

CASE NOTES

A New Dimension of the Constitutional Responsibility of the State for Environmental Damage?

Decision No. 5/2022. (IV. 4.) AB of the Hungarian Constitutional Court

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Abstract

This article showcases a recent decision of the Hungarian Constitutional Court regarding the State's responsibility in a case concerning environmental damage which reaches back more than half a century. The reasoning attached to the decision contains important findings concerning the State's responsibility, in part deduced from the scope of the right to a healthy environment giving way to the enforcement of individual compensation claims. However, the general validity of the constitutional argument is disputable and yet to be determined. It may be considered a new dimension of the State's constitutional responsibility for environmental damage in light of the right to a healthy environment, with a significant long-term interpretative spectrum. Just as much as it may be interpreted as a way to achieve legal reparation in a particularly unfair and protracted individual legal affair.

Keywords: environmental damage, state responsibility, right to a healthy environment, environmental liability, Hungarian Constitutional Court.

1. Introduction

Perhaps the most unexpectedly direct and tragic way to face the environmental debt of past generations is on the individual level. Of course, in the end we are all affected by environmental harm passed down from earlier generations, but in the case which is the focus of this case note, individuals suffered a loss due to a contamination that took place more than five decades ago – at no fault of their own. The injured parties have been seeking reparation for more than two decades, with various legal proceedings still pending. Decades passed before *Decision No. 5/2022. (IV. 4.) AB* of the Hungarian Constitutional Court (HCC Decision) ruled that the responsibility of the State cannot be ruled out. The responsibility of the

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State in that sense is independent of its underlying liability for environmental remediation according to which it is obliged to clean up and prevent further environmental damage, where no other party can be forced to do so. In this case, the State's responsibility – including the duty to provide individual compensation – was specified also in connection with its constitutional obligations stemming from the right to a healthy environment.

2. Brief Summary of the Facts of the Case

Soroksár lies in District No. XXIII of Budapest. This is still a relatively laidback suburb at the outskirts of the capital, on the plain and more industrialized Pest side. Although Soroksár is the largest district of Budapest, it also has the lowest population,¹ with relatively low housing density. Back in the early 1950's, it was still more of a rural area, having just recently become part of the capital city as District No. XX.² This was one of the key periods of the communist era in Hungary, with the government of the Hungarian People's Republic acting under the subordination of the former Soviet Union (USSR).

The property in focus³ of this case is located in a narrow side street close to the busy main street of the suburb. In 1954 an individual applied for a production permit to produce purine acid, picric acid and salt volatile for nutritional purposes on this property. The permit was granted⁴ owing to the 'national economic interests' associated with the activity. The individual continued the production of these chemicals and products until the end of 1979, the time of their passing.

In the early summer of 2010,⁵ an explosion from below the floor level, followed by another a few days later shook the living room of one of the apartments in the newly built condominium established on the very same property. The apartment in question and two additional apartments were damaged to the extent that they were no longer safe to inhabit. Upon analyzing the circumstances of the explosion and the site thereafter, an environmental forensic report stated⁶ that the plot was heavily contaminated and the level of environmental hazard justified an overall housing restriction on the whole property. Due to the presence of various carcinogenic and toxic substances and to an unpredictable explosion hazard, all residents of the condominium had to leave the property immediately.

2.1. Facts and Circumstances of Legal Relevance

During the communist period, state ownership outweighed the legal ownership structure, as it was the case with the property in question. The individual authorized

1 Official website of the XXIII. District of Budapest, at <https://soroksar.hu/tortenelmi-attekintes-788/>.

2 1 January 1950, Soroksár originally became part of the capital together with the neighboring district of Pesterzsébet.

3 11 Ékes str., Budapest, Soroksár.

4 Resolution No. 59/V/44-1954 of the XX. District Council, dated 23 August 1954, *see also* Decision No. 5/2022. (IV. 4.) AB, Reasoning [8].

