

Zsófia HORNYÁK\* – Roland LINDT\*\*  
Liability rules protecting waste management in the light of the right to a healthy  
environment\*\*\*

*Abstract*

*Some European countries use a complex system of liability to protect the environment through civil, criminal, and administrative law. The purpose of this work is to present and evaluate the constitutional background of the complex liability system protecting the order of waste management in Hungary, in addition to examining the constitutional provisions of three Western European countries – namely France, Spain and Germany – in relation to the topic. Paying particular attention to how the Constitution of the given country regulates the right to a healthy environment.*

**Keywords:** environmental protection, right to a healthy environment, waste management, environmental liability, constitutional review

### 1. Introductory thoughts

In addition to classical security policy problems, at the end of the 20th century, a new, globally significant subject appeared, which attracted the attention of an increasingly large part of the profession: the issue of ‘environmental safety’. The aim of this area is to identify threats that pose a threat to human civilization, either directly from the environment or indirectly through their impact on the environment.<sup>1</sup> Szálkai identifies three main groups of environmental hazards.<sup>2</sup> (1) Natural environmental threats to human civilization that are independent of human activity, such as volcanic eruptions and earthquakes. (2) Human activities that are dangerous to the environment, but apparently not to civilization, such as the depletion of some of Earth's mineral resources, the use of which can be abandoned as technological development progresses. (3) Threats to the environment from human activities, including environmental pollution and greenhouse gas emissions, which also pose a risk to civilization.

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\* dr. jur., PhD, assistant professor, University of Miskolc, Faculty of Law, Institute of Private Law, Department of Agricultural and Labour Law, e-mail: [zsofia.hornyak@uni-miskolc.hu](mailto:zsofia.hornyak@uni-miskolc.hu)

\*\* Student, University of Miskolc, Faculty of Law, e-mail: [lindt.rol99@gmail.com](mailto:lindt.rol99@gmail.com)

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<sup>1</sup> For different conceptual approaches of environmental security and its interface with environmental protection, see: Bándi 2021, 343–344.

<sup>2</sup> Szálkai 2021, 208.



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The topic of the present work focuses on the latter, since activities belonging to this category can ideally be the subject of legal regulation, and the so-called ‘waste problem’, which has become perhaps the most significant environmental risk factor in recent years, can be interpreted in this context.<sup>3</sup> However, the regulatory regime of causal environmental law is very different from that of other laws. Kecskés points out that while in other regulated areas (e.g., nuclear law) the aim is prevention, waste generation must be accepted as a natural consequence of human civilization,<sup>4</sup> and therefore, a different approach must be taken.

The importance of waste law was demonstrated by Eurostat's report, according to which nearly 2,145,000,000 tons of waste were generated in the European Union (hereinafter: EU) states in 2008, while in 2018, this number exceeded 2,337,000,000 tons,<sup>5</sup> which means that in the ten-year period under review, there was an increase of almost 9%.

Notably, Hungary is not one of the largest waste producers in Europe. Looking at the ratio of the country's land area and population compared to other member states, it can be concluded that an ‘average’ amount of waste is generated in our country. With this in mind, it is worth paying attention to the data of the Hungarian Central Statistical Office (HCSO): the amount of waste collected under public service, which is, of course, only a fraction of the total amount, was more than 3,310,000 tons in 2020, which is slightly higher than ten years earlier.<sup>6</sup> Although there was a decrease in some years during the examined period, it is clear that the amount of waste produced by the population was stagnant, which indicates an increase in the amount of waste per capita, in addition to a moderate decrease in the population.<sup>7</sup>

Based on this data, waste-related provisions are often formulated in international documents. Without going into an exhaustive list of ‘soft law’ documents, we would like to highlight the European Charter on Environment and Health (1989) (hereinafter referred to as the ECEH), which was adopted at the ‘First European Conference on Environment and Health’, organized by the WHO. Among the basic principles, we found the following provision: “*The entire flow of chemicals, materials, products and waste should be managed in such a way as to achieve optimal use of natural resources and to cause minimal contamination.*”<sup>8</sup> The ultimate goal of proper waste management (hereinafter referred to as wm.) is the optimal use of the environment and minimization of environmental pollution.

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<sup>3</sup> See more: Kóhalmi 2010, 48–51.

<sup>4</sup> Kecskés 2012, 101–102.

<sup>5</sup> Eurostat 2022.

<sup>6</sup> HCSO 2022.

<sup>7</sup> At this point, it should be noted that the restrictions imposed as a result of the pandemic could potentially have contributed to the increase experienced over the past two years, as the consumption of certain goods logically increases, thus the generation of waste, if the range of services available to the population narrows.

<sup>8</sup> ECEH, Principles for public policy 8.

