentient beings.[2] Differentiated protection of animals is justified by their sensitivity and suffering ability.[3]

Krisztina Bányai: Thoughts on the principle of ne bis in idem in the light of administrative and criminal sanctions for the legal protection of animals – Gondolatok a ne bis in idem elvéről az állatok jogi védelmét szolgáló közigazgatási és büntetőjogi szankciók tükrében. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2021 Vol. XVI No. 31 pp. 7-38, https://doi.org/10.21029/JAEL.2021.31.7

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[1] Commission working document on a Community Action Plan on the Protection and Welfare of Animals 2006-2010 2006.

[2] Article 13, Treaty on the Functioning of the European Union.

[3] The preamble of Hungarian animal protection act emphasizes animals are living creatures that are capable of feeling, suffering and showing happiness, and it is a moral duty for every human being to respect them and guarantee their well being. Several european countries enacted this into law, most recently the british animal welfare act in May 2021, that animals with spinal cord are capable of emotion.

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Act XXVIII of 1998 on the protection and sparing of animals (Animal Protection Act, hereinafter referred to as: APA) was promulgated on 1st of April 1998 and entered into force on 1st of January 1999. Besides objective liability provisions and sanctions of Act, there has emerged a subjective, guilt-based criminalization of illegal behaviors against animals; from 24th of April 2004, the legislator enacted the crime of cruelty to animals in the Criminal Code, while repealing its offense form from 3rd of September 2004,[4] thus emphasizing the importance to criminalize unlawful conduct against animals.[5] In criminal law, cruelty to animals often appears as a cumulative act, such as when perpetrators killed and stole magnalica pigs at a pig farm, they were judged for cruelty to animals and theft, as this was a crime against property and against environment and nature. Cruelty to animals one of the criminal offenses against environment and nature and the crime was issue of two different protected legal subjects.

Sanctions for animal welfare offenses arise in areas governed by more than one legal field, and an unlawful conduct may have legal consequences in more than one legal field, which raises the issue of double assessment. The same unlawful act may be suitable for establishing administrative proceedings for violation of the provisions of the APA and for criminal proceedings for cruelty to animals contained in Section 244 of Act C of 2012 on the Criminal Code (hereinafter referred to as: Criminal Code). The basic idea is appropriate that the independent application of two sanctions in different jurisdictions would not be a question if we take dogmatic differences of the two proceedings into account. The basis of an administrative procedure for the protection and welfare of animals contains an objective responsibility and not only a natural person can be the subject to the procedure, while criminal proceedings can be examined on a subjective, criminal basis. The administrative procedure also covers a much wider range of unlawful conduct than the criminal assessment.[6]

According to the current wording of cruelty to animals in the Criminal Code, any person who is engaged in the unjustified abuse or unjustified mistreatment of vertebrate animals resulting in permanent damage to the animal's health or in the animal's destruction; or who abandons, dispossess or expels a domesticated vertebrate animal or a dangerous animal is guilty of a misdemeanor punishable by imprisonment not exceeding two years. The penalty for a felony shall be imprisonment not exceeding three years, if the criminal offense is carried out in a manner to cause undue suffering to the animal, or results in permanent damage to several animals or in the destruction of more than one animal.[7]

[4] Although in Act II of 2012 on minor offences, offence procedures and the registration system of offence eliminates the parallel procedures in Section 2 (4) that says no offence can be stated if the activity or omission constitutes a crime, as well as law if government decree orders an administrative fine.

[5] There are also ongoing efforts to tighten rule, for example, a referendum was initiated on 9th of December 2019 in order that cruelty to animals that caused the death of an animal to be punished by imprisonment only. The National Election Committee by 495/2019 NVB decision refused to authenticate the issue, as it concerns a prohibited subject.

[6] 8/2017. (IV.18.) AB decision [24].

[7] Criminal Code 244. §.

However, the constitutional principle of the prohibition of double assessment and punishment has pushed the possibilities of parallel proceedings of administrative and criminal proceedings into a new direction. This study reviews the regulation of the sanction system of the two proceedings and some practical problems of application of law from the perspective of the constitutional principle of the ne bis in idem, with special regard to the role of the prosecutor.

2. Interpretation of the ne bis in idem principle

2.1. In an international perspective

The principle of the ne bis in idem, the prohibition of double jeopardy and double jeopardy, is a principle of fundamental criminal origin designed to eliminate multiple proceedings. Internationally, issues have been resolved through mutual legal assistance agreements in specific cases on the basis of legal acts,[8] conventions on fundamental rights and the principle of mutual recognition,[9] and in most states the rules prohibiting ne bis in idem are laid down in separate legal instruments.

Under Article 14 (7) of the International Covenant on Civil and Political Rights,[10] "*no one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country*."

Article 4 of the Protocol No. 7 to the Convention for Protection of Human Rights and Fundamental Freedoms[11] is about the right "*not to be tried or punished in criminal proceedings for an offense for which one has already been acquitted or convinced, so it regulates the right of the accused in respect of a second proceeding in the same state."*

Under Article 50 of the Charter of Fundamental Rights,[12] applied by the courts of the European Union and the courts of the Member States,[13] "*no one shall be liable to be tried or punished again in criminal proceedings for an offense for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*."

[8] In Hungary, co-operation in criminal matters with other states is governed by bilateral and multilateral international treaties and, unless an international treaty provides otherwise, provided by Act XXXVIII of 1996 on International Mutual Assistance in Criminal Matters.

[9] For example, under Article 9 (non bis in idem) of the European Convention on Extradition of 13 December 1957 in Paris, extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested.

[10] Adopted by the United Nations General Assembly on 16 December 1966.

[11] Convention by Council of Europe, signed at Rome on 4 November 1950, officially proclaimed in Hungarian: Convention for the Protection of Human Rights and Fundamental Freedoms.

[12] Charter of Fundamental Rights of the European Union (2012/C 326/02).

[13] According to the of Article 6 (1) of the Treaty on European Union: 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. It entered into force on 1 December 2009, the date of entry into force of the Treaty of Lisbon.

Article 54 of the Convention Implementing the Schengen Agreement[14] on the application of the principle of the ne bis in idem says: "*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.*"

The principle of the ne bis in idem has been enshrined in national laws by Constitution and in certain Acts of procedural law as a directing principle arising from the principle of legality, for limiting the criminal power of the state. The prohibition of double assessment was soon transferred to the practice of other areas of law, as unlawful conduct cannot be assessed only in criminal law. The case law of the ECtHR[15] and the CJEU[16] has repeatedly raised the issue of double sanctioning, administrative and criminal, on the basis of the same factual acts.

The CJEU stated in Åkerberg Fransson judgment[17] regarding the cumulation of tax law and criminal law sanctions (in particular non-payment of value added tax) that the ne bis in idem principle does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of valued added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine. In this case the opinion of the Advocate General emphasized that it is practice of the Member States of the European Union to prescribe sanctions of different legal fields, especially in issues of taxation,[18] environment and public security. Double sanction does not constitute an infringement of the ne bis in idem principle in itself, provided that the administrative sanction and the criminal sanction are applied with respect to each other; thus, for example, with the reduction of the penalty by the administrative sanction previously imposed.[19]

In case A and B v. Norway,[20] the ECtHR has given a broad interpretation to the ne bis in idem principle, stating that two criminal type sanctions may be imposed under certain conditions and that proceedings should be considered as a whole if there is a close material and temporal connection between them, and the purpose and means of the procedure are complementary and the consequences of the procedure are

[14] 42000A0922 (02), incorporated into the primary law of the European Union by the Treaty of Amsterdam, which entered into force on 1 May 1999. Although, under Article 55 (1) any Contracting Party may declare that Article 54 is not bound for a state in the cases listed, but in accordance with Article 56, the custodial sentence already served by the convicted person, or even the non-custodial sentence, shall be taken into account in the new criminal proceedings. Article 58 of the Convention does not preclude the application of more comprehensive national provisions relating to the principle of the ne bis in idem to judgments given abroad.

[15] European Court of Human Rights.

[16] Court of Justice of the European Union.

[17] Åklagaren v Hans Åkerberg Fransson C-617/10. Judgment of 26 February 2013.

[18] The Member States' free choice of sanctions is justified by the need to ensure the collect of value added tax (VAT) revenue, thus protecting the financial interests of the Union. See more about this: Harmati & Kiss 2016, 63–68.

[19] Opinion of Advocate General P. Cruz Villalón in Case C-617/10, 94. and 96.

[20] Judgment of 15 November 2016, 24130/11., 29758/11.

foreseeable and proportionate to the person concerned. In Menci case,[21] the CJEU entrusted to national courts the limitation of the additional burden of the accumulation of proceedings and sanctions to the extent that is strictly necessary regarding the burden of the committed infringement.

In order to establish a conflict with the prohibition of double assessment, the ECtHR applied the so-called Engel criteria[22] that was developed in an earlier case and which practice the CJEU eventually adopted with the Bonda case,[23] interpreting the concept of a crime and providing a broader interpretative framework for the ne bis in idem principle. The Engel criteria examine three rounds of assessment: whether an act constitutes a criminal offense under national law, the nature of the offense and the nature and gravity of the sanction applied, whether it is intended to be deterrent or preventive. For example, if two proceedings of a criminal nature have been instituted against a person, and both proceedings concern the same unlawful act (idem) and therefore two sanctions (bis) have been imposed in parallel, which are effective, proportionate and dissuasive, these are against ne bis in idem principle.

It is very important if the dual proceedings had foreseeable consequences, if they were proportionate and that the authorities made every effort to avoid double assessment. Thus, a broad interpretation of the principle of ne bis in idem was crystallized. Under the concept of the same act, historical identity must be taken into account, regardless of the legal classification and the subject protected.[24]

2.2. Ne bis in idem in Hungarian animal protection and 8/2017. (IV.18.) AB decision

The Hungarian Constitutional Court (hereinafter referred to as: AB) in 38/2012. (XI.14.) AB decision stated that, with view of the practice of the ECtHR, judging the criminal nature of the examined conduct based on three factors. It examines whether the unlawful conduct which is the subject of the procedure constitutes a crime in the legal system of that state, it examines the nature of the unlawful act and the nature and burden of the sanction placed in perspective or applied. Administrative law sanctions and minor offenses are also taken as criminal matter. When classifying administrative sanctions, the criminal nature of the conduct can be judged if the purpose of the declaration the unlawfulness, and the substantive or procedural legal regulation and the applied form of liability have the peculiarities of the criminal legal regulation.

The Constitutional Court in 8/2017. (IV.18.) AB decision interpreted the principle of ne bis in idem regarding the prohibition of twofold assessment of animal welfare fines and criminal liability for cruelty to animals, taking the established

[21] Luca Menci C-524/15. Judgment of 20 March 2018.
[22] Judgment of 8 June 1976 in case Engel and Others v Netherlands 5100/71, 5101/71, 5354/72, 5370/72.
[23] Lukasz Marcin Bonda C-489/10. The judgment of 5 June 2012 applied the Engel criteria in the context of the reduction or exclusion of agricultural support due to the unreal information provided in the application for in the light of criminal proceedings for fraud.
[24] Leopold Henri Van Esbroeck Case C-436/04., Judgment of 9 March 2006, paragraph 2.

European case law, accepting the level of legal protection of fundamental rights enshrined in international treaties and in the related case law as a minimum measure.[25]

According to the historical facts, a pet keeper drowned five puppies of his dog in the spring of 2011, for which he was fined to 125,000 HUF for the criminal offense of cruelty to animals, and a few months later the notary fined him to 450,000 HUF on the basis of the facts established in the criminal case. The keeper finally brought an action against the final administrative decision to court, complaining for double punishment. In the lawsuit for the judicial review of the administrative decision on the animal welfare fine the judge suspended the trial and turned to AB.

The AB stated that the during the application of Section 43 (1) and (4) of the Act, the constitutional requirement of legal certainty and ne bis in idem under Article B (1) and Article XXVIII (6) of the Fundamental Law of Hungary, comes that an animal welfare fine may not be imposed on the same person for the same unlawful act if the criminal liability has been determined. Besides it rejected the judicial initiative to annul the objected legislation.

Article XXVIII (6) of the Fundamental Law says "*with the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty and a legal act of the European Union, in another State, as provided for by an Act.*" From the requirement of predictability arising from legal certainty the legislator should regulate the relationship between the various procedures if a conduct is threatened with criminal sanction but it is accompanied by a legal consequence falling within another law field.

Thus, the principle of ne bis in idem does not in itself exclude a person being the subject of several proceedings under the different laws but with a different function for the same unlawful act, which may result in a legal sanction.[26] The criterion of discrimination will be the nature of the legal sanction, i.e. if there is a sanction for a crime, an administrative sanction with a repressive purpose cannot be applied either. AB pointed out that from the principle of ne bis in idem comes the constitutional requirement of prohibition of twofold assessment and for the same act in criminal and administrative law sanctions. And to settle the rules arising from the principle of legal certainty is a legislative task.

3. Sanction Act and the prohibition of twofold assessment

In order to avoid the double sanctions for the same unlawful act as a result of two parallel or consecutive (administrative and criminal) proceedings with the same content, purpose and function the Act CXXV of 2017 on Administrative sanctions was enacted (hereinafter referred to as: Sanction Act), and after several amendments it finally entered into force on 1st of January 2021.

[25] 32/2012. (VII.4.) AB decision [41]; 3206/2014. (VII.21.) AB decision [30]; 32/2014. (XI.3.) AB decision [50].
[26] 8/2017. (IV.18.) AB decision [49].

Act CLXVIII of 2020 helps its work and tries to establish the coherence of existing legislation at sectoral level by amending certain legislation.

This study, without evaluating Sanction Act, merely seeks to answer the question of whether this legislation is appropriate to avoid multiple proceedings and multiple sanctions of administrative fines for animal protection and criminal liability for cruelty to animals in accordance with the principle of idem. The question is whether this codification would help European standards and the basic system of domestic law to function effectively and to enforce the law.

The scope of Sanction Act extends to the legal consequences (administrative sanction) established by a substantive decision of the administrative authority in case of violations of law (administrative infraction) in administrative authority proceedings based on the Act CL of 2016 on General Public Administration Procedures (hereinafter referred to as: General Public Administration Procedure Act). This introduces the concept of administrative infraction, which is not covered by sectoral legislation, and the term administrative sanction is usually replaced by the word fine (see animal welfare fine in our case), so there is no uniform terminological background, as there are so many specific ones. The regulatory technique of the Sanction Act is specific, discrepany from the act is only permitted if the act allows it itself.

For an administrative infraction the administrative authority shall impose an administrative sanction which may be imposed on a natural person, a legal person or a person with no legal personality who has been found liable for the administrative infraction.

The administrative sanctions for an administrative infraction named in the Sanction Act – thus falling within its scope – are notification, administrative fines, prohibition from carrying out the activity and confiscation, which can be applied even if no liability has been established. The institution of the originally planned administrative bail (a financial disadvantage of a collateral nature, which would have been returned after a year) has been removed from the Act, so its problems should not be examined. However, Sanction Act points to the fact that a law or a government decree issued in its original legislative authority may impose additional administrative sanctions. There are about fifty sectoral legislation, so there are a lot of other instruments. The main objective of Sanction Act is the gradation of administrative sanctions, so the first step is the notitication, which is an expression of disapproval of the authority for preventive purposes, but in some cases its application is excluded.[27]

For enforcing the principle of ne bis in idem, Sanction Act rules that if a court in its final decision has convicted a natural person for an unlawful conduct on the basis of the same facts and imposed a penalty or a measure on him or her; or has acquitted him or her on the grounds that the crime was not committed by the accused;[28] no administrative fine or prohibition from an activity shall be imposed.[29]

[27] Notification is excluded, for example, in cases of Act LIII of 1996 on the Protection of Nature, Section 80 (5a).
[28] Act XC of 2017 on criminal proceedings (Criminal Procedure Code, hereinafter referred to as: CPC) Section 566 (1) b).
[29] Sanction Act Section 5/A.

The reason for the acquittal is therefore relevant, since in the case of other grounds for dismissal, any sanction of the Sanction Act can be applied. Of course, any sanction can also be considered for a fact that has not been assessed in a criminal case (residual facts) or against a natural person whom has not been assessed in a criminal case. If the acquittal is based on the absence of evidence,[30] the assessment of the evidence can be carried out independently by the administrative authority, as the administrative authority carries out an evidentiary procedure if the available data are not sufficient to make a decision, freely choosing and evaluating the method of proof and the available evidence.[31] The administrative lawsuit is not bound either by the decision or disciplinary decision of another authority, or by the facts established therein, except for a final adjudicated criminal liability.[32]

Sanction Act provides that if the authority imposing an administrative sanction becomes aware that criminal proceedings are in progress for the same unlawful conduct on which its procedure is are based and the application of the administrative sanction depends on the criminal procedure, the administrative authority shall suspend its procedure until the criminal procedure is concluded.[33] Consequently, administrative sanctions of notification and confiscation can be applied regardless of criminal liability based on Sanction Act as well as other administrative sanctions or measures not covered by Sanction Act, distinguishing criminally and non-criminally threatened administrative infractions. The legislator thus emphasized the primacy of criminal assessment, as it makes the administrative procedure dependent on it. Criminal law threat is ultima ratio in the toolbox of law or it should be. However, it often happens that administrative procedure starts and ends earlier than a criminal procedure does, and the other authority may not even be notified about it. In this respect, however, Sanction Act does not contain any practical rules, it presumes the primacy of the criminal assessment and that the administrative authority also detects this circumstance in time. Administrative proceedings can sometimes produce more results in a shorter period of time than criminal proceedings and may even have a greater deterrent effect.[34] The ultima ratio nature of criminal prosecution for cruelty to animals is broken by the fact that administrative sanctions sometimes place a greater burden on a person who engages in illegal conduct, and the legal consequences of different weights even raise the question of which law is "cheaper" to prosecute.[35] The main objective of Sanction Act is to reduce the payment obligations of citizens and undertakings and, in this context, to limit the scope of sanctions that create a real financial disadvantage.[36] Although this applies to gradual sanctions, it is feared that the reduction of material burdens will be the main principle in multiple proceedings and not necessarily based on the infraction committed.

[30] CPC Section 566 (1) (c).
[31] General Public Administration Procedure Act Section 62 (1) and (4).
[32] Act I of 2017 on Administrative Procedure Ordinance Section 85 (6)–(7).
[33] Sanction Act Section 5/B.
[34] Beszámoló 2018, 49.
[35] More about this Kajó 2021.
[36] Second paragraph of the general statement of reasons to the Sanction Act.

Sanction Act orders to record administrative sanctions in the Register of Administrative Sanctions from the period after its entry into force on 1st of January 2021. The Act does not help the application of law by providing transitional provisions or prohibiting retrospective effect, thus offerss a kind of tabula rasa that is unfair and disproportionate, as these data are taken as a condition of the application of a fine. This public register shall contain data for a period of three years from the date of registration (in theory it is the date of the final administrative decision), which may be accessed by the sanctioning administrative authority in the course of its proceedings. The register is therefore intended to facilitate the gradual sanctioning of administrative infractions and not to eliminate duplication of procedures, because it is not linked to other registers and contains only the decisions of administrative authorities which have been definitively finalized, not those in progress. For this reason, there would still be a need for communication between authorities and even between different areas of the authority. It would be worth considering making this register available to other non-administrative bodies, or even entrusting its management to an organization that is already involved in criminal proceedings.

A good example of communication in various fields is the Prosecutor General Regulation No. 1/2014. (III.31.) on the environmental activities of the Prosecution Service, which emphasizes high importance of special cooperation in the process of environmental prosecution activity, which means the mutual transfer of information, data and documents in compliance with the requirements of continuity and topicality. In practice, this interdisciplinary cooperation means that criminal law prosecutor in case of crimes affecting Chapter XXIII[37] of Criminal Code informs prosecutor of public interest by sending a copy of the decision rejecting the report, or of the termination decision of investigation, or the expert opinion in the case, as well as the indictment and the court decision in the criminal case. But in the same way, vice versa, the public interest prosecutor also transmits information relevant for the criminal prosecutor, or may even initiate criminal proceedings.

The three-year registration period is adjusted to the limitation period of Sanction Act.[38] Nevertheless Sanction Act itself pushes the deadline, since it regulates that if criminal proceedings have been initiated for the infringing conduct on which the administrative proceedings are based, an administrative sanction may still be imposed for a period of one more year from the end of the criminal procedure. The regulation on the previous five-year objective limitation period has been removed from the animal protection act.

Administrative fines and prohibition from an activity are priority sanctions. While respecting the principle of ne bis in idem, Sanction Act precludes the application of these administrative sanctions in the case when unlawful conduct is assessed under criminal law, so these depend on the outcome of the criminal proceedings. Sanction Act contains a specific list as a condition for the imposition of an administrative fine, but it is not necessarily able to capture the specifics of the animal welfare administrative

[37] Criminal Code Section 241–252. amongst also cruelty to animals is contained in Section 244.
[38] The subjective limitation period for an administrative sanction is six months from the detection, while the objective one is up to three years.

procedure. In case an act may remain unpunished or administrative proceedings may be reduced to sanctioning the rest that criminal proceedings have not assessed. According to András Zs. Varga,[39] the application of an administrative sanction should not normally depend on other law sanctions, and if the subjective, criminal-based criminal sanction were omitted for any reason, then the administrative law liability would be an advanced rest-liability. Letting the violation of administrative law rules without any sanction would not serve the order.[40] Sanction Act regarding the double assessment of animal welfare fines and cruelty to animals criminalization, still does not regulate precisely the case when for some reason the administrative procedure precedes criminal procedure. According to Sanction Act the primacy of criminal assessment is the rule and the administrative procedure is adjusted to it. From this phenomenom comes the fear that this may lead to the degradation of administrative liability to a simple mathematical formula, or it easily may mean that administrative procedure is limited to assessing the residual conducts after the criminal procedure. It cannot be the aim of the legislator. Administrative sanctioning is an objective measure, it cannot depend on criminal proceedings, but it has to pay attention to it because of ne bis in idem principle. Due to the requirement of legal certainty, this must be foreseeable and predictable.

In the field of animal protection, in addition to imposing an administrative sanction, the animal welfare authority may take a number of measures,[41] requiring the keeper to tolerate, or stop an act that is a breach of animal welfare and animal welfare rules, it can impose an obligation, restrict or prohibit the keeper from keeping an animal for a period of 2 up to 8 years depending on the gravity of the infraction. Prohibition may mean a higher financial disadvantage than a suspended imprisonment.

A person who violates or fails to comply with the provisions of law or an authoritative decision on the protection and welfare of animals is obliged to pay an animal welfare fine. The APA in its wording prescribed the imposition of an animal welfare binding, however, the Sanction Act in the case of a criminal threat to an unlawful conduct expressly prohibits it. This would have been worth amending in accordance with the ne bis in idem principle.[42] Payment of the fine does not exclude other legal consequences. Regarding APA mentions the obligation to training on animal protection or, for example, a ban on keeping an animal or animal species,[43] but it may even result the confiscation of the animal. The basic amount of the animal protection fine is 15,000 HUF, but if the victim of the infraction is a pet animal, the basic amount

[39] The parallel opinion of András Zs. Varga to 8/2017. (IV.18.) AB to the decision [82]–[87].
[40] 8/2017. (IV.18.) AB decision [79]–[89].
[41] According to APA Section 42/D an authority, for example, can revoke a permit of functioning, can close an establishment or part of it, can revoke a keeping permit, and can oblige the animal welfare officer to carry out a new training.
[42] If the legislator imposes a mandatory imposition of a fine, the legislator may not disregard this legal consequence if it is established that an infraction has been committed. See the 2013.El.II.JGY.1/1/1. II.4.1, 26 of the summary opinion prepared by the law practice-analysing group set up at the Curia on the subject of the examination of "Administrative fines".
[43] APA Section 43 (9).

of the fine is 75,000 HUF.[44] Government Decree No. 244/1998 (XII.31.) on fines for the protection of animals (hereinafter referred to as: Government Decree) increases the basic amount of the fine by multipliers depending on the circumstances of the infraction.[45] The highest is the multiplier is ten that must be applied in the case of killing an animal without an acceptable reason or circumstance, or torturing an animal, or in case of abandonment, expulsion, animal fight or inciting an animal. In criminal law, according to the principle of gradation, the minimum of a fine of a perpetrator punished for cruelty to animals is 30.000 HUF when the administrative fine can be a fine of millions.[46]

The perpetrator of the crime is a natural person and not necessarily the keeper of the animal, while an administrative infraction is typically committed by the keeper of the animal, who may even be a legal person against whom the Act CIV of 2001 on criminal measures against legal persons may be applied. Measures (termination of a legal person, restriction of the legal person's activities or a fine) can be applied in the case of an intentional crime, or if the crime was intended or resulted in gaining an advantage for the legal person or was committed using the legal person.[47]

If a keeper who was obliged to participate in animal protection training does not fulfill this obligation voluntarily, the animal protection training or the remaining part of it shall be replaced by an animal protection fine. The question may arise whether the financial conversion of the omission constitutes a pecuniary and repressive sanction or not and if it infringes the principle of ne bis in idem. Because in case of non-fullfillment of animal welfare training the fine would be at least 100,000 HUF, and an animal protection fine of 50,000 HUF corresponds to participation in one day of training.[48] The obligation to report regularly on the keeping and health status of the animals and the use of a person with husbandry experience for the species shall not rise a conflict in case of twofold assessment.

Overall, the criminal law assessment does not affect the aplication of administrative sanctions not defined as primary in Sanction Act, or outside its scope.

[44] APA Section 43, and Government Decree Section 2 (1) regulates that the basic amount of the fine is fifteen thousand forints, and from the 7th of January, 2021, in the case of a pet animal, it is seventy-five thousand forints.

[45] It depends on the case of several conducts or whether the infraction directly affects the welfare of the animal, or how many vertebrate animals are affected, or whether the act causing the infraction was committed intentionally, or it is a repeated infraction of the same facts within three years. The highest multiplier should be applied for intentional conduct. Government Decree Section 2 (6) f).

[46] Of the 78 cases investigated by Kajó, the highest fine was 300,000 HUF, while notaries and district offices imposed fines of millions, tens of millions, for example a fine of 1.6 million HUF was imposed by a notary to an animal keeper because his pet regularly roamed the streets in a self-walking way without having vaccinated against rabies vaccine or a chip, and even caused a traffic accident. Besides a livestock farm was fined to 26 million HUF.

[47] Act CIV of 2001. Section 2 (1). Regarding this issue Council Regulation No 2988/95. and Council of Europe Recommendation R (91) 1 should be considered as options for regulating the liability of legal persons.

[48] Government Decree Section 3.

Many other sectoral administrative sanctions or measures which are not listed in Sanction Act can be applied freely. If an administrative violation occurs, that can result in a priority sanction of the Sanction Act, the result of the criminal proceedings should be taken into account.

4. Further questions and suggestions

Several states place the determination of the direction of proceedings in the hands of the prosecutor,[49] as an actor who also has an insight into the criminal proceedings and has the power to bring civil actions and to initiate a number of official proceedings.

In Hungary, the prosecutor, as a contributor to the administration of justice, shall contribute to the administration of justice by exclusively enforcing the State's demand for punishment as public prosecutor. The prosecution service shall prosecute criminal offenses and take action against other unlawful acts and omissions, as well as contribute to the prevention of unlawful acts.[50] In its non-criminal competence as a guardian of public interest, exercise further functions and powers laid down in the Fundamental Law or in an Act.[51] In order to protect public interest, the Prosecution Service shall participate in ensuring that every person observes the law. If legal regulations are violated, the Prosecution Service shall take action to protect legality in the cases and in the manner specified by legislation.[52] Separate laws on the public interest tasks and powers of the prosecutor's office other than criminal law as a participant in the judiciary are provided for in the law. The prosecutor exercises these powers primarily by instituting court and non-litigation proceedings (right of action) and by initiating official proceedings and bringing legal remedies (action) in order to remedy the offence.[53] The prosecutor's duties related to environmental and nature protection are performed by the prosecutors appointed for this purpose at county or capital city office of the Prosecutor General,[54] the prosecutor's duties related to environmental protection and the two-way mechanism of co-operation between the criminal and public interest fields have been regulated separately.[55] From the point of view of twofold assessment, it may be reasonable to involve the prosecutor more widely in different proceedings and even to have rights over the register of administrative sanctions.

[49] In Croatia, since the case of the ECtHR in Maresti v. Croatia (55759/07), the legal environment has changed due to compliance with the ne bis in idem principle, in order to exclude double proceedings, the main initiator of the various proceedings is the prosecutor. Bizjak 2015, 54.
[50] Article 29 (1) of the Fundamental Law of Hungary.
[51] Article 29 (2) d) of the Fundamental Law of Hungary.
[52] Act CLXIII of 2011on the Prosecution Service, Section 1 (2).
[53] Act CLXIII of 2011on the Prosecution Service, Section 26 (1).
[54] Prosecutor General Directive No. 3/2012. (I.6.) on the public interest tasks of the Prosecution Service, Section 68.
[55] Prosecutor General Regulation No. 1/2014. (III.31.) on the environmental activities of the Prosecution Service.

In Hungarian penalty system, the most common penalties for cruelty to animals are fines, suspended imprisonment, and also community service work. Some animal rights' activists suggest animal shelters to be the place where the sentence of community service work can be fulfilled. However, this is not so simple, as the willingness of employers cannot be enforced, it requires a voluntary declaration of employment so it is difficult to find a workplace, and the convicting court has no influence on it. In addition, the execution of community service work is often inefficient due to the convicted person's own fault. (does not appear in the probation procedure, does not cooperate in accordance with the law, etc.) Prohibiton to exercise professional activity should also be mentioned that may be imposed upon a person who has committed a criminal offense through the violation of the rules of his/her profession requiring professional qualifications; knowingly, by using his profession, either has the necessary qualification for the profession.[56] But the introduction of prohibition to animal husbandry as a measure,[57] or as a rule of conduct besides the penalty, have also been raised.

Cruelty to animals may even involve deferral of prosecution,[58] as an option for diversion instead of prosecution, which is a means of prosecutorial discretion based on the principle of opportunism. The prosecutor's office may suspend the proceedings if the dismissal can be expected in view of the suspect's future conduct,[59] and the proceedings shall, as a general rule, impose a sentence of no more than three years' imprisonment, just like cruelty to animals. It is not a decision made in a court proceeding, but it does affect the merits of the case, as after the successful expiry of the period of suspension, the prosecutor terminates the proceedings in this regard. Sanction Act in Section 5/A. mentions only a criminal conviction or acquittal by a court decision as the reason for the exclusion of priority administrative sanction, it does not cover the proceedings terminated by the prosecutor. In international relations, in some states, the closure of criminal proceedings by a prosecutor is seen as a conviction in another state,[60] it would be worth avoiding double assessment in such a case as well, accepting the dismissal decision of the prosecutor. That would meet the requirements of legal certainty and predictability. The provision providing for the principle of ne bis in idem refers to acquittals and convictions, and the constitutional provision containing the presumption of innocence explicitly and exclusively links the

[56] Criminal Code Section 52. 1 (a)(b) and (2).
[57] Beszámoló 2018, 49.
[58] CPC Section 416–420.
[59] Given the nature of the crime, the manner in which it was committed and the identity of the suspect, a favorable change in the suspect's behavior is expected from this parole. CPC Section 416 (2) b).
[60] Joined Cases C-187/01 and C-385/01 Criminal proceedings against Hüseyin Gözütok and Klaus Brügge. In the case of Gözütok the decision of the Dutch public prosecutor's office and in the case of Brügge the decision of the German public prosecutor's office was taken into account by the German and Belgian authorities respectively.

final determination of criminal liability to a final court decision, so currently only a court decision is capable of producing a res iudicata effect.[61]

The biggest problem in practice is the temporality problem already indicated; if an administrative procedure has been initiated in an administrative procedure on animal protection case has been completed but in the meantime or afterwards a criminal procedure starts. It is of a theoretical nature, as the administrative clerk can detect and indicate the existence of a criminal offense at the beginning of the administrative proceedure, but this is not always perceptible. So in this case, the administrative decision is legally created as a result of a legal procedure. However, there is no possibility of being this 'taken into account' in any way in criminal proceedings, furthermore the fact of an administrative authority decision may not be either revealed. However, a consistent interpretation of ne bis in idem principle would justify the avoidance of twofold assessment.

The possibility of remedies against the administrative could arise upon request (administrative lawsuit or appeal procedure) or ex officio in accordance with the provisions of the General Public Administration Procedure Act. In the latter case, amending or revoking the decision can fall within the authority's own competence, but the procedure can be initiated by the prosecutor either,[62] which may also justify the prosecutor's participation in animal protection proceedings.[63] It seems problematic to establish the subsequent illegality of an otherwise lawful administrative decision at the time of its adoption, if we insist on the primacy of criminal proceedings in case of twofold assessment. Regarding the administrative decision, Tibor Lengyel points to another practical example in his study,[64] when after the – among others – 252,000 HUF administrative fine, the court during the review of the administrative decision has decreased the fine with the amount of 100,000 HUF fine imposed in the criminal procedure following the basic administrative decision. Thus a criminal sanction, that was applied subsequently in time after the administrative procedure, was taken into account despite of the fact that the prohibition of twofold assessment was emerged in the criminal procedure. It would be entirely appropriate to validate the preliminary administrative procedure as a mitigating circumstance during the imposition of a penalty at criminal courts. In this way, the principle of ne bis in idem could be fully enforced in a guaranteed manner, avoiding the accumulation of administrative and criminal sanctions without degradating the administrative procedure, and thus the constitutional principle of a fair trial could prevail. As Ágnes Czine pointed out, the final decision on liability in animal welfare proceedings should also have an impact on the sanction imposed in criminal proceedings.[65]

[61] See Court decision BH2018.301, which expressed that view in relation to the interpretation of Article XXVIII. (2) and (6) of the Fundamental Law.
[62] General Public Administration Procedure Act Section 113.
[63] It is important to emphasize that in the absence of scheduled prosecutorial investigations in the previous period, this now requires a starting circumstance (notification, application, etc.).
[64] Lengyel 2020, 65–66.
[65] Dissenting opinion of Ágnes Czine to 8/2017. (IV.18.) AB decision [110].

The multifaceted issue of prohibiton is also problematic, because the Sanction Act takes prohibition to exercise an activity as a priority sanction and does not allow it to be applied solely depending on the outcome of the criminal proceedings. In the APA, the prohibition can be ordered by the administrative authority in its own competence or on the initiative of the prosecutor, but conceptually it causes some confusion that there is also a prohibition in civil proceedings. The law may entitle the prosecutor to bring an action, in particular in connection with the protection of the environment, nature and arable land. In case of such an action, the public interest in the proceedings shall be presumed.[66] In case of breaking rules of animal welfare and protection, the prosecutor is entitled to bring an action for prohibition from an activity or compensation for the damage caused by the activity.[67] The legal consequence of bringing an action is not a sanction in legal terms, but in substance it is, as a civil law obligation initiated on the basis of public interest has a negative effect on the defendant's living conditions as a repressive legal consequence of the infringing conduct. So the question is whether it is consistent with the ne bis in idem prnciple if we examine strictly the Engel criteria. The civil law aspect of prohibition cannot be included in the conceptual framework of prohibition in criminal or administrative law. In the case of an action for damages caused by an activity, it is not in clear to whom the damage is, whether it can be enforced in other legal ways and under what conditions. In the case of a civil law prohibition, it is also questionable how such a prohibition can be enforced in the absence of voluntary performance. Otherwise, this type of civil action is rare in practice, we encounter such actions more often in the activities of animal welfare NGOs in this field, as they have been given a specific role in animal welfare; on the one hand, they have the status of a client in official proceedings brought by them for breaches of animal welfare legislation; on the other hand, such an organization may also bring an action for prohibition of unlawful conduct.

5. Closing remarks

Overall, such practical problems can emerge in the application of the Sanction Act indicated above. Thus, a comparison between the administrative procedure for the protection of animals and criminal proceedings for cruelty to animals would justify the existence of a more transparent registration system in terms of the ne bis in idem principle, the precise relationship between the different proceedings, the appropriate communication between the bodies and, possibly, the control of a coordinating body. The further clarification of Sanction Act is needed in order to avoid the accumulation of sanctions, perhaps it may have been better for the Constitutional Court in its relevant decision to annul the provisions of the Act on animal welfare fines with a future effect[68] in order to ensure full re-regulation, as further practical can occur in this area in the future.

[66] Act CLXIII of 2011 on the Prosecution Service Section 27 (5) (e) and (6).
[67] APA Section 44 (2).
[68] Dissenting opinion of Ágnes Czine to 8/2017. (IV.18.) AB decision [114].

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Gondolatok a ne bis in idem elvéről az állatok jogi védelmét szolgáló közigazgatási és büntetőjogi szankciók tükrében**

1. Bevezetés

Az állatok jóléte az Európai Unió egyik prioritása,[1] a Lisszaboni Szerződés az állatokat érző lényként ismeri el.[2] A állatok megkülönböztetett védelme az érző- és szenvedőképességük okán indokolt.[3]

Magyarországon az állatok védelméről és kíméletéről szóló 1998. évi XXVIII. törvény (a továbbiakban: Átv.) 1998. április 1-jén került kihirdetésre és 1999. január 1. napján lépett hatályba. Az Átv. objektív felelősségi alapú előírásai és szankciói mellett megjelent az állatokkal szemben tanúsított jogellenes magatartások szubjektív, vétkességi alapú pönalizáltsága; a jogalkotó 2004. április 24. napjától a Büntető Törvénykönyv tényállásai közé emelte az állatkínzás tényállását, míg annak szabálysértési alakzatát 2004. szeptember 3. napjával hatályon kívül helyezte,[4] ezzel is hangsúlyozva az állatokkal szembeni jogellenes magatartások kriminalizáltságának

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** *A tanulmány az Igazságügyi Minisztérium jogászképzés színvonalának emelését célzó programjai keretében valósult meg.*

[1] A Bizottság munkadokumentuma az állatjóllétért és az állatok védelméért 2006 és 2010 között folytatott közösségi cselekvési tervről 2006.

[2] Az Európai Unió Működéséről szóló Szerződés 13. cikke.

[3] A magyar állatvédelmi törvény preambuluma utal az emberiség számára megkülönböztetetten nagy értéket jelentő állatok érző-és szenvedésképességére, aminek a tiszteletben tartása, jó közérzetük biztosítása minden ember erkölcsi kötelessége. Számos európai ország rögzítette ezt törvénybe, legutóbb a 2021 májusában elfogadott brit állatvédelmi törvény, hogy a gerincvelővel rendelkező állatok képesek érzelmekre.

[4] Bár a szabálysértési jog párhuzamosságát a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről szóló 2012. évi II. törvény 2. § (4) bekezdése kiküszöböli, mivel e jogszabályhely eleve rögzíti, hogy nem állapítható meg szabálysértés, ha a tevékenység vagy a mulasztás bűncselekményt valósít meg, úgyszintén, ha a tevékenységre vagy mulasztásra törvény vagy kormányrendelet – az eljárási bírság kivételével – közigazgatási eljárásban kiszabható bírság alkalmazását rendeli el.

