

GYULA BANDI

Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations¹

bandi.gyula@jak.ppke.hu

THE HUNGARIAN OMBUDSMAN FOR FUTURE GENERATIONS

L'OMBUDSMAN UNGHERESE PER LE GENERAZIONI FUTURE

SINTESI

Questo contributo mira a fornire un'introduzione su un'istituzione relativamente giovane – attiva dal 2008 – in Ungheria, che opera nell'interesse delle generazioni future. Per meglio comprendere il tema, si pongono alcune delle criticità correlate al tema delle future generazioni, seguite da una panoramica sulla storia, il contesto e alcune delle prassi di questa specifica organizzazione

ABSTRACT

This paper is a short introduction to a relatively novel – active since 2008 - institution in Hungary, serving future generations interests. To set the scene, some general foundations of the future generations challenge is presented, followed by an overview of the history, context and some practice of this specific ombudsperson organization.

PAROLE CHIAVE: Ungheria; Ombudsman; generazioni future.

KEYWORDS: Hungary; Ombudsman; future generations.

TABLE OF CONTENTS: 1. Some basics of international and domestic documents in terms of future generations – 2. Regarding the concept of future generations – 3. The ombudsman of future generations in Hungary

1. Some basics of international and domestic documents in terms of future generations

¹Elected in February 2017 for a six years term by the 2/3 majority of the Parliament

The current interpretation of sustainable development, providing primarily the primary basis for our topic has been based upon the report of the 'Brundtland Commission', adopted in 1987¹. The UN conference in Rio five years later could build on this report, accepting the Rio Declaration on Environment and Development², which is now taken as a decisive element of our current thinking. Principle 3 might be taken as the most important principle from our point of view: «*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*». And if we now try to understand this definition in a simple way, we might conclude: «*A synthesis of these core documents shows that the meaning of 'sustainable development' can be reduced to the combination of two principles that can be seen as axiomatic to understand sustainable development: intergenerational and intragenerational equity*»³

Five years after Rio, a declaration on the responsibilities of the present generations towards future generations has been issued⁴ (Declaration, 1997), covering several commitments (taking into consideration the needs and interests of future generation, freedom of choice, environmental protection, cultural diversity, peace, or non-discrimination, etc., altogether presented in 11 articles) presented as moral obligations to formulate behavioral guidelines for the present generations.

Countries have different sustainable development strategies and Hungary is not an exception. Therefore, in this respect, we might also refer to the ideas of Hungarian sustainable development strategy, adopted in 2012, completing its third progress report at the end of 2019, as this aims to clarify the above

¹Report of the World Commission on Environment and Development: Our Common Future, as an annex to the document no. A/42/427, presented to the UN General Assembly

²Rio Declaration, adopted by the UN Conference on Environment and Development, 3-14 June 1992, Rio de Janeiro,

³BARRAL, Virginie: Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm, *The European Journal of International Law*, Vol. 23. no. 2, 2012, p. 380

⁴Declaration on the Responsibilities of the Present Generations Towards Future Generations, 12 November 1997, The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 21 October to 12 November 1997 at its 29th session

thoughts better⁵ (NFFS, 2012, pp. 9): «*Therefore sustainability should be defined in a way that any generation, while striving to create their own well-being, do not deplete their resources, but conserve and expand them both in terms of quantity and quality for future generations. The interests of those unborn, and therefore without voting right, may only be protected by current generations limiting their own freedom through moral, constitutional or institutional restrictions*».

2. Regarding the concept of future generations

Equity towards future generations, the equitable behavior is by no means a part of international policies and regulations, mostly in connection with sustainable development. The understanding of the rights of future generations – and obviously the other foundation of sustainable development, intragenerational equity - is a fascinating moral and legal challenge, which several authors have try to address along the lines of different approaches, on a scale from the heartfelt support to total rejection. Here I do not want to enter into a deep examination of the concept, instead I only refer to Edith Brown Weiss, being the pioneer and most prominent author of the rights of future generations. The basic enigma is not too difficult: «*This ethical and philosophical commitment acts as a constraint on a natural inclination to take advantage of our temporary control over the earth's resources and to use them only for our benefit without careful regard for what we leave to our children and their descendants*»⁶. In her paper Weiss classifies three major principles in connection with intergenerational equity, namely

⁵National Framework Strategy on Sustainable Development 2012–2024, Passed by and recommended to be submitted to the Parliament by the National Council for Sustainable Development on the session of 16/May/2012.

