Journal of Agricultural and Environmental Law

(Agrár- és Környezetjog)

CEDR Hungarian Association of Agricultural Law

Volume XVIII

2023 No. 34

Disclaimer

Published by:
CEDR – Hungarian Association of Agricultural Law

H-3515 Miskolc-Egyetemváros, A/6. 102., tel: +36 46 565 105

Publisher:
Prof. Dr. habil. Csák Csilla PhD,
president, csilla.csak@uni-miskolc.hu

Editor-in-chief:
Prof. Dr. habil. Szilágyi János Ede PhD,
Head of the Institute, Ferenc Mádl Institute of Comparative Law (Hungary), cedr.jael@gmail.com

Technical editor:
Szilágyi Szabolcs dr. jur. LL.M.

Journal manager:
Ritó Evelin dr. jur.

HU ISSN 1788-6171

DOI prefix: 10.21029/JAEL

The Journal may be downloaded from:

http://epa.oszk.hu/01000/01040

http://ojs3.mtak.hu/index.php/JAEL

The journal is indexed in:

http://www.mtmt.hu

http://www.proquest.com/

https://www.crossref.org/

https://road.issn.org/

https://home.heinonline.org/

The journal is archived in:

http://real.mtak.hu

The journal is supported by the University of Miskolc

Contents

Enikő KRAJNYÁK*

The Role and Activity of the Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations in Shaping Environmental Protection in Hungary**

Abstract

The study analyzes the position and the work of the Hungarian Ombudsman for Future Generations in light of the global development of the institutional protection of future generations. The Hungarian model has an outstanding role both at the domestic and international levels: not only does it influence environmental protection in the country but it could also serve as a role model for similar institutions to be established in other countries in the future. The paper gives an overview of the institutional protection of future generations in international law and introduces the historical development and the legislative framework for the establishment of the institution in Hungary, and lastly, briefly presents the different rights and duties of the Ombudsman with a particular focus on recent achievements and initiatives.

Keywords: interests of future generations, protection of the environment, common heritage of the nation, institutional guarantees, ombudsman for future generations

1. The Protection of Future Generations – Theoretical Foundations and Institutional Framework in a Global Context

1.1. The Concept of Future Generations in International Law

The recognition of the importance of protecting the natural environment for the future has been an inherent part of international environmental law since the first stages of its development. The first notable legal document in the field, the 1972 Stockholm Declaration on the Human Environment, declared man's responsibility to protect and improve the environment for present and future generations.[1] The report of the Brundtland Commission entitled `Our Common Future´ adopted in 1987 introduced the concept of sustainable development,[2] which shaped environmental legal thinking ever

Enikő Krajnyák: The Role and Activity of the Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations in Shaping Environmental Protection in Hungary. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 7-30, https://doi.org/10.21029/JAEL.2023.34.7

* dr. jur., PhD Student at the Ferenc Deák Doctoral School of Law, University of Miskolc, Faculty of Law; Scientific Researcher at the Central European Academy, e-mail: eniko.krajnyak@uni-miskolc.hu, ORCID: 0009-0003-2457-9491

** *The research and preparation of this study was supported by the Central European Academy.*

[1] United Nations Conference on the Human Environment, Principle 1.

[2] World Commission on Environment and Development, 27. According to the report, sustainable development is a development that *"meets the needs of the present without compromising the ability of future generations to meet their own needs".*

https://doi.org/10.21029/JAEL.2023.34.7

since: the 1992 Rio Conference on Environment and Development built upon the theoretical foundations of sustainable development laid down in the Brundtland Report;[3] and the 1997 Kyoto Protocol, as well as the subsequent 2015 Paris Agreement, put sustainable development in the context of climate change.[4]

The concept of sustainable development is founded on the principles of intergenerational and intragenerational equity. While the former principle refers to the sustainable dimension of sustainable development and implies that the environmental capital shall be transmitted to future generations in conditions equivalent to those in which it was received, the `developmental´ dimension encompasses intragenerational equity, which requires equity in the distribution of developmental outcomes within one generation at the national and international levels.[5] Naturally, the intergenerational and intragenerational sides of sustainable development are mutually determined: no one can dream about due care of the interests of future generations if the basic needs of vast layers of the present generation are not met. The concept of future generations is an integral component of the principle of intergenerational equity, which, according to Edith Brown Weiss, the pioneer and most prominent scholar of the rights of future generations, has three major elements: (a) the conservation of options and the diversity of choice; (b) the conservation of the quality of life comparable to that which has been enjoyed by previous generations; and (c) the conservation of comparable or non-discriminatory access to natural resources.[6]

Although attention has been given to the interests of future generations in several international documents,[7] the fact that future generations are not represented in current decision-making processes constitutes a fundamental problem for the proper implementation of such declarative provisions. The representation of people who do not yet exist[8] raises several questions for lawmakers.[9] First, assigning rights to unborn humans could be problematic because they cannot possess anything, including rights. Contrarily, considering that rights go hand-in-hand with duties, posing legal obligations to present generations while legal rights are absent may seem arguable, not to mention the difficulties in enforcing such obligations. Furthermore, the standing of future generations before courts may also challenge the existing legal framework, especially if one takes into account that the scope of who exactly belongs to future generations is still disputed: there have been (and are) continuous attempts before national courts to enforce their rights;[10]

[3] See, inter alia, Principle 3 of the Rio Declaration on Environment and Development: *"The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."*; art. 3.4 of the United Nations Framework Convention on Climate Change (UNFCCC): *"The Parties have a right to, and should, promote sustainable development […]"*.

[4] Kyoto Protocol to the UNFCCC, see e.g. art. 2, 10, 12.; Paris Agreement, Preamble, art. 2, 4, 6, 7, 8, 10.

[5] Szabó 2021, 77–78.

[6] Weiss 1992, 22–23. See also: Weiss 1989.

[7] See an almost exhaustive list as of 2012 in Ward, Pierce & Roderick 2012.

[8] See the Parfit paradox and its critical analysis in Roberts 2009.

[9] See: Fülöp 2021, 141–150.

[10] The most high-profile cases include the *Minors Oposa case* (the Philippines), *Juliana v. the US* (the United States of America), the *Urgenda case* (the Netherlands), the *Colombian Amazonas case* (Colombia), the *Neubauer case* (Germany), or the *Sharma case* (Australia). These cases appeared in

however, the link between the concrete cases and the interests of people not born yet may seem indirect for some courts. Based on the recently adjudicated cases, one may conclude that courts tend to accept the argumentation of people challenging inadequate measures addressing climate change when the group of plaintiffs includes children or young people, considering them as members of future generations.[11]

A possible solution for the representation of the interests of future generations could be through high-level specialized institutions that have the power to influence decisions at national and international levels. The importance of this issue was pointed out in the UN Secretary General's 2013 report, which proposed several ideas for the institutionalization of the representation of future generations at the international level. These included a High Commissioner for Future Generations, a Special Envoy of the UN Secretary-General for future generations, addressing intergenerational solidarity and the needs of future generations as a recurring agenda item in the high-level political forum, and interagency coordination concerning the needs of future generations.[12] Among these proposals, special attention shall be dedicated to the establishment of a High Commissioner for Future Generations, who, according to the report, could help in addressing the long-term consequences of present-day actions by drawing attention to future impacts in tangible, non-abstract terms, and supporting sustainability in planning government decisions.[13] However, these proposals have not yet been implemented.[14] Nevertheless, a high-level institution dedicated to the protection of future generations – as also pointed out in the report – could be based on the already functioning national institutions specialized in protecting their interests and needs. The report also examined certain national institutions, including the Hungarian Parliamentary Commissioner for Future Generations, as outstanding examples of the institutional protection of future generations, which could serve as a model for the establishment of a similar institution at the international level.

1.2. A Glance at Certain National Institutions for Future Generations

The aforementioned 2013 report of the UN Secretary-General pointed out eight offices that served or had served to protect the needs of future generations at the national level, which could also become models for similar institutions to be established in the

front of national courts and challenged the domestic regulation relating to intergenerational equity, claiming that climate laws unlawfully prioritize present generations over future generations, as the regulations do not take into account that children and/or future generations will be more exposed to the negative impacts of climate change in the future than older generations, and thus global warming interferes with their (human) rights.

[11] Children were considered as part of future generations in the *Neubauer case* or the *Colombian Amazonas case*, while the legal standing of future generations was avoided to be addressed, for instance, in *Juliana v. the United States*.

[12] UN Secretary General 2013, notes 62–67.

[13] Ibid, note 56.

[14] The representation of future generations continues to be a high priority of the United Nations: the 2021 report of the UN Secretary-General `Our Common Agenda´ builds on the proposal of the 2013 report, and further investigates the institutional framework for future generations. See: UN Secretary General 2021, 45.

future in other countries.[15] The following paragraphs are dedicated to a brief introduction to these institutions in order to contextualize the Hungarian model among the few institutions that advocate for future generations in different parts of the world.

The office of the *Parliamentary Commissioner for the Environment* in New Zealand[16] was one of the first institutions to embrace environmental protection. Taking into account that the office was established in 1986 – not long before the issue of sustainable development appeared on the agenda of the United Nations Conferences – the needs of future generations were originally not explicitly addressed by the Parliamentary Commissioner, but it is apparent from its documents that concerns for future generations and the environment are intertwined.[17] The primary role of the Commissioner is investigative, but he may also provide the Parliament with advice and briefings – for instance, he had a major role in the adoption of the Climate Change Response (Zero Carbon) Amendment Act of 2019[18] – and present his work to the public and respond to public concerns.

In 1993, Finland established the *Committee for the Future* as a parliamentary committee. The Committee, which is composed of seventeen Members of the Finnish Parliament – usually the most respected, senior members of the party sections – has a relatively limited role, given that it does not have the powers and rights of an ombudsman but it serves as a think tank for future, science and technology policy. This shows that the mandate of the Committee extends well beyond environmental sustainability and the protection of future generations. The Committee may issue a report on long-term future prospects and the Government's targets and adopt statements and draft submissions to other committees of the Parliament.[19]

The position of the Canadian *Commissioner of the Environment and Sustainable Development* was established in 1995.[20] The office is embedded within the Office of the Auditor General and mainly issues reports on assessing whether departments of the Federal Government are meeting their sustainable development objectives for air, biodiversity, climate change, environmental assessment, land, toxins, water, industry, and Sustainable Development Goals (SDGs).[21] Similar to the scope of the Parliamentary Commissioner in New Zealand, future generations are not specifically defined in the work of the Canadian Commissioner. However, its dedication to sustainable

[15] UN Secretary General 2013, notes 39–48.

[16] See: Parliamentary Commissioner for the Environment: Te Kaitiaki Taiao a Te Whare Päremata n.d.

[17] As an example, the Parliamentary Commissioner for the Environment deals with the issue of the protection of the needs of future generations in its report from 2002: *"But what are the needs of future generations? While specific future preferences and wants (as opposed to needs) may be hard to determine, it is reasonable to assume that basic goods such as food, clean water and energy will be future needs. Internationally, reasonably foreseeable needs have been recognised as including the right to life, property, culture and health. […]"*, see: Parliamentary Commissioner for the Environment 2002, 43.

[18] See: Parliamentary Commissioner for the Environment 2017, 29–34.

[19] Eduskunta Riksdagen n.d.

[20] See: Office of the Auditor General of Canada n.d.

[21] See, for instance, Commissioner of the Environment and Sustainable Development Reports from the years 2018, 2019, 2020, 2021, 2022.

development may indirectly embrace a certain level of concern towards the interests of future generations.

The Israeli Parliament, the Knesset, created the *Commission on Future Generations* with a *Knesset Commissioner for Future Generations* in 2001. The main task of the Commission was to assess bills with particular relevance for future generations, to investigate, including the ability to demand information from state agencies, and to issue recommendations on issues relevant for future generations. In practice, the Commissioner had strong power in the decision-making process: the fact that it claimed the right to issue an informed opinion even when the Knesset was bound by law to make a decision within a given timeframe effectively led to the Commission having informal veto power over law-making. Furthermore, one of the key powers of the Commission was to request a reasonable time from a parliamentary committee to collect data and prepare evaluation on certain bills or secondary legislation, which could even require committee chairs to delay their discussion to allow this. Needless to say, this arrangement endowed the Commissioner with a strong bargaining position, which he did not hesitate to maintain. The first Commissioner's term ended in 2006, and in 2007, the Parliament abolished the Commission. Apart from the high cost of its operation, the fear that the Commission had received too much authority to interfere with the work of the Knesset certainly contributed to the dissolution of the entity.[22]

In 2007, the Hungarian Parliament established the Office of the *Parliamentary Commissioner for Future Generations*.[23] A detailed analysis of the work of the Hungarian institution is given below. At this point, it should only be mentioned here that the office was terminated in 2011, and the institutional protection of future generations continued to operate within the institution of the Commissioner for Fundamental Rights as one of the two Deputies of the Commissioner. The position of the *Deputy Commissioner for Future Generations* or *Ombudsman for Future Generations (hereinafter `the OFG´ or `the Ombudsman´)* primarily and expressly represents the interests of future generations.[24]

Although the 2013 UN Secretary-General report mentioned and analyzed the *Welsh Commissioner for Sustainable Futures*, the institution was replaced in 2015 by the currently operating *Future Generations Commissioner for Wales*. Based on the Well-Being of Future Generations (Wales) Act adopted in 2015, the new Commissioner may provide advice or assistance on the issue, encourage best practices, undertake the necessary research, and publish regular reports and recommendations.[25]

The Norwegian *Ombudsman for Children*,[26] established in 1981 – well before the adoption of the 1989 Convention on the Rights of the Child (CRC) – was the world's first ombudsperson for children. Although the Norwegian Ombudsman for Children does not expressly advocate for future generations, as her main duty is to ensure the

[22] Shoham & Kurre 2021, 336–339.

[23] See: Jövő Nemzedékek Országgyűlési Biztosa (Parliamentary Commissioner for Future Generations) 2011.

[24] See: Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations n.d.

[25] Well-Being of Future Generations (Wales) Act 2015, Paragraphs 17–24.

[26] See: Barneombudet n.d.

proper implementation of the CRC, the recent constitutional development of Norway[27] created significant room for the Ombudsman to act in support of future generations.[28]

Finally, the *German Parliamentary Advisory Council on Sustainable Development,*[29] which was established in 2009 to serve as an advocate of long-term responsibility, can be considered. The Council is integrated within the parliamentary system, and its main task is to monitor compatibility with the National Sustainability Strategy. To this end, the Council may adopt recommendations and carry out an evaluation of the sustainability impact assessment. The latter encompasses four areas that are strongly related to the protection of future generations: (a) fairness between generations, (b) social cohesion, (c) quality of life, and (d) international responsibility.[30]

Based on the above, it would not be an exaggeration to state that the office of the Hungarian model has an outstanding role even among institutions of the future generations, as seen in the establishment of the Network of Institutions for Future Generations in 2014. Inspired by the 2013 report of the Secretary-General, the Network, which encompasses the model institutions mentioned in the report, was established upon the initiative of Marcel Szabó, the incumbent Hungarian OFG of the time. The aim of the platform was – and continues to be – to contribute to closer cooperation among the national institutions mentioned in the 2013 UN Secretary-General report for the purpose of exchanging good practices for the national implementation of sustainability and intergenerational justice. One may also observe that responsibility specifically for future generations is not given the same weight on the agenda of the eight institutions; very few, including the Hungarian one, are identified as advocates for future generations, instead of defenders of the environment, sustainable development, or children. Although all of these categories may also embrace care for future generations, in the author's view, the indirect link between the center of their concern and future generations may lead to the fragmentation of the scope of their activities.

2. Institutional Protection of Future Generations in Hungary

2.1. The Establishment and Dissolution of the Office of the Parliamentary Commissioner for Future Generations

The introduction of an advocate of the environment and future generations appeared in public discussion as early as 1990: a Hungarian civic organization, the Védegylet (`Save the Future´) presented a private draft for an Act on the Ombudsman for Future Generations, authored by László Sólyom, the first President of the Hungarian

[27] As a result of a series of amendments starting in 2014, the Norwegian Constitution was amended with two provisions of particular interest concerning the rights of children: the duty to create conditions that facilitate the child's development, including adequate economic, social, ad health conditions (art. 104) and the right to education (art. 109), which are strongly linked to sustainable development and thus future generations.
[28] Fauchald & Gording Stang 2021, 358–362.
[29] Parliamentary Advisory Council on Sustainable Development n.d.
[30] Reimer 2021, 391–394.

Constitutional Court (1990–1998) and later President of the Republic (2005–2010).[31] At the political level, however, it took almost ten years of debate that the position of the *Parliamentary Commissioner for Future Generations* was established in 2007[32] under the presidency of Sólyom. The so-called `green ombudsman´ operated as a separate ombudsman, along with three other independent ones.[33] The Parliamentary Commissioners were elected for a six-year term by the Parliament. Regarding the green ombudsman, the law described specific criteria, namely, to be an outstanding scholar or have at least ten years of practice in environmental and nature protection law, and significant experience in conducting and supervising procedures relating to environment and nature protection or in the enforcement of the right to a healthy environment.[34]

Although the Parliamentary Commissioner was labelled as the Commissioner for Future Generations, the constitutional and the legal framework in force at the time implies that the Ombudsman was responsible for the protection of the environment.[35] The Constitution – Act XXXI of 1989 – declared everyone's right to a healthy environment, and the protection of the built and natural environment as a state task for the realization of the right to the highest possible physical and mental health. However, it did not contain any reference to the interests or needs of future generations. Furthermore, the law establishing the position expressly stated that the Parliamentary Commissioner for Future Generations should ensure the fundamental right to a healthy environment.[36] The law further specified two values to be protected by the Commissioner: the quality of life of future generations in the frames of evaluating the long-term planning of local governments and the common heritage of humankind in connection with competencies relating to international obligations of the country.[37] As for the interpretation of the protected values at the time of the establishment of the position, it shall be taken into account that the right to a healthy environment had already been elaborated precisely in the practice of the Constitutional Court – especially by Decision no. 28/1994 (V.20.) – but the interests of future generations were discussed in detail by the Court only after the adoption of the Fundamental Law in 2011.

Besides the subject matter of this office, the distinctive attributes of the Commissioner also lie in his competencies; in addition to the general powers of an ombudsman – activities relating to the control over authorities concerning fundamental rights – the green ombudsman had the power to call upon a person or organization illegally endangering, polluting, or damaging the environment to cease such activities, and to call the competent authority to take measures to protect the environment.[38] Furthermore, in case such measures were not found satisfactory, he may ask the court to

[31] See: Jávor ed. 2000. For the discourse on the institution building of the ombudsman, see also: Sólyom 2001.
[32] Act CXLV of 2007 on the modification of Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights, art. 10.
[33] The other Parliamentary Commissioners were responsible for civil rights, data protection, and the rights of national minorities.
[34] Act CXLV of 2007, art. 10 (27/A (2)).
[35] Fodor 2008, 47–48.
[36] Act CXLV of 2007, art. 10 (27/A (1)).
[37] Act CXLV of 2007, art. 10 (27/B (3) f), g)).
[38] Act CXLV of 2007, art. 10 (27/B (3) a) b)).

prohibit the person or organization from damaging the environment, to oblige them to take the necessary measures to prevent damage, and to restore the environmental condition prior to the environmentally damaging behavior.[39]

This competence is particularly interesting in light of the current legal environment: Article XXI (2) of the Fundamental Law provides that *"Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration […]."* Given that the provision mentions `anyone´, it cannot undoubtedly be deduced that the term also encompasses legal persons, non-state actors, the State, or only natural persons, thus, the scope of liable subjects under this provision is questionable. The comparison of the competencies of the former green ombudsman and of the current Deputy Commissioner for Future Generations may help in the clarification of the problem. Contrary to the former constitutional framework, the current Deputy Commissioner does not have the competency to call legal persons to cease an environmentally harmful activity, and consequently, it is questionable whether the scope of liable subjects would encompass the State or legal persons under the current legislative framework.

Furthermore, the above constitutional provision also raises the question of whether it expresses the polluter pays principle, which would be a broader concept than liability, as it encompasses the entirety of the behavior of the polluter, and thus his responsibility does not only manifest at the time of the occurrence of the damage, but from the beginning of using the environment until the elimination of the dangers and damages.[40] However, as Gyula Bándi, the current Deputy Commissioner for Future Generations, suggests, it is rather interpreted as a `narrow understanding´ of the polluter pays principle,[41] also because the constitutional text itself does not provide *expressis verbis* the requirement of precaution and prevention, which are equally important components of the above-mentioned principle. The former green ombudsman also expressed his opinion during the process of drafting the Fundamental Law. In his proposal, Sándor Fülöp suggested the *expressis verbis* formulation of the principle of precaution, prevention, integration, as well as the polluter pays principle in the constitutional text,[42] but finally, they were not included in the Fundamental Law. In a resolution issued the same day as the adoption of the Fundamental Law, he highlighted that *one side* of the polluter pays principle was raised to the constitutional level under Article XXI (2).[43] Therefore, one may conclude that the competency to investigate and take action against natural and legal persons illegally damaging the environment was one of the strongest powers of the green ombudsman, which is not provided to the Deputy Commissioner under the current regulation.

The Hungarian constitutional framework essentially changed with the adoption of the Fundamental Law in 2011:[44] not only did the constitutional text introduce more

[39] Act CXLV of 2007, art. 27/C (3).
[40] Bándi 2020a, 20–21.
[41] Bándi 2020b, 16.
[42] Draft law no. T/2627 on the Fundamental Law of Hungary, pp. 1–2.
[43] Parliamentary Commissioner for Future Generations, JNO-258/2011, 3–4.
[44] For further information on the drafting and adoption of the Fundamental Law in light of the provisions relating to the environment, see: Raisz 2012.

provisions on the protection of the environment[45] and sustainability,[46] but it also contained unique provisions for future generations, which constituted a solid basis for the mandate of the Ombudsman. The Preamble declares the responsibility for our descendants, and therefore, the obligation of protecting the living conditions of future generations *"by making prudent use of our material, intellectual and natural resources."* Further, Article P (1) provides that *"natural resources […] shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."* Third, according to Art. 38 (1), the *"needs of future generations"* shall be taken into account in the management and protection of national assets.

The new ombudsman system was introduced by Article 30 of the Fundamental Law, which established the position of the Commissioner for Fundamental Rights and the two Deputies: the Deputy Commissioner for Future Generations and the Deputy Commissioner for the Rights of National Minorities. Act CXI of 2011 on the Commissioner for Fundamental Rights entered into force on January 1, 2012, the same day as the Fundamental Law, and dissolved the previously functioning ombudsman structure. The Commissioner for Fundamental Rights became the legal successor of the Parliamentary Commissioners for Civil Rights, Rights of National Minorities, and Future Generations.[47]

2.2. The Green Ombudsman and the new Fundamental Law

The introduction of the new ombudsman model was heavily debated among state actors. The incumbent green ombudsman at the time issued an opinion concerning the ombudsman structure during the process of drafting the Fundamental Law,[48] arguing that the dissolution of the separate ombudsman's office would result in the derogation of the previously achieved level of institutional protection. According to him, given that environmental protection requires a wide range of interdisciplinary expertise, including different fields of law and policies (traffic, spatial planning, rural development, energy policy, etc.), its complexity may not be properly analyzed in a system where the respective ombudsman is integrated into a hierarchical structure.[49] Due to his power to initiate Constitutional Court proceedings, the green ombudsman also initiated an ex-post norm control for the dissolution of the former ombudsman system. However, given the fact that its legal successor, the Commissioner for Fundamental Rights, did not intend to

[45] See, for instance, liability for the damage caused to the environment, and the prohibition of the transport of pollutant waste to the territory of Hungary (art. XXI (2)–(3)).

[46] Sustainable development expressly appears in art. Q; and sustainable budget management is regulated in art. 36 (4). The latter provision determines the maximum limit of government debt, which implicitly protects the interests of future generations by aiming to avoid indebtedness which would pose an intolerable burden on them by excessively prioritizing the needs of present generations. See: Explanatory Memorandum of Article 36 of the Fundamental Law.

[47] Act CXI of 2011 on the Commissioner for Fundamental Rights, art. 45 (1).

[48] See: Recommendation of the Parliamentary Commissioner for Future Generations for the elaboration of the new Constitution.

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

continue the procedure, the court rejected the motion.[50] Although the Explanatory Memorandum of Article 30 of the Fundamental Law does not clarify why such a comprehensive structural change was necessary, the literature points out that the establishment of newer ombudsmen would result in fragmentation and may lead to different interpretations, and consequently, huge conflicts among the ombudsmen.[51] The institutional development of the ombudsman's office brought greater independence for the deputies within the monocratic model, which is shown by the extension of competencies,[52] the changes in the internal structure (i.e., the establishment of the Secretariat of the Deputy Commissioners),[53] the growing number of employees, and their increased media representation in the last few years.[54]

The green ombudsman played a significant role in the formation of other constitutional provisions regarding environmental protection.[55] In his proposal, Sándor Fülöp pointed out that the right to a healthy environment was first declared at the constitutional level in 1989, and since then, the importance of environmental protection and the requirement of sustainable development became more prominent. Thus, according to him, the already achieved level of protection shall certainly be preserved, and the development of the interpretation of the right by the Constitutional Court shall be reflected in the new Constitution through the explicit declaration of the principles of non-derogation, precaution, prevention, and the polluter pays principle. Although the Fundamental Law does not mention any of these principles in this form, the right to a healthy environment was supported by two provisions: the responsibility for the damage caused to the environment and the prohibition of the transport of pollutant waste to the territory of the country. Although the Constitutional Court emphasized the objective, institutional side of the right to a healthy environment, it also entails certain subjective elements, which are, for instance, access to information and participation in the decision-making process in environmental matters, which were not guaranteed by the former constitutional text. However, these rights are still not included in the Fundamental Law.

The proposal also highlighted that in several European constitutions, the protection of the environment is perceived not only as a right but also an obligation, given that its protection is a common interest, and therefore, a common responsibility. This obligation is provided in Article P in relation to the common heritage of the nation, as *"it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."* Furthermore, the green ombudsman proposed the expressis verbis mention of the interests of future generations in connection with the right to a healthy environment and in the preamble as a general value for the Fundamental Law and the entirety of the legislation. This proposal was undoubtedly successful, as future generations appear directly and indirectly in the constitutional text several times. Thus, one may conclude that the green ombudsman contributed to the formulation of the

[50] Order no. 3002/2012. (VI.21.) [44], [47].
[51] Varga Zs 2012, 136–137.
[52] See Act CCXXIII of 2013 on the modification of Act CXI of 2011.
[53] Order no. 1/2012 (I.6.) of the Commissioner for Fundamental Rights.
[54] Csink 2016, 603–605.
[55] Fülöp 2012, 76.

Fundamental Law with valuable proposals that were – even if not entirely but surely to some extent – taken into account during the constitution-making process.

2.3. The Legal Framework for the Deputy Commissioner for Future Generations

As mentioned above, Article 30 of the Fundamental Law laid down the legal framework for the position of the Commissioner for Fundamental Rights and his Deputies. According to this article, the Commissioner for Fundamental Rights shall protect fundamental rights; investigate any violations related to fundamental rights that come to his or her knowledge, and initiate general or specific measures to remedy them. The Fundamental Law further provides that the Commissioner and his or her Deputies shall be elected for six years with a two-thirds majority of the National Assembly, and that *"the Deputies shall protect the interests of future generations and the rights of national minorities living in Hungary."*[56]

Act CXI of 2011 on the Commissioner for Fundamental Rights (hereinafter `the Commissioner´) regulates the mandate of the Commissioner and the two deputies in detail. The comprehensive analysis of the duties and competencies of the Commissioner for Fundamental Rights would exceed the limits of this study; therefore, only the rules relevant to the OFG will be presented in the following. The interests of future generations appear in two contexts in the general rules on the Commissioner. First, the Act sets out four areas for which the Commissioner has to pay particular attention: children's rights, values protected in Article P of the Fundamental Law (i.e., the interests of future generations), the rights of minorities living in Hungary, and the rights of the most vulnerable social groups;[57] and second, within the framework of his duty to give an opinion on plans and concepts otherwise directly affecting the quality of life of future generations *(inter alia)*.[58] This latter duty was known in the former ombudsman system as well; however, in the new regime, it was transferred to the Commissioner instead of the OFG.[59] Theoretically, this solution fits better within the concept of sustainable development, of which intragenerational justice constitutes an inherent part.

Under the new legislative framework, the main task of the Deputy Commissioner is to monitor the enforcement of the interests of future generations. As pointed out above, the regulation for the former green ombudsman puts the enforcement of the right to a healthy environment at the center of concern, with two further values to be protected. One of these, the quality of life of future generations, was expressly transferred to the Commissioner. The other value, the common heritage of humankind, was not explicitly defined in the constitutional law of the time. Article P of the new Fundamental Law introduced the notion of the `common heritage of the nation´, which encompasses *"natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artifacts",* which shall be protected, maintained, and preserved for future generations as a general obligation.[60] The term `common heritage of

[56] The Fundamental Law of Hungary, art. 30 (3).
[57] Act CXI of 2011, art. 1 (2).
[58] Act CXI of 2011, art. 2 (2).
[59] Cf. Act CXLV of 2007, art. 10 (3) f).
[60] The Fundamental Law of Hungary, art. P (1).

the nation´ is a unique concept of Hungarian law, which – contrary to the notion of the `common heritage of mankind´, which refers to areas that are incapable of national appropriation and where the principle of sovereignty is not applicable – encompasses those resources that belong to a certain entity, in this case, to the nation.[61] Given the strong interrelation of the protection of the common heritage of the nation as well as the environment with the moral responsibility towards future generations, the mandate has three pillars, as concluded by Gyula Bándi: (a) the human right to a healthy environment; (b) the right to physical and mental health; and (c) the common heritage of the nation, as stipulated in Article P of the Fundamental Law.[62]

Furthermore, the law prescribes eight tasks or competencies of the Deputy Commissioner, namely: (a) to regularly inform the Commissioner for Fundamental Rights on his/her experience regarding the enforcement of the interests of future generations; (b) to draw the attention of the Commissioner, the institutions involved and the public to the danger of infringement of the rights of a larger group of natural persons, especially of future generations; (c) to propose the Commissioner to institute proceedings ex officio; (d) to participate in the inquiries of the Commissioner; (e) to propose the Commissioner to turn to the Constitutional Court; (f) to monitor the realization of the National Framework Strategy on Sustainable Development adopted by the Parliament; (g) to propose the adoption or modification of laws concerning the interests of future generations; and (h) to assist the presentation of the values of the Hungarian institutional framework for the interests of future generations through his or her international activity.[63] Although some competencies are similar to those of the former green ombudsman – such as proposing the adoption of laws, issuing recommendations and reports, or representing the Hungarian institution at the international (or EU level) – certain competencies of the previous mandate are reserved for the Commissioner, and the OFG may propose the Commissioner to take action, namely, to institute proceedings ex officio and to turn to the Constitutional Court. However, powers relating to liability for environmental damage, including the competency to oblige the person or organization illegally damaging the environment, or instituting court proceedings against them, were not transferred to the new system. Neither was the former right of the Ombudsman to sue the polluters in administrative or civil courts transposed to the new legal arrangement. At the same time, we have to note that neither of these rights was frequently used by the green ombudsman because they were considered as partly undertaking the tasks of environmental administration, which was not the goal of the old institution of intergenerational equity. In other words, it was deemed to decrease the methodological independence of the Ombudsman from the Government.

[61] See: Shaw 2017, 396–397.; Kovács 2016, 442.; Cf. Szilágyi ed. 2017, 32. The word `heritage´ also indicates that the legislator did not refer to the natural resources merely as objexts of commercial transactions (goods, capital, etc.) but also takes into account their other, vital functions. See: Szilágyi 2021, 139.

[62] Bándi 2020b, 9–11.

[63] Act CXI of 2011, art. 3 (1).

3. An Overview of the Activities of the Deputy Commissioner for Future Generations at the National and International Levels

3.1. Domestic Activities

The work of the OFG is comprehensive; as it embraces a wide range of activities and topics, an attempt to present it in its entirety would be too ambitious for this study. Therefore, we may arbitrarily select a handful of examples from his achievements and present them in the following paragraphs.

3.1.1. Influence on the Constitutional Court Practice

The Constitutional Court (hereinafter the CC) often considers and refers to the findings and opinions of the OFG in several key environmental decisions. First, in Decision No. 28/2017 (X.25.), which is of paramount importance for the interpretation of the protection of biodiversity in light of Article P (1) of the Fundamental Law, the CC relied on the *amicus curiae* submitted jointly by the Commissioner and the OFG and concluded that the sale of Natura 2000 areas in the absence of a legal provision guaranteeing the preservation and improvement of such protected areas constitutes a violation of the obligations laid down in Article P.[64] The decision is also notable for its findings on biodiversity, pointing out that it shall be protected not only for its ecological function and thus its usability for humans (e.g., the production of goods such as water, food, or fuel; the natural self-regulation of rainfall or climatic processes; photosynthesis, soil formation, or the circulation of nutrients, the so-called ecological services of nature) but also on the basis of natural law, which is the starting point for the Christian interpretation of environmental protection.[65] In the author's opinion, the confirmation that the environment will be protected from both anthropocentric and ecocentric perspectives – focusing on the inherent value of biodiversity[66] – certainly shows a progressive approach to the issue in Hungarian constitutional law.

Another outstanding example is Decision No. 13/2018 (IX.4.), which was initiated by the President of the Republic. The arguments of the *amicus curiae* submitted by the OFG were used and cited in the President's petition,[67] as well as the CC decision. Notably, this motion of the President and OFG was supported by a wide array of civil and professional organizations, including the Hungarian Academy of Sciences. The Constitutional Court pronounced the unconstitutionality of a regulation allowing unlimited drilling and use of groundwater wells: given that groundwater resources belong to the exclusive property of the state, as well as the common heritage of the nation, the Court stated that such a regulation would violate the non-derogation principle and consequently the protection of natural resources and the right to a healthy environment

[64] Decision no. 28/2017 (X.25.) [76].
[65] Decision no. 28/2017 (X.25.) [35]–[36]; Cf. Pope Francis, 2015; Ecumenical Patriarch Bartholomew, 2012.
[66] Szabó 2019, 98–101.
[67] Bándi 2020b, 18–19.

enshrined in Articles P (1) and XXI (1).[68] This decision is principally notable for two reasons: first, it elaborated on the precautionary principle[69] and raised it to a constitutional criterion for the benefit of the interest of future generations; and second, the CC interpreted the obligations towards future generations laid down in Article P based on the generally accepted theory of intergenerational equity of Edith Brown Weiss.[70] The CC also referred to an opinion issued by the OFG, in which he drew attention to the importance of the principles of precaution and prevention. The fact that the OFG brought the principles back to the discussion and, consequently, the CC could raise them among the most important principles for environmental protection shows that the OFG does have a significant role in the interpretation of the related constitutional provisions.

Furthermore, the OFG raised his voice in relation to the right to fair trial from an environmental perspective, pointing out that state guarantees of access to environmental information are crucial for the realization of the protection of the environment enshrined in Articles P, XX, and XXI of the Fundamental Law. In other words, access and disclosure of such information are prerequisites and form part of the constitutional right to a healthy environment.[71] These findings were reflected in Decision No. 4/2019 (III.7.) in which the CC found that the way statements on the protection of environmental compartments and natural values shall be disclosed in decisions issued by an authority shall be clarified in the law,[72] thereby establishing a link between environmental protection and procedural rights. It is worth noting that the green ombudsman also emphasized the importance of the declaration of procedural environmental rights in the Constitution; however, they were finally not implemented. Nevertheless, one may conclude that in this decision, the CC acknowledged a certain level of interrelation between the environment and the right to a fair trial.

Finally, Decision No. 14/2020 (VII.6.) should be mentioned, which can certainly be considered the most eclatant example of the involvement of the OFG in the work of the CC. The proceedings were initiated by the Commissioner upon the request of the OFG in connection with forest protection: the OFG sought the annulment of certain provisions of the Forest Act and the Nature Protection Act for violating the non-derogation principle, thus contrary to the values provided in Articles P and XXI (1) of the Fundamental Law. The CC found the petition well founded and pronounced the annulment of the provisions in question. This decision is remarkable for two further findings. First, a statement providing that *"the Commissioner for Fundamental Rights together with the Deputy Commissioner responsible for the interests of future generations plays a crucial institutional role in the protection of natural and cultural assets."* Second, the decision deduced the internationally accepted legal concept of the public trust doctrine from Article P, which is considered a major milestone in the constitutional strengthening of

[68] Decision no. 13/2018 (IX.4.) [73].
[69] Szilágyi 2019, 106–109. See also: Kecskés 2020a.
[70] The decision provided that protection, maintenance, and preservation of the common heritage of the nation are the obligation of the State and everyone in light of art. P. See: 13/2018 (IX.4.) [13]. Cf. Weiss 1989, 22–23.
[71] Bándi 2020a, 22–23.
[72] Decision no. 4/2019 (III.7.) [93].

environmental and nature protection. According to the public trust doctrine, the state acts as a trustee over the natural heritage of the nation for the benefit of future generations to the extent that it does not jeopardize the long-term existence of the natural and cultural assets that are worthy of being protected on account of their inherent values.[73] Therefore, the doctrine imposes limitations on state policies regarding the use, exploitation, and transfer of ownership over trust assets.[74] The CC also affirmed that the natural and cultural values stipulated in Article P (1) shall be protected per se for future generations, even if against the actual economic interests of current generations.[75]

As one may conclude from the above, the OFG has a significant impact on the Constitutional Court decisions. Besides the competency to initiate proceedings at the CC through the Commissioner, the OFG may contribute to cases instituted by other actors through *amici curiae* and opinions, which are duly taken into account and respected by the Court. Moreover, if one takes a closer look at the subject matters of the above-mentioned decisions, it may be apparent that the majority of the findings of the CC were also proposed by the green ombudsman during the constitution-making process: the principles of precaution and prevention, participatory rights in environmental matters, and the protection of natural values against the actual economic interest of current generations were all pointed out in the legislative proposals. Although these provisions were not implemented in Fundamental Law, they still form part of the Hungarian constitutional framework for the protection of the environment and future generations through the interpretation of the CC. Thus, it can be inferred from the above that the OFG has the tools to shape environmental protection at a high level.

3.1.2. Legislative Proposals

As mentioned above, the OFG has the competency to propose the adoption or modification of legislative acts. Based on this power, the OFG issued a comprehensive proposal on environmental liability in 2019 and protection of groundwater resources in 2020.

The legislative initiative on the effective enforcement of environmental liability (hereinafter `the 2019 proposal´) is based upon the EU Environmental Liability Directive (ELD)[76] within the framework of the existing liability scheme, with a broader understanding of liability, and with the most inclusive approach of the polluter pays principle. The 2019 proposal does not advocate for the radical transformation of the existing liability regime but rather aims at introducing certain auxiliary measures that would ensure a higher level of certainty and efficiency for the protection of the interests of present and future generations and the protection of the entirety of the environment.[77] The proposal is dedicated to the effective implementation of the polluter pays principle,

[73] Decision no. 14/2020 (VII.6.) [22].
[74] Sulyok 2021, 360–363.
[75] Decision no. 14/2020 (VII.6.) [35].
[76] Directive 2004/35/CE. For an overview of the recent and potential further legislative steps in Hungary regarding the implementation of the Directive, see: Kecskés 2020b.
[77] Bándi 2020a, 10, 19.

and since environmental liability is not only a tool of ex-post sanctioning and remediation, it also helps enforce the principles of precaution and prevention.[78]

First, the OFG draws attention to the regulation of financial guarantees for environmental liabilities in legal activities. In this context, the greening of the rules influencing the economic decisions of users could also significantly serve for the enforcement of environmental liability through, for instance, financially supporting environment users who voluntarily introduce measures serving precaution and prevention, to the disadvantage of those who try to avoid such costs. Second, the creation of separate budgetary funds for state intervention is advisable[79] in order to secure financial resources for state actors in cases when (a) immediate intervention is needed but the resources do not enable the stakeholder to cover the costs; (b) the performance is not fulfilled; and (c) the identity of the perpetrator is unknown.[80] Third, the OFG proposes the adoption of an act regulating the details and methods of the settlement of damages, especially in relation to the `inherited´ or historical damages.[81] The regulation of this field is particularly important, as the scope of application of the ELD does not extend to damages that occurred prior to April 30, 2007. Besides the environmental and health aspects of these damages, their management also bears economic damages; the later the interventions take place, the greater burden it poses on the budget. In addition, the above regulations shall duly take into consideration the protection of the health and property of the population.

Furthermore, the 2019 proposal highlights the necessity of the enforcement of environmental liability in connection with real estate. According to the OFG, besides permanent environmental damage, the environmental burden shall also be noted among the relevant legal facts in the real estate records. The OFG also pointed out that the availability and accessibility of information on environmental matters are the basic conditions for the enforcement of Articles P (1), XX, XXI, and 38 of the Fundamental Law. A reform of the sanction system is also recommended, which would serve as a basis for the establishment of a uniform practice, and as a guideline for the environmental user and decision-making authority. The conditions for the intervention of authorities shall be based on the public procurement rules provided by the EU, and the `greening´ of the domestic regulation of public procurements shall be facilitated.[82] The OFG also emphasizes that sanctions shall focus on the implementation and enforcement of obligations with special regard to the principles of precaution and prevention. Lastly, the 2019 proposal suggests some modifications regarding the administrative conditions for the enforcement of environmental liability, such as ensuring the petitioner status of civil

[78] Fodor 2020, 42.

[79] Regarding the interrelation of environmental and financial policies, see: Bartha, Bordás & Horváth 2020.

[80] Securing sufficient financial resources is particularly important as scientific uncertainty may arise in establishing casuality between the pollution and its source, and which actors should bear the costs of remediation. See: Sulyok 2020.

[81] It shall be noted that the term `historical damage´ is not a legal term but in colloquial language it rather refers to damages originating from permanent pollution which occurred before the change of regime or even the past centuries. See: Agócs 2020, 158–160.

[82] For further analysis on the nexus between public procurement and the enforcement of environmental liability, see: Gyulai-Schmidt 2020.

organizations for the protection of the environment or nature[83] or introducing guarantees for the professionality of the work of authorities regarding environmental matters.[84]

As pointed out in the 2019 Report of the Commissioner, the proposal serves to enforce the obligations derived from the Fundamental Law, with regard to the obligations arising from the transposition of the ELD.[85] The proposal embraces a comprehensive approach to liability and offers solutions for the existing gaps and future problems arising thereof, while also targeting historical damages of the past.[86] Even though the results are not tangible yet, in the sense that the Parliament has not adopted such legislation until the conclusion of the present study, given the high-profile contributors to the elaboration of the proposal – several Ministries, the Prosecutor General's Office, the Parliamentary Committee for Sustainable Development, the National Council for Sustainable Development, and different environmental organizations – the Office of the Deputy Commissioner has high hopes for the success of the 2019 proposal. The forward-looking nature of the proposal is also shown by the fact that in the following year, the European Commission published an ambitious study of the joint effort of 40 leading scholars and practitioners in environmental liability matters that strongly supports and underpins the former statements of the OFG.[87]

In comparison to the 2019 proposal, the proposal on the protection of groundwater resources (hereinafter `the 2020 proposal´) was less comprehensive in that it commented on one specific legal act, instead of offering a comprehensive solution for an issue which was already complex. At the time of publication of the proposal, a modification of Act LVII of 1995 on the management of water was discussed in the National Assembly. The planned modification aimed to divide the unified system of water management to facilitate the establishment of agricultural irrigation wells. The OFG pointed out that groundwater resources should not be distinguished based on the purpose of their utilization.[88] The CC Decision No. 13/2018 (IX.4.) – which relied on the reasoning of the OFG – pronounced that groundwater resources do form part of the `common heritage of the nation´, and as such, Article P and its guarantees apply to these compartments. The OFG drew attention to the fact that the draft law did not implement the principles of precaution and prevention and the equal division of water resources between present and future generations. The 2020 Report of the Commissioner concluded that, in the end, the law adopted by the National Assembly was more favorable compared to the first draft on which the OFG commented. However, a part of the constitutional dilemmas of the OFG – such as concerns stemming from structural

[83] For an analysis of progressive solutions, such as the activity of civil society in thecleaning of polluted areas from the perspective of environmental civil experts, see: Fülöp 2020. For a further overview on the role of public participartion in light of the Aarhus Convention and the petititoner status of civil organizations, see: Pánovics 2020.

[84] Legislative proposal of the Ombudsman for Future Generations for the effective enforcement of environmental liability 2019, 1–3.

[85] Commissioner for Fundamental Rights 2019, 121–122.

[86] For an overview of the complexity of the proposal, see: Pump 2020.

[87] See: European Commission 2021.

[88] Legislative proposal of the Ombudsman for Future Generations for the protection of groundwater resources 2020, 1–3.

changes – was not implemented, but its solution was delegated to the government.[89] The 2020 proposal, although not adopted in its entirety, was taken into account during the legislative procedure, and it also implied that the OFG had a considerable impact on the formation of the law. The fact that the CC Decision no. 14/2020 (VII.6.) was issued in the same year, also shows that the OFG is actively engaged in the enforcement of the protection of future generations through various channels, which has already produced tangible results.

3.2. International Activities

The OFG is also active at the international level: as mentioned above, the Network of Institutions for Future Generations was established in 2014 on his initiative. The Network brings together the institutions of future generations highlighted in the 2013 UN report, as well as other establishments from around the world that are committed to creating institutional means for the protection of future generations in their own countries. The cooperation aims at sharing and exchanging institutional best practices for the development of effective means and practices, to provide innovative ideas for other establishments working on various levels worldwide, as well as to channel outside perspectives, successes, and lessons learned into the work of already existing bodies. The Parties also adopted the 2014 Budapest Memorandum, which summarizes their goals and expresses their support for the establishment of a High Commissioner for Future Generations at the UN level.[90]

Furthermore, the review of the OFG on the implementation of the sustainable development goals in Hungary was internationally cited,[91] as it was published as an annex to the document issued at the High-Level Political Forum on Sustainable Development 2018 in New York. The review provided an in-depth analysis of the implementation of certain sustainable development goals, namely Goal 6 (ensure availability and sustainable management of water and sanitation for all), Goal 7 (ensure access to affordable, reliable, sustainable, and modern energy for all), Goal 11 (make cities and human settlements inclusive, safe, resilient, and sustainable), Goal 12 (ensure sustainable consumption and production patterns), and Goal 15 (protect, restore, and promote sustainable use of terrestrial ecosystems).[92] The OFG articulated several recommendations as to the steps needed on the basis of the Ombudsman's practice: the review pointed out that the individual cases have a concrete, detailed, and specific nature similar to the implementation steps, and thus, the recommendations of the Ombudsman may serve the concretization of the broad and abstract goals.[93] The presentation of this review could

[89] Commissioner for Fundamental Rights 2020, 148–149. Cf. Act CLXXV of 2020 on the modification of Act LVII of 1995.
[90] See: Network of Institutions for Future Generations 2014.
[91] See, for instance, GANHRI 2021a, 25–26; and GANHRI 2021b, 21.
[92] Voluntary National Review of Hungary on the Sustainable Development Goals of the 2030 Agenda 2018, 8–18.
[93] Voluntary National Review of Hungary on the Sustainable Development Goals of the 2030 Agenda 2018, 6.

also serve as an example for other national institutions with a similar profile, to promote and contribute to the implementation of Agenda 2030 in their own countries.

Apart from the above, the work of the OFG is considered a good example in a number of international documents. For instance, the Hungarian model is highlighted in the annual thematic reports of the Special Rapporteur on human rights and the environment.[94] In conclusion, the fact that the Hungarian OFG is given special attention among other similar institutions implies that it has a special role not only at the domestic level but also in the context of other future generation institutions.

3.3. Other Activities

Besides the examples from the practice of the OFG highlighted above, the Ombudsman also frequently issues opinions, recommendations, or awareness-raising reports on various topics related to the interests of future generations, such as the preservation of national parks,[95] protected species,[96] certain elements of nature (including soil[97] and groundwater resources[98]), the landscape,[99] or waste management.[100]

The Commissioner also turned to the Supreme Court (Curia) upon the initiative of the OFG in relation to the violation of the law on the shaping and protection of the built environment by a local government decree. The petition could be considered successful, as the Curia annulled the provisions of the decree.[101] The decision was particularly important as the decree was issued by the local government of a town situated near Lake Balaton. The legal nature of the Balaton is at the center of the OFG's attention, and in 2018, he raised his voice to grant legal personhood to the lake, similar to the protection afforded to the Whanganui River in New Zealand.[102] Recognizing the Balaton as a legal subject instead of considering it an object would allow the realization of only those developments that could guarantee (and do not jeopardize) the protection of the Balaton as having natural value.[103]

The OFG also took part in the monitoring of advertisements and the elaboration of related guidelines, and was asked to contribute to the review process of the Hungarian Code of Advertising Ethics in 2018.[104] In addition, the OFG participates in several

[94] See, for example, A/HRC/28/61 2015, 14.; A/HRC/31/53 2015, 13.; A/HRC/43/53/Annex III 2019, 5.; A/77/284/Annex II 2022, 5–6.
[95] National parks as the guardians of natural and cultural values for future generations 2014.
[96] The preservation of Nannospalax (leucodon) montanosyrmiensis for future generations 2015.
[97] The protection of soil 2016.
[98] The protection of groundwater resources 2017.
[99] The fundamental law aspects of the landscape, the protection, management and planning of landscape 2021.
[100] The problems of the functioning of the waste management public service 2018.
[101] Köf. 5004/2019/5, Curia.
[102] In 2017, the Whanganui river in New Zealand was the first river to receive the status of a legal person. This act also recognizes the spiritual attachment of the indigenous Maori people to the river. This approach expresses respect towards the value of the natural resource and aims at preventing irreversible pollution in the future. See: Kramm 2020.
[103] Commissioner for Fundamental Rights 2018, 367.
[104] See: Önszabályozó Reklám Testület 2018.

conferences in Hungary and abroad and represents the Hungarian viewpoint and practices in the field of the protection of the environment and future generations.

Although the entire activity of the Ombudsman could not be presented in depth in the present study, one last point ought to be highlighted: the social embeddedness of the institution. The work of the Ombudsman is strongly interconnected with various state actors and stakeholders. The office is often present in parliamentary committees, co-operates with courts, intervenes in proceedings, requests information from the government, articulates his opinion on government policies and legislation, collaborates with actors of the economic sector, investigates in public complaints, contacts and collaborates with green organizations, and represents itself in academia.[105] In addition, the OFG often appears in the media, reflecting on environment-related issues that are at the center of public attention.

4. Concluding Remarks

Although the moral responsibility towards future generations is recognized by international conventions, national constitutions, and non-binding (soft-law) instruments, the practical enforcement of their needs and interests seems difficult under the current legal regime. The representation of people not yet born may raise certain concerns – such as the uncertainty of defining their preferences, lack of concrete claims and claimants, and separation of rights and obligations in legal relationships – but these dilemmas must not hinder the endeavors to include a future generation-perspective in decision-making. In the author's view, the institutional protection of the interests of future generations from a bottom-up approach could be a viable solution. Until the establishment of a High Commissioner or a similar international institution for the protection of future generations, the creation of more such national institutions and their close cooperation could certainly provide a solution as a first step.

The Hungarian model for the institutional protection of future generations is one of the few endeavors worldwide to expressly safeguard the interests of our descendants. Even though the institution went through fundamental changes for which the new Fundamental Law was strongly criticized, the powers of the Ombudsman are still significant in light of the unique constitutional provisions on future generations and even in the context of other similar mandates abroad. As pointed out above, the findings of the OFG had a significant impact on several key Constitutional Court decisions, and in 2020, he initiated a successful proceeding in the Court. Furthermore, the OFG may also contribute to legislation-making by issuing his own legislative proposals. These could be considered his strongest powers, which may not be found in the case of the other future generation institutions presented above.

In comparison to the competencies of the predecessor of the OFG, the so-called green ombudsman, one may argue that the scope of the former mandate was broader. For instance, he had the power to call upon a person or organization illegally damaging the environment to cease this activity, and in case it is unsuccessful, turn to court in order to enforce the call. Moreover, the former green ombudsman had all the competencies of an ombudsman, while the current OFG is integrated within a single-ombudsman system

[105] Agócs et al. 2021, 566–567.

and may enforce certain initiatives only through the Commissioner. However, it could be concluded from the dissolution of the formerly functioning Israeli Commissioner for Future Generations that Parliaments may consider too much authority of such an institution as a threat to their work. The Israeli Commissioner had different tools and powers from those of the Hungarian green ombudsman, and the circumstances of its dissolution could not be compared either, but we may draw the conclusion from the dissolution of the two institutions that a delicate balance shall be stuck between the competencies of future generations advocates and political bodies when defining the scope of their influence.

Furthermore, it should be noted that the OFG significantly contributed to the implementation of several concepts into the interpretation of the constitutional norms that were proposed explicitly by the former green ombudsman. Therefore, even if such principles, linkages, and value choices were not included in the text of the constitution, the OFG had a significant role in the fact that, by now, the proposals of the green ombudsman form part of the interpretation of the constitutional provisions.

In conclusion, the institutional protection of future generations is a currently evolving field in the international sphere, and numerous questions arise in relation to the establishment and the future of such institutions. Defining the scope of action, the institutional structure, and the relationship to political bodies, as well as the potential role of advocates in youth-led environmental – especially climate change – litigations, are certainly challenging issues for the legal sphere, which must be solved in order to enforce the interests of future generations in practice. Nevertheless, the position and work of the Hungarian OFG may serve as a role model for other similar institutions, which could contribute to the representation of the interests of future generations at ever higher levels across the globe.