Waste is also referred to in the provision for so called ‘low-impact technologies’,<sup>9</sup> and waste disposal in connection of drinking water supply and agriculture, as well as the management, transport, and disposal of hazardous waste are identified as ‘priorities’ and deserve particular attention at national, regional and international levels.<sup>10</sup>

Due to its global importance, we cannot forget the United Nations 2030 Agenda for Sustainable Development, 2015 (hereinafter: Agenda 2030), which is an ‘action plan for people, planet, and well-being.’<sup>11</sup> In order to achieve the 17 ‘Sustainable Development Goals’, 169 sub-goals have been identified, of which three explicitly include waste-related objectives.<sup>12</sup>

In accordance with these goals, the 4th National Environmental Protection Program of Hungary for the period 2015-2020 also emphasizes waste management priorities, mainly prevention of generation, reduction of quantity, development of separate collection, and increase of utilization; in the last case, if the waste cannot be utilized, professional disposal.<sup>13</sup> This order of objectives reflects the waste ‘hierarchy’.<sup>14</sup> In addition, the 2020 Climate and Nature Protection Action Plan includes eight measures, four of which help improve the domestic waste situation:<sup>15</sup> (1) liquidation of illegal landfills; (2) banning the distribution of single-use plastics; (3) protection of our rivers from waste coming from abroad; (4) expectation for multinational companies to use environmentally friendly technology.

The various programs and action plans – although common in the field of environmental law development – are not sufficient instruments for the enforcement of environmental interests, as they lack enforceability, and their non-compliance is free of consequences. Although there are a small number of *lex imperfecta* rules in the field of ‘hard law’, the violation of the vast majority of legal rules implies some kind of legal disadvantage or sanction.

The complex liability system that ensures the protection of terrain from environmental regulations is practically indefinable. The complexity was observed both horizontally and vertically. It is horizontally complex as the legislator invokes the sanctioning rules of several branches of law to protect the environment; thus, Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter: EPA) refers to the civil, criminal, and administrative liabilities of the user of the environment.<sup>16</sup> It is also vertically complex because environmental liability goes beyond national law, and we must consider both EU and international law.

The purpose of this study is to present and evaluate the constitutional background of a liability system protecting the order of waste management in Hungary, France, Spain,

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<sup>9</sup> ECEH, Strategic elements d).

<sup>10</sup> ECEH, Priorities 1.

<sup>11</sup> Agenda 2030, Preamble

<sup>12</sup> Agenda 2030, 11.6; 12.3; 12.4; 12.5; 14.1. On the importance of the Sustainable Development Goals, see: Bándi 2022, 23–25.

<sup>13</sup> 27/2015 (17.VI.) Parliamentary decision Annex I, 51–53.; separate objectives have been established for some special waste streams, practically all of them envisage the use of other alternatives instead of disposal.

<sup>14</sup> Act CLXXXV of 2012 on the Waste (hereinafter: WA) 7. § (1)

<sup>15</sup> Climate and Nature Protection Action Plan 2020.

<sup>16</sup> EPA 101. § (1).

and Germany. In this study, we do not describe the entire complex liability system, the rules of international law with environmental implications, or the provisions of EU legislation concerning waste management.

In addition to this Western European perspective, it may be interesting to examine the regulations in some Central European countries. We will not attempt to do so in this study, but we would like to draw attention to the research conducted within the framework of the Central European Academy, which examines, among others, the constitutional protection of the right to a healthy environment in Poland,<sup>17</sup> the Czech Republic,<sup>18</sup> Slovakia,<sup>19</sup> Hungary,<sup>20</sup> Slovenia,<sup>21</sup> Croatia,<sup>22</sup> Serbia<sup>23</sup> and Romania<sup>24,25</sup>

## 2. Constitutional review<sup>26</sup>

Today's perception of environmental protection is strongly anthropocentric, which is why it is related to the human right to health. Thus, the Fundamental Law of Hungary (April 25th, 2011) (hereinafter: the Fundamental Law) states that Hungary promotes the right to physical and mental health by, among other things, "*ensuring the protection of the environment.*"<sup>27</sup> This wording contradicts the detailed justification of the Fundamental Law, which, in the context of the text still appearing in the proposal as Article XIX, states that "*the Proposal aims to achieve health protection through regulatory and... material means.*"<sup>28</sup> The quoted line of justification suggests that the legislator's intention was to formulate a state objective, even though it is certain that the provisions of the relevant section appear as a state task in the Fundamental Law. In addition, we share the position that even if the Fundamental Law does not explicitly include the right to a healthy environment, it can still be derived from the right to life.<sup>29,30</sup>

In addition to the declaration of the right to a healthy environment, two provisions of the Fundamental Law that present substantive legal rules on environmental liability and waste management are worthy of analysis.

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<sup>17</sup> Majchrzak 2022, 249–308.

<sup>18</sup> Radvan 2022, 161–202.

<sup>19</sup> Maslen 2022, 399–438.

<sup>20</sup> Krajnyák 2022, 203–248.

