UDK 342.7:502]:342.565.2(497.5)
Review article

THE ''GREEN" CONSTITUTION OF THE REPUBLIC OF CROATIA AND THE CONSTITUTIONAL COURT AS A PROTECTOR OF THE RIGHT TO A HEALTHY ENVIRONMENT

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ABSTRACT

Unlike the "pioneer" constitutions, which contained guarantees of personal and political rights in their provisions, newer constitutions, or constitutions of the 20th century, began to guarantee social and economic rights in their provisions, and among them soon appeared the right to a healthy environment. Similar to the constitutions of other new democracies, the Constitution of the Republic of Croatia belongs to the ranks of environmentally conscious constitutions. The right to a healthy environment was part of the Constitution of the Socialist Republic of Croatia from 1974, and after the establishment of the independent and sovereign Republic of Croatia, it became part of the Constitution of 1990. In Croatia, since the very beginning of independence, the conservation of nature and the human environment have been included in the category of the highest values of the constitutional order (Article 3), which represent the foundation for the interpretation of the Constitution. In the part of the Constitution that refers to human rights and fundamental freedoms, we find provisions on restrictions of entrepreneurial freedom and property rights in order to protect nature, the environment and human health, then on special protection of the state to all things and goods of special ecological significance. It is also clearly prescribed that everyone has the right to a healthy life, and that the state has a certain responsibility for environmental protection. The Constitutional Court takes care of the protection of constitutionality and the protection of environmental rights. The aim of this paper is to analyze how the constitutions of the new democracies relate to environmental pro-

tection, whether the Constitution of the Republic of Croatia is really a "green" Constitution, and based on the analysis of the previous practice of the Constitutional Court in environmental cases, reach a conclusion about the approach and the role of the Constitutional Court of the Republic of Croatia as a protector of the right to healthy environment.

Keywords: *Constitution of the Republic of Croatia, Constitutional Court, green constitution, right to a healthy environment*

1. INTRODUCTION

Although environmental law and environmental rights started to develop as late as the second half of the 20th century, it is apparent that this particular intersection of constitutional and international law, human rights, and environmental rights[1] has since become one of the liveliest and most dynamic areas of dialogue in contemporary constitutional politics. The landmark moment in the process of constitutionalizing environmental rights is considered to be the 1972 United Nations Conference on the Human Environment with the respective Stockholm Declaration on the Human Environment, which "famously recognized the human right to healthy environment."[2] From this moment on, we have witnessed a "dramatic increase"[3] in the number of countries that demonstrated their dedication to environmental protection by "greening" their constitutions, as well as an increase in the number of various documents in the domain of environmental protection, making up the architecture of human rights on international and regional levels,[4] notably recent resolutions of the United Nations Human Rights Council (8 October 2021) and of the General Assembly (28 July 2022), which could prove to be powerful catalysts towards formal recognition of the human right to clean, healthy and sustainable environment on the global scale[5]. Another influential example contributing to this trend is the position of the European Parliament in its resolu-

1 Daly, E., May, J. R., *Global environmental constitutionalism: a right-based primer for effective strategies*, Jindal Global Law Review, 6(1), 2015, p. 21.

2 Collins, L., *The Ecological Constitution; Reframing Environmental Law,* Routledge, London and New York, 2021, p. 4.

3 Gellers, J., *Greening Constitutions with Environmental Rights: Testing the Isomorphism Thesis*, Review of Policy Research, Vol. 29, No. 4, 2012, p. 527.

4 Here we have in mind the Rio Declaration on Environment and Development (1992), the Aarhus Convention (1998), the African Charter on Human and People's Rights (1981), the Additional Protocol to the American Convention on Human Rights (1999).