Bibliography

1. Agócs I (2020) Az állam felelőssége a történeti károk kialakulásában, megelőzésében és kezelésében, a területek hasznosítására vonatkozó kitekintéssel, *Pro Futuro* 10(2), pp. 156–174, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8432
2. Agócs I, Debisso K, Fiala-Butora E, Gubek N, Hargitai K, Krómer I, Martinez-Zemplén A, Pump J, Radnai A, Somlai J, Sulyok K, Szamek G (2021) Bándi Gyula, a jövő nemzedékek szószólójának hatása a környezetjogra, in: Tahyné Kovács Á, ed., *Vox Generationum Futurarum. Ünnepi kötet Bándi Gyula 65. születésnapja alkalmából*, Pázmány Press, Budapest, pp. 527–571.
3. Bándi Gy (2020a) Jogalkotási javaslat a jövő nemzedékek szószólójától, *Pro Futuro* 10(2), pp. 10–28, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8427
4. Bándi Gy (2020b) Interests of Future Generations, Environmental Protection and the Fundamental Law, *Journal of Agricultural and Environmental Law* 15(29), pp. 7–22, doi: https://doi.org/10.21029/JAEL.2020.29.7
5. Bartha I, Bordás P & Horváth M T (2020) Hős és antihős: Környezeti politika és pénzügyi szabályozás, *Pro Futuro* 10(2), pp. 128–155, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8431
6. Csink L (2016) Az ombudsman, in: Jakab A & Gajduschek Gy, eds., *A magyar jogrendszer állapota*, MTA Társadalomtudományi Kutatóközpont, Budapest, pp. 600–616.
7. Encyclical Letter 'Laudato si' of Pope Francis (2015)
8. Fauchald O K & Gording Stang E (2021) Norway: Norwegian Ombudsman for Children, in: Cordonier Segger M C, Szabó M & Harrington A H, eds., *Intergenerational Justice in Sustainable Development Treaty Implementation – Advancing Future Generations Rights through National Institutions*, Cambridge University Press, Cambridge, pp. 352–373, doi: https://doi.org/10.1017/9781108768511
9. Fodor L (2008) A jövő nemzedékek jogai, *Fundamentum* 12(1), pp. 47–52.
10. Fodor L (2020) Sötét vizeken? A környezetvédelmi felelősség helye a környezetpolitika eszköztárában (szabályozásmódszertani és alapelvi kérdések), *Pro Futuro* 10(2), pp. 42–66, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8436
11. Fülöp S (2012) Az egészséges környezethez való jog és a jövő nemzedékek érdekeinek védelme az Alaptörvényben, in: Csák Cs, ed., *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, Miskolci Egyetem, Miskolc, pp. 76–87.
12. Fülöp S (2020) A környezeti felelősség joga civil környezetvédelmi jogi szakértők nézőpontjából, *Pro Futuro* 10(2), pp. 86–112, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8585
13. Fülöp S (2021) Future Generations Institutions to Implement International Obligations towards Future Generations, in: Cordonier Segger M C, Szabó M & Harrington A H, eds., *Intergenerational Justice in Sustainable Development Treaty Implementation – Advancing Future Generations Rights through National Institutions*,

Cambridge University Press, Cambridge, pp. 137–162, doi: https://doi.org/110.1017/9781108768511.010
14. Gyulai-Schmidt A (2020) Közbeszerzési dilemmák a környezeti felelősség érvényesítése körében, *Pro Futuro* 10(2), pp. 175–188, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8564
15. Jávor B (2000) *A jövő nemzedékek jogai*, Védegylet, Budapest.
16. Kecskés G (2020a) The Hungarian Constitutional Court's Decision on the Protection of Groundwater, *Hungarian Yearbook of International Law and European Law* 8(1), pp. 371–382, doi: https://doi.org/10.5553%2FHYIEL%2F266627012020008001022
17. Kecskés G (2020b) A környezeti felelősség irányelv hazai végrehajtásának tapasztalatai, felülvizsgálata, a jövőbeli változtatások iránya *Pro Futuro* 10(2), pp. 29–41, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8430
18. Kovács P (2016) *Nemzetközi jog,* Osiris, Budapest.
19. Kramm M (2020) When a River Becomes a Person, Journal of Human Development and Capabilities 21(4), pp. 307–319, doi: https://doi.org/10.1080/19452829.2020.1801610
20. *On Earth As In Heaven: Ecological Vision and Initiatives of Ecumenical Patriarch Bartholomew* (2012)
21. Pánovics A (2020) A civil szervezetek szerepe a környezeti felelősség érvényesítésében, *Pro Futuro* 10(2), pp. 113–127, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8504
22. Pump J (2020) A környezeti felelősség határai: a vendégszerkesztő összegzése, *Pro Futuro* 10(2), pp. 189–198, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8679
23. Raisz A (2012) A Constitution's Environment, Environment in the Constitution – Process and Background of the New Hungarian Constitution, *Revue Est Europa*, numéro special 1/2012, pp. 37–70.
24. Reimer F (2021) Institutions for a Sustainable Future: The German Parliamentary Advisory Council on Sustainable Development, in: Cordonier Segger M C, Szabó M & Harrington A H, eds., *Intergenerational Justice in Sustainable Development Treaty Implementation – Advancing Future Generations Rights through National Institutions*, Cambridge University Press, Cambridge, pp. 374–394, doi: https://doi.org/10.1017/9781108768511
25. Roberts M A (2009) The Nonidentity Problem, in: Zalta E N, ed., Stanford Encyclopedia of Philosophy; https://plato.stanford.edu/entries/nonidentity-problem/ [21.11.2022]
26. Shaw M N (2017) *International Law,* Cambridge University Press, Cambridge.
27. Shoham S & Kurre F (2021) Institutions for a Sustainable Future: The Former Israeli Commission for Future Generations, in: Cordonier Segger M C, Szabó M & Harrington A H, eds., *Intergenerational Justice in Sustainable Development Treaty Implementation – Advancing Future Generations Rights through National Institutions*,

Cambridge University Press, Cambridge, pp. 332–351, doi: https://doi.org/10.1017/9781108768511
28. Sólyom L (2001) Az ombudsman „alapjog-értelmezése" és „normakontrollja", *Fundamentum* 5(2), pp. 14–23.
29. Sulyok K (2020) A természettudományos bizonytalanság szerepe a környezeti felelősség érvényesíthetőségében, *Pro Futuro* 10(2), pp. 67–85, doi: https://doi.org/10.26521/PROFUTURO/2020/2/8437
30. Sulyok K (2021) The Public Trust Doctrine, the Non-Derogation Principle and the Protection of Future Generations – The Hungarian Constitutional Court's Review of the Forest Act, *Hungarian Yearbook of International Law and European Law*, 1/2021, pp. 359–375; doi: https://doi.org/10.5553/HYIEL/266627012021009001020
31. Szabó M (2019) A biológiai sokféleség jogi védelmének jelentősége, *Iusutum Aequum Salutare* 15(2), pp. 89–105.
32. Szabó M (2021) Intergenerational Justice under International Treaty Law: The Obligations of the State to Future Generations and the Example of the Hungarian Ombudsman for Future Generations, in: Cordonier Segger M C, Szabó M & Harrington A H, eds., *Intergenerational Justice in Sustainable Development Treaty Implementation – Advancing Future Generations Rights through National Institutions*, Cambridge University Press, Cambridge, pp. 68–98, doi: https://doi.org/10.1017/9781108768511
33. Szilágyi J E (2019) The precautionary principle's 'strong concept' in the case law of the Constitutional Court of Hungary, *Lex et Scientia International Journal* 26(2), pp. 88–112.
34. Szilágyi J E (2021) 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, *Journal of Agricultural and Environmental Law* 16(31), pp. 130–144, doi: https://doi.org/10.21029/JAEL.2021.31.130
35. Szilágyi J E (2017) *Agrárjog. A magyar agrár-és vidékfejlesztési jogi szabályozás lehetőségei a globalizálódó Európai Unióban,* Miskolci Egyetemi Kiadó, Miskolc.
36. Varga Zs A (2012) *Ombudsman, ügyész, magánjogi felelősség: Alternatív közigazgatási kontroll Magyarországon*, Pázmány Press, Budapest.
37. Ward H, Pierce C & Roderick P (2012) *Committing to the future we want: a High Commissioner for Future Generations at Rio+20 – Annexes;* https://www.fdsd.org/wp-content/uploads/2014/11/Committing-to-the-future-we-want-Annexes.pdf [21.11.2022]
38. Weiss E B (1989) *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity,* Transnational Publishers Inc., New York.
39. Weiss E B (1992) In Fairness To Future Generations and Sustainable Development, *American University International Law Review* 8(1), pp. 19–26.

Karmen LUTMAN* – Lucija STROJAN**
State liability for health damage caused by excessive air pollution: Constitutinal and Private Law aspects***

Abstract

Air pollution severely damages human health and causes premature deaths. In order to fight against it, the European Commission initiated a revision of the Ambient Air Quality Directives aiming to improve the quality of outdoor air and to reach the Zero Pollution goal. However, the CJEU is already facing requests for a preliminary ruling dealing with state liability for health damage caused by excessive air pollution. The old common law maxim "The King does no wrong" according to which a citizen may not seek redress from the government for wrongs committed by the latter has long been surpassed. The institution of state liability is thus a widely recognised concept. The paper analyses the main features of state liability for health damage caused by polluted air and its boundaries. It focuses on the recent development of EU law in this regard and the established case law of the ECtHR. Since the right to a healthy living environment is recognised by several constitutions across the world, including Slovenia, the paper deals also with the Slovenian case law on state liability for damages caused by air and noise pollution from road and rail transport.

Keywords: environment, state liability, nuisance, air pollution, EU law, right to a healthy environment, sustainability, health, air quality, human rights

1. Introduction

Air pollution is one of the greatest environmental risks to human health worldwide. According to the World Health Organization (WHO), 6.7 million people die annually from air pollution.[1] The most problematic aspect is ambient (i.e., outdoor) air pollution,[2] the major sources of which are fossil fuel burning in industries and automobile emissions.[3]

Although, in principle, everyone is responsible for taking care of their own health, the state can be held liable for health damage caused by excessive air pollution. The right to a healthy environment is recognized as a human right by several constitutions across

Karman Lutman – Lucija Strojan: State liability for health damage caused by excessive air pollution: Constitutinal and Private Law aspects. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 31-51, https://doi.org/10.21029/JAEL.2023.34.31

* Ph.D., LL.M., Assistant Professor, University of Ljubljana, Faculty of Law, e-mail: karmen.lutman@pf.uni-lj.si

** Master of Law, Researcher, Institute for Comparative Law at the Faculty of Law in Ljubljana, Teaching Assistant, University of Ljubljana, Faculty of Law, e-mail: lucija.strojan@pf.uni-lj.si

*** *This study has been written as part of the Ministry of Justice programme aiming to raise the standard of law education.*

[1] WHO 2022.

[2] Ibid.

[3] Chi-Hsien & Yue 2019, 210.

https://doi.org/10.21029/JAEL.2023.34.31

the world, which brings with it the positive and negative obligations of states. Moreover, to improve air quality, states are bound by several international environmental agreements, regional laws, and other agreements. With the aim of achieving cleaner ambient air by 2030 and zero pollution by 2050, the European Commission (hereinafter, the Commission) recently proposed stronger rules on ambient air, as contained in the proposed revision of the Ambient Air Quality Directives.[4]

This study aims to provide insights into the various approaches to the concept of state liability for health damage caused by excessive air pollution. Traditionally (under Roman law), an individual was protected against excessive emissions (caused by another) through the mechanisms of private law. However, the concept of human rights has brought about another dimension of law, including the liability of the state for violating such rights. Nevertheless, it can be seen (at least in Slovenian law) that certain concepts and institutions of tort law (including nuisance) can be (with certain modifications) applied to the vertical relationship between an individual and the state.

This paper aims to provide an overview of the legal framework on air quality in European Union (EU) law and current developments concerning the liability of EU Member States for the damage suffered by individuals due to excessive air pollution (Section 2). In doing so, the paper focuses on the recent ruling of the *Court of Justice of the European Union* (CJEU) in case C-61/21 and the proposed revision of secondary legislation on the matter. In addition, this study takes a closer look at the causality thereof, which is a prerequisite for state liability, which is, at least in environmental matters, usually considered *probatio diabolica*. Section 3 analyzes relevant European Court of Human Rights (ECHR) case law on the matter. Although there is no explicit right to a healthy living environment in the European Convention on Human Rights (hereafter, the Convention), the ECHR established its protection under the umbrella of Article 8 of the Convention (the right to respect for private and family life) and other provisions, and carved out the main features of state liability in such cases. Section 4 provides insight into Slovenian law – more precisely, into Slovenian case law dealing with massive claims of individuals against the state for damages caused by air and noise pollution from road and rail transport. Recently, the Supreme Court of the Republic of Slovenia changed its legal assessment of state liability in such cases, moving from a private law-oriented approach towards a more public law-oriented approach.

2. Air quality and eu law: the liability of member states for an infringement of eu law on ambient air quality

The legal basis for the EU to take measures regarding air quality lies in Articles 191 and 192 of the Treaty on the Functioning of the European Union[5] regarding the environment. These articles empower the EU to preserve, protect, and improve the quality of the environment, protect human health, and promote actions at the international level to address regional or global environmental problems. As this is an

[4] European Commission 2022a.
[5] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

area of shared competence between the EU and the Member States, EU measures must respect the principle of subsidiarity.[6]

The rules for the protection of ambient air quality are based on the EU's environmental competence and, therefore, necessarily aim at a high level of protection with regard to human health.[7] Awareness of the harmful effects of air pollution has led to the adoption of specific restrictions.[8] The limit values for some pollutants were established in 1980 and were gradually supplemented with new harmful substances.[9] Currently, the main legislations are the Ambient Air Quality Directives 2004/107/EC[10] and 2008/50/EC.[11]

Air quality in the EU has improved over the last three decades,[12] but this has not been sufficient. Air pollution continues to be the number one environmental cause of early death in the EU.[13] In November 2019, the Commission published a fitness check for the Ambient Air Quality Directives. It was concluded that the directives have been partially effective in improving air quality and achieving air quality standards; however, not all their objectives have been met thus far.[14] The Commission also presented the European Green Deal. The Commission is committed to drawing on the lessons learned from the evaluation of current air quality legislation and proposing a revision of air quality standards to align them more closely with the WHO recommendations.[15]

The Ambient Air Quality Directives are part of a comprehensive clean air policy framework based on three main pillars. The first consists of Ambient Air Quality Directives that set quality standards for the concentration levels of 12 ambient air

[6] European Commission 2022b. See Chapter 1.2. Legal basis.
[7] Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 87.
[8] See Misonne 2021, 35.
[9] Council Directive 80/779/EEC of July 15, 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, OJ L 229, 30.8.1980; Council Directive 82/884/EEC of December 3, 1982 on a limit value for lead in the air, OJ L 378, 31.12.1982; Council Directive 85/203/EEC of March 7, 1985 on air quality standards for nitrogen dioxide, OJ L 87, 27.3.1985; Council Directive 92/72/EEC of September 21, 1992 on air pollution by ozone, OJ L 297, 13.10.1992. For more, see: Misonne 2021, 35.
[10] Directive 2004/107/EC of the European Parliament and of the Council of December 15, 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, OJ L 23, 26.1.2005.
[11] Directive 2008/50/EC of the European Parliament and of the Council of May 21, 2008 on ambient air quality and cleaner air for Europe, *OJ L 152, 11.6.2008, as amended by* Commission Directive (EU) 2015/1480 of August 28, 2015 amending several annexes to Directives 2004/107/EC and 2008/50/EC of the European Parliament and of the Council laying down the rules concerning reference methods, data validation and location of sampling points for the assessment of ambient air quality, *OJ L 226, 29.8.2015*.
[12] European Commission 2022b. See Chapter 1. Context of the Proposal.
[13] Ibid.
[14] European Commission 2019a, 38.
[15] European Commission 2019b, 14.

pollutants. The second is the NEC Directive,[16] which establishes Member States' obligations to reduce emissions of key ambient air pollutants and their precursors and works within the EU to collectively reduce transboundary pollution. The third pillar comprises legislation[17] that sets emission standards for key sources of air pollution, such as road transport vehicles, domestic heating appliances, and industrial plants.[18]

In October 2022, the Commission proposed a revision of the Ambient Air Quality Directives (hereinafter, the Proposal for a Directive on Ambient Air Quality and Cleaner Air for Europe, or the Proposal).[19] Article 28 of the Proposal for a Directive on Ambient Air Quality and Cleaner Air for Europe introduces the right to compensation for damage caused to human health.[20] The Proposal states that "*Article 28 aims to establish an effective*

[16] Directive (EU) 2016/2284 of the European Parliament and of the Council of December 14, 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, *OJ L 344, 17.12.2016*.

[17] Directive 2010/75/EU of the European Parliament and of the Council of November 24, 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010; Directive (EU) 2015/2193 of the European Parliament and of the Council of November 25, 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants, OJ L 313, 28.11.2015; Directive 98/70/EC of the European Parliament and of the Council of October 13, 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, OJ L 350, 28.12.1998*;* etc.

[18] Full para. summarised from: European Commission 2022b. See Chapter 1. Context of the Proposal.

[19] European Commission 2022b.

[20] Ibid. Proposal for Art. 28 (entitled Compensation for damage to human health) shall read as follows:

"1. Member States shall ensure that natural persons who suffer damage to human health caused by a violation of Articles 19(1) to 19(4), 20(1) and 20(2), 21(1) second sub-paragraph and 21(3) of this Directive by the competent authorities are entitled to compensation in accordance with this article.

2. Member States shall ensure that non-governmental organisations promoting the protection of human health or the environment and meeting any requirements under national law are allowed to represent natural persons referred to in paragraph 1 and bring collective actions for compensation. The requirements set out in Article 10 and Article 12(1) of Directive (EU) 2020/1828 shall mutatis mutandis apply to such collective actions.

3. Member States shall ensure that a claim for compensation for a violation can be pursued only once by a natural person referred to in paragraph 1 and by the non-governmental organisations representing the person referred to in paragraph 2. Member States shall lay down rules to ensure that the individuals affected do not receive compensation more than once for the same cause of action against the same competent authority.

4. Where a claim for compensation is supported by evidence showing that the violation referred to in paragraph 1 is the most plausible explanation for the occurrence of the damage of that person, the causal link between the violation and the occurrence of the damage shall be presumed.

The respondent public authority shall be able to rebut this presumption. In particular, the respondent shall have the right to challenge the relevance of the evidence relied on by the natural person and the plausibility of the explanation put forward.

5. Member States shall ensure that national rules and procedures relating to claims for compensation, including as concerns the burden of proof, are designed and applied in such a way that they do not render impossible or excessively difficult the exercise of the right to compensation for damage pursuant to paragraph 1.

6. Member States shall ensure that the limitation periods for bringing actions for compensation as referred to in paragraph 1 are not less than 5 years. Such periods shall not begin to run before the violation has ceased and the

right for people to be compensated where damage to their health has occurred wholly or partially as a result of a violation of rules prescribed on limit values, air quality plans, short-term action plans, or in relation to transboundary pollution. People affected have the right to claim and obtain compensation for that damage. This includes the possibility for collective actions."[21] The right to compensation is invoked when damage to human health is caused by a violation of Articles 19(1)–19(4), 20(1), 20(2), 21(1), or 21(3) by competent authorities. The proposals in these articles demand the establishment of air quality plans, short-term action plans, and activities for transboundary air pollution. Therefore, this Proposal assumes an effective right to compensation in the event of limited violations. It is up to Member States to decide how to meet the requirements foreseen.

If such amendments are adopted, certain issues may be resolved, at least theoretically. These provisions have raised several theoretical and practical questions. However, air pollution is of an older date, and the damage to health is the result of years of exposure. Accordingly, the *CJEU* already had to answer whether individuals are able to demand compensation for health damage resulting from an infringement of the current directives.

In its air quality-related case, *Deutsche Umwelthilfe,* the *CJEU,* underlined that the full effectiveness of EU law and the effective protection of the rights of individuals may, where appropriate, be ensured by the principle of state liability.[22] Case C-61/21 was the first to reach the CJEU to test this statement. As highlighted by Advocate General Kokott, the case was intended to clarify the extent to which an infringement of the limit values for the protection of ambient air quality under EU law can *in fact* give rise to an entitlement to compensation.[23] On December 22, 2022, the CJEU delivered its judgement. The answer is decisive because it could open the door to many potential lawsuits.

2.1. The request for a preliminary ruling in Case C-61/21

The case originated from a dispute initiated by a French resident on the French State's breach of EU air quality rules. The applicant in the main proceedings claimed that he had suffered damage to his health as a result of the deterioration of ambient air in the Paris geographical area where he lives.[24] He submitted that he had been suffering from health problems since 2003 and that his problems had worsened over time.[25] The limit values for ambient air quality have been exceeded in the relevant Paris agglomeration,

person claiming the compensation knows, or can reasonably be expected to know, that he or she suffered damage from a violation as referred to in paragraph 1."

[21] European Commission 2022b. See Chapter 5. Detailed explanation of the specific provisions of the Proposal.

[22] Judgement of the CJEU of December 19, 2019, Deutsche Umwelthilfe, C-752/18, EU:C:2019:1114, para. 54. See Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 29.

[23] Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 29.

[24] Request for a preliminary ruling lodged on February 2, 2021, C-61/21, 5.

[25] Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 24.

namely the limit values for nitrogen dioxide (since 2010) and PM10 (from 2005 to 2019).[26] Therefore, he requested that the Prefect of the Département du Val-d'Oise take measures to comply with the limit values under EU secondary legislation. Additionally, he demanded compensation of EUR 21 million for the harm he attributed to air pollution; EUR 6 million for damage to his health; and EUR 15 million for emotional distress, anxiety, bodily injury, disfigurement, physical harm, and psychological damage.[27]

Since his action was dismissed by the *Tribunal administratif de Cergy-Pontoise* (Eng.: Administrative Court, Cergy-Pontoise, France), he appealed to the *Cour administrative d'appel de Versailles* (Eng.: Administrative Court of Appeal, Versailles, France).[28] The Appellate Court in the main proceeding stated that the decision on the compensation claim requires clarification of the scope of Articles 13(1) and 23(1) of Directive 2008/50 with regard to the entitlement of individuals to compensation.[29] Therefore, the French National Court referred two preliminary questions to the CJEU. Through its first question, the national court was essentially asking whether individuals are able to demand compensation for damage to health resulting from an infringement of said provisions. Assuming that the provisions may indeed give rise to such entitlement, the national court asked what conditions entitlement was subject to.[30]

2.2. State liability and the Francovich Doctrine

The key question in this case is whether individuals suffering from health problems caused by excessive air pollution can successfully follow the *Francovich*[31] line of case law.[32] Advocate General Kokott proposed that Member States could be held liable for air pollution-related health damages. However, the CJEU does not follow this opinion.

The principle of state liability for harm caused to individuals by breaches of EU law for which a Member State can be held responsible is inherent in the treaty system.[33] This was established by the CJEU in the *Francovich* case.[34] Since then, the conditions for

[26] Ibid., para. 23. See endnotes Nos. 11–13: Judgement of the CJEU of October 24, 2019, Commission v. France (Exceedance of limit values for nitrogen dioxide), C-636/18, EU:C:2019:900; Judgement of the CJEU of April 28, 2022, Commission v. France (Limit values – PM10), C-286/21 (not published), EU:C:2022:319; Judgement of the Conseil d'État (Council of State) of August 4, 2021, Association les Amis de la Terre France et Autres, 428409, FR:CECHR:2021:428409.20210804, points 4 and 5.

[27] Ibid., para. 24. See also the request for a preliminary ruling lodged on February 2, 2021, C-61/21, 2.

[28] Ibid., para. 26. Ibid.

[29] Request for a preliminary ruling lodged on February 2, 2021, C-61/21, 5.

[30] Full questions, as refered to the *CJEU*: See Judgement of the CJEU of December 22, 2022, JP v. Ministre de la Transition écologique, Premier ministre, C-61/21, EU:C:2022:1015, para. 33.

[31] Judgements of the CJEU of November 19, 1991, Francovich and Others, C-6/90 and C-48/93, EU:C:1991:428.

[32] The principle of state liability for breaches of EU law made its first appearance in Francovich. Bobek 2020, 183.

[33] Judgements of the CJEU of November 19, 1991, Francovich and Others, C-6/90 and C-48/93, EU:C:1991:428, para. 35.

[34] See footnote No. 32.

state liability have been reformulated slightly.[35] An individual's right to compensate for the damage caused by a Member State for a breach of EU law is examined under three conditions. First, the rule of law infringed must be intended to confer rights on individuals. Second, a breach of this rule must be sufficiently serious. Third, there must be a direct causal link between the breach of obligation born by the Member State and the damage sustained by the injured parties.[36]

The CJEU has stated that numerous air quality directives[37] establish quite clear and precise obligations regarding the results to be achieved by Member States.[38] However, these obligations serve the general objective of protecting human health and the environment.[39] The relevant provisions of Directive 2008/50 and its predecessors do not confer any explicit rights on individuals. The obligations laid down in those provisions, in the context of the general objective of protecting human health and the environment as a whole, do not allow individuals to be implicitly granted individual rights based on these obligations.[40] The first of the cumulatively required conditions is not met.[41] This conclusion is not altered by the fact that when a Member State has failed to ensure compliance with the set limit values, individuals may require national authorities to take the measures required by these directives (if necessary, by bringing an action before the competent court).[42] Similarly, natural or legal persons directly affected by an exceedance of the set limit values must be able to require national authorities to draw up an air quality plan (if necessary, by bringing an action before the competent court).[43] The CJEU emphasized that individuals must have the right to seek measures from the authorities. The CJEU explicitly stated that its conclusion does not oppose state liability

[35] Bobek 2020, 184.

[36] Judgements of the CJEU of March 5, 1996, Brasserie du pêcheur and Factortame, C-46/93 and C-48/93, EU:C:1996:79, para. 51; of March 24, 2009, Danske Slagterier, C-445/06, EU:C:2009:178, para. 20; and of December 10, 2020, Euromin Holdings (Cyprus), C-735/19, EU:C:2020:1014, para. 79. See also: Judgement of the CJEU of December 22, 2022, JP v. Ministre de la Transition écologique, Premier ministre, C-61/21, EU:C:2022:1015, paras. 43–44 and the cited case law.

[37] The CJEU pointed out that, in light of the period referred to in the national court's submissions, not only the provisions of the Detective 2008/50 are relevant, but also those of Directive 96/62 (Council Directive 96/62/EC of September 27, 1996 on ambient air quality assessment and management, OJ L 296, 21.11.1996*), Directive* 1999/30 (Council Directive 1999/30/EC of April 22, 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L 163, 29.6.1999*)*, Directive 80/779 (see footnote No. 9*)* and Directive 85/203 (see footnote No. 9*)*. See Judgement of the CJEU of December 22, 2022, JP v. Ministre de la Transition écologique, Premier ministre, C-61/21, EU:C:2022:1015, para. 41.

[38] Judgement of the CJEU of December 22, 2022, JP v. Ministre de la Transition écologique, Premier ministre, C-61/21, EU:C:2022:1015, para. 54.

[39] Ibid., para. 55.

[40] Ibid., para. 56.

[41] Ibid., para. 57.

[42] Ibid., paras. 58–59. See also the cited case law.

[43] Ibid., paras. 60. See also the cited case law.

under the national legal orders of Member States[44] or periodic penalty payment orders to ensure that Member States meet the requirements of these directives.[45]

On the contrary, on May 5, 2022, Advocate General Kokott took the view that an infringement of the limit values set under Directive 2008/50/EC may give rise to entitlement to compensation from the state under the classic conditions for state liability. Even if the CJEU did not follow her Opinion and concluded its assessment on the first condition, the more `futuristic´ Opinion of Advocate General Kokott can serve as a guideline for domestic courts in the future. Therefore, her opinion is as follows:

Advocate General Kokott stated that the first condition is fulfilled. The limit values for pollutants in ambient air and the obligation to improve ambient air quality are intended to confer rights on individuals.[46] Articles 7 and 8 of Directive 96/62, read in conjunction with the limit values for nitrogen dioxide and PM10 in Directive 1999/30, establish a clear and unconditional obligation to comply with these limit values. The limit values have existed since January 1, 2005, with respect to PM 10 and from January 1, 2010, with respect of nitrogen dioxide. The Advocate General also noted that the Member States, in accordance with Article 7(3) of Directive 96/62, only had to take measures to reduce the duration of exceedance to a minimum. In doing so, they had to strike a balance between conflicting interests. The second obligation is sufficiently clear only in the aspect of exceeding the limits of the margin of discretion.[47] Furthermore, Article 13(1) of Directive 2008/50 establishes a precisely defined, directly effective obligation on the part of Member States to prevent the exceedance of the limit values for the air pollutants covered.[48] In addition, Article 23(1) imposes a clear and independent obligation to establish an air quality plan that must comply with certain requirements. This obligation is triggered by the infringement of the limit values.[49]

The standard of liability is determined by the `sufficiently serious breach´ test.[50] Advocate General Kokott submitted that an exceedance of the limit values for ambient air quality without a corresponding plan to remedy the exceedance satisfies the second condition.[51] Although the question of whether the exceedance of the limit values constitutes a serious infringement of EU law is unclear,[52] a sufficiently serious breach is reached when the limit values are exceeded without the adoption of an adequate air quality improvement plan. In addition, according to case law, a breach of EU law is sufficiently serious if it persists despite a judgement finding the breach in question.[53]

---

[44] Ibid., para. 63.
[45] Ibid., para. 64.
[46] Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 103. For a detailed analysis, see paras. 22–103.
[47] Ibid., para. 54.
[48] Ibid., para. 68.
[49] Ibid., para. 69.
[50] Craig & de Búrca 2020, 296.
[51] Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, paras. 112 and 125. For a detailed analysis, see paras. 106–125.
[52] Ibid., paras. 108–112.
[53] Ibid., para. 107. See endnote No. 85: Judgements of the CJEU of March 5, 1996, Brasserie du pêcheur and Factortame, C-46/93 and C-48/93, EU:C:1996:79, para. 57; of December 12, 2006, Test Claimants in the FII Group Litigation, C-446/04, EU:C:2006:774, para. 214; of May 30, 2017,

Regarding the third and final condition, Advocate General Kokott warned that the real hurdle to a successful compensation claim is proving a direct causal link between the serious infringement of air quality rules and concrete damage to health.[54] Although the limit values are based on the assumption of significant damage to human health, they do not prove that the suffering of an individual is attributable to the exceedance of the limit values and an insufficient air quality plan in terms of legally relevant causation.[55] However, the fact that something is difficult to prove should not rule out a particular legal basis for the protection of individuals in advance.

2.3. Problems of causation

As previously mentioned, one of the key problems faced by an individual when it comes to claims for damage caused by pollution is the question of causation. In principle, national courts determine ways to prove causation and the standards of proof. Member States approach this issue differently by applying different theories of causation and standards of proof. However, when applying EU law, they must observe the principles of equivalence and effectiveness.[56] This means that the rules of causation should be applied without distinction, whether the infringement alleged is of EU law or national law (where the purpose and cause of the legal action are similar); conversely, the application of such rules should not make it virtually impossible or excessively difficult to obtain compensation for the damage suffered.

As stressed by Advocate General Kokott in her opinion in Case C-61/21, the injured party should prove: (i) that he or she has stayed for a sufficiently long time in an environment in which the limit values of ambient air quality have been seriously infringed; (ii) the existence of damage that can be linked to the relevant air pollution; and (iii) a direct causal link between the abovementioned stay and the damage claimed.[57] To ease the burden of proof, it was suggested applying a rebuttable presumption that a typical type of damage to health is attributable to a sufficiently long stay in an environment in which the limit value has been exceeded, similar to that of the ECHR in *Fadeyeva v. Russia* (see below). However, unfortunately, the CJEU did not give any further guidance on the issue of causation in case C-61/21, since it held that the first prerequisite for state liability was not fulfilled.

Causality brings many challenges to environmental matters, particularly in the case of climate-change litigation. Such cases require the claimant to prove not only that greenhouse gas emissions cause climate change (and that the defendant contributed to such emissions) but also that the claimant's damage is caused by climate change.[58] Moreover, because climate change is a consequence of various factors and stakeholders, it is particularly difficult to determine the proportion of defendants that contribute to the

Safa Nicu Sepahan v. Council, C-45/15 P, EU:C:2017:402, para. 31; and of January 18, 2022, Thelen Technopark Berlin, C-261/20, EU:C:2022:33, para. 47.

[54] Ibid., para. 126. For a detailed analysis, see paras. 126–142.

[55] Ibid., para. 130.

[56] Ibid., para. 128.

[57] Ibid., paras. 131–136.

[58] Sindico, Moïse Mbengue & McKenzie 2021, 681.

specific damage caused by climate change. Causality is typically proven as a standard of certainty. However, numerous legal orders enable a reduction in the standard of proof, for example, to the preponderance of evidence.[59]

Luciano Lliuya v. RWE AG,[60] a prominent case of climate change litigation before German courts, perfectly illustrates the problems that arise in proving causation (although it does not deal with state liability but with the liability of a private entity). In this case, a Peruvian farmer filed declaratory judgement and damages against RWE, Germany's largest electricity producer, stating that RWE, having contributed to climate change by emitting substantial amounts of greenhouse gases, bore some measure of responsibility for the melting of mountain glaciers near Huaraz.[61] The claimant demanded that the RWE pay 0.47% of the expected cost of erecting the flood protection. This percentage is the RWE's estimated contribution to global industrial greenhouse gas emissions since the beginning of industrialization. This case raises many issues regarding causation, the most contentious of which is the percentage contribution of the defendant. The district court dismissed the claimant's request for damage, also for the reason of causality (stating that no linear causal chain could be discerned amid the complex components of the causal relationship between particular greenhouse gas emissions and particular climate change impacts).[62] In German private law, causation has two components: the first is the but-for test (the alleged behavior has to be the actual cause of the damage in the sense of a *condictio sine qua non*), and the second is the doctrine of adequate causation (the alleged behavior should lead to a serious increase in the risk of harm, and the harm claimed should be expected to flow from the defendant's wrongful act within the natural course of events).[63] The causality must be proven beyond reasonable doubt.[64] German scholars mostly agree with the district court's decision in this case and deny causality under both but-for causation and adequate causation.[65] It seems indeed problematic, if not impossible, to establish a causal link between a particular stakeholder and a particular regional climatic condition (let alone the percentage of the contribution).

Considering the above-mentioned (and several others) problems regarding proving causality, the EU legislature proposed a (rebuttable) presumption of a causal link in the recent Proposal for a Directive on ambient air quality and cleaner air for Europe that conferred the right to compensation for damage to human health, as mentioned above. The proposed rule reads as follows: "*Where a claim for compensation is supported by evidence showing that the violation referred to in paragraph 1 is the most plausible explanation for the occurrence of the damage of that person, the causal link between the violation and the occurrence of the damage shall be presumed. The respondent public authority shall be able to rebut this presumption. In particular, the respondent shall have the right to challenge the relevance of the evidence relied on by the*

[59] See Pöttker 2014, 141–161 (Germany) and 306–323 (USA).
[60] Judgement of Essen Regional Court (Germany) of December 15, 2016, No. 2 O 285/15 (on appeal).
[61] See Climate Change Litigation Databases 2015.
[62] Ibid.
[63] Wagner & Arntz 2021, 12.
[64] Ibid., 13.
[65] Ibid., 15.

natural person and the plausibility of the explanation put forward."[66] This solution seems reasonable because it aims to strike a fair balance between the individual's and the state's burden of proof and thus aims to establish an effective right for an individual to be compensated where damage to his or her health has occurred.

3. The right to a healthy environment and state liability: a human-rights approach

It is widely accepted that human rights and the environment are synergistic, even to the extent of suggesting that environmental rights belong to the `third generation of human rights.´[67] The concept of an independent right to a healthy environment is not unproblematic.[68] Its recognition differs from state to state,[69] and the ECHR protects environmental rights in innovative ways.[70]

The right to a healthy environment is constitutionally protected in over 100 states.[71] At the national level, Portugal and Spain were the first countries to enshrine this right in their constitutions, in 1976 and 1978, respectively.[72] Since then, the right to a healthy environment has spread to other constitutions, more rapidly than any other new human right.[73] Approximately two-thirds of all constitutional rights refer to healthy environment.[74] For example, Article 72 of the Slovenian Constitution, entitled *"The right to a healthy environment,"* guarantees everyone the right to a healthy living environment in accordance with the law. To this end, the state establishes conditions for carrying out economic and other activities. The law sets out the conditions under which and to what extent a person causing damage to the living environment is liable to pay compensation. The same article grants animal protection against torture. An alternative phrasing of the specified object of protection includes the right to a clean, safe, favorable, wholesome, and ecologically balanced environment.[75] From the EU perspective, although environmental protection is not enshrined in constitutional texts in many Member States, it may be protected by other laws or case law.[76] Article 37 of the Charter of Fundamental

[66] Art. 28(4) of the Proposal for a Directive on ambient air quality and cleaner air for Europe. See European Commission 2022b.
[67] Council of Europe 2022, 9. An in-depth discussion of their historical development and legal recognition goes beyond the scope of this paper. For more, see, e.g.: Knox & Pejan 2018, Atapattu & Schapper 2019, Lavrysen 2012. See also: Miščević & Dudás 2021, 55.
[68] In its landmark decision, the Human Rights Council unequivocally recognized for the first time that having a clean, healthy, and sustainable environment is a human right. See Human Rights Council 2021.
[69] Knox 2018, 11.
[70] The ECHR provided indirect protection concerning environmental matters by its interpretation of some Convention rights. Morgera & Marín Durán 2021, 1043.
[71] Boyd 2019, 4. See also: Knox 2018, 11.
[72] Knox 2018, 11. See also: Boyd 2012, 5.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Morgera & Marín Durán 2021, 1047–1048.

Rights of the EU (hereinafter: EU Charter)[77] on environmental protection[78] is a clear manifestation of a lack of consensus among the EU Member States as to a substantive human right to a healthy environment[79] since it only belongs to the category of principles.[80]

We now turn to the protection offered to individuals against the state, as determined by the ECHR. Regarding the rights in question, the ECHR has frequently remarked that the Convention has no explicit right to a clean and quiet environment.[81] However, its case law shows a growing awareness of the link between the protection of individuals' rights and the environment,[82] which has led to a clear extension of the scope of Article 8 to cover environmental human rights.[83]

The ECHR's assessment of interference is relative and depends on all circumstances, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life.[84] An arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in a significant impairment in the applicant's ability to enjoy his or her home, private, or family life.[85] However, no issue arises if the complaint of detriment is negligible in comparison to the environmental hazards inherent in life in every modern city.[86] Environment-related issues may also be addressed in the context of other provisions of the Convention, such as Articles 2, 3, and 10 and Article 1 of Protocol No. 1.[87]

The following is a presentation of two ECHR judgements that often guide national courts in interpreting state liability for damages in alleged breaches of the right to environmental protection (as illustrated in Section 4). In some respects, parallels can be drawn in the case of C-61/21. However, the principles of the assessments are quite different.

[77] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016.
[78] Art. 37 of the EU Charter reads: "*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.*"
[79] Morgera & Marín Durán 2021, 1048.
[80] Ibid., 1042, 1053–1055, and 1060–1063.
[81] Lafferty 2018, 561.
[82] Council of Europe 2022, 19.
[83] Lafferty 2018, 561 and the cited case law.
[84] The case of Dubetska and others v. Ukraine, ECHR judgement of February 10, 2011, para. 105 and the cited case law. See also: Hatton and Others v. The United Kingdom, ECHR judgement of July 8, 2003, para. 96; Ioan Marchiş and Others v. Romania, ECHR decision of June 28, 2011, para. 28 and the cited case law.
[85] Ibid.
[86] Ibid.
[87] Morgera & Marín Durán 2021, 1043–1044. For more, see: ECHR 2022.

3.1. The case of Fadeyeva v. Russia

In the case of *Fadeyeva*,[88] the applicant alleged that the operation of the Severstal steel plant, the largest iron smelter in Russia, close to her home endangered her health and well-being. She relies on Article 8 of the Convention.[89]

Like thousands of others, she and her family lived inside a zone that was supposed to separate the plant from the town's residential areas. The blocks of flats in the zone belonged to the plant and were mainly designated for the plant's workers and the applicant's husband among them.[90] The applicant, along with her family and various other residents, sought resettlement outside the zone.[91] The applicant claimed that the concentrations of certain toxic substances in the air near her home constantly exceeded and continues to exceed the safe levels established by Russian legislation.[92] She stated that this caused her poor medical condition because she suffers from various nervous system illnesses.[93]

In *Fadeyeva*, the ECHR established that Severstal steel plant operations did not fully comply with the environmental and health standards established in Russian legislation.[94] The ECHR did not establish that the applicant's health had deteriorated solely because of her living in the zone. Even under the assumption that the pollution did not cause any quantifiable harm to her health, it inevitably made applicant more vulnerable to various illnesses. Moreover, there was no doubt that this adversely affected her quality of life at home. Therefore, the ECHR accepted that the actual detriment to the applicant's health and wellbeing had reached a level sufficient to bring it within the scope of Article 8 of the Convention.[95]

In the aforementioned case, the ECHR considered two alternatives to solve the applicant's problem: resettlement of the applicant outside the zone and reduction of toxic emissions. First, the ECHR found that little, if anything, had been done to help applicants move to a safer area. Regarding the efforts of authorities aimed at reducing pollution, the ECHR noted that certain progress has been made since the 1980s. However, government programs and privately funded projects have not achieved the expected results. The ECHR accepted that given the complexity and scale of the environmental problems around the Severstal steel plant, such problems could not be resolved in a short period. However, the complexity and severity of the environmental problem did not mean that the authorities remained passive. On the contrary, they had to take "*reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8*," as established in the case of *Hatton and Others v. the United Kingdom*,[96] with the shortest delay possible.

[88] Case of Fadeyeva v. Russia, ECHR judgement of June 9, 2005.
[89] Ibid., para. 3.
[90] Ibid., paras. 10–11.
[91] Ibid., paras. 20–28.
[92] Ibid., paras. 29–4 3.
[93] Ibid., paras. 44–47.
[94] Ibid., para. 102.
[95] Ibid., para. 88.
[96] Case of Hatton and Others v. the United Kingdom, ECHR judgement of July 8, 2003, para. 98.

Given the seriousness of the situation, the *onus* was on the state to show how it dealt with environmental problems.[97]

The ECHR concluded that despite the wide margin of appreciation left to the state, it failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect her home and private life. The ECHR found a violation of Article 8.[98] The ECHR reached a similar conclusion in the cases of *Ledyayeva and Others*,[99] referring to the *Fadeyeva* judgement.

3.1. The case of Pavlov and others v. Russia

The recent case of *Pavlov and Others*[100] raised the question of whether the state's failure to take adequate protective measures to minimize or eliminate the effects of industrial air pollution constitutes a violation of Article 8 of the Convention.

The participants lived in Lipetsk, an industrial city in Russia.[101] They unsuccessfully brought proceedings against 14 federal and regional agencies. They claimed that the concentrations of harmful substances in the atmospheric air and drinking water in Lipetsk consistently exceeded the maximum permitted levels. The authorities failed to take meaningful measures, such as creating sanitary protection zones around the city's industrial undertakings. They requested that the court order defendants (federal and regional agencies) to take relevant measures. They also claimed EUR 10,500.00 for non-pecuniary damages.[102] These lawsuits and all subsequent national legal remedies were unsuccessful.[103]

Applicants turned to the ECHR and relied on Article 8 of the Convention. They complained that severe industrial pollution in Lipetsk endangered their health and impaired the quality of their lives for many years and that the state had failed to take effective protective measures.[104]

The ECHR reiterated that in order to fall within the scope of Article 8 of the Convention, complaints relating to environmental nuisances have to show, first, that there was actual interference with the applicant's private sphere and, second, that a level of severity was attained. Assessment of the minimum level is relative. Health risks present a relevant factor. In the absence of medical evidence, it cannot be said that industrial air pollution necessarily caused damage to the applicants' health. Nevertheless, the ECHR considered that it had been established based on the extensive evidence submitted that living in an area where pollution exceeded the applicable safety standards posed an increased risk to applicants' health. The ECHR also reiterates that severe environmental pollution may affect individuals' well-being and adversely impact their right to private

[97] See the case of Ledyayeva and Others v. Russia, ECHR judgement of October 26, 2006, paras. 103–104.
[98] See the case of Fadeyeva v. Russia, ECHR judgement of June 9, 2005, para. 134. Regarding the State's omission in the present case, see the Concurring Opinion of Judge Konvler.
[99] Case of Ledyayeva and Others v. Russia, ECHR judgement of October 26, 2006.
[100] Case of Pavlov and Others v. Russia, ECHR judgement of October 11, 2022.
[101] Ibid., para. 5.
[102] Ibid., para. 8.
[103] Ibid., paras. 11–13.
[104] Ibid., para. 53.

and family life without seriously endangering their health. The applicants, as long-term residents of Lipetsk, were exposed to air pollution above the relevant norms. The ECHR, therefore, considered that the material in the case supported the applicants' allegations that the level of pollution they experienced in their daily lives for more than 20 years was not negligible and exceeded the environmental risks inherent in living in any modern city.[105]

The ECHR further analyzed two main issues. First, the state has a positive duty to take reasonable and appropriate measures to secure applicants' rights under the first paragraph of Article 8 of the Convention. Second, whether the state, within its margin of appreciation, struck a fair balance between the competing interests of the applicants and the community as a whole, as required by paragraph 2 of Article 8 of the Convention. Official reports clearly indicate that industrial air pollution was the main factor contributing to the overall environmental deterioration of Lipetsk. The authorities issued operating permits for industrial undertakings in the city, regulated their activities, conducted environmental assessments, and conducted inspections. The environmental situation was not the result of a sudden or unexpected change in events. In contrast, it is long-standing and well known. Domestic authorities were aware of the continuing environmental problems and applied certain sanctions to improve them. The ECHR concluded that the authorities in the present case were in a position to evaluate the pollution hazards and take adequate measures to prevent or reduce them. After an extensive analysis of all the measures taken and an assessment of their actual effectiveness in light of the appellants' complaints, the ECHR concluded that there had been a violation of Article 8 of the Convention. Therefore, domestic authorities failed to strike a fair balance in carrying out their positive obligations to secure the applicants' right to respect their private lives.[106]

4. State liability for emissions from road and rail traffic in national law: the slovenian experience

In the last two decades, Slovenian courts have faced massive claims for damages caused by air and noise pollution from road and rail transport. Individuals who lived along particularly busy roads and railroads (in the northeastern part of the country[107]) filed claims against the state, requesting compensation for nonpecuniary damage. They claimed to have suffered from air pollution, noise, and vibrations that exceeded the `normal limits.´[108] Consequently, they claimed to have several health issues, including headaches, problems with concentration, insomnia, etc. They asserted that the state violated their personal right to a healthy living environment.

Case law shows that most have succeeded in their claims against the state, and the latter had to pay damages in the amount of several tens of millions of euros. The courts

[105] Ibid., paras. 58–71.
[106] Ibid., paras. 77–93.
[107] Before the construction of the highway in Pomurje in 2008, all freight traffic with Hungary was carried out on regional roads that led through settlements.
[108] See, e.g., Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 254/2008 of May 8, 2008.

grounded the state's liability in Article 72 of the Slovenian Constitution (the right to a healthy living environment) and held that the state is obliged to ensure a healthy living environment. It follows from the case law that the state should have taken adequate measures in the field of transport so that individuals would not be exposed to excessive noise.[109] If such measures are not taken (even if due to a lack of resources) and the environment is polluted beyond permissible limits, the state shall be liable for damages due to a violation of the constitutional right to a healthy living environment.[110] The courts have awarded damages on the basis of a nuisance, which is an institution of private law (Art. 133(3) of the Slovenian Obligations Code[111]) and – in cases of generally beneficial activities (such as traffic) – allows compensation for damage that exceeds the `normal limits.´[112]

The reasoning of the courts in the above-mentioned cases was highly disputed by Slovenian scholars.[113] Možina argues that the concept of civil liability for damage due to an excessive nuisance between private individuals shall not be automatically (i.e. without any modifications) transferred to relationships between the state and private individuals.[114] He agrees that the state should take every reasonably possible measure to ensure a healthy living environment for its citizens, but it can hardly guarantee a healthy environment in the sense of the strict liability of the state for nuisances exceeding the `normal limits´ (as held by the courts).[115] Namely, as a result of the application of such strict liability, the state was liable regardless of fault for the entire damage of individuals suffering from nuisances above the `normal limit.´ The private law approach is based on the idea that whoever benefits from an activity that causes an excessive nuisance should also bear the costs of such an activity, including damage. However, this approach is not (entirely) applicable to the state, because the benefit from such traffic cannot be considered profitable in the abovementioned sense. Instead, courts should apply Article 26 of the Constitution, which establishes a legal framework for the liability of the state based on the principle of fault for the wrongful exercise of authority.[116] A modified approach to liability for excessive nuisance should also enable courts to strike a proper balance between the public and private interests.[117]

---

[109] See, e.g., Decision of the Higher Court in Ljubljana (Republic of Slovenia), No. III Cp 2607/2014 of October 28, 2014.

[110] Ibid.

[111] Art. 133 (3) of the Obligations Code reads: "*If damage arises during the performance of generally beneficial activities for which permission has been given by the relevant authority it shall only be possible to demand the reimbursement [sic!] of damage that exceeds the normal limits*." Similar provisions can also be found in other States of former Yugoslavia; for Serbian law (and its application in Serbian case law), see Miščević & Dudás 2021, 65. For the practice in other countries see e.g.: Orosz F et al. 2021, 99–120.

[112] `Normal limits´ is a legal standard that is defined by the court, taking into consideration all legally relevant circumstances of the case and limits defined by administrative law.

[113] See Možina 2018.

[114] Možina 2018, 187 et seq.

[115] Ibid., 186.

[116] Ibid., 188.

[117] Ibid.

These arguments contributed significantly to the turnabout in jurisprudence in 2020. In a set of decisions,[118] the Supreme Court changed its legal reasoning and adopted a more restrictive approach towards state liability. Instead of applying strict liability for nuisances exceeding `normal limits´ as established in private law, it referred to Article 26 of the Constitution, which is the legal basis for state liability based on the principle of fault for the wrongful exercise of authority.[119] The Supreme Court followed the line of argumentation suggested by Možina that the state does not profit from road and rail traffic in a way that would justify the use of strict liability. Conversely, such activity is in the public interest and not in the interest of the state. With reference to the concept of state liability as laid down in the Constitution, the Supreme Court held that it should be evaluated whether all conditions for such liability are met: (i) a damage event, (ii) the illegal conduct (or omission) of a state authority when exercising authority, (iii) legally relevant damage, and (iv) a causal link between conduct and damage. Regarding the second condition, illegal conduct, the Supreme Court stressed the importance of the state's actual and financial capabilities.[120] Conversely, to reduce or exclude state liability it should be taken into consideration to what extent the injured parties exercised their duty to mitigate – i.e. what they did to prevent or reduce damage.[121] Decisions of the courts of lower instances (to which the cases were returned for retrial) are still awaited. However, it is expected that courts will follow the guidance of the Supreme Court and take a more restrictive approach towards state liability, which will probably result in rejecting claims for damages in such cases.

The analysis of the Slovenian legal framework on state liability for excessive nuisance is of great importance in the context of the recent decision of the CJEU in Case C-61/21. Expressly, after rejecting the possibility of establishing state liability according to the rules of EU law, the CJEU held that the decision does not preclude Member States from establishing state liability according to the (stricter) rules of their national laws.[122] In Slovenian law, such liability would be evaluated according to the rules of Article 26 of the Constitution. As in the case of massive claims for damage caused by air and noise pollution from road and rail transport, the second prerequisite of the claim (i.e., the illegal conduct (or omission) of a state authority when exercising authority) seems the most difficult to establish. It can clearly be seen from the presented legal analysis that both theory and jurisprudence tend to interpret this condition rather strictly, thereby considering the actual and financial capabilities of the state.

[118] Decision of the Supreme Court of the Republic of Slovenia, Nos. II Ips 126/2019, II Ips 129/2019, II Ips 130/2019 of May 29, 2020. See also: Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 44/2021 of September 1, 2021.
[119] Decision of the Supreme Court of the Republic of Slovenia, Nos. II Ips 126/2019, II Ips 129/2019, II Ips 130/2019 of May 29, 2020, para. 24.
[120] Ibid., para. 26.
[121] Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 44/2021 of September 1, 2021, para. 19.
[122] Judgement of the CJEU of December 22, 2022, JP v. Ministre de la Transition écologique, Premier ministre, C-61/21, EU:C:2022:1015, para. 63.

5. Conclusion

This analysis shows that the concept of state liability for health damage caused by excessive air pollution is relatively nascent, at least at the EU level. As shown above, the CJEU has recently rejected the possibility of establishing Member States' liability for a breach of EU secondary legislation on air quality, reasoning that it does not confer rights on individuals. However, this might change soon, since the Commission has already proposed the revision of the Ambient Air Quality Directives, giving the right to compensation for damage to human health. Until then, state liability for damage caused by excessive air pollution could be established according to the existing national laws of Member States.

However, several constitutions worldwide recognize the right to a healthy environment as a human right. Although not explicitly mentioned in the Convention, the ECHR found a strong connection between a healthy living environment and the right to respect for private and family life (Article 8) and some further provisions. An arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in a significant impairment of an individual's ability to enjoy his or her home, private, or family life. Health risks and problems are relevant factors in the overall assessment of interference. Severe environmental pollution may affect an individual's well-being by adversely affecting his or her private and family life, without seriously endangering health. As mentioned, a healthy living environment as such is not protected by the Convention, but only by the impact of pollution and health problems on an existing Convention right.

In Slovenia, the right to a healthy living environment is guaranteed by the constitution (Article 72). In the last two decades, massive claims have been filed before civil courts by individuals, requiring the state to pay damages caused by air and noise pollution from roads and rail transport. These claims were based on Article 72 of the Constitution and the institution of nuisance, as established in tort law. The 2020 turnabout in the jurisprudence of the Supreme Court is of great importance to this topic. The Supreme Court rejected the application of unmodified rules on nuisances, as established in private law, as they did not allow weighting between private and public interests. Instead, special rules on state liability should apply, as in Article 26 of the Constitution. In addition, under the influence of the relevant ECHR case law, the Slovenian Supreme Court (as suggested by academics) emphasized the importance of the actual and financial capabilities of the state and the contribution of the injured party when establishing the liability of the state in each individual case.

Bibliography

1. Atapattu S & Schapper A (2019) *Human Rights and the Environment: Key Issues* (1st edn.), Routledge, Abingdon.
2. Bobek M (2020) The effects of EU law in the national legal systems, in: Barnard C & Peers S, eds., *European Union Law* (3rd edn.), Oxford University Press, Oxford, pp. 154–190.
3. Boyd R D (2012) The Constitutional Right to a Healthy Environment, *Environment: Science and Policy for Sustainable Development* 54(4), pp. 3–15, doi: https://doi.org/10.1080/00139157.2012.691392.
4. Boyd R D (2019) Right to a healthy environment: good practices, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* United Nations, A/HRC/43/53.
5. European Commission (2019) Fitness Check of the Ambient Air Quality Directives: Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air and Directive 2008/50/EC on ambient air quality and cleaner air for Europe, *Commission Staff Working Document, SWD(2019) 427 final,* https://commission.europa.eu/system/files/2020-04/swd_2019_0427_en.pdf [08.01.2023].
6. European Commission (2019) The European Green Deal, *Communication from the Commission, COM(2019) 640 final*, https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF [08.01.2023].
7. European Commission (2022) *European Green Deal: Commission proposes rules for cleaner air and water*, October 26, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6278 [4.1.2022].
8. European Commission (2022) Proposal for a Directive of the European Parlament and of the Council on ambient air quality and cleaner air for Europe, *COM(2022) 542 final, 2022/0347(COD)*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A542%3AFIN [28.11.2022].
9. Chi-Hsien C & Yue L G (2019) Asthma: Environmental and Occupational Risk Factors, in: Nriagu O J, ed., *Encyclopedia of Environmental Health: Volume I* (2nd edn.), Elsevier B. V., Amsterdam; Kidlington; Cambridge, pp. 207–216, https://www.sciencedirect.com/topics/earth-and-planetary-sciences/outdoor-air-pollution.
10. Climate Change Litigation Databases (2015) *Luciano Lliuya v. RWE AG*, December 15, 2016, https://doi.org/10.1016/B978-0-12-409548-9.11419-8 [04.01.2022].
11. Council of Europe (2022) *Manual on the Human Rights and the Environment (3rd edn.)*, 1 February, https://rm.coe.int/manual-environment-3rd-edition/1680a56197 [30.11.2022].
12. Craig P & de Búrca G (2020) The Application of EU Law: Remedies in National Courts, in: Craig P & de Búrca G, eds., *EU Law: Texts, Cases, and Materials* (7th edn.), Oxford University Press, Oxford, pp. 262–302.

13. European Court of Human Rights (2022) *Factsheet: Environment and the European Convention on Human Rights*, n.d. October, https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf [30.11.2022].
14. Human Rights Council (2021) *Resolution adopted by the Human Rights Council on 8 October 2021: Resolution 48/13 – The human right to a clean, healthy and sustainable environment*, October 8, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement [29.11.2022].
15. Knox J H (2018) Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,* United Nations, A/73/188, July 19.
16. Knox J H & Pejan R (2018) *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge.
17. Lafferty M (2018) Article 8: The Right to Respect for Private and Family Life, Home, and Correspondence, in: Harris D J, O'Boyle M, Bates E P & Buckley C M, eds., *Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, Oxford, pp. 501–570.
18. Lavrysen L (2012) *The Right to the Protection of a Healthy Environment: International and Comparative Perspective*, Lap Lambert Academic Publishing, Saarbrücken.
19. Misonne D (2021) The emergence of a right to clean air: Transforming European Union law through litigation and citizen science, *Review of European, Comparative & International Environmental Law* 20 (1), pp. 34–45, doi: https://doi.org/10.1111/reel.12336.
20. Miščević N & Dudás A (2021) The "Environmental Lawsuit" as an Instrument of Preventive Protection of the Constitutional Right to Healthy Environment in the Law of the Republic of Serbia, *Journal of Agricultural and Environmental Law* 16(31), pp. 55–69, doi: https://doi.org/10.21029/JAEL.2021.31.55.
21. Morgera E & Marín Durán G (2021) Article 37 – Environmental Protection, in: Peers S, Hervey T, Kenner J & Ward A, eds., *The EU Charter of Fundamental Rights: A Commentary* (2nd edn.), Hart Publishing, Oxford, pp. 1041–1063.
22. Možina D (2018) Road Traffic Nuisance in Slovenia: State Liability for Non-pecuniary Damage, *Review of Central and East European Law* 43(2), pp. 174–196, doi: https://doi.org/10.1163/15730352-04302003.
23. Orosz F, Suri N, Hrecska-Kovács R & Szöke P (2021) Constitutional protection of the environment with particular regard to the Hungarian, German, Italian and Belgian constitutional regulation, *Journal of Agricultural and Environmental Law* (31), pp. 99- 120, doi: https://doi.org/10.21029/JAEL.2021.31.99.
24. Pöttker E (2014) *Klimahaftungsrecht: Die Haftung für die Emission von Treibhausgasen in Deutschland und den Vereinigten Staaten von Amerika*, Mohr Siebeck, Tübingen.
25. Sindico F, Moïse Mbengue M & McKenzie K (2021) Climate Change Litigation and the Individual: An Overview, in: Sindico F & Moïse Mbengue M, eds., *Comparative Climate Change Litigation: Beyond the Usual Suspects,* Springer, Cham, pp. 1–33, doi: https://doi.org/10.1007/978-3-030-46882-8_1.

26. Wagner G & Arntz A (2021) Liability for Climate Damage under the German Law of Torts, *Social Science Research Network* 22 March 2021.
27. World Health Organization (2022) *Ambient (outdoor) air pollution*, December 19, https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health [04.01.2023].

Bartosz MAJCHRZAK*

Constitutional Framework for Planning Acts as Legal Forms of Administration's Activity in Environmental Protection (on the Example of Poland)**

Abstract

Planning acts constitute a very important instrument for conducting environmental protection policy in Poland. Despite the relative freedom of public authorities in shaping their provisions, these acts are adopted on the basis of explicit authorisations contained – in principle – in universally binding law, primarily in statutes. The aim of the article is to draw attention to the fact that a quite detailed normative framework for adopting environmental planning acts is also present at the level of the Constitution of the Republic of Poland. Determining its scope, however, requires defining the legal nature of the indicated acts, which is an issue that raises certain problems. They are visible especially in the context of the administrative law doctrine.

Keywords: Constitution of the Republic of Poland, environmental protection, planning act, normative act, Council of Ministers, local government, cooperation between the public powers, healthy environment, ecological security, principle of proportionality, social dialogue, right to a fair trial.