5 On 18 and 21 June 2010.

6 Decision No. 5/2022. (IV. 4.) AB, Reasoning [25].

to perform the chemical industrial activity carried it out on state-owned property with permits specifying the benefits of his activity to the state, *i.e.* the state's highly rated economic interest related to the export products produced by the authorized individual. However, due to the authorized and prioritized activity, environmental conflicts arose from the beginning, complaints from the neighboring area regarding air, soil and especially ground and drinking water pollution addressed to the local district council⁷ are traceable back to as early as the start of the authorized activity on the property in 1955.⁸ No evidence of any state interference or measure was found related to those complaints or to the suggested environmental damage. The activity was ceased due to the passing of the individual in 1979. The local council of District No. XX took possession of the property again sometime after that.

Although the handover protocol stated that the building found on the property was in poor condition and had to be demolished, the first official record mentioning the presence of various toxic and explosive substances on the property is a transcript of the local council from 1987.⁹ Later, the local council undertook various measures to assess the environmental damage and hazard by defining the scope of the pollution and setting priorities for the clean-up such as the replacement of the contaminated soil.

Meanwhile, the former political regime was abolished. A milestone of the peaceful transition to democracy in Hungary, the first free election was held in 1990 and the Soviet military occupation of the country which had persisted since World War II, ended in 1991.

The newly established local government became the owner of the property¹⁰ and established a new plan for the environmental remediation of the plot. The property was sold in 1993, to an individual with contractual liability to undertake the necessary measures for the remediation according to a forensic expert plan procured by the buyer and approved by the environmental agency within six months from the date of the purchase. In 1994, the competent environmental authority informed the local government in a certifying transcript¹¹ that the buyer fulfilled its obligation by removing the contaminated soil and the plot was cleaned.

The ownership of the property was transferred again in 2003, this time to a business venture with the intention of investing into building two three-flat apartment buildings on the site. The building permit process was smooth, no question or inquiry arose from the competent authorities related to the former contamination or clean-up process and construction followed. The local government agency as the competent authority issued the certificate of occupancy in 2006, certifying the building's compliance with applicable building codes and other laws,

7 Before the regime change, based on the Act XX of 1949 on the Constitution of the Hungarian People's Republic, the so-called council system was in place, with the first general election of councils held on 22 October 1950. The local body of public administration in villages and towns were the local councils, in the capital the district councils.

8 Decision No. 5/2022. (IV. 4.) AB, Reasoning [10].

9 *Id.* Reasoning [12].

10 Act XXXIII of 1991 on the transfer of certain State-owned assets to municipalities.

11 Transcript No. KF:20.000-3/1994 of the Central Danube Valley Environmental Protection Agency, *see also* Decision No. 5/2022. (IV. 4.) AB, Reasoning [16].

and indicating that they were in a condition of suitable, safe and healthy occupancy.¹² The apartments were sold individually over the next few years, predominantly to young families who used bank loans to be able to purchase them.

In 2010, the explosions severely damaged the buildings, but no person was injured. An additional basement level was found under one of the buildings with barrels and other containers of unidentified chemical substances. The previously mentioned forensic expert's report later specified the large quantities of hazardous chemicals as highly explosive and carcinogenic substances.¹³

2.2. *Legal Proceedings and Lawsuits*

The six owners of both of the three-flat buildings filed their first lawsuit in 2011, not shortly after they were obliged to leave the property due to the environmental hazard. The original compensation suit was directed at several parties to be held accountable for the environmental damage and tort. In addition to the seller and contractor, it also included all other previous owners of the property, including the state and the former local council, the local government agency issuing the occupancy permit, and the environmental agency certifying that the environmental remediation was properly carried out.

It took seven years of legal proceedings for the Budapest-Capital Regional Court to come to a judgment¹⁴ about the potential responsible parties. The court acknowledged the prime responsibility of the contractor – which business venture since went into liquidation – because the underground basement level had to be noticed during the construction but was not reported or otherwise dealt with in an official manner. Instead, it was probably partly used as building foundation for the new construction. The court held the local government agency accountable and stated the irregularities of the process of issuing a certificate of occupancy. However, the court ruled out the responsibility of the state as unfounded, notwithstanding that fact that it was the former owner of the property and well informed about the hazardous activities, and that it had acted as authorizing agency during the entire period of remediation and construction.