<sup>21</sup> Juhart & Sancin 2022, 439–478.

<sup>22</sup> Staničić 2022, 127–160.

<sup>23</sup> Savčić 2022, 359–397.

<sup>24</sup> Benke 2022, 309–358.

<sup>25</sup> For a comparative study on this, see: Szilágyi 2022, 497–499.

<sup>26</sup> This chapter does not deal with the less relevant statutory provisions of the Fundamental Law. For all the provisions of Fundamental Law relating to environmental law, see: Téglásiné Kovács 2021, 395–396.

<sup>27</sup> Fundamental Law Article XX (2); Several state commitments formulated in this legislation are almost unique in Europe. See about this: Hojnyák 2018, 156–157.

<sup>28</sup> Detailed justification of the Fundamental Law.

<sup>29</sup> Fundamental Law Article II.

<sup>30</sup> Csák 2012, 162.

Subsequently, it is important to briefly note the nuanced differences between the liability principles contained in the Fundamental Law and those in other relevant legislation.

## 2.1. Interpretation questions arising in connection with the right to a healthy environment

In major human rights conventions, the rights under discussion are typically not explicitly enshrined. The reason for this is that it was drafted relatively late, even among third-generation rights, so its first draft can be found primarily in soft law documents. However, the Banjul Charter of 1981 (African Charter of Human and Peoples' Rights), which does not create an obligation for our country, should be mentioned as the first significant (regional) human rights convention that contains a provision for the right to the environment. According to this theory, every person has the right to a development-promoting and satisfactory environment.<sup>31</sup> Thus, the environment can be considered to be of sufficient quality if it is suitable for sustainable development. On the one hand, this interpretation is forward-looking, as it refers to the need for integrated environmental protection; on the other hand, it can be considered insufficient, since it does not state whose obligation is to ensure this environmental quality, so it can be interpreted more as a declaration than as an enforceable subject right.

Most national constitutions have addressed this deficiency. According to Majtényi, it is useful to group constitutions based on this aspect so that states recognize the right to the environment as a right to all (e.g. Spain, Portugal), as an obligation for themselves (e.g. Germany, Austria), or in both aspects (e.g. Latvia).<sup>32</sup> Hungary belongs to this category.

The article declaring the right to the environment in the Fundamental Law is very general: "*Hungary recognises and enforces everyone's right to a healthy environment.*"<sup>33</sup> Apart from the fact that human rights-type wording prevails and the idea of state involvement also appears, the detailed content of the fundamental right is not defined, so its interpretation is the task of the Constitutional Court (hereinafter: CC).

On this issue, since the Constitutional Court established continuity between the Fundamental Law and the Constitution in relation to the right to the environment<sup>34</sup>, it is necessary to return to the legal interpretation of the 1990s. On this basis, we can say that the right to the environment cannot be interpreted as a subjective right; that is, its direct enforcement by an individual who has suffered a violation of the right is not possible. With regard to this right, the state's objective institutional protection obligation comes to the fore: "*The right to the environment raises the guarantees of the state's fulfillment of its obligations regarding environmental protection to the level of fundamental rights, including the conditions for limiting the protection of the environment achieved.*" The relevant decision also lays down the *prohibition of retrogression*, that is, the prohibition of lowering the level of protection

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<sup>31</sup> "All peoples shall have the right to general satisfactory environment favourable to their development." Banjul Charta Article 24.

<sup>32</sup> Majtényi 2018, 85.

<sup>33</sup> Fundamental Law Article XXI (1).

<sup>34</sup> 3068/2013. (14.III.) Constitutional Court Decision (CCD) Justification [46].

achieved in terms of nature conservation, and allows exceptions to this only to pursue other fundamental rights or values, to an extent proportionate to the aim pursued.<sup>35</sup>

The immaturity of the subject is undoubtedly a serious shortcoming. However, there is an approach in which certain sublegal rights can be interpreted as procedural rights that constitute a substantive right. This is the right to participate in environmental decision making, access to environmental information, and appeal to environmental decisions.<sup>36</sup> From this point of view, the lack is not as serious as it seems at first sight, but it is indisputable that the protection of the right to the environment is, to this day, primarily implemented in connection with other – mainly first generation – rights at the individual level. This statement is somewhat contradictory, and the situation is overshadowed by the fact that there is a precedent in a civil case in which the court ordered a defendant to pay restitution because of a violation of the fundamental right to the environment as a personal right.<sup>37</sup>

The declaration of the State's objective institutional protection obligation can be linked to the so-called *first abortion decision*. "*The State may, from a general and objective point of view, determine the objective, institutional scope of protection of the same fundamental right beyond the scope of protection of the subjective fundamental right. This is the case, for example, if the individual exercise of a right of freedom does not appear to be endangered, but in the totality of the cases, the institution of freedom or life relationship generated by the fundamental right is endangered.*"<sup>38</sup> Based on this definition, it can be concluded that the CC emphasized the institutional protection side of the fundamental right in question in 1994, since the purpose of the right is to ensure an appropriate quality of the environment for everyone, and this can only be done with regulations that protect the environment. According to Sári's definition based on the cited decision, "*the State's obligation to enforce fundamental rights is not limited to refraining from violating rights, but must ensure the conditions necessary for their enforcement.*"<sup>39</sup> This interpretation also illustrates that the State must act actively to ensure the enforcement of fundamental rights.