1. Introduction

Environmental planning acts form an extensive structure of related documents in the Polish legal system.[1] They are issued both at the central level and by local public administrative bodies (at all levels of local government). Among the above-mentioned acts, there are the so-called acts of general planning, but also acts relating to conducting highly specialised activities in specific areas of the state's territory.[2] All of them, as elements of the legal system of public administration in Poland, require the existence of specific legal grounds for adopting them. With regard to general acts, they follow from the Act of 6 December 2006 on the Principles of Development Policy[3] (hereinafter PDP) and the Act of 27 April 2001 – the Environmental Protection Law[4] (hereinafter EPL).

Bartosz Majchrzak: Constitutional Framework for Planning Acts as Legal Forms of Administration's Activity in Environmental Protection (on the Example of Poland). *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 52-72, https://doi.org/10.21029/JAEL.2023.34.52

* Associate Professor, Department of Administrative Science and Environmental Protection, Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw, Poland, b.majchrzak@uksw.edu.pl, ORCID: 0000-0001-5336-6717.

** *The research and preparation of this study was supported by the Central European Academy.*

[1] Górski & Kierzkowska 2012, 217.

[2] Ibid. 212–213.

[3] Journal of Laws of 2021, item 1057, as amended

[4] Journal of Laws of 2021, item 1973, as amended.

https://doi.org/10.21029/JAEL.2023.34.52

Specialist planning acts are regulated by numerous statutes in the field of environmental protection law. This study is limited to the analysis of the latter acts i.e. those based on EPL regulations, having assumed that this is sufficient to achieve the main purpose of their consideration.

In the context of the above-mentioned legal bases of environmental planning acts, the issue of key importance seems to be the constitutional framework for their adoption, because they result from the act of the highest binding force. They determine the actions of both the body adopting a specific planning act and the legislator establishing the statutory framework (systemic, substantive, or procedural) of these acts. Despite the importance of the issue, a rather surprising phenomenon can be observed that the problem of the constitutional framework of planning acts is, in fact, completely ignored in the Polish legal literature, and yet the connection between the provisions of the Constitution of the Republic of Poland of 2 April 1997[5] (hereinafter the Constitution, Fundamental Law) and planning acts in environmental protection is quite clearly visible. According to Art. 74 (1) of the Constitution, public authorities shall pursue policies ensuring the ecological security of current and future generations. Thus, the provision refers to the concept of administrative policy aimed at ensuring an appropriate state of the environment.[6] Administrative policy is defined as "*an ordered set of actions and omissions distinguished in the organisational structure of the public administration system of an entity, aimed at changing or maintaining the current state, and consisting in determining, weighing and selecting values significant for the entity implementing the administrative policy.*"[7] It should be emphasised that planning acts are considered the basic instrument of this policy as well as its formal expression.[8] Most often they are defined as: acts issued by public administration bodies setting out the goals, tasks, and directions of action of the addressees, together with an indication of the measures for their implementation.[9] It is worth noting, however, that the aforementioned goals, tasks, and directions are only a refinement of the category that is `original´ or `primary´ in relation to them, i.e. the value. In other words, planning acts will be acts of various legal form, prospective in nature, issued by public administration entities, specifying the values to be implemented and the means used to achieve this. The indicated group of these acts is to serve the implementation of the constitutional value of ecological security, which is clearly stated in Art. 74 (1) of the Constitution. This justifies the claim that Fundamental Law determines that the necessity to issue environmental planning acts at least indirectly within the limits set out, in particular, in constitutional regulations.

[5] Journal of Laws No. 78, item 483, as amended.
[6] Cf. Judgements of the Constitutional Court: of 6 June 2006, case ref. K 23/05 (OTK ZU no. 6/A/2006, item 62); of 28 November 2013, case ref. K 17/12 (OTK ZU no. 8/A/2013, item 125).
[7] Cieślak, 2013, 7.
[8] Cf. Gajewski 2017, 47.; Suwaj 2009, 309–310.
[9] Cf. Gajewski 2017, 66; Górski & Kierzkowska 2012, p. 186; Kokocińska 2014, 150–151; Wróbel 1990, 193.

2. Legal nature of planning acts in environmental protection

1. The issue affecting the scope of the provisions of the Constitution relating to the issue in question is the determination of the legal nature of environmental planning acts. This is part of a broader issue of the nature of all planning acts (regardless of their subject matter), defined in statutory regulations by various names, e.g. plan, programme, strategy, concept, priorities, study, policy, or report. Unfortunately, their legal qualifications often lead to divergent conclusions.

On the one hand, the legal doctrine aims to distinguish an independent, specific legal form of administration (apart from typical forms, e.g. a normative act, an administrative act, or a public-law contract) – the so-called planning acts, due to the possibility of indicating some of their common specific features.[10] On the other hand, however, it is pointed out that such a postulate is unjustified due to the fact that the heterogeneity of this category of acts takes the form of either a generally binding normative act, an internal normative act, an administrative act, or a material and technical act – being a different type of document such as a study, concept, development, design, or analysis.[11]

In this context, the problem of the legal nature of the so-called planned norm arises, the resolution of which directly influences the decision whether planning acts can be considered normative acts. In other words, it boils down to the controversy over the answer to the question whether a norm prescribing the pursuit of a certain goal or task (and therefore a value) by certain means[12] is a legal norm, and thus whether an act containing it is a normative act.

According to the first position, the significant differences between planned norms and legal norms make it impossible to include the planned norms in the category of legal norms. The first norms are of a concrete nature, as they define specific tasks that are to be carried out in a specified time. Moreover – unlike typical legal norms – they should be implemented `unconditionally´. Planned norms do not specify the circumstances whose occurrence would justify their application, and thus do not contain the classical hypothesis. Additionally, after completing the task (goal) set in them, they lose binding force and become pointless. Thus, the planned norms do not contain general and abstract rules of conduct that could be applied repeatedly.[13]

On the other hand, according to the opposite view, planned norms should be treated as legal norms – a special kind of general norms. This is because they may constitute a legal basis for other normative acts (other planning acts) or individual acts (including contracts or administrative acts).[14] Moreover, their normative nature is supported by the nature of their binding force – they are binding upon certain entities, and their implementation is ensured by various legal means.[15]

[10] Stahl 2013, 371–372.
[11] Ibid. 370; Gajewski 2017, 74.
[12] Cf. Szydło 2006, 150.
[13] Dąbek, 2007, 152; Szydło, 2004, 58–59.
[14] Cf. Brzeziński 1961, 39–46.
[15] Cf. Gosiewski 1975, 96.

2. All the above-mentioned problematic issues are fully related to the planning acts in environmental protection. Hence, the response to these doubts may take place, in particular, through the prism of the analysis of the indicated scope of the activity of public administration. Moreover, the results obtained in this way can be treated as relatively reliable in the universal dimension as well due to the large variety of environmental planning acts.

Therefore, first of all, it is appropriate to set the objective boundaries of the considerations. They result from Art. 14 (1) of the EPL, according to which the environmental protection policy is conducted on the basis of the development strategy, programmes, and programming documents indicated in the provisions of the PDP. They include in particular: the medium-term national development strategy, `other development strategies´, voivodeship development strategies, supra-local development strategies, and commune development strategies (Art. 9 PDP), programmes for the implementation of a partnership agreement (Art. 5 (1a) PDP), and operational and development programmes (Art. 15 (4) PDP).

The medium-term national development strategy is adopted by the Council of Ministers, specifying the basic conditions, goals, and directions of the country's development in the social, economic, and spatial dimensions for a period of 10–15 years, and detailed activities for a period of 4 years that are implemented by other development strategies, voivodeship development strategies, and programmes (Art. 9 (2) PDP). Therefore, the so-called `other development strategies´ should be `consistent´ with the medium-term strategy (Art. 13 (1) PDP). With the help thereof, the Council of Ministers or the voivodeship parliament (a body of a local government unit), by way of resolution, define the basic conditions, goals, and directions of development relating to sectors, areas, regions, or spatial development (Art. 9 (3) PDP). An example of such a `different strategy´ is the document *"National Environmental Policy 2030 – Development Strategy in the Area of Environment and Water Management."*[16] The voivodeship development strategy is to be `consistent´ with the previously mentioned strategies, i.e. the mid-term national development strategy and the national strategy for regional development (Art. 11 (1aa) of the Act of 5 June 1998 on Voivodeship Self-Government;[17] hereinafter VSG). It is adopted by the voivodeship parliament, which defines in particular: the strategic goals in the social, economic, and spatial dimensions, the directions of activities undertaken to achieve strategic goals, and the system of their implementation (Art.11 (1c) VSG). Identical elements should be included in the strategies of supra-local development and in particular those of communes adopted by the councils of the respective communes. Their `coherence´ with the voivodeship development strategy is also required (Art. 10e (2) and (3), Art. 10g (1) and (3) of the Act of 8 March 1990 on Municipal Self-Government[18]).

[16] Resolution No. 67 of the Council of Ministers of 16 July 2019 on the adoption of the *"National Environmental Policy 2030 – Development Strategy in the Area of Environment and Water Management"*, Monitor Polski of 2019, item 794.
[17] Journal of Laws of 2022, item 547, as amended.
[18] Journal of Laws of 2022, item 559, as amended.

Programmes for the implementation of the partnership agreement (concerning the use of funds from the European Union budget) are generally adopted by the Council of Ministers. They contain in particular: selected goals to be achieved in accordance with the partnership agreement, a description of the activities that may receive funding under this programme, a financial plan, and an indication of the institutional system – the institutions and entities involved in the implementation of the programme and their connections (Art. 14 and PDP). At the same time, when developing the draft of the above-mentioned partnership agreement, the medium-term development strategy of the country, `other development strategies´, and the voivodeship development strategy are taken into account (Art. 14e (3) PDP).

Operational and development programmes are to implement the above-mentioned development strategies (Art. 15 (1) PDP), defining, *inter alia*, the main goal and specific objectives in relation to the medium-term development strategy of the country or other development strategies, priorities, and directions of intervention and the programme implementation system (Art. 17 (1) PDP). These programmes take the form of resolutions of relevant authorities, in particular: the Council of Ministers, the voivodeship parliament, the poviat council, and the commune council (Art. 19 (2–4) PDP).

Pursuant to Art. 14 (2) of the EPL, the environmental protection policy is also carried out by means of voivodeship, poviat, and communal environmental protection programmes. They are adopted by means of resolutions, respectively, of the voivodeship parliament, poviat council, and commune council, as bodies of the relevant units of local government (Art. 18 (1) EPL). The regulations as to the content of these programmes is very sparse. They only state that the programmes are to be prepared in order to implement the environmental policy, `taking into account´ the objectives included in the above-mentioned development strategies, programmes, and programming documents indicated in the provisions of the PDP (Art. 17 (1) EPL). In particular, the statute does not require compliance of environmental protection programmes with each other. In addition, an important regulation is Art. 186 (1) of the EPL, according to which the authority competent to issue the emission permit (and thus the administrative decision) will refuse to issue it if this were inconsistent with the action programmes listed in Art. 17 of the EPL. Therefore, the legislator expressly allows, *inter alia*, that environmental protection programmes provide for specific restrictions directed at entities located outside the administrative apparatus, i.e. those `operating installations´ that require a permit.

The EPL is also the basis for the adoption of an `air protection programme´ by the voivodeship parliament in the event of exceeding the permissible or target level of substances in a given zone (Art. 91 EPL). The programme is primarily aimed at achieving these levels of substances in the air, and at the same time should take into account the objectives contained in other planning and strategic documents, including the national air protection programme, voivodeship environmental protection programmes, and regional operational programmes (Art. 91 (9b) EPL). The statute specifies the content of the air protection programme by including e.g. the indication of: the planned environmental effect of remedial actions, entities and bodies responsible for their implementation, action schedule, and obligations and limitations resulting from the programme (which may apply to administrative bodies, entities using the environment

and other natural persons; Art. 91 (7a) EPL). It should be emphasised that in the light of Art. 84 (1) of the EPL, the programme is created by means of an act of local law, i.e. a normative act generally applicable in a specific part of the territory of the state.

In the event that the permissible or target levels of substances in the air are exceeded in a large area of the country and the measures taken by local government authorities do not reduce the emission of pollutants into the air, the Minister responsible for climate may develop a `national air protection programme´. In the statute, this is defined as *"a document of a strategic nature, setting the goals and directions of activities that should be included in air protection programmes"* (Art. 91c (1) EPL). The Minister informs about the adoption of this document in the form of an `communiqué´ (Art. 91c (2) EPL). The regulations do not provide a basis for designating any rights and obligations in the national programme for entities remaining outside the administration structures.[19]

Another planning act resulting from the EPL regulations is the `short-term action plan´, which is a resolution of the voivodeship parliament. The premise for adopting it is the risk of exceeding the alarm, information, permissible, or target levels in the air in a given zone. The aim of the plan is to reduce the risk of such exceedances and to limit the effects and duration of such exceedances (Art. 92 (1) EPL). The short-term action plan should include in particular: a list of entities using the environment that are obliged to limit or stop the release of gases or dusts into the air from the installation, the manner of organising and restricting or prohibiting the movement of vehicles and other devices powered by internal combustion engines, the procedures of bodies, institutions, and entities using the environment, and the behaviour of citizens in the event of exceedances (Art. 92 (2) EPL). The elements defined in this way indicate that the document is an act of local law.[20]

On the other hand, the environmental protection programme against noise is adopted by the voivodeship parliament on the basis of strategic noise maps. They contain information about areas at risk of noise and areas where the permissible noise levels are exceeded. The programme includes in particular: a description of measures to reduce noise levels in the environment, including the schedule for their implementation, as well as obligations and limitations resulting from the implementation of this programme (Art. 119a (4) EPL). In the light of Art. 84 (1) of the EPL and the elements of the content of the environmental protection programme against noise specified in the statute, it should be considered an act of local law.

3. In particular, in the light of the above documents in the field of environmental protection, it is reasonable to say that the assessment of their legal nature cannot be reduced only to recognising them as a specific legal form of administrative activity – a planning act. More detailed findings are necessary from classifying these acts within a typical catalogue of administrative activities, especially as normative acts (generally binding or internal) or administrative acts. The main argument determining this is the need to define the scope of control of planning acts, including the protection of the addressees of these acts. The regulations specifying the control capacity of public authorities do not use the general concept of a planning act. Instead, they refer to the category of `normative act´ (e.g. Art. 79 (1) of the Constitution), `statute´ and `provisions

[19] Gruszecki 2019, 184.
[20] Cf. Dubowska 2015, 103–108.

of law´ (Art. 188 of the Constitution), `act of local law´, `administrative decision´, or *"a public administration act or action relating to rights or obligations under the law"* (Art. 3 (2) of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts[21]). Additionally, it is worth noting that since the Constitution does not refer to the concept of a planning act, this study would be difficult without more detailed distinctions. Whether we are dealing with a normative act or e.g. an administrative act is important from the point of view of the regulatory scope of certain provisions of the Constitution (e.g. Art. 93 (1) and Art. 94 of the Fundamental Law). As a result, this influences the establishment of the constitutional framework of environmental planning acts as referred to in the title of this paper, especially of those of competence-defining nature.

Considerations concerning the legal nature of the above-mentioned acts should be started with an assessment of their normative value. In this context, it can be noted that the environmental protection planning acts presented so far are documents with different content, *prima facie* unlike typical normative acts (statutes or regulations). In the analysed acts, there are so-called indicative provisions (data, information, and forecasts as to the state of reality and its development), influential ones (encouragement of specific actions with the help of psychological, organisational, or economic motivation), and imperative ones (directly defining the behaviour of the addressees by establishing binding goals, tasks, values, and methods of acting, associated with negative legal consequences in case of failure to implement them).[22]

From the point of view of qualifying planning acts as normative acts, the most important are of course the imperative provisions. Only they are characterised by one of the features of legal norms, namely the obligations resulting from them, i.e. prescribed or forbidden behaviour patterns of the addressee that are binding upon them.[23] Additionally, the answer to the question whether, due to the presence of such provisions in a given act, it can be considered a normative act requires the adoption of several suppositions. They have been developed in the jurisprudence of the Constitutional Court, for which the meaning of the concept of a normative act is extremely important, as it determines the scope of the authority's jurisdiction capacity.[24]

First, normative acts are understood as all acts which – regardless of their provisions – are qualified by the legislator as sources of law in terms of the Constitution (e.g. statutes, regulations, acts of local law). Second, normative acts are understood as all acts which – regardless of their name – contain legal norms, i.e. norms that are, in principle, general and abstract, with the proviso that nowadays legal doctrine does not emphasise the abstract feature, accurately pointing out that legal norms are often of a general and a specific nature[25]. Third, a specific presumption of the normativity of legal acts should be adopted which will ensure the broadest possible control of their constitutionality or legality, corresponding to the assumptions of a democratic state ruled

[21] Journal of Laws of 2022, item 329, as amended.
[22] Cf. Strzyczkowski 1985, 125; Strzyczkowski 1990, 147–149; Szydło 2006, 153–157.
[23] Cf. Ziembiński 1994, 73, 81.
[24] Federczyk & Majchrzak 2014, 153.
[25] Order of the Constitutional Court of 7 January 2016, case ref. U 8/15 (OTK ZU no A/2016, item 1).

by law.[26] Fourth, if we find any normative provision (novelty) in an act, it is a normative act.[27] Fifth, the normativity of an act may also be determined by provisions which, although they do not establish complete legal norms, are an element of a norm whose framework is included in another legal act.[28]

In the context of the above interpretative guidelines, it should be assumed that all the enumerated environmental planning acts can be considered normative acts.[29] This is, of course, dependent on the specific provisions adopted in a given act, which are shaped on the basis of relative freedom. Nevertheless, the provisions of the statutes provide grounds for formulating such content of the analysed documents as has a normative value. This conclusion includes the following elements of statutory regulations: (1) a clear indication that the planning act is an act of local law (the so-called formal criterion); (2) introducing a requirement that a given planning act be `consistent´ with another or included in another act;[30] (3) making the content of the administrative decision dependent on the provisions of the planning act; (4) an imperative to achieve goals, directions, or actions, the failure of which may cause negative legal effects (in particular in the form of an allegation of failure to perform public tasks); and (5) clear authorisation to formulate in the planning act obligations and limitations concerning specific entities, including those located outside the administrative apparatus. All these regulations show that in a given case we are dealing with a normative act.

In particular, the requirement of `consistency´ or `being included´ defining the relationship between two planning acts means that the entity adopting the `dependent´ act is guided by the legal norm (general and abstract) whose elements are determined by substantive and procedural statutory regulations, as well as relevant fragments of the `superior´ planning act. If we refer to the regulation contained in Art. 186 (1) of the EPL or a similar one, which makes issuing a decision dependent on the provisions of the planning act, we note that it defines a typical general abstract norm subject to specification in this decision. One of its components is the relevant provision of the planning act, which may shape the scope of rights or obligations of external entities.[31] Moreover, the imperative to perform a specific task does not mean that the planned norm containing it loses the character of a legal norm because it is concrete[32].

As mentioned above, the Constitutional Court also treats the feature of abstractness flexibly in assessing the normativity of an act. Moreover, striving to implement a strictly defined venture sometimes lies at the heart of typical normative acts

[26] Order of the Constitutional Court of 12 March 2020, case ref. U 1/17 (OTK ZU no A/2020, item 11).
[27] Judgement of the Constitutional Court of 12 July 2001, case ref. SK 1/01 (OTK ZU no 5/2001, item 127).
[28] Judgement of the Constitutional Court of 22 September 2006, case ref. U 4/06 (OTK ZU no 8/A/2006, item 109).
[29] With regard to the planning acts of the Council of Ministers – cf. Gajewski 2017, 131–133; for all planning acts indicated in PDP – cf. Kokocińska 2014, 150–153.
[30] In contrast: Judgement of the Constitutional Court of 3 July 2012, case ref. K 22/09 (OTK ZU no 7/A/2012, item 74).
[31] In contrast: Czerwiński 2018, 135.
[32] Cf. Dąbek 2007, 152; Szydlo 2004, 58–59.

– statutes – without depriving them of their normative value.[33] In addition, the imperative to achieve a strictly defined state of affairs is, on the grounds of the planning act, a repeatable rule of behaviour, `repeatedly applied´, because it requires taking a number of specific actions contributing to the achievement of the desired result. At the same time, the lack of specified circumstances in which the planned norm is applicable (no clear indication of its hypothesis) also does not constitute an argument against its normativity. Legal doctrine has long distinguished the construction of the so-called task-oriented (task-oriented directional) norm,[34] which is characterised by the fact that it orders a specific entity of public administration to implement or strive to achieve given values (e.g. a voivode is obliged to prevent threats to life and health). The normative definition of the conditions of behaviour may be very general or even omitted, so it is not the actual state of affairs that will update the task and directional norms but the intent of the acting subject.[35] The same situation is shaped on the grounds of the planning act, defining only goals, tasks (values), and directions of action.

To sum up, bearing in mind the guidelines for assessing the normativity of an act adopted in the jurisprudence of the Constitutional Court, planning acts in the protection of the environment may be considered normative acts. Taking into account the addressees of the imperative provisions of these acts, they include both acts of universally binding law and acts that are binding only within the structure of public administration bodies.

3. Constitutional determinants of a systemic and competence nature

1. First of all, referring to the systemic and legal context, it is worth considering whether the Fundamental Law contains regulations indicating entities that should be assigned tasks and competences in the field of environmental protection to be implemented by means of planning acts. This question is answered in Art. 146 (1) and (2) of the Constitution,[36] which introduces the presumption of the competence of the Council of Ministers to `conduct the policy of the state´, which can be rebutted by the opposite evidence, i.e. the normative competence of another public authority body.[37] This presumption should also be understood as allowing any public action necessary or possible to be taken for the purpose of policy-making.[38] At the same time, this `conducting´ is a complex process, embracing: development of specific concepts of solutions (current, medium-, and long-term), taking decisions in an appropriate legal form, their implementation by the Council of Ministers itself and its supervision of their

[33] E.g. the Act of 7 September 2007 on the Preparation of the Final Tournament of the UEFA European Football Championship EURO 2012 (Journal of Laws of 2020, item 2008); the Act of 24 February 2017 on Investments in the Construction of a Waterway Connecting the Vistula Lagoon with the Bay of Gdańsk (Journal of Laws of 2021, item 1644).
[34] Cf. Wróbel 1990, 213–216.
[35] Cieślak 1992, 63, 68.
[36] Pursuant to these provisions: *"The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland. The Council of Ministers shall conduct the affairs of State not reserved to other State organs or local government"*.
[37] Wyrzykowski 1999, 438.
[38] Sarnecki 2001, 6.

implementation by other bodies, controlling the course of this implementation, and, if necessary, correcting it.[39] Undoubtedly, adoption by the Council of Ministers of planning acts which are an expression of `specific concepts´ in the field of identifying, weighing, and selecting significant values to be implemented (cf. the definition of `administrative policy´ quoted at the beginning of this study) is an element of the process.

The objective scope of the above policy covers all areas of social relations, regardless of whether they were listed in the exemplary list contained in Art. 146 (4) of the Constitution.[40] In particular, therefore, the policy pursued by the Council of Ministers, including when using planning acts, relates to environmental protection. This is confirmed in the above-mentioned regulations on development strategies, programmes, and programming documents resulting from the provisions of the PDP in connection with Art. 14 (1) EPL. At the same time, it is worth pointing out that Art. 146 (4) of the Constitution clearly empowers the Council of Ministers to *"ensure the security (internal and external) of the state"* (cf. points 7 and 8 of this provision). This concept includes, *inter alia*, *"ensuring ecological security for present and future generations"*, as stated in Art. 74 (1) of the Constitution.[41] Therefore, this aspect of state policy should be of particular concern to the Council of Ministers, and thus an important element of the content of the planning acts adopted by the indicated body.

2. In opposition to such an assignment of tasks and competences, one can find the regulation of the Constitution according to which the local government participates in the exercise of public authority by performing a significant part of public tasks assigned to it on the basis of the subsidiarity principle (Art. 16 (2) in connection with the preamble to the Constitution). What particularly results regarding this principle is that the competences to perform public administration are entrusted to the lowest possible level, being as close to the citizen as possible (in this order: commune, poviat, voivodeship), and at the same time capable of performing tasks.[42] In the analysed context, this means the necessity to guarantee in statutes a significant scope of powers for local government bodies to adopt environmental planning acts. We are dealing with the implementation of this assumption on the basis of regulations concerning voivodeship, poviat, and communal environmental protection programmes as well as the air protection programme, short-term action plan, and programme of environmental protection against noise. All of these are the subject of resolutions of the relevant bodies of local government units.

Against the background of these statutory regulations, a certain regularity can be seen that reflects the constitutional assumptions. These planning acts which are more of an implementation nature in relation to environmental protection policy provide for subjectively, objectively, and territorially specific values (goals, tasks) and measures for their implementation; in particular, they result in orders or prohibitions directed at entities located outside the public administration system and are adopted by government

[39] Ibid. 4–5.
[40] Ibid. 9.
[41] Cf. dissenting opinions of the Judges: Mirosław Granat and Teresa Liszcz to the Order of the Constitutional Court of 20 May 2009, case ref. Kpt 2/08 (OTK ZU 5/A/2009, item 78); Jurgilewicz 2013, 161.
[42] Bąkowski 2007, 79.

bodies of a commune, poviat, or voivodeship. On the other hand, the sphere of general environmental planning, taking into account generally defined values (goals, tasks), a general reference to the entire territory of the state, and the harmonisation of environmental values and values from the sphere of other social relations, is the domain of the Council of Ministers, including the Minister responsible for the environment.

3. The regulation of environmental planning acts presupposes that their adoption is connected with the necessity to include in their content as well the axiology of other spheres of state influence for which different public authorities are responsible, and that the implementation of the value of a given act may take place at different levels of territorial division – i.e. central, voivodeship, poviat, and commune. These are the premises for making reference in the planning acts in environmental protection to the constitutional principle of cooperation between the public powers. This is because in those cases where the scopes of activity of two or more bodies of public authority – objectively or territorially designated – intersect,[43] there is a basis for the application of the *"systemic principle of cooperation between the public powers, aimed at ensuring the integrity and efficiency of public institutions"* (cf. preamble to the Constitution).[44] The forms of implementing this principle may be very diverse and include in particular the obligation of the authority adopting the planning act to consult with other authorities or to seek their opinion regarding its draft[45] (cf. Art. 6 PDP, Art. 91 (1), Art. 92 (1), Art.119a (6) EPL).

4. One of the obvious foundations of a democratic state ruled by law (cf. Art. 2 of the Constitution) is the principle of legalism,[46] which in Art. 7 of the Fundamental Law takes the following wording: *"The organs of public authority shall function on the basis of, and within the limits of, the law"*. At this point, it will be referred to the normative basis for the application of a specific legal form of the environmental planning act.

Taking into account the previous findings concerning the nature of this act (as a normative act), the constitutional determinant contained in Art. 94 in conjunction with Art. 87 (2) of the Constitution should be indicated. Pursuant to this regulation, planning acts of local government bodies, containing legal norms generally applicable in the area of operation of these bodies, may be established only *"on the basis and within the limits of authorisations contained in the statute"*. In other words, a direct basis of the law-making competence of a competent authority, other than a constitutional provision, is required in a specific scope and form.[47] This authorisation must be included in the `statute´, i.e. in an appropriate normative act of the parliament, established in a special procedure regulated essentially in the Constitution itself.[48] The above-presented regulations relating to environmental planning acts indicate that constitutional orders are *in genere* implemented in this respect. Some doubts, however, are raised by these authorisations, which do not clearly indicate the form of the local law act but require interpretation on

[43] Biernat 1979, 38.
[44] Cf. Judgements of the Constitutional Court of: 24 July 2013, case ref. Kp 1/13 (OTK ZU no 6/A/2013, item 83); 20 June 2017, case ref. K 5/17 (OTK ZU no A/2017, item 48).
[45] Cf. Błachucki 2019, 106, 108; Ofiarska 2008, 18.
[46] Sokolewicz 2007, 3–4.
[47] Działocha 2001, 2.
[48] Garlicki 2006, 130–131.

the basis of the content and effects of a given planning act (this applies to voivodeship, poviat, and communal environmental protection programmes or short-term action plans).

The limits of issuing acts of internal law (also called `acts of internal management´ or `internally binding acts´) are determined mainly by Art. 93 of the Constitution. It expressly refers only to resolutions of the Council of Ministers and regulations of the Prime Minister and ministers. Nevertheless, the Constitutional Court rightly assumes that all acts of domestic law (of which the constitutional catalogue is merely an example) must comply with the requirements of Art. 93 of the Constitution[49]. The features of such an act include the following: 1) it may apply only to organisational units subordinate to the authority issuing the act (Art. 93 (1) of the Constitution); 2) may only be issued pursuant to a statute (Art. 93 (2) of the Constitution); 3) is subject to control of compliance with generally applicable law (Art. 93 (3) of the Constitution); and 4) may not constitute the basis for decisions against citizens, legal persons, or other entities (Art. 93 (2) of the Constitution), because in no case may it bind entities that are not subject to the authority issuing such an act[50]. However, in the judgment of 28 June 2000, case ref. K 25/99[51], the Constitutional Court stated that the above `subordination´ is *"a constitutional and legal bond in which superior organisational entities may interfere, in an objectively and constitutionally defined scope, in the activities of subordinated entities at every stage and to the extent, by means of freely selected for a given situation of measures"*. The Court also found that *"the criterion of organisational subordination (...) should be understood more broadly than hierarchical subordination in the meaning adopted in administrative law."*[52]

The criteria for distinguishing acts of internal law adopted in the Constitution give rise to some doubts in light of the regulations in the acts of environmental planning. Defining the relationship between these acts in the form of `consistency´ or `being included´, which in fact means binding the body adopting the `dependent´ act with another act, refers in particular to the relationship between: (1) the Council of Ministers and the voivodeship parliament (e.g. voivodeships with a medium-term national development strategy); (2) the Council of Ministers and the poviat council or commune council (e.g. an order to include in the poviat and communal environmental protection programme the goals included in the development strategies); (3) the minister and the voivodeship parliament (requirement to include the national air protection programme in air protection programmes adopted by the voivodeship government); and (4) the voivodeship parliament and the commune council (commitment to the coherence of the commune development strategy with the voivodeship development strategy). In this respect, there are *prima facie* links between entities independent of each other, that is, between which there is no `subordination´ within the meaning of Art. 93 of the Constitution. Despite this, the legislator introduced competence norms, including: a resolution of the Council of Ministers, a ministerial communiqué (on the national air protection programme), or a resolution of the voivodeship parliament (without clearly

[49] Judgements of the Constitutional Court of: 1 December 1998, case ref. K 21/98 (OTK ZU no 7/1998, item 116); 19 October 2010, case ref. K 35/09 (OTK ZU no 8/A/2010, item 77).
[50] Ibid.
[51] OTK ZU no 5/2000, item 141.
[52] Ibid.

indicating that it is an act of local law). The aforementioned acts may contain normative content addressed to the organs of local government units, the independence of which has been guaranteed in Art. 165 (2) of the Fundamental Law, which excludes the relationship of subordination described in Art. 93 (1) of the Constitution. In this context, environmental planning acts affecting entities outside the circle of organisational units subordinate to the authority issuing a given act should be established in the form of a generally binding normative act (i.e. a regulation of the Council of Ministers, a ministerial regulation, or an act of local law).[53] The legal literature, however, indicates the possibility of adopting a `compromise´ solution, i.e. distinguishing a third category of sources of law intermediate between generally applicable acts and internal law. It is referred to as `*sui generis* sources of law´, `informal sources of law´, or `unorganised sources.´[54] Nevertheless, the distinguished concept contradicts the intentions of the authors of the Constitution, for whom the constitutional system of sources of law is dualistic and dichotomous. For warranty reasons (primarily towards an individual), it is based on an exhaustive division into the sources of universally binding law and the sources of internal law.[55] Thus, it excludes the existence of any third, intermediate category of sources of law.[56]

5. The consequence of distinguishing environmental planning acts as normative acts is the necessity to refer them to the principle of the hierarchical structure of the system of legal sources, which can be derived from Art.8 (1), Art. 87, Art. 91 (2) and (3), Art. 92 (1), Art. 93 (3), Art. 94, and Art. 188 of the Constitution. One of its main consequences is the requirement that the content of the norms contained in planning acts comply with the higher-order norms,[57] i.e. statutes, ratified international treaties, the law established by an international organisation, and the Constitution, and in relation to internally binding acts also other acts of universally binding law. It is worth noting that the application of this rule is problematic in the context of the statutory dependence of the content of the planning act – an act of local law (e.g. air protection programme) on the provisions of a resolution of the Council of Ministers or a communiqué of the minister responsible for climate. It means the introduction of a requirement that an act of universally binding law must conform to an internal act, which is inconsistent with the constitutional regulation. This may constitute another argument in favour of the legitimacy of statutory granting to the above-mentioned acts of environmental planning (i.e. the resolution and the communiqué) of the value of generally binding law.

4. Constitutional determinants of a substantive nature

1. Referring to the constitutional framework for shaping the key elements of the provisions of environmental planning acts, i.e. the values that require implementation and the means to achieve this, the axiological function of the Fundamental Law should

[53] Cf. Gajewski 2017, 136–137.
[54] Cf. Błachucki 2014, 121; Kokocińska 2014, 152–153; Stahl 2013,365.
[55] Cf. Judgement of the Constitutional Court of 12 December 2011, case ref. P 1/11 (OTK ZU no 10/A/2011, item 115).
[56] Ibid.; Garlicki 2006, 127.
[57] Cf. Kordela 2016, 20–21.

be indicated in the first place.[58] This act fully delimits the field of axiological choices of the `sub-constitutional´ legislator (as well as the organs applying the law), which includes not only the catalogue of values subject to implementation, but also the definition of their content.[59] In other words, it is from the Constitution that the essential values that should be achieved through planning acts derive. At the same time, constitutional values will often be detailed on the basis of these acts (e.g. constitutional value: `ecological security´ – with the more specific value: `healthy air´).

The catalogue of constitutional values related to environmental protection results from Art. 5, Art. 31 (3), Art. 68 (4), Art. 74, and Art. 86 of the Fundamental Law. Taking into account the jurisprudence of the Constitutional Court, these provisions are the basis for the reconstruction of values in the form of: `healthy environment´[60], `ecological security´ (understood as *"obtaining such a state of the environment that allows for a safe stay in this environment and enables the use of this environment in a way ensuring human development"*),[61] and *"wide access to information on the state and protection of the environment"*. However, only the last value is the source of the corresponding subjective right of the individual – cf. Art. 74 (3) of the Constitution.[62] The remaining norms mentioned above do not constitute the right to `live in a healthy environment´[63] or any other subjective rights on the part of the individual.[64]

Against the background of the aforementioned regulations, one can additionally ask about the value (and its content) which results from the constitutional obligation to protect the environment (included in Art. 5, Art. 74 (2), and Art. 86 of the Constitution). It should be assumed that it does come down not only to a `healthy environment´ and `ecological security´, but refers to all positive conditions of the `environment´ and its state – e.g. non-deteriorated, or – more broadly – optimal from the point of view of various environmental measures (e.g. valuable habitat, bio-diversity, and so on).

2. Acts of planning (and not only environmental planning) are a natural plane on which the authorities responsible for their adoption make decisions resolving `axiological conflicts´. They appear in particular when the implementation of a specific environmental value requires restrictions in the implementation of another value or vice versa (e.g. environmental security versus freedom of economic activity or property). Then it is necessary for the public authority to apply the `value weighting mechanism´, which is also provided for by the Fundamental Law. In such a situation, shaping the content of the environmental planning act should first of all take place in accordance with the `principle of proportionality´. In the first place, it results from Art. 31 (3) of the Constitution, which, however, applies only to the axiology of protection of human and

[58] Kryszeń & Prokop 2017, 21.
[59] Cieślak 2017, 183.
[60] Judgement of the Constitutional Court of 13 May 2009, case ref. Kp 2/09 (OTK ZU no. 5/A/2009, item 66).
[61] Judgements of the Constitutional Court: of 6 June 2006, case ref. K 23/05 (OTK ZU no. 6/A/2006, item 62); of 28 November 2013, case ref. K 17/12 (OTK ZU no. 8/A/2013, item 125).
[62] Pursuant to this provision: *"Everyone shall have the right to be informed of the quality of the environment and its protection."*
[63] Judgement of the Constitutional Court, case ref. Kp 2/09.
[64] Judgement of the Constitutional Court, case ref. K 23/05.

civil rights and freedoms defined in the Fundamental Law. Therefore, in particular, it concerns interference with *"wide access to information about the environment and its protection"*, but does not refer to interference with a `healthy environment´ or `ecological security´, due to the lack of constitutional subjective rights in this regard. Therefore, `complementarily´, the principle of proportionality is also derived from Art. 2 of the Constitution and the general clause of the democratic state ruled by law. According to the Constitutional Court, this results in the conditions for the legal limitation of the values constituting the axiological foundation of the rights of variously understood public entities (especially local government units), as well as human and civil rights and freedoms guaranteed only at the statutory, not constitutional, level.[65] Thus, the conditions resulting from Art. 2 of the Constitution may be relevant, for example, in a situation of a collision of values in the form of `optimal state of the environment´ and `independence of local government´ (especially in the financial dimension). The conflict will manifest itself, for example, in the context of imposing by a planning act new environmental protection tasks on this local government without increasing revenues to the local budget at the same time.

Under both Art. 31 (3) and Art. 2 of the Constitution, the value weighting mechanism influencing the results of environmental planning comes down to the obligation to meet the following conditions: (a) suitability – the introduction of limitations in the implementation of a certain value can lead to the achievement of another value; (b) necessity – restrictions are necessary to protect this other value; (c) proportionality *sensu stricto* – the positive effects in the form of the realisation of a given value adequately balance the lower degree of realisation of another value.[66]

3. In addition to weighing the values encoded in the principle of proportionality, the principle of sustainable development as laid down in Art. 5 of the Constitution is also of great importance, especially in the context of environmental protection.[67] This conclusion is related to the adoption of the definition of the aforementioned constitutional concept proposed by the Constitutional Court in the Judgment, case ref. Kp 2/09. According to the Court, although the terms used in this provision of the Fundamental Law have an autonomous meaning, the reference in their context to statutory definitions is not in itself a mistake. Therefore, though with caution, for the purposes of resolving specific cases, the Constitutional Court defined `sustainable development´ – pursuant to Art. 5 (50) of the EPL – as *"such social and economic development which extends to the process of integrating political, economic, and social actions, with maintaining the environmental balance and sustainability of basic natural processes, with a view to guaranteeing the capability of satisfying basic needs of particular communities or citizens of both the present and future generations"*. Moreover, for the Court, this means a requirement that the interference with

[65] Judgement of the Constitutional Court of 11 February 2014, case ref. P 24/12 (OTK ZU no. 2/A/2014, item 9).

[66] See e.g. Judgements of the Constitutional Court of: 16 July 2009, case ref. Kp 4/08 (OTK ZU no. 7/A/2009, item 112); 6 July 2011, case ref. P 12/09 (OTK ZU no. 6/A/2011, item 51).

[67] According to this provision: *"The Republic of Poland (...) shall ensure the protection of the natural environment pursuant to the principle of sustainable development"*.

the environment should be as limited as possible (causing as little harm as possible), and the social benefits should be proportional and socially adequate to the damage caused.[68]

With this approach, in principle, of sustainable development, two groups of values are coded, i.e. socio-economic development and `appropriate state of the environment´, as well as guidelines for weighing these values, i.e. integrating them, to guarantee the possibility of meeting the basic needs of the modern and future generations. Moreover, in light of the jurisprudence of the Constitutional Court, this `integration´ of values should also take into account the principle of proportionality.

5. Constitutional determinants of a procedural nature

1. In the context of the appropriate shaping of the procedure for adopting environmental planning acts, the principle of social dialogue resulting from the preamble and detailed in Art. 20 of the Constitution can be indicated in the first place. Social dialogue is a process of negotiating key decisions in public matters in order to socialise decision-making mechanisms and counteract the processes of marginalisation of various interests.[69] Public authorities in particular are the addressees of this obligation. In the procedural dimension, it includes the creation of a negotiating method of resolving disputes, forms of information exchange, presentation of positions, and institutional guarantees of social discourse, including legislative discourse. The legislator's duty is to provide the necessary legal and institutional infrastructure, as well as to guarantee that there will be a dialogue procedure in every significant dispute, allowing for a solution to be sought.[70] Materialising these assumptions on the grounds of environmental planning acts is, *inter alia*, the requirement to consult their drafts with social and economic partners (cf. Art. 6 PDP), or ensuring public participation in the procedure leading to the adoption of an act (Art. 17 (4), Art. 91 (9), Art. 119a (5) EPL), which consists in particular in the possibility of submitting comments and motions to the draft document. An element of the implementation of the principle of social dialogue may also include ensuring everyone the right to access information on the environment (cf Art. 74 (3) of the Constitution), exercised in the course of the planning act creation procedure and after its completion, pursuant to the principles set out in the Act of 3 October 2008 on Sharing Information on the Environment and Its Protection, Public Participation in Environmental Protection, and on Environmental Impact Assessments[71].

2. An essential legal construction of each procedure before public authorities is the establishment of appropriate means of appealing the decisions made by these authorities. This statement, of course, also applies to environmental planning acts. However, Art. 78 of the Constitution, which provides for the right of each party to appeal against judgments and decisions issued at first instance, does not apply to these acts. As stated above, the analysed planning acts are normative (general) acts, and therefore do not take the form of judgments or decisions addressed to parties to court and

[68] Judgement of the Constitutional Court, case ref. Kp 2/09.
[69] Stefaniuk 2009, 328.
[70] Judgement of the Constitutional Court of 7 May 2014, case ref. K 43/12 (OTK ZU no. 5/A/2014, item 50).
[71] Journal of Laws of 2022, item 1029, as amended.

administrative proceedings. The principle set out in this provision of the Fundamental Law *"is applicable only where rights and freedoms are subject to specification and individualisation, i.e. when it is possible to issue individual legal decisions."*[72] Environmental planning acts do not have this feature.

In the above context, therefore, attention should be paid to Art. 45 (1) of the Constitution. According to that provision, *"everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial, and independent court."* The recognition of this regulation as relevant to the acts of environmental planning is conditioned by the adoption of a specific understanding of the concept of case on constitutional grounds. According to the Constitutional Court, the right to a fair trial covers the widest possible range of cases heard by courts in relation to their primary function – the administration of justice. Nevertheless, the essence of the administration of justice and judicial protection of the rights of an individual is necessarily related to the examination by a court of a specific, individual case brought by a non-public entity or against a non-public entity. Hence, against the background of environmental planning acts, the condition for recognising that we are dealing with a case in terms of the Constitution is a direct, objective, and real violation of an individual's legal interest by specific provisions of such a planning act. It is only in this situation that the case is `created´ in the constitutional sense.[73] In other words, in accordance with the guarantees resulting from the Fundamental Law, a complaint to the court against an act of environmental planning should serve the entity only when the act produces legal effects directly in the sphere of rights or obligations of this entity (cf. e.g. Art. 90 (1) VSG[74]).

3. Supplementarily, it should be mentioned that the analysed planning acts may be subject to the control of the Constitutional Court. The explicit legal basis is the Fundamental Law, so this control is a direct consequence of the application of the Constitution. The aforementioned planning acts, as normative acts (universally or internally binding), fall within the jurisdiction capacity of this Court, which decides, *inter alia,* in matters of: (1*) "the conformity of legal provisions issued by central State organs*[75] *to the Constitution, ratified international agreements, and statutes*"; (2) constitutional complaint concerning the constitutionality of a normative act, on the basis of which a court or a public administration body finally adjudicated on the freedoms, rights, or obligations of the complainant specified in the Constitution; and (3) legal questions of the court as to conformity of a normative act to the Constitution, ratified international agreements, or

[72] Judgement of the Constitutional Court of 13 March 2000, case ref. K 1/99 (OTK ZU no. 2/2000, item 59).

[73] Cf. Judgement of the Constitutional Court of 1 July 2021, case ref. SK 23/17 (OTK ZU no. A/2021, item 63). See also: Judgement of the Constitutional Court of 16 September 2008, case ref. SK 76/06 (OTK ZU no. 7/A/2008, item 121).

[74] Pursuant to this provision: *"Anyone whose legal interest or right has been violated by a provision of a local law act issued in a case falling in the field of public administration may challenge the provision to an administrative court."*

[75] They include both generally applicable provisions and provisions of internal legal acts – cf. Judgement of the Constitutional Court of 20 April 2020, case ref. U 2/20 (OTK ZU no. A/2020, item 61).

statute, if the answer to such question of law will determine an issue currently before such court.[76]

6. Conclusion

Statutory regulations concerning planning acts in environmental protection constitute grounds for the conclusion that they can be considered normative acts. Depending on the group of their addressees, they fall within the scope of generally applicable law or internal acts. Determining their legal nature allows for a more accurate identification of the constitutional framework for the adoption of environmental planning acts. Their constitutional determination seems to be obvious in indicating the substantive values to be implemented in the above-mentioned acts (i.e. the values of the `optimal´ – in various respects – state of the environment) and the mechanism of balancing them against other `colliding´ values (resulting from the principle of proportionality and sustainable development). In addition, already at the level of the Constitution, there has been a general allocation of powers to issue planning acts (the Council of Ministers and local government), combined with the need for cooperation between the public powers in the event of overlapping competences of different bodies. The Fundamental Law also defines the requirements for the legal (statutory) basis of environmental planning acts and stipulates that the planning norms comply with the higher-order norms. Moreover, the Constitution indicates the basic procedural framework for adopting planning acts. They include the participation of the public in the procedure of drafting an act, as well as the challengeability of the `decisions´ made, conditioned by the fulfilment of certain prerequisites.

[76] Art. 188 in connection with Art. 79 and Art. 193 of the Constitution.

Bibliography

1. Bąkowski T (2007) *Administracyjnoprawna sytuacja jednostki w świetle zasady pomocniczości*, Warszawa, Wolters Kluwer Polska Sp. z o.o.
2. Biernat S (1979) *Działania wspólne w administracji państwowej*, Wrocław-Warszawa-Kraków-Gdańsk, Zakład Narodowy Imienia Ossolińskich – Wydawnictwo.
3. Błachucki M (2014) Urzędowe wyjaśnienia przepisów prawa wydawane przez organy administracji publicznej, in: Błachucki M & Górzyńska T, eds., *Źródła prawa administracyjnego a ochrona wolności i praw obywateli*, Warszawa, Naczelny Sąd Administracyjny, pp. 121–152.
4. Błachucki M (2019) *Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny*, Warszawa, Wydawnictwo INP PAN.
5. Brzeziński W (1961) *Plan zagospodarowania przestrzennego. Studium z zakresu nauki administracji i prawa administracyjnego*, Warszawa, Państwowe Wydawnictwa Naukowe.
6. Cieślak Z (1992) *Zbiory zachowań w administracji państwowej. Zagadnienia podstawowe*, Warszawa, Wydawnictwa Uniwersytetu Warszawskiego.
7. Cieślak Z (2013) Siatka podstawowych pojęć nauki polityki administracyjnej, in: Cieślak Z & Zalasińska K, eds., *Prace studialne Warszawskiego Seminarium Aksjologii Administracji. Szkice z zakresu nauki administracji. Tom 2*, Wrocław, PRESSCOM Sp. z o.o., pp. 7–11.
8. Cieślak Z (2017) Modele układów administracyjnych i ich usprawnianie, in: Cieślak Z, ed., *Nauka administracji,* Warszawa, Wolters Kluwer Polska Sp. z o.o., pp. 156–211.
9. Czerwiński G (2018) Charakter prawny programów ochrony środowiska, in: Korzeniowski P & Wieczorek I M, eds., *Reglamentacja korzystania ze środowiska jako funkcja administracji samorządowej*, Łódź, Narodowy Instytut Samorządu Terytorialnego, pp. 128–137.
10. Dąbek D (2007) *Prawo miejscowe*, Warszawa, Wolters Kluwer Polska Sp. z o.o.
11. Dubowska A (2015) Plan działań krótkoterminowych jako prawny instrument ochrony powietrza, *Przegląd Prawa Ochrony Środowiska*, no. 2, pp. 95–110, doi: https://doi.org/10.12775/PPOS.2015.017
12. Działocha K (2001) Komentarz do art. 94, in: Garlicki L, ed., *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II,* Warszawa, Wydawnictwo Sejmowe, pp. 1–7.
13. Federczyk W & Majchrzak B (2014) Akt normatywny w orzecznictwie Trybunału Konstytucyjnego. Problemy na tle aktów organów administracji, in: Błachucki M & Górzyńska T, eds., *Źródła prawa administracyjnego a ochrona wolności i praw obywateli*, Warszawa, Naczelny Sąd Administracyjny, pp. 153–173.
14. Gajewski S (2017) *Programy rządowe. Studium administracyjnoprawne*, Warszawa, Wydawnictwa Uniwersytetu Warszawskiego.
15. Garlicki L (2006) *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa, LIBER sp. z o.o.
16. Gosiewski J (1975) Charakter prawny planów społeczno-gospodarczych na tle planowania badań naukowych, *Państwo i Prawo*, no. 7–8, pp. 95–106.

17. Górski M & Kierzkowska J (2012) Strategie, plany i programy, in: Hauser R, Niewiadomski Z & Wróbel A, eds., *System prawa administracyjnego. Prawo administracyjne materialne. Tom 7*, Warszawa, C.H. Beck, pp. 179–220.
18. Gruszecki K (2019) Komentarz do art. 91(c), in: Gruszecki K, ed., *Prawo ochrony środowiska. Komentarz*, Warszawa, Wolters Kluwer, pp. 184–185.
19. Jurgilewicz M (2013) Zarys znaczenia bezpieczeństwa ekologicznego państwa, *Zeszyty Naukowe Wyższej Szkoły Informatyki, Zarządzania i Administracji w Warszawie*, 25(4), pp. 158–165.
20. Kokocińska K (2014) *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej*, Poznań, Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu.
21. Kordela M (2016) Aksjologia źródeł prawa, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 2, pp. 15–26.
22. Kryszeń G & Prokop K (2017) *Aksjologia polskiej konstytucji*, Warszawa, Wydawnictwo Sejmowe.
23. Kulesza M (2000) Przepisy administracyjne w «zamkniętym systemie źródeł prawa, *Samorząd Terytorialny*, no. 5, pp. 3–35.
24. Ofiarska M (2008) *Formy publicznoprawne współdziałania jednostek samorządu terytorialnego*, Warszawa, C.H. Beck.
25. Sarnecki P (2001) Komentarz do art. 146, in: Garlicki L, ed., *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, Warszawa, Wydawnictwo Sejmowe, pp. 1–32.
26. Sokolewicz W (2007) Komentarz do art. 7, in: Garlicki L, ed., *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom V*, Warszawa, Wydawnictwo Sejmowe, pp. 1–14.
27. Stahl M (2013) Szczególne prawne formy działania administracji, in: Hauser R, Niewiadomski Z & Wróbel A, eds., *System prawa administracyjnego. Prawne formy działania administracji. Tom 5*, Warszawa, C.H. Beck, pp. 315–402.
28. Stefaniuk M E (2009) *Preambuła aktu normatywnego w doktrynie oraz w procesie stanowienia i stosowania polskiego prawa w latach 1989–2007*, Lublin, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej.
29. Strzyczkowski K (1985) *Administracyjnoprawne instytucje planowania*, Warszawa, Wydawnictwa Uniwersytetu.
30. Strzyczkowski K (1990) *Podstawowe problemy prawne planowania*, Warszawa, Państwowe Wydawnictwo Naukowe.
31. Suwaj P J (2009) Instrumenty administrowania, formy działania administracji i polityka publiczna, in: Kudrycka B, Guy Peters B & Suwaj P J, eds., *Nauka administracji*, Warszawa, Wolters Kluwer Polska Sp. z o.o., pp. 308–311.
32. Szydło M (2004) Planowanie w gospodarce energetycznej na obszarze gminy, *Samorząd Terytorialny*, no. 5, pp. 50–66.
33. Szydło M (2006) Planowanie indykatywne jako funkcja państwa wobec gospodarki, in: Popowska B, ed., *Funkcje współczesnej administracji gospodarczej. Księga dedykowana Profesor Teresie Rabskiej*, Poznań, Wydawnictwo Poznańskie, pp. 143–161.
34. Wróbel A(1990) *Centralne planowanie państwowe. Studium administracyjno-prawne*, Lublin, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej.

35. Wyrzykowski M (1999) Osiem tez w sprawie systemu rządów premierowskich, in: Adamiak B, Boć J, Miemiec M & Nowacki K, eds., *Administracja publiczna w państwie prawa. Księga jubileuszowa dla Profesora Jana Jendroński*, Wrocław, Wydawnictwo Uniwersytetu Wrocławskiego, pp. 433–445.
36. Ziembiński Z (1994) Normy postępowania, in: Redelbach A, Wronkowska S & Ziembiński Z, eds., *Zarys teorii państwa i prawa,* Warszawa:ó, Wydawnictwo Naukowe PWN, pp. 73–93.

Michal MASLEN*

Waste management and its possible development in the Slovak Republic**

Abstract

This paper analyses the climate impacts of the individual waste management activities expressed in the waste management hierarchy. The author seeks to include the mentioned impacts in the Slovak reality of waste management. Moreover, this paper includes foreign approaches to municipal waste management and the analysis of the extent of merits and demerits of waste-to-energy plants. Herein, the author seeks to assess the current possibilities of heat and electricity production from municipal waste. According to the waste management hierarchy, the waste-to-energy approach is better and more suitable than waste landfilling (waste disposal). However, it must not collide with higher methods of waste management hierarchy. The mentioned principle should be respected when performing the waste-to-energy approach; however, some types of materials are not suitable for higher methods of the waste management hierarchy, such as personal protective equipment, including facemasks, protective clothing, helmets, goggles, or other garments, or equipment predominantly designed to protect the wearer's body from infection by COVID-19. Per my perspective, these waste materials are highly suitable for waste-to-energy production because of their depreciation caused by the possible infection. Therefore, the methods of prevention, re-use, or recycling are not applicable to them. However, these objects have the potential to serve as sources of energy. In my knowledge, Slovak legislation has not responded in a specific legislative way that would state how to manage the aforementioned objects. Thus, in general, this paper elucidates the possible development of waste-to-energy plants in the Slovak Republic and also describes the author's approach to the opportunities of the landfill backdown in the Slovak legal environment.

Keywords: waste management, COVID-19 pandemic, renewable energy sources, landfill

1. Introductory remarks

Recently, Slovak companies that are members of the Confederation of European Waste-to-Energy Plants (CEWEP), Association of Towns and Municipalities of Slovakia (ZMOS), and Association of the Automotive Industry of the Slovak Republic (ZAP) have joined the so-called *`Call from Berlin´*, whereby the Association of German Municipal Enterprises (VKU) calls on the EU to continue supporting the energetic recovery of waste. The aforementioned subjects have fully identified with the VKU and its current consensus regarding the waste-to-energy plants' irreplaceable role in the waste management hierarchy. The Call from Berlin builds on the experience of the German waste management model, which is currently the most advanced waste management system in the EU. The waste management model is based on a combination of recycling

Michal Maslen: Waste management and its possible development in the Slovak Republic. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 73-90, https://doi.org/10.21029/JAEL.2023.34.73

* dr. jur., PhD, University of Trnava, Department of Administrative Law, Environmental Law and Financial Law, maslen.michal@gmail.com.

** *The research and preparation of this study was supported by the Central European Academy.*

https://doi.org/10.21029/JAEL.2023.34.73

and the energetic use of non-recyclable waste at a high technological level. The authors of the Call claim that waste-to-energy plants are an essential part of services provided in the public interest for several reasons. First, according to them, no more sustainable alternative exists for treating non-recyclable waste streams. Nevertheless, this method enables the production of energy and recycling of inert components and metals in the circular economy while achieving European climate goals. Another reason for the greater involvement of waste-to-energy plants in Slovak waste management is the safe and hygienic recovery of non-recyclable waste and current production of energy in the form of heat or electricity. Additionally, the authors of the call argue that these facilities create suitable conditions for the diversion of waste from landfills, which are the most climatically unfavourable form of waste management. Finally, these facilities are pressurising the packaging policy of products intended for the final consumer, especially in relation to climate goals. Participants of the mentioned call claim that landfilling of untreated and biodegradable municipal waste has been banned in the Federal Republic of Germany since 2005. By 2015, this landfill ban reduced direct methane emissions from landfills by approximately 30 million tonnes of CO2eq. per year. This amount corresponds to a reduction in greenhouse gas emissions of 70% to 80% compared to the reference year 1990. Thus, the waste sector achieved, by far, the largest reduction in greenhouse gas emissions across all sectors.