Passed by the Parliament on the session of 25/March/2013, p. 20.,
<https://www.nfft.hu/documents/127649/4101265/NFFT-ENG-web.pdf/f692c792-424d-4f5a-9f9d-9e6200303148?t=1580130885736>

⁶WEISS, Edith Brown: In Fairness to Future Generations and Sustainable Development, American University International Law Review, Volume 8, Issue 1, Article 2, 1992. p. 18 and 19. The major publication of the same author in this respect: WEISS, Edith Brown: In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity, New York: Transnational Publishers, Inc., 1989

- the first is to conserve options, diversity of choice – «*Future generations are entitled to diversity comparable to that which has been enjoyed by previous generations.*»
- the second is to maintain the quality comparable to that which has been enjoyed by previous generations,
- the third principle is the equitable access, e.g., access to potable water supplies.

Later the author presents four general decisive criteria underlying these principles⁷:

- equality among generations, which does not allow the present generations to exploit resources to the exclusion of future generations, or to impose unreasonable burdens on present generations to meet indeterminate future needs,
- we may not predict the values and preferences of future generations therefore sufficient flexibility is needed to achieve their own goals according to their own values and preferences,
- clear expectations are needed in the application to foreseeable situations,
- the different cultural traditions and different economic and political systems shall be taken into consideration.

Weiss also referred to the need of institutional representation of future generations, as well as legal and policy scholars in many respects analyze the problem to clarify the most general features of a proper institutional representation of future generations. Here I refer only to the World Future Council, being a think-tank of several professions with environmental relevance. The Council has formed a Future Justice sub-commission and working group dealing extensively with this issue. The major features of such an institution ac-

⁷See above, pp 22-23

According to WFC are: longtermism, integration, bringing authority to agreed sustainability goals and holding governments and private actors accountable for not delivering on them and connecting citizens with the national and even international level decision-making procedures⁸. WFC has issued a leaflet⁹ on this issue and further broke down the main branches of the responsibilities:

“The Guardian

- as an ombudsperson conveys citizen concerns to the legislating units,
- as an interface creates incentives for integration and prevents policy incoherence,
- as an advisory body recommends solutions,
- as an auditing body traces conflicts of interests and road-blocks to implementation.”

3. The ombudsman of future generations in Hungary

The institution of the Hungarian Ombudsmen (commissioners of fundamental rights) was established during the democratization process of the late 1980's and early 1990's¹⁰, while the first ombudspersons were elected in 1995. The previous Hungarian Constitution adopted a model of the ombudsman system with separate Commissioners for the protection of individual rights, with the Ombudsmen being nominated by the President of Hungary and being elected by the Parliament with a 2/3 majority for a 6-year mandate. This also refers to the independence from the Government (qualified majority of the Parliament, with a tenure longer than government cycles). The Ombudsman was responsible, amongst others, for the protection of the right to a healthy

⁸<https://www.worldfuturecouncil.org/future-justice/>

⁹<https://www.worldfuturecouncil.org/guarding-our-future/> One may also find our introductory page in the paper.

¹⁰The first ombudsman act was the Act LIX. of 1993, while the current act is the Act CXI of 2011 – one may find the English version at: <https://www.ajbh.hu/en/web/ajbh-en/act-cxi-of-2011>

environment. However, the text of the Constitution allowed for the election of additional Ombudsmen for the protection of other fundamental rights.