Regarding the prohibition of retrogression, we must also note that although there may be an exception in theory, the CC did not use this option in practice. At the same time, it can be observed that, in its decisions, it tries to refrain from the direct application of the principle and prefers to cite formal reasons for destroying harmful legal provisions.<sup>40</sup> In its recent interpretation, the CC clarified the content of the prohibition, which extends to the substantive, procedural, and organizational rules that ensure environmental protection. According to this, a violation of the principle means, in addition to unchanged substantive legal rules, the weakening of the procedural or organizational rules that enforce it, but also when the object of the regulation changes

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<sup>35</sup> 28/1994. (20.V.) CCD V.

<sup>36</sup> Majtényi 2018, 87.

<sup>37</sup> Court of Appeal of Debrecen Pf.II.20.749/2009/4.; Court of Appeal of the Capital 6.Pf.21.995/2009/3.

<sup>38</sup> 64/1991. (17.XII.) CCD Justification C).

<sup>39</sup> Sári 2004, 34.

<sup>40</sup> Fodor 2014, 110.

unfavorably from the point of view of environmental protection, and substantive legal regulation does not respond to this.<sup>41</sup>

According to Article XXI Section (2) of the Fundamental Law, “*Anyone who causes damage to the environment must - as defined by law - restore it or bear the cost of the restoration.*” The CC considers this provision to be a codification of the ‘polluter pays’ principle and states that, on the one hand, it creates an absolute substantive limit for the law enforcer and, on the other hand, that the principle must be respected at all times in the application of the law.<sup>42</sup>

Finally, a specific waste management provision, which is considered curious in Europe, is included in the examined article. According to this, “*it is prohibited to import polluting waste into the territory of Hungary for the purpose of disposal.*”<sup>43</sup> This sentence, which is highly controversial in terms of its placement, is also worrying because its concepts are incompatible with existing waste management legislation. The ‘disposal of waste’ is an unknown concept in the EU Framework Directive.<sup>44</sup> According to Fodor, the scope of interpretation may include disposal on the ground surface (landfills), long-term storage, deep injection, or surface filling.<sup>45</sup> These are elimination methods according to the Annex of the Framework Directive.

Another problem is the indicator polluter, which does not correspond to waste management terminology. T. Kovács’s opinion was that the cited legal provision can also be a directly applicable prohibition; however, in practice, it must be coordinated with the derogation of the free movement of goods.<sup>46</sup> However, we agree with Fodor that the indicator in question refers to certain waste treatment processes. With these procedures, pollution can only be judged on an individual basis; therefore, the material scope of the provisions is not specific. Based on this, he concluded that it was a declarative rule rather than a normative provision.<sup>47</sup> The difficulty of interpretation is greatly aided by the 2013 amendment to the Waste Act, which states that “*hazardous waste for elimination, household waste for elimination and residues from the incineration of household waste may not be imported into the territory of Hungary.*”<sup>48</sup>

## 2.2. Subject of the right to a healthy environment

We have already made it clear that the right to a healthy environment is a human right, a right that everyone has and a right linked to so-called ‘biological existence’.<sup>49</sup> As protection must be provided to everyone, the right tool, according to Sári, is to create the possibility of popular action.<sup>50</sup> The EPA provides two ways to do this: anyone can

<sup>41</sup> 16/2015 (5.VI.) CCD Justification [110]; 3223/2017. (25.IX.) CCD Justification [28]; cf. Krajnyák 2022, 216.

<sup>42</sup> 3162/2019. (10.VII.) CC Order, Justification [18]; 5/2022. (14.IV.) CCD Justification [87].

<sup>43</sup> Fundamental Law Article XXI (3).

<sup>44</sup> Directive 2008/98/EC.

<sup>45</sup> Fodor 2012, 643.

<sup>46</sup> Téglásiné Kovács 2021, 399.

<sup>47</sup> Fodor 2012, 649.

<sup>48</sup> WA 19. § (2).

<sup>49</sup> Téglásiné Kovács 2021, 391.