The Association of German Municipal Enterprises based its call on the experience of German cities and municipalities, which – together with municipal waste management companies – highlight that waste-to-energy plants respect the waste hierarchy and best available techniques and must remain a pillar of waste management in the long-term horizon.[1]

Waste-to-energy plants' importance and contribution can also be appreciated during the COVID-19 pandemic, when hygienically critical waste was safely recovered in these facilities. The Call from Berlin did not go unnoticed beyond Slovakia. Gradually, other German and foreign institutions, cities, and municipalities, as well as companies conducting business in the waste management field have joined it. The Call has already been supported by the German Association of Towns and Municipalities, which

[1] The current landfill capacity in Germany will be depleted in about two decades. In some regions, some places already need to be compensated by the construction of new sites. When waste is delivered to a landfill, it must be tested to ensure that its limit values for pollutants do not exceed the limit values for the class of the landfill concerned. This applies to all types of waste, whether inert, non-hazardous, or hazardous. Some types of waste need to be treated to comply with the statutory limit values. In Germany, this is required by legislation based on strict limits on the concentrations of organic matter in all household waste. Biodegradable waste is landfill gas, half of which is methane, which is a gas with the strongest greenhouse effect. Preliminary processing includes forms such as incineration in waste incineration plants in conjunction with heat recovery. See: Umwelt Bundesamt 2022. In Germany, there also is a practice of the separate collection of organic waste and its subsequent composting, which began approximately 25 years ago. Since then, the use of recycled organic waste has been steadily increasing. According to the Federal Statistical Office (Statistisches Bundesamt), in 2011, approximately 14 million tons of organic waste were composted or converted to digestate (in biogas plants) for use as fertiliser. See: Umwelt Bundesamt 2022.

represents the interests of 11,000 towns and municipalities and entities, including approximately 96% of Germany and 68% of the German population.[2]

Currently, two facilities are orientated towards the waste-to-energy approach in Slovakia. However, considering our country's potential, up to 17 times as many such facilities are possible. The greatest benefit provided by these facilities is the direct supply of heat to consumers, whether in the form of steam or of hot water. In such a case, the waste-to-energy plant's efficiency can be above 80%. Another way of generating energy from waste is producing electricity. Efficiency in this area can be around 25%. A combination of heat and electricity generation is essential for the best use of energy from waste.

Slovakia has a huge advantage of expanding the central systems for heat supply, which have been used in our country since the 1960s. Contrariwise, Western European nations are building these systems only now, except for the Scandinavian countries, which are pioneers of this method of heat distribution. At present, the facilities in question in the EU produce electricity for 19 million people and heat for 16 million people. The mentioned amount of energy is produced from 88 million tons of waste per year. The mentioned amount of energy produced will replace 11–55 million tons of fossil fuels needed for the operation of power plants and heating plants and will prevent emissions of 24–49 million tons of CO2 that would be generated by burning fossil fuels. These facts reveal the potential of using waste as an energy source, especially in the context of the recent European energy crisis and volatile gas supply situation as basic raw material for domestic heating.[3]

2. Pandemic waste and its energetic potential

However, waste-to-energy plants do not always encounter a positive attitude from the public in question, which is particularly concerned regarding the on-site air pollution and high concentration of waste materials. Therefore, positively evaluating the initiative of the interest association of the Slovak cities and municipalities is possible. This association primarily ensures an initial contact with representatives of territorial self-governments, and also provides professional training to its members, and implements the right to territorial self-government for individual cities and municipalities in Slovakia. It is true that the waste hierarchy requires more climate-friendly ways of dealing with waste, such as waste prevention and the reuse of waste materials. On the contrary, indubitably, the COVID-19 pandemic has increased the pressure on the management of non-recyclable waste, which is primarily represented by personal protective equipment.[4]

[2] See: ZMOS 2022

[3] See: EWIA 2022

[4] Globally, there has been growing concern that discarded surgical masks, medical gowns, face shields, goggles, protective aprons, disinfectant containers, plastic shoes, and gloves generated by the COVID-19 pandemic could end up in our aquatic ecosystems. In March 2020, there was an avalanche of COVID-19 cases worldwide. Medical facilities worldwide were faced with shortages of gloves, surgical masks, face masks and other protective medical equipment. Commonly available and recommended types of protective equipment include N95 and KN95 respirators and surgical masks designed for maximum filtration of aerosols and airborne infectious particles, which protect the user from respiratory diseases, including COVID-19, by filtering airborne

Additionally, the aforementioned disease and its pandemic spread brought the operations of waste collection facilities to a halt e.g. in Italy. Moreover, it increased illegal landfills in parts of 2020. The assessment of the pandemic's impact on the management of municipal waste in the mentioned country revealed that only 2 of the 16 analysed municipalities exhibited an increase in the amount of mixed, paper, and packaging waste collected in the first half of 2020, compared to the same period of the previous year. In the other localities, this extent decreased, and in three of them, the extent declined even more significantly. Data on the amount of kitchen waste indicated a decreasing trend in the collected biological fraction in the March–May 2020 period, with decreases of 6–67%.[5]

infectious particles. N95s are tight-fitting respirators, while surgical gowns are loose-fitting medical masks designed in various thicknesses and water-penetrating capabilities. Both types are wearable devices that must be disposed of after a single use. According to various recommendations, respirators, surgical drapes, and face masks are labeled as disposable medical devices or single-use respiratory protection devices and should be disposed of in a *plastic bag* after use and, thereafter, thrown away in the basket. Human activities on land, such as unregulated disposal of biomedical waste, are generally considered potential sources of toxic, infectious, and radioactive pollutants. Medical waste usually includes chemical, pathological, pharmaceutical, radioactive, and general waste. Most of this waste is produced from plastics and predominantly includes common waste, such as syringes, gloves, surgical masks, surgical and isolation gowns, face shields, shoe covers, disinfectant containers, and waterproof aprons. The COVID-19 pandemic has created a great deal of biomedical waste in the form of plastic wastes. In China, where COVID-19 first originated, the Office of Emergency Situations of the Ministry of Ecology and Environment documented a 23% increase in the amount of medical waste produced and processed. Thus, China witnessed the accumulation of 142,000 tons of medical waste, with the national medical waste processing capacity increasing from 4902.8 tons per day before the outbreak of SARS-CoV-2 to the current 6022 tons per day. The amount of plastic waste generated worldwide since the pandemic's outbreak is estimated at 1.6 million tons per day. At the same time, prognoses indicate that approximately 3.4 billion disposable face masks or face shields have been thrown away daily because of the COVID-19 pandemic. Arguably the largest population worldwide, China generated nearly 702 million discarded face masks per day and could potentially produce around 108 million tons of plastic waste by the end of 2020. See: Bensona, Bassey & Palanisamic 2022.

[5] The years 2020 and 2021 saw a production of plastic waste approximately 30% greater than that in 2019. Certainly, recycling systems worldwide had to react to the mentioned onslaught, which began falling apart predominantly owing to the budgetary demands. Where then did all this extra plastic go? In the Western world, much of it ended up either in landfills (primarily in North America) or incinerated (primarily in Europe), and a small amount – approximately 10% on average – was recycled. The US has about 9,000 recycling facilities, most of which are operated by municipalities and tied to local budgets. As individual states bear the brunt of the health and unemployment costs associated with COVID-19, some municipalities had to suspend their recycling services. Cases have begun emerging in states such as Illinois, wherein recycling programmes have ended. Cities such as Omaha and New Orleans have considered massive cuts to save money. In the developing world, plastic ends up – often in a poorly managed stream – in open dumps, eventually escaping into the environment and ending up in rivers and then oceans. Most minimum financial resources intended for waste management infrastructure in developing economies have been reassessed owing to the COVID-19 pandemic. What occurred in the US and Europe was, thus, amplified even more in the economies of countries such as Indonesia, Brazil, India, Kenya, Guatemala, and Haiti. Fifteen million waste-pickers in developing countries

The two-thirds drop occurred in a group of Portuguese cities and towns totalling nearly a million residents, where they reduced the frequency of the door-to-door collection from every other day to twice a week. Practice in Slovakia also clearly points to increased pressure on waste management in the area of local self-government. Food packaging from delivery services, face masks, respirators, and other protective equipment could be included among the most common waste materials during the pandemic. Therefore, waste generation has shifted from offices to households. As residents spent more time inside their residences, they produced more household waste. Therefore, municipalities and cities noted an increase, precisely in the removal of waste from households. A certain amount of hazardous waste was also generated by municipalities during antigen testing for SARS-CoV-2.[6] Currently, pressure on municipal waste management may have also been created by so-called home antigen self-testing. Used antigen tests, protective clothing, and other protective equipment make up a non-negligible, indeed substantial portion, of mixed municipal waste. Municipalities must ensure the disposal of hazardous medical waste by specialised companies.[7]

The situation in Slovakia, in my opinion, was not completely clear and understandable. The legislation differentiated and classified the danger of potentially infected waste according to who its originator was. At the end of last year, the Ministry of the Environment of the Slovak Republic issued a new guideline that explained how to deal with waste from testing for COVID-19 in companies and where to throw away used tests. According to the mentioned material, the relevant fact was who performed the test

collect plastic on the streets. In recent years, some waste-collecting communities have been forced to collect twice as much plastic as they used to for the same amount of money. In some cases, this has discouraged them from capturing plastic at all because other materials are more valuable. In the case of a combination of factors, such as the breakdown of recycling infrastructure in the West and escalation of single-use plastics in the developing world in connection with COVID-19, we can discuss the so-called plastic tsunami in the world's oceans. Ford 2022.

[6] The European Union has also reacted to the mentioned facts. The European Environment Agency published a report entitled Impacts of COVID-19 on single-use plastics in the European environment, according to which, responses to COVID-19 have increased the use of certain products made from single-use plastics over a long period of time. The increased production and consumption of masks and gloves, which are necessary to protect people's health, and certain types of food packaging have resulted in the creation of additional greenhouse gas emissions, as well as the production of waste that can harm ecosystems and animals. The import of protective masks and gloves into the European Union more than doubled during the first half of the pandemic, and the domestic production of the mentioned products within the Union market also grew. A report of the European Environmental Agency estimated that about 170,000 tons of additional protective masks were imported into the Union in the mentioned period, or approximately 0.75 protective mask per person per day, resulting in additional greenhouse gas emissions and other types of pollution. Further, the document estimates that reusable cotton masks are a greener alternative, as they can be used for approximately 13 washings in a home washing machine; nevertheless, the report also noted that reusable masks may not provide the same level of protection, which was a major driver of increased demand after disposable protective equipment. Likewise, in the Union, restrictions on movement, freedom of assembly, and freedom of business have caused restaurant closures, thus increasing the demand for food delivery and associated production of packaging. European Environment Agency 2022

[7] Ďurianová 2022

and where the tests had been conducted. According to several sources, waste from coronavirus testing was a contentious issue for all companies that had to provide testing for their employees. However, testing for COVID-19 was not only provided by companies. According to the guidelines of the Ministry of the Environment of the Slovak Republic, the correct handling of used tests and other waste that was generated during testing depended upon which entity performed the testing. The document distinguished several different options for dealing with the mentioned type of waste. The first group performing testing were natural persons, businesses, and legal entities. Provided that the mentioned entities were not in the position of a medical facility, nor operated a general or specialist doctor's clinic, they were obliged to place the waste generated during testing for the presence of COVID-19 in black containers. This obligation depended on the condition that the waste was created by testing with self-diagnostic tests. Another possible situation distinguished by the document was when the testing had been conducted by a natural person-entrepreneur or a legal entity that was a medical facility. Such subjects can be, for example, mobile specimen collection stations, hospitals, and general or specialist doctor's clinics, including those located in the operation of a natural person-entrepreneur or legal entity. In accordance with Art. 14 sec. 1 letter f) of the Act no. 79/2015 Coll. on waste and on the amendment and supplementation of certain laws as amended (hereinafter referred to as the Waste Act), in such a case, the originator of the waste was obliged to keep the records on the generation and management of waste. Additionally, under Art. 14 sec. 1 letter g) of the Waste Act, such a person was obliged to report necessary data from the register to the competent body of the State Administration of Waste Management and to store the reported data.[8] Moreover, municipalities that conducted testing through mobile specimen collection stations had a legal obligation to proceed in the same way. In that case, they were considered the originators of pandemic waste. This obligation also applied to testing conducted by concluding a contract with an existing health care provider. In that case, the originator of the waste was a third party, i.e., the entity with which the municipality had contracted to test for COVID-19.[9]

The Ministry of the Environment of the Slovak Republic referred to the opinion of the Public Health Office of the Slovak Republic when distinguishing the aforementioned situations. In simple terms, the ministry distinguished between situations in which the originator of probably contaminated waste was a household or employer, and between situations wherein the waste had been generated by a medical facility or municipality. According to the opinion of the Public Health Office of the Slovak Republic, the protection of the health of employees from risks related to exposure to biological factors at work is regulated by the Regulation of Government of the Slovak Republic No. 83/2013 Coll., which establishes the requirements of the European directive for the protection of the health and safety of employees from the risks of exposure to biological factors at work. This regulation concerns employees whose work with biological factors is of the nature of long-term work. Biological waste management in medical facilities is governed by the Decree of the Ministry of Health of the Slovak Republic No. 553/2007 Coll. on the requirements for the operation of medical facilities

[8] See: MŽP SR 2021

[9] See: Slovak Ministry of the Environment 2022

from the perspective of health protection. These legal regulations are intended for specific work activities associated with exposure to biological factors at specific employers, e.g. in medical facilities, veterinary care facilities, laboratories producing vaccines, waste disposal plants, and waste-water treatment plants. Thus, these legal regulations are intended for specific subjects for which they establish a number of special requirements and obligations.[10]

Therefore, companies and individuals (households) had the obligation to handle the mentioned waste as a material of category 20 03 01 – mixed municipal waste. The aforementioned entities had, therefore, proceeded in accordance with the generally binding regulation of the given municipality. The Public Health Office of the Slovak Republic recommended storing the waste from self-diagnostic tests in strong plastic bags, sprayed with a commonly available disinfectant solution, tied off, and then disposed of in municipal waste. A completely different procedure for handling waste from testing was specified in the guidelines of the Ministry of the Environment of the Slovak Republic in cases wherein the waste had been generated by parties other than companies and households. In this case, the waste from testing for COVID-19 had been classified under catalogue number 18 01 03 – waste, the collection and disposal of which are subject to special requirements from the perspective of infection prevention (hazardous waste). This waste must not be mixed with other types of waste. The aforementioned generators of waste from testing had to hand over the generated waste to a person authorised to dispose of waste according to the Waste Act, i.e. to a person to whom the relevant consent by a state authority had been granted. In the given case, such entities had to ensure the transport of the mentioned waste to facilities for energy recovery of waste.[11]

Above all, the approach of the Ministry of the Environment of the Slovak Republic, which realised the impossibility of recycling the mentioned wastes and emphasised their energy potential, can be perceived positively. On the contrary, the probable infectiousness of the same waste from an originator who is a household or an employer will, in principle, not differ from the probable infectiousness of the waste created by a medical facility or municipality during testing for the COVID-19 disease. In my opinion, the aforementioned fact shall also apply in the case of waste generated by using personal protective equipment, such as protective masks, respirators, protective shields, and gloves.

3. Possible risks to the environment of waste-to-energy facilities

However, to summarise the previous data and facts in the context of waste-to-energy facilities, some opinions object that the so-called a `waste-to-energy´ approach can encourage waste production and discourage recycling to ensure regular incinerator feedstock. These facilities do not have a desirable reputation owing to the released toxins and greenhouse gases. In a similar vein, some NGOs present an opinion that the above approach has no place in the circular economy, because in the future, waste-to-energy facilities shall lose their input when there is nothing left to burn. However, the European Commission itself opines that waste-to-energy processes can play a role in the transition

[10] MŽP SR 2021

[11] Slovak Ministry of the Environment 2022

to a circular economy, provided that the EU waste management hierarchy is used as a guiding principle and that the decisions taken do not hinder a higher level of prevention, reuse, and recycling. This does not automatically imply that the Commission is positively inclined to the mentioned facilities because, at the same time, it presents a certain concern regarding the suppression of recycling and disruption of the hierarchy. However, waste-to-energy facilities must fulfil the requirements established in the Industrial Emissions Directive. Even before the pandemic, the Commission itself allowed the existence of input materials that corresponded to the waste-to-energy approach and, simultaneously, respected hierarchy as a fundamental principle of waste management. This is also why European regulations have established the obligation for member states to consider within their waste policies the availability of materials that are necessary for operating a waste-to-energy facilities during their lifetime, i.e. 20–30 years from start-up. At the same time, by operating such a facility, the member state must not neglect the superior principles of the hierarchy.[12]

While there is some scepticism towards waste-to-energy facilities from the perspective of waste management, the situation differs from the perspective of renewable energy. Biomass (which includes the biodegradable part of municipal waste) was and is one of the renewable energy sources defined in the Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.[13] The inclusion of the organic part of municipal waste in the definition of potential renewable energy sources has enabled the Member States to fulfil their national renewable energy targets through the waste-to-energy sector. Statistically speaking, biomass and waste are the largest sources of `renewable energy´ in Europe, representing 63.1% of the total share of renewable energy sources.[14] In November 2016, the Commission published the Clean Energy for All Europeans strategy called the `Winter Package´, wherein it recommended setting a new target of at least 27% renewable energy sources by 2030, according to the aforementioned directive, among the eight legislative instruments.[15] However, the Parliament reiterated its demand for a binding target for at least 30% of total energy consumption to come from renewable energy sources by 2030. Therefore, biomass has enabled the Member states to fulfil the EU's ever-increasing renewable energy target. At the same time, per expert opinions, maintaining the hierarchy of waste management is not climbing the ladder. Incineration with high efficiency energy recovery can be understood as waste recovery, and anaerobic digestion can be considered recycling. Thus, the stated opinions have two consequences. First, they support the conclusion regarding the climatic disadvantage of landfilling waste. Further, they state that waste-to-energy facilities should play a role in waste management and contribute to the coexistence of EU policy in the field of waste management, energy union, and environmental policy (climate change). Therefore, they are intended to enable

[12] European Commission 2022

[13] Čl. 2 ods. 24 uvedenej smernice vymedzuje biomasu ako *biologicky rozložiteľné časti výrobkov, odpadu a zvyškov biologického pôvodu z poľnohospodárstva vrátane rastlinných a živočíšnych látok, z lesného hospodárstva a príbuzných odvetví vrátane rybného hospodárstva a akvakultúry, ako aj biologicky rozložiteľné časti odpadu vrátane priemyselného a komunálneho odpadu biologického pôvodu.*

[14] Eurostat 2014

[15] European Commission 2016

the Member States to fulfil their objectives linked to these policies, particularly in relation to resources and energy efficiency.[16]

4. Climatic impacts of landfills

Information regarding the carbon footprint of landfills and amount of greenhouse gas emissions produced by municipal waste landfills from individual cities in Slovakia resonated in the Slovak media recently. The truth is that the climate impacts of landfills were not discussed in the media and by the public until recently. The attitude towards climate change was primarily influenced by industry, economic production, transport, and motoring.[17] The current climate crisis has sparked discussions on the causes of global warming and is gradually starting to draw attention towards municipal waste landfilling's effects. The professional public highlights the fact that when considering all methods of waste management, considering multiple aspects is necessary. One is the condition that there is no damage to other components of the environment. The stated condition results from the environmental policy enshrined in Art. 191 par. 2 of the Treaty on the Functioning of the EU. A primary goal for the future – also in terms of the hierarchy of waste management – remains the greatest possible removal of waste by placing it in landfills. Therefore, the professional public claims that for the stated purpose combining measures, such as waste recycling and their energy use, is necessary. On the contrary, science adds that excessively focusing on building facilities for the energy use of waste can lead to air damage and gives examples from the Swedish environment.[18] Despite the aforementioned facts, waste disposal remains at the bottom of the waste management hierarchy. Although the law enshrines fees associated with the operation of waste landfills, which are a manifestation of the polluter-pays principle, the importance of the aforementioned principle in environmental law must also be seen in the context of the precautionary principle and prevention principle.[19]

If we wish to apply the aforementioned principles to the Slovak reality, whether we could apply them properly is questionable.[20] In the field of environmental law of the

[16] See: Malinauskaite et al. 2017

[17] In particular, German courts recently dealt with the qualitatively unsatisfactory state of the air in cities. In the German environment, court decisions in relation to the cities of Frankfurt and Berlin, which ordered them to update their air quality plans, resonated in particular. See: Vodička 2019.

[18] See: Dosoudil 2017

[19] See: Vícha 2014

[20] According to the principle of prevention, the essence of environmental protection is primarily the prevention of damage to the environment. The basic premise of this principle, according to professional literature, is that it is preferable to prevent the occurrence of damage or injury than to try dealing with its consequences thereafter. The principle of prevention requires that environmental protection be ensured already at the planning stage at the best possible technical level. Its goal is, as far as possible, to exclude the deterioration of the environment from the beginning and, in the event of adverse effects on the environment, to ensure their minimisation. The principle of prevention is a general legal principle operating across all branches of law. However, it plays a key role in environmental law and can be considered one of the supporting principles on which the said area of law stands. See: Luptáková Urbanová & Figuli 2022.

Slovak Republic, the principle of prevention can be found in Art. 9 of Act no. 17/1992 Coll. on the Environment.[21] Thereafter, the precautionary principle is enshrined in Art. 13 of Act no. 17/1992 Coll. on the environment.[22] The precautionary principle, like the prevention principle, belongs to the newer and more modern principles of environmental law. The difference between the principle of prevention and precautionary principle basically lies in the certainty of the risk of potential damage.[23]

About four years ago, the European Union pointed to the high level of waste landfilling and, simultaneously, to the low fees for this method of waste management. In the period in question, the recycling rate in Slovakia reached approximately 15%-20%, while other EU countries reached an average of 46%. A key reason Slovakia failed to increase the rate of recycling was because landfilling was cheap, and, in several cases, it was not worth recycling (from an economic perspective). Thus, a great deal of waste ended up in the landfills. All countries that have changed landfill fees and increased fees have also changed the targets achieved in the area of recovery and recycling, achieving them at a significantly higher rate. In the mentioned period, Slovakia was in the 27th place among the 28 EU countries in the field of waste recovery and recycling. Only Malta achieved worse results in this area, landfilling up to 98% of waste.[24]

Low fees for landfilling, then, do not correspond to the requirements of the polluter-pays principle, which is supposed to act as an economic tool contributing to a high level of protection in the mentioned area. Consequently, the quantity of landfills, which are the `weakest´ tool in the waste management hierarchy, may not correspond to the principle of prevention in environmental law. At the same time, waste landfills' climatic impacts may not correspond to the content requirements of the precautionary principle if the law also distinguishes more favourable instruments of waste management.

However, experience in the field of municipal waste management also presents examples of positive practice in Slovak cities. Recent information underscore the Košice reality. From the perspective of waste management, the mentioned city is the most ecological city in Slovakia. This results from calculations that also include metal recycling, which has the merit of better statistics, that indicate that the carbon footprint of Košice is at the level of 132 kilogrammes of carbon dioxide equivalent (CO2) per one ton of

[21] Under this provision: *"Environmental protection includes activities that prevent pollution or damage to the environment or limit and eliminate this pollution or damage. It includes the protection of its individual components, or specific ecosystems and their interrelationships, but also the protection of the environment as a whole."*

[22] Under this provision: *"If, taking into account all the circumstances, it can be assumed that there is a danger of irreversible or serious damage to the environment, the doubt that such damage will actually occur must not be a reason for postponing measures to prevent damage."*

[23] The essence of the precautionary principle is, therefore, the obligation to always decide in favour of the environment in cases wherein a sufficient amount of accurate and unambiguous information regarding the possible consequences of decisions for the environment is not available within the decision-making process. This implies that when in doubt about the possible consequences of a decision, one cannot rely on the fact that these negative consequences will not occur, but on the contrary, assume that they will occur. If such a decision were to be issued in favour of the intended activity in the aforementioned situation, it must always be preceded by measures that would prevent – or at least minimise – the occurrence of negative consequences for the environment to the lowest possible level. See: Luptáková Urbanová & Figuli 2022

[24] Maleš 2022

municipal waste. The capital of Slovakia ranked second with a value of 243 kilogrammes. All other regional cities have a carbon footprint above 350 kilos of CO2 equivalent per ton of municipal waste. The carbon footprint levels differ in the individual regional cities of Slovakia. On a positive note, however, the rate of sorted collection or recycling in regional cities is growing from year to year. The better statistics are attributable to the high proportion of metals in the analysts' sorted collection. The contribution of metal recycling represents up to 85% of all avoided greenhouse gas emissions, and the largest carbon footprint is left by the disposal of waste in landfills. The impacts of landfills are reflected in their methane production. From one ton of municipal waste landfilling, 870–880 kilos of carbon dioxide equivalent are produced. Last year, 1.17 million tons of municipal waste ended up in landfills in Slovakia, corresponding to a carbon footprint of one million tons of carbon dioxide equivalent. For comparison, a similar carbon footprint will be left behind by 15,000 passenger cars that travel the return route between Bratislava and Košice every day during the year. At the same time, analysts highlight greenhouse gas emissions arising from the energy recovery of waste in the form of electricity or heat production. However, the mentioned production represents, to a certain extent, a saving, compared to the emissions during the production of energy from classic fossil fuels. The same approach is used to determine the impact on climate change when evaluating `avoided´ emissions in the case of composting and recycling. Avoided emissions are those that have not been released into the air through the use of lower or no-emission practices. Thus, waste can act as a raw material mitigates the use of primary resources, which are primarily natural resources. In the case of bio-waste composting, the net emission value is − 74 kilogrammes of carbon dioxide equivalent per one ton of waste. When recycling one ton of waste, the saving ranges from − 181 kilos of CO2 equivalent in the case of e-waste to − 5891 kilos of CO2 equivalent in the case of textiles.[25]

5. Comparing the climatic impact of waste-to-energy facilities with landfills

An example of the already-mentioned Swedish approach can be the city of Linkoping, whose waste-to-energy facility recovers waste in a boiler under a 10-story shaft. The temperature in the mentioned environment reaches approximately 815 °C, and the process runs 24 hours a day to help power the waste-to-energy plant. In total, Sweden has built 34 power plants to produce energy from waste. Instead of burning coal or gas, these devices burn garbage. For comparison, about 4 tons of waste contain energy equivalent to 1 ton of oil, 1.6 tons of coal, or 5 tons of wood waste. According to data from the mentioned country, less than 1% of household waste goes to landfills. Approximately 49% of household waste is recycled, and approximately 50% of waste is incinerated in power plants. The heat is converted into steam, which spins turbines to produce electricity, like conventional coal or gas-fired power plants. Hence, waste energy provides heat equal to energy for 1.25 million apartments and electricity for approximately 680,000 households. Generally, the energy output when generating electricity is only approximately 40%. However, the aforementioned power plant can use up to 90% of energy in the form of heat and electricity-combined production. Moreover, this device is subject to criticism regarding emissions. On the contrary, it helps reduce

[25] Fontech 2022

methane emissions from landfills, which contribute to climate change up to 72 times more intensively. Despite this, energy conversion of waste is a short-term but, simultaneously, reasonable means of dealing with waste. It is less carbon intensive than coal and uses resources more efficiently than landfilling. In a landfill, these resources would still decompose and release greenhouse gases.[26]

Regarding the Slovak Republic, current studies in the field of environmental law and criminal law highlight that the basic factors in the field of unauthorised waste management are primarily caused by the lack of interest of the individual (as the source of waste), but are shared by the competent authorities, which are municipalities, district offices, the Ministry of the SR environment, as well as police authorities. A review conducted by the General Prosecutor's Office of the Slovak Republic in 2016 clarifies that all the aforementioned authorities did not fulfil their tasks sufficiently at the given time, which was also the reason for the high incidence of the crime of unauthorised disposal of waste according to Art. 302 of Act no. 301/2005 Coll. Criminal Code (hereinafter referred to as the Criminal Code)[27] and high latency. Municipal authorities often do not have sufficient capacity and do not report illegal waste dumps, of which they are often aware, and also because they would have to bear the financial burden of their removal themselves in the event that the offender is not detected. In the period of control carried out by the General Prosecutor's Office of the Slovak Republic, the level of clarification of the aforementioned crime was approximately 10%. Thus, municipalities would almost always have to bear the cost of liquidation of illegal landfills, for which they often do not have sufficient budgetary provision, from their own budgets. In this context, the science of environmental law emphasises the high need for prevention in the field of municipal waste management and the need for education and training in consistently applying the waste management hierarchy.[28]

Waste-to-energy facilities in the US burn municipal solid waste to produce steam in a boiler, which is then used to generate electricity.[29] The European Union is also aware of the aforementioned contribution of waste to electricity production. The EU's plans to become climate-neutral by mid-century further fuel the raging debate regarding the environmental impacts of burning waste for electricity generation. The sector provides a small but significant proportion of the EU's total energy supply, with Germany being the largest consumer. In the EU, waste-to-energy facilities also use household waste as fuel for energy production, like how other power plants use coal, oil, or natural gas. The principle of their operation is basically the same as that in the United States.

[26] Yee 2018

[27] Under the Art. 302 of the Criminal Code: *"(1) Whoever, even through negligence, disposes of waste on a small scale in violation of generally binding legal regulations shall be punished by imprisonment for up to two years. … (2) The offender shall be punished by imprisonment for six months up to three years, if he commits the act referred to in section 1 … a) and puts the environment at risk of greater damage, or … b) and by such act places another in danger of serious injury or death. … (3) The offender shall be punished by imprisonment for one up to five years, if he commits the act referred to in section 1 to a significant extent. … (4) The offender shall be punished by imprisonment for three up to eight years, if he commits the act referred to in section 1 … a) and causes serious injury or death by it, or … b) on a large scale."*

[28] Kučerová 2019

[29] U.S. Energy Information Administration 2020

In 2018, in the EU, the total energy production from all waste (industrial waste, solid municipal waste, non-renewable waste) represented approximately 2.4% of the total energy supply. Municipal solid waste accounts for only approximately 10% of the total amount of produced waste that can be used in facilities for the energy recovery of waste. Changes in waste management legislation – predominantly owing to factors such as requirements for the gradual end of landfilling – caused a dramatic increase in the incineration of waste and, therefore, its energy use. Statistics indicate that the amount of municipal solid waste incinerated in the EU increased from 32 million tons (67 kg per capita) in 1995 to 70 million tons (136 kg per capita) in 2018. At the same time, this underscores that the mentioned phenomenon resulted in a 56% reduction in the share of landfilling. The production of energy from waste in 2018 in the EU was the highest in Germany (7.1 MWh). During this period, Great Britain was still a member of the Union and ranked second in the ranking of producers of energy from waste (4.4 MWh). These states were followed by France (2.5 MWh), Italy (2.4 MWh), and the Netherlands (2.2 MWh). German indicators suggest that the proportion of energy utilisation of waste in this country represents 4.3% of the primary energy consumption in Germany. At the same time, the measurements indicate that up to 18 million European citizens receive electricity produced by waste recovery and approximately 15 million inhabitants heat their homes with heat from waste-to-energy facilities.[30]

Energy recovery significantly affects the volumes of greenhouse gases, especially in Germany and the EU. Proponents claim that the production of heat and electricity in European incinerators prevents the production of up to 50 million tons of CO2 emissions per year, which would otherwise be caused by the burning of fossil fuels. Additionally, this burning diverts waste from landfills, which release huge amounts of methane and also cause air, water, and soil pollution. Thus, the fact, that conventional landfills represent the worst of all options for waste is one of the few facts on which supporters and critics of energy recovery agree.[31]

The production of electricity or heat is only considered secondary by the professional public. Currently, the Union is exerting enormous efforts to develop activities in the area of the circular economy. However, the continent's ambitious waste recycling plans could mean that most of the waste-to-energy generation could eventually become obsolete. The truth is that in the hierarchy of waste management, the goal of energy recovery of waste lies above landfilling. However, this method of waste management is subject to recycling and reuse. The mentioned hierarchy is established by Art. 4 sec. 1 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.[32] Moreover, this directive established European households' obligation to recycle or prepare for reuse 50% of the weight of waste materials, such as paper, metal, plastic, and glass, from 2020. The recycling and preparation for re-use of municipal waste should, subsequently, increase to at least 55%, 60%, and 65% by weight by 2025, 2030, and 2035, respectively.

[30] Clean Energy Wire 2021

[31] Clean Energy Wire 2021

[32] Under the mentioned provision: *"1. The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy: (a) prevention; … (b) preparing for re-use; … (c) recycling; … (d) other recovery, e.g. energy recovery; and … (e) disposal"*.

The European Commission's new Circular Economy Action Plan (CEAP) aims to lower residual waste by 2030. The European Parliament's CEAP report calls for waste incineration to be minimised, while also asking the Commission to define an Europe-wide approach towards managing non-recyclable residual municipal waste, which ensures its optimal processing. The mentioned document warns against building excessive waste incineration capacity, which could hinder the circular economy's development.[33] The EU's pursuit of climate neutrality raises a large question mark over the future of electricity production by burning waste. Proponents suggest that waste-to-energy recovery prevents even more environmental damage from landfills. Some power plants are promoting a waste-to-energy approach to supplement renewable electricity as part of a decarbonised future. However, critics of this approach are urging immediate decommissioning. The continent's ambitious recycling and circular economy plans are another risk for the industry, as most waste-to-energy generation could eventually run out of fuel and become obsolete.[34]

Under Slovak conditions, energy recovery of waste is regulated by Act no. 79/2015 Coll. on waste and on amendments to certain laws.[35] The conditions for incinerating municipal waste are, subsequently, regulated by Art. 18 sec. 2 of Act no. 79/2015 Coll.[36] Thus, incineration should aim to obtain energy, and it should, by its very nature, be an activity whose primary result is, in accordance with Art. 3 sec. 13 of Act no. 79/2015 Coll., a beneficial use of waste to replace other materials in the production activity or in the wider economy, or to ensure the readiness of waste to fulfil this function. At the same time, considering the requirement of Art. 58 sec. 5 of Act no. 79/2015 Coll. – according to which support for energy recovery is taken into account when determining the rate of recovery and the rate of recycling, if it is preferred over recycling for environmental and economic reasons – is necessary. Waste recovery in the mentioned manner should, therefore, follow environmental goals and economic goals simultaneously. Environmental goals will be expressed primarily by Art. 15 of Act no. 137/2010 Coll. on air (hereinafter referred to as Act No. 137/2010 Coll.), which, in section 1 letter p), establishes the obligation of the operator of a large or medium source of air pollution. A waste-to-energy facility may also be a listed polluter, insofar as it operates with a capacity of two or more tons of incinerated waste per hour. In that case, it is obliged to

[33] Clean Energy Wire 2021

[34] Clean Energy Wire 2021

[35] Under Art. 18 sec. 1 of this Act *"Communal waste incineration in municipal waste incinerators is considered waste recovery by activity R1 according to Annex no. 1, if energy in the form of heat or electricity is produced for commercial purposes and if the energy efficiency of such equipment is equal to or higher than … a) 0.60, if it is a device that received a permit to operate until December 31, 2008 in accordance with generally binding legal regulations,37) or … b) 0.65, if it is a device that received a permit to operate after December 31, 2008."*

[36] Under Art. 18 sec. 2 of this Act "*Incineration of non-municipal waste in waste incinerators is considered energy recovery of waste by activity R1 according to Annex no. 1, if the following conditions are met: … a) it is an activity mentioned in § 3 par. 13, … b) the purpose of waste incineration is energy production, … c) the energy obtained by this incineration of waste is greater than the energy consumed during the incineration process, … d) a larger part of the waste must be consumed during waste incineration and … e) the greater part of the energy obtained during the incineration of waste must be evaluated and actually used, whereby the said use is either immediate in the form of heat obtained by incineration, or after processing in the form of electrical energy."*

prepare an annual report on the operation and control of the source of air pollution.

The said document must, thereafter, be submitted to the district office by 15 February of the following year. The report must include an evaluation of the operation of the source of air pollution and a comparison of actual emissions into the air and water with emission limits. For violating the aforementioned obligation, the district office or environmental inspection imposes a fine on the operator of the facility in the range of EUR 160 to EUR 33,000, according to the Art. 30 sec. 3 letter a) of Act no. 137/2010 Coll. This conclusion is also confirmed by case-law.[37]

6. Conclusion

Opinions on the management of municipal waste in Slovakia differ. The truth is that the high rate of landfilling in Slovakia is an undesirable reality. On the contrary, there are intentions to operate facilities promoting other methods of waste management, which are more favourable from the perspective of the hierarchy of waste management. However, even these do not escape criticism. If we were to consider the energy recovery of waste, it cannot be claimed to be a perfect means to deal with it. On the contrary, neither law nor scientific and technological progress are perfect, but they try responding to past experience and current environmental reality and, simultaneously, plan and prepare solutions for a more favourable climate future, i.e. at least one that will not deteriorate compared to the reality today.

In Slovakia, only two mentioned waste-to-energy facilities are currently in operation, in Bratislava and Košice. The diversified orientation of the mentioned facilities' activities can certainly be considered beneficial. For the village or city where it is located, a waste-to-energy facility is primarily an extremely cheap source of heat. Its production develops from the beginning or end of the heating season, and with the onset of autumn, the waste-to-energy facility is dominantly oriented towards the distribution of the produced heat; then, during the spring, there is a moment when the produced heat is used to drive the turbine, which generates electricity. Operating such a device includes four stages of flue gas cleaning and subsequent monitoring in the device's chimney. Moreover, the technologies also enable the capture of carbon dioxide at the output of the device, which can subsequently be used in agriculture for the production of ornamental plants. The emission limits of the equipment are stricter than those for coal-fired power plants or cement plants.[38]

A further positive example can be adduced of the city of Vienna, where up to four such facilities operate and generate heat from the waste of 210,000 households. Their electricity is used in 45,000 households. Considering the number of Viennese households of 900,000, one can even discuss a strategic share in the case of heat.

[37] For example, the Supreme Administrative Court of the Czech Republic pointed at this part of the Slovak legislation in its decision no. 6 As 288/2016 of 20 December 2017.
[38] EWIA 2021

The remainder of the produced heat and electricity is either consumed by the waste-to-energy facilities themselves or is distributed to nearby industrial plants.[39] One can definitely discuss the negatives in the case of the mentioned devices in the form of emissions into the atmosphere, which are, however, lower than the emissions of waste landfills. Therefore, it is important that decisions on the establishment and operation of the mentioned facilities be taken responsibly and not simultaneously negate the waste management hierarchy's superior goals.

[39] HN Online 2022

Biblography

1. Bensona N U, Bassey D E & Palanisamic T (2022) *COVID pollution: impact of COVID-19 pandemic on global plastic waste footprint,* https://www.sciencedirect.com/science/article/pii/S2405844021004485 [08.07.2022]
2. Clean Energy Wire (2021) *EU climate ambitions spell trouble for electricity from burning waste,* https://www.cleanenergywire.org/news/eu-climate-ambitions-spell-trouble-electricity-burning-waste [24.07.2022]
3. Dosoudil K (2017) Concept of waste management and climate change, in: Damohorský M, Franková M. & Sobotka M, eds., *Soil, water, landscape adaptation to climate change from the perspective of law*, Beroun, p. 103.
4. Ďurianová M (2022) *Not only people moved from offices to households, but also waste. How to dispose of pandemic waste?*, https://smeti.sme.sk/c/22641962/z-kancelarii-do-domacnosti-sa-presunuli-nielen-ludia-ale-aj-odpad.html [31.01.2022]
5. European Commission (2022) *Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions – the role of waste-to-energy in the circular economy,* http://ec.europa.eu/environment/waste/waste-to-energy.pdf [31.01.2022]
6. European Commission (2016) *Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable source*, Brussels.
7. European Environment Agency (2022) *COVID-19 in Europe: increased pollution from masks, gloves and other single-use plastics,* https://www.eea.europa.eu/highlights/covid19-in-europe-increased-pollution [09.07.2022]
8. Eurostat (2014) *Primary production of renewable energy,* http://refhub.elsevier.com/S0360-5442(17)31986-2/sref43 [31.01.2022]
9. EWIA (2022) *There are many ways to use energy from waste,* https://www.ewia.sk/energeticke-vyuzitie-odpadu/vyroba-energie-v-zevo/ [31.01.2022]
10. EWIA (2022) *'Waste-to-energy' facility,* https://www.ewia.sk/sluzby/zariadenie-na-energeticke-vyuzitie-odpadov/ [25.01.2022]
11. Fontech (2021) *They overtook Bratislava. The metropolis of the east is the most ecological city in Slovakia,* https://fontech.startitup.sk/spravy/predbehli-bratislavu-metropola-vychodu-je-najekologickejsim-mestom-na-slovensku/ [14.07.2022]
12. Ford D (2022) *COVID-19 Has Worsened the Ocean Plastic Pollution Problem. A drastic increase in use of masks and gloves, plus a decline in recycling programmes, is threatening the health of the seas*, https://www.scientificamerican.com/article/covid-19-has-worsened-the-ocean-plastic-pollution-problem/ [09.07.2022]
13. HN Online (2022) *Energy from waste. Is she looking towards the better future in Slovakia?*, https://hnonline.sk/pr-clanky/2143145-energia-z-odpadu-svita-jej-na-slovensku-na-lepsie-casy [25.08.2022]
14. Luptáková Urbanová I & Figuli I (2022) *Application of the principle of preliminary caution and the principle of prevention in the performance of the state administration of environmental care with 12–15,* https://viaiuris.sk/wp-content/uploads/2020/04/Analyza_I.cast_.pdf [21.07.2022]

15. Kučerová D (2019) *Unauthorised disposal of waste - criminal law aspects,* Prague, Leges.
16. Maleš I (2022) *Increasing landfill fees is key to our waste management,* https://euractiv.sk/section/odpadove-hospodarstvo/opinion/zvysenie-poplatkov-za-skladkovanie-je-klucove-pre-nase-odpadove-hospodarstvo/ [15.07.2022]
17. Malinauskaite J, Jouhara H, Czajczyńska D, Stanchev P, Katsou E, Rostkowski P, Thorne R J, Colón J, Ponsá S, Al-Mansour F, Anguilano L, Krzyżyńska R, López I C, Vlasopoulos A, Spencer N et al (2017) Municipal solid waste management and waste-to-energy in the context of a circular economy and energy recycling in Europe, *Energy*, 141, pp. 2013–2044, doi: https://doi.org/10.1016/j.energy.2017.11.128
18. MŽP SR (2021) *Answers to questions related to waste generated during testing for COVID-19*,https://www.minzp.sk/files/sekcia-enviromentalneho-hodnotenia-riadenia/odpady-a-obaly/registre-a-zoznamy/odpovede-otazky-suvisiace-odpadmi-vzniknutymi-ramci-testovania-covid_06.12.2021_final.pdf; [31.01.2022]
19. Slovak Ministry of the Environment (2022) *Are you testing for COVID-19 in your company?*, https://www.odpady-portal.sk/Dokument/106464/testujete-na-covid-19-vo-firme-mzp-sr-vydalo-nove-usmernenie-pre-odpad-z-testovania.aspx [31.01.2022]
20. Umwelt Bundesamt. Composting and fermentation. (Online: https://www.umweltbundesamt.de/en/topics/waste-resources/waste-disposal/organic-wastet-reatment#composting-and-fermentation-; 31.1.2022)
21. Umwelt Bundesamt (2022) *Landfill,* https://www.umweltbundesamt.de/en/topics/waste-resources/waste-disposal/landfill [31.01.2022]
22. U.S. Energy Information Administration (2020) *Biomass explained Waste-to-energy,* https://www.eia.gov/energyexplained/biomass/waste-to-energy-in-depth.php [24.07.2022]
23. Vícha O (2014) *The 'polluter-pays' principle from the point of view of the legal system,* Prague, Linde Praha.
24. Vodička J (2019) Technical conditions of the operation of passenger vehicles and responsibility for their compliance, in: Jančářová I & Hanák J, eds.. *Cars, cars, cars… and the environment*, Brno, Masaryk University, p. 23.
25. Waste to Energy (2021) *Controversial power generation by incineration*, https://www.cleanenergywire.org/factsheets/waste-energy-controversial-power-generation-incineration [24.07.2022]
26. Yee A (2018) *In Sweden, trash heats homes, powers buses, and fuels taxi fleets,* https://www.nytimes.com/2018/09/21/climate/sweden-garbage-used-for-fuel.html [21.07.2022]
27. ZMOS (2022) *Association of Cities and Towns of Slovakia. Municipalities and industry support the 'Berlin Challenge' on the importance of energy recovery from waste*, https://www.zmos.sk/samospravy-a-priemysel-podporuju-berlinsku-vyzvu-o-dolezitosti-energetickeho-zhodnocovania-odpa dov--oznam/mid/406157/.html#m_406157 [31.01.2022]

Michal RADVAN*

New Charges on Communal Waste in the Czech Republic**

Abstract

The aim of this contribution is to confirm or dispute the hypothesis that the new system of charges for municipal waste management in the Czech Republic is suitable for both taxpayers and municipalities. To achieve this aim, the article critically describes the old and new methods of communal waste charging, compares the two, and highlights their weaknesses and strengths. In addition, it summarizes the opportunities and threats of new options so that municipalities receive more valuable information when deciding whether to tax communal waste and what charge is most effective in their territories.

Keywords: communal waste, charge, charge on communal waste, Czech Republic.

1. Introduction

Until the end of 2021, there were two (with a contract system, three) possible ways to collect charges for municipal waste management in the Czech Republic. Both charges had pros and cons. It was up to the municipality to choose a better charge on communal waste according to local conditions. This is why the capital city of Prague chose the waste act charge: many individuals work there but have their permanent residence in another municipality. The primary problem in Prague's charge administration was identifying payers – that is, persons producing communal waste. On the other hand, the second-largest city, Brno, has chosen a local charge because it is very easy to identify all taxpayers due to existing public registries of individuals and real estate. However, in practice, it might happen that an individual had to pay twice (this person has a permanent residence in Brno but actually lives, works, and produces waste in Prague) or does not pay at all (if s/he has a permanent residence in Prague and lives in Brno). Regarding rates, only the local charge on communal waste had maximal rates in the act: a maximum of CZK 1,000 per person per year. The waste act charge did not have a maximal rate, and it was up to the municipality to determine the concrete rate in the bylaw for the calendar year. The conditions of payment (e.g., when and how to pay) had to be set in both cases in the bylaw. Even if the taxable period was formally one calendar year, the actual tax period would be one month.

A new regulation dealing with charges for municipal waste management was adopted at the end of 2020. However, it was too late for municipalities to adopt the local

Michal Radvan: New Charges on Communal Waste in the Czech Republic. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 91-105, https://doi.org/10.21029/JAEL.2023.34.91

* Associate Professor, Faculty of Law, Masaryk University, Czech Republic, michal.radvan@law.muni.cz, ORCID: 0000-0002-9858-4555.

** *The research and preparation of this study was supported by the Central European Academy.*

https://doi.org/10.21029/JAEL.2023.34.91

bylaw. The transitional provisions allowed the use of current charges in 2021. From the beginning of 2022, all Czech municipalities, if willing to collect charges on communal waste, must use one of the new local charges on communal waste: the charge for the municipal waste management system or the charge for the disposal of municipal waste from immovable property.

The charge for the municipal waste management system is a modernized version of the abolished local charge. It is paid by persons with a permanent residence in the municipality. The charge rate is fixed and the same for all inhabitants. The municipality is free to set correction components. In short, if the municipality does not want to change the existing communal waste management in its territory, charging for the municipal waste management system is the best solution.

The charge for the disposal of municipal waste from immovable property is an entirely new form of communal waste charging but, to a certain extent, inspired by the waste act charge. This is based on the pay-as-you-throw principle. It is paid by those who truly live in the municipality, that is, produce communal waste. The municipality may choose the tax base: the weight in kilograms, the volume of waste, or the capacity in liters of the waste bin. It is also possible to define a minimal tax base so that people do not throw communal waste somewhere else than to concentrate on immovable waste. The tax rates are fixed.

The aim of the contributions is to confirm or dispute the hypothesis that the new system of charges for municipal waste management in the Czech Republic is suitable for both taxpayers and municipalities. To achieve this aim, it is necessary to critically describe the old and new methods of communal waste charging, compare them, and highlight their weaknesses and strengths. In addition, it is necessary to summarize the opportunities and threats of new options so that municipalities obtain more valuable information when deciding whether to tax communal waste and what charge is more effective in their territories.

2. Methodology and Literature Background

To achieve the aim of this contribution and to confirm or disprove the hypothesis, it is necessary to describe and critically analyze all possibilities for collecting charges for municipal waste management in the Czech Republic before 2022 and in the following years. Moreover, the comparison between all old (the waste act charge, the local charge on communal waste, and the contract) and new possibilities (the charge for the municipal waste management system and the charge for the disposal of municipal waste from immovable property) is carried out in the research part of this contribution. Based on the critical analysis, comparison, and evaluation of the practical experience of selected municipalities, the pros and cons of individual charges are defined in the discussion. The conclusion then summarizes the findings and provides suggestions for different types of municipalities in the Czech Republic regarding what charge better suits their circumstances and needs. Moreover, the de lege ferenda suggestions are included.

Regarding the literature background, the state of scientific legal literature in this area is rather weak in the Czech Republic (though not only). The most frequent author addressing charges on communal waste from a legal perspective is Radvan. He has analyzed the economic autonomy of the local self-government units in the Czech

Republic, focusing on local taxation (Radvan 2008; Radvan 2012; Radvan 2016a), and he specifically explored the taxation of communal waste (Radvan 2010; Radvan 2016b). As communal waste charges belong to the group of local taxes, he also pointed out the possibility for municipalities to choose between recurrent property tax and charges on communal waste (Radvan 2019), and he described ways to get taxpayers to pay local charges (Radvan 2017). Certain portions of these materials were also used (and cited) in this contribution. The other Czech lawyers mentioned here are Czudek and Mrkývka (Czudek & Mrkývka 2017). The situation in other Visegrad countries is not better, and there is also a lack of legal literature dealing with communal waste taxation issues. Popławski from Poland (Popławski 2012; Popławski 2013) and Babčák from Slovakia (Babčák, 2005) should be mentioned in particular.

In the economic literature concerning charges on communal waste, the scientific literature situation is much better in the Czech Republic. There are several case studies (Slavík & Pavel 2013; Mikušová Meričková, Nemec & Soukopová 2014; Soukopová & Vaceková 2015; Soukopová, Struk & Hřebíček 2017), analytical articles (Šauer, Pařízková & Hadrabová 2008; Nemec, Soukopová & Mikušová Meričková 2015), and specific studies addressing the efficiency and effectiveness of waste management at the local level (Soukopová, Klimovský & Ochrana 2017).

3. Research

3.1. Abolished regulation

By the end of 2021, municipalities in the Czech Republic had three possibilities for collecting sources to cover municipal waste management costs. The Waste Act[1] stated that the municipality might collect a levy for the gathering, collection, transport, sorting, recovery, and disposal of municipal waste from natural persons on the basis of a contract. The contract had to be in writing and include the payment amount. The act also stated that if the municipality collects such a levy, it may not impose a waste act charge or a local charge on communal waste.

The second possibility was also stated in the Waste Act.[2] By generally binding ordinance, a municipality could assess and collect a charge on municipal waste (waste act charge) generated in its territory. The charge could not be simultaneously assessed as a local communal waste charge. The taxpayer was defined as any natural person whose activity generated municipal waste (waste producer). The property owner or the community of unit owners (in the case of blocks of flats) on the property where municipal waste was generated was the payor (paying agent). The payor had to apportion the charge to individual taxpayers. If the taxpayer failed to pay the charge to the payor on time or in the correct amount, the payor had a duty to notify the municipality, which assessed the charge through a tax assessment. The maximum amount of the charge had to be determined according to the municipality's estimated justified costs resulting from the municipal waste management scheme. No exemptions were defined directly in the act.

[1] Sec. 17/6 of the Act no. 185/2001 Sb., Waste Act, as amended.
[2] Sec. 17a of the Waste Act.

The third option for the municipality was to manage the system of gathering, collection, transport, sorting, recovery, and disposal of municipal waste (local charge on communal waste) regulated by the Local Charges Act.[3] In addition, this charge had to be assessed by the generally binding ordinance. The charge was paid primarily by registered natural persons (with a permanent residence) in the municipality. However, a natural person owning a building intended for individual recreation, an apartment, or a family house in which no natural person was registered had to pay the charge in the amount corresponding to the charge for one natural person. One person could pay the charge on behalf of natural persons forming a household or persons living in a family or apartment. The exemptions defined directly in the act were applied to children in children's homes, persons placed in homes for persons with disabilities, homes for older adults, and sheltered housing. The maximal tax rate was set directly in the act. It was created using the fixed (up to CZK 250 per person per calendar year) and the variable portions (up to CZK 750 per person and calendar year, determined based on the actual costs incurred by the municipality in the preceding calendar year for the gathering and collection of unsorted municipal waste).

Municipal offices administered both waste act charges and local charges on communal waste. The taxable period was formally one calendar year, but the actual tax period was one month.

3.2. De Lege Lata Regulation

A new regulation regarding charges for municipal waste management was adopted at the end of 2020 as an amendment to the Local Charges Act. However, it was too late for municipalities to adopt the local bylaw. The transitional provisions allowed the use of current charges in 2021. From the beginning of 2022, all Czech municipalities, if willing to collect charges on communal waste, must use one of the new local charges on communal waste: a charge for the municipal waste management system or a charge for the disposal of municipal waste from immovable property. Both are assessed using the general binding ordinance.

The charge for the municipal waste management system is paid by natural persons registered (with a permanent residence) in the municipality or the owner of immovable property comprising an apartment, a family house, or a building for family recreation in which no natural person is registered and that is situated in the territory of the municipality. Persons exempt by the act are those liable for charges for the disposal of municipal waste from immovable property in another municipality, children placed in specific facilities of immediate assistance, people placed in homes for the disabled or older adults, those placed in sheltered housing, and those restricted in terms of personal liberty by law. The municipality is free to set additional exemptions. The charge rate is fixed and cannot exceed CZK 1,200 per year.

The charge for the disposal of municipal waste from immovable property is paid by the natural person who resides in that immovable property (waste producer) or the owner of immovable property in which no natural person resides. The payor (paying agent) who has a duty to collect the charge from the taxpayer is a unit owners' association

[3] Sec. 10b of the Local Charges Act, as amended.

(for blocks of flats) or the owner of the immovable property. The municipality must specify the tax base in the ordinance. This might be the weight of the waste in kilograms, the volume of the waste in liters, or the capacity of the waste bin in liters, always attributable to the taxpayer for one month. The municipality may set a minimum monthly tax base of 10 kilograms/60 liters. The tax rate is fixed and cannot exceed CZK 6 per kg if the tax base is the weight of the waste or CZK 1 per liter if the tax base is the waste volume or the waste bin capacity.

Generally, the self-application principle is used for both charges: the taxpayer and payor are responsible for the announcement to the tax administrator (municipal office) and the payments. Time limits must always be set in the binding ordinance. The municipality may further regulate through a generally binding ordinance other exemptions from the charges, charge reductions, the exclusion of the announcement obligation, and a longer time limit for notification of changes than that set in the Local Charges Act. The taxable period is one calendar year, and the act concerns a partial tax period of one month.

If the charges are not paid on time or in the correct amount, the tax administrator assesses the charge by means of a tax assessment or collective prescription list. If a municipality has established a charge for the disposal of municipal waste from immovable property and has selected the weight of the waste in kilograms or the volume of the waste in liters as a tax base, the self-application principle cannot be used. The tax administrator assesses the charge to the payor through a tax assessment or a collective prescription list. The charge is payable within 30 days of the delivery date of the tax assessment or collective prescription list. If the charge is not paid on time, the tax administrator may increase the unpaid charges or part thereof by up to three times. Sanctions set in the Tax Code[4] cannot be used (except for orderly fines and fines for failure to fulfill an obligation of a non-monetary nature).

3.2. Comparison

Table 1 summarizes the research on communal waste charges. This provides the fundamental differences between the charges on communal waste available to municipalities up to 2022 and in the following years. A discussion based on these findings follows.

	Through 2021			2022 and after	
	Levy on the basis of a contract	Waste act charge	Local charge on communal waste	Charge for the municipal waste management system	Charge for the disposal of municipal waste from immovable property
Set in	Contract	Ordinance	Ordinance	Ordinance	Ordinance
Taxpayer	Contractor	Waste producer	Resident	Resident	Waste producer
Payor	Possible	Yes	No	No	Yes

[4] Act no. 280/2009 Sb., Tax Code, as amended.

Exemptions in the act	No	No	Yes	Yes	Yes
Exemptions in the ordinance	N/A	Yes	Yes	Yes	Yes
Empty property subject to charges	Possible	No	Yes	Yes	Yes
Tax base	N/A	Person	Person	Person	Weight of the waste/volume of the waste/waste bin capacity
Minimum tax base	N/A	No	No	No	Yes
Tax rate	Unlimited	Limited, unspecified	Limited, CZK 250 + 750	Limited, CZK 1,200	Limited, CZK 6/1
Sanctions set in	Contract, Civil Code	Tax Code	Local Charges Act	Local Charges Act	Local Charges Act
Tax administrator	N/A	Municipal office	Municipal office	Municipal office	Municipal office

Table no. 1
Structural Components of Charges on Communal Waste (based on research by the author)

4. Discussion

As evident from Table 1, all charges had to be introduced by the generally binding ordinance issued by the municipality except for the levy on the basis of a contract. The constitutional principle is that taxes (sensu largo, including charges) can be imposed only by acts, not merely by the local bylaw. In the Czech Republic, the principle nullum tributum sine lege is included in the Charter of Fundamental Rights and Freedoms (Article 11/5), which is part of the Czech Constitution sensu largo, together with the constitution sensu stricto (Radvan 2016, Radvan 2019).

Despite the fact that the Czech Ministry of Finance has no statistics concerning the ratios, an educated guess is that approximately 80% of municipalities were using the local charge on communal waste and 19% were using the waste act charge until 2021 (Drahovzal, 2009). The levy on the basis of a contract was used only exceptionally. There were also municipalities that did not collect any payments for communal waste. The reasons were typically either inadequate (legal, economic, personal) capacity to prepare the relevant ordinance or political-economic in nature: while any charge on communal waste must be administered and paid by the municipality itself, other taxes are administered by the central tax offices. Typically, in the case of a recurrent property tax, the municipality has several options to increase the basic tax rate and the tax itself (even five times more than the legal regulation sets). Several municipalities do not collect charges on communal waste, and their waste management is financed by increased property tax (Radvan 2019). Although there are no statistical data, the situation is likely the same with the new regulation effective from the beginning of 2022: most municipalities are employing a charge for the municipal waste management system, and

far fewer have chosen to charge for the disposal of municipal waste from immovable property, as this is a more complicated system (see below).

