



OMBUDSMAN FOR FUTURE GENERATIONS
OFFICE OF THE COMMISSIONER OF FUNDAMENTAL RIGHTS HUNGARY

Budapest, 29 May, 2020

To: Mr. David Boyd, PhD
UN Special Rapporteur on human rights and the environment

Dear Mr. Boyd,

This is in response to your letter dated 1 April 2020 titled “Healthy Ecosystems and Human Rights: Sustaining the Foundations of Life”. Please note that my answers primarily rely on my experience as an Ombudsman for Future Generations (“FG Ombudsman”) highlighting the work I have been doing in this capacity since 2017 relevant to your questions. My answers do not intend to evaluate the challenges faced by the Hungarian Government or any other stakeholder. For better understanding of my below answers, I find it necessary to briefly summarize my role and mandate as FG Ombudsman. Please see [Appendix no. I for a short introduction](#).

1. Please provide examples of ways in which declining biodiversity and degraded ecosystems are already having adverse impacts on human rights. Adversely affected rights could include, among others, the rights to life, health, water, food, culture, non-discrimination, a safe, clean, healthy and sustainable environment, and Indigenous rights.

i. Built environment

In developed countries, the built environment is a typical medium of everyday life, where on average 75% of the population live¹. Therefore, the design and quality of the built environment fundamentally and directly determines their quality of life, and indirectly, amongst others, their right to a healthy environment, water, food, culture. Therefore, it is of paramount importance that zoning regulations allow land uses that take into consideration and aim to minimize the loss of biodiversity. My office has always paid special attention to regulations on the built environment through various channels (citizens’ complaints, ex officio actions) and have established a strong working collaboration with the governmental and civil stakeholders in this sector.

ii. Forests

Healthy forest ecosystems are indispensable for the enjoyment of a variety of human rights, - regarding affected fundamental rights in Hungary in particular, pls. see Q. no 3. When reviewing a recent extensive amendment of the Forest Act I have found many of its measures contrary to the protection of biodiversity and endangering forest ecosystems. Therefore the legal amendment in question was sent to the Constitutional Court (“CC”) for legal scrutiny of potential collision with human rights enshrined in the Fundamental Law.

¹ This number is expected to be growing world-wide in the upcoming decades: 2018 Revision of World Urbanization Prospects prepared by the UN Department of Economic and Social Affairs



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iii. Water bodies and underground water protection

Water quality and quantity, ecosystems and human rights are greatly interlinked, some examples from my practice include: (a) a workshop hosted in 2017 on the potential for granting legal personality to Lake Balaton to ensure its increased protection (b) when a piece of legislation endangering groundwater resources and public health was sent to the CC for constitutional scrutiny, we have provided an amicus brief with arguments that were echoed in the final decision (13/2018 (IX.4.)) annulling the proposed legislation (c) an ex officio investigation is currently underway to explore systemic problems related to right to clean water and sanitation by vulnerable groups.

2. *To protect a wide range of human rights, what are the specific obligations of States and responsibilities of businesses in terms of addressing the main direct drivers of harm to biodiversity and ecosystems (e.g. land conversion, loss and degradation of habitat, climate change, overexploitation, pollution, invasive species) and the indirect drivers (unsustainable production and consumption, rapid human population growth, trade, conflict and inequality)?*

Under this question, we would like to highlight State obligations stemming from the constitution, called the Fundamental Act and its current interpretations by the CC.

Article P) of the Fundamental law (elaborated in Q. no 3.) makes it a general obligation (to be interpreted as including obligation of the State, businesses operating in Hungary, and citizens alike) to protect, maintain and preserve the common heritage of the nation.

In its recent landmark decision, no. 13/2018 (IX.4.), the CC stated that liability to future generations requests the legislator to assess the likely impact of its measures on the basis of scientific knowledge, in accordance with the principle of prevention and precaution. The decision of the CC now treats the precautionary principle – together with the non-derogation principle - as a full constitutional principle. The CC has ruled in this given case that the State, as the sole owner of the groundwater can only manage it in a way that takes into account not only the common needs of present generations, but also the needs of future generations.

3. *Please provide specific examples of constitutional provisions, legislation, regulations, policies, programs or other measures that employ a rights-based approach to prevent, reduce, or eliminate harm to biodiversity and ecosystems or to restore and rehabilitate biodiversity and ecosystems.*

i. Biodiversity related constitutional provisions in the Fundamental Law

The Fundamental Law in its Preamble (National Avowal) states that “we bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.”

Article P) enshrines the concept of “**the common heritage of the nation**”, including in this concept **natural resources**, in particular arable land, forests and the reserves of water, **biodiversity**, in particular native plant and animal species, as well as **cultural assets**. The protection, maintenance and preservation of such common heritage for future generations should be the obligation of the State and everyone else. This concept is less couched as a human right, but rather as a state objective. It is increasingly cited as a strong basis for enacting biodiversity related measures.

Article XXI includes a right to a healthy environment as a human right. The CC established that the right to a healthy environment entails the non-derogation principle, according to which the State is not allowed to step back from the level of environmental protection it already guarantees (this principle is relevant to substantive, procedural and institutional issues as well).