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igényét.[5] A büntetőjogi értékelésben gyakorta halmazati cselekményként jelenik meg az állatkínzás, például mikor az elkövetők egy sertéstelepre bemenve mangalica sertéseket öltek le és tulajdonítottak el, a bíróság pedig a lopás vétsége mellett az állatkínzás vétségét is megállapította, mivel e magatartás egyszerre valósított meg vagyon elleni bűncselekményt, illetve a környezet és természet elleni bűncselekmények körébe tartozó állatkínzás bűncselekményt a két különböző védett jogi tárgy okán.

Az állatvédelemmel kapcsolatos jogellenes cselekmények szankcionálása több jogág szabályozási körébe tartozó területen felmerül, egy jogellenes cselekmény akár több jogágba tartozó jogkövetkezményt vonhat maga után, ami felveti a kétszeres értékelés kérdését. Ugyanazon jogellenes cselekmény alkalmas lehet az Átv.-ben foglalt előírások megsértése miatti közigazgatási eljárás, illetve a Büntető Törvénykönyvről szóló 2012. évi C. törvény (a továbbiakban: Btk.) 244. §-ában foglalt állatkínzás miatti büntetőeljárás megalapozására. Helytálló az alapgondolat, miszerint két, egymástól eltérő jogágba tartozó szankció egymástól való független alkalmazása nem lenne kérdéses, ha a két eljárás dogmatikai különbségeit vesszük. Az állatok védelmére és kíméletére vonatkozó közigazgatási hatósági eljárás alapja mindig egy objektív felelősség, és nemcsak természetes személy lehet az eljárás alá vont, míg a büntetőeljárás szubjektív, bűnösségi alapon vizsgálható. A közigazgatási eljárás továbbá jóval szélesebb jogellenes magatartási kört ölel fel, mint a büntetőjogi értékelés.[6]

Az állatkínzás jelenleg hatályos, Btk.-beli szövegezése értelmében, aki gerinces állatot indokolatlanul oly módon bántalmaz, vagy gerinces állattal szemben indokolatlanul olyan bánásmódot alkalmaz, amely alkalmas arra, hogy annak maradandó egészségkárosodását vagy pusztulását okozza, illetve gerinces állatát vagy veszélyes állatát elűzi, elhagyja vagy kiteszi, vétség miatt két évig terjedő szabadságvesztéssel büntetendő. Minősített eset, így a büntetés bűntett miatt három évig terjedő szabadságvesztés, ha az állatkínzás az állatnak különös szenvedést okoz, vagy több állat maradandó egészségkárosodását vagy pusztulását okozza.[7]

A közigazgatási jogi és büntetőjogi eljárások párhuzamosságának lehetőségeit azonban a kétszeres értékelés és büntetés tilalmának alkotmányos alapelve új mederbe terelte. E tanulmány a két eljárás szankciórendszerének szabályozását és egyes jogalkalmazási problémáit tekinti át a ne bis in idem alkotmányos alapelve vetületéből, különös tekintettel az ügyész szerepére.

2. A ne bis in idem elvének értelmezése

2.1. Nemzetközi kitekintésben

A ne bis in idem elve, a kétszeres eljárás alá vonás és kétszeres büntetés tilalma, alapvetően büntetőjogi eredetű alapelv, amelynek rendeltetése a többszörös eljárások

[5] Folyamatosan vannak törekvések a szigorításra is, például 2019. december 9-én népszavazást kezdeményeztek azért, hogy az állat pusztulását okozó állatkínzást csak végrehajtandó szabadságvesztés büntetéssel lehessen sújtani. A Nemzeti Választási Bizottság a 495/2019. NVB határozatával a kérdés hitelesítését megtagadta, mivel az tiltott tárgykört érint.
[6] 8/2017. (IV.18.) AB határozat [24].
[7] Btk. 244. §.

kiküszöbölése. Nemzetközi viszonylatban jogi aktusok,[8] alapjogot érintő egyezmények,[9] és a kölcsönös elismerés elve alapján konkrét ügyekben kölcsönös jogsegély-megállapodások révén rendezték a felmerült kérdéseket, a legtöbb államban pedig külön jogi dokumentumok rögzítik a ne bis in idem tilalmának szabályait.

A Polgári és Politikai Jogok Nemzetközi Egyezségokmánya[10] 14. cikk 7. pontja értelmében „*senkivel szemben sem lehet büntetőeljárást indítani vagy büntetést kiszabni olyan bűncselekmény miatt, amely miatt az adott ország törvényének és büntetőeljárásának megfelelően jogerős ítélettel már elítélték vagy felmentették.*"

Az Emberi Jogok Európai Egyezményéhez[11] csatolt Hetedik Kiegészítő Jegyzőkönyv 4. cikke „*pedig az ugyanazon államban lefolytatott második eljárás tekintetében hivatott a terhelt jogvédelmét biztosítani.*"

Az Európai Unió bíróságai és a tagállami bíróságok által alkalmazott[12] Alapjogi Charta[13] 50. cikke értelmében „*senki sem vonható büntetőeljárás alá és nem büntethető olyan bűncselekményért, amely miatt az Unióban a törvénynek megfelelően már jogerősen felmentették vagy elítélték.*"

A Schengeni Megállapodás végrehajtásáról szóló Egyezmény[14] kétszeres büntetés tilalma (ne bis in idem) elvének alkalmazásáról szóló 54. cikke értelmében „*az ellen a személy ellen, akinek a cselekményét a Szerződő Felek egyikében jogerősen elbírálták, ugyanazon cselekmény alapján nem lehet egy másik Szerződő Fél területén büntetőeljárást indítani, amennyiben elítélés esetén a büntetést már végrehajtották, végrehajtása folyamatban van, vagy az ítélet meghozatalának helye szerinti Szerződő Fél jogszabályainak értelmében azt többé nem lehet végrehajtani.*"

[8] Magyarországon a büntetőügyekben más államokkal folytatott együttműködést a két- és többoldalú nemzetközi szerződések és – ha nemzetközi szerződés eltérően nem rendelkezik – a nemzetközi bűnügyi jogsegélyről szóló 1996. évi XXXVIII. törvény biztosítják.

[9] Például a Párizsban, 1957. december 13-án kelt, európai kiadatási egyezmény 9. cikke (non bis in idem) szerint nem engedélyezik a kiadatást, ha a kiadni kért személlyel szemben már jogerős ítéletet hoztak a kiadatási kérelem tárgyát képező bűncselekmény vagy bűncselekmények miatt.

[10] Elfogadta az ENSZ Közgyűlése 1966. december 16-án.

[11] Az Európa Tanács Rómában, 1950. november 4-én kelt Egyezménye, hivatalosan kihirdetett magyar elnevezése: Az emberi jogok és alapvető szabadságok védelméről szóló Egyezmény.

[12] Az Európai Unióról szóló szerződés 6. cikk (1) bekezdés 1. fordulata szerint: Az Unió elismeri az Európai Unió Alapjogi Chartájának 2000. december 7-i, Strasbourgban 2007. december 12-én kiigazított szövegében foglalt jogokat, szabadságokat és elveket; e Charta ugyanolyan jogi kötőerővel bír, mint a Szerződések. Hatályba lépett 2009. december 1-jén, a Lisszaboni Szerződés hatálybalépésének időpontjában.

[13] Charter of Fundamental Rights of the European Union (2012/C 326/02).

[14] 42000A0922(02), az 1999. május 1-jén hatályba lépett Amszterdami Szerződés az Európai Unió elsődleges joganyagába emelte, s habár az 55. cikk (1) bekezdése alapján bármely Szerződő Fél kinyilváníthatta, hogy az 54. cikket magára nézve nem tekinti kötelezőnek a felsorolt esetekben, de az 56. cikk szerint a már jogerősen elítélt által letöltött szabadságvesztésbüntetést, de akár a szabadságvesztéssel nem járó büntetéseket is be kell számítani az újabb büntetőeljárásban. Az egyezmény 58. cikke pedig nem zárja ki a külföldön hozott bírósági határozatok tekintetében a ne bis in idem elvével kapcsolatos átfogóbb nemzeti rendelkezések alkalmazását.

A ne bis in idem elve a nemzeti jogokban az alkotmányban, illetve egyes eljárási jogi kódexekben nyert szabályozást a legalitás elvéből fakadóan az állam büntetőhatalmi igényének korlátozását jelentő rendezőelvként. A kétszeres értékelés tilalma hamar átkerült más jogterületek gyakorlatába is, hiszen jogellenes magatartást nem csak a büntetőjogilag lehet értékelni. Az EJEB[15] és az EUB[16] joggyakorlatában több alkalommal merült fel az azonos tényalapú cselekmények kettős - közigazgatási jogi és büntetőjogi - szankcionálásának kérdése.

Az EUB a ne bis in idem elvének az adójogi és büntetőjogi szankciók halmozódása (konkrétan a hozzáadott-értékadó megfizetésének elmulasztása) miatti Åkerberg Fransson[17] ítéletben rögzítette, hogy a ne bis in idem elve nem zárja ki, hogy valamely tagállam a ugyanazon tényállásra egymást követően adójogi szankciót és büntetőjogi szankciót alkalmazzon, amennyiben az első szankció nem büntető jellegű, melynek vizsgálata a nemzeti bíróság feladata. Az ügyben előterjesztett főtanácsnoki indítvány rámutatott, hogy az Európai Unió tagállamainak gyakorlata, hogy ugyanazon jogsértés miatt különböző jogágakhoz tartozó szankciókat írnak elő, különösen az adózás,[18] a környezetvédelem és a közbiztonság területén. A kettős szankcionálás önmagában nem jelenti a ne bis in idem elvének megsértését, amennyiben a közigazgatási szankció és a büntetőjogi szankció egymásra tekintettel kerül alkalmazásra; így például a büntetés enyhítése a korábban kiszabott közigazgatási szankcióval.[19]

Az EJEB az A és B kontra Norvégia ügyben[20] számú ügyében kiterjesztőleg értelmezte a ne bis in idem alapelvét, és kimondta, hogy két büntető jellegű szankció bizonyos feltételek esetén kiszabható, és az eljárások egységes egésznek tekintendők, ha szoros anyagi és időbeni kapcsolat áll fenn köztük, valamint az eljárás célja és eszközei kiegészítőek és az eljárás következménye előre látható és arányos az illetőre nézve. Az EUB a Menci-ügyben[21] a nemzeti bíróságokra bízta az eljárások és szankciók halmozódása többletterhének az elkövetett jogsértés súlyához képest feltétlenül szükséges mértékre történő korlátozását.

A kétszeres értékelés tilalmába ütközés megállapításához az EJEB az ún. Engel-kritériumokat alkalmazta,[22] melyet egy korábbi ügyében dolgozott ki, és mely gyakorlatot az EUB a Bonda-ügyben[23] vette át végül, értelmezve a bűncselekmény fogalmát, és szélesebb értelmezési keretet adva a ne bis in idem elvének.

[15] Emberi Jogok Európai Bírósága, European Court of Human Rights.
[16] Európai Unió Bírósága, The Court of Justice of the European Union.
[17] Åklagaren kontra Hans Åkerberg Fransson C-617/10. sz. ügy, 2013. február 26-i ítélet.
[18] A tagállamok szabad szankcióválasztását az indokolja, hogy biztosítani kell a hozzáadottérték-adóból (héa) származó bevételek teljes körű beszedését, ezáltal pedig az Unió pénzügyi érdekeit kell védeni. Lásd erről bővebben: Harmati & Kiss 2016, 63–68.
[19] P. Cruz Villalón főtanácsnok indítványa 94. és 96. pontja a C-617/10. sz. ügyben.
[20] 24130/11., 29758/11., 2016. november 15-i ítélet.
[21] Luca Menci C-524/15. sz. ügy, 2018. március 20-i ítélet.
[22] Engel és társai kontra Hollandia 5100/71, 5101/71, 5354/72, 5370/72, 1976. június 8-i ítélet
[23] Lukasz Marcin Bonda C-489/10. sz. ügy, 2012. június 5-i ítélet, az agrártámogatás iránti kérelemben szolgáltatott adatok valótlansága miatt alkalmazott támogatáscsökkentés illetve támogatásból való kizárás és a csalás miatti büntetőeljárás vetületében alkalmazta az Engel-kritériumokat.

Az Engel-kritériumok három értékelési kört vizsgálnak: az adott cselekmény az adott nemzeti jog szerint bűncselekménynek minősül-e, a jogellenes cselekmény milyen természetű, és hogy az alkalmazott szankció milyen jellegű és súlyú, a célja az elrettentés-e, vagy a prevenció. Ennek mintájára, ha valakivel szemben két olyan eljárás folyt, amely büntető jellegű, mindkét eljárás tárgya ugyanazon jogellenes cselekmény (idem) és emiatt szabtak ki párhuzamosan két szankciót (bis), mely hatékony, arányos és elrettentő, az a ne bis in idem elvébe ütközik.

Kiemelten fontos, hogy a kettős eljárásoknak előre látható következményei voltak-e, arányosak-e és a hatóságok mindent megtettek-e a kettős elbírálás elkerülése érdekében. Így kristályosodott ki a ne bis in idem elvének kiterjesztő értelmezése. Az ugyanazon cselekmény fogalma alatt történeti tényállásbeli azonosságot kell figyelembe venni függetlenül a jogi minősítéstől és a védett jogi tárgytól.[24]

2.2. Ne bis in idem a hazai állatvédelemben és a 8/2017. (IV.18.) AB határozat

Az Alkotmánybíróság (a továbbiakban: AB) a 38/2012. (XI.14.) AB határozatában kimondta, hogy az EJEB gyakorlatára tekintettel a vizsgált cselekmény kriminális jellegének megítélése során általában három tényezőt vesz alapul. Azt vizsgálja, hogy az eljárás tárgyát képező jogellenes magatartás az adott állam jogrendszerében bűncselekménynek minősül-e, figyelembe veszi az elkövetett jogellenes cselekmény jellegét, valamint a kilátásba helyezett, illetőleg alkalmazott szankció jellegét és súlyát. Büntető ügynek minősülnek közigazgatási jogi és szabálysértési szankciók is. A közigazgatási szankciók minősítése során az elkövetett cselekmény kriminális jellegét annak alapján ítéli meg, hogy a jogellenessé nyilvánítás célja, a cselekményre vonatkozó anyagi, illetőleg eljárásjogi szabályozás, illetve az alkalmazott felelősségi forma rendelkezik-e a büntetőjogi szabályozás sajátosságaival.

Az állatvédelmi bírság és az állatkínzás miatti büntető felelősségrevonás kétszeres értékelése kapcsán az Alkotmánybíróság a 8/2017. (IV.18.) AB határozatában értelmezte a ne bis in idem elvét, figyelembe véve a kialakult európai joggyakorlatot, az alapjogok érvényesülésének minimális mércéjeként fogadva el a nemzetközi szerződésekben foglalt, illetve az ahhoz kapcsolódó ítélkezési gyakorlatban kibontott jogvédelmi szintet.[25]

A történeti tényállás szerint egy állattartó az általa tartott kutya öt kölykét 2011 tavaszán vízbe fojtotta, emiatt állatkínzás vétsége miatt 125.000.-Ft pénzbüntetésre ítélték, majd pár hónappal később a jegyző a büntetőügyben megállapított tényállás alapján 450.000 Ft állatvédelmi bírsággal sújtotta. Az állattartó végül a bíróságon megtámadta a jogerős közigazgatási határozatot, mivel kifogásolta a kétszeres büntetést. Az eljáró bíró az előtte folyamatban lévő, állatvédelmi bírság tárgyában hozott közigazgatási határozat bírósági felülvizsgálata iránti perben a bírósági eljárást felfüggesztette, és az AB-hoz fordult.

[24] Leopold Henri Van Esbroeck, C-436/04. sz. ügy, 2006. március 9-i ítélet, rendelkező rész 2. pontja.
[25] 32/2012. (VII.4.) AB határozat [41]; 3206/2014. (VII.21.) AB határozat [30]; 32/2014. (XI.3.) AB határozat [50].

Az AB kimondta, hogy az Átv. 43. § (1) és (4) bekezdésének alkalmazása során az Alaptörvény B) cikk (1) bekezdéséből és XXVIII. cikk (6) bekezdéséből, a jogbiztonság elvéből, valamint a kétszeres eljárás alá vonás és büntetés tilalmából eredő alkotmányos követelmény, hogy ha állatkínzás vétsége vagy bűntette miatt büntetőjogi felelősség megállapításának van helye, vagy a büntetőjogi felelősség kérdésében már jogerős marasztaló döntés született, akkor ugyanazon tényállás alapján indult állatvédelmi hatósági eljárásban, ugyanazon jogellenes cselekmény miatt állatvédelmi bírság kiszabására ugyanazon személlyel szemben nem kerülhet sor. A kifogásolt jogszabályhely alaptörvény-ellenességének megállapítására és megsemmisítésére irányuló bírói kezdeményezést ugyanakkor elutasította.

Az Alaptörvény XXVIII. cikk (6) bekezdése értelmében „*a jogorvoslat törvényben meghatározott rendkívüli esetei kivételével senki nem vonható büntetőeljárás alá, és nem ítélhető el olyan bűncselekményért, amely miatt Magyarországon vagy - nemzetközi szerződés, illetve az Európai Unió jogi aktusa által meghatározott körben - más államban törvénynek megfelelően már jogerősen felmentették vagy elítélték.*" A jogbiztonságból eredő kiszámíthatóság követelményéből következik, hogy a jogalkotónak szabályoznia kell a különböző eljárások egymáshoz való viszonyát, ha a büntetőjogi fenyegetettségű jogellenes cselekményhez más jogágba tartozó jogkövetkezmény is társul.[26]

Tehát a ne bis in idem elve önmagában nem zárja ki azt, hogy valakivel szemben, ugyanazon jogellenes cselekménye miatt több, más jogágba tartozó, azonban eltérő funkciójú eljárást folytassanak le, és ezek annak eredményeként jogkövetkezményt alkalmazzanak. A jogkövetkezmény jellege lesz a megkülönböztetés ismérve, azaz a büntetőjogi jogkövetkezmény megtorló jellegű szankciója mellett ugyancsak represszív célú közigazgatási szankció nem alkalmazható. Az AB rámutatott, hogy a ne bis in idem elvéből következően alkotmányos követelmény ugyanazon cselekmények büntetőjogi és közigazgatási jogi kétszeres szankcionálásának tilalma, melynek a jogbiztonság elvéből fakadó garanciális rendezése jogalkotói feladat.

3. A Szankció tv. és a kétszeres eljárás alá vonás tilalma

Az ugyanazon jogellenes cselekmény két egyébként más jogágba tartozó, párhuzamos vagy egymást követő eljárás eredményeként mindkét eljárásban azonos tartalmú, célú, funkciójú – közigazgatási jogi és büntetőjogi – szankcionálásának elkerülése érdekében, egy egységes közigazgatási szankciórendszer megalkotásának régóta jelenlévő igényével született meg a közigazgatási szabályszegések szankcióiról szóló 2017. évi CXXV. törvény (a továbbiakban: Szankció tv.), amely végül több módosítást követően 2021. január 1. napjától lépett hatályba. A közigazgatási szabályszegések szankcióiról szóló törvény hatálybalépésével összefüggő egyes törvények módosításáról szóló 2020. évi CLXVIII. törvény próbálta ágazati szinten is megteremteni jelen levő jogszabályok koherenciáját, módosítva egyes jogszabályokat.

E tanulmány anélkül, hogy a Szankció tv. kiegészítésre szoruló szabályait elemezné, mindössze arra keresi a választ, hogy az állatvédelmi bírság és az állatkínzásért való büntetőjogi felelősség tekintetében alkalmas-e ez a keretszabálynak tervezett jogszabály, hogy a párhuzamos eljárások, illetve azonos tényállás alapján

[26] 8/2017. (IV.18.) AB határozat [49].

azonos rendelteltésű többszörös szankciók létét kiküszöbölje a ne bis in idem elvének megfelelően. Kérdés, hogy vajon ez a kodifikáció segíti-e az európai sztendereknek és a hazai jog alapelvi rendszerének hatékony működését, illetve az ehhez kapcsolódó jogalkalmazást.

A törvény az általános közigazgatási rendtartásról szóló 2016. évi CL. törvény (a továbbiakban: Ákr.) hatálya alá tartozó közigazgatási hatósági eljárás során megállapított jogszabálysértések (közigazgatási szabályszegés) miatt a közigazgatási hatósági ügyben érdemi döntéssel kiszabható jogkövetkezményekre (közigazgatási szankció) terjed ki. Ezzel bevezeti a közigazgatási szabályszegés fogalmát, amellyel azonban az ágazati jogszabályok nem operálnak, a közigazgatási szankció elnevezés helyett pedig rendszerint a bírság szó szerepel (lásd esetünkben állatvédelmi bírság), így nincs egységes terminológiai háttér, hiszen ahány ágazati szabályozás, annyi specifikum. A jogszabály szabályozási technikája sajátos, a Szankció tv. rendelkezéseitől törvény akkor rendelkezhet eltérően, ha ezt e törvény megengedi.

A közigazgatási szabályszegésért való felelősség megállapítása esetén a közigazgatási hatóság közigazgatási szankciót alkalmaz, melyet azzal a természetes személlyel, jogi személlyel vagy jogi személyiséggel nem rendelkező szervezettel szemben lehet alkalmazni, akinek, illetve amelynek a közigazgatási szabályszegésért való felelősségét a közigazgatási hatóság megállapította.

A közigazgatási szabályszegésre a Szankció tv.-ben nevesített – ezáltal a hatálya alá tartozó – közigazgatási szankciók a figyelmeztetés, a közigazgatási bírság, a tevékenység végzésétől történő eltiltás és az elkobzás, mely utóbbi akkor is alkalmazható, ha felelősségre vonásra nem került sor. Az eredetileg tervezett közigazgatási óvadék (biztosíték jellegű anyagi joghátrány, mely egy év elteltével visszajárt volna) intézménye kikerült a törvényből, így ennek problémáival nem kell foglalkozni. Ugyanakkor a Szankció tv. rámutat a valóságban is fennálló helyzetre, hogy törvény vagy eredeti jogalkotói hatáskörben kiadott kormányrendelet további közigazgatási szankciókat állapíthat meg. Tekintettel arra, hogy mintegy ötven ágazati jogi szabályozásról van szó, számos további eszköz létezik. A Szankció tv. fő célkitűzése a fokozatosság elvének megvalósítása a közigazgatási szankciók alkalmazása terén, így első lépcsőfok a figyelmeztetés, ami a hatóság rosszallásának kifejezése prevenciós céllal, de van ahol eleve kizárt az alkalmazása.[27]

A ne bis in idem alapelvének érvényesülése érdekében a Szankció tv. úgy szabályoz, hogy ha a bíróság a jogsértő magatartást megvalósító természetes személyt ugyanazon tényállás alapján jogerős ügydöntő határozatban elítélte és vele szemben büntetést szabott ki, illetve intézkedést alkalmazott; vagy arra hivatkozással, hogy a bűncselekményt nem a vádlott követte el,[28] felmentette; nem alkalmazható a közigazgatási bírság vagy tevékenység végzésétől történő eltiltás közigazgatási szankció.[29] A felmentés oka tehát számít, mivel más felmentési jogcím esetén bármilyen, a Szankció tv. hatálya alá tartozó szankció alkalmazható.

[27] Kizárt a figyelmeztetés például a természet védelméről szóló 1996. évi LIII. törvény 80. § (5a) bekezdésében foglalt esetekben.
[28] A büntetőeljárásról szóló 2017. évi XC. törvény (a továbbiakban: Be.) 566. § (1) bek. b) pontja.
[29] Szankció tv. 5/A. §

Természetesen a büntetőügyben nem értékelt tényállás (maradéktényállás), illetve a büntetőügyben nem értékelt természetes személy vonatkozásában is bármely szankció szóba jöhet. Ha bizonyítottság hiányában[30] történik a felmentés, akkor a bizonyítékok értékelését a közigazgatási hatóság önállóan elvégezheti, hiszen a közigazgatási hatóság bizonyítási eljárást folytat le, ha a döntéshozatalhoz nem elegendőek a rendelkezésre álló adatok, melyhez szabadon választja meg a bizonyítás módját, és a rendelkezésre álló bizonyítékokat szabad meggyőződése szerint értékeli.[31] A közigazgatási perben sem köti az eljáró bíróságot a más hatóság döntése vagy fegyelmi határozat, illetve az azokban megállapított tényállás, a jogerős elbírált büntetőjogi felelősséget kivéve.[32]

A Szankció tv. előírja, hogy ha a közigazgatási szankciót alkalmazó hatóság tudomására jut, hogy az eljárása alapjául szolgáló jogsértő magatartás miatt büntetőeljárás van folyamatban és a közigazgatási szankció alkalmazása e büntetőeljárás kimenetelétől függ, az eljárását a büntetőeljárás befejezéséig felfüggeszti.[33] Ebből következően a büntetőjogi felelősségre vonásra tekintet nélkül alkalmazható a Szankció tv. hatálya alá tartozó figyelmeztetés és az elkobzás szankció, valamint a Szankció tv. hatálya alá nem tartozó egyéb közigazgatási szankció vagy intézkedés, megkülönböztetvén a büntetőjogilag fenyegetett és a büntetőjogilag nem fenyegetett közigazgatási szabályszegéseket. A jogalkotó ezzel a büntetőjogi értékelés primátusát hangsúlyozta, hiszen attól teszi függővé a közigazgatási eljárást. A büntetőjogi fenyegetettség ultima ratio a jog eszköztárában, illetve annak kellene lennie. Ugyanakkor gyakori, hogy a közigazgatási eljárás hamarabb megindul, és esetleg hamarabb be is fejeződik, mint egy büntetőeljárás, és az is előfordulhat, hogy erről nem is értesül a másik eljáró szerv. Erre vonatkozóan azonban a Szankció tv. nem tartalmaz gyakorlati szabályozást, vélelmezi a büntetőjogi értékelés elsőbbségét és azt, hogy a közigazgatási hatóság időben észleli is ezt a körülményt. A közigazgatási eljárás ugyanakkor olykor rövidebb idő alatt több eredményt hozhat, mint a büntetőeljárás, és akár nagyobb lehet a visszatartó ereje is.[34] Az állatkínzás miatti büntetőjogi felelősségrevonás ultima ratio jellegét áttöri, hogy a közigazgatási szankció olykor nagyobb terhet ró a jogellenes magatartást tanúsítót személyre, és a különböző súlyú jogkövetkezmények miatt még az is felmerül, hogy vajon melyik jogágban „olcsóbb" eljárást indítani.[35] A Szankció tv. kiemelt célkitűzése az állampolgárokat és vállalkozásokat terhelő fizetési kötelezettségek csökkentése, és ennek keretében a tényleges pénzügyi hátrányt keletkeztető szankciók alkalmazási körének korlátozása.[36] Ez ugyan a fokozatos szankcionálásra vonatkozik, de félő, hogy a többszörös eljárásoknál is fő elvként fog érvényesülni az anyagi tehercsökkentés, és nem feltétlenül a megvalósított jogsértés lesz az alapja.

[30] Be. 566. § (1) bek. c) pontja.
[31] Ákr. 62. § (1) és (4) bekezdései.
[32] A közigazgatási perrendtartásról szóló 2017. évi I. törvény 85. § (6)–(7) bekezdései.
[33] Szankció tv. 5/B. §
[34] Beszámoló 2018, 49.
[35] Erre vonatkozóan bővebben: Kajó 2021.
[36] Általános indokolás második bekezdése.

A Szankció tv. a közigazgatási szankciókat a 2021. január 1. napjától történő hatálybalépését követő időszaktól rendeli bejegyezni a Közigazgatási Szankciók Nyilvántartásába. Átmeneti rendelkezéssel vagy a visszaható hatály tilalmának szabályozásával nem segíti a jogalkalmazót, és ezzel egyfajta tabula rasát biztosít, ami méltánytalan és aránytalan, hisz a nyilvántartásban szereplő adatokra a bírságkiszabás feltételeként is tekint. E közhiteles nyilvántartás a bejegyzés időpontjától (ami elvileg a közigazgatási döntés véglegességének napja) számított három év elteltéig tartalmazza az adott döntéssel összefüggésben nyilvántartott adatokat, amihez a közigazgatási szankció alkalmazására jogosult hatóság férhet hozzá az eljárása során az adott eljárás ügyfelére vonatkozóan. A nyilvántartás tehát a közigazgatási szabályszegések szankcionálásának fokozatosságát hivatott elősegíteni és nem a kettős eljárások kiküszöbölését, mivel más nyilvántartással összekapcsolva nincs, és csak a végleges jelleggel lezárult közigazgatási hatósági eljárások döntéseit tartalmazza, a folyamatban levőkét nem. Emiatt továbbra is szükség lenne a hatóságok közötti, sőt a hatóság különböző szakterületeinek kommunikációjára. Érdemes lenne megfontolni, hogy e nyilvántartás hozzáférhető legyen más, nem közigazgatási szervek részére is, vagy akár a vezetését is rá lehetne bízni egy büntetőeljárásban egyébként is részt vevő szervezetre.

A különböző szakterületi kommunikációra jó példa az ügyészség környezetvédelmi tevékenységéről szóló 1/2014. (III.31.) LÜ körlevél, ami hangsúlyozza, hogy a környezetvédelmi ügyészi tevékenység során a szakági együttműködésnek kiemelt jelentőséget kell tulajdonítani, ami az információk, adatok iratok kölcsönös átadását jelenti a folyamatosság és az időszerűség követelményét betartva. Ez a szakági együttműködés gyakorlatban azt jelenti, hogy a büntetőjogi szakág a Btk. XXIII. fejezetében meghatározott környezet és természet elleni bűncselekmények[37] miatt indult eljárásokban a feljelentés elutasításáról, a nyomozás megszüntetéséről szóló határozatok, az ügyben készített szakértői vélemény, a vádemelés és a büntető ügyben hozott bírósági döntés másolati példányának megküldésével folyamatosan tájékoztatja a kijelölt közérdekvédelmi szakterületi ügyészt. De ugyanígy vice versa a közérdekvédelmi ügyész is továbbítja a feltárt és a büntetőjogi szakágat érintő információkat, vagy akár büntetőeljárást is kezdeményezhet.

A három éves nyilvántartási idő a Szankció tv. három éves abszolút elévülési határidejéhez[38] igazodik, ugyanakkor maga a Szankció tv. is áttöri ezen elévülési határidőt, mivel lehetőséget biztosít arra, hogy ha büntetőeljárás is indult a közigazgatási eljárás alapjául szolgáló jogsértő magatartás miatt, akkor annak befejezésétől számított egy évig még legyen lehetőség közigazgatási szankció alkalmazására indokolt esetben. Az Átv.-ből kikerült a korábbi öt éves objektív elévülési időre vonatkozó szabályozás.

A közigazgatási bírság és a tevékenység végzésétől való eltiltás kiemelt szankciók. A ne bis in idem elvének tiszteletben tartása mellett a Szankció tv. ezen közigazgatási szankciók alkalmazását kizárja a büntetőjogilag értékelt jogsértő magatartások esetében, tehát mindenképp függnek a büntetőeljárás végeredményétől. A Szankció tv. a közigazgatási bírság kiszabásának feltételéül konkrét felsorolást tartalmaz, ugyanakkor

[37] A Btk. 241-252. § büntető tényállásai, melybe beletartozik a Btk. 244. §-ában foglalt állatkínzás tényállása is.

[38] A közigazgatási szankció elévülésének szubjektív határideje a tudomásszerzéstől számított hat hónap, míg az objektív három év.

az állatvédelmi hatósági eljárás sajátosságait nem feltétlenül képes megragadni. Előfordulhat, hogy büntetlenül marad egy cselekmény avagy a közigazgatási eljárást fokozzuk le a büntetőeljárás maradékcselekményének szankcionálására. Varga Zs. András szerint[39] a közigazgatási szankció alkalmazása általában nem függhet más jogági szankciótól, ha a szubjektív, bűnösségi alapú büntető jellegű szankció bármilyen okból elmaradna, akkor a közigazgatási jogi felelősség egy megelőlegezett maradék-felelősség lenne, és a közigazgatási anyagi jogi szabályok megsértésének szankció nélkül maradása nem a rendet szolgálná.[40] A Szankció tv. az állatvédelmi bírság és az állatkínzás büntetőjogi kettős értékelése kapcsán még mindig nem szabályozza pontosan azt az esetkört, amikor a közigazgatási hatósági eljárás valamilyen oknál fogva megelőzi a büntetőeljárást. A Szankció tv. szerint a büntetőjogi értékelés elsőbbsége a főszabály, és ahhoz igazodik a közigazgatási eljárás, ami félő, hogy valójában a közigazgatási jogi felelősségrevonásnak szimpla matematikai formulává történő ledegradálását okozhatja, vagy a közigazgatási eljárás a büntetőeljárásból megmaradt maradékcselekmények értékelésére korlátozódik, ami pedig nyilvánvalóan nem célja a jogalkotónak. A közigazgatási szankcionálás objektív mérce, önmagában nem függhet a büntetőeljárástól, de a ne bis in idem elve miatt mégis figyelemmel kell rá lenni. A jogbiztonság követelményéből eredően ennek előre láthatónak és kiszámíthatónak kell lennie.

Az állatvédelem területén a közigazgatási szankció kiszabása mellett, az állatvédelmi hatóság számos intézkedést tehet,[41] az állatvédelmi és az állattartási szabályok megszegése esetén meghatározott cselekmény végzésére, tűrésére vagy abbahagyására kötelezheti az állattartót, kötelezést írhat elő, korlátozhatja az állattartást vagy el is tilthatja attól az állattartót a jogsértés súlyától függően 2–8 évre. Az eltiltás adott esetben nagyobb anyagi hátrányt jelenthet, mint a felfüggesztett szabadságvesztés büntetésre történő elítéltetés.

Az állatok védelmére, kíméletére vonatkozó jogszabály vagy hatósági határozat előírását megsértő vagy annak eleget nem tevő személy állatvédelmi bírságot köteles fizetni. Az Átv. megfogalmazásában kötelező az állatvédelmi bírság kiszabása, ugyanakkor a Szankció tv. a cselekmény büntetőjogi fenyegettsége esetén ezt kifejezetten tiltja. Ezt érdemes lett volna a Szankció tv. hatálybalépését elősegítő jogszabállyal ugyancsak módosítani a ne bis in idem elvének megfelelően.[42] A bírság megfizetése nem mentesít más jogkövetkezmények alól, az Átv. e vonatkozásban az állatvédelmi oktatásra kötelezést, illetve például az állat vagy állatfaj tartásától történő eltiltást[43] említi, de szóba jöhet még akár az állat elkobzása is. Az állatvédelmi bírság alapösszege tizenötezer forint, de ha az állatvédelmi bírság kiszabására okot adó

[39] Varga Zs. András párhuzamos indokolása a 8/2017. (IV.18.) AB határozathoz [82]–[87].
[40] 8/2017. (IV.18.) AB határozat [79]–[89].
[41] Átv. 42/D. § így például működési engedélyt módosíthatja, visszavonhatja, létesítményt vagy annak egy részét bezárathatja, tartási engedélyt visszavonhatja, az állatjóléti felelőst új képzés elvégzésére kötelezheti.
[42] Ha a jogalkotó a bírság alkalmazását kötelezően írja elő, akkor a jogalkalmazó a jogsértés elkövetésének megállapítása esetén nem tekinthet el e jogkövetkezménytől. Lásd a Kúria 2013.El.II.JGY.1/1/1. számú, a „Közigazgatási bírságok" vizsgálati tárgykörben a Kúrián felállított joggyakorlat-elemző csoport által készített összefoglaló véleménye II.4.1., 26.
[43] Átv. 43. § (9) bekezdése.

jogsértés elszenvedője kedvtelésből tartott állat, akkor a bírság alapösszege hetvenötezer forint.[44] Az állatvédelmi bírságról szóló 244/1998. (XII.31.) Korm. rendelet (a továbbiakban: Korm. r.) a bírság alapösszegét a jogsértés körülményeitől függően szorzókkal rendeli növelni.[45] A legmagasabb a tízszeres szorzó, amelyet az állat életének elfogadható ok vagy körülmény nélküli kioltása, az állat kínzása, illetve az állat elhagyása, kitétele, elűzése, valamint állatviadal és az állat uszítása esetére rendel alkalmazni a jogalkotó. A büntetőjogban a fokozatosság elve szerint kap büntetést állatkínzás miatt az elkövető, a pénzbüntetés legkisebb összege – az anyagi hátrányt összevetve a bírság összegével – harmincezer forint, míg állatvédelmi bírság címén az anyagi szankció a kedvtelésből tartott állat életének kioltása esetén hétszázötvenezer forint, de nem ritka a több milliós pénzbírság sem.[46]

A bűncselekmény elkövetője természetes személy, és nem feltétlenül az állat tartója, míg a közigazgatási szabályszegést jellemzően az állat tartója követheti el, aki lehet akár jogi személy is, mellyel szemben a jogi személlyel szemben alkalmazható büntetőjogi intézkedésekről szóló 2001. évi CIV. törvény alapján lehet eljárni. Az intézkedések (a jogi személy megszüntetése, a jogi személy tevékenységének korlátozása vagy pénzbírság) szándékos bűncselekmény elkövetése esetén alkalmazhatók, az esetben, ha a bűncselekmény elkövetése a jogi személy javára előny szerzését célozta vagy eredményezte, vagy a bűncselekményt a jogi személy felhasználásával követték el.[47]

Ha az állatvédelmi képzésen való részvételre kötelezett állattartó a kötelezettségének önként nem tesz eleget, az állatvédelmi képzés, illetőleg annak hátralévő része helyébe állatvédelmi bírság lép. Felmerülhet kérdésként, hogy az összeg átváltása nem minősül-e anyagi jellegű és represszív természetű szankciónak, és nem ütközik-e a ne bis in idem elvébe, tekintettel arra, hogy az állatvédelmi képzésen való részvétel nem teljesítése esetén, annak állatvédelmi bírságra történő átváltásakor a bírság összege legalább százezer forint, és egy napi képzésen való részvételnek ötvenezer forint állatvédelmi bírság felel meg.[48] Az állatok tartása, egészségi állapota tekintetében rendszeres jelentéstételre kötelezés és az érintett állatfaj vonatkozásában tartási gyakorlattal rendelkező személy igénybevételére kötelezés nem okoz összeütközést a kétszeres eljárások felmerülésekor.

[44] Átv. 43. §, és a Korm. r. 2. § (1) bekezdése, mely szerint a bírság alapösszege tizenötezer forint, 2021. január 7. napjától a kedvtelésből tartott állat esetén hetvenötezer forint.