The levy on the basis of a contract was never a good solution. The fact that it was not possible to combine the contract system with the two existing charges on communal waste, also confirmed by the courts[5], rendered the levy obsolete. Considering the civil law principle of freedom to enter into a contract, it is certain that there was never a situation in which all of the inhabitants of a particular municipality would have entered into a communal waste management contract with the municipality. Conversely, the combination of the levy on the basis of a contract and a local charge on communal waste or a waste act charge might have been a very effective solution to force people to behave more ecologically: those who want to sort the waste could have signed the contract, while others would have paid the charge according to general bylaws applicable to the rest of the population in the municipality. In this situation, the levy on the basis of a contract could have had not only a fiscal function but also regulative and stimulatory effects on waste sorting (Radvan 2016). Moreover, in terms of the legislative-technical aspects, the title `levy´ is unclear (as there are only regular taxes sensu stricto with no direct consideration and irregular charges/fees with certain direct consideration for taxpayers), especially in connection with the `contract´.

In addition, the taxpayer's identification was unclear concerning the levy on the basis of a contract; the contract could have been signed with every household member, with one member of the household, with the owner of the property, etc. All four other possibilities tax each person individually. The person liable to tax (taxpayer) could be set as the taxpayer with respect to the real production of communal waste (the waste producer – the waste act charge and the charge for the disposal of municipal waste from immovable property) or according to the administrative place of permanent residency (the resident – the local charge on communal waste and the charge for the municipal waste management system). Such a difference has meant – and, in certain situations, still means – that some people have to pay the communal waste charge twice (they have a residence in a municipality where residents are set as taxpayers but actually live and work in another one where waste producers are liable for charges), and some do not pay at all (the opposite situation). The solution might be exemption from payment in another municipality. However, this exemption is set only in the legal regulation concerning the charge for the disposal of municipal waste from immovable property. In all other cases, it is up to the municipality to set an exemption in the ordinance (Radvan 2019).

From the tax administrator's perspective, the local charge on communal waste and the charge for the municipal waste management system provide an easy way to identify taxpayers, as the tax administrator has direct access to all registries, including the real estate cadaster. In the case of waste act charges and charges for the disposal of municipal waste from immovable properties, it is much more difficult to identify persons liable for tax. On the other hand, the revenues might be higher as the charge is paid by all producers of communal waste, including students and workers. Taxing people without a residence in the municipality is impossible using the local charge on communal waste or the charge for the municipal waste management system.

[5] Supreme Administrative Court, 2 Afs 107/2007-168.

In practice, there were many issues with unpaid charges by minor taxpayers. The Local Charges Act (i.e., concerning an abolished local charge on communal waste and current charge for the municipal waste management system and charge for the disposal of municipal waste from immovable property) has a specific rule stating that if tax arrears arise with respect to a taxpayer who is a minor on the due date and has not acquired full legal capacity, the tax liability of that taxpayer shall pass to their legal representative, and the tax administrator shall assess the charge to the legal representative of the taxpayer.

Taxpayers (except for the waste act charge) are also owners of empty properties (no natural person is registered or resides there). They have to pay for every empty property. In the case of co-ownership, joint owners are obliged to fulfill the charge duty jointly and collectively. Concerning the levy on the basis of a contract, in my opinion, it was also possible to tax an empty property.

The role of the payor (paying agent) of the charge for the disposal of municipal waste from immovable property might be beneficial for the tax administrator, as the payor (the unit owners' association or owner of the property) has a duty to collect charges from taxpayers living in the block of flats or on the property and send money to the tax administrator. However, for the payor, the regulation is imperfect: if the taxpayer does not pay the charge to the payor, the payor still has to pay, and tax debt may be recovered from the taxpayer through the courts. A very specific and, in my opinion, unconstitutional is Sec. 5/4 of Prague's ordinance[6] stating that if there is no payor, the tax is payable by the taxpayer. Such a rule goes beyond the law and might be considered unconstitutional. Concerning the local charge on communal waste and the charge for the municipal waste management system, legal regulation allows one of the taxpayers living on the same property to pay the charge on behalf of the others. However, the tax duty remains with the taxpayer. For the levy on the basis of a contract, the details concerning more persons in one household should be specified in the contract unless there is a specific contract for every waste producer.

Concerning exemptions, the Waste Act charge alone does not have a statutory exemption directly in the Act. The same applies to the levy on the basis of a contract, but there is no need to set exemptions; the municipality would not have concluded the contract. A positive aspect is that the number of exemptions in the act is limited, and municipalities are free to set additional tax exemptions for all charges in their ordinances, respecting their needs, experience, and local circumstances. Often, there are exemptions for young babies, pensioners, people living abroad for a long time, etc. A handy tool for tax administrators is the rule that if the taxpayer fails to comply with the obligation to declare information relevant to the exemption (and to the reduction – see below) of the tax within the time limit, the entitlement to exemption or reduction of the tax shall be terminated.

Municipalities may also (with the exception of the waste act charge) set so-called reductions of the charge. Unfortunately, this term is highly unclear; tax theory does not know this, and it is not used in other places in Czech tax law. It would be better to use full or partial exemption or set specific lower tax rates rather than reduction.

[6] Generally binding ordinance of the City of Prague no. 17/2021 on the local charge for the disposal of municipal waste from immovable property.

In addition to the definition of the taxpayer, the most important difference is the tax base. Until the end of 2021, all charges used (in fact, not statutory) a person as the tax base. The `tax on head´ still exists with the charge for the municipal waste management system. From this perspective, the charge for the disposal of municipal waste from immovable property seems to be a new form of communal waste charging, as it is based on the pay-as-you-throw principle. However, inspiration from the waste act charge is still apparent. The municipality has three new options for the tax base: the weight of communal waste in kilograms, the volume of communal waste in liters, or the capacity of the waste bin in liters. The last option is the most frequent one,[7] and is usually connected to the collection frequency, as this is the easiest option for the tax administration. The weight of communal waste in kilograms is used by only one municipality, whereas the volume of communal waste in liters is the tax base for two municipalities in the Czech Republic.[8] The reason for this is the need to measure every collection of communal waste, which is technically challenging to implement as well as time consuming. In every case, the charge for the disposal of municipal waste from immovable property may be the best way to motivate people to sort the waste, such that only the minimum necessary amount of unsorted waste remains in their waste bin. People are expected to attempt to minimize the amount of payable unsorted waste by throwing it into other people's waste bins or illegal waste dumps. To avoid such behavior, municipalities can introduce a minimal tax base, assuming that every person necessarily produces a certain amount of unsorted communal waste.

The amount to be paid is set in the contract (for the levy on the basis of a contract) or in the generally binding ordinance (all four charges). The tax rate for all charges was and remains limited. However, there was no fixed amount for the highest possible tax rate for the waste act charge, only the general approach to setting the tax rate. All three other charges have the maximal possible tax rate directly in the Local Charges Act. The tax rate might differ for specific groups of taxpayers (pensioners, children, etc.), but the principle of non-discrimination must always be considered.

When paying charges, the principle of self-application is applied. Time limits are generally set in the binding ordinance. Only if the charges are not paid on time or in the correct amount will the tax administrator assess the charge by means of a tax assessment or collective prescription list. However, such an approach is impossible for the disposal of municipal waste from immovable property if the weight or volume of the waste is chosen as a tax base. The tax administrator must assess the charge to the payor by means of a tax assessment or a collective prescription list according to kilograms or liters of communal waste produced. The charge is then payable within 30 days of the delivery date of the tax assessment or collective prescription list. This is likely why these tax-based possibilities are so rarely used. Until 2021, all municipalities collected waste charges during the taxable period (calendar year) and used them immediately. However, the weight or volume of the waste is known only after the end of the taxable period, and the charge can be assessed afterward. The possible solutions to obtain this revenue sooner are either to collect the charge multiple times during the year for specific partial tax

[7] Used in 86 municipalities, according to ASPI (the legal information system operated by Wolters Kluwer).
[8] According to ASPI.

periods (calendar months) or to introduce an advance payment accountable after the end of the year. Both solutions are less effective from the perspective of the tax administration.

If the charges are not paid on time, according to the Local Charges Act, the tax administrator may increase the unpaid charges or part thereof by up to three times. Sanctions set in the Tax Code cannot be used. For failure to pay the levy on the basis of a contract, sanctions should have been set in the contract, and the general rules stated in the Civil Code[9] should have been applied. Generally, it is better to have other specific tax administration procedures for local charges, including charges on communal waste. However, these specific rules are set only in the Local Charges Act (i.e., for the abolished local charge on communal waste, current charge for the municipal waste management system, and charge for the disposal of municipal waste from immovable property). The waste act charge was administered only by the general Tax Code, while the levy on the basis of a contract had no procedural rules.

Table 2 summarizes the pros and cons of individual charges on communal waste, including the levy on the basis of a contract.

Charge	Pros	Cons
Levy on the basis of a contract	- regulative and stimulation effects for waste sorting	- impossible to combine with other charges on communal waste - impossibility to force persons to sign a contract - unclear title - undetailed legal regulation, including the taxpayer - unlimited tax rate - no tax administration procedures
Waste act charge	- waste producer pays - possibility to tax all waste producers - possibility to add exemptions in the ordinance	- difficult identifying the taxpayer - impossible to tax empty properties - no specific rules for minor taxpayers' tax debts - administered by Tax Code without specifics for such a charge, including sanctions
Local charge on communal waste	- easy to identify the taxpayer - specific rules for minor taxpayers' tax debts - possibility to add exemptions in the ordinance - specific rules for the tax administration	- double payments - people without residency do not pay - unclear term reduction of the charge
Charge for the municipal waste management system	- easy to identify the taxpayer - exemption if the charge for the disposal of municipal waste from immovable property is paid elsewhere - specific rules for minor taxpayers' tax debts - possibility to add exemptions in the ordinance - specific rules for tax administration	- people without residency do not pay - unclear term reduction of the charge

[9] Act no. 89/2012 Sb., Civil Code, as amended.

Charge for the disposal of municipal waste from immovable property	- waste producer pays - possibility to tax all waste producers - specific rules for minor taxpayers' tax debts - possibility to add exemptions in the ordinance - follows pay-as-you-throw principle - motivation for waste sorting - minimal tax base - specific rules for tax administration	- difficult identifying the taxpayer - the payor's role in the case of taxpayers' debts - unclear term reduction of the charge - the construction of the tax base is difficult for the tax administration - cannot be collected during the year if the weight of the waste or the volume of the waste is used as a tax base

Table no. 2
Pros and Cons of Charges on Communal Waste (based on research by the author)

5. Conclusion

Summarizing the knowledge gained and having collected all of the advantages and disadvantages of payments on communal waste in one table, it is possible to state that the legal regulation valid until the end of 2020 and effective until the end of 2021 was imperfect. Even if the municipalities had three options for introducing payments for communal waste collected in their territory, only two of those options were used in practice. The levy on the basis of a contract might have been an excellent tool to encourage people to sort their waste more effectively; however, the impossibility of combining the levy with other charges on communal waste in combination with the impossibility of forcing persons to sign a contract meant that the levy was not used at all in practice. Moreover, the legal regulation was not detailed, especially concerning the definition of the taxpayer, tax rates, and tax administration procedures.

Both the waste act charge and the local charge on communal waste had their pros and cons, often opposite of each other. This provided municipalities the chance to choose a charge that was better suited to local conditions. The capital city of Prague was using the waste act charge to tax those working or studying in Prague but having their permanent residence in another municipality. However, this also meant difficulties in identifying all waste producers – that is, the taxpayers. The second-largest city, Brno, preferred the local charge on communal waste as it was easy for the administration, especially when looking up the taxpayers in public registries of individuals. The differences in the definition of taxpayers meant that some people had to pay twice and some did not have to pay for communal waste at all.

For these reasons, and also because of the need to unify the tax administration's procedures, the legislator approved the amendments, and two new charges on communal waste were created, both regulated by the Local Charges Act. The charge for the municipal waste management system is, to a certain extent, a modernized version of the local charge on communal waste. The added exemption if the charge for the disposal of municipal waste from immovable property is paid elsewhere means that nobody should pay the charge twice for communal waste.

The charge for the disposal of municipal waste from immovable property is a new form of communal waste charging based on the pay-as-you-throw principle; that is, all waste producers have to pay the charge, no matter where their residence is. Many structural components are inspired by the waste act charge.

Thus, it is still difficult to identify waste producers, even if this obligation is more or less delegated to payors. The charge seems to be a good motivation for waste sorting, especially in combination with a minimal tax base and three possibilities for the tax base (the weight in kilograms, the volume of waste, and the capacity in liters of the waste bin). It is a bit challenging for municipalities to prepare a generally binding ordinance so that they obtain revenue during the taxable period, if they chose the weight or the volume of communal waste as a tax base. Possible solutions might be advance payments or partial payments after several partial periods, that is, calendar months.

According to the legal information system ASPI operated by Wolters Kluwer, a charges for the municipal waste management system are more common in Czech municipalities; it is collected in 416 municipalities, while 86 municipalities prefer the charge for the disposal of municipal waste from immovable property. Although there are 6,258 municipalities in the Czech Republic, more than 500 municipalities included in the ASPI show that the ratio between charges effective through the end of 2021 and those effective today remains almost unchanged. The reason is primarily that the basic structural components copy those of the abolished communal waste charges. Of the regional cities, only Karlovy Vary, Plzeň, and Prague as a capital city use a charge for the disposal of municipal waste from immovable property, while in Brno, Ostrava, Olomouc, Zlín, Jihlava, České Budějovice, Liberec, Pardubice, and Hradec Králové, a charge for the municipal waste management system is collected. Ústí nad Labem is the only regional city in which no charge on communal waste has been introduced.

The numbers show that most municipalities prefer easy administration to increased revenue caused by additional taxpayers – that is, waste producers without residency in the municipality's territory. However, there is a solution to attract people actually living but not having a permanent residence in the municipality to move their residence to the municipality. A good example is Brno: every person who has proven that they paid the charge on communal waste gets one-quarter of the price of the annual ticket for public transport in the city back as a subsidy.

To conclude, amendments to the legal regulations concerning communal waste payments have been useful. There are only two possibilities for collecting waste charges in the Czech Republic, and every municipality may choose which charge better suits its circumstances and needs. Nobody is taxed twice. The possibilities for exemptions at the local level are substantial. Both charges are administered under the same procedural rules, including specific rules for minor taxpayers' tax debts or ex offo waivers for emergencies and natural disasters.[10] Notably, the charge for the disposal of municipal waste from immovable property should be the preferred charge in most municipalities, as it follows the pay-as-you-throw principle and motivates waste sorting (in connection with the minimal tax base). The hypothesis that the new system of charges for municipal waste management in the Czech Republic is suitable for both taxpayers and municipalities was confirmed.

[10] At the request of the taxpayer, the tax administrator may also waive the charge for the municipal waste management system in whole or in part to reduce the harshness of the legislation.

However, several structural components remain to be amended to increase the effectiveness of communal waste charge administration. Primarily, the term `reduction of the charge´ should be abolished; municipalities may use full or partial exemptions or different tax rates to achieve the same effects. In addition, the payor should not be responsible for the taxpayers' debts. All other shortcomings of the charge for the disposal of municipal waste from immovable property (the complicated construction of a tax base, the impossibility of collecting the charge during the year if the weight or the volume of the waste is used as a tax base) might be resolved by the sample general binding ordinance prepared by the Ministry of Finance.

Bibliography

1. Babčák V (2005) Miestne dane a miestne poplatky – stav a perspektiva, in: Radvan M & Mrkývka P, eds., *Financování územní samosprávy ve sjednocující se Evropě – Sborník 1. mezinárodního právnického symposia*, Brno, Masaryk University, pp. 1–6.
2. Czudek D & Mrkývka P (2017) Fiscal Resources of Local Self – Government Budgets from Environmental Charges on Czech Republic, *Lex Localis - Journal of Local Self-Government,* 15(3), pp. 669–683.
3. Drahovzal P (2009) *Novela zákona o odpadech aneb žádná velká změna k lepšímu*, http://www.enviweb.cz/?secpart=odpady_archiv_hgiaj/Novela_zakona_o_odpadech_aneb_zadna_velka_zmena_k_lepsimu.html [19.09.2015]
4. Mikušová Meričková B, Nemec J & Soukopová J (2014) The Economics of Waste Management: Evidence from the Czech Republic and Slovakia, *Lex Localis - Journal of Local Self-Government,* 12(3), pp. 431–449.
5. Nemec J, Soukopová J & Mikušová Meričková B (2015) Economic Aspects of the Municipal Waste Management: Czech Republic and Slovakia, *Croatian and Comparative Public Administration,* 15(3), pp. 645–666.
6. Pál Á (2022) *Charges for Communal Waste Management - A Comparison between Slovakia, Hungary, and the Czech Republic*, Brno, Masaryk University, 2022.
7. Popławski M (2012) Konstrukcja uchwały dotyczącej stawki opłaty za gospodarowanie odpadami komunalnymi - wybrane kwestie. Part 1, *Przegląd Podatków Lokalnych i Finansów Samorządowych,* 7(12), pp. 14–18.
8. Popławski M (2013) Konstrukcja uchwały dotyczącej stawki opłaty za gospodarowanie odpadami komunalnymi - wybrane kwestie. Part 2, *Przegląd Podatków Lokalnych i Finansów Samorządowych,* 8(1), pp. 11–16.
9. Radvan M (2019) Municipal Charges on Communal Waste: Do They Compete with the Immovable Property Tax?, *Journal of Financial Management of Property and Construction,* 24(1), pp. 1–19, doi: 10.1108/JFMPC-02-2018-0007
10. Radvan M (2008) Economic Autonomy of the Local Self-Government Units - Local Taxes in the Czech Republic, *Zagadnienia ustroju samorządu terytorialnego w Polsce i innych państwach Unii Europejskiej. Zeszyty naukowe,* 2(1), pp. 178–193.
11. Radvan M (2010) Taxation of Communal Waste (Wrongly Indicated as Taxation of Communal Expenses), in Ruśkowski E & Zawerucha I, eds., *Finanse publiczne i prawo finansowe w Europie Centralnej i Wschodniej w warunkach kryzysu finansowego*, Białystok – Lwów: Temida 2, pp. 379–383.
12. Radvan M (2012) *Místní daně*, Praha, Wolters Kluwer.
13. Radvan M (2016a) Article 9 of the European Charter of Local Self-Government in the Czech Republic, in: Gliniecka J, Drywa A, Juchniewicz E & Sowiński T, eds., *Finansowanie samorządu terytorialnego i jego zadań a Europejska Karta Samorządu Lokalnego*, Warszawa, CeDeWu, pp. 69–82.
14. Radvan M (2016b) Taxes on Communal Waste in the Czech Republic, Poland and Slovakia, *Lex Localis – Journal of Local Self-Government,* 14(3), pp. 511–520.
15. Radvan M (2017) How to Get Taxpayers to Pay Local Charges, in: Radvan M, Gliniecka J, Sowiński T & Mrkývka P, eds., *The Financial Law towards Challenges in the XXI Century*, Brno, Masaryk University, pp. 340–348.
16. Radvan M (2020) *Czech Tax Law*, Brno, Masaryk University.

17. Šauer P, Pařízková L & Hadrabová A (2008) Charging Systems for Municipal Solid Waste: Experience from the Czech Republic, *Waste Management*, 28(12), pp. 2772–2777.
18. Slavík J & Pavel J (2013) Do the Variable Charges Really Increase the Effectiveness and Economy of Waste Management? A Case Study of the Czech Republic, *Resources, Conservation and Recycling,* 70(1), pp. 68–77.
19. Soukopová J & Vaceková G (2015) Competition and Municipal Waste Management Expenditure: Evidence from the Czech Republic, Olomouc Region, *Scientific paper - University of Pardubice*, Series D. 35.
20. Soukopová J, Klimovský D & Ochrana F (2017) Key Factors for Public Utility Efficiency and Effectiveness: Waste Management Services in the Czech Republic, *Ekonomický časopis,* 65(2), pp. 143–157.
21. Soukopová J, Struk M & Hřebíček J (2017) Population Age Structure and the Cost of Municipal Waste Collection. A Case Study from the Czech Republic, *Journal of Environmental Management,* 203(2), pp. 655–663.

Vasilka SANCIN[*] – Miha JUHART[**]

The Right to Safe Drinking Water in International Law and in Slovenia's legal framework and implementation[***]

Abstract

According to the United Nations Office of the High Commissioner for Human Rights, a total of 2.1 billion people globally lack access to safe, readily available water at home. Given the rapid population growth, demand for water has been consistently on the rise, while its available quantity has been decreasing due to its unsustainable use. Despite widespread international support for the recognition of the right to safe drinking water, which was also demonstrated by the adoption of the UN General Assembly Resolution on the Human Right to Water and Sanitation in 2010, progress achieved at international and national levels reveals significant remaining challenges, including huge inequalities between and within countries in accessing basic water services. In Slovenia, drinking water supply, for which data on water quality are available, is provided to almost 90% of the population, and in 2016, Slovenia amended its Constitution and explicitly included the universal right to drinking water (Article 70a). This article discusses the existence and normative content of the right to safe drinking water, both in international and Slovene legal contexts. Furthermore, it critically accessed the adequacy of legal protection of access to safe drinking water and analysed Slovenia's obligations in relation to this right. Hence, in addition to looking into the normative content of the right, it also discusses whether the desired effects are already recognizable in practice, particularly focusing on the situation in Slovenia. The article also includes some de lege ferenda proposals, which competent authorities might wish to consider when further developing a normative framework or concrete policy measures.

Keywords: right to safe drinking water, international law, Slovenia's legislation, Constitution of the Republic of Slovenia, UN General Assembly Resolution on the human right to water and sanitation, UN Special Rapporteur on the human rights to safe drinking water and sanitation.

"Access to safe water is a fundamental human need and, therefore, a basic human right. Contaminated water jeopardizes both the physical and social health of all people. It is an affront to human dignity."[1]

1. Introduction

The United Nations Office of the High Commissioner for Human Rights (hereinafter OHCHR) reports that 2.1 billion people worldwide lack access to safe,

Vasilka Sancin – Miha Juhart: The Right to Safe Drinking Water in International Law and in Slovenia's legal framework and implementation. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 106-124, https://doi.org/10.21029/JAEL.2023.34.106

[*] dr. jur., full professor, Department of International Law, University of Ljubljana, Faculty of Law, email: vasilka.sancin@pf.uni-lj.si, ORCID: 0000-0002-1623-7278
[**] dr. jur., full professor, Department of Civil Law, University of Ljubljana, Faculty of Law, email: miha.juhart@pf.uni-lj.si, ORCID: 0000-0001-6730-4904
[***] *The research and preparation of this study was supported by the Central European Academy.*
[1] Message of the UN Secretary-General Kofi Annan on World Water Day, 12 March 2001.

https://doi.org/10.21029/JAEL.2023.34.106

readily available water at home.[2] Water is one of the elementary natural resources that must be managed in the most sustainable way to ensure its availability not only for the present but also for future generations; given the rapid population growth, the water demand has been consistently on the rise, while its available quantity has been decreasing due to its unsustainable use.

Numerous international instruments emphasise the importance of access to water, and the 2030 Agenda for Sustainable Development,[3] adopted at the United Nations Sustainable Development Summit on 25 September 2015, presenting the 17 Sustainable Development Goals (SDGs), cannot be achieved without ensuring safe drinking water (SDG 6.1 and 6.2) – a necessary element for the survival of the humankind that satisfies the social and human elements of sustainable development.[4] The implementation of SDG 6 requires a paradigm shift; namely, water is regarded not just as a natural resource to be managed and used, but the access to safe, affordable, and reliable drinking water must be understood as a fundamental human right to that all people are entitled without discrimination, as it is indispensable to sustain healthy livelihoods and maintain people's dignity, which is an essential precondition for eradicating poverty and building peaceful and prosperous societies.[5] Thus, drinking water supply has become an increasingly burning global issue, including the context of securing world peace.[6]

The idea of the human right to water first emerged at international environmental conferences in response to global water justice struggles.[7] However, over the years, the international community has begun to consider access to safe drinking water within a human rights framework. Evidence of such developments includes explicit references to access to water in the Convention on the Rights of the Child (monitored by the Committee on the Rights of the Child, hereinafter CRC), the Convention on the Elimination of All Forms of Discrimination against Women (monitored by the Committee on the Elimination of Discrimination against Women, hereinafter CEDAW), and the Convention on the Rights of Persons with Disabilities (monitored by the Committee on the Rights of Persons with Disabilities, *hereinafter* CRPD). Furthermore, in 2002, the UN Committee on Economic, Social, and Cultural Rights (CESCR) adopted its general comment No. 15 on the right to water (GC 15).[8] In 2016, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted Guidelines for the realization of the Right to Drinking Water and Sanitation.[9]

[2] See OHCHR and the right to water and sanitation.

[3] Resolution adopted by the General Assembly on 25 September 2015: Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1.

[4] The UN 2023 Water Conference will be the first United Nations conference on water since 1977 and will be held at the UN HQ from 22–24 March 2023. It is expected to be a watershed moment for the sustainable development community as a whole and is about uniting the world in accelerating action towards achieving SDG 6: water and sanitation for all by 2030.

[5] See also Sancin & Kovič Dine 2016, 95–108.

[6] An entirely new discipline of Water Diplomacy has been developed for these purposes.

[7] Murthy 2013, 90.

[8] General Comment No. 15 (2002), The Right to Water, UN Doc. E/C.12/2002/11.

[9] Guidelines were adopted in Resolution 2006/10, Promotion of the Realization of the Right to Drinking Water and Sanitation, Report of the Sub-Commission on the Promotion and Protection of Human Rights, Fifty-eighth session, UN Doc. A/HRC/Sub.1/58/L.11 (2006), 41.

The United Nations Development Programme (UNDP) promotes the human-rights-based approach[10] and underlines that the starting point and unifying principle for public action in water and sanitation is the recognition that water is a basic human right. In 2008, the Human Rights Council (HRC) created the mandate of the *"independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation"* to help clarify the scope and content of these obligations[11] and so far, three mandate holders have been appointed.[12]

However, the right to water, along with the right to sanitation, has been globally recognised within the human rights legal framework, and widespread international support for the recognition of the right to safe drinking water was demonstrated only by the adoption of the UN General Assembly (UNGA) Resolution on the Human Right to Water and Sanitation in 2010.[13] This resolution explicitly recognised water and sanitation as human rights and acknowledged that both are essential for the implementation of all human rights. In the same resolution, the UNGA called on Member States to provide financial and technical resources to scale up efforts to provide safe, clean, accessible, and affordable drinking water and sanitation for all. Although several commitments have fallen short and challenges yet need to be overcome, the resolution has had a remarkable influence on putting in motion further commitments by the international community. It is important to note that in September 2010, the UN Human Rights Council (HRC) passed a new resolution,[14] affirming recognition by the UNGA and clarifying that the rights to water and sanitation are derived from the right to an adequate standard of living, which is considered a legally binding human right in almost all states. Furthermore, in May 2011, the World Health Organization (WHO) also embraced water and sanitation as a human right through its Resolution 64/24,[15] calling on Member States *"to ensure that national health strategies contribute to the realisation of water- and sanitation-related Millennium Development Goals while supporting the progressive realisation of the human right to water and sanitation."*

Further development occurred in December 2015, when the UNGA passed a resolution of 70/169,[16] acknowledging that the rights to safe drinking water and sanitation are two distinct human rights that warrant separate treatment to address the specific challenges in their implementation and to avoid sanitation being neglected as secondary human rights.

[10] See Human Rights Based Approach and Governance.
[11] The HRC extended the mandate on water and sanitation in March 2011 and changed its title to Special Rapporteur on the human rights to safe drinking water and sanitation (SR). See more on the mandate and work of the SR.
[12] Catarina de Albuquerque (Portugal) served between 2008-2014; Léo Heller (Brazil) served between 2014-2020; Pedro Arrojo-Agudo (Spain) serves since 2020.
[13] Resolution adopted by the General Assembly on 28 July 2010: The human right to water and sanitation, A/RES/64/292.
[14] Resolution adopted by the Human Rights Council: Human rights and access to safe drinking water and sanitation, A/HRC/RES/15/9.
[15] Sixty-Fourth World Health Assembly, Drinking-Water, Sanitation and Health, WHA64.24.
[16] Resolution adopted by the General Assembly on 17 December 2015: The human rights to safe drinking water and sanitation, A/RES/70/169.

Since 2010, several countries have updated their legal frameworks to reflect water and sanitation as human rights.[17] For example, Costa Rica, Egypt, Fiji, Kenya, Mexico, Morocco, Niger, and Slovenia – which is the focus of analysis in this article – Somalia, Tunisia, and Zimbabwe have new constitutional provisions recognising the human right to water, sanitation, or both since 2010, and many states have passed legislation in this regard (e.g. Australia, Nepal, and Togo), joining many other states that already recognised those rights in their national legislation.[18]

Furthermore, the right to safe drinking water has also been recognised by domestic courts that have issued decisions reflecting the 2010 UNGA resolution (e.g. a court of appeal in Botswana, referring to UNGA resolution 64/292, affirmed that water is a human right strongly linked to the rights to health and life[19]). It is also important to mention that an increasing number of civil society organisations and grassroots movements have adopted the language of the human right to water in their formulations, analyses, and struggles on behalf of the most disadvantaged populations and have increasingly organised themselves to monitor their governments' actions in relation to water and to promote public participation in decision-making processes.[20]

Undoubtedly, national implementation requires not only adequate legislation and jurisprudence, but also autonomous regulatory bodies ensuring that water services are provided in compliance with the human rights framework, both through a monitoring and enforcement role and by promoting policy changes in line with human rights.[21]

[17] In 2013, the National Human Rights Institutions (NHRI) Water Initiative was launched to enhance the role of National Human Rights Institutions (NHRIs) in monitoring water governance, providing training services on the advancement, promotion and protection of the right to water and related human rights.

[18] Examples include Argentina, Bangladesh, Belgium, Burkina Faso, Colombia, Costa Rica, Dominican Republic, Ghana, Guatemala, Guinea, Indonesia, Namibia, Nigeria, Panama, Peru, Sri Lanka, Ukraine, and Zambia as Member States recognizing the rights to water and sanitation in their national legislation, and Democratic Republic of the Congo, Ecuador, Maldives, Mexico, Nicaragua, Solomon Islands, South Africa, Uganda, United States of America (at state level), and Uruguay having such a provision in their constitutions even before 2010. See Statement by the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, on 28 July 2020 (hereinafter SR Heller's statement 2020) at https://www.ohchr.org/en/statements/2020/07/10th-anniversary-recognition-water-and-sanitation-human-right-general-assembly (Accessed: 30 August 2022).

[19] Mosetlhanyane and others v. Attorney General of Botswana.

[20] Ibid.

[21] Such regulators exist in a number of countries (e.g. Bolivia established an Authority for Social Oversight and Supervision of Drinking Water and Basic Sanitation in 2009, Poland created an independent regulator in 2018 and the creation of new independent regulatory bodies was (in 2020) underway, among others, in New Zealand, Qatar and Punjab, India. See SR Heller's statement 2020 (cited above). Several manuals have been elaborated to guide practitioners in their work on the issue, such as Bos et al. 2016.

This article critically assesses relevant global developments in terms of legislation and implementation of the right to safe drinking water, reflecting on accepted obligations in Slovenia, demonstrating that much remains to be done to fully implement the commitments made. Although relevant and significant, given the space limitations, this article does not address regional normative developments, even though in Europe, the Council of Europe has, for example, already at the 2001 meeting of the Committee of Ministers to Member States on the European Charter of Water Resources, relying on the recognition of the fundamental right to safe drinking water by international human rights documents, confirmed that everyone has the right to a sufficient quantity of water that meets their basic needs.[22] Furthermore, there undoubtedly exists an impressive development within the European Union centred around the Drinking Water Directive.

2. The international regulation of the right to safe drinking water

The right to safe drinking water, although not explicitly recognised as a self-standing human right in international treaties, has already been recognised as an inherent part of the legal framework of human rights, which obliges states to work towards achieving universal access to water for all, without any discrimination, while prioritising those most in need. The key elements of the right to water are its availability, accessibility, affordability, quality, safety, and acceptability.[23] Not only academic literature[24] but also contemporary practice demonstrates an increasing recognition of the multiple links between the human right to water and other human rights. Interdependency exists with, for example, the rights to life, dignity, health, work, education, housing and food, women's rights, and public participation. SR Heller[25] specifically emphasised that the particular impact and challenges of the human right to water among certain persons and groups have been increasingly acknowledged in the last decade (e.g. accessibility of facilities for persons with disabilities, facilities for persons in homelessness, or the importance of safe, available, and culturally acceptable services).

In academic literature, the right to water is sometimes defined as a subjective human right with direct applicability, meaning that individuals or groups can demand that the states guarantee their right to safe drinking water and have access to judicial and extrajudicial protection from the corresponding authorities.[26]

International human rights law thus entails specific obligations related to access to safe drinking water, which require states to ensure everyone's access to a sufficient amount of safe drinking water for personal and domestic uses, defined as water for drinking, personal sanitation, washing clothes, food preparation, and personal and household hygiene. These obligations also require states to protect the quality of drinking water supplies and resources.

[22] Recommendation Rec (2001)14 of the Committee of Ministers to Member States on the European Charter on Water Resources, 17 October 2001, para. 5.
[23] More on various aspects of the right and relevant materials.
[24] See, for example, Rodriguez 2011; Ahačič et al. and Sancin et al. 2015, Nehaluddin 2020.
[25] SR Heller's statement 2020.
[26] See, e.g. Sereno 2022.

There is also no doubt that access to safe drinking water is an element of social development, as confirmed by the implicit recognition of water as a fundamental human right with the adoption of Article 11 of the International Covenant on Economic, Social, and Cultural Rights[27] (ICESCR) in 1966.

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.

While Article 11 does not explicitly address the right to water, the CESCR confirmed in 2002 with the acceptance of GC 15 that the right to an adequate standard of living also includes the right to water, which played a key role in the development of the human right to safe drinking water. The majority of states that have ratified ICESCR have confirmed in their political declarations that the right to an adequate standard of living necessarily includes the right to safe drinking water.[28] Adoption of GC 15 also recognized the access to safe drinking water as a social right, as before its adoption, it was strongly considered only as an economic commodity, like it was considered that the management of water as an economic good would provide the background for its optimal utilisation and ensure equitable use.[29] Unfortunately, this had the opposite effect, leading to the privatisation of water resources and prices being too high for the impoverished and marginalised communities to afford.[30] This consequence was the main driver for the adoption of GC 15, which was confirmed in its para. 11, where it is specifically stated that water should be treated as a social good and not primarily as an economic one, calling for the recognition that the right to water must be realised in a sustainable manner, available for current and future generations.[31] The GC 15 has also put forward three main criteria for satisfying the right to access to safe drinking water:[32] availability of water for sufficient and continuous use for personal and domestic needs of each person, quality of water that is *"free from micro-organisms, chemical substances, and radiological hazards that constitute a threat to a person's health"*,[33] and the water needs to be physically and economically accessible to every person. These criteria further confirm that access to water is generally treated as an element of social development in any society and should never be used as an instrument of political and economic pressure. Furthermore, GC 15 claims that the right to safe drinking water should also be derived from Article 12 of the ICESCR that recognises *"the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"*. Therefore, GC 15 clearly identifies the nine core obligations for states parties arising from the ICESCR with regard to the implementation of this right,[34] which are (a) access to the minimum essential amount of water, (b) ensuring the right and water facilities on a non-discriminatory basis, c) ensuring physical access to water facilities or services with sufficient amount of safe and drinking water; (d) ensuring that personal security is not

[27] United Nations, Treaty Series, vol. 993, 3.
[28] The right to water and sanitation, International Timeline.
[29] Scheuring 2009, 147–148.
[30] Ibid.
[31] GC 15, para. 11.
[32] GC 15, para. 12.
[33] GC 15, para. 12(b).
[34] GC 15, para. 37.

threatened when having physical access to water, (e) ensuring equitable distribution, (f) adopting and implementing a national water strategy and plan of action for the whole population with periodical reviews, (g) monitoring the realisation of the right to water; (h) adopting low-cost water programs targeted to protect the vulnerable and marginalised groups, and (i) taking measures to prevent treatment and control diseases linked to water. Each of these core obligations has an element of sustainability, as without fulfilment, sustainable development cannot be achieved.

In addition to the ICESCR, several other human rights documents implicitly address the right to water. It has already been argued[35] that Article 6 of the International Covenant on Civil and Political Rights[36] (hereinafter ICCPR) on the right to life can also be considered to cover the right to water, as water is indispensable for life and essential for the health of each individual. Lack of water, especially safe drinking water, leads to diseases among the population that can be the cause of death. The Human Rights Committee (CCPR), established under the ICCPR, in its General Comment 36[37] (GC 36) in relation to the duty to protect life, which implies that state parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life of dignity, explicitly stated in para. 26 that *"The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity, and sanitation."* Furthermore, in a landmark decision on climate change impacts on the right to life published in 2020, deciding on a petition brought by Mr Teitiota against New Zealand,[38] the CCPR had an opportunity to reflect on the petitioner's access to `potable water´ in Kiribitai. In para. 9.8, it decided that *"The Committee also notes the author's claims before the domestic authorities that he would be seriously harmed by the lack of access to potable water on Tarawa, as freshwater lenses had been depleted due to saltwater contamination produced by sea level rise."* In that regard, the Committee notes that according to the report and testimony of climate change researcher John Corcoran, 60 per cent of the residents of South Tarawa obtained fresh water from rationed supplies provided by the public utilities board. The Committee notes the findings of the domestic authorities that there was no evidence that the author would lack access to potable water in Kiribati. While recognizing the hardship that may be caused by water rationing, the Committee notes that the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death. In her dissenting opinion,[39] one Committee member expressed concern that the notion of `potable water´ was used interchangeably with `safe drinking water´ in both domestic jurisdictions deciding on the case as well as by the majority of the CCPR. She emphasised

[35] Winkler 2012. The Human Right to Water: Significance, Legal Status and Implications for Water Allocation. Oxford and Portland: Hart Publishing, p. 49.
[36] United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.
[37] Human Rights Committee, General comment No. 36, Article 6: right to life, CCPR/C/GC/36.
[38] Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016.
[39] Annex II, Individual opinion of Committee member Vasilka Sancin (dissenting).

that *"water can be designated as potable, while containing microorganisms dangerous for health, particularly for children (all three of the author's dependent children were born in New Zealand and were thus never exposed to water conditions in Kiribati)"* and would have thus found a violation of Article 6 in that particular case.

Access to safe drinking water is generally the most limited for marginalised groups such as children, women, and disabled and indigenous peoples.[40] Hence, all international documents addressing the needs of these marginalised groups recognise their right to access safe and drinking water. For example, the 1989 Convention on the Rights of a Child[41] recognises the right to access safe drinking water in Articles 24 and 27. Article 24 grants each child the right to achieve the highest possible health level, which cannot be attained without access to an adequate amount of food and water with satisfactory standards for health, meaning that this right depends on the realisation of the right to a sufficient standard of living entailed in Article 27 of the Convention. The call for improvement of the standard of living, including providing access to safe drinking water, is included in the Convention on Elimination of all Forms of Racial Discrimination Against Women[42] from 1979, where the right of access to safe drinking water is expressed as part of the right to non-discrimination of women in Article 14, which also expressly recognises the developmental dimension of the right. States have an obligation to ensure women's participation in the development processes by ensuring the right to a sufficient standard of living, especially by ensuring boarding, sufficient hygienic conditions, access to electrical energy, transportation routes and connections, and access to safe drinking water. Article 14 is one of the most direct expressions of the connection between access to water and sustainable development in an international document.

While international monitoring mechanisms, such as treaty bodies or special procedures, do provide the opportunity to assess states' efforts to realise the human right to water, the HRC's Universal Periodic Review has shown that this right is rarely at the forefront of the human rights concerns of governments (after 2010, the recommendations in this respect grew from 1 to 2 per cent of all recommendations).[43]

3. The right to safe drinking water in Slovenia's legal framework and practice

3.1. Legal regulation of the right to drinking water in Slovenia

The core of the Constitution of the Republic of Slovenia[44] includes a chapter on fundamental human rights and freedoms (Chapter II, Articles 14–63); however, the right

[40] The CCPR tackled the lack of access to safe drinking water, for example, in its Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2751/2016 (Norma Portillo Cáceres *et al.* v Paraguay).
[41] United Nations, Treaty Series, vol. 1577, 3.
[42] United Nations, Treaty Series, vol. 1249, 13.
[43] See, for example, Bueno de Mesquita 2019.
[44] The Constitution of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, Nos. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a).

to drinking water [*pravica do pitne vode*] codified in Article 70a, features, together with the right to healthy living environment (Article 72), in Chapter III on economic and social relations. Article 70a was added to the Constitution in 2016,[45] and states the following: *"Everyone has the right to drinking water. Water resources shall be a public good managed by the state. As a priority and in a sustainable manner, water resources shall be used to supply the population with drinking water and water for household use, and in this respect, shall not be a market commodity. The supply of drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis."*

Establishing the right to safe drinking water as a fundamental human right in the constitution is important on a symbolic level, but it needs to be fully implemented in practice to have an impact on individuals' lives.

The Constitutional Court of Slovenia adopted several decisions concerning drinking water; however, these predated the adoption of Article 70a.[46] After its adoption, the Constitutional Court tackled water issues in the decision U-I-164/14 of 16 November 2017,[47] where, regarding the provision of the local public service of drinking water supply, the applicant complained that the laws in question do not allow for the provision of substantively adequate minimum information and its assessment of the potential and actual impacts and risks of the planned spatial developments of national significance on the municipal source of drinking water. Although the Court adopted this decision after entry into force of Article 70a, this article was not explicitly mentioned. A separate concurring opinion of Judge Accetto stated that the position of the Court was, after all, confirmed by a constitutional provision not mentioned in the decision – the new Article 70a of the Constitution on the right to drinking water, which was added to the Constitution by a constitutional law in November 2016. The fact that the decision in the present case does not mention this article, on the one hand, understandable because the disputed conduct dates back to 2012 and 2013, and the 18-month deadline for the harmonisation of the laws substantively related to Article 70a was not expired at the time. Judge Acceto, however, opined that it was difficult to understand this provision in any other way, underlining further the importance of water resources as a constitutionally protected public good, which must now be given even greater weight in such cases of balancing. Furthermore, in U-I-223/16[48] of 23 April 2020, the Court reminded that the Constitution does not expressly provide for the exclusive competences of local self-government, except for the provision of drinking water and domestic water supply (Article 70a(4) of the Constitution). Finally, it is relevant to mention the decision, dated before the mentioned change of the Constitution, U-I-226/04[49] of 1 December 2005, where the petitioners challenged the provisions of the Water Act, which regulate the supply of water in areas where it is not provided by the public water supply network.

[45] Constitutional Act Amending Chapter III of the Constitution of the Republic of Slovenia, which was adopted on 25 November 2016 and entered into force on 25 November 2016 (Official Gazette of the Republic of Slovenia No. 75/16).
[46] See for example decisions U-I-3/92 of 17 September 1992, U-I-32/95 of 30 June 1995, U-I-221/95 of 3 July 1997 and U-I-344/96 of 1 April 1999.
[47] Official Gazette of the Republic of Slovenia, No. 75/17.
[48] Official Gazette of the Republic of Slovenia, No. 65/20 and OdlUS XXV, 7.
[49] ODLUS XIV, 89.

The Constitutional Court stated that Article 70 of the Constitution does not guarantee the petitioners the right to the general use of water for the supply of their households and that the Waters Act does not exclude the general use of water but, based on Article 70(1), it limits it by determining special rights for its use to achieve environmental protection goals. It stressed that to achieve these goals, payment for the use of natural resources is envisaged. In addition, the emphasised public nature of water law is also reflected in that it is not possible to acquire the right to property on water. It, therefore, concluded that the petitioners' position that they are the owners of water resources or that these resources are in the ownership of everyone is unsubstantiated.

A rather limited engagement of the Constitutional Court with the right to water embodied in Article 70a might be consequential to the fact that, so far, the implementing regulations have not changed significantly. On the one hand, this might demonstrate that even before the amendment to the Constitution, the Slovenian regulations ensured a high level of drinking water supply through a system of local economic public services.[50] On the other hand, it is evident that the legislative and executive authorities failed to respond to some well-known examples from practice, which has shown that the situation in this area is far from desired. In any case, including the right to drinking water in the catalogue of fundamental human rights undoubtedly provides new and more straightforward grounds for the constitutional review of the constitutionality of regulations and adjudication of a constitutional complaint. Undoubtedly, more pertinent jurisprudence is expected from the Constitutional Court in the future.

According to the new Slovenian Environmental Protection Act[51] (ZVO-2), adopted after the amendment of the Constitution with the right to drinking water, the basic provision regarding the drinking water supply remains the same. The supply of drinking water is a mandatory local public economic service.[52] This means that ensuring a drinking water supply is the task of the municipality or city municipality in its entire territory. Such an arrangement is consistent with Article 70a (4) of the Constitution, which stipulates that the supply of drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis. A special bylaw, the Decree on Drinking Water Supply, was adopted at the national level.[53] The Decree was adopted before the amendment of the Constitution and under the old Environmental Protection Act, but it remained in force even after the ZVO-2 adoption. The Decree regulates the way of performing the economic public service of the drinking water supply, which also includes the way and conditions for connecting to the public drinking water supply network and the requirements for a downtime of the supply.

The weakness of the current regulation is that it has a very narrow legal provision. Most of the general provisions regarding drinking water supply are in the Decree on Drinking Water Supply, which is a by-law. Simultaneously, local communities have the authority to regulate methods and conditions for drinking water supply through municipal ordinances. Municipal ordinances are also considered general by-law acts,

[50] Ude 2017, 11.
[51] ZVO-2 – Official Gazette of the Republic of Slovenia, No. 44/22.
[52] Article 233 (1) of ZVO-2.
[53] Official Gazette of the Republic of Slovenia, Nos. 88/12 and 44/22 – ZVO-2.

which must be in accordance with the Constitution and laws but not with other by-law acts. This allows municipalities to regulate certain issues in this area differently.

As it is a compulsory economic public service, the water supply must be carried out in one of the prescribed ways, as stipulated by the Services of the General Economic Interest Act. These forms vary, but most municipalities provide them through public companies. A public company has the legal status of an economic company, and its sole owners are municipalities and the state.[54]

Article 108 (2) of the Water Act[55] stipulates that drinking water supply should have priority over use for other purposes. The same is specified in Article 15 (1) of the Decree on the Drinking Water Supply. Thus, Article 70a (3) of the Constitution, which determines the priority drinking water supply to the population, raised the established regulation to the level of constitutional provision. However, even with regard to this seemingly simple rule, very serious questions may arise. In the summer of 2022, there was a severe drought in a large part of Slovenia, which affected the sources of the drinking water supply and, in some places, caused a severe shortage of drinking water. One of the possible solutions proposed by the City of Koper to solve the drinking water supply problem is to dry the Rižana riverbed. Fishermen and some environmentalists strongly opposed the announced measures, while the mayor of the City of Koper noted that people's lives and health should be prioritised over animals and plants. The Koper fishing organisation stated that such a decision means ecological damage and permanent long-term damage to people from the source to the outfall. Fortunately, the situation improved and there was no need to resort to such extreme measures. However, the presented situation clearly illustrates the conflict between two constitutional rights belonging to the same category: the right to a healthy living environment and the right to drinking water. The problem is that there is no completely clear way to decide on such a measure, which can have irreversible consequences. This is mainly because such an emergency measure must be taken quickly, making it impossible to carry out lengthy procedures in which interested persons can file requests for judicial protection.

The next subsection discusses two of the most prominent issues in ensuring drinking water supply: the connection to the public water supply network and the interruption of supply due to non-payment of bills for supplied water.

3.2. Connection to the public water network

When connecting to a public water network, two situations must be considered. The first situation occurs when a specific facility is in the area of a public water-supply system. Facilities in the public water supply area must be connected to the public water supply.[56] This also applies to cases in which the land on which the facility stands has its own source of drinking water. In such cases, the supply of drinking water from one's own source is prohibited.[57] The connection of a new building to the public water-supply

[54] Article 25 of the ZGJS.
[55] ZV-1 – Official Gazette of the Republic of Slovenia, Nos. 67/02, 2/04 – ZZdrI-A, 41/04 – ZVO-1, 57/08, 57/12, 100/13, 40/14, 56/15 and 65/20.
[56] Article 10 (1) of the Decree on Drinking Water Supply.
[57] Article 12 (1) of the Decree on Drinking Water Supply.

system has already been foreseen in issuing a building permit. Consent for the connection of a new building to the public water-supply system is a condition for issuing a building permit.

After the construction of the building is completed, the owner of the building enters into a water supply contract with the local public company that provides the water supply in the area of this municipality. Slovenian contract law has a special institution of mandatory contract conclusion.[58] A mandatory contract conclusion means that one of the contracting parties is obliged by law to conclude a contract with anyone who requests it. It is a substantial interference with the parties' autonomy, as the person bound by this obligation has no choice regarding the other contracting party. Even if the other party is unreliable and there is fear that it will not perform, it must conclude a contract with it. The law stipulates such an obligation primarily for goods suppliers and service providers necessary for individuals' lives and for the functioning of legal entities.[59] If the obligation to enter into a contract is specifically prescribed, then Article 17 (1) of the Slovenian Obligations Code applies. The latter stipulates that if a person must conclude a contract by law, a person with legitimate interest may demand that such a contract be concluded immediately. It is clear from this provision that a person with legitimate interest (customer) has a legally protected claim. If the obligee (supplier) does not want to conclude the contract, a person with legitimate interest can request the court to decide on the contract conclusion. A court ruling can replace the contract conclusion, and from the effective date of the judgment, the contract should be considered concluded. At the latest, a person with legitimate interests acquires the status of a contractual party and demands the performance of contractual obligations. Although this is not explicitly specified, an unjustified refusal to enter into a contract may be considered an inadmissible harmful event, and a person with legitimate interest may also request compensation for the damage caused. Almost no disputes have arisen from the violation of this obligation, which proves that it is an effective form of legal protection. Suppliers of goods and service providers bound by such an obligation have an interest in the largest possible volume of business and have no interest in rejecting customers. The technique of general contractual conditions prepared by the supplier is most often used when concluding such contracts. To protect the interests of customers, it is often stipulated that the local community body gives consent to general contractual conditions.[60] In such cases, the supplier's legal interests are protected by the fact that the supplier can withdraw from the contract if its obligations are not fulfilled.

The described method for provisioning is mostly effective. Problems and ambiguities arise in the following two cases. The first is the issue of so-called illegal buildings, or buildings for which a building permit was not obtained or which were not built per building permit. It is worth noting the provisions of Article 107 of the Building Act.[61] In the case of illegal buildings, the building inspector shall issue a decision prohibiting the connection of such a building to economic public infrastructure, which also includes the public water supply. The use of such facilities is legally prohibited.

[58] In German terminology Kontrahierungszwangs.
[59] Article 16 of the ZGJS.
[60] See, in detail, Kranjc 2004, 217.
[61] GZ-1 – Official Gazette of the Republic of Slovenia, Nos. 199/21 and 105/22 – ZZNŠPP.

Nevertheless, people sometimes live in such buildings, and such residences can be permanent. This is especially true for marginalised groups. The case of Hudorovič and others against Slovenia before the European Court of Human Rights (ECtHR) is well known.[62] In 2014, two Roma families approached the ECtHR, claiming that they did not have access to drinking water and sanitary facilities and, therefore, their right to respect for private and family life according to Article 8 of the European Convention on Human Rights (ECHR) and, in connection with this, the prohibition of discrimination (under Article 14 of the ECHR) and the prohibition of torture or inhuman or degrading treatment (per Article 3 of the ECHR) were infringed. The Roma settlement Goriča vas in Ribnica, where the two applicants live, is legally unregulated, built mostly of wooden shacks and without a water supply and sewage. Because the settlement was not legalised, they could not arrange a connection to the water supply. The municipality installed a water tank in the settlement, which was regularly filled with firefighters. The second case concerns a family of 14 who lived in the Roma settlement, Dobruška vas, in Škocjan. A common tap was provided there in 2011, but the applicants did not connect to it due to the neighbours' opposition. Later, due to problems with their neighbours, they moved to a nearby forest where they built a wooden shack. They must drive to obtain water. The ECtHR considered that the authorities ensured that the applicants had access to safe drinking water through concrete measures (which would otherwise be regarded as temporary rather than permanent solutions).

Another example is areas where there is no public water supply. The right to drinking water as a constitutional right imposes a duty on the state and municipalities to provide everyone with drinking water. In this regard, the Decree on Drinking Water Supply stipulates that public water supply must be provided in the area of settlement with 50 or more permanent residents and a settlement density greater than five permanent residents per hectare.[63] In smaller settlement areas, however, public water supply must be provided if there is no possibility of self-supply in this area. There is no possibility of self-supply if more than 50 inhabitants are supplied from the source, and the annual average capacity of the source is less than 10 m^3 of drinking water per day.[64] The question that the regulations fail to answer is what options individuals have if the local community does not fulfil this duty.

A well-known case was dealt with by Ombudsman.[65] The Ombudsman petitioned a resident of a small hamlet in the Municipality of Ribnica, who has been trying unsuccessfully for 23 years to gain access to safe drinking water. According to her, there are currently 11 houses in the hamlet where 25 people, aged 6 to 80. Residents use their own water collectors or cisterns for households, and the quality of water is further reduced by the unkempt macadam road, from which dust rises in the summer owing to the use of tractors, construction machines, and other heavy vehicles. Therefore, the locals must obtain drinking water from forest springs up to 15 km away. Based on this, Ombudsman addressed several enquiries in the municipality. The municipality replied

[62] ECHR Application Nos. 24816/14 and 25140/14 of 10 March 2020, ECLI:CE:ECHR:2020:0310JUD002481614.
[63] Article 9 (1) of the Decree on Drinking Water Supply.
[64] Article 9 (2) of the Decree on Drinking Water Supply.
[65] Ombudsperson's opinion 18.1-3/2018.

that it was in the middle of building the regional public water supply system, and that only after its completion would it start with smaller projects to ensure the supply of drinking water where it was not yet guaranteed. The municipality stated that activities were underway to prepare rules for subsidising drinking water transportation costs. These factors should precisely determine the financing of drinking water transportation. One of the key arguments as to why the provision of water in the area where the petitioner lives is not yet guaranteed is that her property is located in an area that is defined in the Decree on the Municipal Spatial Plan of the Municipality of Ribnica as an area with more specific use of holiday homes, so it was not intended for permanent settlement. The municipality's response did not convince Ombudsman. He warned the municipality that it had failed to adopt an act that would properly regulate the issue in more than a year and three months since the last notification to the Ombudsman. Despite the inclusion of the right to drinking water in the Constitution of the Republic of Slovenia, the municipality failed to prepare the rules with sufficient diligence. By doing so, the municipality violated the principles of good governance. Thus, the petition was justified.

Interestingly, the Ombudsman was successful in another case. The petitioners informed the Ombudsman about the problems with the Municipality of Rogaševci regarding their connection to the public water supply network. Their property was only a few meters away from the connection, yet they could not connect to the water supply. Their own water supply at their homes would not be possible, as the groundwater is mineral water, and thus unsuitable for supply. The Ombudsman turned to the municipality with several questions, and the municipality clarified the process of implementing the public water supply project. The project, completed in 2015, did not enable connections among all households. The Municipality stated that it was planning a project to upgrade the water supply, but it proceeded slowly owing to a lack of financial resources. The Municipality's responses were not convincing for Ombudsman. If the Municipality's funds are insufficient, or if the municipality assumes that construction will not be possible in a reasonable time due to limited funds, it is expected to do everything it can promptly, so that the residents do not suffer the burden of unsuccessful negotiations and misunderstandings between various authorities. Thus, residents do not influence the implementation of investment. They are the only ones directly affected by the long-term actions of authorities. The Municipality initially did not accept Ombudsman's opinion, but it later announced that it had found a solution for the petitioners and connected them to the public water supply on 6 December 2019. Ombudsman considers the Municipality's behaviour to be appropriate, even though the solution was only achieved through its intervention. Thus, the petition was justified. Ombudsman concluded that the Municipality violated the principle of good governance.

3.3. Suspension of drinking water supply due to non-payment

Ensuring the supply of drinking water is the state's duty and the individual's right; however, it is not disputed that an individual's drinking water supply may cease. The Decree on Drinking Water Supply at the national level regulates cases when the supply may be interrupted due to maintenance work, force majeure, and similar. In the

event of an interruption in the drinking water supply for more than 24 h, the operator of the public water supply system must provide users with drinking water for the necessary volume of consumption in an appropriate manner.[66] It is also stipulated that the drinking water supply can be interrupted if the user's behaviour endangers an uninterrupted and safe drinking water supply to other users. However, if customers fail to pay their financial obligations, there is nothing to interrupt the drinking water supply. The drinking water supply is onerous, and each customer is obliged to pay for the consumption of the supplied drinking water.