<sup>50</sup> Sári 2004, 293.

draw the attention of the user of the environment and authorities to environmental hazards and civil organizations representing environmental interests are given the right to act as clients in such cases.<sup>51</sup>

In connection with third-generation rights, the question of the legal personality of humanity arises, which refers to the unity of the present and future generations.<sup>52</sup> Kovács states that the legal personality of humanity is relevant in the categories of ‘crimes against humanity’ and the ‘common heritage of humanity’, and is enforced through the activities of states and certain international organizations.<sup>53</sup> There are dogmatic difficulties in accepting the legal personality of future generations, as it is not possible to attribute legal interests to a set of persons who do not yet exist within the framework of national law, and there is still no broad consensus on the definition.<sup>54</sup> In relation to this dilemma, two prevailing theoretical legal concepts must be mentioned.<sup>55</sup> (1) According to the theory of will, only people capable of asserting their interests have rights, thereby rejecting the idea of rights of future generations. (2) According to the theory of interest, the alternative can be objectively recognized, which may coincide with the likely value choice, which can be considered the interest of a given person or group; therefore, talking about the rights of future generations is not an oxymoron.

In Weiss’s pioneering work, to avoid legal uncertainty, he placed responsibility for future generations on a moral basis. He believes that it is not a direct legal obligation but rather a certain level of development of public consciousness.<sup>56</sup> In light of this, Weiss defined three so-called ‘conservation principles’:<sup>57</sup> (1) conservation of options: preserving the diversity of our natural and cultural heritage, (2) conservation of quality: maintaining the ‘quality’ of the planet, (3) conservation of access: Future generations must be given a fair right to access the heritage of their past generations.

Despite the category that is difficult to accept legally, some constitutions refer to the interests of future generations, including several provisions of the Fundamental Law.<sup>58</sup> Among others, the constitutions of Bolivia and Norway mention the protection of future generations in connection with the use of natural resources. A unique solution was recognized by the ruling of the Supreme Court of the Philippines in 1993, which states that, based on the right to a healthy environment, children have the right to sue for their own sake and for future generations.<sup>59</sup> Taking this into account, we can conclude that the rights of future generations exist.

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<sup>51</sup> EPA 97. § (2); 98. § (1).

<sup>52</sup> Majtényi 2012, 32.

<sup>53</sup> Kovács 2016, 442–443.

<sup>54</sup> For issues causing scientific dissent, see: Bándi (2022) 46–47.

<sup>55</sup> Szabó 2018, 423.

<sup>56</sup> Weiss 1988, 103.

<sup>57</sup> Weiss 1988, 38.

<sup>58</sup> Fundamental Law Preamble, Article P (1), Article 30 (3), Article 38 (1).

<sup>59</sup> Szabó 2018, 421–422.

### 2.3. The relationship between the right to a healthy environment and other human rights

Most human rights conventions do not declare the right in question; however, courts that apply them deal with the violation in their judgments, and more than once, a violation of the given convention is found. Human rights forums apply an ‘anthropocentric approach’, that is, the issue of environmental harm is relevant to them if an explicit human rights violation can be established in its context.<sup>60</sup>

For an analysis of the regional court relevant to us, let’s stick to the case law based on the European Convention on Human Rights (hereinafter: ECHR).

The European Court of Human Rights derives the right to the environment primarily from the right to private and family life.<sup>61</sup> In the case of *Powell and Reynier c. the United Kingdom*<sup>62</sup> merely raised, but did not lead to, a judgment – the rights of nearby residents to have their rights affected by noise pollution from Heathrow Airport. The breakthrough case of *López Ostra c. Spain*<sup>63</sup> was a case in which the complainants applied to this forum because the Spanish authorities and courts did not take action to eliminate an illegal landfill near their homes.<sup>64</sup> There was also a conviction based on Article 8 in the case of *Fadeyeva c. Russia*.<sup>65</sup>

Less often, environmental violations are also established based on the right to a fair trial<sup>66</sup> and the right to life.<sup>67</sup> An example of the former is the case of *Okay et al. c. Turkey*,<sup>68</sup> and the latter is the case of *Öneryıldız c. Turkey*.<sup>69</sup> The latter is also an interesting legal case, as the complainant requested the determination of the liability of the Turkish State based on all three mentioned articles of the ECHR due to a fatal methane explosion at an illegal tire dump; however, the case was ultimately only investigated in relation to the right to life, as its violation was sufficient to the detriment of Turkey.

Therefore, in the current European human rights system, violations of the right to the environment can be established only indirectly through other fundamental rights. However, we can be optimistic about the ‘independence’ of the right under discussion in view of the universally significant 2022 resolution of the General Assembly of the United Nations, which declares the human right to a clean, healthy and sustainable environment.<sup>70</sup>

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<sup>60</sup> Kecskés 2012, 211.

<sup>61</sup> ECHR Article 8.

<sup>62</sup> no. 9310/81.

<sup>63</sup> no. 16798/90 cited from Bándi 2014, 103.

<sup>64</sup> According to Raisz and Krajnyák, the reason behind the different decisions is that while the English authorities have taken a number of measures to reduce the harm caused by noise pollution, the Spanish authorities have remained passive regarding the residents’ complaints. Raisz & Krajnyák 2022, 78.