The Regional Court of Appeal and later on, the Curia of Hungary also ruled out the liability of the state for the damages, although in its decision,¹⁵ the *Kúria* stated that the cause of the environmental pollution was the activity carried out by the individual on the property for more than two decades, between 1955 and 1979.

Subsequently, the owners submitted their constitutional complaint to the Hungarian Constitutional Court against the judicial decision on the grounds that

12 Id. Reasoning [20].

13 According to the concurring opinion by Marcel Szabó, the hazardous chemicals found on the property cast doubt on the nutrition purpose of the products. Id., Concurring opinion by Justice Marcel Szabó, [116]-[123].

14 Judgment No. 36.P24.421/2015/139 of the Budapest-Capital Regional Court (6 November 2018), *see also* Decision No. 5/2022. (IV. 4.) AB, Reasoning [29].

15 Judgment No. Pvf.III.21.484/2019/12 of the Curia of Hungary (27 October 2020), *see also* Decision No. 5/2022. (IV. 4.) AB, Reasoning [35]-[37].

it violated their rights guaranteed by the Fundamental Law of Hungary and by the ECHR.¹⁶

3. The Responsibility of the State for Environmental Damage

3.1. *The Scope of the Responsibility of the State for Environmental Damage*

Firstly, to be able to identify new perspectives traceable in the HCC Decision with regard to the state's responsibility concerning the right to a healthy environment, it is of utmost importance to differentiate the diverse layers of state responsibility in relation to environmental damage and remediation. It is reasonable to differentiate between the different cases on the basis of the temporality of the environmental damage and also upon the identity of the polluter. Although there might be overlaps among the categories, especially in cases of so-called 'historical' damage, in terms of the legal basis of state intervention, these two features – temporality and polluter – are legitimate and justified grounds for distinction. However, the basis of the state's obligation to take action in terms of the element to consider is uniform: it derives primarily from its responsibility to protect life, more precisely, from its obligation to guarantee the fundamental right to a healthy environment.

Upon the first aspect, a clear distinction must be made between the responsibility of the state based on the timeliness of the environmental use in relation (i) to preventing environmental damage; (ii) to dealing with environmental damage generated during operation; and (iii) to remediating already existing environmental damage. The first category has the least relevance in this case, as it is mainly concerned with preventing future pollution during the authorization of a specific activity, and in that case, the user of the environment is present. In the second category, also in line with the precautionary principle, the need for immediate intervention may arise in cases where the aim is to tackle existing damage or prevent further spread. In these cases, however, there is a responsible party on whose behalf the State acts and against whom it can take action *ex post*, through its institutional system, to enforce accountability. In the third category, a further distinction must be made between existing pollution and so-called 'inherited'¹⁷ or 'historical' environmental damage. In Hungary, these pollutions typically date from before the regime change, but can generally be defined as cases where the polluter can no longer be identified and detected and held accountable due to the passage of time. In former communist countries, these are also cases where, due to the specific economic and property structure of the past, only the State can be held liable.

16 The constitutional complaint alleges that the judgments are contrary to Articles VI, XV, XXI, XX, XXVIII and 28 of the Fundamental Law of Hungary as well as to Articles 2, 6, 8, 13 ECHR. Of all these aspects, the present case note focuses on the grounds relating to the fundamental right to a healthy environment.

17 In 2017, Greenpeace Hungary issued a report on 'Toxic Heritage', listing contaminated sites and possible 'chemical bomb effects' in Hungary. The property in focus of this case-note is included, some photos are also available. See at <https://sites.greenpeace.hu/mergezett-oroksegunk/soroksar/>.

With respect to the polluter, the simplest case of state liability is where the environmental damage is caused by the activity of the state or activity carried out on behalf of the state. However, it is important to stress that, precisely on the basis of the right to a healthy environment and the protection of the interests of future generations, and in accordance with the principle of prevention, the state has a duty to remedy damage in all cases where the polluter, for whatever reason, cannot be required or is unable to do so. In such cases, the responsibility for environmental remediation inevitably falls on the state, whether or not the polluter can subsequently be held accountable.