A Hungarian civil society organization - Védegylet (Protecting the Future) - made extensive efforts in order to raise awareness of and popularize the idea of a novel institution for the protection of future generations. With strong support from the then President of Hungary, it was possible to reach multi-party acceptance for the initiative in 2007 and the first OFG was elected in May 2008.¹¹

The first OFG and its staff functioned as an independent institution to monitor, evaluate, influence, and control the enforcement of sustainability through legal means, working separately from the other Ombudsmen. It had strong competencies to investigate issues concerning citizens' right to a healthy environment or that had a likely impact on long-term sustainability and the condition of the natural environment. It had powers to prepare independent reports, resolutions, and legal recommendations, initiate judicial and Constitutional Court proceedings, or even veto concrete measures, decisions of public administration. Anyhow, this special status proved to somewhat different from the traditional ombudsman type activities. Beside the future generations, there had also been an independent ombudsperson for the right of national minorities and for data protection.

In 2012, with the adoption of the new constitution, the Fundamental Law and parallel with it a new Act CXI of 2011 on the Commissioner for Fundamental Rights (hereinafter the Ombudsman Act), a new institution, the Office of the Commissioner for Fundamental Rights was established by merging the independent Ombudsman offices into one. Since 2012 the OFG - as well

¹¹For a better introduction see: An Institution for a Sustainable Future, The Hungarian Ombudsman for Future Generations by Kinga Debisso & Marcel Szabó, in *Hungarian Yearbook of International Law and European Law* 2021 (9) 1, Editor-in-chief: Prof. Marcel Szabó, Eleven, the Hague,

or Sándor Fülöp, 'Clarification and Networking. Methodology for an Institution Representing Future Generations' in Bándi, Gyula (ed) *Environmental Democracy and Law, Public Participation in Europe*, (Europa Law Publishing, 2014)

as the Ombudsman for the Rights of National Minorities - is a Deputy to the Commissioner for Fundamental Rights. (The data protection, being previously a separate ombudsman position, at this time was formed as a special central office, the head of it also elected by the Parliament.) The drafters of the new constitution had a different concept related to the parliamentary protection of human rights, namely, they did not agree with the relatively strong specific ombudsmen system, instead the idea to have one general ombudsman's office with deputies proved to be the preference. The deputies are nominated by the ombudsman to the Parliament.

The status of the OFG was solidified by having anchors and specific provisions built in the new Fundamental Law. His main mandate focuses on a broadly defined representation of the interests of future generations through the preservation of natural and cultural resources and the protection of citizen's fundamental right to a healthy environment, physical and mental health.¹²

The wording of the Fundamental Law is the following:

«Article 30:

(1) The Commissioner of Fundamental Rights shall protect fundamental rights and shall act at the request of any person.

(2) The Commissioner of Fundamental Rights shall examine or cause to examine any abuses of fundamental rights of which he or she becomes aware of and shall propose general or specific measures for their remedy.

(3) The Commissioner of Fundamental Rights and his or her deputies shall be elected for six years by a two-thirds vote of the Members of Parliament. The deputies shall defend the interests of future generations and the rights of nationalities living in Hungary.»

It is also worth to refer to the current wording of the Ombudsman Act:

«Art. 1

¹²For the details of the history and major tasks, also of the most important theoretical background of the institution, see: Intergenerational Justice in Sustainable Development Treaty Implementation, Edited by Marie-Claire Cordonier Segger, Marcel Szabó, Alexandra R. Harrington, Cambridge University Press 2021

(1) The Commissioner for Fundamental Rights shall – in addition to his/her tasks and competences specified in the Fundamental Law – perform the tasks and exercise the competences laid down in this Act.

(2) In the course of his/her activities the Commissioner for Fundamental Rights shall pay special attention, especially by conducting proceedings ex officio, to the protection of

a) the rights of the child,

b) the values determined in Article P of the Fundamental Law (hereinafter referred to as “the interests of future generations”),

c) the rights determined in Article XXIX of the Fundamental Law (hereinafter referred to as “the rights of nationalities living in Hungary”), and

d) the rights of the most vulnerable social groups.

...