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Article XX spells out the right to physical and mental health and one of the tools for ensuring this fundamental right lies in ensuring the protection of the environment.

ii. Biodiversity measures in other pieces of legislations and resolutions

Important pieces of legislation regarding environmental protection are the following: Act No LIII of 1995 on the general protection of the environment, Act No LIII of 1996 on nature protection, Parliament resolution no 28/2015. (VI. 17.) on the national strategy on safeguarding biodiversity for the period between 2015-2020 (Biodiversity Strategy), Parliament resolution no 27/2015. (VI. 17.) on the National Environmental Protection Strategy for the period between 2015-2020, Parliament Resolution no 18/2013. (III. 28.) on the National Framework Strategy on Sustainable Development, Parliament resolution no 23/2018. (X.31.) on the Second National Climate Change Strategy for the period of 2018-2030, with an outlook for 2050, and Act No. CXXXIX of 2018 on the spatial planning of Hungary and its priority areas.

4. *If your State is one of the 156 UN Member States that recognizes the right to a safe, clean, healthy and sustainable environment,² has this right contributed to protecting, conserving and restoring biodiversity and healthy ecosystems? If so, how? If not, why not?*

The Fundamental Law of Hungary (adopted in 2012) contains numerous provisions on environmental protection as detailed under question no. 3. The aforementioned Article P) recognizes the right of not only current, but also future generations to a safe, clean, healthy and sustainable environment. Article P) provided the basis for establishing the mandate of FG Ombudsman. As discussed in Appendix 1 in detail, we have a range of powers and mandate to help and facilitate the enforcement of these legal principles.

There are very few institutions in the world whose mission is similar to the mandate of the Hungarian FG Ombudsman³. Although the protection of the environment or future generations is mentioned in many constitutions in the world, there are very few of them in which all this is consistently enforced from the preambles through the general provisions to the fundamental rights. The mission of the FG Ombudsman is two-fold, one is to handle and investigate citizen complaints related to the potential infringement of their fundamental rights, the other is to constantly remind the state, including all state organs at all levels, of this task and responsibility via various channels and tools (pls see Appendix 1 on our mandate). The office of the FG Ombudsman has accomplished a number of important achievements in the past years, see Q. no 5.

5. *Please provide specific examples of good practices in preventing, reducing, or eliminating harm to biodiversity and ecosystems, or restoring and rehabilitating biodiversity and ecosystems. These examples may occur at the international, national, sub-national, or local level. Where possible, please provide evidence related to the implementation, enforcement, and effectiveness of the good practices (e.g. measurable outcomes such as increases in terrestrial and marine protected areas, increases in Indigenous and Community Conserved Areas, declining rates of deforestation and poaching, or progress in the recovery of species that were previously threatened or endangered).*

The institution of the FG Ombudsman in itself can be regarded as a best practice in the field - details on the mandate in Appendix 1. Four further examples are set out below, which highlight the different ways in which we have helped to protect and promote biodiversity.

² See, A/HRC/43/53, Annex II.

³ In his report of 15 August 2013 on 'Intergenerational solidarity and the needs of future generations' the UN Secretary-General noted, among eight other institutions, the Hungarian Office of the Commissioner for Fundamental Rights regarding its special mandate in protecting the interest of future generations.



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i. Evaluation of national heritage not only by using economic evaluation methodologies

In protecting the nation's common heritage as per the Fundamental Law, a key question is how to define heritage as a specific national asset and how to assign a value to its services. Expressing the value of ecosystem services in monetary units would be an important tool to raise awareness and convey the importance of ecosystems and biodiversity to policy makers. The State Audit Office ("SAO") has the power to evaluate whether the State has met his extended duty of care when it comes to the common heritage of the nation. For this reason, I have proposed to the President of the SAO to develop (together with our experts) a set of criteria for the assessment of the management of the common heritage taking into account the interests of future generations.

ii. Implementation of UN Sustainable Development Goals (SDGs)

We issued a General Opinion (attached as Appendix II) in December 2017 highlighting the most important recommendations of our practice relevant in implementing the SDGs. The General Opinion summarizes our former recommendations stemming from our everyday practice, the realization of which would be essential to the ambitious national implementation of SDGs. Hungary presented a Voluntary National Review on the national implementation of Agenda 2030 at the UN's High-level Political Forum in New York in July 2018, to which a short summary of our report was attached.

iii. Interpretation by the Constitutional Court

In the period of 2017 to today, a number of groundbreaking decisions was delivered by the CC, all of which represent a substantial progress in the interpretations of the environmental provisions of the Fundamental Law. At the request of the CC we submitted a number of amicus briefs, the essence of which are resonated in the decisions.

In addition to the landmark decision of 13/2018 detailed under question no. 2, two other recent steps are also worth noting.

In decision 4/2019 (III.7.) the CC stressed that it is a constitutional requirement that the authority competent for the environmental and nature protection in its decision-making process do not subordinate environmental aspects to other aspects.