5 See: SDG Knowledge Hub, *UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment*, 3 August 2022 [https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/#:~:text=The%20UN%20General%20Assembly%20(UNGA,and%20sustainable%20environment%20for%20all.], Accessed 20 March 2023.

tion Biodiversity strategy for 2030, from June 2021, advocating recognition of the right to a healthy environment in the EU Charter.[6]

The environment and its protection are a fairly new element in the so-called *materiae constitutionis.*[7] Unlike the "pioneer" constitutions, which contained guarantees of personal and political rights in their provisions, newer constitutions, or constitutions of the 20th century, began to guarantee social and economic rights in their provisions, and among them soon appeared the right to a healthy environment. Similar to the constitutions of other new democracies, the Constitution of the Republic of Croatia belongs to the ranks of environmentally conscious constitutions. The right to a healthy environment was part of the Constitution of the Socialist Republic of Croatia from 1974, and after the establishment of the independent and sovereign Republic of Croatia, it became part of the Constitution of 1990. In Croatia, since the very beginning of independence, the conservation of nature and the human environment have been included in the category of the highest values of the constitutional order (Article 3), which represent the foundation for the interpretation of the Constitution. In the part of the Constitution that refers to human rights and fundamental freedoms, we find provisions on restrictions of entrepreneurial freedom and property rights in order to protect nature, the environment and human health, then on special protection of the state to all things and goods of special ecological significance. It is also clearly prescribed that everyone has the right to a healthy life, and that the state has a certain responsibility for environmental protection. The Constitutional Court takes care of the protection of constitutionality and the protection of environmental rights. The aim of this paper is to analyze how the constitutions of the new democracies relate to environmental protection, whether the Constitution of the Republic of Croatia is really a "green" Constitution, and based on the analysis of the previous practice of the Constitutional Court in environmental cases, reach a conclusion about the approach and the role of the Constitutional Court of the Republic of Croatia as a protector of the right to a healthy environment.

2. "GREENING" THE CONSTITUTION

Around fifty years ago, the concept of human right to a healthy environment probably seemed like a pretty radical idea. Since then, however, such progress has been

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6 See: European Parliament Research Service, *A universal right to a healthy environment*, 14 December 2021 [https://epthinktank.eu/2021/12/14/a-universal-right-to-a-healthy-environment/], Accessed 20 March 2023

7 Bačić, A., *Ustavni temelji i problemi zaštite okoliša u hrvatskom i europskom pravu*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 45, No. 4, 2008, p. 730.

made in this respect, we can now safely say it was the most rapid expansion of any right in the last five decades.[8] As one of the so-called solidarity rights, also known as the third generation of human rights, the right to a healthy environment began to develop in the second half of the 20th century, more precisely after the above-mentioned Stockholm Declaration from 1972. Therefore, it is not found in any of the pioneering international human rights documents (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), nor in any of the pioneer constitutions. The world's oldest constitution, the United States Constitution (1787), does not mention the concept of "environment," although the specific nature of this country's constitutional development allowed the development of environmental rights in the second half of the 20th century to proceed notwithstanding, largely owing to the Congress' intensive legislative work and the activist approach of the Supreme Court.[9] Another classic constitutionalist country, France, approached constitutional environmental rights in a unique way, by incorporating in its 1958 Constitution the Charter for the Environment (2005)[10], a document strongly proclaiming and affirming rights and obligations concerning the environment and sustainable development.

The rapid spread of the constitutionalization of environmental rights can be traced back to the mid-1970s, when Portugal (1976) and Spain (1978) were the first two countries in the world to incorporate the right to a healthy environment in their constitutions.[11] By mid-1990s, this right was constitutionalized in around fifty countries, by mid 2000s in around sixty,[12] and today the environment is granted constitutional protection in more than 100 countries,[13] 90 of which explicitly guarantee the right to healthy environment in their constitutions, while another 12 or more do so implicitly,[14] through interpretations of constitutional provisions

[8] Boyd, R. D., *The Constitutional Right to a Healthy Environment*, Environmental Magazine, Vol. 54, No. 4, p. 5.

[9] Bačić, A., *op. cit.*, note 7, p. 731.

[10] Charter for the Environment, 2005 [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/charter_environnement.pdf], Accessed 20 March 2023.

[11] Boyd, D. R., *op. cit.*, note 7, p. 5.

[12] May, J. R., *The Case for Environmenatl Human Rights: Recognition, Implementation, and Outcomes*, Cardozzo Law Review, Vol. 42:3, 2021, p. 993.

[13] Human Rights Council, *Good practices of States at the national and regional levels with regards to human rights obligations relating to the environment*, 23 January 2020 [https://digitallibrary.un.org/record/3872337], Accessed 20 March 2023.