<sup>65</sup> no. 55723/00 cited from Csák 2008, 13.

<sup>66</sup> ECHR Article 6.

<sup>67</sup> ECHR Article 2.

<sup>68</sup> no. 36220/97 cited from Raisz 2010, 23–24.

<sup>69</sup> no. 48939/99 cited from Kecskés 2012, 213.

<sup>70</sup> A/RES/76/300. See more: Raisz & Krajnyák 2022, 75.

### 3. Principles of environmental liability in the Hungarian legal system

“The phenomena of environmental liability permeating all areas of life appear in the rules of law, the ethical standards of society, or the teachings of religion.”<sup>71</sup> The principles protecting the environment had a non-legal origin; they appeared much earlier in the moral and religious rules of early societies. In the absence of State enforceability, it was justified to give these norms, which have existed since time immemorial, the binding force of the law. This is how environmental liability systems were established, the tools of which can be found in several branches of law, the application of which is also possible in parallel. For these systems, liability principles have been formulated. Principles are typically indirectly related to the application of law by performing an interpretative function, but in addition to this, we can also talk about integrative, law-enhancing, etc. functions too.<sup>72</sup>

There is no uniform principle of environmental liability. Different names and contents are found in the Fundamental Law, Civil Code, EPA and sectoral legislation. Therefore, it is worthwhile to analyze and compare them.

The above-mentioned section of the Fundamental Law was interpreted by the CC as the polluter-pays principle, but in our opinion, this is incorrect because only liability for damage to the environment is required. Damage means that “*damage is done, the ecological system is affected, which includes both damage to public property and private property.*”<sup>73</sup> Consequently, in the private law approach, property is a necessary precondition for damage because, in its absence, we cannot speak of a victim. Pollution can occur without harming a specific person.<sup>74</sup> Therefore, we agree with the view that only part of the polluter pay principle is covered by the Fundamental Law.<sup>75</sup>

In EPA, the ‘principle of liability’<sup>76</sup> appears explicitly, establishing the liability of the user of the environment in connection with the effects of his/her activity on the environment. According to the provisions of the Fundamental Law, the subject already covers a much broader scope than the tortfeasor. At the same time, this rule covers a broad spectrum of liability: it is not limited to the obligation of reparation (or restitution) but also includes the application of criminal sanctions. However, its shortcoming is that there is no provision for compensation for omissions, even though it can be suitable for changing the environment in a negative direction.<sup>77</sup>

The polluter pays principle has already been included in the Waste Act<sup>78</sup> by its original name, but as it is a sectoral rule, the scope of the persons concerned is well

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<sup>71</sup> Csapó 2015, 111.

<sup>72</sup> Csák 2014, 19.

<sup>73</sup> Csák 2012, 74.

<sup>74</sup> We are therefore talking about cases in which environmental damage within the meaning of the EPA (4. § 13.) is not accompanied by damage in the civil law sense. Spanish jurisprudence faced the same dogmatic difficulty in the early 2000s, which was solved by the category of ‘pure environmental damage’ (daño ecológico puro). See more: Leyva Morote 2016, 114–115.

<sup>75</sup> See for example: Csák 2014, 23.; Bándi 2020, 16.; Krajnyák 2022, 222–223.

<sup>76</sup> EPA 9. §; According to Csák – although it was not included in the wording – the polluter pays principle can be considered one of the implicit principles of the EPA. See: Csák 2014, 21.

<sup>77</sup> Csapó 2015, 180.

<sup>78</sup> On the circumstances of the creation of the Waste Act, see: Mélypataki 2012, 51–58.

defined: “*the waste producer, the waste holder or the manufacturer of the product that has become waste is responsible for the treatment of the waste and the payment of the costs of waste management.*”<sup>79</sup> The interpretative provisions of the Act define all the three subjects.<sup>80</sup> This principle of liability limits obligations and only lays down financial liability. *Marton* pointed out, as a shortcoming of the old Waste Act, that this principle does not imply an effort to reduce emissions, that is, prevention, nor does it clarify whether liability is based on objective or subjective grounds.<sup>81</sup> These two comments are still relevant today, with the addition that, from 2021, the ‘principle of preventing waste generation’<sup>82</sup> is separately included in the Waste Act; that is, the legislator fulfills his previous debt.