The Constitutional Court ruled on the question of interruption of the drinking water supply even before the right to drinking water was enshrined in the Constitution. The Court ruled that the interruption of the drinking water supply due to non-payment of obligations was a permissible measure. *"The interruption of water supply is a means by which the recovery of the bill for water supplied but not paid for is protected. Given that the water supplier is obligated to conclude a contract, this tool serves to balance the position of the contracting parties. With these means, the water supplier also guarantees a relatively regular flow of funds necessary for carrying out activities. If a significant proportion of the people who are guaranteed drinking water supply do not regularly pay the resulting debt, this could make it impossible for the supply to function smoothly. The conduct of forced judicial collection procedures means a delay in payment and the unpredictability of the inflow of income. Ensuring an uninterrupted supply of drinking water, for which the interruption of the water supply serves, is a constitutionally permissible goal. The measure used in the present case to achieve this objective was appropriate. Owing to these drastic consequences, it can be expected that the debt will settle. However, this does not increase. The necessity of the measure cannot be contested either; that is to say, it could be replaced by an equally effective but milder measure."*[67]

The regulation of this issue is left to the local communities. For example, in the City of Ljubljana, the capital, with the largest population in Slovenia, the drinking water supply is provided by VO-KA d.o.o. Ljubljana, which is exclusively owned by the city municipality and some neighbouring municipalities. The conditions of water supply are regulated by the Decree on drinking water supply in the City of Ljubljana.[68] The Decree stipulates that the company may interrupt the drinking water supply to the customer if the latter fails to pay the bill within 15 days of receiving the reminder before the interruption of the drinking water supply. In summary, the customer must pay all bills for the supplied drinking water on time, and as soon as payment is delayed, the company can send a notice to perform before interrupting the delivery, in which it sets an additional deadline for payment of no shorter than 15 days. If the bill is still unpaid, the company can interrupt the drinking water supply and disconnect the customer from the network. The legal regulation of interruption of the drinking water supply is very strict and does not allow for any exceptional circumstances on the customer's side. It is true that, in practice, the company does not act in such a way and reminds the non-payer several times before issuing the last warning before disconnection.

Such an arrangement for interrupting the supply of drinking water is highly inappropriate, not taking into account, what is the reason for no payment. Especially, if we consider that it is the exercise of a right that was explicitly enshrined in the

[66] Article 23 (5) of the Decree on Drinking Water Supply.
[67] Up-156/98 of 18 June 1998.
[68] Official Gazette of the Republic of Slovenia, No. 59/14.

Constitution. Interestingly, the interruption in the supply of some other essential goods is fundamentally different. For example, let us consider the supply of electrical energy. The first fundamental difference is that the conditions of the electric energy supply are not left to the by-laws. Electricity supply is regulated by the Special Electricity Supply Act.[69] Legal regulation undoubtedly implies a higher level of legal protection, which is guaranteed in the same way for the entire country. The procedure for the interruption of supply was similar under basic conditions. The electricity supplier may interrupt supply to those customers who have not paid their financial obligations. The supplier must send a notice to the customer before disconnection and set a deadline for payment. The electricity supply may be disconnected if the bill is not paid even within this additional period. The supplier must inform the household customer about the disconnection for at least 10 days. The law recognises a special category of vulnerable customers. A vulnerable customer is a household customer who, due to their financial situation, the share of energy expenditure from disposable income and other social circumstances and living conditions, cannot secure another source of energy for household use that would cause them the same or lower costs for essential household use.[70] The supplier shall not disconnect electricity from a vulnerable customer, which is absolutely necessary, depending on the circumstances (time of year, temperature conditions, place of residence, state of health, and other similar circumstances), so as not to endanger the life and health of the customer and the people who live with him. Undoubtedly, a legally comparable provision would also be necessary in Slovenia in the drinking water supply field.

For Slovenia, it is utterly unacceptable that the level of protection for vulnerable water customers is not equal to the regulations that apply to electricity. The practices in the water supply field are different. In the well-known case, the Ombudsman received a letter from a single mother with two children asking for intervention due to an allegedly unjustified disconnection of water. The company explained that the disconnection occurred due to the non-payment of water supply. The petitioner did not deny the debt but complained that she had not received an appropriate notification about the disconnection. For the sake of her children, she asked for reconnection and the possibility of repaying the owed amount in instalments, which the operator had refused. Ombudsman concluded that the disconnection of the drinking water supply due to non-payment of costs is legally permissible in principle. The company also failed to find any violations of the law. However, in this specific case, it could not be overlooked that the petitioner was a single mother with small children who was denied the vital right to a water supply. It is also necessary to consider that winter circumstances and social distress further complicate the situation of the family. On this basis, the Ombudsman, aware that it was an act of a voluntary nature, suggested that the company reconsider the circumstances of the case and the implemented measure of disconnection of the drinking water supply. Ombudsman suggested that, in a specific case, the proportionality of action in the difficult living circumstances of the family with small children should be assessed,

[69] ZOEE – Official Gazette of the Republic of Slovenia, No. 172/21.
[70] The provision of Article 33 of the ZOEE is the implementation of Article 28 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

and the petitioner should be allowed to repay the amount owed in instalments or find another suitable solution that would allow for the establishment of a drinking water supply as soon as possible. Poverty and the lack of basic goods mean a severe encroachment on human dignity, the consequences of which and social stigmatisation are especially felt by children. The company responded to the Ombudsman's initiative with understanding and informed them that they would allow the petitioner to reconnect, agreeing that children should not suffer the consequences of the circumstances in which their parents find themselves. In particular, children need special care and protection, which is the social duty of each of us. Ombudsman assessed the conduct of the company Vodovod-Kanalizacija d.o.o. Ljubljana as an example of good practice and reiterated the necessity to include the right to water as a fundamental human right in the legal order of the Republic of Slovenia.[71]

4. Conclusions

The survival of the human population also depends on sufficient access to safe drinking water. Despite all of the important international and domestic efforts and progress achieved in the last decades, too many people around the world (one in three) still desire access to safe drinking water, and the negative effects of climate change[72] exacerbate the current situation. Lack of access to safe drinking water causes an excessive and unacceptable number of deaths and diseases every year, clearly demonstrating that progress has been far too slow and the commitment to achieve universal and equitable access to safe and affordable drinking water for all by 2030 is far from accomplished.

Although the number of states recognising access to safe drinking water as a human right has grown in the last decades, too many still lack such recognition, making it difficult for this right to be justiciable in national courts. Without such legal protection, access to safe drinking water risks being treated merely as a commodity, meaning that families can cut off the service provision for not being able to pay the bills, tariffs can become unaffordable for those in poverty, and national water policy risks, leaving behind members of already vulnerable groups, such as migrants, minorities, and people living in informal settlements or in rural and remote areas.

Experience with the coronavirus pandemic has clearly exposed the critical importance of availability, accessibility, and affordability of water in efforts for global health, simultaneously demonstrating that too many of the poor living in informal settlements continue to lack access to clean water, and measures taken for the emergency provision of water during the pandemic have been insufficient.

There are a great diversity of obstacles in realising the right to safe drinking water. In addition to the lack of resources, as the economic value of safe drinking water is increasing, thus strengthening the pressure to treat it as a free market good and not as a public good, there is a myriad of political and legal factors that jeopardise people's enjoyment of this right, often related to the discrimination of those who do not have a say in public decision making. In 2020, SR Heller warned that in developed countries, undocumented migrants are often excluded from public services because of their

[71] The Ombudsperson's opinion 8.1-20/2015.
[72] See also Szwedo 2021.

irregular status and live in inhumane conditions unimaginable for citizens of those countries, and that in many places around the world, human rights defenders working on water and sanitation are persecuted, arrested, and even tortured and executed as a result of their work, especially when it affects large economic interests.[73]

States often fail to protect affected communities and instead give priority to short-term economic considerations. While informal settlements continue to grow quickly around the world, governments too often exclude their inhabitants from water services, ignoring the fact that the enjoyment of human rights cannot be conditioned by the legal status of tenure.

The current legislative framework and practice in Slovenia demonstrate that, although the commendable inclusion of the right to drinking water in the Constitution took place in 2016, the subsequent development remains insufficient to realise this right in practice. Equally, if not more important, constitutional regulation is the creation of corresponding implementing rules. Until such rules, which are harmonised with internationally and constitutionally recognised rights, are adopted and implemented in concrete cases, even the codification of the right to drinking water as a fundamental constitutional right remains only a declaratory aspiration lacking any discernible effect. Hopefully, the *de lege ferenda* proposals of this article will be timely considered by competent Slovene authorities, leading to an improved normative framework and efficient policy measures.

[73] SR Heller's statement 2020.

Bibliography

1. Ahačič J, Bregač M, Gril M, Košir T, Zupančič S, Sancin V, Pucelj Vidovič T, Kovič Dine M & Vrbica S et al eds. (2015) *Odgovornost države zagotavljati pravico do čiste pitne vode,* Pravna fakulteta, Ljubljana.
2. Bos R, Roaf V, Payen G J, Rousse M, Latorre C & McCleod N et al (2016) *Manual on the Human Rights to Safe Drinking Water and Sanitation for Practitioners*, IWA Publishing, London.
3. Bueno de Mesquita J (2019) The Universal Periodic Review, A Valuable New Procedure for the Right to Health?, *Health and Human Rights Journal*, 21(2), pp. 263–277.
4. SR Heller's statement (2020) *10th anniversary of the recognition of water and sanitation as a human right by the General Assembly*, https://www.ohchr.org/en/statements/2020/07/10th-anniversary-recognition-water-and-sanitation-human-right-general-assembly [30.08.2022]
5. Kranjc V (2004) *Commentary to Obligation Code*, Book 1, GV Založba, Ljubljana.
6. Murthy S (2013) The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy Over Privatization, *Berkeley Journal of International Law*, 31(1), pp. 89–149.
7. Nehaluddin A (2020) Human right to water under international law regime: an overview, *Commonwealth law bulletin*, 46(3), pp. 415–439.
8. Rodriguez R M (2011) *The Right to Water*, https://www.researchgate.net/publication/215868528_The_Right_to_Water [30.08.2022]
9. SancinV & Kovič Dine M (2016) Ensuring access to safe drinking water as an imperative of sustainable development, in: Mauerhofer V, ed., *Legal aspects of sustainable development: horizontal and sectorial policy issues,* Springer.
10. Scheuring S (2009) Is There a Right to Water in International Law?, *UCL Jurisprudence Review*, 15, pp. 147–171.
11. Sereno A (2022) Human Right to Water and Sanitation: Water for All vs. Full Cost Recovery, *Front. Water*, 4:885193; doi: 10.3389/frwa.2022.885193.
12. Szwedo P (2021) Climate Change and the Human Right to Water, *International Community Law Review*, 23(2/3), pp. 209–218.
13. Ude L (2017) Geneza ustavne pravice do pitne vode, *Javna uprava*, 1(2), pp. 7–14.

Sanja SAVČIĆ*

Intellectual Property Law Aspects of Environmental Protection and Sustainable Development: Where Is the Line Between Public and Private Interests?**

Abstract

Protection of the environment is regulated by numerous laws and bylaws, within legal areas. As regards regulations of an imperative nature, there is no doubt that these provisions represent the public interest and responsibility of the state to preserve and improve the environment. The paper examines the potential of private law rights to contribute to environmental protection and improvement, because the action of entities depends on the choice of whether to act or not in certain circumstances. To illustrate a possible contribution of private law in environmental protection matters, patent and indications of geographical origin have attracted attention. While trying to determine a particular connection between rights and environmental matters, it has become clear that significant improvement of environmental protection can be provided in a circular flow through different areas of law. Protecting and supporting private law rights is not detached from guarding the public interest. An examination of patent law potential should demonstrate that cooperation between scientific research institutions and industry is of primary concern in modern society. In practice, a number of issues obstruct successful cooperation; however, this is an opportunity for the state to encourage collaboration. A similar approach should be suggested in relation to indications of geographical origin. State and local governments should encourage recognition of indicators of geographical origin, attracted to localities of high environmental quality.

Keywords: intellectual property law, environmental protection, sustainable development, public interest, private interest.

1. Introduction

Modern human beings have not only adapted nature to their needs but have also created an environment that supports this perception. This achievement has endangered the natural value of water, air, and food for the present and future generations.

Environmental protection has been recognized as a task of the highest law in Serbia. In this context, the Constitution has three types of provisions that are of importance in this matter.

The first is the provision of the right to a healthy environment. Article 74 of the Constitution Act of the Republic of Serbia, Healthy Environment, provides that everyone shall have the right to a healthy environment and the right to timely and full information about the state of the environment. Everyone, especially the Republic of Serbia and its

Sanja Savčić: Intellectual Property Law Aspects of Environmental Protection and Sustainable Development: Where Is the Line Between Public and Private Interests? *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 125-142, https://doi.org/10.21029/JAEL.2023.34.125

* dr. jur., associate professor, University of Novi Sad, Faculty of Law.

** *The research and preparation of this study was supported by the Central European Academy.*

https://doi.org/10.21029/JAEL.2023.34.125

provinces, shall be accountable for the protection of the environment and shall be obliged to preserve and improve the environment.

The second type of provision establishes a healthy environment as a reason for the restriction of other rights.

Finally, determination of the competence for the issue of environmental protection is also provided by the Constitution Act. The constitution provides that everyone shall be obliged to preserve and improve the environment, but the Republic of Serbia and provinces are accountable for the protection of the environment (Art. 74(2)).

Environmental protection is regulated by numerous laws and bylaws within all legal areas.[1] Many regulations illustrate the need for legal intervention to protect the environment for future generations. Therefore, regulations cover a wide range of legal interventions. Most provisions on environmental matters are directed on setting standards for environmental protection and prohibiting vulnerable or hazardous acts; consequently, these provisions are equipped with different kinds of measures to achieve and maintain the desired standards for a healthy environment.

Regarding regulation of imperative nature, there is no doubt that these provisions represent the public interest and responsibility of the state to preserve and improve the environment. Everyone is obliged to follow imperative rules. Attention in this article is paid to situations when the action depends on choice, whether to act or not, in certain circumstances.

2. Civil Law Aspects of Environmental Matters

Civil law rights are guaranteed to protect recognized private interests. Hence, the rights holder has the freedom to decide whether he/she will exercise his/her right, and when, how, and to what extent the right will be exercised. This freedom is limited by imperative norms, public order, and good business practices.[2] Keeping in mind that a healthy environment is of constitutional relevance, indisputable civil law rights could be restricted due to the care of the environment. The Constitution of Serbia contains explicit provisions in this regard, especially that the right to a healthy environment is the reason for restrictions on other human rights. Entrepreneurship, for instance, may be restricted by the law for protecting people's health, environment, and natural goods and security in the Republic of Serbia.[3] Similarly, according to the Constitution, the law may restrict the models of utilization and management of agricultural land, forest land, and municipal building land on private assets, to eliminate the danger of causing damage to the environment or prevent violation of rights and legally justified interests of other persons.[4]

[1] According to the official data, there are 17 laws and over 270 by laws relevant to environmental protection. These regulations cover different sectors of commerce and life, the Law on Environmental Protection could be realized as the general law, because it consists of principles of environmental protection.

[2] Law on Contracts and Torts, Official Gazette of the Social Federal Republic of Yugoslavia, no. 29/78, 39/85, 45/89 – Constitutional Court Decision and 57/89, Official Gazette of the FRY br. 31/93, Official Gazette of the Republic of Serbia, No. 1/2003 – and 18/2020, Art. 10.

[3] The Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 98/2006 (hereinafter referred to as Constitution), Art. 83.

[4] Constitution, Art. 88.

The latter means that the owner cannot use his/her property rights (*usus, fructus, abusus*) in his/her own manner.

These illustratively mentioned constitutional provisions indicate that the legal system of environmental protection in the field of civil, or rather private law, lays in restrictions. Therefore, it seems that the potential of other civil law regulations, not explicitly linked to environmental protection, is not recognized. Here we consider the fact that the need to protect the environment for future generations could be achieved not only by prohibitions of certain actions, but also by supporting or forcing the exercise of the law. Moreover, as Art. 74, para. 2 provides that there is an obligation of everyone, especially of the state, not just to protect, but to improve the environment as well.

In this regard, further examination would demonstrate whether private law regulations could result in the improvement of environmental protection.

3. Environmental Protection and Sustainable Development

The level of development of the society has reached an extent where the survival of the human species has been questioned for a long period. Human beings have not only adapted nature to their needs but have also created an environment in accordance with their own image. In the technical and technological sense, there are numerous illustrations of human power. However, each time humans battle nature, the unpredictable strength of nature is displayed. This long-lasting `outsmarting´, that humans named achievements, threatens to destroy future generations' sources of existential needs: water, air, and food. For these reasons, the current challenge is to find a compromise between nature and humans. In other words, the long-term goal is to shape society that would deliver further technical-technological and economic progress, while preserving natural values for future generations.[5] Specifically, the aim is to promote development that would not endanger living conditions for a long period, that is, to arrange sustainable development.

Sustainable development must be realized as a complex, multidimensional concept. Within the framework of the United Nations, several acts have been adopted to proclaim the principle of sustainable development.[6] None of them contain binding provisions, but they define the priorities of future development. In terms of the above, the concrete measures that need to be taken are quite complex and imply organized social, state, and scientific action at all levels.[7]

The Treaty on the European Community establishes a policy on environmental protection, the rational use of natural resources, and international cooperation in resolving environmental problems. As part of the transferred competence, numerous acts were adopted at the EU level, which define these issues in more detail. With the entry into force of the Treaty of Lisbon, increased activity is expected in ensuring legal

[5] Nikolić 2009, 50.

[6] The most important are: Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972, Declaration on Environment and Development, Rio de Janeiro, 1992, Declaration on Sustainable Development, Johannesburg, 2002.

[7] Thus, sustainable tourism, sustainable consumption and production, sustainable agriculture, food, sustainable architecture, etc., are being talked about more often. Radovanović 2011, 951.

frameworks for sustainable development, since the act foresees the obligation to include a high level of environmental protection and the improvement of its quality in the policy of the Union.[8]

Regarding Serbia, the Constitution mentions sustainable development *expressis verbis* only in the provisions on competence of the Republic of Serbia, even though it is a commitment of the Republic of Serbia. According to Article 94, Balanced Development, the Republic of Serbia shall take care of balance and sustainable regional development in accordance with the law. In addition, in Art. 97, para. 1, ad 9 regulates that the Republic of Serbia shall organize and provide for sustainable development, system of protection and improvement of environment, protection and improvement of flora and fauna, production, trade, and transport of arms, poisonous, inflammable, explosive, radioactive, and other hazardous substances.

Considering the importance and complexity of sustainable development, apart from the competence of state authorities, provinces and local municipalities have numerous delegated competences regarding environmental matters.[9] In addition, mentioning sustainable development in the context of environmental protection directly sets the core of sustainability into the framework of protection of the environment and, in particular, natural values. Therefore, the Law on Environmental Protection explicitly prescribes the principle of sustainable development[10] and provides its meaning. In this aspect, sustainable development should be understood as a harmonized system of technical-technological, economic, and social activities in overall development, in which natural and created values of the Republic of Serbia should be implemented on the principles of economy and reasonableness, to preserve and improve environmental quality for present and future generations. More precisely, sustainable development is to be achieved by making and implementing decisions that ensure the harmonization of the interests of environmental protection and economic development. In other words, the principle of sustainable development could be considered as an expression of the necessity to set a permanent and consistent system of balanced and simultaneous economic prosperity and environmental protection.[11]

Attaining sustainable development is a gradual and comprehensive process, which should overcome the influence of institutional and group interests.[12] However, that does not mean that rights that protect private interest should be ignored, partly because private interests could be an engine for desired progress and sustainability.

[8] Knez 2009, 289.
[9] As regards environmental matters of autonomous province, Constitution of RS, Art. 183, para. 2, ad 2, and on competence of local self-government units regarding the environment, Art. 190, para. 1, ad 6 and 7.
[10] Law on Environmental Protection, Official Gazette of Republic of Serbia, No.135/2004, Art. 9, para. 1, ad 4.
[11] Drenovak-Ivanović 2021, 39.
[12] Mebratu 1998, 515–518.

4. Innovation as an Aspect of the Environmental Protection and Sustainable Development

The conceptual definition of sustainable development indicates that inventiveness is an integral element. On the one hand, technical-technological progress is based on invention as it drives economic progress. On the other hand, technical-technological solutions should emerge from inventions that maintain the constancy of natural resources to the greatest extent.

With the rise of global emissions, technological innovation has become the focus of policymakers. As stated in the literature, *"Most organizations abandoned response measures and short-term strategies to eliminate environmental inadequacy and adopted proactive and innovative environmental approaches."*[13] This should be supported by economic and environmental regulations.

It is well known that the European Union set the target for climate-neutrality by 2050 in the core of the European Green Deal,[14] which is the EU's commitment to global climate action under the Paris Agreement.[15] With regard to this, and based on a comprehensive impact assessment, the European Commission has proposed to increase the EU's ambition to reduce greenhouse gases and set it ambitiously for 2030. The assessment shows that all sectors of the economy and society can contribute towards this and it sets out the policy actions required to achieve this goal. With regard to carbon-neutral activities, spending on clean energy technologies has been increasing over the last decade. European companies targeted `high-value´ inventions with international protection, which displays a growing confidence in their competitiveness in the global energy technology market.[16] Impact assessment shows that the largest share of respondents perceived that revenue from carbon pricing should be used to finance green technologies and low-emission mobility infrastructure.[17] Further, new Strategic Investment Facility (EUR 15 billion provision) will be the key EU instrument to crowd in private capital to support investments in policy areas essential for achieving the European Green Deal objectives: including renewable energy, energy efficiency, decarbonized energy infrastructure or research and innovation in green technologies. All projects above a certain size financed by InvestEU will be subject to sustainability proofing, to ensure they are in line with the Green Deal.[18]

[13] Khurshid et al. 2021, 1; Fraj et al. 2015, 30–42.
[14] A European Green Deal, 12 August 2022.
[15] Paris Agreement, 25 July 2022.
[16] Commission Staff Working Document Impact Assessment – Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, 30 July 2022.
[17] Ibid.
[18] Ibid. under 9.11.1 Green recovery from the COVID-19 crisis.

5. Role of Patent Protection in Environmental Protection and Sustainable Development

Inventiveness is not a goal in itself. By placing a new product on the market or applying a new procedure in production, the inventor expects that the invested values (knowledge, time, and money) will be economically valorized. Patent law plays a significant role in this regard that is, with the recognition of a patent for a technical invention that is creative, has an inventive level, and is industrially applicable, the holder exclusively acquires the right to exploit the subject of protection for a limited period. In other words, he/she is authorized to exploit the patented invention but also to oppose all third parties who do so without his/her consent. By doing so, he/she gains a market advantage over his competitors and, consequently, a financial gain. It is precisely this privilege of exclusivity that the patent provides along with an incentive for further technical and technological improvements.[19]

The economic implications of patent protection go beyond the interests of individuals. If we bear in mind that patent policy is a national issue, it is clear that normative regulation could significantly influence the development of the internal market, as well as the attraction of foreign investments. For these reasons, patent legislation reflects an economic strategy at the national level.[20] Viewed globally, disparity among different legal systems of patent protection deepens the gap between rich and poor societies. In developed countries, investing in inventiveness is an unquestionable method of technical and technological development. Undeveloped and developing countries do not have conditions for the development of their technologies. Therefore, their development depends on the import or transfer of technology from developed countries. For the above reasons, this transfer requires at least an acceptable level of patent protection.[21] The global character of sustainable development imposes an even

[19] Radovanović 2011, 951–953.

[20] The most obvious confirmation of this statement is the patent system of the United States of America. Namely, the position of the leader on the world market is largely due to the rather liberal interpretation of the conditions of patentability, which is illustratively reduced to the recognition of a patent for everything *"under the sun that man makes."* Diamond v. Chakrabarty 1980, 447; d'Erme 2022. The other extreme is made up of underdeveloped and developing countries, which recognize patent protection as an obstacle to economic development and the rise of social standards. These countries do not have enough capacity to create a market-competitive product on their own, viewed at the global level. Their economy is based mainly on imports. Placing patented inventions in markets where there is no adequate protection is a risk for the holder. Namely, a protected product or process can be imitated, with significantly less costs than it takes to create it. Therefore, holders want to register patents in these countries as well. Sometimes this is their only interest, because it is possible that they do not locate the production of the protected invention or the application of the protected process in the territories of underdeveloped or developing countries. The subject of the patent, for those reasons, however, must be imported or it would be absent from the market (as regards expensive technology). Kameri-Mboten 2022. See more: Radovanović 2011, 952–953.

[21] An interesting example of the extent to which adequate patent protection contributes to the rise of the economy is certainly China, which is clearly becoming a new economic power. In the past decade, there has been a drastic growth of local production based on imported technologies, but also on the increasing participation of the domestic research sector. In addition to production,

greater obligation on relevant entities to find solutions that would satisfy conflicting interests to the greatest extent. The field of action, understandably, encroaches on the internationalization of the patent system, since inventiveness, as explained earlier, is supposed to be a significant factor in past and future green action plans.[22]

The starting point in the determination of the patent framework of sustainable development is the question of whether technology based on saving the natural environment, that is, on the use of renewable resources (environment friendly technology, green technology, environmentally sound technology [EST], herein after sustainable technology) should be subsumed under a special patent program. In this sense, sustainable technology should be exempt from patent protection, or the protection period should be shortened so that it becomes available as soon as possible.[23]

UN and non-governmental organizations have made efforts to ensure that the relevant institutions, primarily the World Intellectual Property Organization (WIPO) and World Trade Organization (WTO), support sustainable technology. Thus, in 2007, within the framework of WIPO, an act was adopted that accepted recommendations in the direction of sustainable development.[24] However, the provisions are principles rather than binding rules. In addition, the fact that there was a reaction at this level several years after the adoption of the UN Millennium Development Goals and other declarations of similar content indicate that this is a sensitive and important issue. However, a specific system of patents for green technology has not yet been established at the international level.

Certain international acts, most importantly TRIPS, leave room for sustainable technology to be separated from the general regime of patent protection.

Specific solutions, with particular reference to the approach of the legislature of the Republic of Serbia, are explored in this article.

5.1. Exceptions to Patentability

According to Art. 27, paragraph 2, TRIPS provides that members may exclude from patenting those inventions whose commercial exploitation in their territory is not acceptable for reasons of protection of public order and morals, including the protection of life and health of humans, animals, or plants, or to avoid serious damage to the environment, provided that the exclusion is not made only because the exploitation is prohibited by national law.

TRIPS does not exempt sustainable technology from patent protection but rather adopts, conditionally speaking, a compromise that only those inventions that may seriously harm the environment can be patented. Starting from the market implications of the patent, which actually form the core of TRIPS, in an indirect way, the funds

the world's leading companies are increasingly moving research centers to China. A significant role in this process was undoubtedly played by the fact that intellectual property protection was raised to the level of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Straus 2009, 31. See more: Radovanović 2011, 952–953.

[22] Radovanović 2011, 953.

[23] Radovanović 2011, 954.

[24] WIPO Development Agenda, 30 July 2022.

intended for research and development of technology are directed precisely toward sustainable technology. Suppression of the exploitation of technology that seriously damages the natural environment should follow spontaneously, according to the market laws of competitive supply and demand.[25]

Serbian legislators take a neutral position on this matter. The provision on exceptions to patentability covers only inventions that are against the public order and morals of society and harm the life and health of people and animals, or plant varieties,[26] but not inventions that could seriously damage the environment.

The Law on Patents of Serbia provides several situations in which a compulsory license[27] may be granted.[28] Even though all of the provided cases, under certain circumstances, could be applied, for the purpose of this research few of them would be mentioned. The most relevant provisions on compulsory license are those provided in the case that exploitation of the patent is in the public interest, as well as those compulsory licenses for the purpose of protecting health, nutrition of the population, public interest in areas of vital importance for socioeconomic and technological development, or for the purpose of protecting competition on the market.[29]

Although not explicitly stated, the need to preserve the environment is a legitimate reason for issuing a compulsory license, even more so because the preservation of a healthy environment is the reason for the restriction of other constitutional rights. Thus, considering the social importance, it is possible for a compulsory license for sustainable technology to be granted immediately after obtaining or registering a patent in the Intellectual Property Office, with the obligation of interested users to pay the appropriate fee.[30] Additionally, if the patent holder does not use or insufficiently uses the protected invention in the field of sustainable technology for four years from the date of submission of the application, that is, three years from the date of recognition of the patent, the interested party may (after proving that he or she tried to conclude a license agreement with the holder under reasonable economic conditions and deadlines)[31] submit a request for the issuance of a compulsory license to the competent authority in the field in which the invention is to be applied. A compulsory license will not be granted if the interested party does not have the technological conditions and production capacities necessary to exploit the patent.[32] Such a solution is understandable, considering the function of the cited provisions. The purpose of a compulsory license is not to limit rights but to exploit the patent economically for the benefit of society.

If we relate this to the foregoing exceptions to patentability and the conditions for obtaining a compulsory license, a national strategy regarding sustainable technology could be perceived. These inventions are patentable, and consequently, it is possible to register

[25] Radovanović 2011, 955.
[26] Law on Patents, Official Gazette of the Republic of Serbia, No. 99/2011, 113/2017, 95/2018, 66/2019 and 123/2021, Art. 9.
[27] Compulsory licence means that government, under certain condition, is allowed to authorise the use of a patented invention without the consent of the patent holder.
[28] Art. 26–31.
[29] Marković & Popović 2020, 145.
[30] Law on Patents, Art. 26, para. 8.
[31] Law on Patents, Art. 26, para. 2.
[32] Law on Patents, Art. 26,

a patent of foreign origin for sustainable technology. This creates favorable conditions for foreign investments. In this sense, issuing a compulsory license can represent a way to exploit advanced sustainable technology in the domestic market or to develop domestic inventions.[33] However, the widespread practice of approving compulsory licenses could have the opposite effect that is, of discouraging investment by foreign business entities. Thus, to avoid compulsory obligation, a foreign company can decide not to register a patent in Serbia. In this case, protected inventive products would not be offered in the domestic market.[34]

In addition, the use of any, even sustainable, technology can be largely based on knowhow, which is not covered by a compulsory license, or on human resources (knowledge and experience). Therefore, compulsory licenses cannot be considered an assurance that sustainable technology will actually become available in the domestic market or in industry.

5.2. Commercialization of Green Technology

The previous part of the examination of patent law demonstrated a proper ground for the development of green technology in the domestic market.[35] However, the practical consequences were not as strong as expected. Regarding foreign investments, it could be stated that the reasons for the insufficient transfer of technology oriented toward the preservation and protection of the environment are outside the legal framework of patent protection. It is similar to domestic invention. While for foreign inventors, one could find justification, among other things, in the fact that Serbian market is not attractive enough, at the same time, for domestic inventors the incentive should not be lacking.[36]

On the one hand, the exploitation of domestic patents usually begins within Serbian territory. On the other hand, the economic growth of the domestic economy depends, largely, on the ability to compete in the world market with domestic technological innovations. Therefore, factors of sustainable development in the national economy are found in the economic exploitation of domestic inventions in the field of green technology. In other words, future development should be based on two simultaneous processes: stimulation of innovations in the field of sustainable technology, and creation of conditions for full-scale economic exploitation.[37]

This proclaimed goal is in accordance with the Serbian (UN) Agenda 2030 to achieve a sustainable industry that works on clean technology to reduce the emission of CO_2 in relation to GDP, which is, according to World Bank data, double the value of

[33] Bainbridge 2007, 434; Varga 2010, 154; Radovanović 2011, 957.
[34] Radovanović 2011, 957.
[35] The reason for this is the fact that while drafting the Law on Patents (and other laws governing the legal protection of intellectual property), Serbia respected the standards contained in international conventions, especially those to which it is a signatory. In addition, Serbia has been a full member of the European Patent Convention and the European Patent Organization since October 1, 2010.
[36] Radovanović 2011, 958.
[37] Ibid.

EU members' average. Moreover, there is unfavorable ground for the enhancement of scientific research, improvement of technological capacities, and incentives for innovations.[38] Even though the number of researchers has been increasing over the last decade, Serbia still has almost half the number of studies per million citizens than the EU average. Participation of private entities in the field of science is extremely low if the investments, researchers, and range of research in the companies are considered.[39]

5.3. Incentives for Research in Green Technology

When it comes to stimulating innovation in the sphere of green technology, there are encouraging circumstances. According to the Strategy for Scientific and Technological Development of the Republic of Serbia for the period 2021–2025,[40] environmental protection, and climate change are of the highest priority. This is a continuation of the previously settled goals regarding science and technology development.[41]

Since protection of the environment is a commitment of the state authorities, the sustainability of public finance demands a balance between income and outcomes in environmental matters. From this point of view, financial instruments are aimed at providing public finances, and incentives to private individuals and businesses to harmonize their activities with environmental protection policies.[42] The Law on the Budget System, in Art. 18, paras. 1 and 2, provide that fees may be introduced for the use of goods that are determined by a special law as natural resources, that is, goods of general interest and goods in general use.[43] All the provided fees are included in the Green Fund, which was established in 2016,[44] in accordance with the Law on Environmental Protection. The aim of the Green Fund is to receive funds intended for financing the preparation, implementation, and development of programs, projects, and other activities in the field of conservation, sustainable use, protection, and improvement of environmental change. The question arises as to which entities are invited to respond to

[38] 9.5.1. UN indicator, Agenda, 14.
[39] 9.5.2. UN indicator, Agenda, 14.
[40] Strategijanaučnogitehnološkograzvoja Republike Srbije za period 2021–2025.
[41] Strategijanaučnogitehnološkograzvoja Republike Srbije za period 2010–2015.
[42] Cvjetković 2014, 386.
[43] The person liable to pay the fee, the basis for payment of the fee, the amount of the fee, the manner of determining and paying the fee, as well as the affiliation of the fee are regulated by a special law proposed and implemented by the ministry in charge of finance. The usual fees in Serbia are: fee for the use of natural values (Law on Environmental Protection, Art. 84); compensation for environmental pollution (Law on Environmental Protection, Art. 85); fee for the use of the fishing area; fee for the use of the protected area; fee for the collection, use, and trade of species of wild flora, fauna, and fungi; fee for protection and improvement of the environment; compensation for products that after use become special waste streams; fee for packaging or packaged products that after use becomes packaging waste; fee for water pollution (Law on fees for the use of public goods, Official Gazette of the Republic of Serbia, no. 95/2018, 49/2019, 86/2019, 156/2020, 15/2021).
[44] Decision on the establishment of the Green Fund of the Republic of Serbia: 91/2016-17, 78/2017-24, Official Gazette of the Republic of Serbia, no. 91/2016.

the expectations of the government and other authorities or organizations that invested in the research.

Universities and scientific research institutions should be able to respond to expectations regarding certain research. Universities, as educational and scientific institutions, have the necessary capacity for the research and development of sustainable technology. This primarily refers to human resources, which are already engaged in research within the scope of the employer's activities. However, research, in itself, and even when patents are granted, is an initial phase of improvement. To achieve economic development, it is necessary to make the results available in the market. At this stage, institutions face certain problems because of their non-commercial nature. The funds intended for research are limited in scope and purpose, and therefore are usually exhausted during the research. The production or application of sustainable technology for the sake of market exploitation requires new investments. The next step in marketing the improved technology depends on business entities. In addition, researchers do not have sufficient market-relevant information or negotiation skills. For this reason, cooperation between research and business can only be achieved if the conditions for multidirectional communication are created.[45]

6. Indications of Geographical Origin

6.1. Indications of Geographical Origin in General

Indications of geographical origin are used to mark natural, agricultural, food and industrial products, and traditional handicraft products and services.[46] It is a common term for two different types of indications: appellation of origin, and geographical indication.

Appellation of origin, according to Article 3, is the geographical name of region, locality, or country used to designate a product originating therein, the quality and specific characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors, and such a product is produced, processed, and prepared entirely within a specific geographic area. Geographical indications identify particular goods as goods originating from the territory or specific country, region, or locality within such a territory, where a given quality reputation or other characteristics of such goods can be essentially attributed to their geographical origin, and such goods are produced and/or prepared within a definite geographical area (Article 4).

The distinction between the appellation of origin and geographical indication is in fact whether all phases in the production procedure take place in a narrow-limited area, as in the case with the appellation of origin or just the phase that gives the product its reputation (special characteristics and quality).[47]

[45] Radovanović 2011, 962.
[46] Law on indications of geographical origin, Official Gazette of the Republic of Serbia, no. 18/2010 and 44/2018, Art. 2.
[47] Marković & Popović 2020, 179, 180.

As is the case with all intellectual property (IP) rights, indications of geographical origin represent the exclusive property right that authorizes its holder to prohibit another from using the protected indication at the market.

From a commercial point of view, indications of geographical origin provide certain advantages in the market. Namely, the products or services labeled with indications of geographical origin indicate the distinctiveness of the goods, which is in connection with the geographical locality. This usually affects consumer choice on buying products. The higher value that consumers attach to products originating from specific geographic locations is expressed in the higher price for that product. The origin of goods gives them quality, reputation, or other valuable characteristics that are essentially attributable to their geographical origin.[48] Undoubtedly, with regard to the national economy, indications of geographical origin should play an important role. This is the case with producers of goods who are authorized to use indications of origin as well. Moreover, this commercial advantage underlies the legal intervention into the natural condition of the products' or services' success among other undifferentiated commodities.[49]

The additional value of products, created by indications of geographical origin, contributes to the national economic development, competitiveness of commercial entities, and promotion of tourist capacities – all of which could enable higher employment, regional and, rural development, and protect traditional knowledge. Apart from this economic justification and goal, indications of geographical origin, due to their essentiality, could receive the additional function of environmental protection and sustainable development, which we examine next.

6.2. Impact of Indications of Geographical Origin on Environmental Matters

To understand the impact of indications of geographical origin on environmental matters, it is necessary to briefly explain the procedure for the recognition of the indications of geographical origin and the recognition of the status of the authorized user of the indications.

The protection of geographical origin is realized in two phases. The first phase of administrative procedure, initiated in the Intellectual Property Office of the Republic of Serbia, concerns the registration of the indication of geographical origin (appellation of origin or geographical indications).[50] Application can be filed by domestic natural persons or legal entity persons who produce products marked with the name of the geographical area, or an association of individuals, or a chamber of commerce association of producers, or government bodies interested in the protection of goods with indications of origin. Foreign applications are proceeded if the indication is recognized in the country of its origin when it arises from international agreements.

The geographical indication shall be registered when goods originate from the territory of a certain country, region, or locality, where certain quality, reputation, and other characteristics can essentially be attributed to its geographical origin; however, for

[48] Blakeney 2017, 163.
[49] Réviron et al. 2009, 10–16.
[50] Law on indications of geographical origin, Art. 18–31.

the registration of the appellation of origin, it is required that the characteristics of a certain product are exclusively or essentially conditioned by its geographic origin. The link between appellation of origin and locality is clear because all phases of production (preparation, processing, and production) take place in the related geographical area. In the case of geographical indications, one of these phases must be performed in a certain area.[51]

The distinction between the two types of indications of geographical origin implies procedural requirements as well as legal and commercial consequences.

The application for indications of geographical origin must contain, among other relevant data, a description of the geographic area, which includes precisely determined boundaries of a certain area, a geographical map of that area, and data about geographical and human factors from which the product attracts specific characteristics, quality, and reputation. Additionally, regarding appellation of origin, the application form is elaborate, and includes a project report. The project report is proof of the performed quality control and the special characteristics of the products.

The second phase of the administrative procedure is the recognition of authorized user status of the indication of geographical origin. Among other elements of the application, the applicant must provide proof on the performed quality control and special characteristics of the products, which shall be taken to be the certificate on the performed control of quality and special characteristics of the product issued by the certification body, not older than three months.[52]

The indication of geographical origin is acquired by entry into the Register of Indications of Geographical Origin, and its duration is unlimited. The status of the recognized user of the indication of geographical origin is acquired by entry in the Register of the Recognized Users of The Indication of Geographical Origin, and it lasts three years from the date of entry of granted status of recognized user, but it can be renewed unlimited number of times, as long as the appropriate indication of geographical origin lasts.[53] However, the status of the authorized user could cease, among other reasons, if the quality of products and services has changed, or the production has been extended out of the recognized geographical locality, or the technology of production has been changed.[54] For this reason, authorized users would make extraordinary endeavors to preserve the environmental conditions of their products. Drinking water could be considered the most illustrative product labeled by indication of origin, for which the user undertakes all necessary measures and improvements in order to guard its natural quality. In Serbia, few water sources are registered indications of geographical origin.[55] Associated to the potential of this natural good, this is a weak outcome.

[51] Law on indications of geographical origin, Art. 3 and 4.
[52] Law on indications of geographical origin, Arts. 32–51.
[53] Law on indications of geographical origin, Art. 48.
[54] Markovic & Popovic 2020, 182.
[55] National Register of the Intellectual Property Office of the Republic of Serbia, 29th August 2022.

6.3. Environmental Protection and Indications of Geographical Origin: Where Is the Link?

Considering the substantiality of the indications of geographical origin, the product for which indication is recognized has characteristics that are mainly attracted by natural conditions within a certain geographical area. For this reason, goods are often free of contaminants.[56]

There are a few reasons for this. The first reason is that product quality and specific characteristics primarily depend on conditions of geographic location – usually nature. Second, particularly when it comes to appellation of origin, quality of product must be proven by an expert entity, from the very moment of application, and further, during the whole period of its existence. As pointed out, the case of the opposite situation could be the reason for ceasing the status of the authorized user of indication.

Authorized users must keep production that complies with recognized quality, labeled by indications of the geographical origin. This means that the user of an indication should avoid technology or substances that could lead to the termination of the recognized status. This approach could cause decreasing production or even a lack of products in a certain period. However, eventual losses could be replaced by the benefit of labeled products on the market. Consumers are eager to pay increasing value for food with integrity, such as the environmental standards involved in the geographical landscape.[57]

Studies confirm the willingness of consumers to accept higher prices for products if the price includes transparency in relation to the structure and origin of the product.[58] Therefore, indications of geographical origin are equipped to testify to the local and natural characteristics, thereby acting as proxies for quality.[59] This statement is in line with policymakers' view that responsible environment management should be a justification for the protection of geographical indications of origin.[60]

An empirical study of the European olive oil industry, conducted by Belletti et al., demonstrates the effectiveness of the indications of geographical origin on environmental protection. The authors identified the connection between the indications and environmental preservation and protection. Along similar lines, lower rates of soil erosion have been detected, along with improvement of the fire-risk control, water efficiency, lower pollution, and other environmental improvements.[61]

---

[56] Blakeney 2017, 164.
[57] Renting et al. 2003, 393.
[58] Xu & Wu 2010, 1368.
[59] Zhao et al 2014, 77.
[60] European Commission, Common Agricultural Policy towards 2020 Assessment of Alternative Policy Options, Brussels, Belgium, SEC (2011) 1153 final/2, pp. 4, 25, 47. Similar approach is visible in the literature: Vandecandelaere et al. 2021; Flinzberger et al. 2022; Ferrer-Pérez et al. 2020; Marescotti et al. 2020; Owen et al. 2020; Chilla et al. 2020; Millet et al. 2020; Fernández-Zarza et al. 2021; Fracarolli 2021; Mariani et al. 2021.
[61] Blakeney 2017, 167.

Even though there is no imperative regulation on environmental issues within the content of indication of geographical origin, it is obvious that producers of products labeled by indication of geographical origin are interested in preservation and protection of the environment, to safeguard both their own reputation and market success.[62]

7. Conclusion

This paper has examined the potential of private law rights to contribute to protection and improvement of environment. To illustrate this, patents and indications of geographical origin have attracted attention. While determining the connection between those rights and environmental matters, it is evident that significant improvement of environmental protection can be provided in a circular flow through different areas of law. Protecting and supporting private law rights is not detached from guarding public interest.

Regarding environmental matters, the question is not where the line between public and private interests is, but rather whether there is a line at all. More precisely, the effective collaboration of private entities and state authorities depends on the benefits for both sides. The task put in front of authorities should be to identify obstacles in the cooperation between the two mentioned sectors and efforts to eliminate them.

As demonstrated by the examination of patents, cooperation between scientific research institutions and the industry is of main concern in modern society. In practice, there are issues that could be obstacles to successful cooperation. The core of cooperation lies in freedom of contracting. However, this freedom is limited by mandatory regulations, public order, and good business practices. The need for sustainable development is of national importance. With regard to this, by insisting on the absolute autonomy of the will, private interests could be overestimated at the expense of public ones. Although great caution is required during any intervention in the market flow, we believe there is a need (and justification) to do so in terms of sustainable technology. In our opinion, since it is a technology that occupies a priority place in scientific research activity and development, the disposal of sustainable technology should be legally defined in a non-exclusive manner, or exclusive assignments should be limited in time.[63] Besides, since fiscal obligations represent a burden on economic entities, a significant incentive in the intensification of technology transfer should come from the side of the state, in the form of fiscal benefits.

A similar approach should be suggested in relation to indications of geographical origin. State and local governments should encourage recognition of indications of geographical origin attracted to localities of high environmental quality. Therefore, environmental issues would be included in the determination of specific characteristics of products or services, and consequently in certain labeled goods.

[62] Williams 2007, 43, 61.
[63] Radovanović 2011, 961.

Bibliography

1. Bainbridge D (2007) *Intellectual Property*, Harlow.
2. Blakeney M (2017) Geographical Indications and Environmental Protection, *Frontiers of Law in China*, 13(2), pp. 162–173, doi: https://doi.org/10.3868/s050-006-017-0011-9
3. Chilla T, Fink B, Balling R, Reitmeier S & Schober K (2020) The EU Food Label 'Protected Geographical Indication': Economic Implications and Their Spatial Dimension, *Sustainability*, 12(14), 5503, doi: https://doi.org/10.3390/su12145503
4. Cvjetković C (2014) Ekološke naknade kao instrument zaštite životne sredine, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 48(2), pp. 385–399.
5. d' Erme R (2022) *Sustainable Human Development: Why Patetnts Are The Paramount,* http://www.atrip.org/Content/Essays/Roberto%20d'Erme.pdf [01.08.2022]
6. Drenovak Ivanovic M (2021) *Ekolosko pravo*, Beograd.
7. Fernández-Zarza M, Amaya-Corchuelo S, Belletti G & Aguilar-Criado E (2021) Trust and Food Quality in the Valorisation of Geographical Indication Initiatives, *Sustainability*, 13(6), 3168, doi: https://doi.org/10.3390/su13063168
8. Ferrer-Pérez H, Abdelradi F & Gil J M (2020) Geographical Indications and Price Volatility Dynamics of Lamb Prices in Spain, *Sustainability*, 12(7), doi: http://dx.doi.org/10.3390/su12073048
9. Flinzberger L, Cebrián-Piqueras M A, Peppler-Lisbach C & Zinngrebe Y (2022) Why Geographical Indications Can Support Sustainable Development in European Agri-Food Landscapes, *Frontiers in Conservation Science*, 2, doi: http://dx.doi.org/10.3389/fcosc.2021.752377
10. Fracarolli G S (2021) The Effects of Institutional Measures: Geographical Indication in Mercosur and the EU, *Sustainability*, 13(6), 3476, doi: https://doi.org/10.3390/su13063476
11. Fraj E, Matute J & Melero I (2015) Environmental strategies and organizational competitiveness in the hotel industry: the role of learning and innovation as determinants of environmental success, *Tour Manag*, 46, pp. 30–42, doi: https://doi.org/10.1016/j.tourman.2014.05.009
12. Kameri-Mbote P (2022) *Patents and Developments*, http://www.ielrc.org/content/a9401.pdf [01.08.2022]
13. Khurshid A, Rauf A, Cantemir Calin A, Qayyum S, Hussain Mian A, Qayyum S, Fatima T et al (2021) Technological innovations for environmental protection: role of intellectual property rights in the carbon mitigation efforts. Evidence from western and southern Europe, International Journal of Environmental Science and Technology, 19(1), doi: 10.1007/s13762-021-03491-z
14. Marescotti A, Quiñones-Ruiz X F, Edelmann H, Belletti G, Broscha K, Altenbuchner C, Penker M & Scaramuzzi S et al (2020) Are Protected Geographical Indications Evolving Due to Environmentally Related Justifications? An Analysis of Amendments in the Fruit and Vegetable Sector in the European Union, *Sustainability*, 12(9), 3571, doi: https://doi.org/10.3390/su12093571

15. Mariani M, Casabianca F, Cerdan C & Peri I (2021) Protecting Food Cultural Biodiversity: From Theory to Practice. Challenging the Geographical Indications and the Slow Food Models, *Sustainability*, 13(9), 5265, doi: https://doi.org/10.3390/su13095265
16. Marković S M, Popović D V (2020), *Pravo intelektualne svojine*, Beograd.
17. Maskus K (2022) *Differentiated Intellectual Property Regimes for Environmental and Climate Technologies,* http://www.oecd-ilibrary.org/docserver/download/fulltext/5kmfwjvc83vk.pdf?expires=1302859851&id=0000&accname=guest&checksum=9E3DB6C471BFB311EAB1C15F31063E80 [20.07.2022]
18. Mebratu D (1998) Sustainability and Sustainable Development: Historical and Conceptual Review, *Environmental Impact Assessment Review*, 18(6), pp. 493–520, doi: https://doi.org/10.1016/S0195-9255(98)00019-5
19. Millet M, Keast V, Gonano S & Casabianca F (2020) Product Qualification as a Means of Identifying Sustainability Pathways for Place-Based Agri-Food Systems: The Case of the GI Corsican Grapefruit (France), *Sustainability*, 12(17), 7148, doi: https://doi.org/10.3390/su12177148
20. Nikolić D, Brkić S, Gajstlinger M, Đurđev D, Etinski R, Knez R, Milkov D, Pajvančić M, Petrušić N, Popov Đ, Salma J, Drakić D, Lukić T et al (2009) *Osnove prava životne sredine*, Univerzitet u Novom Sadu Pravni fakultet, Centar za izdavačku delatnost, Novi Sad.
21. Owen L, Udall D, Franklin A & Kneafsey M (2020) Place-Based Pathways to Sustainability: Exploring Alignment between Geographical Indications and the Concept of Agroecology Territories in Wales, *Sustainability*, 12(12), 4890, doi: https://doi.org/10.3390/su12124890
22. Radovanović S (2011) Uloga patentnog prava u održivom razvoju, *Pravo i privreda*, 4(49), pp. 948–963.
23. Renting H, Marsden T K & Banks J (2003) Understanding Alternative Food Networks: Exploring the Role of Short Food Supply Chains in Rural Development, *Environment and Planning A: Economy and Space*, 35(3), pp. 393–411, doi: http://dx.doi.org/10.1068/a3510
24. Réviron S, Thevenod-Mottet E & Benni N (2009) *Geographical Indications: Creation and Distribution of Economic Value in Developing Countries,* https://nanopdf.com/download/geographical-indications-creation-and-distribution-of_pdf [10.07.2022]
25. Varga S (2010) *Pravo industrijske svojine*, Kragujevac.
26. Vandecandelaere E, Samper L F, Rey A, Daza A, Mejía P, Tartanac F & Vittori M (2021) The Geographical Indication Pathway to Sustainability: A Framework to Assess and Monitor the Contributions of Geographical Indications to Sustainability through a Participatory Process, *Sustainability*, 13(14), 7535, doi: https://doi.org/10.3390/su13147535
27. Williams R M (2007) *Do Geographical Indications Promote Sustainable Rural Development: Two UK Case Studies and Implications for New Zealand Rural Development Policy*, Lincoln University, Oakland.
28. Xu l & Wu L (2010) Food Safety and Consumer Willingness to Pay for Certified Traceable Food in China, *Journal of the Science of Food and Agriculture,* 90(8), pp. 1368–1373, doi: https://doi.org/10.1002/jsfa.3985

29. Zhao X, Finlay D & Kneafsey M (2014) The Effectiveness of Contemporary Geographical Indications (GIs) Schemes in Enhancing the Quality of Chinese Agrifoods – Experiences from the Field, *Journal of Rural Studies,* 36(3), 2014, pp. 77–86, doi: http://dx.doi.org/10.1016/j.jrurstud.2014.06.012

Frane STANIČIĆ*

Public participation and access to justice in environmental matters in Croatia**

Abstract

Environmental protection is often achieved through participation in administrative procedures by the interested public in the form of interested parties. Such parties are able to participate in administrative procedures through which, for example, building permits and environmental permits are issued. In this manner, the public is able to challenge administrative decisions in front of first-instance and second-instance bodies in administrative procedure, and, subsequently, in administrative disputes in front of competent administrative courts. However, in many sector laws this opportunity is being bypassed by narrowing the possibility to participate in administrative procedure. Croatia is also a party to the Aarhus Convention, which guarantees the possibility of the public concerned (having only factual interest to prove) to participate in administrative procedures regarding administrative matters. Furthermore, the possibility to partake in spatial planning will also be analyzed in this paper, as spatial planning has a huge impact on the environment. Therefore, this paper will analyze the opportunities and challenges for public participation and access to justice in environmental matters in Croatia.

Keywords: party in administrative procedure, public participation, environmental protection, spatial planning

1. Introduction

Environmental protection is primarily the responsibility of the state. The Constitution[1] prescribes that everyone has the right to a healthy life and that the state is obliged to ensure conditions for a healthy environment (Article 69, para. 1[2]).[3] Therefore, it is the duty of the state to ensure that the environment is protected. Furthermore, the Constitution also prescribes in Article 3[4] that one of the fundamental

Frane Staničić: Public participation and access to justice in environmental matters in Croatia. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 143-158, https://doi.org/10.21029/JAEL.2023.34.143

* Frane Staničić, Ph.D., full professor, Faculty of Law, University of Zagreb, frane.stanicic@pravo.hr; ORCID ID: https://orcid.org/0000–0001–8304–7901

** *The research and preparation of this study was supported by the Central European Academy.*

[1] Constitution of the Republic of Croatia, OG, nos. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14. I am using the redactor version of the Constitution made by the Constitutional Court of the Republic of Croatia, so the numbering of articles is different from that in the official version used by the Parliament.

[2] *"Everyone shall have the right to a healthy life. The State shall ensure conditions for a healthy environment."*

[3] See Ofak, 2021 with regard to the constitutional protection of the right to a healthy environment.

[4] *"Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution."*

https://doi.org/10.21029/JAEL.2023.34.143

constitutional values of the constitutional order of the Republic of Croatia is the protection of nature and the environment. It is also important to note that the protection of nature and the environment is the basis for interpreting the Constitution according to Article 3, which is of great importance for this paper and the thesis set in it.[5] It is also worth mentioning that the Constitution establishes special protection by the state for certain things and goods – natural resources, parts of nature, and things legally prescribed as things of interest to the Republic of Croatia (Article 52[6]).[7] Therefore, the obligation of the state to protect and care for the environment is evident, and the state achieves this through various means. For example, the state is obliged to prosecute those who commit crimes against the environment.[8] The state is obliged to perform its duties according to the Constitution, international documents in force, and relevant legislature, most importantly the Environmental Protection Act (EPA).[9] It is the duty of the state, for example, to issue only permits and other legal acts in accordance with its obligation to care for and protect the environment. However, sometimes the state neglects its duties, mostly through ignorance of various acts, EU legislature, and the still existing reluctance to apply the Constitution, the European Convention for Human Rights, or the Aarhus Convention, to which Croatia is a party, directly. It is important to mention that Croatia signed and ratified the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Aarhus Convention), which came into force in Croatia on June 25, 2007. This is a fact that will be stressed repeatedly in this study. Now is the time to mention Article 69 para. 3 of the Constitution, which reads:

"*Everyone shall, within the scope of his/her powers and activities, accord particular attention to the protection of human health, nature, and the human environment*."

[5] See Ofak 2021, 89.

[6] *"The sea, seashore, islands, waters, air space, mineral resources, and other natural resources, as well as land, forests, flora and fauna, other components of the natural environment, real estate and items of particular cultural, historical, economic or ecological significance which are specified by law to be of interest to the Republic of Croatia shall enjoy its special protection."*

[7] See Ofak 2021, 93–94.

[8] Protection of the environment is assured through the Criminal Act (OG nos. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.), which has a special section on crimes against the environment. There are such crimes as pollution of the environment (Art. 193), dumping of pollutants from a ship (Art. 194), endangering the ozone layer (Art. 195), endangering the environment with waste (Art. 196), endangering the environment by facilities (Art. 197), endangering the environment by radioactive matter (Art. 198), endangering by noise, vibrations or non-ionizing radiation (Art. 199), destroying protected natural values (Art. 200), destroying habitats (Art. 201), trafficking in wild species (Art. 202), unlawful entering into environment wild species or GMO (Art. 203), unlawful hunting and fishing (Art. 204), killing or torturing of animals (Art. 205), transmitting of infectious diseases of animals and organisms harmful for plants (Art. 206), manufacturing and trafficking harmful matters for treatment of animals (Art. 207), giving veterinary help recklessly (Art. 208), destroying forests (Art. 209), changing the water lanes (Art. 210), unlawful exploitation of ores (Art. 211) and unlawful building (Art. 212). The Criminal Act also prescribes especially severe crimes against the environment (Art. 214).

[9] OG, nos. 80/13, 153/13, 78/2015, 12/18, 118/18.