[45] Több tényállás esetén vagy attól függően, hogy a jogsértés közvetlenül befolyásolja-e az állat jólétét, hány gerinces állat egyedét érinti, a jogsértést okozó cselekményt szándékosan követték-e el, azonos tényállású, három éven belüli ismételt jogsértésről van-e szó. A szándékos elkövetéshez a legmagasabb szorzót kell alkalmazni. Korm.r. 2. § (6) bekezdése.

[46] A Kajó által vizsgált 78 esetből a legmagasabb pénzbüntetés 300 ezer forint volt, míg jegyzők és járási hivatalok milliós, tízmilliós bírságokat szabtak ki, például 1,6 millió forintos állatvédelmi bírságot egy városi jegyző szabta ki azért, mert az állattartó kutyája rendszeresen az utcán kóborolt önsétáltató módon, érvényes veszettség elleni oltása és chipje nem volt, és még közlekedési balesetet is okozott, míg 26 millió forintos bírságot kapott egy haszonállat-tartó telep.

[47] 2001. évi CIV. törvény 2. § (1) bekezdése, E körben érdemes lenne az Európai Unió Tanácsa 2988/95. számú Rendelete és az Európa Tanács Miniszteri Bizottsága R (91) 1. Ajánlása alapján átgondolni a jogi személyek felelősségével kapcsolatos lehetőségeket.

[48] Korm. r. 3. §.

Összességében a büntetőjogi felelősségre vonás nem érinti a Szankció tv.-ben nem kiemeltként meghatározott közigazgatási szankciókat, illetve a Szankció tv. hatálya alá nem tartozó, ott fel nem sorolt számos egyéb, ágazati közigazgatási szankciót vagy intézkedést, azok szabadon alkalmazhatók. Ha olyan közigazgatási szabályszegés történik, amelynek jogkövetkezménye kiemelt szankció is lehet, akkor a büntetőeljárás eredménye mindenképpen mérvadó.

4. További felvetések és javaslatok

Több állam is az ügyész kezébe helyezi az eljárások irányának meghatározását,[49] mivel olyan szereplő, akinek rálátása van a kezdetektől a büntetőeljárás folyamatára is, polgári jogi keresetindítási, illetve számos hatósági eljárás-kezdeményezési jogkörrel rendelkezik.

Magyarországon az ügyész az igazságszolgáltatás közreműködőjeként, mint közvádló az állam büntetőigényének kizárólagos érvényesítője. Az ügyészség üldözi a bűncselekményeket, fellép más jogsértő cselekményekkel és mulasztásokkal szemben, valamint elősegíti a jogellenes cselekmények megelőzését.[50] Büntetőjogon kívüli jogkörében a közérdek védelmezőjeként az Alaptörvény vagy törvény által meghatározott további feladat- és hatásköröket gyakorol.[51] Az ügyészség a közérdek védelme érdekében közreműködik annak biztosításában, hogy mindenki betartsa a törvényeket. A jogszabályok megsértése esetén - törvényben meghatározott esetekben és módon - fellép a törvényesség érdekében.[52] Az ügyészségnek az igazságszolgáltatás közreműködőjeként gyakorolt büntetőjogon kívüli közérdekű feladat- és hatásköreiről külön törvények rendelkeznek. Az ügyész ezeket a hatásköreit a törvénysértés kiküszöbölése érdekében elsősorban bírósági peres és nemperes eljárások megindításával (perindítási jog), valamint hatósági eljárások kezdeményezésével és jogorvoslat előterjesztésével gyakorolja (fellépés).[53] A környezet- és természetvédelemmel kapcsolatos ügyészi feladatokat a megyei, illetve fővárosi főügyészségeken erre kijelölt ügyész végzi,[54] az az ügyész környezetvédelemmel kapcsolatos feladatait és a büntető valamint a közérdekvédelmi szakterület együttműködésének kétirányú mechanizmusa külön is szabályozást nyert.[55] A kétszeres értékelés kiküszöbölése szempontjából indokolt lehet az ügyész szélesebb körű szerepvállalása és akár a közigazgatási szankciók nyilvántartása feletti rendelkezési jogot is kaphatna.

[49] Horvátországban az EJEB Maresti kontra Horvátország ügye óta (55759/07) változott a jogi környezet a ne bis in idem elvének való megfelelőség miatt, a kétszeres eljárások kizárása érdekében, a különböző eljárások fő kezdeményezője az ügyész. Bizjak 2015, 54.
[50] Alaptörvény 29. cikkének (1) bekezdése.
[51] Alaptörvény 29. cikkének (2) bekezdés d) pontja.
[52] Az ügyészségről szóló 2011. évi CLXIII. törvény (a továbbiakban: Ütv.) 1. § (2) bekezdése.
[53] Ütv. 26. § (1) bekezdése.
[54] Az ügyészség közérdekvédelmi feladatairól szóló 3/2012. (I.6.) LÜ utasítás 68. §-a.
[55] Az ügyészség környezetvédelmi tevékenységéről szóló 1/2014. (III.31.) LÜ körlevél.

A magyar büntetőjog büntetési rendszerében állatkínzás esetén a leggyakoribb büntetés a pénzbüntetés, illetve a felfüggesztés szabadságvesztés büntetés, de előfordulhat közérdekű munka büntetés is. Egyes állatvédők hangoztatják, hogy érdemes is lenne a közérdekű munka büntetés végrehajtásának helyéül valamelyik állatmenhelyet kijelölni. Ez azonban nem ilyen egyszerű, mivel a munkahelyek foglalkoztatási kedve nem erőltethető, ahhoz önkéntes foglalkoztatói nyilatkozat szükséges, nehéz is munkáltatót találni, és erre a hatályos szabályok szerint a büntetést kiszabó bíróságnak nincs hatása. Ráadásul a közérdekű munka végrehajtása sokszor eredménytelen az elítélt önhibája miatt. (nem jelenik meg a pártfogói felügyeleti eljárásban sem az elítélt, vagy nem jogszabálynak megfelelően teljesít etc.) Meg kell említeni a foglalkozástól eltiltás büntetést is, amelyet elviekben a büntetőeljárásban ki lehet szabni az állatkínzás elkövetőjére, amennyiben szakképzettséget igénylő foglalkozása szabályainak megszegésével követi el, vagy foglalkozásának felhasználásával, szándékosan követi el a bűncselekményt, akkor is, ha nem ez a foglalkozása, de megvan hozzá a szakképesítése.[56] De felmerült már az állattartástól eltiltás intézkedésként való bevezetése is,[57] vagy a büntetés mellett magatartási szabályként való előírásként.

Állatkínzás miatt akár feltételes ügyészi felfüggesztés[58] is szóba kerülhet, a vádemelés helyetti elterelési lehetőségként, ami az ügyészi diszkréció egyik eszköze az opportunitás elve alapján. Az ügyészség határozattal felfüggesztheti az eljárást, ha a gyanúsított jövőbeni magatartására[59] tekintettel az eljárás megszüntetése várható, és az eljárás főszabály szerint háromévi szabadságvesztésnél nem súlyosabb büntetés kiszabását rendeli – az állatkínzás vétségi és bűntetti alakzata is ilyen – és a sikeres felfüggesztés esetén az eljárás megszüntetésére kerül sor. Nem bírósági eljárásban hozott határozat, mégis az ügy érdemére kihat, hisz a felfüggesztés idejének eredményes elteltét követően az ügyész erre tekintettel megszünteti az eljárást. A Szankció tv. 5/A. §-a a kiemelt közigazgatási szankció kizárásának okaként ugyanakkor csak bírósági határozatban történő büntető elítéltetést vagy felmentést említ, az ügyészi szakban megszüntetett eljárásra nem tér ki. Nemzetközi viszonylatban egyes államokban a büntetőeljárás ügyész általi lezárását ítélt dologként értékelik másik államban is,[60] érdemes lenne a kétszeres értékelést kiküszöbölni ilyen esetben is, és elfogadni az ügyész általi megszüntetést, ami megfelelne a jogbiztonság és kiszámíthatóság követelményének. A ne bis in idem elvét előíró rendelkezés felmentésre és elítélésre utal, az ártatlanság vélelmét tartalmazó alaptörvényi rendelkezés a büntetőjogi felelősségrevonás végleges megállapítását kifejezetten és kizárólag a bíróság jogerős

[56] Btk. 52. (1) bekezdés a) b) pontja és (2) bekezdése.
[57] Beszámoló 2018, 49.
[58] A büntetőeljárásól szóló 2017. évi XC. törvény (a továbbiakban: Be.) 416–420. §§
[59] A bűncselekmény jellegére, az elkövetés módjára és a gyanúsított személyére tekintettel e feltételes ügyészi felfüggesztéstől a gyanúsított magatartásának kedvező változása várható. Be. 416. § (2) bek. b) pontja.
[60] C-187/01 és C-385/01. Gözütok és Brügge egyesített esetek. A Gözütok ügyben a holland ügyészség, míg a Brügge ügyben a német ügyészség eljárást lezáró döntését vette figyelembe a német, illetve a belga hatóság.

határozatához köti, így jelenleg res iudicata hatás kiváltására csak bírósági határozat képes, ügyészségi nem.[61]

A legnagyobb gondot a gyakorlatban a már jelzett *időbeliségi* probléma okozza; ha közigazgatási hatósági eljárás indult állatvédelmi ügyben, és büntetőeljárás csak utóbb indul miközben a közigazgatási eljárás időközben befejeződött. A felvetés elvi jellegű, hiszen a közigazgatási előadó már az eljárása kezdetén észlelheti a bűncselekmény létét és jelezheti is ezt, de ez nem mindig életszerű. Tehát ez esetben a közigazgatási döntés egy jogszerű folyamat eredményeként, törvényesen jön létre. Arra viszont nincs lehetőség, hogy a büntetőeljárásban ezt 'beszámítsák' bármilyen módon, sőt, lehet, hogy ki sem derül a közigazgatási hatósági döntés ténye. Ugyanakkor a ne bis in idem elvének következetes értelmezése indokolná a kétszeres büntetés elkerülését.

Felmerülhetne a döntés elleni jogorvoslat lehetősége az Ákr. rendelkezéseinek megfelelő módon kérelemre (közigazgatási per vagy fellebbezési eljárás) vagy hivatalból. Ez utóbbinál a döntésnek a hatóság saját hatáskörében történő módosítása vagy visszavonása mellett, külön kiemelhető az ügyészi felhívás és fellépés indított eljárás,[62] amely ugyancsak indokolttá teheti az ügyészi részvételt az állatvédelemmel kapcsolatos eljárásokban.[63] Ugyanakkor aggályos a meghozatala idején egyébként jogszerű közigazgatási döntés utólagos jogszerűtlenségének megállapítása, amennyiben a kétszeres értékelés tilalmazottsága esetén ragaszkodunk a büntetőeljárás elsőségéhez. A közigazgatási döntés tekintetében egy másik gyakorlati példára mutat rá Lengyel Tibor a tanulmányában,[64] amikor a – többek közt – 252.000. Ft összegű jövedéki bírság ügyében hozott közigazgatási határozat felülvizsgálata során indult közigazgatási perben a bíróság beszerezte a közigazgatási alaphatározatot követő büntetőeljárásban orgazdaság miatt kiszabott 100.000. Ft összegű pénzbüntetésről szóló büntető határozatot, majd a ne bis in idem elvére hivatkozással a jövedéki bírság összegét a pénzbüntetés 100.000. Ft-os összegével utólag csökkentette. Tehát egy időben később keletkezett büntetőjogi szankcióra figyelemmel, annak ellenére, hogy a kétszeres értékelés tilalma valójában a büntetőeljárás során állt be. Teljes mértékben indokolt lenne ezt a körülményt a büntetőbíróságok büntetéskiszabási gyakorlatában enyhítő körülményként érvényesíteni az előzetes közigazgatási eljárásra figyelemmel. Így tudna garanciális módon maradéktalanul érvényesülni a ne bis in idem elve a közigazgatási és büntetőeljárási szankcióhalmozódás elkerülésével a közigazgatási eljárás csorbulása nélkül, és így érvényesülhet a tisztességes eljárás alkotmányos alapelve. Ahogy Czine Ágnes rámutatott, az állatvédelmi hatósági eljárásban született felelősségről szóló végleges döntésnek is ki kellene hatnia a büntetőeljárásban kiszabott szankcióra.[65]

Problémás az eltiltás sokrétű kérdésköre is, mert a tevékenység végzésétől eltiltást a Szankció tv. kiemelt szankcióként kezeli, és nem engedi alkalmazni csak

[61] Lásd BH2018.301., amely az Alaptörvény XXVIII. cikk (2) és (6) bekezdésének értelmezése kapcsán fejtette ki ezt az álláspontot.
[62] Ákr. 113. §.
[63] Fontos kiemelni, hogy a korábbi időszakban lévő ütemezett ügyészi vizsgálatok hiányában jelenleg ehhez kezdő körülményre van szükség (bejelentés, kérelem etc.).
[64] Lengyel 2020, 65–66.
[65] Czine Ágnes különvéleménye a 8/2017. (IV.18.) AB határozathoz [110].

a büntetőeljárás eredményének függvényében. Az Átv.-ben az eltiltást a közigazgatási hatóság saját hatáskörben, vagy az ügyész kezdeményezésére is elrendelheti, de fogalmilag okoz némi zavart, hogy létezik polgári jogi eljárásban történő eltiltás is. Törvény perindításra jogosíthatja az ügyészt különösen a környezet, természet és termőföld védelmével, összefüggésben, ilyen perindítási jogosultság esetén, az eljárás közérdekűségét vélelmezni kell.[66] Az állatok kíméletére és védelmére vonatkozó jogszabályok megsértése esetén az ügyész jogosult keresetet indítani a tevékenységtől való eltiltás, illetőleg a tevékenységgel okozott kár megtérítése iránt.[67] A keresetindítás jogkövetkezménye jogi értelemben nem szankció, tartalmilag azonban igen, hiszen a közérdekű célból indított polgári peres kötelezés negatívan kihat az alperes életviszonyaira, mint a jogsértő magatartáshoz fűzött represszív jogkövetkezmény, így kérdés, hogy ez mennyiben áll összhangban a kétszeres értékelés tilalmának alkotmányjogi alapelvével, amennyiben következetesen végigvisszük az Engel-kritériumok alapján nyugvó vizsgálatát. A tevékenységtől való eltiltás polgári jogi vetülete nem illeszthető be a tevékenységtől eltiltás büntetőjogi illetve közigazgatási jogi fogalmi keretébe. A tevékenységgel okozott kár megtérítése iránti keresetnél pedig valójában nem tisztázott, hogy ez kinek a kára, tudja-e egyéb törvényes úton és milyen feltételek mentén érvényesíteni. A tevékenységtől való polgári jogi eltiltás esetén az is kérdéses, hogy az önkéntes teljesítés hiányában egy ilyen eltiltás végrehajtása hogyan történhet. Egyébként ez a típusú polgári kereset gyakorlatban ritka, gyakrabban találkozunk az állatvédő civil szervezetek aktivitásával e téren, mivel sajátos szerepet kaptak az állatvédelemben; egyrészt az állatvédelmi jogszabályok megsértése miatt általuk kezdeményezett hatósági eljárásokban az ügyfél jogállása illeti meg őket; másrészt a jogszabályba ütköző magatartástól való eltiltás iránt az ilyen szervezet is pert indíthat.

5. Zárszó

Összességében a Szankció tv. alkalmazása során felmerülnek a fentebb jelzett gyakorlati problémák. Így az állatvédelmi közigazgatási eljárás és az állatkínzás miatti büntetőeljárás összevetése a ne bis in idem elve szempontjából indokolná egy átláthatóbb nyilvántartási rendszer meglétét, a többszörös eljárások egymáshoz való viszonyának pontos rendezését, a kétszeres értékelés tilalmának minden állatvédelmi szankcióra történő kiterjesztését és átgondolását, az eljárásokban részt vevő szervek megfelelő kommunikációját, illetve esetlegesen egy koordináló szervezet kontrollját. A Szankció tv. a szankcióhalmozódás elkerülése érdekében további pontosításra szorul, lehet, hogy jobb lett volna az Alkotmánybíróságnak a vonatkozó határozatában megsemmisítenie jövőbeli hatállyal[68] az Átv.-nek az állatvédelmi bírság tekintetében kifogásolt rendelkezéseit, hogy lehetőség legyen a teljes újraszabályozásra, mivel a ne bis in idem alapelvéből következő elvárások e területen a jövőben még további gyakorlati kérdéseket vethetnek fel.

[66] Ütv. 27. § (5) bekezdésének e) pontja, és (6) bekezdése.
[67] Átv. 44. § (2) bekezdése.
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Current tendencies of the development of the right to a healthy environment in Hungary in the light of the practice of the Constitutional Court in recent years**

Abstract

In recent years, there have been several Constitutional Court decisions dealing with the right to a healthy environment and its interpretation. In these decisions, the Constitutional Court has further developed and partially renewed the content of the right to a healthy environment and its interpretation, which was necessary and justified following the adoption of the Fundamental Law of Hungary, and especially following its fourth amendment. Accordingly, the present study reviews the recent changes in the content and interpretation of the right to a healthy environment and the new tendencies that can be observed in this context by analysing the practice of the Constitutional Court of Hungary.

Keywords: right to a healthy environment; environmental protection; Fundamental Law of Hungary; Constitutional Court of Hungary.

1. The fourth amendment to the Fundamental Law of Hungary and its impact on the dogmatics of the right to a healthy environment

Although it is not the aim of the present work to analyze the provisions of the Fundamental Law of Hungary that are relevant from an environmental law perspective,[1] we consider it important to note that compared to the regulations of the previous Constitution, in the Fundamental Law, which came into force on 1 January 2012, the issue of environmental values and environmental protection appears more

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[1] For a detailed analysis of the environmentally relevant provisions of the Fundamental Law, see in particular: Bándi 2013, 67–92.; Horváth 2013, 222–234. For the interpretation of the provision of the Fundamental Law concerning GMO-free agriculture, see in particular: T. Kovács 2015, 308–314.; Fodor 2018, 48–50. and Szilágyi 2021a, 455–464. Regarding the concept of the right to food included in the Fundamental Law, see in particular: T. Kovács 2017, 76–78., 126–127., 144–145. and Szilágyi, Hojnyák & Jakab 2021, 72–86. For a detailed analysis of the water provisions of the Fundamental Law, see in particular: Fodor 2013, 329–345. and Raisz 2012, 156–157.

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widely and with greater emphasis. We see that from the National Avowal, which functions as a preamble, to the chapter entitled 'Foundation' that contains general provisions and principles, to the chapter 'Freedom and Responsibility', which deals with constitutional fundamental rights, and to 'The State', the Fundamental Law contains environmental law provisions. Before reviewing the case law of the Constitutional Court it can be stated, based merely on the comparison of the previous and the current constitutional regulation, that environmental values, environmental protection, sustainable development, and future generations are given more weight in the Fundamental Law.[2] In our view, all this is related, among other things, to the fact that, compared to the previous Constitution, which is considered to be value-neutral, the current Fundamental Law has a value-bearing character, one of the manifestations of which is the protection of the environment in the document itself. In the light of all this, it is not surprising to find that among the national constitutions of the European Union, the Hungarian constitution regulates the most comprehensively relevant areas from the point of view of environmental policy.[3] According to László Fodor, a constitution recognizing environmental values can formally contribute to the development of an environmentally friendly legal order in such a way that it provides a basis for reference and creates an obligation to define environmental protection requirements.[4] In our view, the regulation of the Fundamental Law meets these criteria.

The fourth amendment to the Fundamental Law is relevant to the present work because as a result of the amendment the decisions of the Constitution Court before its entry into force were rendered lapse, i.e. the Constitutional Court was not bound by its decisions and case law that is based on the previous Constitution.[5] According to the explanatory memorandum to the proposal for the fourth amendment of the Fundamental Law, the purpose and legal policy reason of the amendment was to interpret the provisions of the Fundamental Law in the context of the Fundamental Law itself, independently of the system of the previous Constitution. However, the amendment and its explanatory memorandum also stated that this act does not affect the legal effects of the decisions of the Constitutional Court in this area, i.e. issued based on the regulations of the previous Constitution, nor does it forbid the Constitutional Court to refer to previous decisions. It must be noted that the latter cannot be ruled out simply because the Fundamental Law itself states that the provisions of the Fundamental Law must be interpreted in accordance with the achievements of the historical constitution,[6] and the former Constitution and the case

[2] As Attila Antal puts it '[…] *the adopted Fundamental Law has a strong environmental policy profile, an environmental philosophy, if you will.*' Antal 2011, 47.

[3] Kiss 2017, 257. László Fodor takes the same position. See Fodor 2013, 337.

[4] Fodor 2006a, 65.

[5] Fundamental Law of Hungary, Final and mixed provisions, point 5. Ordained by Article 19 Paragraph (2) of the fourth amendment to the Fundamental Law.

[6] Paragraph (3) Article R) of the Fundamental Law of Hungary. See more in this regard: Trócsányi 2014, 59–62. Paragraph 17 of the National Avowal is also relevant in this regard, which, in our view, should be read in conjunction with Paragraph (3) Article R). Paragraph 17 of the National Avowal states: "*We respect the achievements of our historical constitution and the Holy Crown, which embodies the constitutional national continuity of Hungary and the unity of the nation*".

law of the Constitutional Court developed on the basis thereof, falls within this scope.[7] Due to such a change in the constitutional regulation, it was left to the Constitutional Court to clarify this issue. With regards to the right to a healthy environment, the interpretation of this provision was particularly important, as the case law of the Constitutional Court of more than two decades prior to the enactment of the Fundamental Law was of paramount importance in shaping and developing the dogmatics of this right.

Shortly after the entry into force of the fourth amendment to the Fundamental Law on 1 April 2013, the Constitutional Court also ruled on this issue[8] but did so in a general manner for the time being, as the issues of interpretation of the right to a healthy environment were not directly addressed at that time. From the above-mentioned decision of the Constitutional Court, the following findings are of huge importance to our topic and the problems raised. As stated in the reasoning of the decision, the Constitutional Court may refer to or cite the arguments, legal principles, and constitutional contexts developed in its previous decisions if there is no obstacle to the applicability of such findings based on substantive conformity of the relevant section of the Fundamental Law with the Constitution, taking into account the rules of interpretation of the Fundamental Law and that there is no obstacle based on the specific case.[9] At the same time, it was also established that the applicability of these arguments, legal principles, and constitutional contexts must always be examined by the Constitutional Court on a case-by-case basis, looking at the context of the specific problem.[10] The Constitutional Court has thus established a link – or legal continuity if you will – between the provisions of the Fundamental Law and the applicability of its decisions based on the previous Constitution and the principle findings expressed therein. The connection between the previous and the current constitutional regulation regarding the right to a healthy environment was finally established by the Constitutional Court's Decision 16/2015 (VI.5.).

2. The findings of Decision 16/2015 on the dogmatics of the right to a healthy environment

Decision 16/2015 is of outstanding importance for the subject of the present study in two aspects. Firstly, in this decision, the Constitutional Court reaffirmed its practice concerning the dogmatics of the right to a healthy environment established before the enactment of the Fundamental Law, and on the other hand, it interpreted the environmentally relevant provisions of the Fundamental Law.[11] In the following, Decision 16/2015 will be analyzed along with these two aspects.

[7] Cf.: Varga Zs. 2016, 87–88.

[8] The Constitutional Court made principle statements in Decision 13/2013 (VI.17.) in connection with the problem raised.

[9] The reasoning of Decision 13/2013 [32].

[10] The reasoning of Decision 13/2013 [33]–[34].

[11] It should be noted at this point that prior to Decision 16/2015, regardless of the fourth amendment to the Constitution, the Constitutional Court would have had the opportunity to

2.1. Strengthening the dogmatics of the right to a healthy environment

In Part V of the explanatory memorandum of the decision, the Constitutional Court reviewed the dogmatics of the right to a healthy environment through the development of the Hungarian Constitution and the relevant case law of the Constitutional Court. Prior to this, however, the Constitutional Court examined the development of the right to a healthy environment and environmental protection in its international context, recording the key findings of the Stockholm Declaration (1972), the Rio Declaration (1992), the Johannesburg Declaration (2002) and the Rio 20+ Declaration (2012) and also briefly touched upon the work of the Club of Rome and the Brundtland Commission.[12] It is important to emphasize all this at this point because the Constitutional Court considers the dogmatics developed by it to be a pioneer in an international context as well.[13]

Following this background, the Constitutional Court reviewed its own previous case law relevant to the dogmatics of the right to a healthy environment.[14] Of the relevant case law of more than two decades, the Constitutional Court specifically highlights Decision 28/1994 (V.20.), which is aptly called the 'basic environmental decision' of the Constitutional Court, as in addition to the two environmentally relevant provisions of the previous Constitution, the principles and requirements it contains can be considered as the constitutional basis of the right to a healthy environment, which was then further developed and clarified by the Constitutional Court in several further decisions.[15] Next, let us briefly review the most important elements of the dogmatics of the right to a healthy environment based on the interpretation of the Constitutional Court:

(a) The right to a healthy environment is a fundamental right which, however, is special among fundamental rights in a way that it has no subjective side, but which, because of its fundamental rights nature, is stronger than the objectives and duties of the state enshrined in the Constitution. This third-generation right with *differentia specifica* is, therefore "*primarily an independent and inherent institutional protection, i.e. a specific fundamental right of which the objective, institutional protection side is predominant and decisive*"

interpret the right to a healthy environment, now in view of the new constitutional regulations. The interpretation would have been based on Decision 44/2012 (XII. 20.) and the case on which it is based.

[12] The reasoning of Decision 16/2015 [69]–[76].

[13] The reasoning of Decision 16/2015 [79].

[14] The reasoning of Decision 16/2015 [80]–[86].

[15] It should be noted that, although Decision 16/2015 bases the dogmatics of the right to a healthy environment primarily on the provisions of Decision 28/1994, it also refers to a number of other decisions which have also made a significant contribution to the design, development and clarification of the dogmatics. Thus, the Constitutional Court referred to the following decisions when defining the content elements of the right to the environment: Decision 64/1993 (XII.22.); Decision 27/1995 (V.15.); Decision 14/1998 (V.8.); Decision 48/1998 (XI.23.).

and thus the right to a healthy environment "*raises the guarantees of the state's fulfillment of its environmental obligations to the level of fundamental rights.*"[16]

(b) With regard to the nature of the right to a healthy environment, the Constitutional Court also found that it is, in fact, part of the objective institutional protection of the right to life, and the Constitution thus *"declares the state's obligation to maintain the natural foundations of human life as a separate constitutional right.*"[17]

(c) The state can ensure the right to a healthy environment primarily by providing legal and organizational guarantees. In this context, the Constitutional Court ruled that the extent of the institutional protection of the right to a healthy environment cannot be determined arbitrarily by the state, i.e. "*the state does not enjoy the freedom to allow the state of the environment to deteriorate or to allow the risk of deterioration.*" From this requirement, among several others, one of the most important elements of the dogmatics of the right to a healthy environment, the so-called "*non-derogation principle*" (the prohibition of regression) follows.[18] The purpose of this prohibition is to ensure that "*the level of protection already achieved does not decrease*", i.e. the state may not reduce the level of protection of nature and the environment already provided by legislation.[19]

(d) The reduction of the level of protection set out above – i.e. the restriction of the right to a healthy environment - is considered allowable by the Constitutional Court in one instance, namely when it is absolutely necessary for the enforcement of another fundamental right or constitutional value.[20] Restriction of the right to a healthy environment is therefore only possible in accordance with the requirement of proportionality and necessity, by carrying out a fundamental rights test - however, all this has not yet happened. As it can be seen, the fundamental nature of the right to a healthy environment can also be seen in this respect.

(e) In addition to the non-derogation principle, the Constitutional Court also named several other environmental principles in its decision, such as the principle of prevention,[21] the principle of proportionality[22] , or the principle of integration.[23]

(f) Another important finding of the Constitutional Court was stating that one of the means of enforcing the right to a healthy environment is that "*the level of protection of the built environment provided by law cannot be reduced by legally non-binding official decisions*", which means that the Constitutional Court extended the right to a healthy environment to the protection of the built environment, which also includes the protection of the urban environment and spatial planning.[24]

[16] The reasoning of Decision 16/2015 [80].
[17] The reasoning of Decision 16/2015 [85].
[18] For more about the non-regression see: Bándi 2017, 159–181.; Fodor 2006b, 109–131.
[19] The reasoning of Decision 16/2015 [81].
[20] The reasoning of Decision 16/2015 [80].
[21] The reasoning of Decision 16/2015 [81] and [109].
[22] The reasoning of Decision 16/2015 [80] and [109].
[23] The reasoning of Decision 16/2015 [83].
[24] The reasoning of Decision 16/2015 [83].

In addition to defining the main substantive elements of the constitutional fundamental right to a healthy environment, the Constitutional Court also stated that "*the text of the Fundamental Law regarding the right to a healthy environment is the same as the text of the Constitution, therefore the findings made in previous decisions of the Constitutional Court can also be considered relevant in the interpretation of the right to a healthy environment.*"[25] In Decision 16/2015, after reviewing its own previous case law, the Constitutional Court confirmed the main elements of the dogmatics of the right to a healthy environment, at the same time establishing the link between the previous and current constitutional regulations, i.e. the previous case law of the Constitutional Court regarding the right to the environment can be maintained and will be applicable in the future.

2.2. Interpretation of the environmental provisions of the Fundamental Law

Following the above, the Constitutional Court reviewed the environmental and nature protection provisions of the Fundamental Law. In doing so, the Constitutional Court stated that "*the Fundamental Law not only preserved the level of protection of the fundamental right to a healthy environment, but also contains significantly more extensive provisions in this area than the Constitution. The Fundamental Law thus further developed the environmental values and approach of the Constitution and the Constitutional Court.*" Although the Constitutional Court itself states in the decision that "*it is the task of the Constitutional Court to interpret and explain the content of the provisions of the Fundamental Law in today's circumstances*", unfortunately, this was done only in an extremely narrow circle.[26]

In its decision, the Constitutional Court primarily interpreted Article P), in connection with which it found that Paragraph (1) Article P) raised the requirement to protect, maintain and preserve the environment and nature for future generations to a constitutional level. Paragraph (1) Article P) thus expressly regulates the state's obligation, and, on the other hand, defines what environmental protection actually means as the state's and citizens' obligation. In addition, the Constitutional Court considers the extension of the scope of obligations with regard to the protection of the environment to be a significant step forward compared to the regulation of the previous Constitution. While the Constitution focused exclusively on state obligations, the Fundamental Law extends environmental obligations to everyone, that is, to all citizens.[27] The Constitutional Court also referred to the close relationship between Article P) and Article XXI stating that Paragraph (1) Article P) sets out an objective for the state, the achievement and implementation of which is ensured by the fundamental right derived from Paragraph (1) Article XXI. These two articles have been linked by the Constitutional Court to the prohibition of regression and, as we shall see later, to the precautionary principle, when it stated that "*the fulfillment of the state objective and the*

[25] The reasoning of Decision 16/2015 [90]; It should be noted that the Constitutional Court has already established the above in Decision 3068/2013 (III.14.), however, the decision was issued before the fourth amendment to the Fundamental Law, and the dogmatics of the right to a healthy environment was not addressed in such detail by the Constitutional Court.
[26] The reasoning of Decision 16/2015 [91].
[27] The reasoning of Decision 16/2015 [92].

enforcement of the fundamental right to a healthy environment is ensured by the maintenance of the already achieved level of protection of the healthy environment".[28]

However, the Constitutional Court has stopped at this point and did not proceed with the interpretation of the provisions of the Fundamental Law. At the same time, it is important to refer to the concurring reasoning of Constitutional Judge Imre Juhász, in which he added an addition to the part of the decision interpreting Article P). Constitutional Judge Juhász also made three critical remarks regarding the reasons for the adopted decision. On the one hand, he expressed doubts as to whether the dogmatics of the right to a healthy environment, laid down almost 25 years ago,[29] could be applied to the new provisions of the Fundamental Law.[30] On the other hand, he pointed out that the Constitutional Court did not give sufficient weight to the conceptual change, which, in his view, had taken place in the constitutional regulation of environmental protection, the right to health, and the right to a healthy environment with the Fundamental Law's entry into force.[31] Thirdly, in the concurring reasoning, he explains that the Constitutional Court did not use the possibility of interpretation in relation to the new provisions of the Fundamental Law, i.e. those that were not present in the previous Constitution. Constitutional Judge Juhász sees this as a missed opportunity, which would have been suitable for modernizing the dogmatics of the right to a healthy environment, stating that "*in this respect, the decision remains indebted to the consistent solution of the task it has undertaken, i.e. the interpretation and explanation of the provisions of the Fundamental Law in today's circumstances*". At the same time, he emphasizes that "*the reasons for the decision, therefore, left the question partly unanswered of whether, and if so in what direction, had progress been made in the last 20 years in the field of constitutional environmental protection since the adoption of the deservedly important and rightly cited decision.*"[32] In any case, the statement of the concurring reasoning pointed out that there were still several questions to be answered regarding the provisions of the Fundamental Law on environmental law and the dogmatics of the right to a healthy environment.

3. New directions and tendencies in the practice of the Constitutional Court of Hungary

Six years have passed between the adoption of Decision 16/2015 and the finishing of the manuscript of the present work. In the light of the above, the question arises as to whether there has been a substantial change in the interpretation of the right to a healthy environment. In the following, without wishing to be exhaustive,

[28] The reasoning of Decision 16/2015 [109].

[29] In connection with this, it should be noted that several Hungarian environmental lawyers have previously pointed out that the dogmatics of the right to a healthy environment is outdated, which – among several other circumstances – can be justified by the lack of legal development activities of the Constitutional Court. See: Fodor 2006c, 53–99.; Majtényi 2010, 21.; Fodor 2011, 4.; Bándi 2013, 91.

[30] The reasoning of Decision 16/2015 [143].

[31] The reasoning of Decision 16/2015 [144]–[145].

[32] The reasoning of Decision 16/2015 [153].

it is reviewed what new directions can be observed concerning the dogmatics of the right to a healthy environment in the light of the Constitutional Court's legal interpretation and legal development activities.

3.1. The emergence of the precautionary principle as a constitutional principle in the case law of the Constitutional Court

The precautionary principle has appeared in the recent practice of the Constitutional Court.[33] From the legal practice's point of view, Decision 13/2018 (IX.4.) is of the greatest significance, as in this decision the Constitutional Court has so far dealt with the precautionary principle, more precisely with its interpretation, in the greatest detail. However, it is important to note that the precautionary principle appeared in the case law of the Constitutional Court before and after this 2018 decision. Accordingly, the following is a brief overview of the Constitutional Court's case law on the precautionary principle.[34]

The legal development implemented in Decision 13/2018 was preceded – or substantiated if you will – by three decisions of the Constitutional Court. In the case law of the Constitutional Court, the precautionary principle first appeared in Decision 3223/2017 (IX.25.), namely as a principle of environmental legislation. In that regard, the decision states that "*the main reason for the prohibition of* regression *(non-derogation), as a regulatory line is that failure to protect nature and the environment can trigger an irreversible processes, so it is only possible to create regulations on environmental protection if we take into account the principles of precaution and prevention.*"[35] According to the decision, the legislator must therefore also take the precautionary principle into account when creating new legislation.[36]

The next decision to be examined, Decision 27/2017 (X.25.) goes beyond all this in a way stating that this principle is one of the generally accepted principles of environmental law, however, it does not address its substantive issues.[37] However, Decision 28/2017 (X.25.)[38] provides a real novelty, as the Constitutional Court defined the principle of precaution in this decision, i.e. the Hungarian constitutional concept of

[33] It should be noted at this point that *László Fodor* has already indicated in a study published in 2007 that there are principles of environmental law that have not been used by the Constitutional Court so far, but could have been effectively invoked to interpret and enforce the right to a healthy environment. Within this circle, Fodor specifically mentions the precautionary principle. Cf.: Fodor 2007, 18.

[34] During the processing of the topic, we relied heavily on the research results of *János Ede Szilágyi*. See more in this regard: Szilágyi 2018, 76–91. In connection with the practice of the precautionary principle in the Hungarian Constitutional Court see: Olajos 2019, 1391–1412.

[35] The reasoning of Decision 3223/2017 [27].

[36] Szilágyi 2018, 79.

[37] The reasoning of Decision 27/2017 [49] states the following: "*According to the generally accepted precautionary principle in environmental law, the state must ensure that the deterioration of the state of the environment does not occur as a result of a particular measure.*"

[38] For the detailed analysis of the decision, see: Csák 2018, 29–32.

the principle was born.[39] According to the decision, "*the legislator must also take into account the precautionary principle*", i.e. the addressee of the principle is, in accordance with Decision 3223/2017, the legislator. The decision also states that, in accordance with the precautionary principle, "*the State must demonstrate that, in the light of scientific uncertainty, the deterioration of the state of the environment as a result of a particular measure will certainly not occur*".[40]

After such antecedents, we arrive at the judgment of the Constitutional Court on the protection of groundwater resources, Decision 13/2018. In this decision, the Constitutional Court raised the precautionary principle to a constitutional criterion, meaning that it no longer requires the simple observance of the precautionary principle but also defines a procedure in accordance with the principle as a requirement for legislation. The Constitutional Court derived all this from Paragraph (1) Article P), which reflects the idea of responsibility towards future generations, more precisely from the phrase "*the obligation to preserve the common heritage of the nation for future generations.*"[41] With regard to the precautionary principle, another important finding of the decision is that the Constitutional Court considers the principle to be enforceable not only in connection with the prohibition of regression but also independently. With regard to the application of the precautionary principle in connection with the prohibition of regression, the Constitutional Court states as follows: "*Therefore, on the basis of the precautionary principle, when a regulation or measure may affect the state of the environment, the legislator should verify that the regulation is not a step-back and this way it does not cause any irreversible damage as the case may be, and it does not even provide any ground in principle for causing such damage*". The decision then sets out in which case the precautionary principle applies independently, stating "*in the case of regulating cases not regulated before, the precautionary principle is enforced not only in the context of non-derogation, but also individually: with regard to those measures that do not formally implement a step-back, but they influence the condition of the environment, also the precautionary principle shall pose a restriction on the measure, and in this respect the legislator shall be constitutionally bound to weigh and to take into account in the decision-making the risks that may occur with a great probability of for sure.*"[42]

Since the adoption of Decision 13/2018, the precautionary principle has been included in three further decisions. Decision 4/2019 (III.7.) and Decision 14/2020 (VII.6.) confirmed the previous practice of the Constitutional Court, i.e. the constitutional significance and applicability of the precautionary principle,[43] while in Decision 3/2020 (I.3.) the precautionary principle was mentioned in the context of the

[39] Szilágyi 2018, 80.

[40] The reasoning of Decision 28/2017 [75]; The decision also refers to domestic, European Union and international sources of law, as well as case law, according to which the precautionary principle can be considered recognized and applicable. However, the presentation of the relevant sources of law and case law is not the purpose of the present work, see in this regard: Szilágyi 2018, 80–82.