In addition, the ‘principle of extended producer liability’<sup>83</sup> is defined, which imposes a double obligation on producers. On the one hand, as a specific manifestation of the principle of prevention, it requires life-cycle planning when choosing the product and technology; on the other hand, it requires the return of the product or the acceptance and collection of the waste left over, as well as the performance of prescribed waste management activities.<sup>84</sup> The two parts of this special liability principle reinforce each other; it encourages the manufacturer to maintain the requirement of conscious design because it has fewer obligations at the end of the product’s life cycle. The effective March 2021 amendment created an ‘extended producer liability system’, which is a set of measures aimed at making the producer financially or organisationally responsible for the management of waste after it becomes waste.<sup>85</sup>

According to *Bándi*, the polluter-pays principle and the principle of liability can be used as synonymous concepts, as they both serve the same purpose in the sense of complexity.<sup>86</sup> On the other hand, we share Fodor’s point of view that individual liability principles cannot be treated as synonymous simply because not all presuppose actual infringement or damage. Accordingly, the possibility of subjective criminal (and misdemeanor) liability appears in most cases, alongside objective liability.<sup>87</sup>

#### 4. Constitutional bases of liability systems protecting the order of waste management in some countries

States use complex liability systems to protect their environment through civil, criminal and administrative law. This study examines the constitutional provisions of three Western European countries, France, Spain, and Germany, in relation to this topic. Particular attention has been paid to how the constitution of a country regulates its right to a healthy environment.

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<sup>79</sup> WA 3. § (1) e).

<sup>80</sup> WA 2. § (1) 16., 24., 32.

<sup>81</sup> *Marton* (2001) 36.

<sup>82</sup> WA 3. § (1) a).

<sup>83</sup> WA 3. § (1) b).

<sup>84</sup> For the manufacturer, the requirement is made more difficult by the Hungarian licensing system, which is strict regarding the use of recycled materials. See about the problem: *Olajos* 2016.

<sup>85</sup> WA 30/A–C. §§; This is essentially a manifestation of the ‘cradle to grave’ principle from Anglo-Saxon law in our domestic law. See more: *Kubasek & Silverman* 2014, 281–282.

<sup>86</sup> *Bándi* 2014, 87.

<sup>87</sup> *Fodor* 2014, 90–91.

#### 4.1. France

The Constitution of France (1958) (*Constitution française*) does not contain fundamental rights, but only a constitutional foundation and state organization rules. A special institutional structure, the ‘Economic, Social and Environmental Council’ (*Conseil économique, social et environnemental*),<sup>88</sup> a consultative body with maximum of 233 members, which gives its opinion on draft legislation in matters within its competence, but can also be consulted by Parliament and the Government on various programmes and budget planning, should be highlighted.<sup>89</sup>

At the same time, the preamble to the Constitution refers to the ‘Charter of the Environment’ (*Charte de l’environnement*), adopted in 2004, as a kind of ‘attachment’ (*attachement*), the creation of which, although mainly due to the strengthening of environmental criminal law, does not contain any repressive provisions.<sup>90</sup> The ten-article document contains the following provisions: (1) declares everyone's right to a ‘balanced and healthy’ (*équilibré et respectueux de la santé*) environment,<sup>91</sup> (2) simultaneously, it makes everyone responsible for preserving and improving their environments,<sup>92</sup> (3) raises the principles of damage prevention and mitigation to a constitutional level, (4) establishes the principle of compensation for damages caused to the environment, (5) raises the precautionary principle to constitutional level,<sup>93</sup> (6) takes a stand in favor of the policy for sustainable development (considering all three pillars), (7) declares environmental procedural rights (right to information and participation), (8) emphasizes the importance of education, (9) and research and innovation in preserving the environment, (10) and foresees European and international cooperation.

Although the Charter can be evaluated as a gap-filling document, considering that these rights and obligations have not been recognized in a constitutional legal source in France, the wording is vague in several cases and does not contain specifics – not to mention Articles 8-10, which can only be interpreted as a political declaration – and understandably was the subject of criticism in French professional circles.<sup>94</sup> On the other hand, it is a welcome result that, regarding the procedural rights contained in Article 7, it has become a constitutional obligation of the legislator to develop detailed rules.

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<sup>88</sup> For the history and functioning of the body, see: Delevoeye 2013, 737–739.

<sup>89</sup> Constitution of France Articles 69–71; In addition, the text of the Constitution does not contain any provisions related to agriculture or environment, just like the constitutions of most Western European states. Hojnyák 2018, 158.

<sup>90</sup> Jaworski 2009, 891–892.

<sup>91</sup> On the interpretation of the wording of the right to a healthy environment in the Charter, see: Capitani 2005, 497–499.

<sup>92</sup> Capitani points out that while the term *chacun* specifically refers only to natural persons in terms of the right discussed, the phrase *toute personne* means that both natural and legal persons must be considered the subject of the obligation. Capitani 2005, 503.

<sup>93</sup> The judgments of the French Supreme Court (*Cour de cassation*) recognized the applicability of this principle in private law disputes. See about this: Camproux-Duffrene & Muller-Curzydlo 2011, 373–381.

<sup>94</sup> See: Prieur 2008, 58–59.