Art. 3

(1) The Deputy Commissioner for Fundamental Rights responsible for the protection of the interests of future generations shall monitor the enforcement of the interests of future generations, and

a) shall regularly inform the Commissioner for Fundamental Rights, the institutions concerned and the public of his/her experience regarding the enforcement of the interests of future generations,

b) shall draw the attention of the Commissioner for Fundamental Rights, the institutions concerned and the public to the danger of infringement of rights affecting a larger group of natural persons, the future generations in particular,

c) may propose that the Commissioner for Fundamental Rights institute proceedings ex officio,

d) shall participate in the inquiries of the Commissioner for Fundamental Rights,

e) may propose that the Commissioner for Fundamental Rights turn to the Constitutional Court,

f) shall monitor the implementation of the sustainable development strategy adopted by the Parliament,

g) may propose the adoption and amendment of legislation on the rights of future generations, and

h) shall promote, through his/her international activities, the presentation of the merits of domestic institutions related to the interests of future generations.»

The Fundamental Law contains multiple references to future generations, with the preamble setting out the following: *«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».*

The constitutional mandate of the OFG has two main pillars: the human right to a healthy environment and a novel provision stipulating the ‘common heritage of the nation’. It provides that all natural resources constitute the common heritage of the nation and thus shall be preserved, maintained, and protected by everyone, including the state for the benefit of future generations. Based on such constitutional language, in the practice of the OFG the “interests of future generations” are understood as issues relating to very broadly defined environmental interests, intergenerational justice, sustainability and cultural heritage protection.

The actual clauses underpinning the mandate of the OFG in the Fundamental Law are the following:

Article P) (1): *«Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations».*

Article XX

(1) «*Everyone shall have the right to physical and mental health*» And Par. 2 clarifies that environmental protection is on the means of implementation.

Article XXI

(1) «*Hungary shall recognise and endorse the right of everyone to a healthy environment*»

The means and methods through which the OFG exercises its mandate is set out in the Ombudsman Act. In many aspects the Ombudsman works closely together with the general Commissioner while in other instances he acts independently.

1. As its main task the Ombudsman investigates *citizens' complaints* filed concerning maladministration complaints, alleged violations of the right to a healthy environment, right to physical or mental health and rights of future generations. During these investigations they have extensive authority to request relevant information and look into documentation they deem significant. Concluding these investigations, the Ombudsman and the Commissioner issue joint reports containing recommendations addressed to respective authorities and Ministries to comply with their constitutional obligations. In case a need for changing the corresponding legislative setting is detected, the concluding report can contain legislative proposals.
2. The Ombudsman with the Commissioner can launch *ex officio investigations* into any matter affecting the well-being, rights and interest of future generations in order to explore and call attention to systemic errors or potential mismanagement and propose an improved course of action and/or legislative framework.
3. The Ombudsman, through the Commissioner can seek a *constitutional review* procedure before the Constitutional Court relating to any piece of legislation that is suspected to violate the relevant provisions of the Fundamental Law affecting the well-being, rights and interest of future

generations or the present generations' right to a healthy environment, physical and mental health.

4. In case of an alleged *conflict* between a *local and a national piece of regulation*, the Ombudsman, through the Commissioner may request the Curia (Highest Court) to review their compatibility.
5. The Ombudsman functions as a *watchdog* in monitoring the national sustainability strategy and the situation and enforcement of the rights of future generations and raises awareness in this respect. He has the right to examine and advise on national and local legislative actions; to monitor policy developments and legislative proposals to ensure that they do not pose a severe or irreversible threat to the environment or harm the interests of future generations. In doing so, the Ombudsman can
 - a. *inform* competent *ministers and stakeholders* about his concerns in writing or voice his concerns in the meeting of *Parliamentary committees* that are responsible for drafting a given piece of legislation,
 - b. submit *legislative proposals* in fields covered by his mandate (some of the most recent: green waste burning, fireworks, data protection within water management),
 - c. publish so called *Ombudsman opinions*, quasi position papers regarding any matter relating to the protection of the interests of future generations,
 - d. can intervene in court in the judicial review of administrative decisions in environmental matters,
 - e. issue *press releases* to call attention to significant matters.
6. The Ombudsman has a significant role in providing a *neutral platform for negotiations and building consensus* between the scientific community, expert NGOs and governmental stakeholders to discuss legislative proposals and pressing environmental issues thereby effectively channelling pu-

blic comments and the opinion of the scientific community into law-making and enforcement processes.