[41] The reasoning of Decision 13/2018 [13]–[14].

[42] The reasoning of Decision 13/2018 [20].

[43] Cf.: The reasoning of Decision 4/2019 [74], [79], [93], [99]–[100]; and also the reasoning of Decision 14/2020 [36]–[37], [128], [183].

protection of human health. At this point, we, therefore, see that the Constitutional Court finds the precautionary principle applies and can be applied not only in relation to the right to a healthy environment and environmental protection but also – in this case – in the context of the right to health. It should also be noted that the Constitutional Court has previously indicated in Decision 13/2018 that, in addition to Paragraph (1) Article XXI, the principle also applies in general.[44] The latter decision was therefore not based on an environmental matter, so the precautionary principle does not appear in connection with the right to a healthy environment, however, the concurring reasoning of Constitutional Judge Marcel Szabó attached to the decision contains several important findings. According to the Constitutional Jude, the precautionary principle can be interpreted in the context of the right to a healthy environment, the protection of the environment, and the protection of human health. He then – following the directions of the interpretation of the Constitutional Court - summarizes the essence of the principle, stating "*if there is an uncertainty about the existence or the extent of a risk threatening human health and/or the environment, the precautionary principle may justify the action of the law-maker in the form of adopting new restrictive measures.*"[45] According to Constitutional Judge Szabó, the Constitutional Court's practice on the precautionary principle – i.e. its interpretation as a constitutional principle – is reinforced by the fact that the Minister of Human Resources and the Minister of National Development stated in their joint ministerial resolution (amicus curiae opinion) that in the event of potential risks, the legislator is obliged to act in accordance with the precautionary principle.[46]

At this point, it is worth briefly referring to the dissenting opinions as well as the concurring reasoning related to the decisions affected by the precautionary principle, as they show the extent to which the constitutional judges have been divided about raising the precautionary principle to the level of constitutional criterion. The main criticism of the precautionary principle can be attributed to Constitutional Judge András Zs. Varga, who mentions, among other things, that the Constitutional Court, 'fused' the precautionary principle from the text of the Fundamental Law, as it has done with the prohibition on regression. Exceeding its powers to interpret the Fundamental Law, the Constitutional Court has entered into a kind of 'co-constituent role' for which, however, it has no authority.[47] A similar view is taken by Egon Dienes-Oehm, who has repeatedly drawn attention to the difficulties of applying certain principles of environmental law (such as the non-derogation principle and the precautionary principle).[48] At the same time, many constitutional judges consider it forward-looking

[44] The reasoning of Decision 13/2018 [14].
[45] The reasoning of Decision 3/2020 [128].
[46] The reasoning of Decision 3/2020 [132].
[47] The reasoning of Decision 13/2018 [131] and [133].
[48] The reasoning of Decision 13/2018 [109] and the reasoning of Decision 14/2020 [192]; *Imre Juhász* also joined the criticism of *András Zs. Varga* and *Egon Dienes-Oehm*. Cf.: the reasoning of Decision 13/2018 [114].

that the Constitutional Court has incorporated the precautionary principle into its practice.[49]

After reviewing the case law, it can be stated that according to the interpretation of the Constitutional Court the precautionary principle plays a decisive role in the system of protection of the right to a healthy environment, in addition to the principle of non-derogation and prevention, and accordingly, the Constitutional Court consistently refers to the precautionary principle in its decisions of recent years. However, the detailed rules necessary for the practical application of the principle are not yet known, their elaboration is the task of the Constitutional Court for the future.

3.2. The emergence of the interests of future generations in the dogmatics of the right to a healthy environment

In addition to the development of law in connection with the precautionary principle, the provisions of the Fundamental Law declaring the protection of the interests of future generations and their interpretation have also appeared with great emphasis in the practice of the Constitutional Court in recent years.[50] It should be noted at the outset that the representation and protection of the rights and interests of future generations that are without legal personality, rooted in the principle of sustainable development,[51] is closely linked to the concept of the right to a healthy environment today.[52]

Decision 16/2015 was the first time that the Constitutional Court first dealt with the provisions of the Fundamental Law declaring the protection of the interests of future generations in substance - doing so primarily through the interpretation of Article P). The decision points out that, although Paragraph (1) Article P) of the Fundamental Law does not define exhaustively the scope of natural resources to be protected, it nevertheless states what environmental protection, as a state and civic obligation, entails. Based on this, we can speak of a triple obligation, which includes the obligation to protect, maintain, and preserve for future generations. The decision also states in connection with Article P) that the state obligation was thus independently regulated in the Fundamental Law and that the extension of the scope of obligations can be considered forward-looking, especially because only state obligations were emphasized under the previous Constitution regarding environmental protection.[53]

Going further in interpretation, the Constitutional Court supplemented the above in Decision 3104/2017 (V.8.) stating that "*Paragraph (1) Article P) is such a pillar of the institutional protection guarantees of the fundamental right to a healthy environment, which establishes the preservation of the natural and built environment, the common, natural and cultural*

[49] In addition to the above cited concurring reasoning of *Marcel Szabó*, the concurring reasoning of Ágnes Czine (paragraphs 81 to 84) and István Stumpf (paragraph 106) to Decision 18/2013 should also be mentioned.

[50] See more in this regard: Szilágyi 2021b, 223–233.

[51] Bándi 2020, 1181. and 1186.

[52] Cf.: Bándi 2020, 1194.; Fodor 2013, 343., Fülöp 2012, 77.

[53] The reasoning of Decision 16/2015 [92].

heritage of the nation for future generations as a constitutional responsibility of the state and the general responsibility for everyone and declares it a duty under the Fundamental Law."[54] Although the Fundamental Law and the Constitutional Court referred to the general and joint obligation of everyone concerning the constitutional responsibility for the common heritage of the nation, at the same time the decision emphasizes the primacy of the state obligation within this responsibility, based on the fact that "*the coordinated enforcement of this responsibility through institutional protection guarantees, the creation, correction, and enforcement of the institutional protection is a task of the state directly and primarily.*"[55]

As we have seen in the decisions of the Constitutional Court analyzed so far, the protection of the interests of future generations was deduced by the Constitutional Court from Paragraph (1) Article P), which is also confirmed by Decision 28/2017. At the same time, in the context of the reasoning of the Constitutional Court, the prohibition of regression already appears in this context. In that regard, the decision states that "*Article P) of the Fundamental Law implies the will of the constituent assembly to protect human life and living conditions, particularly arable land and related biodiversity, in such a way as to ensure the life chances of future generations and not to worsen it, based on the generally accepted principle of non-derogation*".[56] However, Decision 28/2017 already links the protection of the interests of future generations to Article 7 of the National Avowal,[57] Article 38 on the fundamental constitutional issues of public finances[58] and the right to the environment[59] (including, in addition to Article XXI, which declares the right to a healthy environment, the environmental provisions of Article XX). We can see that the Constitutional Court no longer bases the constitutional protection of the interests of future generations solely on Article P). Another important finding of the analyzed decision is that "*Paragraph (1) Article P) confers a hypothetical future heritage on future generations.*" At this point, the decision analyzes the category of "*common heritage of the nation*", comparing it with the categories of 'common cause of humanity' in the Convention on Biological Diversity, the 'heritage of European peoples' in the Birds Directive and the 'natural heritage' in the Habitats Directive. After the comparison, the Constitutional Court finds that the category in Paragraph (1) Article P) of the Fundamental Law can be considered as a concretization of these concepts, "*according to this, the Hungarian citizens and the Hungarian state undertake that the institutional system of the state will ensure the protection of the values fixed in a non-exhaustive manner in Paragraph (1) Article P) for future generations as well. All this can be seen as a concrete commitment to the »common cause of humanity« that exists in international law.*"[60] The Constitutional Court then defines the obligations of the present generations arising from Paragraph (1) Article P). These three obligations are: (a) to ensure choice, (b) to preserve quality, and (c) to ensure access. Paragraph [33] of the decision of the Constitutional Court defines this triple system of

[54] The reasoning of Decision 3104/2017 [37].
[55] The reasoning of Decision 3104/2017 [39].
[56] The reasoning of Decision 28/2017 [28]; the decision confirms this at Paragraph [32].
[57] The reasoning of Decision 28/2017 [25].
[58] The reasoning of Decision 28/2017 [24].
[59] The reasoning of Decision 28/2017 [26].
[60] The reasoning of Decision 28/2017 [31].

requirements along with the following content elements: (a) Based on the requirement of *ensuring choice* the living conditions for future generations can be most effectively ensured if the inherited natural heritage can provide future generations freedom of choice in solving their problems, rather than putting them on a forced trajectory. (b) Based on the requirement to *preserve quality*, present generations should strive to pass on the natural environment to future generations at least in such a state as they have inherited it from previous generations. (c) And based on the requirement of *access to natural resources*, present generations are free to have access to the resources at their disposal as long as the equitable interests of future generations are respected.

In this context, the Constitutional Court states, as a sort of conclusion, that *"the legislator can only meet these fundamental expectations if it takes long-term, cross-governmental cycles into account when making its decisions.*"[61]

Going further in the line of Constitutional Court decisions, Decision 13/2018 confirms the previous practice of the Constitutional Court regarding the protection of the interests of future generations and even goes beyond it in one point. The Constitutional Court now links the interests of future generations not only to the prohibition of regression but also to the other two fundamental principles of environmental law, the principle of prevention and the precautionary principle. In that regard, the decision states that "*one of the purposes of the responsible management of the property belonging to the common heritage of the nation, as stated in the Fundamental Law, namely, the definition of the needs of future generations is not a political matter, it can and should always be determined with scientific need, taking into account the precautionary principle and the principle of prevention*".[62]

Of the most recent environmental decisions, Decision 14/2020 is relevant to the subject under consideration. In this decision, the Constitutional Court assesses the provisions of Article P) as a constitutional formulation of the public trust doctrine, which on the one hand includes the state acting as a kind of trustee for future generations as beneficiaries and managing the natural and cultural values entrusted to it. On the other hand, it imposes a kind of restriction on present generations by "*allowing the use and exploitation of these resources only to the extent that it does not jeopardize the long-term survival of natural and cultural assets as these assets are to be protected for their own sake*". Another important finding for our topic of the decision is that this subparagraph of Article P), that is, the constitutional provision declaring the obligation to preserve natural and cultural values for future generations is considered by the Constitutional Court to be part of universal customary law. In conclusion, the Constitutional Court states that *"the state must take into account the interests of both present and future generations when managing these treasures and creating regulations for them.*"[63]

Not only is it positive and forward-looking that the legislator has enshrined the interests of future generations and their protection in the Fundamental Law at several points and different contexts, but also that in the practice of recent years the

[61] The reasoning of Decision 28/2017 [34].
[62] The reasoning of Decision 13/2018 [15]; moreover, that connection is already referred to in Paragraph [13] to [14] of the decision.
[63] The reasoning of Decision 14/2020 [22].

interpretation and the filling of these provisions with content has begun. For all these reasons, it can be stated that the Constitutional Court has laid the basic foundations of interpretation, but at the same time, as explained in connection with the precautionary principle, detailed rules are needed for the interests of future generations to prevail in practice, both in legislation and in law enforcement.

4. Conclusions

After reviewing the case law of the Constitutional Court of Hungary related to the subject of the study, the main conclusion is that the Constitutional Court confirmed the main elements of the dogmatics of the right to a healthy environment, and at the same time established the link between the previous and current constitutional regulations. In other words, the previous case law of the Constitutional Court regarding the right to a healthy environment is maintainable and can be applied in the future. At the same time, this means that the fourth amendment to the Fundamental Law of Hungary did not affect the dogmatics of the right to a healthy environment essentially, and its validity.

Examining the case law of the Constitutional Court in recent years, it can also be stated that new directions and tendencies can be observed in the constitutional interpretation of the right to a healthy environment, which can be traced back primarily to the new, changed constitutional regulation. The precautionary principle as a constitutional principle and the emergence of the interests of future generations in the case law of the Constitutional Court can be considered forward-looking. In these areas, the Constitutional Court has already laid the groundwork for interpretation, but the detailed rules necessary for the practical application of the precautionary principle and the effective consideration and enforcement of the interests of future generations remain to be seen. However, the elaboration of these detailed rules is also a task that awaits the Constitutional Court in the future.

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Nikolina MIŠČEVIĆ* – Attila DUDÁS**
The "Environmental Lawsuit" as an Instrument of Preventive Protection of the Constitutional Right to Healthy Environment in the Law of the Republic of Serbia***

Abstract

A lot of attention has been paid to the environment and its protection in Serbian legislation. The right to healthy environment is guaranteed by the Constitution, and in the last two decades numerous laws have been passed regulating various aspects of the environment in order to ensure its protection. The subject of the paper is the claim to eliminate the danger of damage, stipulated by the Law on Obligations from 1978. From the enactment of the law, this legal institution has been considered as a means suitable for providing preventive environmental protection, which is why it is often called an "environmental lawsuit" in Serbian legal theory.
Keywords: environment, right to a healthy environment, environmental lawsuit, claim to eliminate the danger of damage.

1. Introduction

The right to healthy environment in the Republic of Serbia is guaranteed by Art. 74 of the Constitution of the Republic of Serbia, in the part regulating human rights and freedoms. According to the para. 1 of this article, everyone shall have the right to healthy environment and the right to receive timely and full information about the state of environment. This provision stipulates that everyone is obliged to preserve and improve the environment, as well as that everyone, especially the Republic of Serbia and the autonomous province, is responsible for the protection of environment.[1] The right to a healthy environment is classified in the so-called third generation of human rights, traditionally provided for since the second half of the 20th century, regulating *"the environment of people (habitat) and values that are different, but in their entirety have a general, global significance."*[2] The theory points out that it indirectly provides additional

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[1] Art. 74, para. 2 and 3 of the Constitution of the Republic of Serbia.
[2] Orlović 2014, 162–163 with further references.

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protection and gives new content to the first basic human right – the right to life.[3] There is a lasting relationship of interdependence between them, since there is no human life without the environment, that is, the quality of human life depends on the good or bad condition of the environment, and while on the other hand, man can positively and negatively affect the environment.[4]

The field of environmental protection is regulated in more detail by the Law on Environmental Protection (hereinafter: LEP) from 2004, as well as other laws, bylaws and legal acts of the autonomous province and local self-government units. In LEP, the environment is defined as *"a set of natural and man-made values whose complex mutual relations constitute the environment, i.e., space and living conditions."* This law determines the subjects of environmental protection and the principles on which the environmental protection is based. Art. 9 regulating the principles shows the intention of the legislator to ensure the protection of the environment in accordance with the modern approach in this area of law. Among these principles are the integration principle, which implies the mutually harmonized work of state, autonomous provinces and local self-government units on the improvement and protection of the environment, the principle of prevention and precaution, the 'polluter pays' principle and the principle of sustainable development.

In addition to the LEP, there are laws specifically regulating certain aspects of the environment, such as e.g., Law on the Environmental Impact Assessment (hereinafter: LEIA),[5] Law on Strategic Environmental Assessment (hereinafter: LSEA),[6] Law on Waste Management,[7] Law on the Protection of Air,[8] Law on the Protection from Noise Pollution in the Environment,[9] Water Law,[10] Nature Protection Law,[11] etc.

There are many different legal instruments which should contribute to the achievement of the goal of environmental protection. Some belong to the field of public law and some to private law. The clear intention of the Serbian legislator to suppress behaviour harming the environment can also be seen from the fact that an entire chapter of the Criminal Code is dedicated to this subject-matter. The chapter regulates criminal liability for environmental pollution, failure to take environmental

[3] Ibid, 163.
[4] Ibid, 169.
[5] Law on the Environmental Impact Assessment from 21 December 2004 (Official Gazette No. 135/04 and 36/09).
[6] Law on Strategic Environmental Assessment from 21 December 2004 (Official Gazette, No. 135/04 and 36/09).
[7] Law on Waste Management (Official Gazette, No. 36/2009, 88/2010, 14/2016, 95/2018 – other law).
[8] Air Protection Law (Official Gazette, No. 36/2009, 10/2013, 26/2021 – other law).
[9] Law on Protection from Noise Pollution in the Environment (Official Gazette No. 36/2009, 88/2010).
[10] Water Law (Official Gazette, No. 30/2010, 93/2012, 101/2016, 95/2018, 95/2018 – other law).
[11] Nature Protection Law (Official Gazette, No. 36/2009, 88/2010, 91/2010, 14/2016, 95/2018 – other law).

protection measures or other acts endangering the environment.[12] Beside criminal offenses, environmental pollution, or failure to act in accordance with the measures provided by the LEP and other mentioned statutes, may also be qualified as misdemeanour or economic offense. Also, measures of public law include those in the field of administrative law. In addition to these forms of public law protection, environmental protection can also be achieved by legal institutions of private law.

In Serbian legal theory three institutes are most often mentioned in that context: negatory claim from the Law on Foundations of Property Law Relations (hereinafter: LFPLR),[13] claim for compensation for damages and the claim to eliminate the danger of damage (the so-called environmental lawsuit) from the Law on Obligations (hereinafter: LObl).[14] The subject of the present paper is the latter, but the negatory claim will also be elaborated in order to compare these two claims in certain aspects.

2. Property law protection by the negatory claim

In the domain of civil law, environmental protection has traditionally been achieved within the framework of neighbour relations, i.e., neighbour rights providing protection against impermissible immissions. It is pointed out in the literature that neighbour rights in Serbia are regulated as a legal limitation of the ownership on real estate.[15] Unlike e.g. the Croatian Law on Ownership and other Real Rights,[16] or the Law on Property Rights of the Republic of Srpska[17], which contain a definition of neighbour rights, such definition is not explicitly given in the Serbian LFPLR. Neighbour rights are one of the legal institutions not adequately regulated in the current legislation.

[12] Art. 260–277 of Criminal Code (Official Gazette, No. 85/2005, 88/2005 – corrigendum, 107/2005 – corrigendum, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019).

[13] Law on Foundations of Property Law Relations (Official Gazette of the Socialistic Federal Republic of Yugoslavia", No. 6/80, 36/90,"Official Gazette of the Federal Republic of Yugoslavia, No. 29/96 and "Official Gazette of the Republic of Serbia", No.115/2005 – other law).

[14] Law on Obligations (Official Gazette of the Federal Republic of Yugoslavia, No. 29/78, 39/85, 45/89 – odluka USJ i 57/89, Official Gazette of the Federal Republic of Yugoslavia, No. 31/93,"Official Gazette of Serbia and Montenegro", No. 1/2003 – Constitutional Charter and "Official Gazette of RS", No. 18/2020)

[15] Vučković 2018, 60.

[16] According to Art. 100, para. 1 of the Croatian Law on Ownership, neighbour rights represent the powers given by law to the owner of one real estate to, in connection with the exercise of his ownership, demand from the owner of another real estate to do or to refrain from something that he or she, as the owner, could do by law.

[17] Art. 66, para. 1 of the Law on Property Rights of the Republic of Srpska *("Official Gazette of RS*", No. 124/2008, 3/2009 – corrigendum, 58/2009, 95/2011, 60/2015, 18/2016 – CC decision, 107/2019 and 1/2021 – CC decision) stipulates that "the owner of real estate in the exercise of his or her powers from his ownership has the obligation to act carefully towards the owner of another real estate, and who refrains or does in his interest something that is determined by law (neighbour rights).

Aside from the Art. 5 of the LPFLR, referring to the admissibility of harmful influences in neighbour relations, the rules from the Serbian Civil Code from 1844 are still applicable to these relations on the basis of Art. 4 of the Law on the Invalidity of Legal Regulations Adopted Before April 6 and During Enemy Occupation.[18]

An important neighbour right is the one providing protection against excessive immissions. The term "immission" means harmful influence coming from one real estate to the neighbouring one, making the use of the latter difficult. It is often described by listing examples of harmful influences, such as noise, unpleasant odours, smoke, dust, heat, light, etc.[19] The Serbian LFPLR does not use the term 'immission', but it determines what is considered an impermissible way of exercising property rights.[20] Art. 5 stipulates the duty of the owner to *"refrain from actions when using real estate and to eliminate the causes coming from his real estate, making the use of another real estate difficult (transmission of smoke, odours, heat, soot, earthquakes, noise, wastewater runoff etc.) beyond the usual measure, in light of the nature and purpose of the real estate and local conditions, or causing significant damage."* Par. 2 of this article prohibits also the mentioned disturbances without a special legal basis by using special devices. According to Cvetić, from the wording of Art. 5 of the LFPLR, using the expression 'other real estate', and not 'neighbouring real estate', it can be concluded that protection against immissions exceeds the limits of neighbour rights.[21] It can be said that this is in line with the need to protect the environment from harmful influences that are continuously increasing due to the modern way of life, technological and industrial development. The Serbian theory points out that these processes endanger material goods and the environment to a greater extent, so the harmful effects arising from them exceed the usual understanding of immission as a harmful influence from one land to the neighbouring one, i.e. as an influence of material nature that can be noticed.[22] Thus, according to the understanding of these authors, there is a need for a different conceptual definition of immission by including other forms of harmful influences, as a wider space in which these influences can manifest themselves.[23]

Protection against excessive immissions in Serbian law can be achieved by different claims belonging to property law or to the law of obligations. In property law negatory claim and possessory claim can contribute to the protection of the environment, because they serve to stop disturbing the holders of property rights and to prevent further disturbance.[24] However, in the context of protection against excessive immissions through the legal institutions of property law, Serbian authors regularly mention negatory claim from Art. 42 of the LFPLR. According to this rule, in the case when the disturbance does not consist in the loss of the possession, but is accomplished in another way, the owner, i.e. the presumed owner, may demand from

[18] Cvetić 2015, 1591.
[19] Ibid, 1592.
[20] Gajinov 2015, 7.
[21] Cvetić 2015, 1593.
[22] Gajinov 2015, 9.
[23] Gajinov 2015, 11.
[24] Vučković 2018, 236. Lazić 2012, 122–125.

the third person who is unjustifiably disturbing to cease the disturbance. This right of the owner does not become unenforceable by the laps of time. Also, para. 2 of this article stipulates that the owner has the right to claim for the compensation for damages according to the general rules on damages in case the damage is caused to him by the disturbance.

Negatory claim requires the fulfilment of several conditions. First, it is necessary that the third party does not have a legal ground for taking the action which the owner considers disturbance. In addition, the immission must be excessive, meaning that the harmful influences from one real estate on another must be greater than usual at the given locality, taking into consideration the nature and purpose of the real estate. Excessive immissions constitute unlawful disturbance as a condition for protection under Art. 42 of the LFPLR. Therefore, as *Knežević* points out, illicit immissions are merely a form in which disturbance to other real estate manifests itself, thus the precondition for a negatory claim from Art. 42 of the LFPLR exists. The condition of this claim is that disturbance has actually occurred and it is unlawful. In the case of disturbance by harmful immissions, Art. 5, para. 1 of the LFPLR determines when the immission is considered unlawful.[25]

The means of use of a real estate exceeding the usual extent from Art. 5 of the LFPLR is a legal standard according to which the court in each specific case assesses whether there is an excessive immission. In doing so, the court takes into account whether the real estate from which the immissions originate in the particular case is located in a village or town, in a residential area or industrial zone of the city, what is the purpose of the real estate, the extent of damage caused by immission, whether there is a special regulation stipulating the immission impermissible, etc.[26] As the detailed regulation of environmental protection for most types of immissions determined environmental standards and established precise limits of tolerance of these influences (e.g. in decibels for noise, or a precise measure of harmful gases in the air), the court in determining whether disturbance exists usually relies on these objective criteria too.[27]

Also, for granting protection against immissions by a negatory claim, it is necessary that the disturbance is permanent.[28] When it comes to protection against excessive immissions through a negatory claim, in theory, the range of persons who have cause of action is still discussed,[29] as well as the distribution of the burden of proof in the procedure initiated for the realization of this claim[30].

[25] Knežević 2013, 364. Given the different interpretations of the nature of the claim from Art. 42 of the LPFPLR in Serbian literature, *Knežević* points out that this is a negatory claim as a special subjective right arising from the violation of another, existing subjective right or legally protected interest – in this case the ownership. Knežević 2013, 356–358.
[26] Lazić 2012, 119.; Josipović 2017, 59–60.
[27] Lazić 2012, 119.
[28] Lazić 2012, 124.; Gajinov 2015, 214.
[29] Popov, Nikolić, M. Salma, Cvetić & Knežević 2017, 89.
[30] Knežević 2013, 353–374.; Cvetić 2015, 1594.

3. Protection of the environment by the so-called environmental lawsuit of the law of obligations

Another means of civil law protection of the environment is the so-called environmental lawsuit from Art. 156 of the LObl. It prescribes that everyone may demand from another the removal of a source of danger threatening to cause considerable damage to him or her or to an unspecified number of persons, as well as to refrain from any activity causing disturbance or danger of loss, should the ensuing disturbance or loss be impossible to prevent by adequate measures.

This rule represents the concretization of the principle of prohibition of causing damage from Art. 16 of the LObl, according to which *"everyone shall be bound to refrain from an act which may cause damage to another."*

The preventive claim for the removal of the source of danger from Art. 156 of the LObl, as well as the negatory claim, does not have the exclusive function of environmental protection but is intended to protect individuals and legal entities from considerable damage of any kind. However, it has a significant role in the protection against impermissible immissions. By preventing harmful immissions, preventive protection of the environment is provided. Thus, although it primarily serves the protection of private subjective rights, this claim indirectly protects the public interest as well.[31]

This lawsuit shows several advantages over the negatory claim. First, the negatory claim is limited, as a rule, to a neighbouring real estate. Also, the scope of persons who have active or passive legal standing in a dispute initiated by a negatory lawsuit is significantly narrower than the circle of persons who can appear as a plaintiff, i.e., a defendant in a dispute under the so-called environmental lawsuit. As can be seen from para. 1 of this article, everyone has the right to demand the removal of the source of danger. Therefore, the claim holders are not only persons who are threatened by considerable damage, but also all third parties if the occurrence of considerable damage threatens an indefinite circle of persons.[32] That is why it is also called a popular lawsuit (actio popularis).[33] To that extent, the so-called environmental lawsuit differs from the classic civil lawsuit which can be filed only because of the violation of a subjective right a concrete person, or his or her legally protected interest.[34]

[31] Petrušić 2009, 219; T. Josipović, 53. Josipović in her paper writes about the environmental lawsuit in Croatian law, regulated by Art. 1047 of the Croatian Law on Obligations (Official Gazette of Republic of Croatia No. 35/05, 41/08, 125/11, 78/15, 29/18), which is almost identical to Art. 156 of the LObl that remained in force in Croatia until the enactment of the valid Law on Obligations.

[32] Popov, Nikolić, Salma M., Cvetić & Knežević 2017, 88.

[33] Popular lawsuits (actones popularis) in Roman law were established with the aim of protecting a wider interest by private initiative. They could be submitted by any citizen in case he notices that a certain regulation has been violated. Malenica 2007, 402.

[34] Salma M. 2014, 134.

3.1. Claims arising from Art. 156 of the LObl

Art. 156 LObl regulates three different claims: the claim for elimination of the source of danger, claim for prevention of damage or disturbance and the claim for compensation for damages. Par. 1 stipulates that *"everyone may demand from another to remove a source of danger from which he or an indefinite circle of persons is threatened with considerable damage, as well as to refrain from an activity which causes disturbance or danger of damage in case that the occurrence of disturbance or damage cannot be prevented by other appropriate measures."* In the para. 2 the possibility is provided for the court to order, on the demand of the interested person, certain measures in order to prevent damage or disturbance, or to eliminate the source of danger at the expense of the holder of the source of danger, if he or she him- or herself does not do so.

According to para. 3 and 4 of the Art. 156 of the LObl, if the damage occurs in the performance of an activity undertaken in the interest of the general public for which a permit from a competent authority has been obtained, only compensation for damage exceeding normal limits may be demanded. Besides that, in these cases, socially justifiable measures for the prevention or reduction of damage may be demanded.

3.1.1. Claim for the removal of the source of danger of damage and for refraining from activities from which the disturbance or danger of damage arises

This claim serves to protect from considerable damage when its occurrence cannot be prevented in any other way, by taking other measures, but only by cutting it at the root, i.e. by removing the source from which it threatens to arise, or by ceasing of activities threatening of causing damage or disturbance. This claim requires the fulfilment of several conditions regarding the magnitude of the damage, the danger of its occurrence and the source of danger.

(a) Considerable damage – While the condition of a negatory claim is the unlawfulness of the disturbance causing excessive immissions, the condition of a popular claim for elimination of the source of danger of damage from Art. 156 of the LObl is that the damage is "considerable". In other words, it is not enough that any damage threatens, but it must be of a greater relevance.

When speaking about the popular claim or the so-called environmental lawsuit as an instrument of environmental protection, the concept of damage must be determined first. Namely, in Serbian law, damage, in the civil law sense, is the reduction of someone's property, prevention of its increase, as well as inflicting physical pain, mental pain or fear on another.[35] On the other hand, the LEP uses the term 'environmental pollution' or 'environmental damage' in the context of damage and liability for damage.[36] Environmental pollution is defined in the introductory provisions of this law as *"the introduction of pollutants or energy into the environment, caused either by human activities or*

[35] Art. 155 LObl.
[36] Art. 102–108 LEP.

natural processes, which has or may have adverse effects towards quality of the environment and human health."[37]

Therefore, in theory, a distinction is made between environmental damage and the classical term of damage in civil law sense. Environmental damage, according to J. Szalma, is a broader term since it sometimes does not consist in diminishing someone else's property or violating someone else's mental or physical integrity.[38] Environmental damage *"is simply not measurable by the criteria of civil law, because it is sometimes enormous, financially inexpressible, and often cannot be tied only to the property of a particular person, even sometimes cannot be treated as public goods, tied to a particular state sovereignty in the classical sense of the word."*[39] This author distinguishes environmental damage from environmental damage in a narrow sense, by which he means environmental damage that is economically measurable, i.e. refers to the property of a particular person.[40] It can be subsumed under the classic civil law concept of damage, and it is characterized by the fact that it occurs as a consequence of an immission. This division in Serbian theory is also made by other authors, but they do not use the term *"environmental damage in a narrow sense."* These authors make a difference between 'environmental damage' which means damage to the environment and "traditional damage" including damage *from* polluted environment.[41] According to *Cvetić*, environmental damage is a damage to the environment that *"does not mean a violation of private interest"* at the same time.[42]

In any case the damage must not be insignificant.[43] The court will evaluate that in each individual case. Some authors proposed guidelines for the assessment whether the extent of the threatening damage justifies this sort of claim. Thus, some point out that this issue should be assessed from the point of view of the party suffering the damage, i.e., who is threatened by the damage. They assert that one should also consider the geographical area where the damage threatens to occur.[44] In addition, in theory, there are proposals to adopt certain criteria according to which the court in a particular case would assess whether the standard of 'considerable damage' is met or not. According to *Josipović*, the court should take into account the type and scope of personal rights, the type of things threatened by damage and their value, the number of persons threatened by damage, the size and purpose of the endangered area, etc.[45] Brkić proposes the introduction of one general and several special criteria. According to this author, human life and health, as well as balance in nature, can be taken as a general criterion. Therefore, it could be said that a threat of considerable damage exists when there is a danger that the harmful event will result in death or damage to human health or environmental pollution in terms of the provisions of the LEP.[46] This author points out

[37] Art. 3, para. 1, item 11.
[38] Salma J. 2009, 38.
[39] Ibid.
[40] Ibid.
[41] Karanikić Mirić 2007, 465.
[42] Cvetić 2014, 295–296.
[43] Cigoj 1980, 436–437.
[44] Ibid, 437.
[45] Josipović 2017, 69
[46] Brkić 2019, 302

that by applying the term of damage in sense of environmental pollution from the LEP, it is achieved that the extent of damage is not assessed exclusively according to economic criteria, but according to biological ones. This is important considering that certain harmful consequences to the environment could not be economically valued even though they have an exceptional biological value, such as e.g. the extinction of a particular species.[47] This author, therefore, suggests that when applying Art. 156 of the LObl, in the case when the damage threatens the environment, one should rely on the term of economic damage as understood by the previously mentioned authors, and not from the damage in the classical civil law sense. As special criteria, this author mentions those related to neighbour relations[48], criteria related to areas where the risk of damage occurs[49], criteria in case there are rules that precisely determine the limits of permissible influence on environmental elements[50] and criteria related to the object of protection[51].

(b) Danger of damage and a high degree of probability that the damage will occur – The domestic theory points out that the mere existence of a danger of damage is not sufficient to grant protection on the basis of this claim. The danger of damage should be "concrete and certain, and not contingent on a completely uncertain future event".[52] There needs to be a high level of probability that the damage will occur if appropriate measures are not taken to prevent it.[53] Since this is a preventive claim,

[47] Ibid.

[48] In neighborly relations, there would be a danger of significant damage if the neighbor undertakes certain actions without the necessary attention, that is, with a lower degree of attention than expected from other neighbors in this particular case. *Ibid*, 303 with further reference.

[49] This criterion implies that the court should take into account the area in which the danger of damage occurs, i.e., whether it is an area in which the activity is carried out, implying an increased danger of the occurrence of harmful consequences, i.e. pollution on scale larger than usual. Also, it is emphasized that this criterion cannot be applied outside the limits of the stated general criterion. *Ibid*, 304 with further reference.

[50] According to this criterion, if the regulations explicitly stipulate the limit to which certain harmful effects are considered permissible, anything exceeding that limit should be considered as considerable damage. Ibid, 305.

[51] This author also states that when assessing the extent of damage, the object threatened by damage should be considered, i.e. whether it is life, health, personal property or the environment. Thus, if the damage threatens property, it is taken into account whether it originates from the performance of a certain activity for which a permit has been issued and to which another criterion refers. If the damage threatens health, Brkić emphasizes that one should separate physical or mental pain and fear of impairing health by causing a certain disease. This is because physical, mental pain and fear are of an individual character and their existence, intensity and duration in the same circumstances can vary from person to person. Therefore, the court expert in the procedure cannot assess whether a person would suffer any of these types of non-pecuniary damage and what intensity they would be, i.e. whether the condition of "considerable damage" would be met. On the other hand, if he can determine that there is a risk of injury or illness, this condition should be considered fulfilled. When it comes to the environment, the above general criterion applies. Ibid. 306–307.

[52] Šago 2013, 904.

[53] Salma M. 2014, 135.

it is necessary that the damage has not yet occurred, but *"that the risk is on a certain path of realization."*[54] An example of this is the case of the existence of intense harmful ionizing radiation by which the health consequences have not yet occurred, but it is certain that they will do so if no measures are taken to prevent or reduce the degree of radiation.[55]

(c) Causal link between the source of danger or activity and the potential damage – As one of the conditions to achieve legal protection by this claim, some Serbian authors name also the causal link between the source of danger and the potential damage.[56]

3.1.2. Claim for taking measures to prevent disturbance or damage

The possibility of filing this sort of claim is not so clearly stipulated in Art. 156, para. 1 of the LObl, as the claim for elimination of the source of danger or refraining from the activity from which the disturbance or danger of damage arises, but follows the logic by which the former is regulated. Namely, according to this provision, the claim for the elimination of a source of danger depends on the possibility of preventing the occurrence of damage by taking appropriate measures. This means that a person who assesses that he or she or an indefinite number of persons is threatened with considerable damage from a certain source of danger or due to the performance of a certain activity of another person may first demand prevention of the occurrence of the given damage in another way than by removing that source.[57] These measures differ, depending on what the source of danger is. It can be e.g. installation of appropriate filters at the factory plant in order to prevent the release of harmful gases into the air, installation of water purifier in order to prevent the spillage of toxic substances into the river, installation of sound insulation, etc.

However, vindicating these demands in court proceedings by the so-called environmental lawsuits are not without difficulties. Before filing a lawsuit, it is necessary to identify the source of the danger, and clearly determine the specific measures that need to be taken and justified in order to eliminate the danger of damage. This requires appropriate knowledge, which, as a rule, a plaintiff does not have, and, hence, consulting an expert of the appropriate expertise already in the phase of preparation of the lawsuit and before initiating the litigation. The justification of these measures and their suitability for the prevention of damage or disturbance should be proven in the proceedings, which also implies the participation of experts, and thus imposing significant costs on the plaintiff.[58]

[54] Salma J. 2009, 42.
[55] Salma J. 2009, 42; Salma M. 2014, 140.
[56] Salma J. & Nikolić 2009, 189; Salma M. 2014, 135.
[57] Dudás 2015, 33.
[58] Josipović 2017, 65–66. and 70.; Maganić 2017, 39.

3.1.3. Claim for compensation for damages

Par. 3. and 4. of Art. 156 of the LObl regulate the case when the damage occurs due to the performance of an activity undertaken in the interest of the general public for which a competent authority has given a permit. According to these rules, only compensation for damages can be claimed in such circumstances. At the same time, the injured party cannot claim compensation for the entire damage he or she suffers, but only for the damage 'exceeding normal limits'. Since it is necessary for the damage to have already occurred in order to enable the plaintiff to file this claim, it does not have a preventive character, unlike the previously mentioned ones. Since the risk of damage in this case has already been realized, and it is possible to identify the person who suffers the harmful consequences of performing this generally beneficial activity, only to the injured party has active standing in the litigation. In that sense, this is not a so-called popular lawsuit, as it is the case with the claim to implement measures for the prevention of damage or disturbance, or a claim to eliminate the source of danger of damage or to refrain from activities resulting in disturbance.

Therefore, when it comes to a generally beneficial activity the performance of which has been permitted by a competent authority, it is not possible to demand forbearance from performing this activity, but only compensation for excessive damage caused to a certain person. This rule is an manifestation of the idea of the so-called socialization of risks, according to which all citizens benefit from development, and in that sense, everyone should bear the environmental consequences within certain limits.[59] However, preventive protection in the case of performing generally beneficial activity is sought to be achieved by administrative measures contained in LEP, LEIA, LSEA and other regulations establishing limit values of allowed immissions, conditions for obtaining permits and licenses for work, etc.[60]

However, in addition to compensation for excessive damage, the implementation of socially justified measures for the prevention of damage or its reduction may also be requested. By this way, the lawsuit from Art. 156, para. 3 and 4 of the LObl still can have preventive effect. In that case, it is also necessary to state in the lawsuit the specific measures whose performance is requested.