## 4.2. Spain

The Constitution of Spain (1978) (*Constitución Española*) declares everyone's right to an 'environment suitable for the development of the individual' (*medio ambiente adecuado para el desarrollo de la persona*), as well as the obligation to preserve this environment. The holders of public power, relying on 'indispensable community solidarity' (*indispensable solidaridad colectiva*), guard the use of natural resources in order to protect and improve living standards and to protect and restore the environment. For those who violate the provisions of the previous paragraph, criminal<sup>95</sup> or, in certain cases, administrative sanctions as well as the obligation to restore the damage caused will be imposed within the framework of the law.<sup>96</sup>

The Spanish Constitution essentially discusses the right to a quality environment, the preservation of which is the duty of both state bodies and the people. This refers uniquely to the consequences of environmental violations in different branches of law. Strictly speaking, the triad of civil criminal administrative law is also separate, and the principle of liability appears implicitly.<sup>97</sup> It is important to emphasize the systematic placement of the article, which is in the chapter 'Main principles of social and economic policy' (*De los principios rectores de la política social y económica*), not in 'Rights and freedoms' (*Derechos y libertades*),<sup>98</sup> thereby referring to, that the active activity of the State has a decisive role in terms of the fundamental right. The literature also confirms that this is not a programmatic norm, but a principle that imposes obligations not only on the legislator but also on the depositories of executive and judicial power, but does not directly provide citizens with a legal basis for taking action.<sup>99</sup>

It can therefore be seen that the objective institutional protection side of the right to the environment is more dominant in Spain, although some authors find that the subjective side is also emphasized because of its formulation as a human right.<sup>100</sup>

## 4.3. Germany

The Constitution of Germany (*Grundgesetz für die Bundesrepublik Deutschland* – GG) was adopted in May 1949; thus, it is the text that has been in force for the longest time among the examined constitutions. Some areas of environmental protection that appear in the chapter dealing with legislative issues, such as waste management, air

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<sup>95</sup> A relatively recent development in this field is the introduction of the new offense called 'crime against the environment' (*delito ecológico*) into the Criminal Code of Spain (*Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal art. 326 bis.*). Gómez Puerto 2020, 230.

<sup>96</sup> Constitution of Spain Article 45; translation by the authors; The Constitution only protects natural resources, but does not affect the issue of land ownership, which is a glaring omission among southern European constitutions. See: Hornyák 2017, 193.

<sup>97</sup> The literature underlines that the scope of the principle of liability extends not only to citizens but also to public authorities, both in the case of their illegal activities and omissions. Real Ferrer 1994, 323.

<sup>98</sup> Domínguez 2004, 136.; Gómez Puerto criticizes this solution, since according to him the protection of environmental interests is left to the current political leadership. Puerto 2020, 254.

<sup>99</sup> Real Ferrer 1994, 325.; Morote 2016, 113.

<sup>100</sup> For an overview of these, see: Puerto 2020, 233–234.

protection, noise protection, nature protection, landscape protection, and water resources management, are classified as shared competences between the federal legislature and the provinces,<sup>101</sup> i.e. the provinces can decide on these issues as long as and to the extent that no regulations are made at the federal level.<sup>102</sup>

As the right to the environment became significant in human rights thinking only in the second half of the 20th century, the text did not originally contain, and still does not contain, a provision in the chapter on fundamental rights (Grundrechte). On the other hand, at the beginning of the 2000s, the idea of state liability for future generations was introduced into the chapter entitled ‘The Confederation and the provinces’ (Der Bund und die Länder), in which they emphasize ‘natural subsistence and animals’ (die natürliche Lebensgrundlagen und die Tiere) by the coordinated application of the branches of power.<sup>103</sup>

## 5. Final thoughts

As a summary, we can say that of the four examined countries, at the constitutional level, the ‘right to a healthy environment’ has been regulated in Hungary, France and Spain. There are also differences in the content of the provisions and in the way they are regulated: while the constitutions of Hungary (‘right to a healthy environment’) and Spain (‘right to an environment suitable to the development of the individual’) explicitly mention these rights, in France the ‘right to a balanced and healthy environment’ is not declared in the Constitution but in the Charter of the Environment, which has constitutional value. Common to all three regulations is that they not only recognize everyone is right to a healthy environment but also make its preservation an obligation for everyone.

In contrast, in the Constitution of Germany, there is no such provision among the fundamental rights, only in the chapter ‘The Confederation and the provinces’ is the idea of state liability for future generations, in the context of which the protection of ‘natural subsistence and animals’ is mentioned, with the coordinated application of the branches of power.

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<sup>101</sup> Constitution of Germany Article 74 (1) 24., 29., 32.

<sup>102</sup> Constitution of Germany Article 72 (1) (section (3) of the same article defines exceptions to this rule, but waste management is not mentioned there)

<sup>103</sup> Constitution of Germany Article 20a.; See about this: Bernsdorff 1997, 328–334.; Henneke 1995, 325–335.; Kloepfer 1996, 73–80.

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