[14] Boyd, D. R., *The Implicit Constitutional Right to Live in a Healthy Environment*, Review of European Community & International Environmental Law, Vol. 20, No. 1, 2011, p. 171.

by competent supreme or constitutional courts.[15] We should add to these numbers the countries incorporating the right to healthy environment in environmental legislation (more than 100 countries) and regional agreements (more than 125 countries).[16]

Most of the countries that have constitutionalized the right to healthy environment are in Europe, Central Asia, Latin America, and Sub-Saharan Africa.[17] The reasons for such an uneven distribution of constitutional protection of environmental rights in different parts of the world lie in a combination of domestic and international circumstances, whereas these rights have been observed to enjoy better protection in countries whose constitutions contain a wide range of economic, social and cultural rights.[18] The rapid "greening" of constitutions, and the ensuing adoption of executive environmental legislation, was prompted by various factors. Apart from the mentioned influence of the Stockholm Declaration, there is an effect of migration of constitutional ideas, not only in constitutional documents, but also in the case-law of national courts. For example, the provision from the Portuguese Constitution, "right to a healthy and ecologically balanced environment" is found today in 21 other constitutions.[19] Regional influences should also be noted, i.e. regional documents and case-law of regional courts and commissions, notably the European Court of Human Rights (hereinafter: ECHR), which has, in the absence of an explicit provision on environmental protection in the Convention for the Protection of Human Rights and Fundamental Freedoms, acknowledged environmental rights in its case-law[20], as has the European Court of Justice. The EU accession process and the related requirement to harmonize all legislation with the *acquis communitaire* of the European Union has had a considerable influence on environmental legislation, especially in Eastern Europe.

The constitutionalization of environmental rights involves a lot of variety in terms of terminology, definitions, and procedural elements of exercising these rights. In general, it can be said that constitutions recognize two forms of articulating

15 Boyd includes the following 12 countries in this list: Bangladesh, Estonia, Guatemala, India, Israel, Italy, Malaysia, Nigeria, Pakistan, Sri Lanka, Tanzania and Uruguay. Ibid., p. 172.

16 Human Rights Council, *op. cit.*, note 13, p. 3.

17 Gellers, J., *op. cit.*, note 3, p. 529.

18 *Ibid.,* p. 993.

19 Boyd, D. R., *op. cit.*, note 14, p. 178.

20 Bačić, P., *O značaju prava na informaciju u upravljanju okolišem i zaštiti ljudskih prava*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 45, No. 4, 2008, p. 814 Environmetal cases have been examined by the Court in large number of cases concerning rights such as the right to life, the right to respect for private and family life, the right to fair trial. See, for example: Council of Europe, *The Execution of Judgements of the European Court of Human Rights. Environment*, October 2020 [https://rm.coe.int/thematic-factsheet-environment-eng/1680a00c09], Accessed 21 March 2023.

environmental rights, and these are "fundamental rights or statements of public policy".[21] It is also important to note that constitutional protection of the right to healthy environment occurs in two ways: by legislators, i.e. by way of constitutional provisions, and via courts and their interpretations of existing fundamental rights.[22] In their global overview of environmental constitutionalism, Daly and May state that at least 76 countries guarantee the rights to "quality", "clean", "healthy", "adequate", "harmonious", "productive", and "sustainable" environment in their constitutions, while more than 120 constitutions worldwide guarantee the protection of natural resources, including water, flora and fauna, land, minerals, soil, air, forest, nature, and energy.[23] They also mention that some constitutions contain provisions tailored towards ameliorating the harmful effects of certain activities on the environment, such as disposal of chemical or radioactive materials, while others are aimed towards long-term interests of future generations.[24] Constitutions of many countries contain provisions on reciprocal obligations between the government and citizens in the area of environmental protection, and three thirds of constitutions establish special procedural rights pertaining to the environment, such as right to information, participation and access to justice.[25] In countries without explicit constitutional provisions on environmental rights, such rights are protected through competent courts' interpretation of existing fundamental rights such as the right to life, dignity and health.[26] Still, we should note that even though general constitutional provisions exist on the responsibility of governments and individuals for the environment, such provisions are not enforceable and can only be viewed as a statement of the ethics of common responsibility to nature and the environment.[27]

Constitutions of new democracies are not only well-equipped with a variety of social and economic rights, but can also be considered "green". The Constitution of Bulgaria, for example, contains a provision on "the right to a healthy and favourable environment" (Art. 55); the Constitution of Czechia guarantees "the right to a favourable environment", as well as "the right to timely and complete information about the state of the environment and natural resources" (Art. 35), while the Constitution of Romania lays down "the right of every person to a healthy and

[21] Gellers, J., *op. cit.*, note 3, p. 527.