4. The right to a healthy environment in the case law of the Constitutional Court of the Republic of Serbia

In Serbian law constitutional appeal is a special legal remedy providing protection in the case of violation of human or minority rights guaranteed by the Constitution. In accordance with Art. 170 of the Constitution of the Republic of Serbia, a constitutional appeal may be lodged against individual acts or actions performed by state bodies or organisations exercising delegated public powers infringing or denying human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or they are not envisaged at

[59] Salma M. 2014, 139.
[60] Vučković 2018, 262.

all. In the case law of the Constitutional Court there are not too many cases of constitutional appeals asserting violation of the right to a healthy environment.[61] Among them, only one ended with the decision by which the Constitutional Court upheld the constitutional appeal and established the violation of the right to a healthy environment from the Art. 74 of the Constitution.[62] In this case, the complainants claimed a violation of the right to a fair trial under Art. 32, para. 1 in connection with the right to a healthy environment under Art. 74 of the Constitution. Namely, the complainants asserted that the Court of Appeals in Novi Sad arbitrarily applied the substantive law when deciding on the claim for the elimination of the transmission line pole producing harmful radiation from their yard, and by that violated their right to a fair trial. The civil procedure, which ended with the judgement of the Court of Appeals in Novi Sad[63], against which a constitutional appeal was filed, was initiated by a lawsuit in the Municipal Court in Bačka Palanka against the Public Company Electric Network of Serbia. In addition to compensation for non-pecuniary damage due to fear and stress, the plaintiffs demanded the elimination of the transmission line pole that the predecessor of the defendant company placed in their yard or the payment of a certain amount of money which would grant the defendant the right to use the plaintiffs' land and facilities. During the litigation, expertise of electrical, geodetic, and oncological experts, as well as experts of the 'Vinča Institute of Nuclear Sciences' and the Public Company 'Nuclear Facilities of Serbia' were submitted.

The Constitutional Court established the violation of the right in the manner of evaluation of the expert findings and opinion by the Court of Appeals. The expert's finding of the 'Vinča Institute of Nuclear Sciences' was accepted only in the part stating that the measured maximum values are many times less than the reference values in comparison with the guidelines of the International Commission for Protection of Non-Ionizing Radiation and the Rulebook on Exposure Limits to Non-Ionizing Radiation. On the other hand, the Court of Appeals assessed the part related to the proposed measures – relocation of the transmission line pole or eviction of the plaintiffs' household as a non-binding recommendation because only the laws of the Republic of Serbia can be applied to a specific case, and not Russian norms referred to by the experts.

In connection to the claim for removal of the transmission line pole pursuant to Art. 156 of the LObl, the Court of Appeals in Novi Sad considered that the claim was not founded since the transmission line pole does not represent a source of danger from which considerable damage threatens. Also, this court referred to para. 3 of this article, pointing out that even if it were determined that the plaintiffs suffered damage, the request for removal of the pillar would not be justified because it is a generally

[61] Decisions od the Constitutional Court No. Už-1198/2008 from 3 March 2011, Už-1424/2008 from 31 March 2011, Už-2945/2013 from 23 December 2015. and Už-7702/2013 from 7 December 2017.
[62] Decisions od the Constitutional Court No. Už-7702/2013 from 07.12.2017. Bulletin of the Constitutional Court for 2017, Belgrade 2019, 612–629.
[63] Decision of the Court of Apeal in Novi Sad No. Gž. 3677/12 from 20 June 2013.

beneficial activity, and the plaintiffs could only claim damages exceeding normal limits, which they did not do in the lawsuit.

In relation to this position of the Court of Appeals, the Constitutional Court pointed out that Art. 156, para. 4 stipulating that in the case referred to in para. 3, one may also demand the implementation of socially justified measures to prevent damage or for its reduction and noted that the Court of Appeals did not even refer to the given provision in its reasoning. Since the Court of Appeals found the claim for non-pecuniary damage justified, emphasising that the plaintiffs suffered this damage simply because they knew that radiation could cause a danger to their health or life, the Constitutional Court wondered why these circumstances were not taken into account properly when assessing that the given transmission line pole does not represent a source of danger.[64]

The Constitutional Court concluded that the Court of Appeals in Novi Sad, in reasoning of the judgement, failed to establish and take into consideration all relevant aspects of this case and to take a stand in relation to them. According to the Constitutional Court, "failure to consider issues that are crucial for assessing the merits of a claim in the context of the right to a healthy environment has led to a violation of the right to a reasoned court decision, as an element of the right to a fair trial from the Art. 32, para. 1 of the Constitution, in connection with the right to a healthy environment from Art. 74 of the Constitution".[65]

5. Conclusion

The right to healthy environment is guaranteed by Art. 74 of the Constitution of the Republic of Serbia. In order to protect it, numerous laws have been passed which regulate various elements and aspects of the environment. As the protection of the environment requires a comprehensive approach, these laws contain measures of criminal law, rules on misdemeanour or administrative law which should ensure the achievement of this goal. In addition to them, certain legal institutions of civil law also contribute to the protection of the environment, such as the compensation for damages, a negatory claim and a claim to eliminate the danger of damage (the so-called environmental lawsuit). The paper analyzes the latter: the claim from Art. 156 of the LObl. The authors point out that this article actually contains three different claims: a claim to remove the source of danger, a claim to prevent damage or disturbance, and a claim for compensation for damage caused by performing generally beneficial activities. The main advantage of this legal institution is its preventive character, i.e., the possibility to request from the liable person to take appropriate measures in order to prevent the occurrence of damage or disturbance, even before the damage arises from the holder of the source of danger, i.e., the performer of the activity from which the disturbance or the damage threatens. If this cannot be achieved by appropriate measures, one can demand the elimination of the source of the danger, i.e., the cessation of performing the activity.

[64] Ibid. 612–629.
[65] Ibid. 629.

An additional advantage of the claim, that is, the environmental lawsuit from Art. 156 of the LObl, is that everyone can file it, and not only the person who is directly threatened with the damage (popular lawsuit). When the threat of damage stems from a generally beneficial activity for which the permission of a competent authority has been obtained, it is not possible to demand the termination of the activity, but only compensation for the damage in the extent exceeding normal limits. Therefore, this claim does not have a preventive character and cannot be requested by everyone, but only by the person who suffered the damage. However, even in this case, there is a claim for implementing socially justified measures for the prevention of the occurrence of damage or its reduction, which has a preventive character.

In this paper the conditions of these claims, and certain facts that may hinder their implementation in the civil procedure were analysed in order to encourage their application in the future.

At the end of the paper, authors presented the decision of the Constitutional Court of the Republic of Serbia on the constitutional appeal due to the violation of the right to a fair trial in connection with the right to a healthy environment in a civil procedure regarding the claim to eliminate the source of danger from damage from Art. 156 of the LObl.

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Dušan NIKOLIĆ*
Right to a Healthy Environment and Legal Regulation of Viticulture**

Abstract

The foundations for the introduction and development of the modern right to a healthy environment were laid almost half a century ago, by adoption of the Declaration on the Human Environment at the United Nations thematic Conference on the Human Environment, held in Stockholm in 1972. The gathering was preceded by extensive preparations in which members of the academic community and people from politics participated equally. Scientists have obviously prepared a good basis for considering key issues, and representatives of member states and UN bodies have given it an appropriate political dimension. Thanks to that, reasonable, necessary compromises were made, which made it possible to establish a (fragile) balance of interests in the then polarized world and to start a process of great importance for humanity with a lot of optimism. Unfortunately, relatively little has been done on global level since then. This is evidenced by the terminological inconsistency and conceptual uncertainty of the right to a healthy environment, unclear legal nature, dominant development and expansion through constitutionalization at the national level (not on the basis of international instruments), as well as indirect application through the so-called greening of other human rights. The United Nations Human Rights Council, which in October 2021 adopted a Resolution on a safe, clean, healthy and sustainable environment by which the right to a healthy environment was raised to the level of human rights, officially assessed that many questions about the relationship of human rights and the environment remain unanswered and require further examination. This paper opens several interrelated topics whose consideration can contribute to the further development of the right to a healthy environment. The author believes that over time there will be an interaction between the right to a healthy environment and property rights; that this will pave the way for a more extensive interpretation that could result in an individual's autonomous right to independently shape a healthy environment in the space person uses as the owner or holder of another property right; that such interaction would enable the owner to more effectively counter unjustified restrictions on property rights established by state bodies or supranational institutions, such as those existing in the field of viticulture. The paper points out the need to rethink policies and rights related to agriculture and to pay more attention to the part of the population that contributes to the preservation of a healthy environment through their way of life and work. In the final part, winegrowers 'oases that represent specific spatial units are analyzed.

Keywords: human rights; healthy environment; agricultural policy; planting rights; winegrowers' oases.

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1. Right to a healthy environment

1.1. Genesis and evolution

The beginning of October 2021 was also the beginning of a new era in the development of the right to a healthy environment and related basic human rights. In those days, the five-decade-long struggle for the recognition of its independent existence on a global level and for bringing it to the similar level with other rights that are essential for human beings and their communities ended. It is not known whether this happened precisely then because of the tendency of most people to remember something and end something in the jubilee year (or just before it), because the United Nations Climate Change Conference in Glasgow was approaching – COP 26)[1] or because a critical mass of people (decision makers, but also ordinary citizens) have finally understood what is happening and what will happen in their environment.

In any case, on October 8, 2021, at the 48th session in Geneva, the United Nations Human Rights Council adopted a 'Resolution on a safe, clean, healthy and sustainable environment.'[2] This was preceded by a long series of initiatives, analyses, debates, scientific and political gatherings, advocacy and disputes, political proclamations, statutes, and court decisions.

In the literature, the emergence of the idea of the right to a healthy environment is implicitly linked to the modern movement for the protection of the environment (green movement), which emerged in the late 1960s.[3] However, it was only a new beginning in the time that belongs to the present generations. Namely, the fact is that some rudiments of that right existed in ancient times.[4] This is evidenced by the duties that Roman citizens had, but also the recognition of the right to sue in case of environmental damage by various immissions (imissio).

The formation of the modern right to a healthy environment was officially, in the programmatic, legal-political sense, begun with the adoption of the Declaration on the Human Environment at the United Nations thematic Conference on the Human Environment, held in Stockholm in 1972.[5] It is believed that the idea of organizing such a gathering came from the academic world, from the Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation of Biosphere Resources organized by UNESCO in Paris in 1968,

[1] Such an assumption is indicated by the appeal sent to the COP participants by the Special Rapporteur of the UN Human Rights Council, David Boyd.

[2] UN Geneva, Human Rights Council Adopts Four Resolutions on the Right to Development, Human Rights and Indigenous Peoples, the Human Rights Implications of the COVID-19 Pandemic on Young People, and the Human Right to a Safe, Clean, Healthy and Sustainable Environment.

[3] Knox 2020, 79–95.

[4] Detailed: Sáry 2020, 199–216.

[5] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14, at 2 and Corr.1 (1972); Report of the United Nations Conference on the Human Environment, Stocholm 15-16 June 1972.

while the official initiative of the same year came from the world of politics, from the Government of the Kingdom of Sweden. The idea was supported by the UN Advisory Committee on the Application of Science and Technology to Development and the UN Secretary-General, followed by the Economic and Social Council and the General Assembly of the world's most important organization. This unusually strong union of science and politics was probably the key contributor to the Conference being declared the most successful international gathering in that period, and Declaration on the Magna Carta of the Human Environment. Scientists have obviously prepared a good basis for considering key issues, and representatives of member states and UN bodies have given it an appropriate political dimension. In such an atmosphere, ambitious conclusions and decisions were born. In addition to the Declaration, two other documents were adopted, the Resolution on Institutional and Financial Arrangements and the Action Plan. It was proposed that the United Nations General Assembly establish: an intergovernmental Steering Committee for Environmental Programs, which would provide general policy guidelines for the direction and coordination of environmental programs; Secretariat for the Environment headed by the Executive Director; Environmental Fund, which should provide additional funding for environmental programs; interdepartmental Coordination Committee for the Environment in order to ensure cooperation and coordination between all interested bodies in the implementation of environmental protection programs. The action plan envisaged an environmental assessment, through the establishment of an Earthwatch, designed to identify and measure international environmental problems and warn of impending crises; environmental management based on Earthwatch estimates; and necessary support measures, including education, training, and public information. The goal was to create an appropriate infrastructure at the international level.

By its legal nature, the Stockholm Declaration is a legally non-binding document, which, according to the authors, contains a set of common principles that should inspire and guide the peoples of the world in preserving and improving the human environment. It is the result of numerous consultations, negotiations, and compromises that have led to a (fragile) balance of different interests. It was a time of drastic ideological divisions, of the Cold War, of the growing gap between developed and underdeveloped countries, between rich and hungry... There is authentic evidence that the Conference organizers constantly kept in mind the fact that the mentioned multiple polarizations may jeopardize the adoption of documents and their subsequent application. In an era of bloc divisions and the significant influence of the Non-Aligned Movement, any attempt to impose principles and concrete normative solutions would be completely counterproductive. Diplomatically, everything that could be disputable was avoided, and what was realistically achievable at that time was proposed. Using modern political terminology, we could say that a 'bottom-up approach' has been applied. This is evidenced by the fact that the Draft Declaration was written based on the analysis of the questionnaire sent by the UN Secretary General to all member states, as well as the principles contained in the final version of the document, which were adopted at the Conference.

The Committee in charge of preparing the meeting concluded that the Declaration should contain basic principles that will draw the attention of humanity to the many different, but interrelated problems of the human environment, as well as the rights and obligations of man (individual), the state and the international community related to that. It was considered a goal of the Declaration to encourage community participation in the protection and improvement of the human environment and, where appropriate, to restore its primitive harmony, in the interests of present and future generations.[6] Finally, it was concluded that the principles contained in that document could represent guidelines for governments in formulating policies and goals for future international cooperation. Competences for the implementation of the legal and political commitments expressed in the Declaration are divided between the member states on one hand and the international community on the other. The Declaration states that the relevant national institutions must be entrusted with the task of planning, managing and controlling (national) environmental resources in order to improve the quality of the environment and that states have the sovereign right to exploit their own resources in accordance with their environmental policy.[7] On the other hand, they also have the responsibility to ensure that activities within their jurisdiction or control do not cause harm to the environment of other States or to areas outside the borders of national jurisdiction.[8] At the same time, it was agreed in principle that states would ensure that international organizations play a coordinated, efficient and dynamic role in protecting and improving the environment.[9] The dominant position in that process was given to the state authorities. In the past half century, they have used it to a significant extent for the normative shaping of the right to a healthy environment. In the 1970s, the belief was expressed that the international community, taking responsibility for preserving and improving the human environment, *"would find in the Stockholm Declaration a source of strength for later, more concrete action."*[10] Unfortunately, relatively little has been done internationally since then. This is evidenced by the terminological inconsistency and conceptual uncertainty of the right to a healthy environment, unclear legal nature, dominant development and expansion through constitutionalization at the national level (not on the basis of international instruments), as well as indirect application through the so-called greening of other human rights.

1.2. Terminological inconsistency and conceptual uncertainty

The right to which this paper is dedicated is not precisely terminologically determined. In international documents, in scientific and professional literature, and in public addresses of decision makers at the national and international level, the terms right to healthy environment, right to clean environment, right to sustainable and healthy environment, right to favorable environment, right to wholesome environment, right to ecologically balanced environment etc., are used.

[6] Its. U.N. Doc. A/CONP.48/PC/6, para. 27(32)–(38).
[7] Declaration, Principle 17.
[8] Declaration, Principle 21.
[9] Declaration, Principle 25.
[10] Ibid.

Terminological confusion was further exacerbated by the recently adopted United Nations Human Rights Council Resolution on the Human right to a safe, clean, healthy and sustainable environment. Since the word right is used in the singular, and not rights, in the plural, it can be concluded that the creators of that document established a new, more complex and comprehensive right. An additional problem is that this time its conceptual notion (definition) was again missing.

Like the Roman jurist Iavolenus, who stated that any definition in civil law is dangerous (Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset),[11] the drafters of the Stockholm Declaration once concluded that it is risky (dangerous) to define human environment and that the work should be postponed for some other time in which there will be more favorable circumstances. According to the records from the preparatory period, some representatives considered *"that it might be difficult at the present stage to reach agreement on a satisfactory definition which would not be unduly restrictive; and that an attempt to formulate a definition might unprofitably delay the preparatory work on the substance of the draft Declaration."* For the past half century, the right to a healthy environment has not been conceptually defined. There is no comprehensive definition in legal documents and literature on the basis of which it can be concluded what it is and what it is not (Definitio fit per genus proximum et differentiam specificam). Instead, there are only various descriptions that indicate its legal nature.

1.3. Legal nature

The starting point for determining the legal nature of the right to a healthy environment is the Declaration adopted in 1972 in Stockholm, and the final point is in the Resolution adopted in 2021 in Geneva. In the first provision of the first-mentioned document, it is written: *"Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself."*[12]

Based on the above, it can be concluded that the right to a healthy environment is instrumental. It enables the realization of other, related human rights. It is a right that connects and integrates other rights from the same corpus.

According to the provisions of the Geneva resolution, it is one of the basic human rights.

The literature discusses the aspirational nature[13] of the right to a healthy environment. This feature has rights that are unenforceable, that do not create (suable) obligations, but indicate some intention, hope or expectation that cannot be achieved through the courts. The fact is that the right to a healthy environment, at the global scale, is determined by the provisions of legally non-binding acts. However, it is also a

[11] Iavolenus, D, 50, 17, 202.
[12] Declaration, Principle 1.
[13] About that and related topics, Harvey 2004, 102. and 123.; Pirie 2010, 207–228.

fact that there is a case law that testifies to its application. Besides, at the national level, in countries where it is constitutionalized (regulated and guaranteed by the constitution) it is not aspirational, but perfect and effective.

1.4. Constitutionalization

1.4.1. Expansion at the national level

Even the most optimistic proponents of the process that began with the adoption of the Stockholm Declaration, half a century ago, probably did not envision that the right to a healthy environment would experience a great expansion. According to official data from the United Nations Environment Program (UNEP), it is recognized and guaranteed by the constitution in more than 150 countries around the world. In addition, it is more precisely regulated by numerous laws passed at the national level.

1.4.2. The importance of constitutionalization and inclusion into the corpus of human rights

The constitutional guarantee of the right to a healthy environment is important for several reasons. First of all, a constitution is the highest legal act of a state with which all laws and other legal acts must be harmonized. In case of relevant deviation, any interested person may request a constitutional review and request the repeal (cessation of effect) of the related legal norm. This achieves the highest level of legal protection at the national level.

The adoption of the mentioned Geneva resolution further strengthened the position of the right to a healthy environment in the states where it is included in the constitution, and at the same time opened the possibility for the application of some other legal instruments.

Human rights, including the right to a healthy environment, have been established to strike a balance between the public interests of the social community, represented by the state, on one hand, and the legitimate private interests of every human being (individual), regardless of nationality, religious, racial, social, and sexual affiliations, on the other hand. They represent a framework in which the individual exercises his autonomy in relation to society, and which the authorities may limit only exceptionally and temporarily, in special circumstances and under conditions determined by the highest international documents and constitutional norms.

Under the influence of global processes, a constitutional complaint (lawsuit) has recently been introduced into the legal systems of many European countries, which may require constitutional courts to make decisions regarding specific disputes arising from human rights violations. This opened the way for a new penetration of public law into the domain of private law. In the opinion of some authors, with whom I fully agree, decisions of constitutional courts that allow the direct application of human rights can have devastating effects on private law and cause a high degree of legal

uncertainty.[14] However, the fact is that such a model exists and works according to certain coordinates. It can, in certain situations, where the so-called 'vertical effect of human rights' is involved, contribute to the 'strengthening and more effective protection of private rights.'

1.4.3. Formulation and content of the constitutional right to a healthy environment

1.4.3.1. Traditional approaches: the right of an individual to demand something from the state or the duty of the state to do something

The right to a healthy environment is formulated in the constitutions as an individual right or as a duty of the state. In the first case, an individual or a collective may require the competent state authorities to take measures to preserve a healthy environment or measures to improve it, and in the second case, the state is obliged to do so independently of the requirements of members of the community. The first variety is based on an anthropocentric approach, and the second is close to the so-called *ecocentric approach* to environmental protection. In both cases, the state is expected to take appropriate measures and provide a healthy environment.

1.4.3.2. A new approach: the autonomous right of the individual to shape a healthy environment

In my opinion individuals and smaller collectives should be enabled to independently shape a healthy environment and seek legal protection in the event of unfounded and unnecessary state interventionism (or the interventionism of supranational institutions) that limits them. The precondition for that is that the interested person also has the right of ownership or some other property right that authorizes him to hold and use a part of his environment.

It is a kind of interaction of two rights (one universal human right and one property right).

1.5. Interaction and interference: greening other rights

1.5.1. Greening human rights

The right to a healthy environment has developed indirectly since the adoption of the Stockholm Declaration, through an extensive interpretation of the provisions governing other human rights. These represent a kind of interference and interactions. The whole process is known as greening human rights. According to John Knox, the first Independent Expert on human rights and the environment, appointed by the UN Human Rights Council, who was one of its key proponents on global level: *"[H]uman rights and environmental protection can form a virtuous circle: the exercise of human rights helps to protect the environment, which in turn enables the full enjoyment of human rights. […]*

[14] Collins 2012, 15–16.

States also have substantive obligations to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors. The obligation to protect human rights from environmental harm does not require States to prohibit all activities that may cause any environmental degradation; States have discretion to strike a balance between environmental protection and other legitimate societal interests. But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights [highlighted by D.N.]"[15]

Some courts have a similar view on this issue. This is evidenced by the decisions in many cases, including famous Urgenda case.[16]

1.5.2. Greening ownership and other property rights

In the future, a stronger functional link between the right to a healthy environment and property rights should be expected. Namely, there are situations in which the protection of the environment in the public interest also protects the legitimate private interests of individuals in the property sphere, and vice versa. This interaction will be more and more pronounced under the influence of climate change,[17] which will require a certain transformation and limitations of ownership and other property rights, but also a further evolution of human rights.

All this requires deeper scientific considerations, such as those that preceded the adoption of the Stockholm Declaration and a more detailed review of current legal policy. As it is stated in documents of the United Nations Council of Human Rights "Yet many questions about the relationship of human rights and the environment remain unanswered and require further examination."

1.5.3. Greening the green: rethinking policies and rights related to the agriculture

Modern agrarian policy and legal rules for its implementation have led to great social stratification, enormous enlargement of agricultural holdings and plant production in a way that greatly endangers the environment of many people. The consequences are numerous.

One of the most difficult is the mass migration from rural areas to cities individuals and familiesthat have contributed to the preservation and improvement of a healthy environment through their way of life and work. The need to support those categories of the population has been recognized within the international framework. This is testified by the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, adopted in 2018, whose preamble states that the United Nations Assembly is *"convinced that peasants and other people working in rural areas should be supported in their efforts to promote and undertake sustainable practices of agricultural production that support and are in harmony with nature, also referred to as Mother Earth in a number of countries and regions, including by respecting the biological and natural ability of ecosystems to adapt*

[15] Knox 2020.
[16] Albers 2018.; Krstić & Čučković 2015.
[17] Nikolić 2017, 52–70.

and regenerate through natural processes and cycles." Within the particular provisions, it is emphasized that the Declaration refers to any person engaged in artisanal or small-scale agriculture, that peasants and other people working in rural areas have the right to determine and develop priorities and strategies to exercise their right to development and, that states shall take appropriate measures to eliminate conditions that cause or help to perpetuate discrimination, including multiple and intersecting forms of discrimination, against peasants and other people working in rural areas.[18]

Within the European Union, there is a special greening program to support farmers who use land in a sustainable way. In June 2021, the European Parliament, the European Council, and the European Commission reached an agreement on a new cycle that will begin in 2023. However, the reality is significantly different from political proclamations. Especially when it comes to the common EU agricultural policy in the field of viticulture.

2. Agricultural policy in the field of viticulture and planting rights[19]

2.1. History

The powers deriving from the right of ownership give the owner the freedom to plant on his land. In principle, everyone is free to decide whether, where, and what to plant, taking into account the rights of others and the general interest of the community. However, particular rules have been introduced for the cultivation of certain plant species. Thus, in the region of continental Europe, in different epochs, special legal regimes were introduced for planting vines (and wine production).

State interventionism in this field ranged from restricting property rights by prescribing agro-technical measures, to complete prohibitions that applied to certain categories of the population, certain parts of the state territory, and some grape varieties.

History repeats itself in that area as well. In similar circumstances, similar forms of interventionism have emerged. The history of the legal regulation of viticulture (and winemaking) in Europe is basically a chronology of the introduction of various prohibitions and their abolition. The Roman emperor Domitian (Titus Flavius Domitianus) in 92 AD. passed an edict forbidding planting of new vineyards on the Apennine Peninsula and ordered the removal of half of all vines in the Roman provinces. This restriction was lifted two centuries later (in 280) by Emperor Probus (*Marcus Aurelius Probus*).

In France, the most influential European wine empire there have been several bans. In 1725, under pressure from influential vineyard owners in Bordeaux, King Louis XV banned the planting of new vineyards in the region without his explicit approval. Despite a protest from Charles de Montesquieu (also an owner of a vineyard),

[18] Declaration, Article 3.

[19] The 2nd and 3rd section of this paper are partialy based on: Nikolić 2018a, 167–177.; Nikolić 2018b.

that restriction was later extended to the whole of France. It was abolished only at the time of the Revolution. A new ban was introduced in 1931 to protect domestic producers from the mass import of wine from Algeria, which was once the largest producer in the world.

French legislation had a great influence on the creation of economic policy of the European Communities in the 1960s and 1970s, as well as on the common agricultural policy of the European Union.

Within the European Communities a restrictive legal regime has been developed since 1970 with a system of vine planting rights. Twenty years later, it was stated that there is hyper-regulation and that many provisions with numerous restrictions did not give the desired results. It is estimated that there is too much wine in the single European market and that it is of poorer and poorer quality. Based on that, and as part of a more comprehensive reform of the common agricultural policy, the ministers of agriculture of the member states, in 2008, at a joint meeting, adopted the proposal of the Commission to liberalize the right to plant. It was an announcement of the gradual lifting of previously established restrictions. This decision was opposed by certain influential interest groups. Protests and lobbying were organized. Under these influences, a new turn in agrarian and legal policy was made in 2013. Instead of the announced liberalization, a new, restrictive system of planting rights has been introduced, the effects of which largely depend on the member states. Namely, Commission Implementing Regulation (EU) no. 2018/274 of 11 December 2017 laying down rules for the application of Regulation (EU) no. 1308/2013 of the European Parliament and the Council regarding the authorization for planting vines stipulates that the member states are obliged to issue approvals for the establishment of new plantations every year at the request of interested persons. This made a concession to winegrowers and winemakers who want to expand production, as well as to countries that have decided to develop that sector of the economy. However, giving permission for planting is limited. The regulation stipulates that the existing area under vines in each Member State may be increased by a maximum of 1% per year.[20] The decision on who will be allowed to plant the vine is made by the state authorities, guided by national interests and public policies based on them.

It is clear that such a common agricultural policy favors Member States with large areas under vines and their growers, who generally have larger vineyards. Instead of contributing to the establishment of balance, it creates growing differences.

According to EUROSTAT data,[21] in 2015, there were about 3,200,000 hectares under vineyards in European Union countries (1.8% of the total area of arable land). Of that, three quarters (74.1%) on the territory of France, Spain and Italy. Two-fifths (39.2%) of the total 2,500,000 owners and other users of vineyards in the European Union are from those countries. Of all the member states, Romania has the most winegrowers (854,766). They grow vines on an area of 183,717 hectares. The average area of vineyards in Romania is 0.21 hectares. In France, the leading wine-growing

[20] See: Regulation, Article 62.

[21] These data were published in 2017. Updates are made every five years. New data will be available in 2022.

country in Europe, there are 802,896 hectares under vines and 76,453 owners and other users of vineyards with an average area of 10.50 hectares.

The Court of Justice of the European Union in one of the so-called historical wine judgments also considers that, in accordance with the common agricultural policy, supranational regulations may in principle prohibit landowners from planting new vineyards, and that, on the other hand, each Member State may determine the conditions under which, within the stated quotas. This position was taken in the late seventies of the XX century in the often cited historical verdict regarding the case of Liselotte Hauer v. The Land of Rhineland-Pfaltz (C 44/79) has not been significantly changed so far.

As proclaimed in the Stockholm Declaration, states have the freedom to determine the policy of using their resources. The authorities have the possibility to spatially plan vineyard areas and it will depend on them whether priority will be given to the enlargement of existing vineyards or the development of smaller winegrowers' estates. A more extensive interpretation of the newly recognized human right to a healthy environment could enable individuals to initiate proceedings before the Constitutional Court to protect a legitimate interest in using their land for grape production. This would also improve the position of owners of smaller estates.

In the Republic of Serbia, which is a candidate for membership in the European Union, the importance of small producers for the sustainable development of rural areas and for the preservation of a healthy environment has been recognized. The creators of the legal system had in mind this category of population when they passed regulations on wine-growing areas.

3. Legal specificum: winegrowers' oases

A few years ago, a new, specific category of agricultural estate, called the winegrowers' oases, was introduced into the legal regulations of the Republic of Serbia, related to viticulture and winemaking. The name itself indicates that it is a space shaped by winegrowers. The emphasis is on the subject (person, individual or group of people) and not on the object. The word oasis refers to something that is different from the surrounding and is associated with a healthy environment. In reality, it really is. In oases, grapes are produced by small producers, in a way that least endangers the environment and human health.

3.1. Legal notion

In the Ordinance on the regionalization of wine-growing geographical production areas of Serbia, it is written that a 'winegrowers' oasis' is a narrow wine-growing area, which has no geographic borders with the remaining part of the vine region to which it belongs.[22] These are geographical areas of an enclave type, comprising one or more vineyard plots in a region which is mainly used for farming or other types of agricultural production.

[22] Article 2, paragraph 1, item 3 of the Rulebook on regionalization of wine-growing geographical production areas of Serbia.

3.2. Production and legal advantages of winegrowers' oases

Winegrowers' oases enable uniform or at least more harmonized technology of grape production, because they typically represent smaller, isolated spatial units owned by one or a smaller number of persons. This is very important both from a production and a legal point of view. The application of different technologies and approaches to viticulture, opens a number of legal issues and can result in a multitude of legal problems.

In Serbia, as in other parts of the world, various technological procedures are applied.

The most widespread is the conventional viticulture. This methodological approach implies application of various chemical substances to control grapevine diseases, such as downy mildew, powdery mildew, phytoplasma, then to protect grapes from botrytis, to control weeds in vineyards, and the like. Typically, synthetic (artificial) fertilizers are used to fertilize the vines. Conventional viticulture (as well as conventional agriculture in general) is considered to endanger the environment.

In some countries, there are large plantations where, in addition to what is characteristic of classical conventional production, heavy mechanization (vine pruning machines, grape harvesters, etc.) is used, which affects the structure and permeability (drainage) of the soil. The plantations are monocultural. Typically, producers destroy all biological species except the vine. Such an approach could be called industrial viticulture.

Conventional viticulture is close to the methodological approach, which in literature is referred to by the French compound la lutte raisonée (in free translation: reasonable struggle). Unlike industrial viticulture, which has the most drastic impact on the environment, here certain elements of conventional production are eliminated or significantly limited. Smaller quantities of chemical substances are used to the most necessary extent,[23] taking into account the impact on the environment. In recent times, for the needs of such a methodological approach, special sensor-type devices are being developed, together with advanced computer programs,[24] atomizers with more precise sprayers, etc. This is the so-called smart viticulture. Further development will be due to the fourth industrial revolution that eliminates the boundaries between physical, digital, and biological and allows fusion of various technologies and technical facilities, in accordance with the concept known as the Internet of Things. The institutions of the European Union estimate that in this way the costs of grape and wine production could be reduced by 20-30%. The application of this approach in viticulture in most countries is currently not controlled and falls more into the domain of viticultural etics than legal regulations. From the legal point of view, it is important that the winegrowers who claim to use it are allowed to emphasize on the bottles that the wine was produced from grapes grown in the conditions of la lutte raisonée. Anyone who would dispute that claim would have to prove the allegations untrue. The burden of proof, in accordance with the general legal rules, is on the one who claims something.

[23] Jensen 2014, 23.
[24] Berk, Hočevar, Stajnko & Belšak 2016, 273.

To protect the environment and preserve human health organic viticulture is increasingly encouraged. It is in almost diametrically opposite positions in relation to conventional production. Only limited use of certain types of chemicals is allowed. The goal is to preserve the ecosystem in the vineyard and to provide conditions for the unhindered development of the vine through the application of various techniques and non-invasive or less invasive methods. Growers strive to ensure biodiversity, that is, the coexistence of different biological species in the vineyard. It is considered that a balanced ecosystem is much more resistant to various plant diseases[25] and the appearance of harmful insects. That is why some growers who have opted for organic production sow or plant other plants between the rows (cover crops). Some of them are habitats for organisms that protect the vine or allow the accumulation of nitrogen in the soil and the like. The soil is primarily enriched with compost, not artificial mineral fertilizers. Heavy mechanization is not used to preserve the drainage of the soil, which is of great importance for the resistance of the vine to certain plant diseases. In establishing such a production more and more importance is given to the varieties that are resistant (or more resistant) to plant diseases.[26] Organic viticulture is subject to strict control regulated by law and other regulations. It requires lengthy preparations to start production, significant investments and much more human labor than conventional production.

Distinct specificity represents biodynamic viticulture, based on the works of the Austrian scientist and philosopher Rudolf Steiner, who stated at the beginning of the 20th century that Western civilization was self-destructive, that the balance between material and spiritual, as well as between people and nature was disturbed. In 1924, he gave a famous series of lectures on agricultural production[27] in which he pointed out that the use of artificial fertilizers and other chemical substances would impoverish arable land, reduce its production value, lead to plant and livestock diseases, reduce food quality and endanger survival an increasing number of human populations. These lectures formed the basis for his book Agriculture, which became the canon of biodynamic production. Many of Steiner's settings have been confirmed by time. Mankind has indeed faced the serious problems he wrote about a hundred years ago. Biodynamics has become topical again and increasingly represented in many areas. Modern biodynamic viticulture is characterized by the application of a complex system of preparations consisting of protective liquids of plant origin and compost, as well as by the fact that the works in the vineyard are realized according to precise timing, respecting the cosmic and Earth cycles. In some variants, such viticulture is even accompanied by obscure spiritual rites. Some of the leading, world-famous wine producers in France, and some winemakers in Serbia on an experimental level, have also opted for a biodynamic approach. From a legal point of view, it is important to

[25] Organic agriculture, environment and food security (eds. Nadia El-Hage Scialabba, Caroline Hattam), Food and Agriculture Organization of the United Nations, Rome, 2002, second chapter: Organic Agriculture and the Environment – The ecosystem approach in organic agriculture.
[26] Cindrić, Korać & Ivanišević, 2019 177–207.; Korać 2011, 31–37.
[27] Paull 2011, 64–70.

emphasize that the approval for highlighting the biodynamic component on wine bottles is given by the international certification association *Demeter*.

According to the official statistics listed in the Annex Ordinance on the regionalization of wine-growing geographical production areas of Serbia, winegrowers' oases, as of now, cover relatively small areas of land under vineyards. Thus e.g,. the Bačka region consists of three such spatial units: the oasis of Temerin, with about 13 hectares; the oasis of Bački Monoštor (Pisak), with about 2.5 hectares; and the oasis Karavukovo, with about 6.5 hectares of cultivated vineyards. According to the census of agriculture from 2012, there are only 22.53 hectares in the Bačka region, of which 20.11 hectares are cultivated and native. Table grape varieties are produced on 9.69 hectares, and wine varieties on an area of 12.84 hectares. Only 76 agricultural farms are engaged in viticulture.[28] In most cases, these are small, usually unconnected estates, on which the production of grapes and wine for the needs of family households is based. In such circumstances, it is almost impossible to organize the so-called industrial viticulture. Small vineyards do not use heavy machinery that compacts the soil and reduces the leakage of land in the area where the vineyard is located, and which could also affect the change of water regime on neighboring plots, owned by other persons. Preparations for the protection of vines and grapes from plant diseases are applied more precisely and typically do not reach the neighboring plots. Since they produce grapes and wine for their own needs, the winegrowers in the oases act in accordance with the previously described principles of la lutte raisonée. They have less impact on the environment and by their actions less endanger production on neighboring vineyard plots, even if it is based on an even more restrictive approach, such as organic viticulture. Summa summarum, in winegrowers' oases there are significantly fewer reasons for disputes among growers that should be resolved in court proceedings.

[28] Appendix Ordinance on the regionalization of wine-growing geographical production areas of Serbia.

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Lana OFAK*

The approach of the Constitutional Court of the Republic of Croatia towards the protection of the right to a healthy environment**

Abstract

This paper analyzes provisions of the Croatian Constitution related to environmental protection, as well as their application in the case law of the Constitutional Court of the Republic of Croatia. The main aim is to examine whether the Constitutional Court considers Croatian Constitution as prescribing the right to a healthy environment although it only explicitly prescribes the right to a healthy life. The paper shall also explore the Constitutional Court's interpretation of other environmental provision that are enshrined in the Croatian Constitution. For the purposes of writing this paper, 94 decisions of the Constitutional Court containing the word 'human environment' were examined. However, the paper dealt in detail with only those decisions that explicitly referred to the application of environmental provisions of the Constitution. The paper ends with conclusions which can be drawn from the case law of the Constitutional Court with an important observation that the conclusion concerning the constitutional protection of the right to a healthy environment in Croatia unfortunately cannot be deduced due to the extreme lack of cases in which applicants call for protection of this right in their constitutional complaints.

Keywords: Consitutional Court, Republic of Croatia, healthy environment, protection, human environment.

1. Introduction

The right to a healthy life environment was introduced in the Croatian Constitution in 1974, at a time when Croatia was still a federal unit within the former Socialist Federal Republic of Yugoslavia (hereinafter 'SFRY'). Constitution of the Socialist Republic of Croatia[1] prescribed the following (§ 276): *"Human beings have the right to a healthy living environment. The community provides the conditions for exercising this right. Everyone who uses land, water or other natural resources is obliged to do so in a way that ensures the conditions for work and life of humans in a healthy environment. Everyone is obliged to preserve nature and its goods, natural sights and rarities and cultural monuments. Misuse of natural resources and introduction of toxic and other harmful materials into water, sea, soil, air, food and objects of general use are punishable."*

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[1] Official Gazette (*Narodne novine*, hereinafter 'OG') no. 8/1974.

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On 25 July 1990 the newly constituted parliament passed the Decision to Commence the Procedure for Adopting the Constitution of the Republic of Croatia for the purpose of developing a political and economic system based on the principles of parliamentarism, market economy, respect for human rights and the rule of law. A new Constitution of the Republic of Croatia (Ustav Republike Hrvatske) was passed by the Parliament of the Republic of Croatia on 22 December 1990.[2] This Constitution, with five revisions and amendments,[3] is still in force. Croatia became an independent and autonomous state on 8 October 1991. It has been a full member of the Council of Europe since 6 November 1996 and a full member of the European Union since 1 July 2013.