The Environmental Liability Directive (ELD)¹⁸ which entered into force in 2007, is the starting point for national legislation in EU countries. The ELD established a liability regime for environmental damage based on the ‘polluter-pays’ principle, putting prevention first. The ELD defines the role of the state in relation to environmental damage primarily in terms of developing an appropriate and effectively functioning institutional system based on equally effective national legal measures.¹⁹ The underlying responsibility of the state is not specifically detailed, but the former requirements also imply that the state must be able to act effectively, through the established organizational arrangements,²⁰ in all cases where the polluter, the original cause of the environmental damage or imminent threat of environmental damage is, for whatever reason, not identifiable or is unable to prevent or eliminate it. However, the ELD does not cover emissions before 2007.²¹ The main goal of the European rules is to set the framework for national legislation for the prevention of future environmental risk or damage, and to promote effective national legislative and institutional measures²² to ensure that no further environmental debt is created. As such, the main focus of the ELD is not the elimination of environmental burdens, but the prevention of adding further burdens.

The Hungarian national legislation²³ regulates the issue of environmental liability in line with the ELD, reflecting the state’s obligations to prevent future pollution and to remedy existing pollution. In the case at hand, this was only relevant from the aspect that the state had to carry out the remediation of the site following the explosions. This meant the identification of the contaminants, the assessment of the risks and the damage, the prevention of further spread, and the clean-up and monitoring of the site within the procedural framework set out in the

18 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 (Environmental Liability Directive).

19 Environmental Liability Directive, Recitals (2) and (5).

20 According to Article 11 of the Directive, “Member States shall designate the competent authorit(ies) responsible for fulfilling the duties provided for in this Directive.”

21 *Id.* Article 17.

22 *Id.* Article 11.

23 Act LIII of 1995 on the General Rules of Environmental Protection; and Decree of the Government 219/2004. (VII. 21.) on the protection of groundwater.

ELD and in the transposed Hungarian legislation.²⁴ However, the basis for the state's action was its constitutional obligation in the field of environmental protection, and not its responsibility for the environmental damage caused in the specific case, which was later sought by the owners, the plaintiffs in the litigation process that ultimately led to the HCC Decision.

To summarize this part of the argument, the state always has a duty to act to prevent, remedy and repair environmental damage, by virtue of its general duty to protect life and prevent damage. That does not necessarily mean, however, that the state is liable for the occurrence of the environmental damage or for further damage resulting therefrom, as in the present case.

However, 'historical' damages represent a specific category, since in these cases, in the absence of a polluter, the state alone is responsible for the elimination of the damage. Due to the specific historical and economic context of the case, these damages also inevitably occurred in connection to the state's activities in the period before the regime change.²⁵

The issue of liability for historical, residual damage is a challenge not only in Hungary, but in many countries around the world.²⁶ These cases require interdisciplinary expertise and often entail costs that are very difficult to estimate.²⁷ Different models have been developed by states²⁸ to cover the financial costs of remediation. However, it is commonly understood that recent users of the environment are less willing to share the costs of the clean-up of these sites than allocating funds for the effective intervention of authorities in such cases.²⁹ In Hungary, during the period of economic restructuring, to avoid overloading the central budget, newly established business ventures, companies took over the responsibility for the remediation of environmental damage through privatization

24 The Report No. 813/2012. of the Commissioner for Fundamental Rights in Hungary described all relevant legal facts in relation to remediation of the site until 2012. The report underlines – upon examination of similar cases – that the passage of time in itself and the unduly length of remediation can be a cause of constitutional nuisance in relation to the right to a healthy environment.

25 A report issued by the Herman Ottó Institute on the 20th anniversary of the National Environmental Remediation Program lists the ongoing remediation under the responsibility of the State, among them four ex-soviet barracks. See Ildikó Péntekné Balogh *et al.* (eds.), *20 éves az Országos Környezeti Kármentesítési Program*, Adu Press, 2016, at https://xn--krnyezetvedelem-jkb3r.hu/sites/default/files/media/docs/20_eves_a_okkp.pdf.