[22] Boyd, D. R., *op. cit.*, note 14, p. 171.

[23] Daly, E., May, J. R., *op. cit*, note 1, p. 24.

[24] *Ibid.*, p. 25.

[25] *Ibid.*

[26] *Ibid.*

[27] Bačić, P., *op. cit.*, note 20, p. 818.

ecologically balanced environment" (Art. 35).[28] Reasons for the environmental awareness of Eastern European constitutions should be sought in circumstances such as the influence of old socialist constitutions and their provisions on environmental social rights, decades of disregard for these and other human rights, but also in the "pursuit of legitimacy in the eyes of the international community".[29] The process of Europeanisation has also played a significant role in strengthening environmental legislation in these countries.

3. THE "GREEN" CONSTITUTION OF THE REPUBLIC OF CROATIA

At the time of adopting their constitutions, the constitution makers of Eastern European new democracies were already familiar with other countries' constitutional templates, which regularly contained provisions on social-economic rights, including the right to a healthy environment.[30] This was also the case in Croatia, which, additionally, had to honor the fact its old Constitution of the Socialist Republic of Croatia from 1974 contained a provision on "the right to a healthy living environment".[31]

A distinctive feature of the Croatian constitution maker in adopting the Constitution of 22 December 1990 was the formulation of constitutional values, which included "preservation of nature and human environment". This, and other constitutional values listed in Art. 3 of the Constitution, represent not "merely" "constitutional fundamentals"[32] and the basis for interpreting the Constitution, but also a defining structural element of the Croatian constitutional state – its con-

[28] UN General Assembly, *Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Eastern European Region*, 14 February 2020 [https://www.ohchr.org/en/special-procedures/sr-environment/good-practices-right-healthy-environment], Accessed 21 March 2023.

[29] Gellers, J., *op. cit.*, note 3, p. 529.

[30] Bačić, A., *op. cit.*, note 7, p. 741.

[31] The respective Article of the 1974 Constitution prescribed the following: ''Human beings have the right to a healthy environment. The community provides the conditions for exercising this right. Everyone who uses land, water or other natural resources is obliged to do so in a way that ensures the conditions for work and life of humans in a healthy environment. Everyone is obliged to preserve nature and its goods, natural sights and rarities and cultural monuments. Misuse of natural resources and introduction of toxic and other harmful materials into water, sea, soil, air, food and objects of general use are punishable." Article 276 of the 1974 Constitution, translated by Lana Ofak, cited in: Ofak, L., *The Approach of the Constitutional Court of the Republic of Croatia towards the protection of the right to a healthy environment*, Journal of Agricultural and Environmental Law, 31, 2001, p. 85.

[32] Bačić, A., *Ustav Republike Hrvatske i najviše vrednote ustavnog poretka*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 49, No. 1, 2012, p. 19.

stitutional identity, so to speak – as confirmed by the Constitutional Court in its case-law since 2013.[33]

Environmental laws are integral to the Constitution's architecture pertaining to guarantees of economic, social and cultural rights. The 1990 Croatian Constitution originally guaranteed the right to healthy environment in its Art. 69 by complementing the right to a healthy life with an obligation of the state to "ensure the right of citizens to a healthy environment", and the duty "of citizens, government, public and economic bodies and associations to pay special attention to the protection of human health, nature and the human environment, within the scope of their powers and activities".[34] The change of the constitution from 2001 affected the above provision, now stating in Art. 70 that the state is no longer required to guarantee citizens' "right" to healthy environment, but "conditions" for healthy environment, while the words "citizens, government, public and economic bodies and associations" were replaced with the word "everybody".[35] Even though the constitutional change from guaranteeing the "right to" to guaranteeing the "conditions for" healthy life can be considered a step backwards in terms of environmental rights, systematic interpretation of the Constitution confirms without doubt its continued protection of the right to a healthy environment.