This means that all citizens of the Republic of Croatia, all residents of the Republic of Croatia (all physical persons), and all legal persons functioning in the Republic of Croatia have a constitutional duty to protect the environment.[10] Now, this raises the question, how can `everyone´ protect the environment? Besides the obvious answers – recycling, sparsely using natural resources, conserving energy, etc. – there are other ways in which an individual and/or association of people (whether as a legal person or not) can protect the environment. First, there is the opportunity to participate in administrative procedures in which building and/or environmental permits are issued. Second, there is the opportunity to participate in making spatial plans that determine the usage of the land. Third, there is the opportunity to participate in public debates on various legislative acts that are mandatory by law. As will be explained, everyone who can prove that an administrative procedure concerns his or her rights, obligations, or legal interests can participate in such a procedure as a party. This is so, as it is prescribed in the General Administrative Procedure Act (GAPA),[11] which is the paramount administrative procedure source in the Republic of Croatia. According to it, everyone whose rights or legal interests (protection of the environment is a legal interest, as it is a constitutional duty and harmful effects on the environment endanger everyone is right to a healthy life) are endangered by a proposed project is entitled to participate in the administrative procedures with regard to the said project. However, sectoral laws have made an (unconstitutional) path for investors by narrowing down (extremely so) the possibility of being a party in administrative procedures regulated by such laws. This paper will analyze such cases and show that such limitations of the opportunity to participate in administrative procedures as an (interested) party creates the inability for such persons to gain access to the courts, which is clearly unconstitutional. As mentioned above, spatial planning is very important for environmental protection, as spatial plans determine which types of objects can be built on a certain piece of land. The subsequent affair of the building is a separate issue in which conformity with the spatial plan is checked. Therefore, the participation in the making of a spatial plan is very important, as this is the time to try to stop harmful projects that could have detrimental effects on the environment. This study shows that public participation in spatial planning is regulated to a good degree, but also that the impact of such participation can be low.

2. The meaning of a party in an administrative procedure

It is important to explain the meaning of a party in terms of administrative procedures. Every administrative procedure revolves around a given party whose rights, obligations, or legal interests are decided in it.[12] Sometimes it is clear who the party in a procedure is – the one that instigated the procedure in order to obtain a right, or the one

[10] Medvedović also states that by the expression `everyone´ we need to understand all state bodies, bodies of local and regional self-government, legal persons with public authority, institutions, companies, artisans, associations, religious communities, and other associations and individuals, domestic and foreign. Medvedović 2012, 42.

[11] OG nos. 47/09, 110/21.

[12] *"A central piece of every administrative procedure is the party. Without the party, there is no administrative procedure."* Medvedović 2012, 15.

who will have an obligation imposed on him. However, in certain cases, the question of whether a person (be it a physical or a legal person) is a party in a given procedure is disputed. The question of determining the subjects who are entitled to the status of a party in administrative procedure is a complicated one for the legislator and implementer of a legal norm.[13] In such cases, special procedures (administrative, administrative dispute, or even constitutional disputes) are instigated to resolve such a question.[14] Namely, being a party in an administrative procedure means being able to bring a certain personal right or justified interests to life.[15] Only a person who is given the status of a party is able to participate in an administrative procedure, has procedural rights prescribed by the law, and is able to challenge a decision brought from the procedure in second instance administrative procedure and/or in administrative dispute in front of a competent administrative court. It is obvious, therefore, that it is necessary to regulate who is to be considered a party in an administrative procedure. The legal definition of a party can, like all legal definitions, be determined in a material or formal sense. The former usually has little to give us, but accordingly, is more accurate. The latter has more content but is regularly less accurate.[16] Therefore, it is almost impossible to determine the material definition of the party in an administrative procedure.[17] As Medvedović has written, such a definition would lead to such practice that the status of a party is not acknowledged by persons who should acquire it, and vice versa.[18] GAPA therefore gives a formal and very general definition of a party in administrative procedure as a person upon whose request a procedure was instigated, against whom a procedure was instigated, or a person who, in order to protect his rights or legal interests, has a right to participate in a procedure (see Article 4[19]). From this legislative conception, three types of parties can be derived: an active party (upon whose request a procedure was instigated, for example of issuing different permits), a passive party (against whom the procedure was instigated, for example determining due taxes), and an interventionist party (who has the right to participate in a procedure in order to be able to protect his rights or legal interests, for example the neighbor in the procedure of issuing building or location permit on a neighboring plot).[20] All such parties have the so-called `party ability´ to participate in an administrative procedure.[21] This ability must exist throughout the procedure.[22] The aforementioned problems of acknowledging the status of a party in administrative procedure usually occur around the third type of party – the interventionist party. Sometimes there is a need to question and determine whether in a procedure that is instigated by someone else, the rights or legal interests of another person are also being resolved. Namely, it is a trait of administrative procedure that involves many different

[13] Medvedović 2012, 15.
[14] Staničić 2019, 25.
[15] Krbek 1928, 15.
[16] Krbek 1928, 15–16.
[17] Ofak 2014, 988.
[18] Medvedović 2012, 17.
[19] *"The party means a person at whose request the procedure was initiated, against whom the procedure is conducted, or who is entitled to participate in the procedure in order to protect his rights or legal interests."*
[20] Staničić 2019, 25; Borković 2002, 418.
[21] Krijan 2006, 88.
[22] Đerđa 2010, 88.

parties with rather different roles and rights and who are because of that impossible to be determined (as in civil procedure) as falling in one of only two groups – plaintiff and prosecutor – in the formal sense where the prosecutor is the one who filed a lawsuit and the plaintiff the one against the lawsuit is filed. One categorization of parties made long ago by Krbek[23] distinguishes between `main´ and `incidental´ parties, with the former being the ones with direct interest in the procedure and the latter being the ones with indirect interest in the procedure. He also wrote in favor of including a broader group of persons in the procedure with the argument that an administration, being organized strictly on an authoritarian idea, will take care of the public interest and will not consistently attract other persons to state their objections of public-right nature against a petitioned permit. Contrarily, an administration organized on a democratic idea will welcome all third parties to support its own activity. In doing so, it primarily uses those whose private interests are targeted. These are primarily immediate neighbors. However, in cases of greater importance, the administration will be inclusive more broadly and allow an objection to a wider circle of persons.[24] Medvedović also states that the question is open whether the care for the protection of legality in deciding a concrete administrative matter and the care for public interest should be given only to the body that is carrying out the procedure, or whether this is the right and duty of other subjects.[25] This idea has been interwoven in all laws regulating general administrative procedures since 1956 and the first Yugoslav General Administrative Procedure Act.[26,27] Therefore, the legislative definition of a party in GAPA stands for a very broad formal definition of a party that should enable all whose rights, obligations, or legal interests[28] are being decided on in an administrative procedure to participate in such a procedure with all procedural rights prescribed by law. Problems usually do not arise regarding active or passive parties, but are often created when interventionist parties emerge because of the need to ascertain whether their rights or legal interests are being decided on in the procedure. Unfortunately, it is the long-standing practice of Croatian administrative courts[29] and public bodies to restrictively interpret the existence of rights and legal interests of an interventionist party in a concrete administrative procedure, so they usually dismiss such claims for participation in a procedure based on a lack of party legitimation.[30] In the case law of the Croatian High Administrative Court of the Republic

[23] Krbek 1928, 25.
[24] Krbek 1982, 27.
[25] Medvedović 2012, 16.
[26] OG SFRJ no. 52/56. It was amended several times (OG SFRJ, nos. 10/65, 4/77, 11/78, 9/86) but this was never changed.
[27] See Ofak 2014, 988. See also Majstorović 1957, 65–66.
[28] Krijan wrote that a `legal interest´ must have its basis in the law or other by law, that it must exist at the time the procedure is being decided and that must be linked to the administrative matter being decided. Also, the content of that interest is based only on the protection of rights of other person from violation. Krijan 2006, 88–89. Legal interest is also known as `party legitimation´ according to Đerđa 2010, 90.
[29] *"The owner of a real estate that has a common border with a real estate for which a demolition decision has been issued is not a party in the procedure of issuing a decision regarding the change of the investor."* See Us-4618/2009.
[30] Đerđa 2010, 92; Medvedović 2012, 29.

of Croatia, legal interest represents a possibility that the plaintiff hopes to achieve the legal benefit that he wants to achieve through the requested legal protection, and a legal interest has such a person whose rights and obligations depend on the manner the concrete administrative procedure will be decided, or when a decision influences the legal relations of said person. Legal interest in applying legal remedies refers to the legal benefit that is represented in an annulment or change of a decision detrimental to a party.[31]

3. GAPA's role in Croatia's administrative procedure

It is important to note that GAPA is a general procedural act and that its application is mandatory in all administrative matters. This is prescribed by Article 3, para. 1 of GAPA, which reads as follows:

"*This Act shall apply in deciding all administrative matters. Only individual questions of administrative procedure may be regulated otherwise by law, where this is necessary for deciding in particular administrative areas and where this is not contrary to the fundamental provisions and the purpose of this Act.*"

From these two separate principles, the following emerges: First, it is clear that deviations from GAPA are permitted only in special cases and that even then the principles and fundamental provisions of GAPA apply; second, only particular questions can be regulated otherwise by law, which leads to the conclusion that the administrative procedure as a whole cannot be regulated by the provisions of any other act. Therefore, the importance of GAPA in the Croatian legal order is paramount.[32] That said, it is important to note that many special acts regulate certain aspects of administrative procedures.[33] GAPA itself allows for deviations from many of its provisions (Art. 12/1, Art. 21/3, Art 25/1. Art. 27/1, Art. 56/1, Art. 59/3. Art. 109, Art. 112/1, Art. 118/2. Art. 135/3, Art. 140/1, Art. 161/1,5 etc.).[34] Of course, there is a need to allow for deviations in special administrative areas, and GAPA recognizes this need. For example, the General Tax Act[35] regulates a great part of the administrative procedure and does this in a way that is significantly different from that provided by GAPA. In this particular case, the differences are justified by the specificities of tax administrative matters, and they do not clash with the main principles of the GAPA. However, this is not the case in many other acts. This leads to practical problems.[36] As Croatian legal theory repeatedly stated, the norms of the general act and the norms of special acts must form a unified whole, allowing for a just and efficient functioning of the legal system.[37] Yet another reason for passing the new GAPA was the wish to unify the administrative procedure throughout Croatia, which represents a task yet to be completed. Namely, the primary problem regarding the relationship between GAPA and special acts concerns the unclear relationship between GAPA and the special acts that also prescribe administrative

[31] See Usl-1637/12-7.
[32] Britvić Vetma & Staničić 2021, 17.
[33] Ljubanović 2006, 20–22; Ljubanović 2010, 325–328.
[34] Staničić 2016, 2.
[35] OG nos. 115/16, 106/18, 121/19, 32/20, 42/20.
[36] Britvić Vetma & Staničić 2021, 18.
[37] Medvedović 2006, 1; Šikić & Staničić 2009, 43; Ofak 2014, 989–991.

procedures or certain parts of them. Consequently, GAPA has failed to fully perform its role as a general procedural act, notwithstanding the formal efforts of the state to ensure this.[38]

4. The link between the right to be a party in administrative procedure and constitutional rights

As mentioned above, every administrative procedure revolves around a party. In every administrative procedure, someone's rights, obligations, or legal interests are decided. According to our constitutional setup, every individual act of a public body is subject to judicial scrutiny, as all individual acts of public bodies must be grounded in law (the principle of legality of administration; see Article 19[39] of the Constitution). his constitutional provision must be linked with another – Article 29 para. 1,[40] which guarantees the right to a fair trial (access to court). One must also mention Article 14 para. 2[41] of the Constitution, which proclaims equality of all before the law. It is important to note that Croatia is also a party to the European Convention on Human Rights and Fundamental Freedoms (ECHR).[42] This international document is part of Croatia's internal legal system and is considered of quasi-constitutional rank by Croatia's Constitutional Court.[43] In her analysis, Ofak clearly states that Article 6 para. 1 of the ECHR is applicable to administrative procedures because the right to a fair trial is protected in all procedures in which the rights and obligations of civil nature are decided. Whether a matter is of a `civil nature´ depends on the practice of the European Court of Human Rights, which has built an autonomous definition of procedures in which rights and obligations of a civil nature are decided.[44] According to its practice, the Court considers all administrative procedures that have an effect on the property private rights of individuals or when they concern rights that do not have a strictly proprietary character, such as the right to life, health, and healthy environment, the right to respect of private and family life, right to access to information, etc., under the scope of Article 6, para. 1 of the ECHR.[45] When we take into account the constitutional setup, which, first, binds the administration to the law, second, guarantees judicial scrutiny of all individual acts of public bodies, and third, ensures the right to a fair trial (access to court), and the ECHR, which also guarantees the right to a fair trial, which applies to administrative procedures as well, one only has to acknowledge that the right to participate in an administrative procedure as a party is and should be a protected fundamental right. Furthermore, denying the status of a party to a person who should

[38] Britvić Vetma & Staničić 2021, 18.

[39] *"Individual acts of state administration and bodies vested with public authority shall be grounded in law. Judicial review of individual acts made by administrative authorities and other bodies vested with public authority shall be guaranteed."*

[40] *"Everyone shall be entitled to have his/her rights and obligations, or suspicion or accusation of a criminal offence, decided upon fairly and within a reasonable time by an independent and impartial court established by law."*

[41] *"All persons shall be equal before the law."*

[42] OG IC nos. 18/97, 6/99, 8/99, 14/92, 1/06.

[43] See decision U-I-745/1999 from November 8, 2000. See also in Šarin 2014, 86.

[44] Ofak 2014, 992.

[45] Ofak 2014, 995.

have obtained such status inevitably leads to denying the same person the constitutional and conventional right to access the court and a fair trial. Therefore, as Ofak rightly states, the provision of Article 4 of GAPA can be seen as a reflection of: 1) the guarantee of a fair trial protected by Article 6, para. 1 of the ECHR, and 2) equality of all in front of the law and the right to a fair trial guaranteed by Article 14 para. 2 and Article 29 para. 1 of the Constitution.[46] If an outcome of an administrative procedure can be detrimental to the rights or legal interests of a person, such a person must be able to protect the said rights or legal interests while the administrative procedure is ongoing. This can only be done if such a person is granted the status of a party during the procedure.[47] However, there are examples of laws that deny such status to persons who would have it according to GAPA.

5. Examples of narrowing the possibility to participate in administrative procedures linked with environmental matters

In our legislative setup, there are several sectoral laws that narrow down the possibility to be granted the status of a party in administrative procedures in which they apply.[48]

For example, the Construction Act[49] provides party status in administrative procedures only to the investor, owner of the plot on which the construction is underway, and owners of surrounding real estate and/or persons who are the holders of real rights (for example, easement) on this real estate (Article 115 para. 1). There are even greater restrictions if the building permit is issued for a building of interest of the Republic of Croatia or is issued directly by the Ministry, where the status of a party is given only to the investor, owner of the plot, and/or persons who are the holders of real rights (for example, easement) on this real estate (Article 15 para. 3). All others are not granted the status of a party and therefore are unable to participate in any administrative procedure regarding issuing of building permits. One must mention that the practice of the administrative court has been rather strict concerning the determination of whether a person fits the criteria `surrounding real estate´ for neighbors that are entitled to the status of a party. For a long time, only the owners of the plots that have a common border with the plot for which the permit is claimed were considered owners of the `surrounding real estate.´ However, in certain judgements[50] of the now High Administrative Court of the Republic of Croatia (then the Administrative Court of the Republic of Croatia) this has been revised.

[46] Ofak 2014, 992.
[47] Borković 2002, 418; Ofak 2014, 995.
[48] See especially Ofak 2014, 999.
[49] OG, nos. 153/2013, 20/2017, 39/2019, 125/2019.
[50] See Us-1134/1998, in which the Court said that determining the legal interest of neighbors to participate in an administrative procedure regarding building permits depends on the factual status of the administrative matter (for example, the distance between the buildings). All those who have a direct common border are parties by law, and the status of others depends on the factual state of the matter.

An even more striking example of narrowing the possibility of being granted the status of a party can be found in the Construction Act, which prescribes that in the procedure of issuing a usage permit for a building, the only persons eligible for the status of a party are the investor or the owner of the building (depending on who filed for the permit).

Another example is the Spatial Planning Act,[51] which narrows the possibility for a person to acquire the status of a party in administrative procedures regarding the issuing of spatial permits in which this Act applies in a very similar manner as was described when discussing the Construction Act. The possible parties are listed in the Act (see Article 141 paras. 1 & 2): the instigator of the procedure, owner of the real estate for which the permit is being issued and the bearers of real rights on that real estate, owners of surrounding real estate, and/or persons who are the holders of real rights (for example, easement) on this real estate. According to the Construction Act, the restrictions are even greater if the location permit is issued for an intervention in the space of interest of the Republic of Croatia or that is issued directly by the Ministry, where the status of a party is given only to the instigator of the procedure, owner of the plot, and/or persons who are the holders of real rights (for example, easement) on this real estate.

The Mining Act[52] prescribes that, in all procedures in which it applies, only the owners of the real estate regarding which the procedures are being held can attain the status of a party (Article 15). All others were excluded.

Lastly, the now retracted Sustainable Waste Management Act[53] should be mentioned, as it also restricts participation in administrative procedures in which it is applied. Only parties were also numbered in the Act (instigator for the issuing of a permit, owner of the real estate for which the permit was issued, and the holders of other real rights on the real estate and the local municipality; Article 95 para. 1). In procedures regarding temporary permits, not even the municipalities were given the status of a party. However, the new 2021 Waste Management Act[54] does not contain such restrictions and is a step in the right direction.

This restriction of a fundamental right, as shown, is said to be justified by economic gains from investment,[55] but there are other ways to ensure the speedy and efficient conduct of these procedures. Namely, one should ask whether the economical carrying out of the procedure is a legitimate goal because of which the legislator is allowed to restrict the position of a party in administrative procedure?[56] Of course, the principle of economical and efficient procedures exists in GAPA (Article 10), and one should abide by it. However, it is a `second rate´ principle when it conflicts with other `more important´ principles of administrative procedure enshrined in GAPA. This principle cannot be enforced if it is detrimental to the aim and purpose of administrative procedures, and it especially cannot be detrimental to the principle of material truth.[57]

[51] OG, nos. 153/13, 65/17, 114/18, 39/19, 98/19.
[52] OG, nos. 56/13, 14/14, 52/18, 115/18, 98/19.
[53] OG, nos. 94/13, 73/17, 14/19, 98/19.
[54] OG, no. 84/21.
[55] Ofak 2014, 1011.
[56] Ofak 2014, 1011.
[57] Popović 1978, 98; Borković 2002, 407; Đerđa 2010, 53.

Denying party status to persons who are entitled to it under GAPA results in the violations of these persons' constitutional and conventional rights – such as the rights to a fair trial, access to courts, and equality before the law. For example, a similar provision in Slovenia's Construction Act was quashed[58] by Slovenia's Constitutional Court in 2011. The Court held that the legislator is not completely free because every man has the right to his constitutionally protected core – the very essence of human rights in which the legislature is not allowed to interfere. According to the Court, the proportionality of measures by which individuals participate in procedures in which their legal interests are being decided cannot be justified by any legitimate goal.[59]

Namely, if there is no denying that a person has a legal interest to participate in a particular administrative procedure (and is a party to it under Art. 4 of the GAPA), but the legislator nevertheless denies him/her this right by a special act (e.g., Art. 115 of the Construction Act), it is obvious that this constitutes a violation of the person's constitutional right. The Constitution guarantees the right of access to courts (Art. 29) and prescribes that everyone is equal before the law (Art. 14, para. 2), including those whose rights are made void by the provisions of special acts. If a person cannot be a party to the administrative procedure, he/she is also denied the right to challenge the decision ensuing from the administrative procedure before a court, which is clearly in violation of the said person's right of access to the courts and equality before the law.[60] The economic swiftness of the procedure cannot be a legitimate goal because of which the right to a fair trial could be restricted. Furthermore, this goal must not endanger equality before the law. It is and should be achieved through legal provisions that regulate legal aid, costs of the procedure, merging matters in one procedure, deadlines for certain actions, etc.[61]

6. The Aarhus Convention and its implementation regarding the participation of public in environmental matters in Croatia

As mentioned above, Croatia is a party to the Aarhus Convention, which has been in force in Croatia since June 25, 2007. The importance of this convention for many special administrative procedures cannot be overstated, for example, procedures regarding access to information on the environment owned by public bodies and procedures of deciding regarding certain activities that can have a significant impact on the environment.[62] Such activities are listed in Addendum 1 of the Convention (energy, manufacturing and processing metal, processing minerals, chemical industry, waste management, and other activities). The Convention defines the `public´ as one or more physical or legal persons and, according to domestic law or practice, their associations,[63] organizations, or groups (Article 2 para. 4). It applies to every person, notwithstanding

[58] See Decision U-I-165/09-34 of March 3, 2011.
[59] See also Ofak, 2014, 1002.
[60] Britvić Vetma & Staničić 2021, 22.
[61] Ofak 2014, 1002.
[62] Ofak 2014, 1003.
[63] On associations and their position in public participation in environmental matters, see Medvedović & Ofak 2011, 69–84.

their nationality, residence, or seat (for legal persons). It also applies to a group of people, organizations, and associations who do not have the status of a legal person (for example, residents of a settlement or citizens organized in an association that is not registered).[64] `The public concerned´ is defined as those affected or likely to be affected by, or having an interest in, the respective environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest (Article 2 Point 5). This definition is very broad, although somewhat narrower than that of the public. It encompasses persons whose rights, for example, their right to property or the right to a healthy environment, could be violated. However, the definition also applies to persons who are interested in decisions on the environment and who are not obliged to prove their legal interest, but only their factual interest.[65] It is clear that some activities can affect multiple people. If we consider gas pipelines, the definition of `the public concerned´ can encompass thousands, and in the case of a nuclear power plant, millions from several countries could be severely impacted; it cannot be limited by number.[66] Therefore, the public concerned must have access to participation in administrative procedures, as this is guaranteed by the Convention. Non-governmental organizations that promote environmental protection are being held as members of the concerned public if they meet the demands set in the domestic legislature. However, those requirements must be aligned with the principles of the Aarhus Convention, such as the ban of discrimination on the ground of the seat (of the association).[67] The necessary requirements were set by the Croatian legislator in the Environmental Protection Act under Article 167. According to it, an association has a sufficient legal interest if it fulfills the following requirements: (1) If it is registered in accordance with special regulations governing associations and if environmental protection, including protection of human health and protection or rational use of natural resources, is set out as a goal in its statute; (2) If it has been registered for at least two years prior to the initiation of the public authority's procedure (in relation to which it is expressing its legal interest), and if it can prove that in that period it actively participated in activities related to environmental protection in the territory of the city or municipality where it has a registered seat in accordance with its Statute.

Such an association shall have the right to file an appeal with the Ministry or file a lawsuit before the competent court for the purpose of challenging the procedural and/or substantive legality of decisions, actions, or omissions.[68] If an association does not meet these requirements, it is not assumed to belong to the `public concerned.´ This does not prevent the association from proving its legal interest in a procedure; rather, such an interest is not assumed.[69] With respect to individuals, pursuant to the EPA, any natural or legal person who can prove a violation of his/her right due to the location of the project and/or the nature and impact of the project or which is affected or is likely to be

[64] Ofak 2014, 1003–1004.
[65] Ofak 2014, 1004.
[66] Ofak 2014, 1004.
[67] Ofak 2014, 1005.
[68] Ofak 2020, 335–336.
[69] Ofak 2020, 336.

affected by environmental damage shall have the right to instigate a legal action against an administrative act of a public authority, and may file an appeal with the Ministry or file a complaint before the competent court in line with the special legislation for the purpose of challenging the procedural and/or material legality of acts, actions, or omissions of public authorities, but only if he/she participated in the procedure as the public concerned (Article 168, para. 1 in connection with Article 167, para. 1).[70]

7. Public participation and access to justice in the processes of spatial planning

Spatial planning is extremely important for every country. By spatial plans, the means of use of space is regulated. One must also consider that space is a limited resource and that it should be carefully used, with the future in mind in such limitations.[71] Because of the importance of spatial planning, it is paramount to establish the surveillance of the public regarding the making of spatial plans and also regarding individual acts that enable interventions in the space, which must be in accordance with the spatial plan. The public must have an insight into the complete process of making spatial plans of all levels so it can correct mistakes and/or illegalities with special regard to environmental protection and quality space management in a timely fashion. Additionally, there must be a special emphasis on the obligation of enabling the public to participate in the procedures of issuing individual acts – location permits, not only in issuing them but also in challenging them in front of the courts.[72] Spatial planning in Croatia is regulated by the Spatial Planning Act, which defines space as an especially valuable and limited national good (Article 2). The system of spatial planning is based on three principal segments: spatial and urbanistic planning, arrangement of settlements and areas outside the settlement, and implementation of spatial planning documents that are interconnected and interdependent.[73] It is also based on the following principles: an integral approach in spatial planning, acknowledging scientific and professionally determined facts, spatial sustainability of development and quality of build, achieving and protecting public and individual interest, horizontal integration in space protection, vertical integration, and public and free access to data and documents important for spatial planning.[74]

[70] Ofak 2020, 336. Arguably, this provision of the EPA, which requires the participation of individuals in the administrative procedure as a condition for access to justice in environmental matters, is not in line with the Administrative Disputes Act (OG nos. 20/10, 143/12, 152/14, 94/16, 29/17, 110/21), according to which any natural or legal person who believes that his rights and legal interests were violated may file a lawsuit before the administrative court. Pursuant to the Administrative Disputes Act, there is no obligation to participate in the administrative procedure prior to filing an action before the administrative court, but only a requirement to submit an appeal to the second-instance body if such possibility exists. In addition, it can be argued that the obligation to participate in the administrative procedure as a condition for access to justice in environmental matters is contrary to the Aarhus Convention and the respective EU Directive concerning access to justice in environmental matters. Ofak 2020, 336.

[71] Staničić 2017, 32.

[72] Staničić 2017, 32.

[73] Bienenfeld 2007, 24.

[74] See Article 7.

One should especially highlight the principle of public and free access to data and documents important for spatial planning. This means that there are obligations for the competent bodies as the state and municipalities are obliged to notify the public of the state of the space, enable and encourage its participation by developing social cohesion, and by strengthening the awareness of the need to protect space. The public also has the right to access information on space, which is owned by all public bodies.[75] Public participation in making or changing spatial planning documents is an important element of their making and/or change. Such participation ensures that the broader public that the spatial plan impacts is informed on its making or change. In this manner, the eventual conflicts lessened as various economic interests undoubtedly existed when making or changing spatial plans.[76] Therefore, the carrier of the making/change of a spatial plan is required to inform the public on the municipal website and through the information system of the Croatian Institute for Spatial Development. Neighboring cities and municipalities are to be also informed in writing, as they are also entitled to participate in the making/change of a spatial plan, as it can influence their rights.[77] There is a mandatory public debate on the proposal of a spatial plan that is open to everyone. The proposal must consist of graphic and textual parts, an explanation, and a summary for the public. Public debate must be publicly announced no later than eight days before it is scheduled. Simultaneously, the proposal of the spatial plan is put into public view.[78] During the duration of the public view, the carrier of the plan is to organize one or more public debates to explain the solutions in the plan or the quashing of a plan. The public debates are first given by the carrier of the plan, experts, and others who are collaborating in the making of the plan. All other participants were entitled to ask questions and put suggestions and objections on the record. All the public is entitled to send written proposals and objections in the deadline previously set in the announcement of the public debate. After the end of the public debate, a report must be prepared during the next 30 days for a new plan and 15 days for the changes. This report must be published on the board and website of the carrier and in the information system.[79] As a result of the public debate, there may be significant changes to the proposal of the spatial plan when a new public debate is required (the public view then takes eight to fifteen days). Before the carrier sends a final proposal of the spatial plan to the representative body to enact it, he is required to deliver to the participants of the public debate a written notice containing an explanation of why their proposals and objection were not fully accepted. The representative body can then enact the spatial plan or its changes. It is important to mention that the legality of a spatial plan can be brought in front of the High Administrative Court of the Republic of Croatia using Article 83 of the Administrative Disputes Act.[80] However, one must state that the carrier is by no means obligated to take

[75] Staničić 2017, 36.
[76] Staničić 2017, 40.
[77] Staničić 2017, 40.
[78] It lasts differently for different spatial plans. For the State spatial development plan it lasts for 60 days, and for all others 30 days. If only amendments, changes, or quashing of a spatial plan are planned, the public view lasts for 15 days.
[79] Staničić 2017, 42.
[80] Staničić 2017, 45.

into account any suggestions or objections to the proposal of the spatial plan; he is only obliged to explain why he did not take them into account. Therefore, the influence of the public, although the procedure is well-regulated, is weak at best.

Besides the aforementioned way of participating in making/changing spatial plans, there are other ways[81] in which the interested public can participate in spatial planning, such as the right to obtain a location information,[82] by accessing reports on spatial condition[83] or participating in the issuing of location permits. It is clear that the possibility of participation in the processes of spatial planning is prescribed very broadly but with rather limited effects on the processes themselves. The public is informed and can participate, but the creators of plans are more or less (except politically and/or personally) free to do as they will (if they abide by the plans of a higher order[84]).

8. Conclusion

Public participation in environmental matters is important. It would be wrong to assume that only the state is to be the protector of public interest in most matters, especially in environmental ones. As was stated above, the Constitution dictates that everyone is, within the scope of his/her powers and activities, to accord particular attention to the protection of the human environment. Therefore, it is a duty of all, not just the state (although it is primarily the duty of the state according to the Constitution). When we look at constitutional, conventional, and legislative regulations, it is shown in this paper that GAPA is a paramount legal source, in that it enables every person whose rights or legal interests are being decided in an administrative procedure to participate in such a procedure as a party, as this is the only way in which such rights or legal interests can be protected. It has also been shown that GAPA does not allow for the possibility to be granted the status of party to be narrowed down. However, several sectoral laws have provisions to that effect. This means that in administrative procedures carried out according to those laws, persons who do have the right to be granted the status of a party in such procedures do not have this right. Because they are not granted the status of a party, such persons are unable to protect their rights or legal interests during the procedure. Moreover, they are unable to lodge legal remedies, especially the opportunity to seek court protection in administrative disputes. As said, access to court and the right to a fair trial are guaranteed by the Constitution (Article 29 para. 1) and by the European Convention (Article 6 para. 1). Furthermore, the Constitution clearly prescribes that all are equal before the law (Article 14, para. 2), and that all individual acts of public bodies are subject to judicial control (Article 19, para. 2). All this said, it is clear that provisions in sectoral laws that narrow down the opportunity to be granted the status of a party in

[81] See in Staničić 2017, 45–47.
[82] An act in written form issued by a competent body with the purpose of acquiring information on spatial use, conditions for taking actions in space according to the in force spatial plan.
[83] A document made for the Croatian Parliament or representative body of the municipalities on the status of the space in a four-year timeframe. It contains various information on the spatial development, implementation of spatial plans, suggestions for improving spatial development, etc. They are publicly published and are therefore available to the public.
[84] There is the state plan, regional plan, and municipal plan (in order of relevance).

administrative procedures contrary to GAPA are not aligned with the Constitution. They are also not aligned with the Aarhus Convention, which defines `the public concerned´ far more broadly than the cited sectoral laws. Therefore, such a provision should be annulled by the Constitutional Court[85] (as the Slovenian Constitutional Court had done). This paper has shown that public participation is very broadly regulated with regard to making or changing spatial plans. The public is entitled to know when, how, and in what manner this will be done, and the duty of the carrier of the plan in this regard is strictly prescribed. The public has the right to object in writing or during public debate. However, the impact of public participation is rather limited, as the carrier is only obliged to explain in writing why he did not heed some (or all) suggestions or objections made by the participants. The responsibility (political or personal) of the carrier is the only thing that can make the carrier heed the suggestions or objections made by the participants. Therefore, the final conclusion is that the right to public participation in environmental matters in Croatia is generally sufficiently prescribed (see Article 4 of GAPA and Article 167 of EPA). However, there are sectoral laws that undermine this right, which creates problems in practice that render these laws clearly unconstitutional. In the area of spatial planning, there is a broad possibility of public participation, but with very limited real effects.

[85] Ofak 2014, 1011; Staničić 2017, 49; Vitez Pandžić 2019, 314.

Bibliography

1. Bienenfeld J (2007) Dokumenti prostornog uređenja, *Pravo i porezi*, 46(3), pp. 23–31.
2. Borković I (2002) *Upravno pravo*, Zagreb, Narodne novine.
3. Britvić Vetma B & Staničić F (2021) Ten years of General Administrative Procedure Act in Croatia, in: Duret P & Ligugnana G, eds., *New Challenges for Administrative Procedure in Europe: A Comparative Perspective*, Napoli, Edizioni Scientifiche Italiana, pp. 13–34.
4. Đerđa D (2010) *Opći upravni postupak u Republici Hrvatskoj*, Zagreb, Inženjerski biro.
5. Krbek I (1928) *Stranka u upravnom postupku*, Zagreb, Tisak I naklada jugoslavenske štampe.
6. Krijan P (2006) *Komentar Zakona o općem upravnom postupku*, Zagreb, Informator.
7. Ljubanović B (2006) Posebni upravni postupci u Republici Hrvatskoj, *Hrvatska javna uprava*, 6(3), pp. 20–22.
8. Ljubanović B (2010) Novi Zakon o općem upravnom postupku i posebni upravni postupci, *Hrvatska javna uprava*, 10(2), pp. 325–328.
9. Majstorović B (1957) *Komentar Zakona o općem upravnom postupku*, Beograd, Nova administracija.
10. Medvedović D (2006) Pravci modernizacije općeg upravnog postupka, *Informator*, 5500, pp. 1–4.
11. Medvedović D & Ofak L (2011) The legal position of associations in environmental protection proceedings in the Republic of Croatia, *The Scientific Journal Facta universitatis Series Law and Politics,* 9(1), pp. 81–82.
12. Medvedović D (2012) Stranka u upravnom postupku, in: Foretić D & Slovinić J, eds., *Komunalno gospodarstvo*, Zagreb, Novi informatory, pp. 15–31.
13. Ofak L (2014) Ograničavanje pravnog položaja stranke u posebnim upravnim postupcima, *Hrvatska i komparativna javna uprava,* 14(4), pp. 978–1014.
14. Ofak L (2020) Croatia, in: Deketelaere K, ed., *IEL Environmental Law*, Netherlands, Kluwer Law International BV, pp. 1–354.
15. Ofak L (2021) The approach of the Constitutional Court of the Republic of Croatia towards the protection of the right to a healthy environment, *Journal of Agricultural and Environmental Law*, 16(31), pp. 85–98.
16. Popović S (1978) *Opšte upravno pravo*, Beograd, Savremena administracija.
17. Staničić F (2017) Sudjelovanje javnosti i pristup pravosuđu u procesima prostornog planiranja, *Zbornik radova Veleučilišta u Šibeniku*, 11(1–2), pp. 31–52.
18. Staničić F (2019) Abecedarij upravnog postupka (5), *Informator*, 6573, p. 25.
19. Šikić M & Staničić F (2009) Uređenje žabe u posebnim upravnim postupcima, *Hrvatska pravna revija*, 9(4), pp. 43–52.
20. Vitez Pandžić M (2019) Stranka u postupku ishođenja građevinske dozvole, *Hrvatska i komparativna javna uprava*, 19(2), pp. 305–327.

Bence UDVARHELYI*

Development tendencies and latest results of the environmental criminal law of the European Union**

Abstract

This study aims to outline the development trends and latest results of the European Union Environmental Criminal Law. The EU legislator issued several criminal laws to criminalize and sanction behaviors that harm or endanger the environment and nature. Based on the strengthened criminal law competencies of the Treaty of Lisbon, the European Commission developed a directive proposal in 2021 to significantly broaden the range of punishable conduct and strengthen the range of applicable sanctions. This is expected to impose legislative duties on the Hungarian legislator.

Keywords: environmental protection, environmental criminal law, environmental crimes, EU legislation, directive proposal

1. Introductory remarks

The intensive technical and economic development of the 20th century has both positive and negative consequences. The negative consequences include environmental damage, which indirectly affects people's health and wellbeing. Environmental preservation and protection are fundamental from the perspective of human health and quality of life. Therefore, environmentally disruptive acts and omissions must be dealt with strictly. In environmental protection, criminal instruments and administrative and civil law play important roles since criminal law provides sufficient deterrence or retention.[1]

One of the most important characteristics of criminal offenses against the environment is that their consequences do not stop at state borders – they affect other states. Therefore, international cooperation between states is essential to successfully fight cross-border crimes. The European Union (EU) (criminal) law has a great influence on the development of environmental criminal law. The EU quickly realized that the number of environment-related crimes is increasing – a common problem for the member states. Since these crimes are often cross-border in nature or have such effects,

Bence Udvarhelyi: Development tendencies and latest results of the environmental criminal law of the European Union. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 159-170, https://doi.org/10.21029/JAEL.2023.34.159

* Assistant professor, Department of Criminal Law and Criminology, Institute of Criminal Sciences, Faculty of Law, University of Miskolc, bence.udvarhelyi@uni-miskolc.hu

** *This study has been written as part of the Ministry of Justice programme aiming to raise the standard of law education.*

[1] See in details: Laczi 2004, 204.

https://doi.org/10.21029/JAEL.2023.34.159

it is essential to create a coherent EU framework in this field. Therefore, the member states are required to act in a coordinated manner to protect the environment.

This study presents the current state and development of the EU Environmental Criminal Law and its latest results. However, a comprehensive analysis of environmental protection policies cannot be implemented within the framework of this study.[2] Hence, the study focuses exclusively on criminal law.

2. The directive proposal and the framework of environmental criminal law

In the fight against environmental criminal offenses in the EU prior to the Treaty of Lisbon, the EU only had explicit criminal law competencies under the so-called third pillar. It was highly questionable whether environmental protection could be regulated through criminal law in the first pillar. However, since the effectiveness of the third pillar was limited, the seriousness of the environmental crimes encouraged the suggestions that, within the common environmental protection policy framework, the first pillar's legal instruments could contain criminal law provisions.

As a result of the competency disputes between the two pillars, a dual legislative process began. In 2000, Denmark presented the third pillar instrument. It is a framework decision with the legal Articles 29, 31, and 34 of the Treaty on the EU, adopted in 2003.[3] Simultaneously, in 2001, the European Commission developed a directive proposal on environmental protection under the criminal law, which was based on Article 175 of the EC Treaty (currently Article 192 of the Treaty on the Functioning of European Union; TFEU).[4] However, the proposal is yet to be adopted.

The content of the directive proposal and the framework decision were similar. Both legal acts determined the list of punishable criminal behaviors. The 2012 Directive Proposal would have punished those who committed criminal conduct or breached environmental community laws adopted by the member states.[5] The annex to the directive proposal listed the legal acts, including prohibiting polluting activities, violation of which would be a basic condition for criminal responsibility. This means that the scope of the directive proposal does not include all types of prohibited behaviors; it only includes the most typical forms of pollution, which cause a serious environmental threat, deterioration, or damage. The criminal offenses listed in the directive proposal could be committed intentionally or due to serious negligence.[6] Regardless, they would be dealt with similarly.

Contrary to the directive proposal, the 2003 Framework Decision did not list the environmentally legal acts. Instead, it used a more common definition of unlawfulness: the infringement of a law, an administrative regulation, or a decision taken by a

[2] See in details: Fodor 2009, 109–121; Görgényi 2018, 46-80; Görgényi & Udvarhelyi 2019, 510–514; Raisz & Szilágyi 2012, 107–148; Szilágyi 2010, 51–72.
[3] Council Framework Decision 2003/80/JHA of January 27, 2003, on environment protection through criminal law [OJ L 29, 05.02.2003, pp. 55–58]
[4] Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law [COM (2001) 139 final, 15.03.2001]
[5] Article 3 of Directive Proposal COM (2001) 139 final
[6] Laczi 2004, 579.

competent authority, including those giving effect to the binding provisions of the community law aiming at environmental protection.[7] The framework decision listed the intentional and the negligent offenses in separate articles;[8] however, the punishable conducts were similar. Member states are required to punish criminal conducts, irrespective of whether they were committed intentionally or due to mild or serious negligence.[9]

In addition, the directive proposal and framework decision determined the applicable sanctions. The directive proposal would punish both natural and legal persons and would require the member states to prescribe effective, proportionate and dissuasive sanctions involving deprivation of liberty in serious cases involving natural persons. However, the member states could provide other sanctions, such as fines, exclusion from entitlement to public benefits or aid, temporary or permanent disqualification in commercial activities, and judicial supervision or winding-up.[10]

The framework decision also prescribed the requirement of effective, proportionate, and dissuasive sanctions. The member states were obliged to determine, at least in serious cases involving natural persons, the penalties involving deprivation of liberty, which can give rise to extradition. The criminal penalties could be accompanied by other penalties or measures, such as the disqualification of a natural person from engaging in an activity requiring official authorization or approval or founding, managing, or directing a company or a foundation where the facts leading to their conviction show an obvious risk that the same type of criminal activity may be pursued.[11] The conditions of the liability of legal persons in the framework decision was more detail than the directive proposal. Accordingly, a legal person could be held liable if the criminal offense was committed for personal benefit, acting either individually or as a part of an organ, where the legal person held a leading position, had the power of representation of a legal person, had an authority to take decisions on behalf of a legal person, or had an authority to exercise control with the legal person. In addition, the legal person could be held liable when the lack of supervision or control by a person in a leading position under their authority made possible the commission of a criminal offense for the benefit of the legal person. The sanctions against legal persons include criminal or non-criminal fines and other sanctions, such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification in industrial or commercial activities, judicial supervision or winding-up, or the obligation to adopt specific measures to avoid the consequences of conduct, such as that on which the criminal liability was founded.[12]

Following the principle of subsidiarity and proportionality, the directive proposal did not contain any provisions concerning criminal procedural issues. On the contrary, the framework decision adopted within the framework of the criminal law cooperation of the third pillar regulated issues on jurisdiction, extradition, and criminal procedure.[13]

[7] Point a) of Article 1 of Framework Decision 2003/80/JHA
[8] Articles 2–3 of Framework Decision 2003/80/JHA
[9] Görgényi 2011, 99.
[10] Article 4 of Directive Proposal COM (2001) 139 final
[11] Article 5 of Framework Decision 2003/80/JHA
[12] Articles 6–7 of Framework Decision 2003/80/JHA
[13] Articles 8–9 of Framework Decision 2003/80/JHA. See: Laczi 2004, 582.

It must be noted that the directive proposal would have created a narrow scope, which would be limited to the criminal law protection of the community's administrative norms. In contrast, the Council's framework decision created a broader environmental criminal law, which served to enforce administrative standards and criminalized certain behaviors that harm the environment.[14]

However, the framework decision was only short-lived because the European Commission challenged its legal basis before the European Court of Justice and requested its annulment. The so-called `battle of pillars´ was, therefore, finally ended by the European Court of Justice, which agreed with the European Commission and annulled the framework decision. The court stated that as a general rule, neither criminal law nor the rules of criminal procedure fall within the community's competence. However, the last finding does not prevent the community legislature from taking measures when the application of effective, proportionate, and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offenses. This relates to member states' criminal law, which considers that the rules on environmental protection are fully effective.[15] This ruling also opened the way for the EU to adopt criminal law measures with respect to the first pillar.[16]

3. Directive 2008/99/EC on environment protection through criminal law

Since the annulment of the Council's framework decision, the EU has been unable to adopt a new legal act on the criminal protection of the environment for several years. However, since the European Court of Justice annulled the framework decision due to its form and legal basis, it is obvious that the establishment of EU regulations for the criminal protection of the environment is necessary.[17] Therefore, the European Commission developed a new directive proposal instead of the 2001 proposal.[18] The new directive proposal of the European Commission was modified during the negotiation process and was finally adopted by the European Parliament and the Council on November 19, 2008.[19] Directive 2008/99/EC on the protection of the environment through criminal law was primarily based on the regulation of the annulled framework decision; however, it adopted several provisions from the previous directive proposal.

Similar to the previous EU legal acts, the directive prescribes punishable conducts. According to the directive, the member states shall ensure that the following conduct constitutes a criminal offense: (a) Discharge, emission, or introduction of materials or

[14] Ligeti 2008, 626–627.
[15] Judgment of the Court (Grand Chamber) of September 13, 2005, in Case C-176/03 Commission v Council [2005, I-7879], points 47–48.
[16] See in details: Farkas 2007, 494–497; Görgényi 2005, 107–111; Karsai 2006, 4–6; Laczi 2004, 577–589; Rétházi 2006, 67–71.
[17] See: Görgényi 2011, 96.
[18] Proposal for a Directive of the European Parliament and of the Council on environment protection through criminal law [COM (2007) 51 final, 09.02.2007]
[19] Directive 2008/99/EC of the European Parliament and of the Council of November 19, 2008, on environment protection through criminal law [OJ L 328, 6.12.2008, pp. 28–37]

ionizing radiation into air, soil, or water, which causes, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (b) Supervision, collection, transport, recovery, disposal, and after-care of waste by dealers or brokers (waste management), which causes, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (c) Shipment of waste within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of June 14, 2006[20], undertaken in a non-negligible quantity, whether executed in single or several shipments. (d) Dangerous activities in plant operation, including irresponsible use and preparation and storage of dangerous substances, which causes, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (e) The production, processing, handling, use, holding, storage, transport, import, export, or disposal of nuclear materials or other hazardous, radioactive substances which cause, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (f) The killing, destruction, possession, or taking of specimens of protected wild fauna or flora species, except for cases concerning a negligible quantity of such specimens and a negligible impact on the conservation status of the species. (g) Trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases concerning a negligible quantity of such specimens and a negligible impact on the conservation status of the species. (h) Any conduct which causes the significant deterioration of habitat within a protected site. (i) The production, importation, exportation, placing on the market, or use of ozone-depleting substances.[21]

The criminal conducts in the directive proposal were mostly adapted, with small modifications, from the framework decision. Only the significant deterioration of habitat within a protected site in point (h) could be found in the 2001 Directive Proposal. The shipment of the non-negligible quantity of waste in point (c), which directly refers to an administrative regulation, was a completely new proposition.

The majority of criminal offenses are punishable, regardless of whether the conduct caused or could have caused serious damage to other persons or the environment.[22] However, there are several conducts that can only be punished if they caused or are likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. The directive proposal obliges the member states to criminalize the aforementioned conducts if they are unlawful and are committed intentionally or due to serious negligence.[23] It integrates the solutions in the framework decision and the previous directive proposals and lists the legal acts in its Annex; violations can be considered unlawful. It generally describes as unlawful any behavior that violates a law, an administrative regulation of a member state, or a decision

[20] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [OJ L 190, 12.07.2006, p. 1–98]
[21] Article 3 of Directive 2008/99/EC
[22] Kőhalmi 2009, 56.
[23] Article 3 of Directive 2008/99/EC

taken by a competent authority of a member state that gives effect to the community legislation.[24]

The member states must take the necessary measures to ensure that the offenses are punishable by effective, proportionate, and dissuasive criminal penalties. According to the directive proposal, natural and legal persons can be held liable, the conditions of which are regulated in the same manner as the framework decision. However, unlike the previous legal acts, the directive proposal does not define the possible types of sanctions. It only refers to the requirement of effectiveness, proportionality, and dissuasive nature, leaving the determination of the specific type and extent of the sanction to the member state.[25] It can be traced back to the fact that the European Court of Justice, in a later decision, ruled that the community legislature may require the member states to introduce effective, proportionate, and dissuasive criminal penalties for combating serious environmental offenses; however, the determination of the type and level of the criminal penalties to be applied does not fall within the community's sphere of competence.[26]

It is worth highlighting that the preamble of the directive proposal declares that the document only establishes minimum rules,[27] which means that the member states are entitled to introduce or maintain stricter rules. Nevertheless, according to many, the adopted directive proposal is a watered-down version of the 2003 Framework Decision.[28]

4. Proposal for a 2021 Directive Proposal on environmental criminal law

The Treaty of Lisbon was a fundamental milestone in criminal law within the EU framework since it strengthened the EU's criminal law legislative competencies and raised the principles elaborated in the above-mentioned rulings of the European Court of Justice as a primary source of law. Article 83(2) of the TFEU states that if the approximation of criminal laws and regulations of the member states proves essential to ensure the effective implementation of EU's policy subject to harmonization measures, directive proposals may establish minimum rules with regard to the definition of criminal offenses and sanctions in the area concerned.[29] Since criminal offenses against the environment meet these conditions, the European Commission issued a new draft directive in 2021 based on this legal competence.[30]

In the explanatory memorandum of the directive proposal, the European Commission stated that the currently approved directive proposal had not reached its aim. Over the past years, the number of environmental crimes successfully investigated and sentenced remained low. Moreover, the sanction levels imposed were too low to be

[24] Point a) of Article 2 of Directive 2008/99/EC. See: Görgényi 2011, 101.
[25] Articles 5–7 of Directive 2008/99/EC
[26] Judgment of the Court (Grand Chamber) of October 23, 2007, in Case C-440/05 Commission v Council [2007, I-9097], points 66–70.
[27] Preamble (12) of Directive 2008/99/EC
[28] Kőhalmi 2009, 60.
[29] See in details: Jacsó 2017, 64–74; Udvarhelyi 2016, 137–140; Udvarhelyi 2019, 128–133.
[30] Proposal for a Directive of the European Parliament and of the Council on environment protection through criminal law and replacing Directive 2008/99/EC [COM (2021) 851 final, 15.12.2021]

dissuasive and cross-border cooperation did not systematically take place. In addition, upon evaluation of the directive proposal, considerable enforcement gaps were found in all the member states and at all levels of the enforcement chain (police, prosecution, and criminal courts). There were no overarching national strategies to combat environmental crime involving all levels of the enforcement chain, and a lack of multi-disciplinary approach was lacking. Furthermore, it was noted that the lack of reliable, accurate, and complete statistical data on environmental crime proceedings in the member states prevents national policymakers and practitioners from monitoring the effectiveness of their measures. To address these problems, the directive proposal formulated the following objectives: (a) Improve the effectiveness of the investigations and prosecution by updating the scope of the directive proposal. (b) Improve the effectiveness of the investigations and prosecution by clarifying or eliminating vague terms used in the definitions of environmental crime. (c) Ensure effective, dissuasive, and proportionate sanction types and levels for environmental crime. (d) Foster cross-border investigation and prosecution. (e) Improve informed decision-making on environmental crime through improved collection and dissemination of statistical data. (f) Improve the operational effectiveness of national enforcement chains to foster investigations, prosecutions, and sanctioning.[31]

To reach these objectives, the directive proposal aims to establish minimum rules concerning the definition of criminal offenses and sanctions to protect the environment more effectively.[32]

The directive proposal would determine a significantly wider range of punishable conduct compared to the current directive. Accordingly, the member states would require to criminalize the following unlawful[33] conducts: (a) Improper discharge, emission, or introduction of materials or substances or ionizing radiation into the air, soil, or water, which causes, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (b) Placing a product on the market which is in breach of a prohibition or other requirement and causes, or is likely to cause, death or serious injury to any person or substantial damage to air, water, or soil quality, or animals or plants as a result of the product's large-scale usage. (c) Manufacture, placing on the market, or use (whether on their own, in mixtures, or articles) of products or substances that violate the EU norms listed in the directive and causes, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (d) Execution of projects without development consent or an assessment concerning their environmental effects, which causes, or is likely to cause, substantial damage to certain factors. (e) Improper

[31] See in details: Explanatory Memorandum of Directive Proposal COM (2021) 851 final
[32] Article 1 of Directive Proposal COM (2021) 851 final
[33] Under Point 2 of the directive proposal, unlawful means a conduct infringing Union legislation, which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy of protecting the environment, as set out in the TFEU; or a law, an administrative regulation of a member state, or a decision taken by a competent authority of a member state that gives effect to the Union legislation. The conduct shall be deemed unlawful even if carried out under an authorization by a competent authority in a member state when the authorization was obtained fraudulently or by corruption, extortion, or coercion.

supervision, collection, transport, recovery, disposal, or after-care of waste by dealers or brokers (waste management) involving hazardous waste and undertaken in a non-negligible quantity, which causes, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (f) Shipment of a non-negligible quantity of waste, whether executed in single or several shipments which appear to be linked. (g) Recycling of ships without complying with the requirements. (h) Ship-source discharges of polluting substances. (i) Installation, operation, or dismantling of an installation in which a dangerous activity is carried out or in which dangerous substances, preparations, or pollutants are stored or used, which causes, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (j) Manufacture, production, processing, handling, use, holding, storage, transport, import, export, or disposal of radioactive material, which causes, or is likely to cause, death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (k) The abstraction of surface water or groundwater, which causes, or is likely to cause, substantial damage to the ecological status or potential of surface water bodies or the quantitative status of groundwater bodies. (l) The killing, destruction, taking, possession, sale, or offering for sale of a specimen or specimens of wild fauna or flora species, except for cases concerning a negligible quantity of such specimens. (m) Trading in specimens of wild fauna or flora species or parts or derivatives thereof, except for cases concerning a negligible quantity of such specimens. (n) The placing or making available on the Union market illegally harvested timber or of timber products that were made of illegally harvested wood, except for cases concerning a negligible quantity. (o) Any conduct which causes significant deterioration of habitat within a protected site. (p) The introduction or spread of invasive alien species of Union concern involving breaches of certain restrictions or permit conditions, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, or water, or animals or plants. (q) Production, placing on the market, import, export, use, emission, or release of ozone-depleting substances or products and equipment containing or relying on such substances. (r) Production, placing on the market, import, export, use, emission, or release of fluorinated greenhouse gases or products and equipment containing or relying on such gases.[34]

The directive proposal defines most of the above-mentioned criminal behaviors by referring to the relevant EU legal sources; hence, the prohibition of criminal law specifies several EU administrative standards.

According to the directive proposal, the member states are expected to punish the criminal conduct committed intentionally. However, except for the crimes listed in points (g), (l), (o), an partially, (p) the member states must criminalize the described conducts due to serious negligence.[35] Similar to other EU criminal law directives, the proposal requires the criminalization of inciting, aiding, abetting, and, with some exceptions, the attempt to commit crimes.[36]

[34] Article 3(1) of Directive Proposal COM (2021) 851 final
[35] Article 3(1)–(2) of Directive Proposal COM (2021) 851 final
[36] Article 4 of Directive Proposal COM (2021) 851 final

The European Commission's directive proposal can be considered a significant step forward compared to the current directive as it would regulate in detail the type and level of sanctions to be imposed by the member states. In addition to the general requirement for determining effective, proportionate, and dissuasive criminal penalties, the directive proposal would prescribe the minimum level of the upper limit of the sanctions for the member states. According to the proposal, the maximum term of imprisonment must be four years for less serious offenses and six years for more serious crimes. Furthermore, if the criminal offense causes, or is likely to cause, death or serious injury to any person, the national legislators are required to ensure that it is punishable by a maximum term of imprisonment of at least ten years. The directive proposal would oblige the member states to prescribe other additional sanctions or measures as well, such as the obligation to reinstate the environment within a given period, fines, temporary or permanent exclusions from access to public funding (including tender procedures, grants, and concessions), disqualification from directing establishments of the type used for committing the offense, withdrawal of permits and authorizations to pursue activities (which have resulted in the offense), temporary bans on running for elected or public office, and national or union-wide publication of the judicial decision relating to the conviction or any sanctions or measures applied.[37]

The directive proposal would regulate the conditions for the responsibility of legal persons following the current directive. It would list in detail the types of sanctions which can be imposed on them. According to the directive proposal, effective, proportionate, and dissuasive sanctions or measures include criminal or non-criminal fines, the obligation to reinstate the environment within a given period, the exclusion from entitlement to public benefits or aid, the temporary exclusion from access to public funding (e.g., tender procedures, grants, and concessions), temporary or permanent disqualification in business activities, withdrawal of permits and authorizations to pursue activities (which have resulted in the offense), judicial supervision or winding-up, temporary or permanent closure of establishments used for committing the offense, due-diligence schemes for enhancing environmental standards compliance, and publication of the judicial decision relating to the conviction or any sanctions or measures applied. One of the important innovations of the directive proposal, which has not been included in any other EU criminal law directive, is that it would determine the upper limit of fines, which cannot be less than 3–5% of the total worldwide turnover of the legal person in the business year preceding the fining decision.[38]

In addition, the directive proposal would establish the circumstances that the member states could take into account as aggravating or mitigating circumstances. An aggravating circumstance occurs if an offense caused the death of or serious injury to a person; caused destruction, irreversible, or long-lasting substantial damage to an ecosystem; committed in the framework of a criminal [39],organization; involved the use of false or forged documents; was committed by a public official when performing their duties; was committed by a repeat offender of similar previous infringements of

[37] Article 5 of Directive Proposal COM (2021) 851 final
[38] Articles 6–7 of Directive Proposal COM (2021) 851 final
[39] See: Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [OJ L 300, 11.11.2008, p. 42–45]

environmental law; was directly or indirectly generated or expected to generate substantial financial benefits or avoid substantial expenses; created liability for environmental damage which the offender did not take remedial action,[40] the offender does not provide assistance to inspection and other enforcement authorities when legally required, or they actively obstruct inspection, custom controls or investigation activities, or intimidates or interferes with witnesses or complainants. A mitigating circumstance occurs if the offender restores nature to its previous condition or he/she provides the administrative or judicial authorities information, which they would not otherwise be able to obtain, helping them to identify or bring to justice the other offenders or find related evidence.[41]

The directive proposal would also provide for the limitation period for criminal offenses against the environment, which adds to its importance since only the directive on the fight against fraud in the Union's financial interests[42] contains such provisions among the EU criminal law directives. As a general rule, the member states are required to take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial, and judicial adjudication of the criminal offenses for a sufficient period after the commission of those crimes for those criminal offenses to be tackled effectively. The minimum limitation period for the investigation, prosecution, trial, and judicial decision would be adjusted to the upper limit of the penalty. In the case of a four-year upper limit, the limitation period is at least four years; in the case of a six-year upper limit, the limitation period is at least six years; and in the case of a ten-year upper limit, the limitation period is at least ten years. However, the member states could establish a limitation period of four to ten years, provided that the period may be interrupted or suspended in the event of the specified acts.[43]

A member state would be obliged to establish its jurisdiction over the criminal offenses falling within the scope of the directive proposal if the offense was committed in whole or in part on its territory; on board a ship or a registered aircraft flying its flag; or by an offender who is a national or habitual resident. Furthermore, a member state could extend its jurisdiction to offenses committed for the benefit of a legal person on its territory, against one of its nationals or its habitual residents, or has created a severe risk for the environment in its territory.[44]

An effective fight against environmental crimes requires early detection. Therefore, the people reporting breaches of Union environmental law are key in exposing and preventing such breaches and, thus, safeguarding the welfare of society. However, these persons are often discouraged from reporting their concerns or suspicions for fear of retaliation.[45] For the protection of the so-called `whistleblowers´, the EU has adopted

[40] See: Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [OJ L 143, 30.04.2004, p. 56–75]
[41] Articles 8-9 of Directive Proposal COM (2021) 851 final
[42] Directive (EU) 2017/1371 of the European Parliament and of the Council of July 5, 2017, on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, pp. 29–41]
[43] Article 11 of Directive Proposal COM (2021) 851 final
[44] Article 12 of Directive Proposal COM (2021) 851 final
[45] Preamble (24) of Directive Proposal COM (2021) 851 final

a directive[46] proposal. The European Commission's environmental directive proposal states that the protection regarding whistleblowing in the directive proposal applies to persons reporting environmental criminal offenses.[47]

5. Closing thoughts

The EU Environmental Criminal Law is characterized by an increasing trend of repression. This can be seen in European Commission's 2021 Directive Proposal, which contains a more detailed regulation and a wider scope of criminal conducts and sanctions than the current directive.