26 The European Environment Agency's archived page titled 'Progress in management of contaminated sites' aimed to provide a comprehensive picture of the management of contaminated sites in the EU countries. See at www.eea.europa.eu/data-and-maps/indicators/progress-in-management-of-contaminated-sites-3/assessment.

27 At the 1995 launch of the National Environmental Remediation Plan the estimated cost for all State responsibility remediation was 1000billion Hungarian Forints for 30-40 years term.

28 The best known of these models is probably the 'Superfund', the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in the US. When there is no viable responsible party, Superfund gives the competent environmental protection agency (EPA) the funds and authority to clean up contaminated sites. Hungary also implemented a similar model, allocating financial assets from the central budget into a 'Central Environmental Fund' between 1990 and 2004.

29 The Hungarian Ombudsman for Future Generation issued a legislation proposal to better enforce the environmental liability, which touches upon the possible financial resources and collateral systems, financial security instruments and markets as well. See at www.ajbh.hu/documents/10180/3157803/Jogalkotasi_kezdemenyezes_kornyezeti_felelossag/4821a1da-bb6b-8659-e97f-66f8b679c17d.

or sale and purchase agreements, through succession or through takeovers, as it happened in the case at hand as well.³⁰

In practice, there are many reasons why such abandoned, ‘inherited’ damage eventually falls on the state once it has become unmanageable by market actors. States have developed diverse regulatory models for dealing with these types of cases, including criminal law remedies. In relation to this latter point, it is worth mentioning, that upon the proposal of the European Commission, the revision of the Environmental Crime Directive³¹ led to a proposal for a new directive, which includes the case of the offender not fulfilling their obligations to take remedial action under the regulation of the ELD as an aggravating circumstance.³²

In the present case, too, the responsibility to remediate after the explosion should have passed to the state. But the fundamental question in this case is whether the state can be held liable for the environmental damage, its occurrence, and the resulting situation and, ultimately, for the specific compensation claims of the victims, on the basis of neglecting its constitutional obligations and its liability for these obligations in relation to environmental protection.

The theoretical foundation of the State’s liability and obligation to remediate environmental, including ‘historical’, damage is the fundamental right to a healthy environment and the protection of the interests of future generations based on solidarity between generations. In terms of intergenerational justice, it is the responsibility of the present generation to manage the environmental debt burden, preferably by not passing it on to future generations, or at least not in an ever-increasing fashion, limiting their opportunities for equal access and decision-making.³³ In Hungary, the protection of the interests of future generations³⁴ is declared by the Fundamental Law as an obligation of the state and of everyone, through the protection of the common heritage of the nation.³⁵

A milestone in the process of establishing universal measures to ensure a more sustainable future is the recognition of the fundamental right to a clean, healthy and sustainable environment by the UN General Assembly in the summer of 2022.³⁶ Nevertheless, the task to give precise, practical meaning to the concepts of ‘clean’, ‘healthy’, and ‘sustainable’ is a long-term task for the future, as is the

30 Ilona Agócs, ‘Az állam felelőssége a történelmi károk kialakulásában, megelőzésében és kezelésében, a területek hasznosítására vonatkozó kitekintéssel’, *Pro Futuro*, 2020/2, p. 161.

31 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

32 Proposal for a Directive of The European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, Article 8.

33 Edith Brown Weiss, ‘In Fairness to Future Generations and Sustainable Development’, *American University International Law Review*, Vol. 8, Issue 1, 1992, pp. 19-26.

34 UN Secretary General Ban Ki-moon issued a report in 2013 on ‘Intergenerational solidarity and the needs of future generations’, which highlighted several national institutions that can serve as important models for the further promotion of the protection of the interests of future generations, one of them being the Hungarian Ombudsman for Future Generations.

35 Fundamental Law of Hungary, Article P(1).

36 Draft resolution on the human right to a clean, healthy and sustainable environment adopted by the UN General Assembly on 22 July 2022.

uniform interpretation of the responsibility of States under fundamental rights in this regard.