Alongside Art. 3 and Art. 70 as core constitutional articles, Art. 50 is another "green" provision, based on which free enterprise and proprietary rights can be exceptionally curtailed for the purpose of, *inter alia*, the protection of nature, human environment and human health. Art. 52, in a similar vein, establishes special protection of certain things and goods, including natural resources and parts of nature, while Art. 135, paragraph 1 states that units of local self-government are obliged to, *inter alia*, protection and improvement of the natural environment.

On the one hand, apart from constitutional provisions, the legal framework for environmental protection includes the Environmental Protection Act as an umbrella environmental act, and a series of special environment acts, such as Air Protection Act, Forest Act, Act on Protection from Noise, Act on Protection against Light Pollution, etc. The Criminal Act assures the protection of the environment through a special section on crimes against the environment.[36] On the other hand,

[33] See, for example: Gardašević, Đ., *Popular initiatives, populism and the Croatian Constitutional Court*, in: Populist Challenges to Constitutional Interpretation in Europe and Beyond, Routledge, 2021, p. 109-125.

[34] The Constitution of the Republic of Croatia, Official Gazette, No. 56/1990.

[35] The Change of the Constitution of the Republic of Croatia, Official Gazette, No. 28/2001.

[36] For more on the legal environmental framework see, for example: Staničić. F., *Constitutional Protection of the Right to a Healthy Life – Do We Need More to Safeguard the Environment and Future Generations?*,

the institutional framework of environmental protection consists of competent state and public authorities, notably the Ministry of Economy and Sustainable Development, courts, the Ombudsman, and the State Inspectorate. Finally, the Constitutional Court of the Republic of Croatia plays a key role in the protection of environmental rights.

4. CONSTITUTIONAL PROTECTION OF THE RIGHT TO A HEALTHY ENVIRONMENT: A SELECTION OF THE CONSTITUTIONAL COURT'S CASE-LAW

The science and practice of law have recognized the environment as an object needing legal protection, which is achieved in nearly all traditional branches of law. Environmental protection laws, like any other laws, must be in accordance with the Constitution, while other regulations must be in accordance with the Constitution and the law. Although the Republic of Croatia has laws aimed towards reducing pollution, protection of biodiversity and limiting climate change, their provisions are not always implemented. It is up to competent state and public authorities and courts to recognize the values required and provided by the Constitution, so that, in the future, the Constitution's prescriptions could be normatively worked out in more detail, and also to allow holders of the right to a healthy environment (people, nation, citizens, community) to refer to provisions that guarantee this right. As human rights are rarely absolute and unlimited, in most cases they need to be balanced with other rights. According to Ofak, "the aim of the constitutional right to healthy environment is to achieve a better balance between conflicting interests, i.e. to give due attention to environmental protection as opposed to entrepreneurial freedoms that traditionally took precedence. The principle of proportionality, normally applied by courts when handling conflicts between rights and interests protected by the constitution, is just as applicable in resolving disputes in matters of environmental protection."[37]

In this sense, the Constitutional Court has made a great step forward in upholding European democratic standards and balancing conflicting interests in its decisions in which it effectively implemented and strengthened the normative framework relevant to environmental protection as one of the core values of our constitutional order. In general, cases related to the protection of the right to healthy environment can appear in the context of reviewing the constitutionality of laws

in: Constitutional Protection of the Environment and Future Generations, Miskolc-Budapest, Central European Academic Publishing, 2002, p. 127-160.

[37] Ofak, L., *op. cit.,* note 31, p. 203 .

and the constitutionality and legality of other regulations[38], and in the context of deciding on constitutional complaints[39].