Above I already listed some more flexible instruments which are not directly connected to individual cases but rather comprise more general messages, worth to be outlined a bit better, such as the followings:

- issuing “general opinions” on various topics (as for example: status and funding of nature conservation directorates, inappropriate heating techniques by citizens, soil and groundwater protection, SDG implementation) on own initiative,
- designing ex officio investigations to explore systemic problems, which might also lead to legislative proposals (waste management, environmental liability schemes),
- general awareness raising issues: organizing conferences, roundtable discussions mostly together with environmental association and professional organisations (such as the Hungarian Academy of Sciences),
- the OFG is a permanent invitee in the work of the National Sustainable Development Council and of the National Environmental Protection Council,
- the OFG has the right to be heard at the different committees of the Parliament, if it is necessary from the point of view of future generation interests.

Our work might be illustrated by parts of the English summaries of the reports, presented to the Parliament by the OFG under my own mandate¹³:

“The very responsibility of the Ombudsman for Future Generations is to draw the attention of the decision-makers, the economic players and all the

¹³The activity and mission of OFG might best be understood, if one examines the English summary of our yearly activity at the website: https://www.ajbh.hu/en/web/ajbh-en/annual-reports?p_p_id=1_WAR_ajbhdocumentlibrarydisplayportlet&p_p_lifecycle=0&1_WAR_ajbhdocumentlibrarydisplayportlet_currentFolderId=129172&1_WAR_ajbhdocumentlibrarydisplayportlet_folderOrderByCol=NAME&1_WAR_ajbhdocumentlibrarydisplayportlet_folderOrderByType=desc&1_WAR_ajbhdocumentlibrarydisplayportlet_fileOrderByCol=NAME&1_WAR_ajbhdocumentlibrarydisplayportlet_fileOrderByType=desc

citizens to the fact that the Fundamental Law of Hungary clearly sets out that such protection is the obligation of everyone. This is why making preliminary comments on national strategies and laws of different levels is one of our key activities, along with the public criticism of activities that damage Nature without any justifiable reasons, and on the other hand, we also promote and strengthen good practices.”¹⁴

*«The primary mission of the Ombudsman for Future Generations is to remind the state, including all the state organs and levels, of this task and responsibility. The elaboration of a modern and efficient system of responsibility is a kind of job in which everyone participates, from the civil society organizations through the professional-economic advocacy groups to the state. The operation of this unique system of cooperation, the harmonization of interests and viewpoints is such a challenge which can be best met by an independent institution like the Ombudsman for Future Generations».*¹⁵

The OFG Office was mentioned in the 2013 Report of the UN Secretary-General Ban Ki-Moon entitled “Intergenerational solidarity and the needs of future generations”¹⁶, as an ombudsman type model for the institutional representation of intergenerational equity. The contribution of the OFG to intergenerational justice and sustainable development is multifold. Long-term thinking lies at the core of the OFG’s work, emphasizing the essential need for integrating long-term considerations into decision-making processes at every level. Through the investigation of individual complaints or via ex officio investigations the OFG can discover systemic errors and can contribute to improvements both during the legislative process through its consultative role,

¹⁴2017 report,

<https://www.ajbh.hu/documents/14315/2851105/>

[Report+on+the+Activities+of+the+Commissioner+for+Fundamental+Rights+and+his+Deputies+2017.pdf/2c9aa8df-d036-e2df-2235-c1bb6b8a75f3?version=1.1&t=1532087170475](https://www.ajbh.hu/documents/14315/2851105/Report+on+the+Activities+of+the+Commissioner+for+Fundamental+Rights+and+his+Deputies+2017.pdf/2c9aa8df-d036-e2df-2235-c1bb6b8a75f3?version=1.1&t=1532087170475)