Croatian Constitution of 1990 guaranteed the right to a healthy environment in the following way (§ 69): *"Everyone shall have the right to a healthy life. Republic of Croatia shall ensure the right of citizens to a healthy environment. Citizens, government, public and economic bodies and associations are obliged to pay special attention to the protection of human health, nature and the human environment, within the scope of their powers and activities."*

In the environmental rights context, the Constitutional Amendment from 2001 was relevant, when the State's duty to ensure citizens the right to a healthy environment was replaced with the duty to ensure the conditions for healthy environment (§ 69/2). In the next paragraph, the words "citizens, government, public and economic bodies and associations" were replaced with the word 'everybody' (§ 69/3). Thus, the Constitutional provision relating to the healthy environment since 2001 reads as follows: *"Everyone shall have the right to a healthy life. The State shall ensure conditions for a healthy environment. Everyone is obliged, within the scope of their powers and activities, to pay special attention to the protection of human health, nature and the human environment."*

One could assume that the change from ensuring "the right" to ensuring "the conditions for" healthy environment was a major step back for the constitutional recognition of environmental rights. It is interesting to note that the 2019 UN Environment report does not include Croatia in the list of countries with the constitutionally protected right to a healthy environment.[4] However, the right to a healthy life (§ 69/1) can be interpreted as a constitutional recognition of the right to a healthy environment. The precondition for a healthy life is healthy environment. Croatian legal theory considers that the right to a healthy environment is protected by the Constitution.[5] Omejec considers that taking into account the content of Article 69 of the Constitution in its entirety, it can be concluded that the right to a healthy life is a special constitutional expression of the broader right called 'right to a healthy environment'.[6]

[2] OG no. 56/1990.

[3] Amendments to the Constitution of the Republic of Croatia of 12 December 1997, 9 November 2000, 28 March 2001, 16 June 2010 and 1 December 2013. English version of the Croatian Constitution is available at <https://www.usud.hr/en/the-constitution>

[4] UNEP 2019, 158.

[5] Omejec 2003, 57–62.; Bačić 2008, 727–743.; Rajko 2007, 22–27.

[6] Omejec 2003, 59.

The aim of this paper is to examine whether the same view regarding the right to a healthy environment can be found in case law of the Constitutional Court of the Republic Croatia (hereinafter 'Constitutional Court'). The right to a healthy life is contained in a provision concerning the protection of the environment in general, which is found in the part of the Constitution relating to the protection of human rights and fundamental freedoms (i.e. economic, social and cultural rights). Human rights are not only those that are explicitly guaranteed, but also those that are implicitly protected, i.e. those whose existence can be concluded through the interpretation of legal norms. Thus, for example, the principle of proportionality which must be respected when fundamental rights and freedoms are being restricted was not explicitly contained in the Constitution until its Amendment in 2000. Nevertheless, the Constitutional Court found that restrictions on fundamental freedoms and rights must be proportionate to the legitimate aim pursued by them.[7] Likewise, although the Constitution does not contain explicit provisions regarding the protection of personal name, the Constitutional Court concluded that the protection of personal and family life, dignity, reputation and honor, which is guaranteed by Article 35 of the Constitution, also applies to the protection of one's personal name.[8] Accordingly, this paper shall explore whether the Constitutional Court in its case law considers Article 69 of the Croatian Constitution as prescribing the right to a healthy environment although it only explicitly prescribes the right to a healthy life. It shall also examine the Constitutional Court's interpretation of other environmental provision that are enshrined in the Croatian Constitution.

Against this background, the paper begins with a brief explanation of the types of proceedings that may arise before the Constitutional Court in environmental matters. The central part of the paper analyzes constitutional provisions related to environmental protection, as well as their application in the case law of the Constitutional Court. For the purposes of writing this paper, 94 decisions of the Constitutional Court which included the word 'human environment' were examined. However, the paper contains only those decisions that explicitly referred to the application of environmental provisions of the Constitution. The paper ends with conclusions that can be drawn from the case law of the Constitutional Court with one important exception i.e. the conclusion concerning the protection of the right to a healthy environment unfortunately cannot be deduced due to the extreme lack of cases in which applicants call for protection of this right in their constitutional complaints.

2. Types of procedures in environmental cases before the Constitutional Court

The Constitutional Court of the Republic of Croatia consists of thirteen justices elected by a two-thirds majority of the Members of the Croatian Parliament from among notable jurists, especially judges, state attorneys, attorneys and university law

[7] *„Although the principle of proportionality is not directly regulated in the Constitution of the Republic of Croatia, its ubiquitous significance cannot be denied."* – Decision of the Constitutional Court, no. U-I-1156/1999, 31 January 2000.

[8] Decision of the Constitutional Court, no. U-III-484/1998, 11 July 2007.

professors pursuant to the procedure and method set forth by the Constitutional Act on the Constitutional Court of the Republic of Croatia.[9] The term of office of a Constitutional Court justice is eight years.

In principle, environmental cases can appear before the Constitutional Court through two procedures. The first one is the procedure of abstract constitutional control of legal norms. In this regard, the Constitutional Court decides on the conformity of laws (i.e. legislative acts of the Parliament) with the Constitution and may repeal a law if it finds it to be unconstitutional. It also decides on the conformity of other regulations (i.e. sub-legislative normative acts of state bodies) with the Constitution and law and may repeal or annul any other regulation if it finds it to be unconstitutional or illegal. It is interesting to note that according to the Constitutional Act on the Constitutional Court every individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations (§ 38/1). Upon the proposal, the Constitutional Court shall, at its Session, adopt the ruling whether to accept the proposal and institute proceedings. Then it shall inform the applicant about the initiation of proceedings or about the refusal of the proposal as might be the case (§ 43).

The second type of procedures through which environmental cases may be brought before the Constitutional Court are instituted by a constitutional complaint. Everyone may lodge a constitutional complaint before the Constitutional Court if he or she deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (hereinafter 'constitutional right'). If some other legal remedy is provided against violation of the constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted. The Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated (§ 62 and § 63).[10]

[9] OG no. 99/1999, 29/2002, 49/2002 (consolidated text).

[10] English version of the Constitutional Act on the Constitutional Court of the Republic of Croatia is available at <https://www.usud.hr/en/constitutional-act>.

3. Environmental provisions in the Croatian Constitution and their meaning in the Constitutional Court's case law

3.1. Highest values of the constitutional order

The Constitution (§ 3) prescribes conservation of nature and the human environment as the highest values of the constitutional order of the Republic of Croatia, next to freedom, equal rights, national and gender equality, peace, social justice, respect for human rights, inviolability of ownership, the rule of law and a democratic multiparty system. These highest values of the constitutional order are the foundation for interpreting the Constitution.

According to the well-established case law of the Constitutional Court, the provision on constitutional values does not contain human rights and fundamental freedoms and the Constitutional Court does not provide protection of these values in procedures initiated by constitutional complaints.[11] Nevertheless, these values are important because they role is to inspire judges when interpreting any individual provision of the Constitution and to guide the judges in resolving their specific cases.[12]

Additionally, the aim of the constitutional values is to guide the Croatian Parliament when, in its laws, it elaborates rights and freedoms.[13] The Constitution (§ 2/4) gives the Parliament the authority to independently decide on the regulation of economic, legal and political relations in the Republic of Croatia. As the Constitutional Court observes, in regulating these relations, the Parliament is obliged to respect the requirements set before him by the Constitution, especially those arising from the principle of the rule of law and the constitutional values.[14] Thus, conservation of nature and the human environment as the highest values of the constitutional order may be applicable in the procedures of abstract constitutional control of legal norms. It is also important to note that, pursuant to the well-established case law of the Constitutional Court, when the legislator decides on the regulation of economic, legal and political relations, the Constitutional Court's assessment of the constitutionality of a law does not imply an assessment of the chosen legislative model, that is, an assessment of whether a particular legislative concept is the best for regulating certain issue and whether the legislative powers in a particular issue should have been exercised in a different way. The Constitutional Court, in this regard, only checks whether the solution offered by the legislator remained within the constitutionally acceptable limits.[15]

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[11] This legal position was expressed by the Constitutional Court in its decision, no: U-III-1125/1999 of 13 March 2000.

[12] Constitutional Court of the Republic of Croatia, Role of Constitutional Courts in upholding and applying constitutional principles, Answers to the Questionnaire for the XVIIth Congress of the Conference of European Constitutional Courts, Batumi, 29 June to 1 July 2017.

[13] Constitutional Court (fn. 12).

[14] Decision no. U-I/4597/2012, 4 November 2014.

[15] This principle position on the jurisdiction of the Constitutional Court in assessing the purposefulness of legislative models was stated in its Decision no. U-I-2921/2003 et al. of 19 November 2008.

How are these views of the Constitutional Court applied in practice was best shown in two constitutional cases. The first case concerned the challenging of the constitutionality of the Act on the Treatment of Illegally Constructed Buildings.[16] The Constitutional Court considered this case, inter alia, from the aspect of constitutional values.[17] The applicant who submitted the proposal for the assessment of the conformity of the Act on the Treatment of Illegally Constructed Buildings with the Constitution claimed that the Act was in its very basis a source of inequality of citizens before the law, because it was designed to privilege illegal builders. The content of his proposal showed the applicant's position on the unfairness of the concept of mass legalization of illegal construction. The Constitutional Court did acknowledge that illegally constructed buildings were a living and well-known fact and a mass phenomenon in Croatia, which could rightly be said to endanger and devalue its territory in many ways – its land, coast, forests, its natural, cultural and historical values and the human environment. As Constitutional Court pointed out, it was the State that, through its long-standing administrative practice and a kind of 'official tolerance' of illegal conduct, actually allowed its own bodies not to act, which resulted in citizens' refusal to comply with construction rules. The consequences of such a pattern of behavior was a huge number of illegally constructed buildings that created the need to find a general legal model to solve this comprehensive problem of national proportions. Concerning the constitutional values, the Constitutional Court stated the following: *"...constitutional provisions order the State to provide special care and protection to the values and goods highlighted in them. On the other hand, the threat to the territory of the Republic of Croatia by illegal construction as a fact, in itself, is an obvious negation of these same constitutional requirements. At the same time, there are a number of reasons why illegal construction cannot be largely eliminated by prescribing and applying measures of an exclusively coercive nature, i.e. by demolishing illegal structures. Among other things, the massive scale of illegal construction in the Republic Croatia and the longevity of such a situation almost exclude the possibility of applying such coercive measures which would have the required degree of effectiveness, which would be proportionate in scope and degree of repression, which would apply to all equally, which would have adequate effects within a reasonable time and which would not lead to their effects manifesting as further devastation of space. This contradiction put the State and the legislator in a legally difficult political task to find such a form of legal arrangements that will, as much as possible, meet the requirements of a fair balance between the goals set, enshrined in the Constitution, and the measures by which these goals will be sought to be achieved."*[18]

In relation to the content of the Act on the Treatment of Illegally Constructed Buildings, the task of the Constitutional Court was to answer the question were the envisaged legal measures constitutionally acceptable and did they have a legitimate aim in accordance with the public or general interest? The Constitutional Court has taken the position that the challenged Act can be considered as acceptable from a constitutional point of view. Its goals were undoubtedly legitimate – they perceived the legalization of illegal construction as a "lesser evil" than the mass demolition of illegally

[16] OG no. 86/2012 and 143/2013.
[17] Decision of the Constitutional Court (fn. 14).
[18] Decision of the Constitutional Court (fn. 14) at [4.1].

constructed buildings and were, from that point of view, economically and socially justified and, as such, in line with the interests of the State and society as a whole.[19]

The second, and most recent case concerned the challenging of the constitutionality and legality of the Governmental Decree on Municipal Waste Management.[20] Among other things, this case dealt with contesting constitutionality and legality of the provision of the Decree which referred to the stimulating fee for the reducing the quantity of mixed municipal waste.[21] Pursuant to the Sustainable Waste Management Act (hereinafter 'SWMA'),[22] the stimulating fee for reducing the quantity of mixed municipal waste is a measure designed to stimulate units of local self-government to implement, within the scope of their competences, measures to reduce the quantity of mixed municipal waste generated in their respective areas (§ 29/1). Units of local self-government are obligated to pay this fee, depending on the excessive amounts of mixed municipal waste. The stimulating fee was introduced with the adoption of the Decree on Municipal Waste Management, which, inter alia, lays down the method for calculating the fee.

The applicants essentially pointed out that the challenged provision of the Decree, which prescribed the method of calculating the fee, violated equality before the law of all local self-government units and that the method of calculating the stimulating fee did not take into account the success of individual local self-government units in separate collection of useful waste fractions. In its decision the Constitutional Court reiterated its position that the Constitutional Court's assessment of the conformity of a by-law (sub-legislative regulation) with the Constitution and the law does not imply an assessment of the selected model of collection and calculation of stimulating fee, especially not its justification and purposefulness. The Constitutional Court is not competent to assess whether a certain concept prescribed by the Government by a Decree is the best for regulating a certain issue, i.e. whether the powers of the Government, which it received on the basis of SWMA, should have been used in a different way. Nevertheless, the Constitutional Court is authorized to assess whether the existing solution or the prescribed manner of calculating the incentive fee is in accordance with the Constitution and the law (SWMA). The Constitutional Court in its assessment noted that it was not clear what was the justification for the stimulating fee in the way it was prescribed by the Government's Decree. The fee was not sufficiently stimulating for local self-government units to implement measures within their powers to reduce the amount of mixed municipal waste generated in their area. Additionally, the fee was not fair in terms of equal treatment of local self-government units in competition for incentives. Thus, in the case of a disputed provision of Article 24 of the Decree, the Constitutional Court found that the prescribed manner of calculating the stimulating fee was inappropriate for achieving the ultimate goal, which is to encourage local self-government units to implement measures to reduce the amount of

[19] Decision of the Constitutional Court (fn. 14) at [5].
[20] OG no. 50/2017 and 84/2019.
[21] Decision of the Constitutional Court no. U-II/2492/2017 et al., 23 March 2021.
[22] OG no. 94/2013, 73/2017 and 14/2019.

mixed municipal waste. It repealed the provision of the Decree as unconstitutional and not in accordance with Article 29/1 of the SWMA.

3.2. Restrictions of entrepreneurial freedoms and property rights in order to protect nature, environment and human health

The Constitution prescribes that free enterprise and proprietary rights may be exceptionally restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature and the human environment and human health (§50/2). According to the Constitutional Court, the rule contained in Article 50 paragraph 2 of the Constitution, recognizes the legislator's power to, without the obligation to pay any compensation, restrict property rights and entrepreneurial freedoms by law only "exceptionally", i.e. when it comes to necessary measures that must be undertaken for the protection of certain constitutional values or protected constitutional goods (e. g. nature and the human environment and human health). Article 50 paragraph 2 of the Constitution speaks, therefore, of the protective function of property and entrepreneurship, which is inherent in the public interest of the community as a whole or a part of it. The Constitution does not guarantee compensation for such restrictions.[23] However these restrictions must fulfill certain requirements in order to be considered as constitutional. This means that measures restricting free enterprise and proprietary rights must be necessary in a democratic society and that the goals they seek to achieve cannot be achieved by any means or measures that would be more lenient for the owner, or that would less interfere with their property rights and entrepreneurial freedoms. At the same time, along with the necessary nature of the measures, the Constitution requires that those measures in a democratic society may be taken only for the protection of the public interest, i.e. certain common values that arise from life in an organized social community (in this case, for protection of interests and security of the Republic of Croatia, nature, human environment and human health).[24]

In this regard, the Constitutional Court found that the Ordinance on Packaging and Packaging Waste[25] restricted entrepreneurial freedom in the form of obligations related to waste collection and storage. However, the aim of these restrictions was to protect the values contained in Article 50/2 of the Constitution (nature, human environment and human health), in connection with Article 3 (preservation of nature and human environment) and Article 69 (guarantee of the right to a healthy life, and the duty of everyone to pay special attention to the protection of human health, nature and the human environment as part of their powers and activities). The Constitutional Court, thus, concluded that the legitimacy of the purpose of the Ordinance on packaging cannot be disputed either as a whole or in relation to individual provisions.

[23] Decision of the Constitutional Court no. U-I-763/2009, 30 March 2011.
[24] Decision of the Constitutional Court (fn. 23) at [53.1].
[25] OG no. 115/2005.

Also, starting from the principle of proportionality, the Constitutional Court found that in this particular case the measures prescribed by the Ordinance on Packaging were not more restrictive than necessary in order to achieve a legitimate aim.[26]

3.3. Special protection of the State to all things and goods of special ecological significance

Pursuant to Article 52/1 of the Constitution, the Republic of Croatia must provide special protection to certain things and goods. These are: (a) the sea, seashore, islands, waters, air space, mineral resources, and other natural goods ; (b) land, forests, flora and fauna, other components of the nature; (c) real estate and goods of particular cultural, historical, economic or ecological significance which are specified by law to be of interest to the Republic of Croatia.

Furthermore, Article 52/2 of the Constitution stipulates that the legal regime of goods of interest to the Republic of Croatia is regulated by law and other regulations based on law. This legal regime prescribes ways in which goods of interest to the Republic of Croatia can be (or cannot be) used and exploited. [27]

As Omejec points out these goods can be classified into two groups according to their natural and other features, especially the ability to be the objects of ownership and other real rights.[28] The first group are certain parts of nature (physical things) cannot be the object of ownership and other real (property) rights, because their natural characteristics do not allow them to belong to any natural or legal person. These are atmospheric air, sea and water in its natural course. Such things also include the seashore, which has characteristic of the common good recognized by the customary law. These things – common goods – serve everyone and no one can dispose of them on any grounds in terms of private law. Although they represent things in the natural, physical sense, they cannot be the object of real rights, because they are not considered as things in terms of law on real (property) rights. If and when there is power in relation to them, that power is not private, but public. It is therefore understandable that the Republic of Croatia takes care and provides special protection to such things, because the State is the holder of a public authority (but not the owner of these things).[29]

The second group of goods to which Article 52 applies are all other things that may be the object of real (property) rights and that do not belong to common goods. These goods and things are specific in the sense that they can be declared by law as the goods of interest to the Republic of Croatia, within the limits of authority provided by Article 52 of the Constitution. Thus, special protection of the State can be provided to them, and the manner in which those goods may be used and exploited by their owners

[26] Decision of the Constitutional Court no. U-II-37/2006, U-II-265/2006, U-II-1131/2006, U-II-64791/2009, 5 July 2011.

[27] Article 52/2 reads as follows: *„The manner in which any resources of interest to the Republic of Croatia may be used and exploited by holders of rights thereto and by their owners, as well as compensation for any restrictions as may be imposed thereon, shall be regulated by law".*

[28] Omejec 2003, 62.

[29] Omejec 2003, 62–63.

and by holders of rights thereto shall be regulated by law. Declaration of those things as goods of interest to the Republic of Croatia does not mean that it is impossible to acquire ownership and other real rights on them and that those rights which already exist must cease. A separate legal regulation is established for them, which is characterized by restricting or burdening the private property by public law (administrative law) order, where the owner's behavior towards these goods and things is settled by rules of public, primarily administrative law.[30]

The general meaning of Article 52 is that Republic of Croatia is obliged to protect these resources (goods) from use and exploitation in a manner that is contrary to the constitutional values and guarantees. Therefore, the constitutional obligation to protect them implies the right of the State to prescribe the legal consequences of illicit infringements of these goods through law and other regulations in accordance with the law, and in proportion to the meaning of the protected good.[31]

In one relevant case, the applicants challenged the constitutionality and legality of the Minister's Ordinance on the criteria for determining compensation for damages done to fish and other marine organisms.[32] Essentially, among other arguments, they contested the amount of the damages to be paid by the offender. They stated that it was fair for the offender to compensate the damage, but it was not fair for him to compensate the damage at a price many times higher than the real one. The Constitutional Court stated the following: *"If ... we have in mind the important fact that the issue at hand is the protection of a specific marine organism – whose biological cycle is extremely slow and long, and which organism is inaccessible without the simultaneous destruction of its habitat, the rocky sea coast, which is by its nature res extra commercium, it is clear that these goods are such protected resources to which market standards are not and cannot be applied. Moreover, this is not just about protecting marine organisms and their habitats, but about the entire ecosystem of the Republic of Croatia, i.e. an important current and future general interest, which cannot be degraded by reducing it to market standards. The fact that these are invaluable goods implies liability for damage according to criteria other than market ones, but such criteria that in a balanced way combine the meaning of the protected good and the real solvency of individuals or legal entities that need to compensate the damages. Therefore, the claimant's assertion is correct ... that the amounts of compensation for damages to the goods in question in this particular case are not equivalent to their commercial value. However, these fees are not equivalent to the real value of protected goods because the value is inestimable and, hypothetically, fees proportional to that real value would have to be incomparably and inconceivably higher than the fees prescribed by the disputed Ordinance. These fees, from the point of view of the objective meaning and value of protected goods, are in fact symbolic amounts of compensation that enter the state budget and are used for specific purposes related to nature protection and environmental improvement and therefore are not "penalties". ... The nominally high amount of damages, as well as the fact that this amount of the fee is prescribed in advance by the state body, as already explained, are an expression of the importance of the protected good."*

Thus, the Constitutional Court concluded that there are no reasons to indicate the that disputed provisions of the Ordinance are unconstitutional or illegal.

[30] Omejec 2003, 63.
[31] Decision of the Constitutional Court no. U-II-3575/2007 and U-II-3182/2010, 17 May 2011.
[32] OG no. 101/2002, 96/2005, 30/2007 and 131/2009.

3.4. The right to a healthy life

It is interesting to note that so far only one constitutional complaint in environmental case has been brought before the Constitutional Court on the basis of Article 69 of the Constitution (i.e. protection of the right to a healthy life).[33] This was a constitutional complaint filed by an environmental association in 2006 in a case concerning challenging an Agreement on determining the relocation of the corridor of the first section of the Zagreb-Sisak motorway. This Agreement was concluded between several local and regional self-government units, *Hrvatske ceste* (company for management, construction and maintenance of state roads) and *Hrvatske autoceste* (company for management, construction and maintenance of state motorways), by which the parties agreed on the relocation of the corridor of the Zagreb-Sisak motorway in the area of the southern entrance to the City of Zagreb. The environmental association claimed, among other things, that their lives would be harder and the environment unhealthy due to sulfur dioxide and nitrogen oxides that would be burned by cars passing by the highway. However, in this case the members of the environmental association chose the wrong way of challenging the project. They filed an action before the Administrative Court of the Republic of Croatia although the Agreement was not an administrative act. Thus, the Administrative Court correctly dismissed their action because the disputed agreement did not concern any right or obligation of an individual or organization in any administrative matter. The Administrative Court also accurately pointed out that the route of the motorway was determined by the spatial plan, i.e. in the procedure of amendments to the spatial plan in which the public concerned had the right to participate in the manner prescribed by law. The decision to change the route must be based on the environmental impact study and specified in the location permit and building permit before construction begins. In all these proceedings, the public concerned may participate in order to protect their rights and interests. Given the validity of the arguments of the Administrative Court, the Constitutional Court justifiably rejected the constitutional complaint. In its reasoning, the Constitutional Court nevertheless touched on the application of Article 69 to this case. Firstly, the Court stated that the provision of the Article 69/1 of the Constitution (everyone has the right to a healthy life) was not relevant in this procedure, because the procedure did not involve a project which had an impact on the healthy life of the members of the association.[34] Secondly, the Court asserted that the provision of Article 69/2 (the State ensures conditions for a healthy environment) did not contain freedoms and rights guaranteed by the Constitution to a natural or legal person, which were protected in Constitutional Court's proceedings initiated by a constitutional complaint.[35]

[33] Decision of the Constitutional Court, U-III/3643/2006, 23 May 2007.
[34] Decision of the Constitutional Court (fn. 33) at [7].
[35] Decision of the Constitutional Court (fn. 33) at [8].

Although the Constitutional Court justifiably rejected the constitutional complaint due to the availability of other legal remedies (i.e. participation in various procedures concerning the granting of the project, as well as obtaining access to justice in each of them), the reasoning of the Court demonstrated a very narrow interpretation of the right to a healthy life which, in my opinion, was flawed. The right to a healthy life certainly includes issues of noise protection and air quality protection that would be affected by motorway traffic. Even the European Court of Human Rights has developed its case law in environmental matters despite the fact that the European Convention on Human Rights does not enshrine any right to a healthy environment as such.[36]

To conclude, this is only one case in which the Constitutional Court applied certain (very restrictive) interpretation of the meaning of Article 69 in environmental matters. It cannot be concluded that one decision creates an entire constitutional case law. Moreover, this case was adjudicated nearly 15 years ago, and, on the other hand, issues concerning environmental protection are, nowadays, rapidly becoming more important in both European and international arena. Thus, if the Constitutional Court were again given the opportunity to decide on the application of Article 69 in an environmental case, in my opinion it is very likely that it would adapt its case law to the case law of the European Court of Human Rights granting protection to the right to a healthy environment through protection of rights which may be undermined by the existence of harm to the environment and exposure to environmental risks.

4. Conclusion

In 2001 Croatia took a step backward when it no longer provided the constitutional right of citizens to a healthy environment but only the right to a healthy life. Although Croatian legal scholars consider that the right to a healthy life is a special constitutional expression of the broader right to a healthy environment, there is still no decision of the Constitutional Court of the Republic of Croatia in which such an understanding has been taken.

Environmental cases in Croatia do appear before the Constitutional Court. However, they predominantly concern the assessment of conformity of laws with the Constitution or other regulation with the Constitution and law. In this procedure the Constitutional Court is not competent to assess whether a certain concept prescribed by the Parliament's legislative act or by the sub-legislative regulation was the best for regulating certain issue. Nevertheless, the Court is authorized to assess whether the regulator respected the requirements set before him by the Constitution, especially those arising from the principle of the rule of law and the constitutional values (among which are the conservation of nature and the human environment). Furthermore, the analysis showed that protection of nature and human environment are also constitution values that constitute a legitimate reason for restricting property rights and entrepreneurial freedoms provided that such restrictions are necessary in a democratic society and proportionate to the nature of the need to implement them in each

[36] See European Court of Human Rights 2021.

individual case. Additionally, components of nature and human environment belong to the legal regime of goods of interest to the Republic of Croatia to which special protection must be given. This implies that, on the one hand, there is a duty of the State to protect them from use and exploitation which is contrary to the constitutional values and guarantees. On the other hand, the State has the right to prescribe the legal consequences of illicit infringements of these goods proportionate to the meaning of the protected good.

Individual environmental cases arrive before the Constitutional Court through filing a constitutional complaint. However, the analysis showed that, so far, there was only one case in 2006 (decided in 2007) in which the Constitutional Court interpreted the right to a healthy life in an environmental context. This does not mean that environmental cases do not at all appear before the Constitutional Court but that the applicants do not invoke a violation of the right to a healthy environment but violations of other constitutional rights, mainly a violation of the right to a fair trial (§ 29/1 of the Constitution).[37] To conclude, the case law of protecting the constitutional right to a healthy environment in Croatia has yet to be developed and one of the future researches could deal with the reasons why the practice of environmental and climate change litigation, which prevails in other European countries, has not come to life yet in Croatia.

[37] Decions of the Constitutional Court, U-III/1114/2014, 27 April 2016 and U-III/5942/2013, 18 June 2019.

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Flóra OROSZ*– Noémi SURI** – Renáta HRECSKA-KOVÁCS*** – Péter SZŐKE****
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 Glasgow[1] 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 recourses, 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 environment[4] 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 right[6] 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 state[8] according to objective, general goals, in order to protect the natural basis of life. In this sense to meet subjective needs[9] 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 principle[17] 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 2015[23] which decision firstly interpreted the third, organisational aspect of this right[24] (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 2018[26] confirmed that non-derogation principle derives directly form the Fundamental Law and relates to Article P and XXI.[27] The precautionary principle[28] 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 detail[30] within the Decision[31] 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 fact[37] 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 maintenanced – 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 environmental[46] 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 activities[49] 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 protection[53]. 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 objective[55]. 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 (Bundesrepublic 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 Bavaria[63] 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 Brandenburg[66] 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 Saxony[68] 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=jlr-VerfNDV3Art57&doc.part=X#jlr-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 constitution[70] 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 an 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 air[73] and the protection of water[74] 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 approach[76] 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. 2003/222[84] 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 conductive 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 Constituzionale, Sentenza, available at <222/2013, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=222>
[85] Corte Constituzionale, Sentenza, available at <214/2006, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2006&numero=214>
[86] Corte Constituzionale: Servizio Studi – La tutela dell'ambiente, dell'ecosistema e dei beni culturali nei giudizi di legittimà constituzionale in via principale, available at <2002-2015. https://www.cortecostituzionale.it/documenti/convegni_seminari/stu_279.pdf>
[87] Corte Constituzionale, 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 Belgium[91] (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 Il 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 *précaution* 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 2021[97] 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 instaurant 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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Bartosz RAKOCZY*
Constitutionalisation of Environmental Protection in Poland**

Abstract

This article aims, on the one hand, to analyse how the constitutionalisation of environmental protection in Poland has developed and, on the other hand, to review the currently adopted constitutional solutions regarding environmental protection. After briefly describing the term 'constitutionalisation', the author presents the constitutional development of Poland, with a special emphasis put on provisions regarding environmental protection. The detailed analysis of provisions is followed by the conclusions.
Keywords: constitutionalisation, environmental law, constitutional law, environmental protection, Poland.

Constitutionalisation of environmental protection is a very important scientific issue both from the point of view of environmental protection and constitutional law. As a matter of fact, constitutionalisation of environmental protection leads to interaction between two fields of law – constitutional law and environmental law. Constitutional law provides the form, and environmental law – the content. The aim of this paper is, firstly, to analyse how constitutionalisation of environmental protection in Poland developed and, secondly, review the currently adopted constitutional solutions regarding environmental protection.

The idea of constitutionalisation is relatively young. The phenomenon of constitutionalisation appeared only at the end of the 18th century when the first constitutions were adopted.

Of course, 'constitution' is not a new term, since it was a type of a legal act known already to the Roman Empire. In addition, apostolic constitutions are one of the primary sources of canon law. However, in both cases 'constitution' had a meaning different from that assigned to it at present. Both in Roman law and canon law it denoted more or less a type of a legal act of no special importance or nature. Thus, constitution meaning a legal act was a better match for the present-day term of an act than the present-day constitution.

The current formula of constitutionalism derives from concepts associated with the Enlightenment. It is in the ideas of the Enlightenment where the origins of the

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present-day constitutionalism should be sought. The Enlightenment thought assumed that a superior legal act existed regulating the most fundamental and basic rules of functioning of the state and - as a consequence - the law it constitutes.

It should be noted that certain issues and contents have been incorporated in the constitutionalisation framework from the very beginning. No doubt such fixed elements of constitutionalisation are political system issues. It is not only about the model of tripartite division of powers proposed by Charles Montesquieu but about the fact that first constitutions covered political system issues. The second extremely important element of the constitution is regulations concerning the rights and freedoms of an individual. This can be seen particularly clearly in the constitution of the United States of America with strongly rooted ideas of personal rights and freedoms.

It can be even indicated that constitution, as a legal act, was created in the first place to protect personal rights and freedoms and regulate political system issues.

Looking at the development of constitutionalism it can be seen that certain ideas are universal and occur virtually in any constitution. However, it can be also observed that certain ideas acquire a constitutional status, and thus are constitutionalised. Such ideas definitely include environmental protection.

Therefore, the term 'constitutionalisation' itself means assigning a specific issue or problem a constitutional rank. It is essential that although a constitution is a unique act of law [1], it does not regulate all issues related to the functioning of the state, the law and the status of an individual. Thus, the constitution does not regulate all issues. Certain ideas that were not naturally regulated by the constitution from the very beginning were incorporated in the constitutional framework due to certain circumstances and events. Thus, such ideas had to be constitutionalised for sufficiently important reasons. Assigning a constitutional rank to a certain idea entails specific far-reaching legal consequences. These consequences – as mentioned hereinafter – are mostly manifested in the sphere of axiology. Due to the settlement of a specific issue in the constitution, and hence its constitutionalisation, this issue (idea) becomes a constitutionally protected value, so its prestige and significance definitely increase. Of course, it is also significant how the constitutional legislator regulates a specific issue since the constitution alone differentiates the values it regulates, which can be seen at least in connection with the constitutional proportionality principle.

Environmental protection is an issue that was not of interest to the legislators adopting the first constitutions. The reason why first legislators did not speak about environmental protection was prosaic – the problem of environmental protection simply did not exist at the end of the 18th century. Some timid voices would highlight certain aspects that today are the object of interest for environmental law; however, neither the scale nor the range of these problems were sufficiently important and world-shaking to assign then a constitutional rank. Moreover, they were only fragmentary phenomena and it is difficult to speak about any general environmental issues.

The 19th century should be given a similar evaluation. From the analysed point of view, the 19th century is a time of very intensive development of industry and

[1] I will not delve deeper into the formal and material problems of the constitution as experience teaches that in most legal systems constitution is a type of legal act.

economy on a global scale. Although the origins of the industrial revolution should be sought in 18th-century England, only in the 19th century did this phenomenon become global. Intensive development of industry had an intense bi-directional impact on the environment. Firstly, industrial development required the supply of natural resources. Secondly, different kinds of ash, wastewater and wastes were disposed of into the environment. The scale of impact was big enough to give rise to intense and dynamic degradation of the quality of the environment.

The breakthrough in thinking about the environment occurred at the end of the 1960s when the then United Nations Secretary-General U'Thand mentioned the problem of environmental protection as being grave and global. From that time the international community became widely interested in environmental protection. Of course, the interest related to its various aspects, including juridical ones. International interest in environmental protection issues gave rise to the interest of the legislator, including the constitutional legislator. The problem of environmental protection became so significant that it could not be neutral from a juridical point of view. It became clear that environmental protection should also involve legal instruments. However, the situation due to the quality of the environment was so grave that it had to be assigned a constitutional rank. The first constitution that regulated environmental protection issues was the constitution of the Kingdom of Spain and then the constitution of Portugal.

From that time on one can speak not only about constitutionalisation of environmental protection but also about assigning environmental protection a higher rank from the point of view of constitution.

An interesting fact could be observed in connection with the collapse of communism. All the states of the so-called Eastern bloc, having gained full sovereignty, adopted new constitutions corresponding to the constitutional standards of Western countries. However, it is important that all constitutions of the former Eastern bloc states were adopted in the 1990s and each of them more or less relates to environmental protection.

It is noticeable that constitutions of the former Eastern bloc states regulate environmental protection issues to a much greater extent and wider range than the constitutions of Western countries do. It suffices to compare the Constitution of the Republic of Poland of 2 April 1997[2] with the German Constitution or the Constitution of the Republic of Italy. Constitutional revaluation is an effect of seeing how grave and significant the problem of environmental protection is in contemporary societies. Insofar as in the 1940s and 50s the problem was not constitutionally important, in the 1990s it had already gained a constitutional rank and importance. Thus, it can be concluded that constitutions at the end of the 1990s widely regulate the issue of environmental protection, which means that environmental protection was constitutionalised. Environmental protection rose to a rank of a constitutionally protected value. This process originated in the 1970s.

A tendency to separate environmental protection issues from climate protection issues can be observed. Perhaps the next generation of constitutions will

[2] Dz. U. (JL)

consider climate protection to be a problem separate from environmental protection. Thus, climate protection will be constitutionalised.

Poland has a special place in constitutionalism. The Constitution of 3 May 1791 was the first constitution in Europe and one of the first in the world. Thus, the idea of constitutionalism has a long and rich tradition in Poland. The above-identified phenomena related to constitutionalisation of environmental protection also relate to Poland. The Constitution of 3 May 1791 is in no way related to environmental protection issues. This was due to the same reasons for which other constitutions at that time did not deal with such issues at all, and namely to the fact that environmental protection simply did not exist as a constitutional problem. This issue was also not regulated in Polish constitutions from the 19th century - the Constitution of the Duchy of Warsaw of 1807 and the Constitution of the Kingdom of Poland of 1815. The Polish constitutional legislator mentioned environmental protection in the March Constitution of 1921.

Another Polish constitution – the April Constitution of 1935 – completely ignored environmental protection.

The legislator of the Constitution of 22 July 1952 was also silent in that respect. However, due to the interest of the international community in the problems of environmental protection, the Polish constitutional legislator took interest in environmental protection. On 10 February 1975, an act amending the Constitution of the Polish People's Republic was adopted. This amendment, next to decisively political solutions incorporated in the legal regime, also covered issues related to environmental protection. The Constitution of the Polish People's Republic, although obsolete, remained in force until the effective date of the Constitution of 2 April 1997.

The present Constitution of the Republic of Poland of 2 April 1997 presents a modern approach to environmental protection, which indicates that the Polish legislator takes great care of these problems. The Constitution of the Republic of Poland contains 242 articles, five of which relate directly to the environment and its protection. The Polish legislator uses the term 'environment' or 'environmental protection' as many as five times. On the other hand, all other constitutional norms relate to environmental protection issues and in particular the provisions expressing social justice and the principle of a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland) and the principle of legality (Article 7 of the Constitution of the Republic of Poland). The principle of equality before the law (Article 32 of the Constitution of the Republic of Poland) and the right to be heard before the court (Article 45 of the Constitution of the Republic of Poland) are also significant.

On the other hand, issues directly related to environmental protection are regulated in Article 5, Article 31 paragraph. 3, Article 68 paragraph 4, Article 74 and Article 86. The provisions of the Constitution regulating the problems of the environment and its protection can be divided into three groups. The first group contains one element only and includes the principle of sustainable development. The principle of sustainable development is the foundation of Polish environmental law, so its separate treatment is fully justified. The second group is legal norms relating to the legal status of an individual. In this group of constitutional issues, the rights and freedoms of an individual in the area of the environment and its protection,

the obligations of an individual in the area of the environment and its protection, and finally the permissibility of limitation of the rights and obligations of an individual in view of environmental protection should be looked at.

The third group of issues relates to the obligation of public authorities to protect the environment and this is the most developed group of issues.

The first group comprises the problems of sustainable development. The normative dimension of the sustainable development principle was expressed in Article 5 of the Constitution of the Republic of Poland reading: *"The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development."* According to literature, this provision regulates issues that are most important from the point of view of the legal regime, and from the point of view of tasks of the state.

The analysed issue – the sustainable development principle – is the last element of the structure of this provision. A dilemma arose regarding the role of the sustainable development principle in this provision.

The tasks of the state enumerated by the Polish legislator include ensuring the protection of the natural environmental. At the same time, it specifies *"pursuant to the principles of sustainable development."* Such a formulation of the provision gave rise to doubts about whether the wording *"pursuant to the principles of sustainable development"* refers only to the *"ensure the protection of the natural environment"* task or to all other tasks mentioned in this provision.

In my opinion, the wording *"pursuant to the principles of sustainable development"* can refer to the *"ensure the protection of the natural environment"* task only. It is difficult to imagine how to *"safeguard the national heritage"* pursuant to the principles of sustainable development and also how to *"safeguard the independence"* pursuant to the principles of sustainable development. Thus, the principle of sustainable development was normatively linked to ensuring the protection of the natural environment.