4.1. Regulation on service areas[40]

Upon request by five applicants, the Constitutional Court instituted proceedings to review the constitutionality and legality of a piece of secondary legislation – the Regulation on service areas. By the Constitutional Court's decision the Regulation on service areas was repealed – in its entirety.[41] The Regulation established water areas as geographical units in which existing public providers of water services, managed and owned by municipal authorities in the respective areas, are merged with companies newly founded in order to provide water services in these specific areas. The disputed Regulation that was repealed by the Decision regulated the establishment of 41 service areas for the provision of water services, defined their borders, and named 41 acquiring companies. In these Constitutional Court proceedings for review of the constitutionality and legality of the above Regulation five service areas were disputed with an essentially equivalent claim that existing providers of water services meet the criteria for their own independent service area and should therefore be exempted from the obligation to merge. The applicants claimed that every attempt at merging would be questionable from the viewpoint of business efficiency and effectiveness of the future public water service provider, and that there are no obstacles preventing the applicants from continuing to do business independently as public water service providers. They claim they were not given the opportunity to make comments and objections to the content of the disputed Regulation, and cite this fact as a violation of procedure in its adoption process. Upon evaluating the applicants' claims, the Constitutional Court found

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38 Art. 38, paragraph 1 of The Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette No. 99/1999, 29/2002 and 49/2002 – consolidated text; hereinafter: the Constitutional Act states: "Every individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations". Article 44, paragraphs 1 and 2 of the Constitutional Act read: "The proceedings to review the constitutionality of the law or the constitutionality and legality of other regulations shall be considered instituted on the day the request was received by the Constitutional Court; the proceedings to review the constitutionality of the law and the constitutionality and legality of other regulations upon the proposal shall be considered instituted on the day the ruling to institute the proceedings was brought.".

39 Art. 62, paragraph 1 of the Constitutional Act states: "Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body … which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution … ".

40 Regulation on service areas, Official Gazette No. 147/2021.

41 Constitutional Court Decision No. U-II-627/2022 and others from 7 February 2023.

that, in the Regulation, the Government failed to cite reasons and arguments to support the claim that establishing service areas in the way it proposed would fulfil the requirements prescribed by the Water Services Act[42], nor did it substantiate whether the Regulation would achieve the primary legitimate aim intended by this law.

The Constitutional Court decided that the primary legitimate aim sought by the WSA 66/19 – which is to secure an affordable price of water for citizens and businesses, the availability of water in sufficient quantity and quality, as well as drainage services, while respecting the principles laid down in Article 5 of the WSA 66/19 (continuous, effective, efficient, and purposeful performance of water services) – does not at all follow from the Regulation's contents. According to Kušan and Selanec,[43] "in the absence of clear, concrete, and convincing reasons indicating that establishing new service providers in specific water service areas will ensure: 1) improved sanitary quality of supplied water; 2) greater accessibility of such water to a greater number of people, and 3) better social accessibility of the service (socially sensitive pricing); we are left with the unacceptable possibility of some kind of water 'gerrymandering' in which water service areas will be arbitrarily or single-handedly tailored and redrawn based on political allegiance and opportunism, instead of the positive obligation to protect public health and environment prescribed by Article 69 of the Constitution. This kind of political arbitrariness would constitute not only a violation of fundamental rights from Article 69 of the Constitution, but also – by eroding the constitutional guarantee of the democratically-based right to local self-government from Article 128 – a violation of the principle of limited government guaranteed by Article 4 of the Constitution."

4.2. Regulation on municipal waste management[44]

Based on 62 applications, the Constitutional Court instituted proceedings to review the constitutionality and legality of a piece of secondary legislation, namely the contested articles of the Regulation on municipal waste management and Regulation on amendments to Regulation on municipal waste management.[45] The applicants claimed that the contested Regulation created the conditions for unequal calculation of prices for services of mixed municipal waste disposal, which lead to

42 Hereinafter: WSA 66/2019.

43 Concurring opinion of judges Lovorka Kušan and Goran Selanec regarding Decision No. U-II-627/2023 and others from 7 February 2023.

44 Regulation on municipal waste management, Official Gazette No. 50/2017 and 84/2019.

45 Constitutional Court Decision No. U-II-2492/2017 from 23 March 2021.

discrimination of users in terms of amount and price for the same waste category, which should be equal for all.

They claimed that calculating the minimum price of services should be done by the service provider, not the municipal authority, and that users who have significantly less waste are placed at a disadvantage compared to those who generate significantly more. They claimed the contested articles violated the provisions of the Consumer Protection Act, and allowed a situation in which a co-owner could be punished for the actions of third parties. Finally, they claimed that the cited contested articles of the Regulation placed excess burden on individuals, which makes such provisions incompatible with the principle of proportionality prescribed by Article 16 of the Constitution.