3.2. *The Decision's New Approach to the State's Responsibility*

By accepting the constitutional complaint, the Hungarian Constitutional Court already acknowledged that the case raised paramount constitutional questions.³⁷ However the basis upon which the complaint was accepted was less in connection to the right to a healthy environment. Rather, it touched upon the state's liability for environmental damages originating from the times before the regime change, *i.e.* the 'historical' damage, disputing that it can be established *via* omission.³⁸ In terms of the present topic the emphasis is on the latter.

One of the reasons that the state's liability was previously ruled out was that the property was managed by the individual authorized to perform the hazardous activity. This person was to be considered the manager of the property and was therefore individually liable for the damages caused by the activity. The Hungarian Constitutional Court dismissed this argument by pointing to the specific ownership structure of the era characterized by the unified and indivisible ownership of the State.³⁹

More importantly, the second argument supporting the exemption of the State from liability was the general statement that environmental damage, by its nature, cannot be caused by omission. On the contrary; the reasoning of the previous court decision⁴⁰ argued that environmental damage due to polluting requires a specific activity carried out by the polluter and a casual link between the activity and the damage. Hence, liability can only be attached to a party who is involved in carrying out such an activity, and consequently, who is the user of the environment.

In this particular case, this reasoning also meant that the victims could have ultimately brought a claim for damages mainly against the contractor, with highly doubtful results, since it had ceased to exist without successor. It is important to note that the contractor had nothing to do with the origin of the environmental damage. The construction work may have involved covering up a basement containing various hazardous substances below ground level, but those were there despite the previously certified remediation. The contractor entered the casual chain of events at a later date. This situation seems extremely unfair to the victims, who were faced with the fact that there was no party effectively liable and willing to pay compensation for the damages they suffered due to the contamination. Also notable, more than a decade had passed since the explosion and the owners leaving their homes, and there is still no legal solution to the matter. Nevertheless, the whole process, which dates back half a century, was demonstrably carried out with the knowledge of the state, and later on, with the involvement of the public authorities, acting in their various capacities.

37 Act CLI of 2011 on the Constitutional Court, Section 29.

38 Decision No. 5/2022. (IV. 4.) AB, Reasoning [57].

39 *Id.* Reasoning [71].

40 *Id.* Reasoning [57].

The new approach lies precisely in the fact that the victims had reasons to trust in the guarantee role of the state's involvement. In the Hungarian Constitutional Court's practice, the two aspects of the fundamental right to a healthy environment are the protection of the conditions of life and the protection of institutions.⁴¹ The former is the duty to protect the conditions necessary for the long-term survival of (human) life on the face of the Earth, and the latter is the duty to establish and operate an effective regulatory and institutional system for this purpose and to ensure its proper functioning.⁴² The essence of the decision is that a judicial interpretation which does not consider the responsibility of the State as owner and exerciser of public authority to be reviewable is not acceptable, because it would empty the former essential substance of the fundamental right to a healthy environment. This interpretation cannot be consistent with the content of the state's constitutional obligation.⁴³ It means that in a process in which the (environmental) damage occurs as a result of pollution from more than half a century ago and following a remediation procedure, the state has not, and could not, fulfil its role as guarantor.

In that sense it is a liability based upon the failure of fulfilling the state's obligation and not upon being the active polluter. The activity in question in this case was nevertheless carried out on behalf of the state and it was considered a 'national economic interest' during the permit process, but the progressive interpretation of the HCC Decision is not based solely upon that. The Hungarian Constitutional Court grounded it also upon the fact that the state was aware of the risks of the activity. In addition, authorities have received complaints from as early as the activity began, still the state failed to intervene at any point. In this regard, it is relevant that the first act on the protection of the human environment in Hungary was already in force in 1976.⁴⁴ Moreover, the state's role is also to monitor the competent authorities who certified the environmental remediation of the site, the replacement of the soil, and later on provided the building and the occupancy permits.