It is interesting that Article 5 of the Constitution of the Republic of Poland is significant not as much as in view of the task to ensure environmental protection articulated in it, but due to the principle of sustainable development expressed in it. However, the principle of sustainable development referred to in the above-mentioned article is not an objective in itself but only a means, way or method to achieve the objective of environmental protection. Thus, this article is significant not as much as in view of the objective but rather of a normatively articulated method of achieving such an objective.

The principle of sustainable development has no normative definition. Only in Article 3 section 50 of the Act of 27 April 2001 – Environmental Protection Law – did the legislator define sustainable development.

This provision stipulates that sustainable development is such social and economic development which includes integration of political, economic and social activities in retaining both the natural balance and the sustainability of basic natural processes - with the aim of balancing the chances to access the environment by particular communities or individuals – of both contemporary and future generations. However, defining constitutional terms using statutory definitions is not allowed.

Thus, a statutory definition can have at least an auxiliary function in explaining the meaning of a constitutional term.

The principle of sustainable development is the foundation of the Polish environmental law. The meaning and essence of the principle of sustainable development for the Polish environmental law was explained by the Constitutional Tribunal in its judgement of 6 June 2006 in the case with ref. no. K 23/05. The statement of reasons to this judgement indicates that public authorities are first of all required to *"pursue a policy ensuring ecological security to the present and future generations"* (Article 74 paragraph 1). This phrase is typical for the determination of the tasks (policy) of the state, but it does not directly give rise to any subjective rights of an individual. The term 'ecological security' must be understood as bringing the environment to a quality allowing the safe staying in such an environment and using such an environment to enable human development. Environmental protection is one of the elements of 'ecological security' but the tasks of public authorities are wider – they also cover activities improving the current quality of the environment and programming its further development. The fundamental method to accomplish this objective is – pursuant to Art. 5 of the Constitution – to be guided by the principle of sustainable development, which makes reference to international agreements, in particular those made at the conference in Rio de Janeiro in 1992 (cf. J. Boć, [in:] Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r., ed. by J. Boć, Wrocław 1998, p. 24 et seq.). The principles of sustainable development comprise not only environmental protection or land management but also due care for social and civilisation development related to the necessity to build relevant infrastructure required for – taking into account the needs of civilisation – the life of man and respective communities. The idea of sustainable development incorporates a need to take different constitutional values into account and balance them properly.

This statement of reasons reflects the essence and role of the sustainable development principle in the system of Polish law. It embodies contradictory values, attempting to reconcile them as long as and to the extent that it is possible.

The principle of sustainable development is addressed both to bodies enforcing and making the law. It also has a process function. Thus, it sets directions and standards for the environmental law.

The second group of constitutional provisions are regulations concerning the legal status of an individual in the context of environmental protection. This group of issues consists of three subgroups. The first subgroup is regulations concerning personal rights and freedoms related to the environment. The second subgroup is regulations concerning the obligations of an individual related to the environment. Finally, the third subgroup is normative solutions referring to the admissibility of limitation of personal rights and freedoms in view of environmental protection.

The Constitution of the Republic of Poland is very terse about regulating personal rights and freedoms in the environmental context. Normatively, it clearly expresses one right only - the right to be informed about the environment and its protection. According to Article 74 paragraph 3 of the Constitution of the Republic of Poland, *"everyone shall have the right to be informed of the quality of the environment and its protection."* It is essential that this right is vested in everyone - not only individuals but also legal persons and units of organisation without legal identity. In the legal regime of

Poland, the right to be informed about the environment and its protection is a right independent of the right to public information regulated by Article 61 paragraph 1 of the Constitution of the Republic of Poland and it inheres in citizens only.

The Polish legislator recognised that information about the quality of the environment and its protection is now the most significant element of environmental protection from the point of view of an individual as such information allows individuals to shape their living conditions and health in the context of their protection.

The Constitution of the Republic of Poland is a fundamental act directly imposing obligations relating to the environment on an individual. According to Article 86 of the Constitution of the Republic of Poland everyone has an obligation to care for the quality of the environment and will be held responsible for causing its degradation. The principles of such responsibility are specified by statute. It is interesting that the constitutional legislator also imposes this obligation on everyone. The obligation to care about the environment is one of the five duties directly mentioned in separate provisions of the Constitution.

It should be emphasized that the duty to care about the quality of the environment should be distinguished from the duty of the public authorities to protect the environment. As specified in Article 74 paragraph 2 of the Constitution of the Republic of Poland, *"protection of the environment shall be the duty of public authorities."* The duty to care about the quality of the environment is much narrower than the duty to protect the environment. As a rule, public authorities are responsible for the quality of the environment. Yet, additionally, public authorities can impose certain duties on everyone. However, these can be the duties that public authorities cannot fulfil alone (e.g. the obligation to separate waste or a ban on wasting water). The above-quoted provision of the Constitution of the Republic of Poland also relates to statutory provisions in the context of liability. It is significant though that legal liability in the context of the environment and its protection was linked to deterioration in the quality of the environment.

Finally, the third group of constitutional provisions regulating environmental protection are regulations concerning the duties of public authorities related to environmental protection. One such provision has already been quoted above - it is Article 5 of the Constitution of the Republic of Poland imposing the duty to ensure environmental protection on public authorities. A similar general solution is contained in Article 74 paragraph 2 of the Constitution of the Republic of Poland. This provision reads: *"Protection of the environment shall be the duty of public authorities."* Public authorities can fulfil the general duties towards the environment in four ways – by making laws considering environmental protection, by financing environmental protection, by regulating the issues of ecological education and, lastly, by arranging for the actual measure of environmental protection.

The constitutional duties of public authorities in the area of environmental protection include the duty expressed in Article 74 paragraph 1 of the Constitution of the Republic of Poland. This provision reads: *"Public authorities shall pursue policies ensuring the ecological security of current and future generations."*

It should be highlighted that this provision does not impose a legal obligation but only a political one. It implies that public authorities only pursue a certain policy.

Thus, a violation of this duty cannot lead to criminal liability - it can only give rise to political liability.

It is also essential that the political obligation should refer to achieving ecological security, which means ensuring the optimum quality of the environment for human life and health. Here, the relationship between ecological security of the current generation and ecological security of future generations is clear, so Article 74 paragraph 1 of the Constitution of the Republic of Poland is linked to Article 5 of the Constitution of the Republic of Poland which expresses the principle of sustainable development.

The constitutional norms regulating the duties of public authorities in the area of environmental protection include Article 74 paragraph 4 of the Constitution of the Republic of Poland. This provision reads: *"Public authorities shall support the activities of citizens to protect and improve the quality of the environment."*

The essence of this provision is that the Polish legislator can see its incapacity and limitations as regards ensuring the right protection of the environment. It also expresses far-reaching confidence that citizens can and are able to handle the matters of the environment and its protection. What is more, the legislator believes that civic action in this respect is better than the action of public authorities.

It should be underlined that this provision does not grant public authorities the right to support citizens' actions to protect the environment and improve its quality, but imposes an obligation to offer such support. This support is offered at the legislative, organisational, educational and – lastly – financial level.

The last constitutional obligation imposed on public authorities is the duty expressed in Article 68 paragraph 4 of the Constitution of the Republic of Poland. It stipulates that *"public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment."* It should be emphasized that the whole of Article 68 of the Constitution of the Republic of Poland does not refer to the protection of the environment but to the protection of health. The problem of the environment appears only in connection with the protection of human health. Yet, the most important thing is that the constitutional legislator established a link between health protection and environmental protection. Although the provision can lead to a disturbing conclusion that the Polish legislator assumes that public authorities will react only when the degraded environment poses a threat to human life and health, all the other provisions analysed above imply that such a conclusion is wrong. Thus, this provision should be only perceived as a manifestation of a normative link between the protection of human life and the protection of human health.

To sum up, an interesting evolution of constitutionalisation of the problems of environmental protection should be noted. This phenomenon features two principal elements. Firstly, this constitutionalisation is a relatively young phenomenon and, secondly, it is very dynamic. De lege lata it is difficult to imagine a modern constitution without making reference – to a larger or smaller degree – to environmental protection issues.

As a background to these general comments on the constitutionalisation of environmental protection, the Constitution of the Republic of Poland is an act presenting a practical comprehensive and exhaustive approach to environmental protection issues. A special constitutional achievement of the Polish legislator is the fact

that the principle of sustainable development is the foundation of environmental law in Poland. Alongside it, the legislator regulates issues of the legal status of an individual and duties of public authorities in the area of environmental protection.

The solutions adopted in the Constitution of the Republic of Poland demonstrate that the problem of environmental protection is treated seriously and its weight and significance are duly taken into account. This value was assigned a suitable constitutional rank and significance.

János Ede SZILÁGYI*

The Protection of the Interests of Future Generations in the 10-Year-Old Hungarian Constitution, With Special Reference to the Right to a Healthy Environment and Other Environmental Issues**

Abstract

The present study is inspired by the tenth anniversary of the new Hungarian Constitution, known under the name of Fundamental Law, which was adopted in 2011 and entered into force in 2012. In this study we analyse the ten-year old Fundamental Law and its constitutional practice with regard to the important challenges and tasks of the 21st century, namely how the protection of the interests of future generations and the environment are reflected in it. Particularly important elements of the study are (a) the institutional guarantees of the relevant provisions, such as the provisions relating to the Constitutional Court and the Advocate of Future Generations, (b) the concept of GMO-free agriculture in the Fundamental Law, (c) the theses of the Constitutional Court practice on the prohibition of retrogression and the precautionary principle, (d) new interpretative frameworks and possibilities arising from other values of the Fundamental Law, such as the provisions on Christian culture, (e) the open questions of interpretation of the Fundamental Law on waste and the environmental liability regime, (f) the priority protection of natural resources, which are the common heritage of the nation, and last but not least (g) the particularly forward-looking integration of the interests of future generations in the rules on public finances and national assets.

Keywords: Hungarian Constitution, future generations, right to a healthy environment, institutional guarantees, protection of natural resources, principle of precaution, non-regression clause.

The new Hungarian Constitution adopted ten years ago, in 2011, known under the name of Fundamental Law and its amendments, as well as the constitutional (especially constitutional court) practice that has undergone significant changes in the recent period, can be considered remarkable from the point of view of protecting future generations, especially in the field of environmental aspects, which is the narrow topic of our study.[1]

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[1] See the comparison of the relevant provisions of the Hungarian Fundamental Law with the German Fundamental Law and the French, Italian and Belgian Constitutions: Szilágyi 2021.

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In this paper, we will attempt, purely on the basis of our own arbitrary selection, to briefly assess the constitutional legislation and constitutional practice of the period that began with the adoption of the Fundamental Law and extended until the finalisation of the manuscript of this paper, i.e. the adoption of the ninth amendment to the Fundamental Law.

Our comments below focus on the related constitutional legislation and the constitutional practice based on it. It is important to note that, in addition to the Parliament and the Constitutional Court (AB), other actors have also played a major role in shaping these, including the *President of the Republic*[2] and the Deputy Commissioner for the Environment of the Parliamentary Commissioner for Fundamental Rights (the Ombudsman), the so-called *Advocate of Future Generations*[3] (the AFG). The AFG has contributed to all this in an institutionalised way through its core specificities, i.e. the special powers guaranteed by the Fundamental Law and the law on the Commissioner for Fundamental Rights and their deputies,[4] and the President of the Republic, possibly through the individual role(s) of the person occupying the position.

1. The constitutional foundations for the protection of future generations and the environment are not without precedent in the Hungarian constitutional legislation and practice following the change of regime.[5] Hungarian public thinking, legislation and practice in the field of environmental protection had a number of major characteristics and results even before the Fundamental Law was adopted. Among those with constitutional relevance,[6] we wish to mention the following.

[2] In this specific case, the role of the President of the Republic is also referred to by the Advocate of Future Generations: Bándi 2020a, 18. In this particular case, forming the background of AB Resolution 13/2018, the President of the Republic also introduced a new approach to the interpretation of the law; on this see: Szilágyi 2018a, 84–85. It should also be noted that, like AB Resolution 13/2018, the other major *'green decision'* of the Constitutional Court, the 16/2015 AB decision, was also submitted to the Constitutional Court on the initiative of the President of the Republic. In addition to all these specific situations, there may also be *cases* that are *'invisible'* to the public, when the President of the Republic intervenes informally during the preparation and adoption of a particular piece of legislation.

[3] Bándi 2020a, 8–11. It is important to note that, in addition to its internal legal activities, the AFG also has a valuable contribution to make in the international policy and legal dimension; see for example the English summary of the AFG's position of SDGs of 8 May 2018; available at <http://www.ajbh.hu/jnbh-figyelemfelhivasok>

[4] See Act CXI of 2011 on the Commissioner for Fundamental Rights.

[5] On the circumstances of the adoption of the Fundamental Law, see also Raisz 2012, 37–70.; Fülöp 2012, 76–87.

[6] It has no constitutional relevance, but because of its international importance, Hungary's involvement in one of the first environmental cases before the International Court of Justice in The Hague could be mentioned: One of the democratic community-forming events of our regime change was the social movement and protests against the Bős-Nagymaros hydroelectric power plant, an initiative with broad social support that led the Hungarian side to reconsider its original ideas regarding the planned hydroelectric power plant. The resulting dispute has become one of the most famous environmental disputes in public international law and was the basis for the judgment of the International Court of Justice in The Hague. In the legal dispute, the

(a) The constitutional basis of the right to a healthy environment and the protection of the environment, namely the right to a healthy environment and the right to the highest attainable standard of physical and mental health, was provided for by Articles 18 and 70/D of the former Constitution[7] as amended in 1989. Originally, *"in 1989, Article 18 of the "Hungarian Constitution was intended to be declarative rather than normative in nature. However, the text of Article 18 [...] has been given normative content by the practice of the Constitutional Court."*[8] In 2006, László Fodor, who elaborated the related jurisprudence of the Constitutional Court in monographic form, captured the role of the Constitutional Court in the development of the normative content of the right to a healthy environment as follows: *"Because, of course, the content of the right to the environment had not been clarified before [...] the Constitutional Court had a rather wide room for manoeuvre in interpreting and giving content to the right to the environment [...] We regret that, in the field of dogmatics, the Court only exercised this freedom for about three years and has not developed the content of the law in recent years with a requirement of principle."*[9] The precedent-setting practice of the Constitutional Court referred to by László Fodor was based on AB Resolution 28/1994 (20 May). One of the central elements of this decision is the *non-regression clause*, which is essentially a prohibition on the deterioration of the level of protection previously achieved.[10] However, the relationship between the right to a healthy environment, environmental protection and the Constitutional Court did not end with the Constitutional Court's interpretation of the relevant paragraphs of the Constitution. In all the – relatively few[11] – cases in which the Constitutional Court has dealt with the right to a healthy environment and other constitutional relevance of environmental protection, the Constitutional Court has also undergone a special change of form: *"The Constitutional Court basically decides on questions of law, but some of its decisions on environmental issues [...] have turned the body into a court of facts, since it has not only provided solutions to the legislation under examination, but also to the situations and conflicts that have arisen. An interesting feature of the Constitutional Court proceedings is that in some of the environmental cases, the panel also conducted a technical or factual evidentiary hearing. This solution was partly successful [...] and partly resulted in errors or debatable elements in the reasoning."*[12]

Hungarian side based its claims to a large extent on environmental aspects, and the environmental approach also played a decisive role in the final court decision.

[7] Act XX of 1949 the Constitution of the Republic of Hungary

[8] Fodor 2006, 193.

[9] Fodor 2006, 194–195. For a discussion of all this, see also Fodor 2006, 157–163.

[10] The interpretation of the Hungarian AB declaring the prohibition of retrogression, which is also forward-looking in international comparison, has been widely recognised at the professional level; this was also considered important to be recorded in the AB Resolution 16/2015 (Section 81). See Bándi 2017, 159–181.

[11] László Fodor refers to these quantitative aspects in 2006: *"However, in evaluating the (in itself forward-looking) judgments of the Constitutional Court, we must add that the reasoning used could certainly serve as a basis for the annulment of hundreds of laws,"* if the cases had reached the Constitutional Court; Fodor 2006, 158. He makes a similar point in 2014: *"In practice, the [AB] rarely applies it, and when it can, it tends to seek formal grounds for annulling the challenged legislation";* Fodor 2014, 110.

[12] Fodor 2006, 162. In our view, the same will be true for the Constitutional Court in the future, for example in the context of AB Resolution 13/2018.

(b) The *Parliamentary Commissioner for Future Generations (CFG),* functioning in the form of a separate Parliamentary Commissioner (i.e. Ombudsman), was a kind of preceding concept to the deputy of the Commissioner for Fundamental Rights, responsible for the protection of the interests of future generations i.e., the AFG mentioned above (Article 30 of the Fundamental Law), and was expressly named in the Fundamental Law. The CFG was already established before the adoption of the Fundamental Law.[13] This has led to the creation of an internationally exemplary concept, which has already made significant progress in putting the right to a healthy environment into practice in a short space of time. In fact, it was the Commissioner's own contribution to the drafting of the environmentally relevant provisions of the Fundamental Law that he considered to be one of his greatest successes.[14]

(c) *The concept of agriculture free of genetically modified organisms (GMOs)* (Article XX of the Fundamental Law), a specific element of the Fundamental Law, can be traced back to the time before the adoption of the Fundamental Law - and essentially to a political consensus, the important embodiment of which is Parliamentary Resolution 53/2006 (November 29). All this political determination has led to one of the EU's most peculiar constitutional GMO legislation at the time of the drafting of the Fundamental Law.

2. The Fundamental Law adopted in 2011 brought with it - in terms of environmental regulation[15] – what the Constitution already contained – namely, by inserting the text of Articles XVIII and 70/D of the Constitution (which are essentially identical in substance to our topic) - and adding some new provisions, including some of great importance, in substance (see below).[16] From the very beginning, however, the question has been raised as to what extent the case law of the Constitutional Court prior to the adoption of the Fundamental Law can be applied to the interpretation of the provisions of the Fundamental Law that show a textual similarity. The CFG wanted to settle this issue early on, arguing in favour of maintaining the previous interpretation of the Constitutional Court.[17] In this case, however, the fourth amendment to the Fundamental Law has created a new situation by stating that Constitutional Court decisions taken before the entry into force of the Fundamental Law are null and void. This provision was then shaded by the AB Resolution 13/2013, generally (*"The Constitutional Court always examines the applicability of the arguments set out in previous decisions on a case-by-case basis, in the context of the specific*

[13] For the discourse on institution building, see Sólyom 2001, 14. Fodor 2008, 47–52.; Majtényi 2008, 25–26. See also the previous opinion of László Fodor: Fodor 2006, 198. (Footnote 5). On the current situation and status of the Green Ombudsman, see in particular Szabó 2015, 6–24.; Fülöp 2016, 195–212.; Bándi 2020a, 8–11.

[14] Fülöp 2012, 76.

[15] For the analysis see Bándi 2013, 67–92.; Bándi 2016, 7–25.; Bándi 2019, 339–382.; Fodor 2011; Farkas Csamangó 2017, 11–12.

[16] For the same conclusion, see the Resolution 258/2011 of the CFG on the State's responsibility under the environmental and sustainability provisions of the new Fundamental Law, Sections 3 and 12–13. Similarly Bándi 2020a, 8.

[17] Resolution of the CFG 258/2011, Section 11.

case."[18]), and AB Resolution 3068/2013 in the specific context of the right to the environment. (*"The text of the Fundamental Law is identical to the text of the Constitution with regard to the right to a healthy environment, and therefore the findings of the Constitutional Court in its previous decisions may be considered as applicable in the interpretation of the right to a healthy environment."*[19])

3. As we have pointed out, Article XX of the Fundamental Law[20], in addition to a few elements to be elaborated later, includes – in its essence – all that was previously included in Article 70/D of the Constitution, namely *the right to physical and mental health and the protection of the environment as one of the means of its realisation.* Likewise, Article XXI (1) of the Fundamental Law[21] essentially transposes the right to a healthy environment enshrined in Article 18 of the Constitution.[22] The basic resolution interpreting the right to a healthy environment in the practice of today's Constitutional Court is the AB Resolution 16/2015 (5 June), which itself refers to the interpretation of the AB Resolution 28/1994 – and several other Constitutional Court resolutions prior to the adoption of the Fundamental Law – essentially adopting its (their) cardinal provisions.[23] Accordingly, AB Resolution 16/2015 adopts the *non-regression clause* from the previous practice of the Constitutional Court.[24] At the same time, AB Resolution 16/2015 puts the previous interpretation of the right to a healthy environment in a new context, given that the Fundamental Law has introduced several new elements into its text (see below), in addition to the previous regulatory framework (Articles 18 and 70/D of the Constitution), in particular Article P), which guarantees a high level of protection of natural resources.[25] With this in mind, the Constitutional Court has

[18] AB Resolution 13/2013. Section 34.

[19] AB Resolution 3068/2013. Section 46.

[20] Fundamental Law, Article XX: *"(1) Everyone shall have the right to physical and mental health (2) Hungary shall promote the effective application of the right referred to in Paragraph (1) by an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision, by supporting sports and regular physical exercise, as well as by ensuring the protection of the environment"*

[21] Fundamental Law, Article XXI: *"(1) Hungary shall recognise and give effect to the right of everyone to a healthy environment. (2) 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 (3) The transport of pollutant waste into the territory of Hungary for the purpose of disposal shall be prohibited."*

[22] On the international dimension of environmental rights, see: Marinkás 2020, 133–170.; Bándi 2021, 179–206.; Kecskés 2021, 207–220.

[23] AB Resolution 16/2015, Section 80-86. E.g., the interpretation of the fundamental right to a healthy environment has been transposed as follows: *"Although according to the [AB] it is a fundamental right, but this right does not have a subjective side [...] The right to the environment therefore does not mean that everyone - even against the state - can formulate a claim and enforce it directly (through litigation) before the courts, demanding an environmental condition that meets their subjective needs. As the literature points out: making the requirements subjective would lead to unfulfillable expectations of the state, and for this reason (or because of the indeterminate content of the right) the right to the environment is not recognised as a subjective right anywhere in Europe."* Fodor 2014, 106.

[24] AB Resolution 16/2015, Section 109.

[25] Fundamental Law, Article *P)*: "*(1) Natural resources, in particular arable and, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common*

already applied the prohibition of retrogression in a new situation, namely in the case of *rules on the regulation of organisations*,[26] unprecedented in previous Constitutional Court practice. Previously, the non-regression clause applied only to substantive and procedural rules.

4. In essence, with reference to the constellation of Article XXI and Article P), which creates a new situation, a further interpretation of constitutional law (almost legislation) was created at the level of principle, namely the conceptualisation of the precautionary principle as a Constitutional Court standard.[27] The *"principle of precaution does not only apply in the context of the prohibition of retrogression, but also in its own right."* [28] When applied in conjunction with the principle of non-regression, *"where a regulation or measure may affect the state of the environment, it is for the legislator to demonstrate that the regulation does not constitute a step backwards";*[29] and "*in accordance with the principle of precaution, the actual deterioration of the environment is not necessary for the non-regression clause to be infringed, but the risk of deterioration alone justifies a breach of the prohibition.*"[30] In the case of autonomous application, *"in the case of measures which do not formally constitute a retrogression but which may affect the state of the environment, the measure is also limited by the principle of precaution, in the context of which the legislator has a constitutional obligation to give due weight to the risks which it considers scientifically likely or certain to occur when making its decision."*[31] The practice of the Constitutional Court related to the interpretation of the precautionary principle may reinforce the specific functioning of the Constitutional Court, which was already mentioned by László Fodor in the context of the previous practice, namely that the Constitutional Court conducts in such cases not only legal questions but also professional or factual evidence. At least the basic decision of the principle of precaution – issued after a number of precedents –[32] AB Resolution 13/2018 (4 September),[33] suggests that. In our view, the new principle also creates an opportunity for the Constitutional Court to decide on the applicability of new, risky technologies - requiring legal regulation; that is, with some (perhaps oversimplified) simplification, if nuclear technology, genetic engineering or even mobile technology had been introduced by law in Hungary for the first time after the adoption of AB Resolution 13/2018, it is far from certain that all of these would have passed the test of

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 (2) The limits and conditions for acquisition of ownership and for use of arable land and forests necessary for achieving the objectives referred to in Paragraph (1), as well as the rules concerning the organisation of integrated agricultural production and concerning family farms and other agricultural holdings shall be laid down in a cardinal Act."

[26] AB Resolution 16/2015, Section 110–111.

[27] AB Resolution 13/2018, Section 20.

[28] AB Resolution 13/2018, Section 20.

[29] AB Resolution 13/2018, Section 20.

[30] AB Resolution 13/2018, Section 65.

[31] AB Resolution 13/2018, Section 20.

[32] On these precedent resolutions, see Szabó 2018, 485–499.; Szilágyi 2018a, 79–82.

[33] For an analysis of this, see also: Szilágyi 2019b, 88–112.; Szabó 2019, 67–83.; Hohmann & Pánovics 2019, 305–309.; Kecskés 2020, 371–382.

a strictly applied precautionary measure.[34] In view of all this, one of the most exciting questions for us in the context of the constitutional revision of the last few years has been whether the legislator intends to react to the established or emerging practice of the Constitutional Court by amending the text of the Fundamental Law in some way. At this stage, it seems that the legislator has not taken this opportunity.

5. Article XX (2) of the Fundamental Law contains several new instruments to enforce the right to physical and mental health. These include, for example, in addition to 'ensuring access to healthy food and drinking water',[35] which is also considered significant, the provision on 'GMO-free agriculture' (hereafter: the concept of *'GMO-free agriculture'*). The interpretation of the latter in particular has posed multiple challenges for those seeking answers when applying the concept.[36] The cardinal questions are - among many others[37] – (a) the scope of activities or products covered by the provisions, (b) the binding force of these provisions, and (c) their relationship with EU law. Without disputing the assessments of other authors on the subject, our interpretation of the provisions of the Fundamental Law on GMO-free agriculture is as follows. In our view, the exact nature of this provision of the Fundamental Law is unclear. It may be noted, however, that this provision is *not a directly enforceable prohibition* (but rather a guideline for public policy makers). Initially, this provision was mainly invoked by Hungarian policy makers in the context of limiting the *public cultivability of GM crops* (a narrow interpretation). In other words, based on this narrow interpretation, the presumed intention of the legislator was not contradicted by the fact that GM products (e.g. food) imported from abroad should be placed on the tables of Hungarian consumers. However, for some years now, it seems that the category of GMO-free agriculture has been increasingly being used by policy makers to include other issues beyond the issue of GMO intercultivation, such as the aspiration to create the conditions for *GMO-free food production in Hungary* (a broader interpretation of the concept). In addition to the above interpretative aspect, the concept of GMO-free agriculture in the Fundamental Law also raises the question of whether the latest techniques (so-called gene or genome editing technologies, as a kind of GMO 2.0 technologies) fall within its scope at all. After the related EU court ruling[38] – following its logic – the Hungarian Ministry of Agriculture finally interpreted that *GMO 2.0 is also covered by the* concept of GMO-free agriculture in the *Fundamental Law*.[39] However, we have to agree with Gyula Bándi that the concept of genetic engineering may in the

[34] For a more detailed discussion of all these arguments, see Szilágyi 2018a.
[35] For an analysis of all this in relation to the right to water, see Szilágyi 2018b, 259–272.
[36] See on this Szilágyi, Raisz & Kocsis 2017, 167–175.; Fodor 2014, 113–114.; Hegyes & Varga 2020, 104–117.; Tahyné Kovács 2015, 88–99.; Téglásiné Kovács 2015, 300–319.; Téglásiné Kovács 2017, 147–164.; C.f. Raisz 2015, 275–286.
[37] Raisz & Szilágyi 2021.
[38] Judgment of 25 July 2018 in the case C-528/16, *Confédération paysanne et al kontra Premier ministre, Ministére de l'Agriculture, de l'Agroalimentaire et de la Foret* (HL C 328., 2018.9.17., pp. 4–5). For the analysis of the case, see: Fodor 2018, 42–64.
[39] For details, see also Raisz & Szilágyi 2021.

future depend in a significant way on the relevant EU legislative trends and therefore a redefinition of the concept in the basic law may be unavoidable.[40]

6. Article XXI (2) and (3) of the Fundamental Law introduce new elements, supplementing the right to a healthy environment, which is provided for in Article XXI (1) of the Fundamental Law and was already provided for in Article 18 of the Constitution. Pursuant to Article XXI (2) of the Fundamental Law, *"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,"* while pursuant to Article XXI (3) of the Fundamental Law, *"The transport of pollutant waste into the territory of Hungary for the purpose of disposal shall be prohibited."* Several comments on the provisions have been made in the literature and by the CFG/AFG, and it should be noted at the outset that none of these comments challenged the strictness of waste management or the enforcement of a higher level of environmental responsibility or the legislative commitment to this end, but were more to do with the way they were formulated and the way they could be enforced. Thus, for example, Professor Gyula Bándi and the AFG do not consider them sufficiently "practical".[41] First of all, it should be pointed out – and this mainly concerns the current Article XXI (2) of the Fundamental Law – that the CFG has already proposed during the preparation of the Fundamental Law to include the polluter pays principle, the precautionary principle and the principle of precaution in the text of the Fundamental Law.[42] Although neither of these principles is stated expressis verbis[43] in the text of the Fundamental Law[44] – in our view – the principle of responsibility has been formulated in a way in Article XXI (2) of the Fundamental Law; Professor Bándi called it *"a narrowed conception of the polluter pays principle"*[45], and according to Professor Fodor, this *"rule merely refers to the framework of environmental liability"*.[46] As an important antecedent of Article XXI (3) of the Fundamental Law – as an explanation for its adoption – we consider it important to mention the German garbage issue, the essence of which was that a huge amount of waste from Germany was illegally dumped on the territory of Hungary. In the light of all this, it is perhaps understandable that the policymaker wanted to respond to the issue with the necessary decisiveness. Nor do representatives of environmental law in Hungary dispute the purpose of this provision: According to Professor Bándi,[47] on the one hand, it would have been sufficient to regulate the issue in the Waste Act alone (the legislator has already done so); on the other hand, we note that regulating the issue in the Fundamental Law provides so much more security than regulating it in the Waste Act alone, since the Fundamental Law can only be amended

[40] Bándi 2020a, 15. It made specific proposals for amendments, essentially based on natural science aspects: Darvas 2018.
[41] Bándi 2020a, 16.
[42] Fülöp 2012, 82.
[43] In our opinion, however, the basic concept of GMO-free agriculture in the Fundamental Law can be interpreted as a regulation that contains the precautionary principle in a hidden form.
[44] We are aware that with this statement we contradict the JNO's legal analysis, see Position 258/2011, Sections 8 and 11 of the CFG.
[45] Bándi 2020a, 16.
[46] Fodor 2014, 114.
[47] Bándi 2020a, 16.

by a two-thirds majority of the members of the Parliament. On the other hand, Professor Bándi also drew attention to the inaccuracies in the wording of the Basic Law; we can identify with these remarks – without going into details – ourselves. In addition to the above, Professor Fodor also considers compatibility with EU law to be an important aspect of Article XXI (3) of the Fundamental Law, noting that *"it is unprecedented in Europe and, in its content, as waste is a commodity in the EU, it is a provision aimed at restricting the free movement of goods. In terms of its binding force, of course, it is not directly enforceable either."*[48] In view of the above arguments, in relation to Article XXI (2)-(3) of the Fundamental Law, the AFG de lege ferenda proposes either to clarify and reformulate the provisions or to delete them from the text of the Fundamental Law.[49] In relation to this proposal, we would argue in favour of the former, i.e. a more precise wording of the basic law, and would rather interpret the simple deletion of the provisions as a kind of retrograde step. However, it would be beyond the scope of this study to explain in which direction we believe the relevant two paragraphs of the Fundamental Law should be clarified; for example, the expressis verbis naming of the polluter pays principle would also require a substantive decision – and a corresponding preliminary assessment – since the inappropriate naming of the polluter pays principle could also lead to further difficulties of interpretation.

7. The Preamble to the Fundamental Law also touches on the subject of our study in several respects. Most often analysed in this context is its Call 7, which states that *"We commit to promoting and safeguarding our heritage, [...] along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants; therefore we shall protect the living conditions of future generations by prudent use of our material, intellectual and natural resources."* The significance of the provision, Professor Fodor noted, is that *"[this] wording is strongly reminiscent of the principle of sustainable development, even if it does not explicitly name the principle itself."*[50] In addition to Call 7,[51] the environmental relevance of other provisions of the Preamble is linked to Christian morality by the AFG. We can agree with him, but we also note that the *Christian culture and set of values* explicitly expressed in the text of the Preamble and in Articles R) and XVI can be interpreted as an important innovation of the Fundamental Law and as a paragraph of the Fundamental Law that embodies the protection of the interests of future generations. Professor Bándi draws attention to a similar connection in several of his studies,[52] in which he analyses human rights, especially the right to the environment and the protection of future generations, and their relationship with Christian beliefs and ideals. Professor Bándi sees correctly interpreted Christian teachings as an important pillar of environmental protection.

[48] Fodor 2014, 114.
[49] Bándi 2020a, 17.
[50] Fodor 2014, 112.
[51] For a different reason, Dávid Hojnyák proposes to supplement Call 7 with regard to the prominent role of rural communities; on this issue see Hojnyák 2019, 58–76.; Hojnyák 2020, 174–185.; Szilágyi 2019a, 451–470.
[52] The latest of these is the following: Bándi 2020b, 9–33. For a background to this study, see for example Bándi 2013, 67–92.; Cf. Bányai 2019, 298–323.

In this respect, Christian culture and Christianity, which is expressed expressis verbis in the text of the Fundamental Law,[53] can also be seen as an institution that helps to protect the interests of future generations and embodies the traditional element of environmental protection. In this context, the amendment of Article XVI (1) of the Fundamental Law with the twist of upbringing of children in accordance with values based on Christian culture could be another forward-looking change for the benefit of future generations.

8. In connection with Article P) of the Fundamental Law, it has already been mentioned that, in addition to Article XXI (1) of the Fundamental Law, this article has provided the basis for the numerous innovative interpretations of the Constitutional Court in 2015 and thereafter[54] (e.g. the principle of precaution). However, Article P) of the Fundamental Law may be relevant in other respects. Thus, in the case of the *'natural resources'* turn of phrase it refers to – such as arable land, forests and water resources, biodiversity[55] – the legislator has provided that they are the common heritage of the nation. (a) In our view, the common heritage of the nation is a kind of contrast with the category of *'common heritage of mankind'* (under which all the peoples of the world could claim the exploitation of a given natural resource), as known in international law. (b) The word *'heritage'* in the common heritage of the nation also indicates that the legislator did not refer to the natural resources named in the Fundamental Law (b1) as objects of mere commercial transactions (goods, capital, etc.), but also takes into account their other, vital functions (b2) and also *intergenerational* aspects (namely that they must be exploited by each generation in the interests of future generations). (c) It is important to underline that the category of the common heritage of the nation does not coincide with another category of the Fundamental Law, namely *'national assets"*, which, incidentally, is not the same as the category of the same name in the preamble to Act LIII of 1995 on the General Rules for the Protection of the Environment (Environmental Protection Act). (c1) While the category of national assets in the Fundamental Law refers to *state and municipal property* (or assets), (c2) the category of 'national assets' in the Environmental Protection Act can be seen as a confrontation with the theory that identifies environmental assets as unowned things. The category of national assets in the Environmental Protection Act cannot be identified with any one form of ownership, but includes the values that are decisive for the country, regardless of who owns them.

[53] This is mentioned four times in the preamble and in the main text of the Fundamental Law, as "Christian Europe", "Christianity", "Christian culture". In addition, the framing text of the Fundamental Law also mentions "God" twice.

[54] The Constitutional Court has reached a similar conclusion, and in relation to his active role in recent years, Bándi, 2020a, 17.

[55] "Although Article P) (1) does not specify the nature of the natural assets to be protected (see the term 'specifically'), it does specify what environmental protection as a public and private obligation actually means: 1. protection; 2. preservation; 3. conservation for future generations." AB Resolution 16/2015, Section 92. Fodor, 2013, 337–338., provides a valuable interpretation of the legal provision

9. One of the features of our Fundamental Law is the protection of 'national assets', managed with the needs of future generations in mind, and of budgetary operations that serve a kind of 'financial sustainability'. The former is centrally regulated by Article 38 (1) of the Fundamental Law, which states: *"The property of the State and of local governments shall be national assets. The management and protection of national assets shall aim at serving public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations."* From the point of view of sustainability, Professor Bándi[56] considers the twists and turns of Article N (1) of the Fundamental Law on the budget to be particularly significant: *"Hungary shall observe the principle of balanced, transparent and sustainable budget management."* To complement all this, we also consider Articles 36-37 of the Fundamental Law to be equally forward-looking, which, among other things, are intended to set a maximum level of public debt, and which, by virtue of their purpose, can also be interpreted as meaning that current generations should not financially incapacitate future generations by a possible credit trap. This interpretation is also supported by the explanatory memorandum to Article 36 of the Fundamental Law,[57] according to which the Fundamental Law provides for rules to prevent the growth of public debt *"with a view to the responsibility for the situation of future generations"*; similarly, the legislator justifies Article 37, i.e. that the Fundamental Law introduces strict budgetary rules *"in order to avoid imposing an intolerable burden on future generations by giving excessive priority to current needs or interests."* We believe that this clearly demonstrates the legislative intention to avoid indebtedness of future generations. Article 36 (4) of the Fundamental Law sets the ceiling for public debt at *half of the 'total gross domestic product.*[58] Given the fact that, in the time since the adoption of the Fundamental Law, the situation provided for in Article 36 ((4)) has not yet arisen (i.e. the level of public debt has not fallen below the amount of half of the total gross domestic product), the situation provided for in Article 36 ((5)) of the Fundamental Law has prevailed until now, i.e., *"As long as state debt exceeds half of the Gross Domestic Product, the National Assembly may only adopt an Act on the central budget which provides for state debt reduction in proportion to the Gross Domestic Product."* Given the difficult situation of the

[56] Bándi 2020a, 13.

[57] Fundamental Law, Article 36: "*[…] (4) The National Assembly may not adopt an Act on the central budget as a result of which state debt would exceed half of the Gross Domestic Product (5) As long as state debt exceeds half of the Gross Domestic Product, the National Assembly may only adopt an Act on the central budget which provides for state debt reduction in proportion to the Gross Domestic Product. (6) 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 case of an enduring and significant national economic recession, to the extent necessary to restore the balance of the national economy."*

[58] Article 37 (6) of the Fundamental Law, supplementing this rule, stipulates that the method of calculation of public debt and total gross domestic product shall be laid down in a law (namely Act CXCIV of 2011 on the Economic Stability of Hungary (Economic Stability Act)). In this context – as a digression – we consider it important to note that both the explanatory memorandum of the Fundamental Law and the Economic Stability Act use the term *'gross domestic product'* (or GDP for short) instead of the term 'total gross domestic product', which seems more economically accurate, thus making the GDP category, used as a general parameter of economic development, the benchmark for combating excessive public debt.

national economy due to the epidemic, we believe that an important question is how Article 36 (5) and (6) of the Fundamental Law will be applied. According to the latter, *"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 case of an enduring and significant national economic recession, to the extent necessary to restore the balance of the national economy."* In our view, the real test of Article 36 (4) - (6) of the Fundamental Law – which is, by the way, very forward-looking for future generations – will be the present period, and only in the light of the experience gained in this period can we really draw conclusions on the practical applicability – and possible future clarification – of the relevant legal provision. However, it is difficult for us to imagine protecting the interests of future generations without a level of public debt that is manageable and not exceeded, i.e. without a form of financial sustainability.

