

Reference No.: AJB-1640/2023

To
Mr. Pedro Arrojo-Agudo

UN Special Rapporteur on the human
rights to safe drinking water and sanitation

Dear Mr. Arrojo-Agudo,

Thank you for the opportunity to comment on the thematic report entitled: *Fulfilling the human rights of those living in poverty and restoring the health of aquatic ecosystems: two converging challenges*".

Let me first offer a brief introduction to our institution.

The Office of the Commissioner for Fundamental Rights of Hungary is the Hungarian National Human Rights Institution ("OCFR") accredited by the Global Alliance of National Human Rights Institutions in accordance with the Paris Principles defined by United Nations General Assembly. The work of the Commissioner for Fundamental Rights of Hungary ("Commissioner") is assisted by two Deputies, one responsible for the protection of the interest of Future Generations (Ombudsman for Future Generations, „FGO”) the other responsible for the protection of national minorities (Ombudsman for the Rights of National Minorities). The mandate of the Commissioner encompasses a broad range of fundamental rights, the founding act stipulates four areas with special focus: the Commissioner pays special attention to the protection of the rights of the child, to the interests of future generations, the rights of most vulnerable social groups and the rights of nationalities living in Hungary – all of these are highly relevant from the perspective of the right to water and the protection of aquatic ecosystems.

The existence of the OCFR with the Commissioner and the FGO as Deputy Commissioner focusing on protecting the rights of future generations in itself is an institutional mechanism whose remit encompasses linkages both to the human rights to safe drinking water and the health of aquatic ecosystems. The corresponding constitutional mandate has three main pillars: the human right to a healthy environment, the right to physical and mental health and a provision stipulating the ‘common heritage of the nation’ specifically highlighting water reserves and biodiversity.

Besides giving a general overview based on the Special Rapporteur’s questionnaire, in the below text we also aim to give specific examples of how the OCFR acts as an accountability and monitoring mechanism regarding the right to water.

1. The global, regional, national or local legal and/or policy frameworks:

In the context of the human-rights based approach, it is important to note that the constitutional basis regarding the right to water and the significance of water ecosystems is solidly anchored in the Fundamental Law of Hungary: several articles refer to the importance of water reserves. Article P)¹ regards 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, *as the common heritage of the nation, the protection, maintenance and preservation of which for future generations should be the obligation of the State and everyone else.*

In Article XX. of the Fundamental Law of Hungary also states that *everyone has the right to physical and mental health*, which is enforced, for example, *through access to drinking water*², and that the state has a duty to promote access to public services³.

According to Article XXI. paragraph (1)-(2) of Fundamental Law, Hungary *shall recognize and implement the right of all to a healthy environment*. Healthy environment includes water reserves: one of the legal objects to be protected under Act LIII of 1995 on the General Rules of the Environmental Protection is water as an environmental element. Environmental use must respect the following principles: precaution, prevention, the polluter pays principle in terms of liability for environmental damage, cooperation and free access to data on the state of the environment. As a general rule, environmental uses can only be carried out after obtaining an official authorisation. The rules for authorisation procedures are laid down in lower level sectoral legislation.

Ombudsman practice with respect to groundwater contamination, remedial sites

A leading water pollution problem in Hungary lies in contaminated sites that are waiting to be remediated. The OCFR has conducted several investigations regarding remedial procedures and has identified violations multiple times due to a lack of enforcement of remedial obligations.⁴ In the case of remedial actions, noncompliance identified was mainly due to inadequate identification and delays in the implementation of the remedial actions.

Based on the investigations conducted, and involving a wide range of experts (from civil society through academia to remedial professionals and insurance companies) the FGO has prepared a complex legislative proposal aimed at a more efficient regime of environmental liability and has submitted this to the relevant Ministries⁵ in 2019.

Ombudsman practice with respect to irrigation techniques – constitutional case law

Water scarcity is becoming a major concern in Hungary, as the local climate is gradually becoming more arid. In order to sustain yields in a drying climate, farmers face an increased need for irrigation and small and middle-scale farmers may use wells for irrigation that were originally drilled for household purposes.

In 2017 a planned amendment to the Water Act allowed the drilling of wells down to 80 meters without permitting or notification procedures, hence greatly endangering the quality and quantity of

¹ Article P) reads as follows: “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 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.”

² Article XX of Fundamental Law reads as follows: „Everyone shall have the right to physical and mental health. Hungary shall facilitate the enforcement of the right referred to in Paragraph (1) by ascertaining that the agricultural sector is free of all genetically modified organisms, by providing access to healthy foodstuffs and potable water, by the protection of occupational health, by health care institutions and medical care, by supporting sports and regular physical exercise, as well as by ensuring the protection of the man-made and natural environment.”

³ Article XXII (1) of Fundamental Law reads as follows „The State provides legal protection for the home. Hungary shall endeavor to ensure appropriate and decent housing conditions and access to public services for everyone.”