The HCC Decision basically indicates that with the required effective public measures and institutions, the causality of the events could and may have been stopped, and this factor in itself must be examined in a liability case. The interpretation of the Ombudsman for Future Generations is also in line with this reasoning, making arguments in relation to 'historic' damage. This means that the state has an obligation to enforce in due time the remediation clause attached to the sale of the property and, as the former owner, is responsible for ensuring that, in the event of non-performance, the financial guarantee provided for in the contract is reimbursed and the state carries out all the necessary interventions to

41 Decision No. 28/1994. (V. 20.) AB, ABH 1994, 134, 140, is the basis of the consistent practice of the Hungarian Constitutional Court regarding the right to a healthy environment for over almost three decades.

42 The constitutional frameworks for the institutional system of protecting the environment was laid out essentially in Decision No. 4/2019. (III. 7.) AB.

43 Decision No. 5/2022. (IV. 4.) AB, Reasoning [88].

44 Hungarian Act II of 1976 on the protection of the human environment.

prevent and manage the damage. The state can also be expected to monitor the performance of contracts and take action in the event of non-performance.⁴⁵

In this respect, the Hungarian Constitutional Court found that, irrespective of the specific ground of liability, the state's liability in the case at hand may arise from its failure to fulfil its constitutional obligations in relation to the fundamental right to a healthy environment. Moreover, the decision went even further and held that for the failure of the state to fulfil its duty to ensure a fundamental right, i.e. to act with particular care in the drafting and in the enforcement of the legislation to protect the environment, the state could be called upon and held accountable by the individual.⁴⁶

Both approaches – the neglect of constitutional obligation as a cause available for consideration and the substantive side of the right to a healthy environment – offer a new perspective on the state's responsibility for environmental damage.

The latter, the substantive relevance in particular could raise a number of practical questions in future cases. In this respect, it is worth mentioning that to avoid similar cases, the HCC Decision also refers⁴⁷ to the urgent need for a so-called priority list,⁴⁸ which is to set the priorities, order, and timelines of the state remediation process of known 'historical' environmental damages. It is also important for this list to be made public and provide access to environmental information.⁴⁹

4. Conclusion

The HCC Decision is in line with the consistent practice of the Hungarian Constitutional Court in terms of it establishing the state's responsibility to intervene in order to prevent or lessen the magnitude of the environmental damage deduced from its obligation to ensure the fundamental right to a healthy environment. In a case where, in this sense, 'nothing' has happened for decades, the controversy between the facts of the case and the goal of the constitutional obligation of the state should at least be taken into account, because it raises questions about the fulfillment of those obligations.

The new perspective in the Hungarian Constitutional Court's interpretation is the acknowledgement of state neglect as a cause for liability and a shift to the subjective side of the fundamental right as opposed to the institutional protection

45 Legislation proposal of the Hungarian Ombudsman for Future Generation to better enforce the environmental liability. See at www.ajbh.hu/documents/10180/3157803/Jogalkotási_kezdeményezés_környezeti_felelősség/.

46 Decision No. 5/2022. (IV. 4.) AB, Reasoning [88].

47 Id. Reasoning [84].

48 The Priority List was established as part of the National Environmental Remediation Plan, it prioritized the remediation of historical damage based on a methodology evaluating the risk and the magnitude of the pollution. The Priority List has not been made public since 2010, regulated by the Resolution of the Government 1042/2008. (VI. 30.), Section 1.39.

49 In accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998, transposed into Hungarian legislation via the Act LXXXI of 2001 (Aarhus Convention).

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aspects. The reasoning of the Decision can be valid in all cases where new damage may arise from ‘historical’ environmental damage which may not have been previously reported or known.

The scope for interpretation and application in individual cases is wide. The general validity and the enforcement of such constitutional requirement is still up to future cases – including the outcome of the retrial of the present case.⁵⁰

50 Order No. Kpk.39.445/2022/3 of the Curia of Hungary (17 May 2022), Reasoning [19]. A newly submitted constitutional complaint to the Hungarian Constitutional Court against Partial Judgment No. Pvf.III.20.232/2022/10. of the Curia of Hungary (28 September 2022) in the case is based upon the argument that the constitutional standards laid down in the CC Decision were not taken into consideration and enforced resulting in the violation of the right to a healthy environment.