For reasons of space, it was not possible to analyse the Fundamental Law and the related case law in detail in this study. In view of this, we have only been able to focus on certain areas that we have selected and have tried to formulate our ideas, assessing the existing legal situation in the interests of future generations and the protection of the environment, and trying to make forward-looking comments on how to improve this situation. Even in its present state, we believe that the now ten-year-old Fundamental Law already regulates the protection of the interests of future generations and the protection of the environment at a high level, and in many respects in a way that is a model for others. With this in mind, it would be important to ensure that the spirit of the Fundamental Law is applied as fully as possible in its implementation.

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Environmental protection in the Constitution of the Czech Republic**

Abstract

This article aims to analyse the constitutional order of Czechia and the decision-making practice of the courts to define the legal means of environmental protection at the constitutional level. The aim is also to provide the reader with an essential insight into environmental protection in Czechia at the constitutional level so that the legal regulation and decision-making practice can be compared with other countries.

Keywords: environmental protection, constitution, Czechia, the right to a favourable environment, environmental information, restrictions.

1. Introduction

Václav Havel, the first Czechoslovak post-communist and then the first Czech president, believed that the modern Constitution of the newly built democratic State should not lack an ecological article.[1] This was also the ethos of constitutional adoption in other post-communist states. Thus, in the 1990s, the greening of constitutions in post-communist countries was well underway, involving environmental protection among constitutionally protected values and the adoption of progressive environmental legislation.[2] This effort resulted, among other things, in incorporating specific provisions protecting the environment into the constitutional order of Czechia.

This article aims to analyse the constitutional order of Czechia and the decision-making practice of the Constitutional Court in particular, but also of the Supreme Administrative Court and other administrative courts, to define the legal means of environmental protection at the constitutional level. The aim is also to provide the reader with an essential insight into environmental protection in Czechia at the constitutional level so that, among other things, the legal regulation and decision-making practice can be compared with other countries.

The first chapter will set out the constitutional background and context for environmental protection. In the following chapters (second, third and fourth), the individual institutes of environmental protection in the Czech constitutional order will

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[1] Chrastilová & Mikeš 2003, 114.

[2] Hanák 2016, 147.

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be analysed, namely the right to a favourable environment, the right to timely and complete information on the State of the environment and natural resources and the limitation of the exercise of other rights in favour of environmental protection. Finally, an assessment of the analysed legislation and case law will be made. It should be noted that a newly published commentary written by leading experts in environmental law from the Faculty of Law of Masaryk University in Brno and the Faculty of Law of Palacký University in Olomouc served as a key source for the writing of this article, especially in terms of a thorough review of the case-law mentioned therein.[3]

2. Constitutional background and context of environmental protection

The Czechia's constitutional order has reflected environmental protection in several elements that are balanced against each other. This was due to the change of the political regime after 1989 (the fall of the socialist establishment as a result of the Velvet Revolution). The significant factors that contributed to its entrenchment were, in addition to the above, also severe environmental pollution, the priorities of the country's political leadership at the time, as well as the desire to be inspired by good examples and to become a member of the European Union as soon as possible.[4]

The Constitution of the Czech Republic (hereinafter referred to as the Constitution), as the highest law of the country, not only contains a reference to environmental protection in its preamble (*"We, the citizens of the Czech Republic in Bohemia, Moravia and Silesia [...] determined to jointly protect and develop the inherited natural and cultural, material and spiritual wealth [...]"*) but also directly sets out the constitutional obligation of the State to protect the environment, in Art 7 *("The State shall take care to use natural resources sparingly and to protect natural wealth."*).

In this context, the Constitutional Court ruled in 1993 that the Constitution *"is not based on value neutrality. It is not a mere definition of institutions and processes but incorporates into its text certain regulative ideas expressing the fundamental inviolable values of a democratic society."*[5] One of the values on which the Constitution is based is the environment. This has been confirmed by the Constitutional Court in its subsequent decision-making practice, according to which in a democratic state governed by the rule of law, "*the environment is a value whose protection is to be implemented with the active participation of all components of civil society, including civil associations and non-governmental organisations which have the status of legal persons. Discourse within an open society, where appropriate by legal means and in proceedings before the courts, is then an effective guarantee of the protection of the natural wealth of the State."*[6]

The Constitutional Court has referred to a 'healthy' environment as a public good (public value), concluding that "*it is typical of public goods that the benefits from them are inseparable and people cannot be excluded from enjoying them. Examples of public goods are national*

[3] Vomáčka, Tomoszková & Tomoszek 2020, 974–1031.
[4] Ibid.
[5] Judgment of the Constitutional Court of 21 December 1993, No. Pl. ÚS 19/93 (N 1/1 SbNU 1; 14/1994 Coll.).
[6] Judgment of the Constitutional Court of 6 January 1998, No. I. ÚS 282/97 (U 2/10 SbNU 339).

security, public order, and a healthy environment. Therefore, a public good becomes a particular aspect of human existence on condition that it cannot be conceptually, substantively or legally broken down into parts and assigned to individuals as shares."[7] At this point, it should be emphasised that the Constitutional Court referred to the public good not only as of the environment itself, but as an environment of a certain quality ('healthy'), and added that it is a public value protected by the constitutional order in Czechia, which is reflected in particular in the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter"), as the essential human rights catalogue of the Czech constitutional order.

The Charter also states in its preamble that the citizens of Czechia are aware of their share of *"responsibility towards future generations for the fate of all life on Earth"* and enshrines both the substantive subjective right to a favourable environment (in Article 35(1)) and the procedural right to timely and complete information about the State of the environment and natural resources (in Article 35(2)), as well as the individual's duty to protect the environment (in Article 35(3)). A detailed discussion of these three individual environmental protection components will be made in chapters 2, 3 and 4 of this article.

However, other provisions of the constitutional order are also related to the right to a favourable environment. On the one hand, an unfavourable environment can have an immediate negative effect on a person's health, thereby interfering with the right to health under Article 31 of the Charter or even leading to a restriction of the right to life under Article 6 of the Charter.

In practice, however, the most frequent conflict arises between the right to a favourable environment and the property right, not least because Article 11(3) of the Charter provides that the exercise of the property right *"shall not harm human health, nature or the environment beyond the extent prescribed by law."* Thus, it is possible to identify three specific purposes that the constitution maker pursued in enshrining this legislation. Firstly, regulating the conflict between environmental protection and other rights is thus specified in limits or the degree of permissible damage to the environment. Secondly, the obligation to set the level of allowable environmental damage is thus enshrined, even in those parts of the environment where the rights and freedoms of individuals are not restricted. Finally, the third consequence is the explicit enshrinement of the principle of the participation of all in the protection of the environment (the principle of shared responsibility), which implies that, although the protection of the environment is a constitutionally enshrined task of the State, individuals must inevitably participate in its implementation and are also subject to certain obligations or restrictions.[8]

Another related provision is Article 14 of the Charter, which regulates freedom of movement and residence, closely linked to the right to a favourable environment. This is manifested, for example, by the right to free passage through the countryside, which is specified in sub-legislation, and this movement cannot be limited to recreation, as is evident, for example, from the regulation of the general use of forests without

[7] Judgment of the Constitutional Court of 9 October 1996, No. Pl. ÚS 15/96 (N 99/6 SbNU 213; 280/1996 Coll.)
[8] Drobník 2010, 51.

reference to their categorisation. Article 14(3) of the Charter provides for the possibility of restricting freedom of movement on the grounds of nature protection.

Article 17 of the Charter enshrines the right to information in a general form and thus constitutes a general provision to Article 35(2) of the Charter, which regulates the right to timely and complete information on the State of the environment and natural resources (see Chapter 3 of this Article for details). It is crucial for the relationship between Article 17 and Article 35(2) of the Charter that the two provisions pursue different purposes - in the case of Article 17 of the Charter, the basis for the control of public authority, the exercise of political rights and the power of the management of public funds. In contrast, in the case of Article 35(2) of the Charter, the main objective is protecting the environment and the right to information on the State of the environment.

Article 20(1) of the Charter, which guarantees the right to freedom of association, is also significant to the right to a favourable environment, as environmental associations play an essential role in protecting the environment.

An essential part of the right to a favourable environment is its procedural component based on Article 36(2) of the Charter. According to the Charter, judicial review of decisions relating to fundamental rights and freedoms under the Charter, including all the components of the right to a favourable environment enshrined in the Charter, must be provided for and cannot be excluded. In addition to access to judicial protection itself, the effectiveness of judicial review is also crucial, particularly the length of the judicial procedure and the use of the institution of the suspensive effect of administrative action to avoid already irreversible damage to the environment. It is therefore settled case-law that *"the applicants from among the public concerned must be granted their applications for the grant of suspensive effect to administrative action in such a way that situations cannot arise where, at the time the administrative action is decided, the authorised project has already been irreversibly implemented."*[9]

Article 41(1) of the Charter is very relevant to the definition of the intensity of environmental protection, according to which, among other things, the rights enshrined in Article 35 of the Charter (see Chapters 2, 3 and 4 of this Article) may be invoked only within the limits of the laws implementing them. The right to a favourable environment thus belongs in the Czech constitutional order to the category of so-called social rights, the limitations of which are examined by the test of rationality, not proportionality, as is the case with other rights enshrined in the Charter. The rationality test and the formulation of its steps have been repeatedly formulated by the Constitutional Court in a somewhat different manner, taking into account the aspects used[10], but their essence is identical. The rationality test consists of the following four steps: 1. defining the essential content of the right; 2. assessing whether the claimed

[9] Judgment of the Constitutional Court of 6 May 2015, No. II. ÚS 3831/14 (U 7/77 SbNU 943), judgment of the Constitutional Court of 15 May 2018, No. III. ÚS 3114/17, judgment of the Supreme Administrative Court of 14 June 2007, No. 1 As 39/2006-55, or judgment of the Supreme Administrative Court of 29 August 2007, No. 1 As 13/2007-63 (No. 461/2008 Coll.).

[10] See e.g. Judgment of the Constitutional Court of 27 January 2015, No. Pl. ÚS 16/14 (N 15/76 SbNU 197; 99/2015 Coll.), paragraph 85 vs. judgment of the Constitutional Court of 24 April 2012, No. Pl. ÚS 54/10 (N 84/65 SbNU 121; 186/2012 Coll.), paragraph 48.

claim affects the core of the right (its actual content); 3. assessing whether the interests opposing the claimed claim are legitimate (acceptable from a constitutional point of view); and 4. consider whether the legislation relating to the claim is reasonable (rational), though not necessarily the best, most appropriate, most influential or wisest, in light of the legitimate competing interests. This test of rationality is then used to assess, in individual cases, whether there has been an interference with the rights protected by Article 35 of the Charter.

3. The right to a favourable environment

Article 35(1) of the Charter provides that *"Everyone has the right to a favourable environment."* The Constitutional Court observes[11] that *"The core of the right to a favourable environment under Article 35(1) is, in particular, the possibility for everyone to claim, in the manner prescribed by law, the protection of the natural environmental conditions of his or her existence and sustainable development, which corresponds to the positive obligation of the State to safeguard the inherited natural wealth, to ensure the prudent use of natural resources and to protect natural wealth (preamble and Article 7 of the Constitution). The positive obligation of the State thus consists, inter alia, in protecting against interference with the environment to such an extent as to prevent the realisation of the basic needs of human life."* However, according to some authors[12], such a definition is entirely inadequate, as it omits the substantive component of the right and states as its core the possibility for everyone to claim this right in the manner prescribed by law, without specifying what constitutional requirements for the procedural aspect of the right belong to the critical content. However, the Constitutional Court was a little more specific in its last key ruling on environmental protection, stating that *"The obligation of the State to protect against interference with the environment can be considered as the essence of this right if the interference reaches such a level that it makes it impossible to realise the basic needs of human life."*[13]

3.1. Substantive content

The right to a favourable environment is anthropocentric in the Czech conception,[14] corresponding to the obligation to ensure healthy living conditions for man and the favourable development of the environment where man is located or whose protection he has a sufficient interest. Thus, the content of the right to a favourable environment is not protecting the environment without more; there must therefore be a particular link between the interest at stake and the specific persons concerned.

[11] Judgment of the Constitutional Court of 17 July 2019, No. Pl. ÚS 44/18 (N 134/95 SbNU 124; 225/2019 Coll.).
[12] Tomoszek & Tomoszková 2016, 156.
[13] Judgment of the Constitutional Court of 26 January 2021. No. Pl. ÚS 22/17 (124/2021 Coll.).
[14] For the ecocentric concept, cf. e.g. Vomáčka 2015, 26–31.

The Constitutional Court refers to the right to a favourable environment as a right with a relative content, which must be *"interpreted from many aspects and always in the light of the specific case"*[15] while finding that the choice of individual instruments for the protection of the right to a favourable environment and their mutual balance are primarily a task of political decision-making, which is not for the courts to assess.[16] Still, the setting of specific instruments and their enforcement are subject to judicial review.

In concreto, the implementation of the right to a favourable environment has so far been identified by the courts as the implementation of public environmental standards in the field of air[17] and noise protection,[18] where quantitative standards of pollution levels are set. The Constitutional Court also includes special territorial protection of nature among the components of the right to a favourable environment.[19] Public law standards thus indicate (not set binding) environmental friendliness. Through them, it is possible to define even a condition that is not favourable. For example, the Supreme Administrative Court[20] has identified a non-favourable condition as one in which, due to the high accumulation of a large number of sources (industrial, local and transport), both short-term and annual immission and target limits for the number of pollutants are consistently exceeded.[21] What matters in terms of potential interference with the right to a favourable environment is *"not how the individual technical standards are conceived and formulated, but the overall impact of the regulation."*[22]

The right to a favourable environment applies even where the exact level of protection is not specified by law, for example, in the context of housing amenity.[23] In particular, the courts have held that the administrative authorities are obliged to reflect all the influences that may affect the home's well-being in an interrelated manner.[24] It follows from the case-law of the Supreme Administrative Court that the requirements for the well-being of housing cannot be absolutised since every building causes a specific burden on its surroundings, and it is fair to require the owners of surrounding buildings to bear such a burden if it is proportionate to the

[15] Judgment of the Constitutional Court of 25 October 1995, No. Pl. 17/95 (N 67/4 SbNU 157; 271/1995 Coll.).
[16] Judgment of the Constitutional Court of 18 December 2018, No. Pl. ÚS 4/18 (N 201/91 SbNU 535; 30/2019 Coll.).
[17] E.g. Judgment of the Supreme Administrative Court of 23 March 2017, No. 10 As 299/2016-29.
[18] E.g. Judgment of the Regional Court in Prague of 6 December 2018, No. 50 A 25/2017-125.
[19] Judgment of the Constitutional Court of 25 September 2018, No. Pl. 18/17 (N 156/90 SbNU 525; 261/2018 Coll.).
[20] Judgment of the Supreme Administrative Court of 14 November 2014, No. 6 As 1/2014-30, 3170/2015 Coll.
[21] For details, cf. e.g. Jančářová 2015, 15–19., 155–169.
[22] Judgment of the Constitutional Court of 18 December 2018, No. Pl. ÚS 4/18 (N 201/91 SbNU 535; 30/2019 Coll.).
[23] Ibid.
[24] Judgment of the Supreme Administrative Court of 4 March 2009, No. 6 As 38/2008-123.

circumstances.[25] It is then within the power of the law only to prevent an extreme imbalance in the rights of neighbouring landowners.[26] Therefore, the existence of specific standards is a guide to assessing the interference with the legal sphere of individuals and the allocation of the burden of proof.

3.2. Holders of the right to a favourable environment

Under Article 35(1) of the Charter, everyone has the right to a favourable environment. The Charter, therefore, does not exclude anyone *a priori* from the enjoyment and protection of this right. The Charter and the laws governing the exercise of fundamental rights by legal persons are based on the assumption, not explicitly stated in the Constitution, that fundamental rights also belong to legal persons to the extent that their nature permits[27]. Therefore, the holder of the right to a favourable environment should be every natural and legal person existing in the environment and affected by environmental interventions.

However, for a long time, the Constitutional Court assumed that only procedural rights belonged to legal persons, later admitting that they could protect their members' right to a favourable environment[28].

First, the Constitutional Court held[29] that *"rights relating to the environment belong only to natural persons since they are biological organisms which – unlike legal persons – are subject to possible negative environmental influences."* Second, the Constitutional Court held that only procedural rights "*related to the right to the environment"* belong to legal persons, particularly civil associations whose primary mission, according to their statutes, is the protection of nature and the countryside.[30] Third, however, the Constitutional Court considered such constitutional complaints filed by legal persons to be filed *"in favour of a third party, possibly in the interest of protecting public interests."* At the same time, the so-called *actio popularis* is not admissible.[31]

However, the approach of the Constitutional Court has not always been shared by the general courts. Thus, for example, the Supreme Administrative Court has held[32] that the bearers of this constitutional right are also *"those legal persons, typically civil associations, for whom the protection of environmental interests is the main or essential part of their activities and which can thus be seen not only as a group of natural persons for whom such a legal person represents a kind of medium through which these natural persons defend their right to a*

[25] E.g. Judgment of the Supreme Administrative Court of 2 February 2006, No. 2 As 44/2005, No. 850/2006 Coll.
[26] Judgment of the Constitutional Court of 28 June 2017, No. I. ÚS 3610/16.
[27] See also judgment of the Constitutional Court of 19 January 1994, No. Pl. ÚS 15/93 (N 3/1 SbNU 23; 34/1994 Coll.).
[28] Judgment of the Constitutional Court of 30 May 2014, No. I. ÚS 59/14 (N 111/73 SbNU 757).
[29] Judgment of the Constitutional Court of 6 January 1998, No. I. ÚS 282/97 (U 2/10 SbNU 339).
[30] Judgment of the Constitutional Court of 10 July 1997, No. III. ÚS 70/97 (N 96/8 SbNU 375).
[31] Judgment of the Constitutional Court of 11 May 1999, No. I. ÚS 74/99 (U 34/14 SbNU 329).
[32] Judgment of the Supreme Administrative Court of 29 March 2007, No. 2 As 12/2006-111.

favourable environment but also as an advocate of this right in favour of other people." The Constitutional Court, however, rejected these conclusions, finding that *"The proceedings for the authorisation of the operation of Unit 2 of the Temelín Nuclear Power Plant did not and could not have involved any of the complainant's substantive fundamental rights, such as the right to life under Article 6, the right to the right to the protection of his privacy under Article 7 of the Constitution, the right to protection of private and family life under Article 10, and the right to a favourable environment under Article 35(1) in conjunction with Article 41(1), on the ground that these fundamental rights, 'asserted' by the complainant, belong only to natural persons."*[33]

In 2014, however, the Constitutional Court reconsidered its conclusions when it concluded[34] that environmental associations could be actively legitimated to file an action for the annulment of a measure of a general nature, *in concreto* a zoning plan, because it would be *"already absurd at first sight if a person meeting the defined conditions, for example, the owner of land directly adjacent to the regulated area, would not have the standing to bring an action for the annulment of the zoning plan simply because they and other persons (residents of the same municipality or neighbouring municipalities) have joined together and are seeking the annulment of the zoning plan or part of it on behalf of the association."* However, the environmental association must first claim interference with its subjective rights and demonstrate a local relationship to the area regulated by the zoning plan or a focus on an activity with local justification. The administrative courts later concluded that the fulfilment of these conditions must also be assessed in proceedings against a decision of the administrative authority[35] and proceedings against unlawful interference[36].

According to the conclusions of the Constitutional Court, an interference with the rights of associations other than environmental associations is also conceivable. However, these associations must be at least marginally focused on environmental protection[37], or the alleged interference must have consequences for the achievement of the objectives pursued by the association in question, and *"in addition to associations for the protection of nature and the countryside, one can imagine, for example, gardening associations, associations organising recreational use of a particular locality, etc."*[38]

Municipalities are also actively legitimated to protect the right to a favourable environment. The Supreme Administrative Court[39] has held that a city (in this particular case Ostrava) is a public person, which, according to the Constitution, is already a territorial community of citizens and is directed by its nature called upon to represent and protect the rights and interests of its citizens, who *"through their council and the general binding ordinance adopted by it, implement and enforce their idea of the form and quality of the living space that immediately surrounds them and has a direct impact on their physical and mental health and*

[33] Judgment of the Constitutional Court of 10 July 2008, No. III. ÚS 3118/07.
[34] Judgment of the Constitutional Court of 30 May 2014, No. I. ÚS 59/14 (N 111/73 SbNU 757).
[35] Judgment of the Supreme Administrative Court of 25 June 2015, No. 1 As 13/2015-295 and judgment of the Supreme Administrative Court of 15 July 2015, No. 2 As 30/2015-38.
[36] Judgment of the Regional Court in Prague of 9 March 2017, No. 45 A 31/2016-19.
[37] Judgment of the Supreme Administrative Court of 8 February 2018, No. 10 As 145/2017-62.
[38] Judgment of the Supreme Administrative Court of 26 April 2017, No. 3 As 126/2016-38.
[39] Judgment of the Supreme Administrative Court of 26 June 2013, No. 6 Aps 1/2013-51.

the well-being of their living environment." The courts[40] have also concluded that a municipality's authority is not limited to its territory; it may also be affected by plans implemented in the territory of a neighbouring municipality. Thus, cities protect the rights and interests of their citizens, particularly in the exercise of the right to self-government, which, according to the Constitutional Court[41], is also a manifestation of environmental protection.[42]

It follows from the above that the conditions for access to the right to a favourable environment (and access to judicial protection) for affected individuals, environmental associations and municipalities are now gradually being unified, where it is the "affectedness" - not the type of subject - that will be the decisive criterion as to whether or not the right to a favourable environment has interfered within each case and whether the subject can claim this right. According to the Supreme Administrative Court, "*in environmental matters, the standing of the public concerned is based on the unlawful interference with the subjective public right to a favourable environment under Article 35(1) of the Charter. [...] Municipalities or individuals whose legal sphere is adversely affected by the contested act of an administrative authority, as so-called persons of the public concerned, should not have a different (inferior) position than associations concerned with the protection of the environment, which are also granted standing under national law."*[43]

3.2.1. Conditions for the rights of natural persons

Even in the case of the right to a favourable environment for natural persons, the case law has evolved considerably. At first, it expected individuals to prove an intense interference with property rights (ignoring, for example, the rights of tenants[44]), while, in addition, the courts required a relatively close relationship between the natural person and the potential environmental damage already when assessing the conditions for active standing to bring an action. However, the above-mentioned recent case law shows a specific shift in judicial practice, as now at least conceivable, even indirect, interference with the plaintiff's rights is sufficient to satisfy the conditions for active standing.[45] In addition, account must be taken of the case law, which recognises that the individuals concerned may also defend the public interest through their rights.[46] Therefore, the courts have referred to the public or general interest not only in the environment itself but also in its protection.

Furthermore, it is understood that environmental protection proceedings are not intended to resolve individual disputes between the investor and the owners of the affected or intervening properties.[47] Still, environmental protection cannot simply be

[40] See also Judgment of the Constitutional Court of 11 December 2007, No. Pl. ÚS 45/06 (N 218/47 SbNU 871; 20/2008 Coll.).
[41] Judgment of the Constitutional Court of 25 September 2018, No. Pl. 18/17 (N 156/90 SbNU 525; 261/2018 Coll.).
[42] Cf. Damohorský & Snopková et. al. 2015. Or Švarcová 2019.
[43] Judgment of the Supreme Administrative Court of 29 May 2019, No. 2 As 187/2017-264.
[44] Cf. Židek 2015, 394–406.
[45] Judgment of the Supreme Administrative Court of 29 May 2019, No. 2 As 187/2017-264.
[46] Judgment of the Supreme Administrative Court of 17 October 2018, No. 8 As 21/2018-66.
[47] Judgment of the Supreme Administrative Court of 27 June 2012, No. 3 As 1/2012-21.

described as the subject of a personal disagreement. In other words, even in the case of the individuals concerned, the interference with (the very) right to a favourable environment should be regarded as an interference with their legal sphere.

In summary, therefore, it can be stated[48] that sufficient interest may be determined, for example, by the fact that the person concerned lives in the area in question, has been recreating there for a long time, or is linked to it by some other firm and objectively recognisable relationship. It will also be given whenever the interference under consideration will lead to a noticeable deterioration in the quality of life, which applies to assessing the interference under the public law regime and any private law claims. The impairment of the quality of life may thus also consist of an interference with privacy, family life or other personality rights which are linked to the right to a favourable environment, or which are difficult to distinguish from each other in practice if the interference with different personality rights consists of interference with the environment. However, it is not a condition of the interference with the right to a favourable environment that affects health, which is also true of other personality rights.

3.2.2. Conditions for the rights of environmental associations to be affected

In the case of legal persons (in particular environmental associations), the assessment of the right to a favourable environment was established by the Constitutional Court in 2014,[49] according to which natural persons, through associations, promote their interests and cannot *be "denied the right to participate jointly in decisions concerning their environment simply because, because they have set up a legal person to which they have delegated their rights of direct participation in the protection of nature and the countryside"*, while the Supreme Administrative Court[50] further specified the conditions of concern (in particular) to environmental associations by stating the following criteria: (a) prejudice to the subjective rights of the association; (b) the local relationship of the association to the site affected by the general nature measure (c) or the focus of the association on an activity that has local relevance.

The courts infer the fulfilment of the individual conditions mainly from the statements of the association itself or the statutes[51]. The Supreme Administrative Court then establishes a rebuttable presumption that the association focuses on the entire area defined in its statutes, which does not necessarily correspond to its name[52]. The courts also infer the association's commitment and relationship to the locality from facts known to them on an official basis, i.e. that the association in question is involved in judicial and administrative proceedings in environmental protection matters[53]

[48] Vomáčka, Tomoszková & Tomoszek 2020, 974–1031.
[49] Judgment of the Constitutional Court of 30 May 2014, No. I. ÚS 59/14 (N 111/73 SbNU 757).
[50] Judgment of the Supreme Administrative Court of 26 June 2014, No. 5 Aos 3/2012-70.
[51] Judgment of the Regional Court in Ostrava of 16 August 2017, No. 79 A 1/2016-82 or judgment of the Regional Court in Brno of 29 January 2018, No. 64 A 4/2017-205.
[52] Judgment of the Supreme Administrative Court of 28 March 2018, No. 2 As 149/2017-164.
[53] Judgment of the Supreme Administrative Court of 24 May 2016, No. 4 As 217/2015-197.

or submitted comments in previous proceedings.[54] The association was established to support a political group does not preclude it from being concerned.[55]

The relationship to the locality may also be due to the members' activities, for example, by participating in administrative or judicial proceedings.[56] The association doesn't need to be consistently involved in environmental protection. In some cases, the situation is relatively clear to assess: for example, when an association based in a neighbouring street opposes a decision on the location of a school[57], an association focusing on nature and environmental protection in the same municipality and its surroundings[58], or an association of residents opposes a land-use plan[59]. For example, associations of citizens in other municipalities may also be affected by the regulation of road traffic in one urban area since large cities are interconnected settlements.[60]

A broader authorisation may also be justified by the importance of the disputed project or the importance of the interests concerned. Thus, for example, an association with a national scope of activity[61] may be affected in its substantive sphere by a decision concerning a project if its operation *"undoubtedly extends beyond the boundaries of the region concerned."*[62] On the other hand, projects with a more negligible but still supra-local impact may affect associations based in the same region (e.g., bypassing the district town of Břeclav[63]). Similarly, an association based outside the area concerned may defend interests in protecting a nationally or even transnationally unique site (e.g. the Slavíkovy Islands[64]; the Šumava National Park and NATURA 2000 Area[65]; the Jeseníky Protected Landscape Area and the Praděd National Nature Reserve[66]).

The "interference with the right of the members of the association to a favourable environment (without deriving it from an existing property right in the regulated area) is sufficient to confer prejudice if the alleged interference has consequences for achieving the objectives pursued by the association."[67]

Therefore, the environmental association's involvement will always need to be assessed on a case-by-case basis, and logically in some cases, this will be a complex assessment.[68] However, an overemphasis on the prejudice of the association members may also conflict with the conception of the role of environmental associations that emerges from the Aarhus Convention and European Union law. However, it should be

[54] Judgment of the Supreme Administrative Court of 28 February 2017, No. 4 As 220/2016-198.
[55] Judgment of the Municipal Court in Prague of 7 February 2018, No. 10 A 173/2016-119.
[56] Judgment of the Regional Court in Brno of 9 October 2018, No. 63 A 2/2018-105.
[57] Judgment of the Regional Court in Prague of 24 January 2018, No. 45 A 25/2016-66.
[58] Judgment of the Supreme Administrative Court of 31 October 2017, No. 8 As 178/2016-69.
[59] Judgment of the Regional Court in Ústí nad Labem of 9 January 2017, No. 40 A 5/2016-96.
[60] Judgment of the Supreme Administrative Court of 23 May 2018, No. 10 As 336/2017-46.
[61] Judgment of the Supreme Administrative Court of 6 January 2016, No. 3 As 13/2015-200.
[62] Judgment of the Regional Court in Ostrava - Olomouc Branch of 28 February 2018, No. 65 A 95/2017-96.
[63] Judgment of the Supreme Administrative Court of 28 March 2018, No. 2 As 149/2017-164.
[64] Judgment of the Supreme Administrative Court of 30 September 2015, No. 6 As 73/2015-40 (No. 3343/2016 Coll.)
[65] Judgment of the Supreme Administrative Court of 27 July 2017, No. 1 As 15/2016-85.
[66] Judgment of the Supreme Administrative Court of 26 April 2017, No. 3 As 126/2016-38.
[67] Ibid.
[68] In more details cf. also Vomáčka & Židek 2017, 36–54.

noted in conclusion that, in addition to the 'European concept', which is more supportive of the professionalisation of environmental associations, the Czech courts also take into account the interests of small associations established *on an ad hoc basis* and the conditions of prejudice will be assessed based on the case law mentioned above.

4. The right to timely and complete information on the State of the environment and natural resources

Article 35(2) of the Charter provides that *"Everyone has the right to timely and complete information on the State of the environment and natural resources." The* Constitutional Court points out that *"this right, as well as the right to a favourable environment (Article 35(1)), may, however, because of the wording of the provisions of Article 41(1), be invoked only within the limits of the laws implementing the provisions of Article 35."*[69] This law is the Act No. 123/1998 Coll. on the right to information on the environment, as amended, and in addition to it, several unique component and other laws, mainly in the field of regulation of the management of specific sources of endangerment. The implementation of Article 35(2) of the Charter is based on the fact that the provision of information on the environment is not so much to control the management of public funds and to satisfy the interest of individuals in the running of public affairs, but rather to portray the State of the environment which may directly and substantially affect those individuals. *"Only based on detailed information about the environment is the public able to know its condition, to be aware of its changes over time, to take responsibility for its quality and to make informed decisions to protect it. By its very nature, full weather information, or the resulting environmental information, must be available on request free of charge, if only because access to its content cannot be dependent on an individual's financial income and social status."*[70] Although the right to environmental information is often classified as a typical procedural right, it *"constitutes a kind of guarantee for environmental protection",* which also has a substantive quality.

According to the Constitutional Court[71], the constitutionally guaranteed right to information on the State of the environment and natural resources is exclusively held by natural persons. This is because they are the only ones who can be affected by changes in the environment. The Constitutional Court later[72] confirmed this conclusion, stating that *"at the level of simple law, the right of a legal person to request information on the environment is not limited or even excluded."* However, according to some authors, it seems most appropriate for the Constitutional Court to change its legal opinion. As the current development of the Constitutional Court's case law indicates*, "this negative attitude is gradually being reconsidered."*[73]

[69] Judgment of the Constitutional Court of 19 January 1996, No. Pl. ÚS 26/95.
[70] Judgment of the Municipal Court in Prague of 27 June 2018, No. 5 A 128/2015-49.
[71] Judgment of the Constitutional Court of 6 January 1998, No. I. ÚS 282/97 (U 2/10 SbNU 339).
[72] Judgment of the Constitutional Court of 27 September 2005, No. II. ÚS 42/05.
[73] Vícha 2018, 91.

It should also be stressed that the regime for providing environmental information in Czechia does not allow for financial remuneration for particularly extensive searches, which means that a significant part of the information is provided free of charge. Regarding the grounds for refusing to provide information, there is a particular public interest in providing information on emissions emitted or emitted into the environment, which overcomes the interest in protecting personal or individual data, the protection of personality and commercial secrecy. In summary, it should be stated that obtaining information on the State of the environment in Czechia does not pose any significant problems in practice, and the legal regulation can be assessed as more than sufficient.

5. Restrictions on the exercise of other rights in favour of environmental protection

Article 35(3) of the Charter provides that *"In the exercise of his or her rights, no one may endanger or damage the environment, natural resources, the species richness of nature or cultural monuments beyond the extent prescribed by law."* The purpose and intent of this provision are not to prohibit across the board all potentially hazardous activities to the environment but rather to legitimise legal measures that restrict or impose conditions on the exercise of various rights on the grounds of environmental protection. Without such restrictions, it would be left entirely to the discretion of the individual to determine how far he or she would take the environment into account in exercising his or her rights. However, according to the Constitutional Court[74], such a situation leaves *"no space for possible simultaneous consideration of other constitutionally protected values, including a favourable environment."*

Specific restrictions can be identified in many Acts. They may take the form of an express prohibition or an obligation, the fulfilment of which results in a restriction of one of the rights of the obliged person. The consequence of a breach of the prohibition or failure to comply with the obligation is usually creating a liability relationship and the possibility of being sanctioned for the infringement. However, it should be noted that the legislation does not always associate the possibility of a sanction with a breach of a specified obligation in the field of environmental protection. The restrictive measure may take the form of a duty to act or an obligation to refrain from a particular action. It may arise directly from the law, but it may also stem from various protective or corrective measures adopted by public authorities, from partial conditions for the enforcement of decisions, and from control and sanction measures to fulfil the right to a favourable environment.[75] However, the restrictions must always be proportionate, respecting a fair balance between the imperatives of the general interest and the protection of the individual's fundamental rights.

[74] Judgment of the Constitutional Court of 25 April 2017, No. III. ÚS 3997/16.
[75] Judgment of the Constitutional Court of 22 September 2003, No. IV. ÚS 707/02.

In assessing the proportionality of a measure, it always depends on the circumstances of the particular case, its subject matter and the area of social life affected by the measure adopted by the public authority and concerning the subject's rights.[76]

In concreto, for example, the owner of a cultural monument is obliged to take care of its preservation at his own expense, maintain it in good condition, and protect it from threat, damage, deterioration, or theft. According to the Constitutional Court,[77] this general obligation is a manifestation of Article 35(3) of the Charter, balanced by the various compensations provided by the State to owners of monuments for their preservation and restoration. The Constitutional Court was also successful in regulating the possibility of taking individual measures to protect the environment[78] or inspecting solid fuel boilers in households. The Constitutional Court[79] also concluded that the right to a favourable environment justified the possibility of interfering with the inviolability of the home. For example, the Constitutional Court has also supported restrictions on logging in protected areas, which *"pursues a legitimate objective, namely the protection of forests in national nature reserves as specially protected areas, which, because of their biological uniqueness and diversity, are worthy of strict protection by the state power."*[80] Similarly, it found constitutionally consistent the restriction of the right of ownership in favour of the protection of game in the exercise of hunting because *"the State has a direct obligation to ensure the legal prerequisites for the possibility of protecting game as a natural wealth"*[81] or the restriction of the owner as a result of the declaration of a thing as a cultural monument, since *"the protection of cultural monuments is associated in all cultural states with a certain restriction on the free disposition of one's property."*[82] From the point of view of balancing constitutionally guaranteed rights and protected interests, the general conditions for felling trees, which *"reflect the need for proportionate protection of both the right to life and health of the people and the right to a favourable environment; one is not a priori mutually exclusive with the other in the present case"*[83], or the obligation of owners of waterworks to allow access to their land to other persons for a specified purpose, since the operation and maintenance of waterworks is "*an integral component of environmental protection."*[84]

[76] Judgment of the Constitutional Court of 26 April 2012, No. IV. ÚS 2005/09 (N 91/65 SbNU 221).
[77] Judgment of the Constitutional Court of 9 October 2018, No. III. ÚS 3147/18.
[78] Judgment of the Constitutional Court of 8 July 2010, No. Pl. ÚS 8/08 (N 137/58 SbNU 115; 256/2010 Coll.).
[79] Judgment of the Constitutional Court of 18 July 2017, No. Pl. ÚS 2/17 (N 125/86 SbNU 131; 313/2017 Coll.).
[80] Judgment of the Constitutional Court of 26 April 2012, No. IV. ÚS 2005/09 (N 91/65 SbNU 221).
[81] Judgment of the Constitutional Court of 13 December 2006, No. Pl. ÚS 34/03 (N 226/43 SbNU 541; 49/2007 Coll.) or judgment of the Constitutional Court of 6 March 2007, No. Pl. ÚS 3/06 (N 41/44 SbNU 517; 149/2007 Coll.).
[82] Judgment of the Constitutional Court of 23 June 1994, No. I. ÚS 35/94 (N 36/1 SbNU 259) or judgment of the Constitutional Court of 4 October 2016, No. III. ÚS 3244/15.
[83] Judgment of the Constitutional Court of 25 April 2017, No. III. ÚS 3997/16.
[84] Judgment of the Constitutional Court of 21 November 2007, No. IV. ÚS 652/06 (N 202/47 SbNU 613).

The reasonableness of legal obligations and various legislative or individual restrictions must then be assessed on a case-by-case basis.

6. Conclusion

This article aimed to define the legal means of environmental protection at the constitutional level based on an analysis of the constitutional order of Czechia and court case law. To this end, the constitutional background and context of environmental protection were first defined. Then the individual institutes of environmental protection in the Czech constitutional order were analysed in turn, namely the right to a favourable environment, the right to timely and complete information on the State of the environment and natural resources and the limitation of the exercise of other rights in favour of environmental protection. I have already outlined my partial conclusions and legal opinions on the legislation and the courts' decision-making practice in the individual chapters, so I refer to them in detail. However, the unifying conclusion, in my opinion, is that with the ever-advancing climate change[85] and the resulting social changes, environmental protection and its legal anchoring in the constitutional order of not only Czechia but also other European countries will be an increasingly topical issue. It is up to the legislator, political representation and legal and judicial practice to deal with it in the future.

[85] Cf. e.g. Vomáčka & Jančářová 2021, 472–488.

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