The development of the EU Environmental Criminal Law naturally affects the national legislation since the member states are obliged to implement the EU directives into their criminal law system. Although the Hungarian criminal law has requirements consistent with the new EU Directive Proposal, certain punishable conducts of the new EU legal act are not *expressis verbis* included in the Criminal Code. Furthermore, the level of sanctions of the Hungarian Criminal Code does not meet the requirements of the directive proposal everywhere. Therefore, it is expected that the adoption of the new directive proposal would impose a legislative obligation on the domestic legislator as well.

[46] See: Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [OJ L 305, 26.11.2019, p. 17–56]

[47] Article 13 of Directive Proposal COM (2021) 851 final

Bibliography

1. Farkas Á (2007) Az Európai Uniós büntetőjog fejlődésének újabb állomásai, in: Farkas Á, Nagy A, Róth E, Sántha F & Váradi E, eds., *Tanulmányok Dr. Dr. h. c. Horváth Tibor professor emeritus 80. születésnapja tiszteletére*, Bíbor Kiadó, Miskolc.
2. Fodor L (2009) Az uniós csatlakozás utáni környezetjog-alkotás főbb eredményei, *Rendészeti Szemle*, 2009(1).
3. Görgényi I (2005) Az Európai Unió elvárásai és a hazai fejlemények a környezet büntetőjogi védelme terén, in: Fodor L, ed., *A környezetvédelmi jog és igazgatás hatékonyságának aktuális kérdései*, Debreceni Egyetem, Állam- és Jogtudományi Kar, Debrecen.
4. Görgényi I (2011) A környezetvédelmi büntetőjog megújulása az új évezredben, *Miskolci Jogi Szemle*, 2011, különszám.
5. Görgényi I (2018) Protection of the environment through criminal law considering the european standards – Környezetvédelmi büntetőjog az európai elvárásokra figyelemmel, *Agrár- és környezetjog*, 2018(25).
6. Görgényi I & Udvarhelyi B (2019) A környezeti bűncselekmények megítélésének változásai az Európai Unióban, *Magyar Jog*, 2019(9).
7. Jacsó J (2017) *Europäisierung des Steuerstrafrechts am Beispiel der gesetzlichen Regelungen in Deutschland, Österreich und Ungarn*, Bíbor Kiadó, Miskolc.
8. Karsai K (2006) Az európai büntetőjog rögös útján, *Magyar Jog*, 2006(1).
9. Kőhalmi L (2009) Az európai környezeti büntetőjog fejlődési irányai és problémái, *Rendészeti Szemle*, 2009(1).
10. Laczi B (2004) A környezet és a természet büntetőjogi védelmének nemzetközi és történeti vonatkozásai, a védelem jogszabályi alapjai, *Magyar Jog*, 2004(4)
11. Ligeti M (2008) Környezetvédelmi büntetőjog, in: Kondorosi F & Ligeti K, eds., *Az európai büntetőjog kézikönyve*, Magyar Közlöny Lap- és Könyvkiadó, Budapest.
12. Raisz A & Szilágyi J E (2012) Az agrárjog és kapcsolódó területeinek (környezetjog, vízjognak, szociális jognak, adójognak) fejlődése az Európai Unióban, a nemzetállamokban és a WTO-ban – Development of agricultural law and related fields (environmental law, water law, social law, tax law) in the EU, in countries and in the WTO, *Agrár- és Környezetjog*, 2012(12).
13. Rétházi Gy (2006) Közösségi büntetőjog? – avagy az Európai Közösségek Bíróságának aktivizmusa a büntető igazságügyi együttműködés vonzásában, *Európai Tükör*, 2006(9).
14. Szilágyi J E (2010) Környezetvédelem az Európai Uniós jogban, in: Nagy Z, Olajos I, Raisz A & Szilágy J E (eds) *Környezetjog II: Tanulmányok a környezetjogi gondolkodás köréből*, Novotni Kiadó, Miskolc.
15. Udvarhelyi B (2016) A Lisszaboni Szerződés és a büntetőjog – gondolatok az Európai Unió megújult büntetőjogi jogharmonizációs hatásköréről, *Állam- és Jogtudomány*, 2016(3).
16. Udvarhelyi B (2019) *Az Európai Unió anyagi büntetőjoga a Lisszaboni Szerződés után*, Patrocínium Kiadó, Budapest.

Katarzyna ZOMBORY*

The Right to Cultural Identity in the Case Law of the Inter-American Court of Human Rights: A New Global Standard for the Protection of Indigenous Rights and Future Generations?

Abstract

This paper examines the protection of the right to cultural identity in the case law of the Inter-American Court of Human Rights (IACtHR), where this question has appeared in connection with the rights of indigenous peoples. Although not expressly guaranteed in the American Convention on Human Rights (ACHR), the right to cultural identity has received protection in the IACtHR's case law through an evolutionary interpretation of the rights to life and property, and other provisions under the ACHR. A landmark decision in the 2020 case of Lhaka Honhat Association v. Argentina has put into a new perspective the protection of the right to cultural identity. For the first time, it was clearly established that cultural rights are autonomous and judicially enforceable under Article 26 of the ACHR. The ICtHR's revolutionary approach offers new opportunities for the judicial protection of environmental rights claims, contributing to the debate on sustainable development and the protection of future generations as well. The ICtHR has risen to be a regional standard-setting treaty body in the Inter-American system. Simultaneously, its far-reaching approach to protecting cultural identity and land rights has made the IACtHR's case law a genuine reference point for other universal and regional international human rights organs.

Keywords: Inter-American Court of Human Rights, the right to cultural identity, cultural rights, environmental rights, indigenous peoples, protection of future generations, sustainable development

1. Introduction

In January 2023, the UN Committee on the Economic, Social and Cultural Rights (CESCR) published its long-awaited General Comment No. 26 on Land and Economic, Social, and Cultural Rights,[1] which elaborates on the interrelations between the land and the effective enjoyment of human rights. For many communities world over, land, apart from being the main resource for the production of food and generation of income, constitutes the very foundation for social, cultural, and religious practices, and for the expression of cultural identity.[2] This is especially true for indigenous people, who either

Katarzyna Zombory: The Right to Cultural Identity in the Case Law of the Inter-American Court of Human Rights: A New Global Standard for the Protection of Indigenous Rights and Future Generations? *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 34 pp. 171-191, https://doi.org/10.21029/JAEL.2023.34.171

* dr. jur., PhD, senior researcher, University of Miskolc, Central European Academy, ORCID 0000-0002-0750-7555

[1] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 26 on Land and Economic, Social and Cultural Rights*, adopted by the CESCR at its seventy-second session (26 September – 14 October 2022), E/C.12/GC/26.

[2] Ibid., paragraphs 1 and 10.

https://doi.org/10.21029/JAEL.2023.34.171

manage or have tenure rights over at least 38 million square kilometres of land in 87 countries world over.[3] For indigenous communities, access to land is a vital precondition for the enjoyment of cultural and religious rights, and is closely linked to the right to internal self-determination. However, the continued and widespread disregard of indigenous land rights and large-scale land acquisitions contributes to the further dispossession of indigenous people worldwide.

While presenting its considerations on the essential role of land, the CESCR drew upon the case law of the Inter-American Court of Human Rights (IACtHR, or the Court), whose contribution to strengthening indigenous peoples' rights to land has been explicitly recognised.[4] In General Comment No. 26, the CESCR referred to the IACtHR's jurisprudence on several occasions: while identifying good practices in protecting indigenous peoples' rights to land and cultural identity, clarifying the scope of states' obligations, and providing examples of effective remedies for the violation of land rights.[5] This paper presents an overview of the case law of the IACtHR vis-à-vis indigenous peoples, in which the right to cultural identity enjoys protection on an unprecedently broad basis, primarily through the right to property, and since a landmark decision in 2020, through the rights to water, adequate food, and healthy environment. This encourages reflection on environmental justice and sustainable development, as well.

2. The right to cultural identity in the Inter-American system of human rights

According to O. Ruiz-Chiriboga, the right to cultural identity is the right of ethnic and cultural groups and their members to belong to a determined culture and be recognised as different; to maintain their characteristic culture and their cultural heritage; and to be protected from forced assimilation.[6] Some authors consider the right to cultural identity a general form of all cultural rights.[7] In the Inter-American system of human rights, the concern for the protection of cultural identity arises primarily in the context of indigenous people. They are descendants of the original inhabitants of Latin America, which was colonised by now-dominant groups, who have faced forced assimilation policies throughout their entire history, and to this day struggle to maintain their distinct culture.[8] Indigenous communities world over have a spiritual relationship with the land on which they live, which forms an essential part of their cultural identity, and which is linked to their traditional activities, such as hunting, fishing, herding, and gathering plants, medicine, and food.[9] Therefore, secure land tenure systems and access to natural

[3] According to the UNCCD, indigenous people constitute over 6% of the world's population. All data after: UN Convention to Combat Desertification of Lands (UNCCD), Global Land Outlook. Second Edition. Land Restoration for Recovery and Resilience, Bonn 2022, 14.
[4] CESCR, General Comment No. 26, paragraph 16.
[5] Ibid., paragraphs 11, 16, 27, 45 and 60.
[6] Ruiz-Chiriboga 2006, 45.
[7] Donders 2008, 320. For more on cultural human rights, see e.g.: Symonides 2000, 175–227; Zombory 2022, 255–257.
[8] Antkowiak 2013, 115–119; Raisz 2008, 36. For more on the concept and definition of the indigenous peoples, see e.g.: Martínez Cobo 1972, paragraph 34; Castellino & Cathal 2018.
[9] CESCR, General Comment No. 26, paragraph 16.

resources are crucial for the protection of indigenous communities. Owing to their way of life, which is directly dependent on the access to and availability of natural resources, indigenous peoples are also among the groups that are most affected by environmental degradation and negative effects of climate change.

Three international documents relevant to economic, social, and cultural rights have been adopted within the Inter-American framework for human rights: (1) the American Declaration of the Rights and Duties of Man, 1948 (ADRDM),[10] (2) the American Convention on Human Rights, 1969 (ACHR),[11] and (3) the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988 (Protocol of San Salvador).[12] None of these instruments explicitly refers to the right to cultural identity. Article XIII of the ADRDM guarantees the right to participate in cultural life, but its practical significance is limited because it is not a binding international document. The ACHR, apart from establishing under Article 26, the obligation of states parties to progressively achieve the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter,[13] does not contain provisions on cultural rights. The practical significance of Article 26 of the ACHR has long been disputed because of its programmatic nature,[14] yet in light of recent case law, it is justified to say that such guarantees may be suitable for protecting the cultural identity of indigenous people. The Protocol of San Salvador lays down under Article 14 paragraph 1(a) the right to participate in cultural life; nonetheless, as a rule, rights guaranteed in the Protocol are not justiciable before the IACtHR (except for the right to education and trade union rights).[15]

3. Overview of the IACtHR's case law

Although not guaranteed explicitly, the right to cultural identity, enjoys protection under the ACHR through the evolutionary interpretation of its provisions.[16] As Judge Abreu Burelli noted, the spectrum of legal guarantees that can be applied in order to protect cultural identity is very broad.[17] In cases affecting indigenous people, the IACtHR

[10] The American Declaration of the Rights and Duties of Man, adopted in Bogotá on 2 May 1948.
[11] The American Convention on Human Rights, adopted in San José on 22 November 1969, UN Treaty Series No. 17955.
[12] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Protocol of San Salvador, adopted in San Salvador on 17 November 1988, OAS Doc. OAS/Ser.L/V/I.4 rev. 13.
[13] Charter of the Organization of American States, adopted in Bogotá on 30 April 1948, UN Treaty Series vol. 119, No. 1609 (OAS Charter).
[14] Ruiz-Chiriboga 2013, 160–162; Raisz 2010, 290.
[15] Article 19 paragraph 6 of the Protocol of San Salvador.
[16] Cançado Trindade 2009, 477–499; Ruiz-Chiriboga 2006, 51.
[17] According to A. Abreu Burelli, the right to cultural identity, while not explicitly set forth, is protected in the ACHR based on an evolutionary interpretation of the content of the rights embodied in its Articles: 1(1) (non-discrimination), 5 (right to humane treatment), 11 (right to privacy), 12 (freedom of conscience and religion), 13 (right to freedom of thought and expression), 15 (freedom of assembly), 16 (freedom of association), 17 (rights of the family), 18 (right to a name), 21 (right to property), 23 (right to participate in government) and 24 (right to equal

interprets the rights guaranteed in the ACHR as having collective dimensions or as creating collective rights.[18]

The distinct cultural identity and its various elements, such as the system of beliefs based on the bond between the living and dead, initially received protection through a broad interpretation of the right to life under Article 4 of the ACHR. This extensive interpretation offered a foundation for the *vida digna* concept, according to which the right to life comprises the conditions for living with dignity.[19] In the IACtHR's understanding, the protection of a dignified life requires respect for cultural customs and religious beliefs.[20] According to Judges Cançado Trindade and Ventura Robles, *"cultural identity is a component or is attached to the right to life lato sensu; thus, if cultural identity suffers, the very right to life of the members of said indigenous community also inevitable suffers"*.[21] In the IACtHR's case law, the protection of indigenous people's cultural identity is intertwined with physical survival and the protection of life, which requires far-reaching protection in response to forced assimilation policies known in the historical and present-day contexts of the American continents. Several cases have highlighted the problem of cultural genocide and ethnocide of indigenous people.[22]

protection), based on the facts of the case in question. See Judge Alirio Abreu Burelli's partially dissenting opinion in Yakye Axa Indigenous Community, paragraph 24: IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay, Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of February 6, 2006. Series C No. 142

[18] Hanson 2018, 162.

[19] Cançado Trindade 2009, 479. See also: Pasqualucci 2008, 1–32; Antkowiak 2013, 146–147 The broad interpretation of the right to life including the protection of *vida digna* is distinctive and unique. By contrast, the African Court of Human and Peoples' Rights (ACtHPR) considers it necessary to make a distinction between the classical meaning of the rights to life and decent existence of a group, and is of the opinion that the right to life, as guaranteed by Article 4 of the African Charter of Human and Peoples' Rights, relates to the physical rather than existential understanding of the right to life (see the ACtHPR's, The African Commission on Human and Peoples' Rights v. Republic of Kenya, judgement of 26 May 2017, application no. 006/2012, paragraphs 153–154).

[20] This interpretation prevailed in the IACtHR's decisions in cases such as: IACtHR, *Case of the 'Street Children' (Villagrán Morales et al.) v. Guatemala*, Merits. Judgment of November 19, 1999. Series C No. 63; IACtHR, *Case of Bámaca Velásquez v. Guatemala*, Merits. Judgment of November 25, 2000. Series C No. 70; IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of February 6, 2006. Series C No. 142; IACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146.

[21] Separate dissenting opinion of judges A.A. Cançado Trindade and M.E. Ventura in the *Yakye Axa Indigenous Community v. Paraguay* case, para.18.

[22] Hanson 2018, 151; Xanthaki 2018, 274; Raisz 2008, 40–41. Considering the social and political reality of many states parties of the Inter-American human rights system, cases heard by the IACtHR often involve grave violations of human rights, including displacement, forced disappearance, murder, and/or massacre, and indigenous peoples' cases are not an exception, given the social and political characteristic of the Inter-American system of human rights protection, see more: Pasqualucci 2013, 4–5.

Since the landmark decision in *Mayagna (Sumo) Awas Tingni v. Nicaragua* (2001),[23] in which the IACtHR recognised indigenous peoples' collective ownership over ancestral lands, the right to cultural identity in the Inter-American system received protection primarily based on the right to property under Article 21 of the ACHR.[24] The IACtHR has, on several occasions, explained the connection between the ancestral land in possession of indigenous communities from time immemorial and their cultural identity. The close relationship between the indigenous communities and their land has an essential component, namely their cultural identity based on their worldviews, which, as distinct social and political actors in multicultural societies, must receive particular recognition and respect in a democratic society.[25] The intrinsic connection that indigenous and tribal people have with their territory should be recognised and understood as a fundamental basis for their cultures, spiritual lives, integrity, and economic survival.[26] According to the IACtHR, disregarding the ancestral right of the members of the indigenous communities to their territories can affect other basic rights, such as the right to cultural identity and the very survival of the indigenous communities and their members.[27] For indigenous communities, relationship with land is not merely a matter of possession and production, but also a material and spiritual element that they should be able to fully enjoy, to preserve their cultural heritage and transmit it to future generations.[28] Although this understanding of land ownership and possession do not conform to the classic concept of property, in the IACtHR's opinion, it deserves equal protection under Article 21 of the ACHR. Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs, and beliefs of each people, would be, according to the Court, tantamount to maintaining that there is

[23] IACtHR, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79.

[24] Since the decision in Mayagna (Sumo) Awas Tingni v. Nicaragua, the IACtHR has issued several judgments in which indigenous peoples' ties to land and natural resources received protection under Article 21 of the ACHR, for example: Yakye Axa Indigenous Community v. Paraguay (2006), Sawhoyamaxa Indigenous Community v. Paraguay (2006), ICtHR, Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 17; ICtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations. Judgment of June 27, 2012. Series C No. 245; ICtHR, Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama; Merits. Judgement of November 13, 2012; ICtHR, Case of the Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309; ICtHR, Case of the Xucuru Indigenous People and its members v. Brazil, Preliminary Objections, Merits, Reparations and Costs. Judgment of February 5, 2017. Series C No. 346; ICtHR, Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400. See more: Raisz 2008, 35–51.

[25] Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 159.

[26] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paragraph 149. See also: Charters 2018, 396–397; Marinkás 2020, 141–143; Ruiz Chiriboga 2006, 59.

[27] Yakye Axa Indigenous Community v. Paraguay, paragraph 147; Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 212.

[28] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paragraph 149.

only one way to use and dispose of property, which would render protection under Article 21 of the ACHR illusory for millions of people.[29]

The protection of the right to communal indigenous property based on Article 21 of the ACHR, is intended to ensure that indigenous people may continue to enjoy their traditional way of life, and that their cultural identity, social structure, economic system, customs, beliefs, and distinctive traditions are respected, guaranteed, and protected by states.[30] The IACtHR has indicated that when states impose limitations or restrictions on the exercise of the rights of indigenous people to the ownership of their lands and natural resources, certain guidelines must be respected. Limitations must be established by law, necessary, proportionate, and aimed at achieving a legitimate objective in a democratic society without denying the right of an indigenous community to exist. In cases concerning natural resources on the territory of an indigenous community, aside from the above criteria, the state must ensure that these restrictions do not threaten the survival of indigenous people.[31] The scope of protection guaranteed under Article 21 of the ACHR is not limited to land ownership. The term `property´ under Article 21 of the ACHR includes all material objects that may be the object of possession, and any right that may be part of a person's patrimony. The concept of property covers all movable and immovable property and all tangible and intellectual elements that are capable of having value.[32]

Aside from the rights to life and property, the case law of the IACtHR on the prohibition of discrimination has laid down legal grounds to protect cultural rights. The principle of non-discrimination established under Article 1 paragraph 1 of the ACHR requires that respect for the right to cultural identity be considered while interpreting and implementing human rights guaranteed by the ACHR, vis-à-vis indigenous people.[33] In cases involving indigenous communities, the IACtHR has repeatedly found, typically parallel to an infringement of the right to property, that the state violated the prohibition of discrimination by not protecting the right of indigenous peoples to communal property to the same extent as the property rights of other citizens.[34] In several cases, the IACtHR has found a breach of the principle of non-discrimination in connection with the normative content of Article 21 of the ACHR, if the state did not ensure appropriate delimitation and land demarcation procedures. As the Court has emphasised, merely

[29] Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 145.
[30] Kaliña and Lokono Peoples v. Suriname, paragraph 164.
[31] Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 156; Yakye Axa Indigenous Community v. Paraguay, paragraphs 144-145; Saramaka People v. Suriname, paragraphs 128-129.
[32] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paragraph 144; Yakye Axa Indigenous Community v. Paraguay, paragraph 137.
[33] Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 213.
[34] See e.g. Mayagna (Sumo) Awas Tingni Community v. Nicaragua; Yakye Axa Indigenous Community v. Paraguay, Saramaka People v. Suriname; IACtHR, Case of the Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214; Kichwa Indigenous People of Sarayaku v. Ecuador; Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina.

abstract or juridical recognition of indigenous lands, territories, or resources, is meaningless if the property is not physically delimited and established.[35]

The international documents dedicated to the protection of indigenous peoples' rights establish the right to consultation,[36] which is closely related to the protection of land ownership and the right to participate in public affairs.[37] The obligation of states to carry out prior consultations, aside from being a treaty-based provision, is a general principle of international law.[38] The recognition of indigenous peoples' right to consultation stems directly from the rights to culture and cultural identity.[39] According to the IACtHR: "(...) *the right to cultural identity is a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society. This means that states have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organisation*."[40] The IACtHR imposes on the states the requirements otherwise set out in international law, according to which states should seek prior, free, and informed consultation. These consultations shall be carried out in good faith, using culturally acceptable procedures and should be aimed at reaching an agreement.[41] When large-scale development or investment projects that would have a major impact within indigenous territory are envisaged, states have a duty to consult with the indigenous community, and obtain their free, prior, and informed consent, according to their customs and traditions.[42] The right to prior consultation is protected under the IACtHR's case law based on the right to participate in public affairs, provided for under Article 23 of the ACHR. For example, in Lhaka Honhat Association v. Argentina (2020), the IACtHR found that Argentina did not ensure adequate mechanisms for a free, prior, and informed consultation, and thus violated the indigenous people's rights to property and participation vis-à-vis state obligations to respect and ensure these rights (Articles 21 and 23 paragraph 1 of the ACHR, in relation to Article 1 paragraph 1 of the ACHR).[43]

The IACtHR has protected indigenous peoples' cultural rights through a broad and dynamic interpretation of civil and political rights guaranteed under the ACHR. The IACtHR has thus merged the first- and second- generation human rights, blurring

[35] See e.g. Yakye Axa Indigenous Community v. Paraguay, paragraph 143; Saramaka People v. Suriname, paragraph 115.
[36] See: Declaration on the Rights of Indigenous Peoples, UN General Assembly resolution of 13 September 2007, Articles A/RES/61/295, 10, 19, 29(2), 32(2), The Indigenous and Tribal Peoples Convention (ILO Convention No. 169), adopted in Geneva on 27 June 1989, UN Treaty Series vol. 1650, no. 28383, Article 6.
[37] Barelli 2018, 247.
[38] Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 164.
[39] According to the IACtHR, 'Respect for the right to consultation of indigenous and tribal communities and peoples is precisely recognition of their rights to their own culture or cultural identity', see: Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 159.
[40] Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 217.
[41] See e.g. Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 177; Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraphs 174 and 184.
[42] Saramaka People v. Suriname, paragraph 134.
[43] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 184.

the traditional division between both categories of human rights and reinforcing the view that all human rights are universal and indivisible.[44] In a recent case concerning indigenous peoples (Lhaka Honhat Association v. Argentina), the IACtHR derived the right to cultural identity directly from second-generation rights, specifically from the right to participate in cultural life, through the application of Article 26 of the ACHR. The latter was declared justiciable in an unprecedented manner, as before the Lhaka Honhat Association v. Argentina judgement, cultural rights were only indirectly enforceable before the IACtHR via one of the first-generation rights and freedoms (the significance the Lhaka Honhat Association case and the issue of autonomous justiciability of Article 26 ACHR will be discussed below). The IACtHR stated that the right to cultural identity is an integral part of the right to participate in cultural life, enshrined, *inter alia,* in the ADRDM (Article XIII) and the Protocol of San Salvador (Article 14 paragraph 1), as well as in the International Covenant on Civil and Political Rights (ICCPR, Article 27) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, Article 15).[45]

4. Lhaka Honhat Association v. Argentina (2020)

On 6 February 2020, the IACtHR issued a landmark judgement in Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, brought by a civil society organisation representing several indigenous communities in Argentina. While the focus of the legal dispute revolved around land tenure issues and the lack of delimitation of communal property, the applicants sought the protection of their cultural identity, which had been threatened by economic activities carried out by non-indigenous settlers on ancestral lands, and the environmental degradation such activities have caused. The applicants claimed that the construction of the international bridge over the Pilcomayo River from Misión La Paz (Argentina) to Pozo Hondo (Paraguay) was carried out by the state without prior environmental and social impact assessment, and without prior consultation with indigenous communities whose territories had been affected by construction work.

4.1. Facts

Since the 1980s, the indigenous communities in the province of Salta, Argentina, have struggled to obtain the official recognition of their collective ownership to the territories they have inhabited for several centuries. The recognition of a collective title, followed by the delimitation and demarcation of land has become an urgent need, as from the end of the 19th century onward, non-indigenous farmers (referred to in the

[44] Pasqualucci 2013, 31. On the different categories of human rights, see: Domaradzki, Khvostova & Pupovac 2019, 423–443. The UN has emphasized that all human rights are universal, indivisible, and interdependent and interrelated, as expressed, inter alia, in paragraph 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, A/CONF. 157/23.

[45] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraphs 231–233.

IACtHR's decision as `criollos´), began to settle on indigenous territories (Lots 14 and 55).[46] The livestock farming and illegal logging carried out by the criollo population, and the erection of wire fences, have had a negative impact on the environment and natural resources. Changes in biodiversity that have occurred as a result of the criollos' presence have seriously threatened the traditional way of life of indigenous communities and their access to water and food.[47]

In 1992, the indigenous communities in the Salta province established the Lhaka Honhat (Our Land) Association to assert their interests and claim the recognition of their communal ownership over indigenous lands (at the time of issuing the judgement, 132 indigenous communities were members of the Association). Their efforts led to the legal recognition by Argentina of collective land ownership. Over the years, there have been numerous legal regulations and agreements in this regard.[48] In 2012 and 2014, two decrees allocated a major part of the area (400,000 ha) to indigenous communities, whereas the smaller part (243,000 ha) remained occupied by non-indigenous settlers. In practice, the state did not take appropriate measures to give effect to these regulations. Their implementation required a precise determination and delimitation territories inhabited by indigenous and criollo populations, and the re-settlement of non-indigenous settlers from indigenous territories, neither of which had been carried out.

In 1998, the Lhaka Honhat Association, with the support of a human rights NGO (Centro de Estudios Legales y Sociales), filed its initial petition to the Inter-American Commission on Human Rights (IACmHR) to seek protection of their land rights and cultural rights. The IACmHR declared the petition admissible in 2006 and ruled on the merits of the case in 2012. It held that there had been a violation of the applicants' freedom of thought and expression (Article 13 of the ACHR), and rights to property (Article 21 of the ACHR), participate in government (Article 23 of the ACHR), fair trial (Article 8 of the ACHR), and judicial protection (Article 25 of the ACHR), resulting in non-compliance with the state's obligation under Article 1 paragraph 1 and Article 2 of the ACHR.[49] The IACmHR made several recommendations to Argentina in order to remedy the wrongdoings. Despite the fact that the deadline for the implementation of recommendations had been extended 22 times, Argentina had not fully complied with the IACmHR's recommendations. The IACmHR considered that although some progress had been made, there was no prospect that the recommendations would be implemented within a reasonable period of time. Therefore, in 2018 (i.e. 20 years after

[46] The two lots are adjacent and together cover an area of approximately 643,000 hectares, Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 47.

[47] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraphs 257-266. The presence of livestock led to overgrazing and the contamination of water sources with animal faeces, the destruction of several botanical species, and a general loss of biodiversity. Cattle-raising affected the composition and abundance of the wildlife that was a major source of protein for the indigenous population. The cattle consumed the produce that the indigenous population used for nutritional, religious, and medical purposes. Illegal logging destroyed forests, and the long stretches of wire fencing blocked access to the river and forest.

[48] In 1991, 1999, 2007, 2012, and 2014.

[49] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 2.

the initial petition was submitted), the case was referred to the IACtHR. Aside from the initial pleadings and the IACmHR's finding, at the submission of the case to the IACtHR, the applicants alleged that there was also a violation of the right to recognition of juridical personality, the freedoms of association, movement, and residence, and the rights to cultural identity, adequate food, and a healthy environment that they alleged were contained in Article 26 of the ACHR.

4.2. IACtHR's judgement

While examining the case, the IACtHR considered relevant circumstances and carried out an on-site visit in Salta. During this visit, the Court delegation met with an assembly of indigenous communities and representatives of the criollo families, visited indigenous areas to examine the presence of fencing and livestock, and visited the Misión La Paz International Bridge.[50] In its judgement, after careful consideration of the petition (and several *amicus curiae* briefs), the IACtHR found that several rights directly or indirectly guaranteed by the ACHR had been violated, thus establishing far-reaching and unprecedentedly broad foundations for protecting indigenous peoples' cultural identity. The IACtHR first examined the alleged violation of the indigenous land rights. It held that Argentina had violated the indigenous peoples' right to property (Article 21 of the ACHR), in relation to the right to a fair trial (Article 8 paragraph 1 of the ACHR) and the right to judicial protection (Article 25 paragraph 1 of the ACHR), and the obligations stemming from Article 1 paragraph 1 and Article 2 of the ACHR.[51] The IACtHR noted that in the Decrees of 2007 and 2014, Argentina had recognised the collective ownership to the ancestral lands but did not provide indigenous communities with an adequate title to the land that would have given them legal certainty. The ancestral land had not been demarcated and the presence of third parties on the ancestral territories continued.[52] The IACtHR declared that the adequate guarantee of communal property does not entail its nominal recognition, but requires the observance and respect for the autonomy and self-determination of the indigenous communities over their territory.[53] It referred to its previous case law on indigenous people (Mayagna (Sumo) Awas Tingni v. Nicaragua, Kichwa Indigenous People of Sarayaku v. Ecuador, Saramaka People v. Suriname, Kaliña and Lokono Peoples v. Suriname), in which it reaffirmed that indigenous communities are collective subjects of international law, who exercise some of the human rights collectively, such as the right to ownership of the land, and who are entitled to the enjoyment of the right to self-determination in relation to the ability to freely dispose of their natural resources.[54] It investigated the allegations of the petition relating to the construction of the international bridge Misión La Paz, connecting Argentina and

[50] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 10. The IACtHR carried out an on-site procedure (visit) for the first time while hearing the case Kichwa Indigenous People of Sarayaku v. Ecuador.
[51] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 168.
[52] Ibid., paragraph 167.
[53] Ibid., paragraph 153.
[54] Ibid., paragraph 144.

Paraguay, without consulting with indigenous communities. The IACtHR found that Argentina had breached its obligation to provide the indigenous communities affected by the construction project with a prior, free, and informed consultation procedure. Thus, their rights to property (Article 21 of the ACHR) and to participate in public affairs (Article 23 paragraph 1 of the ACHR), read in conjunction with Article 1 paragraph 1 of the ACHR had been violated.[55] It addressed the environmental damage caused by non-indigenous settlers and the state's responsibility for failing to adequately protect the environment and indigenous people's rights.

The IACtHR examined these issues in light of the rights to a healthy environment, food, water, and cultural identity. It found that the criollo settlers through their illegal logging and other activities on indigenous lands (livestock farming, erection of fences) had caused environmental degradation, and had put the traditional livelihoods of indigenous peoples (restricted access to water and food) at risk. Thus, the traditional way of life of indigenous communities had changed, followed by the loss of their cultural identity. The IACtHR elaborated on the concept of culture and explained the normative content and basis of the right to cultural identity, while drawing on the practice of international organisations.[56] It reaffirmed that the protection of culture includes the protection of a traditional way of life and its distinctive cultural characteristics.[57] In its interpretation, the right to cultural identity protects the freedom of individuals, when they act together or as a community, to identify with one or several communities or social groups, with a view to follow a way of life connected to the culture to which they belong and to take part in its development.[58] The right to cultural identity protects the distinctive features that characterise a particular social group, without denying the historical, dynamic, and evolving nature of culture itself.[59] The IACtHR cited its previous jurisprudence, in which it recognised cultural identity as a fundamental collective human right of indigenous communities that must be respected in a multicultural, pluralist, and democratic society.[60] It recalled that the right to participate in cultural life imposes a positive obligation on states, and requires the adoption of appropriate legislative, administrative, judicial, budgetary, promotional, and other measures aimed at the full realisation of this right. It imposes on the states the obligation to protect, which requires taking steps to prevent third parties from interfering with the right to take part in cultural life.[61]

[55] Ibid., paragraph 184.

[56] See: Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraphs 231-242. In this context, the IACtHR referred to the documents adopted by UNESCO, the UN Human Rights Committee, and the UN Committee on Economic, Social and Cultural Rights.

[57] In accordance with the definition of culture adopted by the UN Human Rights Committee in its General Comment No. 23 on the Rights of Minorities.

[58] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 240.

[59] Ibid.

[60] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 231, see also: Kichwa Indigenous People of Sarayaku v. Ecuador, paragraph 217.

[61] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 242.

The presence of criollo families and the economic activities they carried out on the indigenous lands, incompatible with the indigenous system of customs and traditions, resulted in a change in the cultural patterns of the indigenous people. The interference ran parallel to restricting the free access of indigenous peoples to their ancestral lands. It affected the access to natural resources, which limited the traditional ways in which the indigenous communities obtained water and food. Thus, there has been harm to cultural identity in relation to natural and food resources.[62] The Court acknowledged that the state had taken several actions to remedy the situation, but it had not been effective in preventing harmful activities, as a result of which, 28 years after the initial indigenous territorial claim, livestock, and fences were still present on indigenous lands.[63] The state did not guarantee the indigenous communities the possibility of deciding, freely or by adequate consultation, on the activities carried out on their territory.[64] Against this background, the IACtHR found that Argentina had violated the right of indigenous communities to take part in cultural life in relation to cultural identity, and the rights to a healthy environment, adequate food, and water, all of which are interrelated and protected under Article 26 of the ACHR.[65]

While determining reparations, the IACtHR took into consideration the complexity of the case, which affected the situation of a large number of people from indigenous and non-indigenous communities inhabiting the vast territory.[66] The applicants formulated their claims in connection with the activity of individual people, accusing non-indigenous settlers and peasant farmers, who otherwise also enjoy international legal protection under the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, of environmental damage.[67] The IACtHR ordered Argentina to delimit, demarcate, and grant a single collective title that recognised the ownership of their territory to all indigenous communities identified as victims, without any subdivisions or fragmentation.[68] To ensure the full exercise of the right to property of the indigenous communities, the Court ordered the state to relocate the criollo population outside indigenous territories, using procedures aimed at the voluntary relocation and endeavouring to avoid compulsory evictions.[69] It urged the state to take several actions to prevent further environmental degradation,[70] and ordered it to set up a community development fund to redress the harm to cultural identity, and as a compensation for the material and non-material damage suffered.[71] The state was ordered

[62] Ibid., paragraph 284.
[63] Ibid., paragraph 287.
[64] Ibid., paragraph 288.
[65] Ibid., paragraph 289.
[66] Ibid., paragraph 320.
[67] UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN General Assembly Resolution of 17 December 2018, A/RES/73/165. In its case-law on indigenous peoples, the IACtHR has usually examined alleged violations of indigenous rights in connection with large investment projects involving governmental or multinational stakeholders.
[68] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 327.
[69] Ibid., paragraph 329.
[70] Ibid., paragraph 333.
[71] Ibid., paragraphs 338–342.

to allocate the sum of USD 2 million to the fund, earmarked for actions aimed at the recovery of the indigenous culture, the use of which shall be decided by the indigenous communities and communicated to the state authorities.[72]

4.3. The interrelated rights to cultural identity, healthy environment, adequate food, and water

The facts of the case provided the IACtHR with an excellent opportunity to reflect on the relationship between the cultural rights and the right to a healthy environment, and equally on the interplay among the rights to adequate food, water, and cultural identity. The Court's findings make a valuable contribution to the debate on cultural rights, and highlight the social impact of environmental change, which is worth considering in the context of what some scholars called `environmental justice´.[73] The IACtHR recognised that the right to a healthy environment has universal value and is a fundamental right for the existence of humankind.[74] This approach was expressed in its earlier advisory opinion OC-23/17, in which it elaborated on the interrelationship between human rights and environmental protection.[75] In *Lhaka Honhat Association v. Argentina*, the IACtHR emphasised that environmental degradation can affect the exercise and enjoyment of human rights, especially for certain vulnerable groups, such as indigenous peoples and other communities whose livelihoods depend on the availability of natural resources. Under human rights law, states must confront these vulnerabilities based on the principle of equality and non-discrimination.[76] The IACtHR noted that for indigenous people, the right to a healthy environment is closely linked to the right to food, water, and cultural identity. Any interference with the natural environment may have a negative impact on the enjoyment of the right to food and water, and to take part in cultural life.[77]

---

[72] Under Article 68 of the ACHR, states parties have the obligation to comply with the judgments of the IACtHR. The Court monitors state compliance with the reparations it orders until they have been completely fulfilled, see: Pasqualucci 2013, 303–306. In February 2023, the IACtHR issued an order that detail with which reparations specified in the 2020 judgement Argentina have already complied, and urged the state to take measures which have not been implemented yet: IACtHR, Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina (Monitoring Compliance with Judgment), order of 7 February 2023.

[73] According to Bándi, environmental justice refers to the fair and equal distribution of environmental quality between different social groups, Bándi 2020, 40–43; see also: Krznaric 2020, 71.

[74] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraphs 202-203. On the relationship between the environmental protection and the rights of indigenous peoples, see: Errico 2018, 450–454; Marinkás 2020, 143–144.

[75] IACtHR, Advisory Opinion OC-23/17 of 15 November 2017 on the Environment and Human Rights, requested by the republic of Colombia, paragraphs 56-68. For more on the Advisory Opinion OC-23/17, see: Marinkás 2020, 138–139.

[76] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 209.

[77] Ibid., paragraph 274.

According to the IACtHR, the right to food should not be understood and interpreted restrictively. The right to (adequate) food does not merely concern physical livelihood, as there is a significant cultural dimension that falls within its ambit, especially in the case of indigenous people.[78] It is not *any* food that meets the requirements of the right to food, but the food that is acceptable to a specific culture, meaning that values and criteria not necessarily directly related to nutrition need to be duly considered.[79] According to the Court, food can be considered one of the cultural characteristics of a given social group and it enjoys protection under the right to cultural identity.[80]

The IACtHR reflected on the interrelation between the right to water and enjoyment of other human rights. As seen in Lhaka Honhat Association v. Argentina, the right to water may be closely related to the right to take part in cultural life.[81] The right to water, like the rights to food and to take part in cultural life, is especially vulnerable to environmental impact and changes in the natural environment.[82] Applicant indigenous communities did not allege the violation of the right to water in their petition. Nonetheless, the facts of the case related to the enjoyment of this right, and based on the iura novit curia principle, the IACtHR established its competence to examine a potential infringement of the right to water.[83] It ruled on all four interrelated rights, namely the right to a healthy environment, adequate food, water, and to take part in cultural life, based on Article 26 of the ACHR. This was unprecedented and the first contentious case to derive the protection of these rights directly from Article 26 of the ACHR, which explains the broad considerations on the normative content of these rights, and their impact in the case of indigenous peoples.[84]

4.4. The significance of the evolutionary interpretation of Article 26 of the ACHR in Lhaka Honhat Association v. Argentina

In *Lhaka Honhat Association v. Argentina*, the IACtHR reaffirmed its willingness and readiness to interpret the ACHR's substantive provisions in an evolutionary and multidimensional manner, to offer far-reaching and effective protection for the cultural rights of indigenous people. The novelty of the 2020 judgement lies in the fact that for the first time in a contentious case, the IACtHR recognised that the rights to cultural identity, healthy environment, food, and water can be derived directly from Article 26 of the ACHR, which is justiciable before the IACtHR. The claims concerning the alleged breach of Article 26 of the ACHR were raised in Yakye Axa v. Paraguay (2005) and Kichwa Indigenous People of Sarayaku v. Ecuador, but until Lhaka Honhat Association

[78] Ibid., paragraph 254.
[79] Ibid., paragraph 274.
[80] Ibid., paragraph 274.
[81] Ibid., paragraph 222.
[82] Ibid., paragraphs 228 and 245.
[83] Ibid., 200. Although neither the ACHR, nor the Statute of the Inter-American Court includes specific provisions establishing the IACtHR's competence to decide questions of its jurisdiction, the IACtHR has declared that it has the inherent authority to determine the scope of its own competence, see: Pasqualucci 2013, 118.
[84] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 201.

v. Argentina, the Court did not made use of the possibility of basing the protection of cultural rights directly on Article 26 of the ACHR.

In Lhaka Honhat Association v. Argentina, the IACtHR asserted its competence to determine violations of rights guaranteed by Article 26 of the ACHR.[85] The issue of enforceability and justiciability of Article 26 of the ACHR was a subject of a heated dispute, within the jurisprudence of IACtHR and in the legal doctrine. According to some authors, the main legal instruments in the Inter-American human rights system do not ensure the enforceability of economic, social, and cultural rights (with the exception of the right to education and trade union rights), therefore, the approach in favour of direct enforceability of Article 26 of the ACHR runs afoul of the ACHR and the Protocol of San Salvador.[86] In 2017, in Lagos del Campo v Peru, the IACtHR took the position that Article 26 of the ACHR is enforceable in an autonomous manner.[87] This stand was ultimately reaffirmed in the Lhaka Honhat Association v. Argentina. However, during the deliberation of the Court, fundamental disagreements arose among the judges over the justiciability of cultural rights. Three of the six judges supported the autonomous enforceability of Article 26 of the ACHR, whereas the other three took the position that the IACtHR had no competence *ratione materiae* to examine violations of this provision. The vote of the presiding judge proved decisive in enabling the IACtHR to put on a new footing the protection of indigenous peoples' right to cultural identity, based on the direct judicial enforceability of the cultural rights guaranteed by Article 26 of the ACHR.[88] The right to cultural identity, which had received protection through the evolutionary interpretation of the right to property and procedural guarantees, can equally be protected under the right to participate in cultural life, the enforcement of which is possible through the direct application of Article 26 of the ACHR, hitherto considered a programmatic provision on the progressive realisation of social, cultural, and economic rights.

According to Judge Eduardo Ferrer Mac-Gregor Poisot, who was one of the supporters of the evolutionary interpretation of Article 26 of the ACHR, the judgement in the Lhaka Honhat Association v. Argentina represents a milestone in the Inter-American case law for three reasons.[89] First, it was the first occasion on which the IACtHR ruled autonomously on the economic, social, and cultural rights of indigenous people. Second, the judgement declared the violation of four rights that may be derived from and protected by Article 26 of the ACHR, namely the rights to cultural identity, take part in cultural life, and a healthy environment, food, and water. Third, the

[85] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paragraphs 195–199.

[86] See for example Ruiz-Chiriboga 2013, 159–186.

[87] ICtHR, Case Lagos del Campo v. Peru, Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340. The facts of the case were related to the dismissal of a trade union leader, therefore, the ICtHR focused on the protection of social and not cultural rights.

[88] In Lhaka Honhat (Our Land) Association v. Argentina, five separate opinions were presented by the judges, all of which are valuable contributions to the debate on the enforceability of economic, social, and cultural rights guaranteed by Article 26 of the ACHR, and on the IACtHR's competence to examine violations of this ACHR provision.

[89] Judge Eduardo Ferrer Mac-Gregor Poisot's separate opinion in the Lhaka Honhat (Our Land) Association v. Argentina, paragraph 4.

reparations ordered by the IACtHR have a differentiated focus in attempting to redress the violation of the social, cultural, and environmental rights that the judgement declared had been violated. According to the judge, the relevance of this case for the Inter-American and international case law can be described as `settling a pending debt´ with the indigenous and tribal people and communities of the region.[90] The judgement confirmed the approach taken by the IACtHR to ensure that all human rights – civil, political, economic, social, cultural, and environmental – are interdependent and indivisible, without any hierarchy among them. The state must respect and guarantee all human rights equally.[91] This is particularly important for indigenous people, who depend physically on the natural resources in their territory and have a spiritual symbiosis with them, while constantly struggling with extreme poverty and historic injustices.

The issue of paramount concern in Lhaka Honhat Association v. Argentina was the protection of cultural identity, endangered by actions causing environmental degradation. It was not new for the Court to consider the right to a healthy environment vis-à-vis cultural rights; this interplay was highlighted and thoroughly examined in several previous cases brought forth by indigenous communities. In Lhaka Honhat Association v. Argentina, however, the protection of the right to a healthy environment was derived for the first time by the IACtHR directly from Article 26 of the ACHR, in parallel with the right to cultural identity (more precisely, the right to participate in cultural life).[92] Before the 2020 judgement, the possibility of protecting the right to a healthy environment before the IACtHR based on Article 26 of the ACHR was established only within the IACtHR's advisory jurisdiction.[93] The judgement in Lhaka Honhat Association v. Argentina reaffirmed and reinforced the Court's earlier findings which highlighted the important role of indigenous people in the effective conservation of nature, related to the fact that traditional uses of natural resources entail sustainable practices.[94] According to the IACtHR, the respect for the rights of indigenous people may have a positive impact on environmental conservation. It justifies the interdisciplinary approach requiring that indigenous people's rights and international environmental laws be understood as complementary.[95]

5. Conclusions

The key documents in the Inter-American system of human rights do not explicitly guarantee the right to cultural identity. In the IACtHR's case law, however, indigenous

[90] Ibid., paragraph 7.
[91] Ibid., paragraph 87. Judge Eduardo Vio Grossi in his partially dissenting opinion argued that the indivisibility of human rights and the link between civil and political rights and economic, social, and cultural rights is not a valid argument to justify that the latter are justiciable before the IACtHR, see: Judge Eduardo Vio Grossi's partially dissenting opinion in the Lhaka Honhat (Our Land) Association v. Argentina, paragraphs 91–92.
[92] The right of every person to live in a healthy environment is guaranteed by Article 11 paragraph 1 of the Protocol of San Salvador, although it is not judiciable before the IACtHR in terms of Article 19 paragraph 6 of the Protocol.
[93] Advisory Opinion OC-23/17, paragraph 57.
[94] See e.g. Kaliña and Lokono Peoples v. Suriname, paragraphs 173 and 181.
[95] Ibid.

people's cultural identity has received substantial protection, primarily through the dynamic and multidimensional interpretation of the fundamental rights and freedoms guaranteed under the ACHR. The right to cultural identity has long been protected by the IACtHR under the rights to property and life. The IACtHR's recent case law demonstrates that the right to cultural identity can be protected under Article 26 of the ACHR as well, alongside the rights to a healthy environment, water, and adequate food. The approach involving the evolutionary interpretation of the ACHR can be explained by the doctrine of `living instrument´ and by the IACtHR's commitment to supporting the indivisibility of human rights. The IACtHR's judgement dated 6 February 2020 puts on the front foot the protection of cultural rights in the Inter-American human rights system, while opening up new possibilities for the protection of environmental rights.

The IACtHR's contribution to human rights protection has been recognised by the UN Committee on the Economic, Social, and Cultural Rights in its General Comment No. 26 on land and economic, social, and cultural rights. The ground-breaking and path-paving approach of the IACtHR in protecting cultural rights inspired other regional treaty bodies, especially the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.[96] The IACtHR's far-reaching approach to victim reparations is worth close attention, and should serve as a role model for other human rights organs, including the European Court of Human Rights. The latter has explicit formal powers to order reparations, but unlike the IACtHR, it does not indicate the means that a state should use to perform its obligations under international human rights law.[97]

The Court's ground-breaking considerations in Lhaka Honhat Association v. Argentina are worth reading in light of the broader concept of sustainable development. The legal components of sustainable development, identified by Bándi as intergenerational and intragenerational equity, public participation, cooperation, integration, precautionary principle, subsidiarity, and good governance, have environmental protection as their central attribute.[98] They aim to protect the rights of current generations, while caring for the welfare and needs of future ones. The concern for unborn generations lies at the heart of the decision-making of many indigenous people world over.[99] Achieving intergenerational equity is a great challenge in the Inter-American and European perspective, and requires *inter alia* a proper conceptual construction of the legal representation of humankind as a whole, comprising the present

[96] See: African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, decision of 25 November 2009, communication no: 276/03, paragraphs 159-162 and 284–294; African Court on Human and Peoples' Rights, The African Commission on Human and Peoples' Rights v. Republic of Kenya, judgement of 23 June 2022 (Reparations), application no. 006/2012, paragraphs 67, 72–74, 91–92, 142.

[97] See: Shelton 2015, 215–216.

[98] Bándi 2022, 36–38.

[99] See the rule of the seventh-generation decision-making in Krznaric 2020, 86–90; Bándi 2022, 40.

and future generations.[100] Finally, it is worth bearing in mind what Cançado Trindade wrote, that due attention to cultural identity awakens human awareness to the temporal dimension in the application of law.[101] Recent jurisprudence of the IACtHR, bringing into our circle of concern the need to both protect cultural identity and safeguard the environment, is a significant step in this direction.

[100] Cançado Trindade 2009, 499; Bándi 2022, 61. For more on the Central European perspective on sustainable development and the protection of future generations, see e.g.: Szilágyi 2021, 211–214; Szilágyi 2022.
[101] Cançado Trindade 2009, 488–499.

Bibliography

1. Antkowiak T M (2013) Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court, *University of Pennsylvania Journal of International Law*, 35(1), pp. 113–187.
2. Barelli M (2018) Free, Prior and Informed Consent in the United Nations Declaration on the Rights of Indigenous Peoples. Articles 10, 19, 29(2) and 32(2), in: Hanson J & Weller M, eds., *The UN Declaration on the Rights of Indigenous Peoples. A Commentary*, Oxford University Press, Oxford, pp. 247–272.
3. Bándi Gy (2020) A fenntartható fejlődés és az őshonos nemzeti kisebbségek, in: Dabis A, ed., *Magyarok jogvédelme a Kárpát-medencében* 2020, Kisebbségi Jogvédő Intézet, Budapest, pp. 11–44.
4. Bándi Gy (2022) Sustainable Development, the Interests of Future Generations, and Moral and Legal Implications, in: Szilágyi J E, ed., *Constitutional Protection of the Environment and Future Generations. Legislation and Practice in Certain Central European Countries*, Central European Academic Publishing, Miskolc, Budapest, pp. 17–71, doi: https://doi.org/10.54237/profnet.2022.jeszcpefg_2
5. Cançado Trindade A A (2009) The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights, in: Yee S & Morin J-Y, eds., *Multiculturalism and International Law*, Koninklijke Brill NV, Boston, Leiden, pp. 477–499.
6. Castellino J & Cathal D (2018) Who Are 'Indigenous Peoples'?: An Examination of Concepts Concerning Group Membership in the UNDRIP, in: Hanson J & Weller M, eds., *The UN Declaration on the Rights of Indigenous Peoples. A Commentary*, Oxford University Press, Oxford, pp. 7–37.
7. Charters C (2018) Indigenous Peoples' Rights to Lands, Territories and Resources in the UNDRIP. Articles 10, 25, 26 and 27, in: Hanson J & Weller M, eds., *The UN Declaration on the Rights of Indigenous Peoples. A Commentary*, Oxford University Pres, Oxford, pp. 395–397.
8. Domaradzki S, Khvostova M & Pupovac D (2019) Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse, *Human Rights Review*, 20(4), pp. 423–443, doi: https://doi.org/10.1007/s12142-019-00565-x
9. Donders Y (2008) A Right to Cultural Identity in UNESCO, in: Francioni F & Schein M, eds., *Cultural Human Rights,* Koninklijke Brill NV, Boston, Leiden, pp. 317–340.
10. Errico S (2018) Control over Natural Resources and Protection of the Environment of Indigenous Territories. Articles 29, 30 and 32, in: Hanson J & Weller M, eds., *The UN Declaration on the Rights of Indigenous Peoples. A Commentary*, Oxford University Press, Oxford, pp. 425–460.
11. Hanson J (2018) The UNDRIP and the Rights of Indigenous Peoples to Existence, Cultural Integrity and Identity, and Non-Assimilation. Articles 7(2), 8 and 43, in: Hanson J & Weller M, eds., *The UN Declaration on the Rights of Indigenous Peoples. A Commentary*, Oxford University Press, Oxford, pp. 150–178.
12. Krznaric R (2020) *The Good Ancestor. A Radical Prescription for Long-Term Thinking*, The Experiment, New York.

13. Marinkás Gy (2020) The Right to a Healthy Environment as a Basic Human Right – Possible Approaches Based on the Practice of the Human Rights Mechanisms, with Special Regard to the Issues of Indigenous Peoples, *Journal of Agricultural and Environmental Law*, 15(29), pp. 133–151, doi: https://doi.org/10.21029/JAEL.2020.29.133
14. Martínez Cobo J R (1972) *Study of the Problem of Discrimination against Indigenous Populations*, 29 June 1972, E/CN.4/Sub.2/L.566.
15. Pasqualucci J M (2008) The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System, *Hastings International and Comparative Law Review*, 31(1), pp. 1–32.
16. Pasqualucci J M (2013) *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press, New York.
17. Raisz A (2008) Indigenous Communities before the Inter-American Court of Human Rights – New Century, New Era?, *Miskolc Journal of International Law*, 5(2), pp. 35–51.
18. Raisz A (2010) Az emberi jogok amerikaközi védelme, *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, vol. 28, pp. 281–295.
19. Ruiz-Chiriboga O (2006) The Right to Cultural Identity of Indigenous Peoples and National Minorities: A Look from the Inter-American System, *SUR-International Journal on Human Rights,* 3(5), pp. 43–69.
20. Ruiz-Chiriboga O (2013) The American Convention and the Protocol of San Salvador: Two Intertwined Treaties - Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System, *Netherlands Quarterly of Human Rights,* 31(2), pp. 159–186, doi: https://doi.org/10.2139/ssrn.1940559
21. Shelton D (2015) *Remedies in International Human Rights Law*, Oxford University Press, Oxford.
22. Symonides J (2000) Cultural Rights, in: Symonides J, ed., *Human Rights: Concept and Standards*, Ashgate, Aldershot, pp. 175–227.
23. Szilágyi J E (2021) Some Values and Guarantees in the Ten-Year-Old Hungarian Constitution, With a Look at the Constitutional Arrangements of the Countries Founding the European Integration, *Central European Journal of Comparative Law*, 2(2), pp. 197–219, doi: https://doi.org/10.47078/2021.2.197-219
24. Szilágyi J E (2022) Constitutional Protection of the Environment and Future Generations in Certain Central European Countries, in: Szilágyi J E, ed., *Constitutional Protection of the Environment and Future Generations. Legislation and Practice in Certain Central European Countries*, Central European Academic Publishing, Miskolc, Budapest, pp. 479–526, doi: https://doi.org/10.54237/profnet.2022.jeszcpefg_12
25. UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 26 on land and economic, social and cultural rights*, adopted by the CESCR at its seventy-second session (26 September – 14 October 2022), E/C.12/GC/26.
26. UN Convention to Combat Desertification of Lands (2022) *Global Land Outlook. Second Edition. Land Restoration for Recovery and Resilience*, Bonn.

27. Xanthaki A (2018) Culture. Articles 11(1), 12, 13(1), and 34, in: Hanson J & Weller M, eds., *The UN Declaration on the Rights of Indigenous Peoples. A Commentary*, Oxford University Press, Oxford, pp. 273–298.
28. Zombory K (2022) The Protection of Cultural Heritage in International Law, in: Raisz A, ed., *International Law From a Central European Perspective*, Central European Academic Publishing, Miskolc, Budapest, pp. 239–262, doi: https://doi.org/10.54171/2022.ar.ilfcec_11