⁴ AJB-813/2012., AJB-831/2012, AJB-2037/2020, AJB-277/2021.,

⁵https://www.ajbh.hu/documents/10180/3157803/Jogalkot%C3%A1si_kezdem%C3%A9nyez%C3%A9s_k%C3%B6rnyezeti_felel%C5%91ss%C3%A9g/4821a1da-bb6b-8659-e97f-66f8b679c17d

groundwater resources through overexploitation and potential of cross-contamination. After consultation with multiple stakeholders, the FGO published a General Opinion and shared the main arguments with relevant Parliamentary Committees detailing why the legislation would violate constitutional provisions and endanger groundwater resources and public health. The President of Hungary initiated an ex ante constitutional review of this amendment before the Constitutional Court. In this process the FGO provided an amicus brief to the Constitutional Court detailing why the legislation would violate constitutional provisions and endanger groundwater resources and public health. These arguments were echoed in the final decision⁶ of the Court annulling the proposed amendment and qualifying that the cancellation of the permitting regime violates the provisions of the Fundamental Law of Hungary (rights to physical and mental health and to a healthy environment).

The FGO has been following developments regarding irrigation practices and has frequently issued publications and legislative proposals⁷ emphasizing the importance of complex regulatory approval with adequate information as legal guarantees necessary for the protection of aquifers.

2. The global, regional and national court rulings that:

The Hungarian Constitutional Court has a wealth of precedent-setting decisions that deal with various aspects of the right to (physical and mental) health and the right to a healthy environment. The earliest decision is 28/1994 (V. 20.) AB, which stated that the right to health is derived from the inviolability of human".

The decision no 28/2017. of the Constitutional Court⁸ echoes the foundations of intergenerational equity in international law⁹, stipulating three basic obligations for present generations: the conservation of options, the conservation of quality, and conservation of access to natural resources for future generations. The legislator can only meet these fundamental expectations if it takes a long-term view when making decisions, spanning several government mandates.

In the earlier referenced decision no 13/2018 (4. IX.) on drilling wells without appropriate regulatory procedures, the Constitutional Court highlighted that the cancellation of regulatory permitting procedures affects access to drinking water and endangers water resources, and through that affects the right to physical and mental health and the right to a healthy environment. Among others, the Constitutional Court pointed out that the protection of natural resources for future generations includes the preservation of choice, quality and accessibility and that the State ad owner of groundwater resources has specific constitutional duties and responsibilities for water protection originating from the Fundamental Law.

According to the decision No. 3196/2020 (VI.11) of the Constitutional Court, ensuring access to drinking water is an objective obligation of the state, meaning it is obliged to ensure that everyone has access to drinking water in sufficient quantity and quality. The State fulfils this obligation primarily through water utilities. In areas where there is no water supply network or where the water quality is unsatisfactory, the State or the municipalities are obliged to provide drinking water of sufficient quantity and quality in the form of drinking water supply from sources other than public water utilities (eg. public wells, locally delivered water dispenser etc). The State is not obliged to provide access to drinking water as a public service free of charge and without restriction to all, but i) to consumers who pay the price for the public utilities it is obliged to provide access to drinking water, provided that the use does not endanger the natural resource itself and the needs of present and future generations and ii) to those natural persons who are unable to pay the service charge the State is required to ensure that they are not deprived of access to the quantity of drinking water necessary for their existence.

⁶ Constitutional Court Decision 13/2018 (IX.4)

⁷ OCFR reports No. JB-5469/2019., AJB-6928-3/2020., and AJB-41/2021.

⁸ In this procedure the FGO sent an amicus brief to the Constitutional Court

⁹ Edith Brown Weiss: In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity, Transnational Publishers Inc., New York, 1988., pp. 40-45.

The decision No. 14/2020. (VII. 6.) of the Constitutional Court based on a petition prepared by the OCFR on the constitutional scrutiny of the Forest Law introduced the internationally recognised „*public trust*” doctrine indicating that the state acting as a trustee should protect natural resources (including water bodies) for the benefit of future generations, allowing present generations to use and benefit from them only to the extent that they do not endanger the long-term availability of these resources.

3. To right holders:

The complaints received by the OCFR are mainly focused on the fact that public utility system for water supply or sanitation has not yet been implemented in a given area. As indicated earlier before, it is not mandatory for these services to be provided by public utilities, but the provision of minimum conditions is an essential obligation of the state as it affects the fulfilment of fundamental rights.

The OCFR also suggested designating protective buffer zones around both private and public wells to guard against pollution of water resources - most recently, an OCFR report¹⁰ on remedial project also touched upon this issue, and the legislator welcomed our initiative. The principle of security of supply requires the quality of drinking water and the operation of continuous, cost-effective, professionally and safely operated systems in a long-term sustainable manner. The construction, extension and development of the water utility network is the responsibility of the state or local government. The OCFR emphasizes that in order to ensure access for people in vulnerable situations the development of the network should be accompanied by a financial plan to help people unable to afford the cost of connection to the utility network.

Budapest, 20 March 2023

Yours faithfully,

Dr. Gyula Bándi
Ombudsman for Future Generations

Dr. Ákos Kozma
Commissioner for Fundamental Rights

¹⁰ Report no AJB 277/2021