In decision No. 28/2017 (X.25.), the CC explained, in agreement with the position taken by the FG Ombudsman, that the Natura 2000 areas specifically serve biodiversity protection purposes, without these biodiversity in Hungary cannot effectively be preserved. It stressed that in the case of the privatization of the Natura 2000 areas, some very important statutory safeguards are missing, the control of the existing requirements is not properly ensured either, which will in combination result in a decreased level of protection.

iv) A specific species protection example

We used Article P) of the Fundamental Law as a legal basis to call upon the Government to save one of the last habitats of a critically endangered endemic mammal, the rat-mole (*Nannospalax (leucodon) montanosyrmiensis*)⁴. The FG Ombudsman issued an official recommendation stressing that the State has a constitutional obligation to safeguard this endemic species. In line with our recommendation, the competent National Park Directorate has thereafter issued a proposal on designating the biggest Hungarian reservation

⁴ This endemic species is now on the brink of extinction, the remaining number of the species in the whole world is currently estimated to be around 400, and these are to be found in only three locations, one in Serbia, one in Hungary and one on the border between the two.



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area of the rat-mole as a so called “protected natural area with national significance”. Due to the increase of “popularity” of the rat-mole, it was elected “mammal of the year” for 2018.

6. Please identify specific gaps, challenges and barriers that your government, business, or organization has faced in attempting to employ a rights-based approach to preventing, reducing, or eliminating harm to biodiversity and ecosystems.

i. Public participation

In principle, the norms set out by the Aarhus Convention were duly implemented in Hungary. In spite of this, the FG Office is often not involved adequately in the process of law-making (i.e. drafts are not sent to the Office for review and consultation as per the law) and also receives citizen complaints about lack of adequate public participation. We have stressed a number of times that efficient environmental protection requires genuine public participation, meaning the involvement of civil society organizations, ombudsman-type institutions, the representatives of the academic sector, as well as youth as representatives of the next generations.

ii. The transformation of the environmental institutional system

The system of environmental authorities in Hungary was transformed in 2015-2016. The previously independent environmental and nature authorities were integrated into government offices, altering the official decision-making process. The integrated government offices have several jurisdictions with competing interests (eg.: building/agriculture vs. environment/nature, etc.) and no independent state player exists whose primary and exclusive responsibility would be the protection of the natural environment. The FG Ombudsman concluded that the reduced efficiency of environmental authorities had a direct effect on the condition of environmental and natural resources and that as a consequence of the reorganizations, the accessibility and contents of the databases related to the status of the environment changed and part of the institutional knowledge was lost.

7. Please specify ways in which additional protection is provided (or should be provided) for populations who may be particularly vulnerable to declining biodiversity and degraded ecosystems (e.g. women, children, persons living in poverty, members of Indigenous peoples and local communities, older persons, persons with disabilities, ethnic, racial or other minorities and displaced persons). How can these populations be empowered to protect and restore declining biodiversity and degraded ecosystems?

Additional protection for children and the next generations is offered through the mandate of the FG Ombudsman who acts as a quasi guardian of children, pregnant women and the unborn generation through safeguarding the common heritage of the nation - more detail in Appendix I.

To allow for a change in the mindset of the next generations for a more sustainable lifestyle, it is essential that children be provided with adequate information about the importance of environmental protection, including that of biodiversity. Their education should increasingly focus on holistic approach of environmental questions.

8. How do you safeguard the rights of individuals and communities working on biodiversity issues (potentially identified as environmental human rights defenders or land defenders)? What efforts has your Government made to create a safe environment for them to freely exercise their rights without fear of violence, intimidation, or reprisal?



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Besides investigating citizen complains as per its mandate, the FG Ombudsman Office helps environmental NGOs in better channeling their concerns and initiatives into the governmental decision-making process and works with environmental NGOs to raise awareness concerning the loss of biodiversity. Our main partners are national and regional environmental organizations, and the Hungarian branches of the most widely known international NGOs, such as WWF, and that of Birdlife International.

9. *There is substantial evidence that consumption in high-income States is adversely affecting biodiversity and ecosystems in low and middle-income States. What are ways in which high-income States should assist low-income States in responding to biodiversity loss and ecosystem degradation, while simultaneously contributing to sustainable development in those low-income States?*

This question is not directly related to the practice of the FG Ombudsman.

10. *For businesses, what policies or practices are in place to ensure that your activities, products, and services across the entire supply chain (extraction/sourcing, manufacturing, distribution, sale, and end-of life management) minimize biodiversity loss and ecosystem degradation and meet human rights standards, especially those articulated in the Guiding Principles on Business and Human Rights?*

Aiming to elaborate and strengthen the application of the polluter pays principle and the general environmental liability scheme in line with international legal norms, amongst other the Environmental Liability Directive⁵, we have developed and sent to the competent ministries at the end of 2019 a complex legislative proposal. One of the fundamental elements of this legislative initiative is to make the actors of the economy interested in the prevention of environmental damages and to take financial responsibility for the environmental damages that they have caused.

For your information, as appendices we are attaching a short introduction of the FG Ombudsman institution (Appendix no. I) and the English summary of our General Opinion on the implementation of SDGs (Appendix no. II).

Sincerely,

Dr. Gyula Bándi



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⁵ 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