¹⁵2018

report,

<https://www.ajbh.hu/documents/14315/2993057/Report+on+the+Activities+of+the+Commissioner+for+Fundamental+Rights+and+his+Deputies+2018.pdf/ef5f4ffa-ef99-8cf8-e4d3-47ebb39b1026?version=1.0&t=1558947152563>

¹⁶Ban Ki-Moon, ‘Intergenerational solidarity and the needs of future generations’ – Report of the Secretary-General, 5 August 2013, A/68/322. Available at: <https://sustainabledevelopment.un.org/content/documents/2006future.pdf>

and at the enforcement side via its recommendations to authorities. By turning to the Constitutional Court, it can influence the constitutional review of certain pieces of legislations, which will then serve as important precedents in the future regarding the topic at hand. By issuing general observations the OFG can raise public attention thereby enhance general awareness.

The office of the Ombudsman strives to be an approachable, accessible, and accountable institution. Any citizen can file a claim free of charge, either personally, with notes taken by the staff at the premises of the institution, or via post or on the Office's internet site. Depending on the topic, certain professional events, conferences, workshops are also publicly advertised.

The OFG has an excellent working relationship with green NGOs, harnessing synergies in their work, often organizing joint workshops, conferences and in many instances the OFG acts as a bridge between various stakeholders (NGOs, academic world, policy makers, members of the executive branch) in conflicting matters.

Some successes from the past 4 years:

- in connection with Nature Conservation Areas: OFG through 'amicus briefs' contributed to the Constitutional Court's case practice ultimately protecting vulnerable areas,
- OFG articulated most urgent steps for implementation of environmental and human health related SDGs, also proposing national indicators. As a result, a summary was annexed to the Hungarian Voluntary National Report of 2018¹⁷
- protecting groundwater resources. The story: legal amendment aimed at allowing groundwater wells to 80 m below ground without prior authorization. OFG issued general opinion on dangers to water resources and human health. The President of the Republic initiated a constitutionality test of the Constitutional Court, within which OFG submitted

¹⁷https://sustainabledevelopment.un.org/content/documents/20137Voluntary_National_Review_of_Hungary_v2.pdf, pp 65-69

an 'amicus brief'. The outcome: Constitutional Court invalidated the amendment, building extensively on the OFG's argumentation.

- airport noise: several complaints received regarding unbearable noise around Budapest airport, OFG organized a roundtable discussion with Ministry and affected stakeholders. The outcome: night-time flights banned.
- Environmental Liability Regulation: 2 years of background work for a more effective national ELD scheme, discussions with Ministries, insurance companies, private sectors – a complex regulatory proposal has been submitted and is under discussion, aiming at a more efficient PPP scheme.

And at the end of this short presentation, a recent success story: The landmark decision No. 14/2020 (VII. 6.) of the Constitutional Court concerning the amendment of the Forest Act was a major success in nature conservation. Based on the proposal of the OFG, the Commissioner voiced constitutional concerns in relation to the Forest Act in his petition submitted earlier. Upholding a significant part of the Commissioner's concerns, the Constitutional Court annulled most of the problematic provisions amending the Forest Act. The Constitutional Court once again recognized and underlined the importance of preserving biodiversity as a value belonging to the nation's common heritage, and it emphasized the duty of the State to act as a sort of public trust and manage the natural and cultural treasures constituting the shared heritage of the nation for future generations as beneficiaries. This common interest cannot be overridden by any current economic interest of the present generations. Following the Constitutional Court's landmark decision, the OFG issued a public statement for those concerned, taking stock of the tasks which – in consequence of the annulment – were delegated to forestry and nature conservation authorities, administrative and public asset managing bodies, local governments, forest owners and forest managers.

To conclude this short overview, I quote my own words from the World Future Council brochure¹⁸: *«Functioning as an official agent of the “green consciousness” of society, raising awareness on every level of decision making lies at the heart of my work. I believe that sometimes altering the main course comes about through several small steps taken in the right direction. Besides investigating individual complaints, I strive towards establishing a legal environment that provides better chances for environmental interests and gives less grounds for complaints».*

¹⁸See fn. 10, page 9