The Constitutional Court decided that Regulation 84/19 amending Regulation 50/17 had put additional burden (unequally and disproportionately) on natural and legal persons in terms of prices of waste disposal and management in that it increased the fines in case of non-compliance with this additional burden. The Court decided that such provisions imply the established model of waste disposal and management is unable to achieve its primary goal – protection of the environment, nature and health as fundamental constitutional values – without serious and disproportionate restriction of the rights and interests of natural and legal persons.

Taking into account the importance of waste disposal and management for the protection of human health, nature, and the environment, the Constitutional Court, in evaluating the justification for the decision, cited the constitutional guarantee prescribed in Article 69 of the Constitution, in light of the fact that, pursuant to Article 3 of the Constitution, protection of nature and the human environment is cited among the fundamental values of the constitutional order of the Republic of Croatia. The Constitutional Court decided that the applicants' arguments were sufficient to conclude that implementing Regulation 84/19 amending Regulation 50/17 would have harmful consequences for both the interests of citizens and the development of the waste disposal system, which is instrumental in fulfilling the constitutional obligation of particular attention to protection of human health, nature and the environment. All the more so because, with time, not only would the potential cost of correcting the resulting damage increase, in terms of additional cost of eventually changing this method of waste disposal, but its potential inability to achieve its goal would be detrimental in the sense of non-compliance with the constitutional obligation of special attention to the constitutional value of environmental protection (Article 69 of the Constitution).

4.3. Law on short-rotation woody crop cultures[46]

The Constitutional Court rejected the applicant's request to institute proceedings to review the constitutionality of the law, namely, individual articles of the Law on short-rotation woody crop cultures.[47] In these Constitutional Court proceedings to review the constitutionality of the LSRWCC, the applicant claims the legislator opted for the most restrictive approach (prohibiting cultivation of short-rotation crop cultures on all categories of agricultural land), despite the availability of less stringent measures, which would be less onerous for agricultural land owners. He cites the practice in other European Union member states of growing short-rotation crop cultures on all, including the highest-quality categories of agricultural land. He claims the legislator failed to specify and substantiate a legitimate aim that would justify constraining citizens to certain practices, i.e. restricting the cultivation of crop cultures to only certain categories of land. The Constitutional Court decided there were no legitimate grounds for instituting proceedings to review the constitutionality of contested articles of the LSRWCC.

The Constitutional Court reminded that the Republic of Croatia, in accordance with Article 52 of the Constitution, is obliged to accord particular attention to preserving nature and its values. The Constitutional Court found that the legislator, within the scope of its powers and obligations arising from the Constitution, took appropriate legislative measures in the contested articles of the LSRWCC, with the legitimate aim of producing biomass from short-rotation crop cultures, as a renewable and environmentally acceptable energy source on agricultural land of lower quality, while preserving higher quality agricultural land for cultivating food crops, and imposed fines for non-compliance (i.e. for cultivating short-rotation crop cultures on land where such cultivation is prohibited, and for cultivation outside the prescribed time period from crop establishment). The Constitutional Court found that the disputed articles of the LSRWCC achieved a legitimate aim – creating conditions for the production of biomass from short-rotation crop cultures as a renewable and environmentally acceptable energy source, while preserving higher quality agricultural land for cultivating food crops.

46 Law on short-rotation woody crop cultures, Official Gazette No. 15/2018 and 111/2018; hereinafter LSRWCC.

47 Constitutional Court Decision U-I-1859/2020 from 8 June 2021.

4.4. The Energy Efficiency Act[48]

Following the applicant's proposal, the Constitutional Court instituted proceedings to review the constitutionality of the Energy Efficiency Act,[49] and repealed Article 29, paragraph 1, and Article 30, paragraph 2 therein.

The applicant claimed the EEA regulated co-owners rights in the process of decision-making in affairs of regular or extraordinary management in a fundamentally different way than the organic Law on Ownership and other Real Property Rights. The Constitutional Court stated that Article 3 of the EEA prescribed the purpose of the law, which is also the interest of the Republic of Croatia, and which includes achieving the goals of sustainable energy development. These goals are: reducing the negative environmental impact of the energy sector, improving the safety of energy supply, meeting the needs of energy consumers, and fulfilling international obligations of the Republic of Croatia in terms of reducing greenhouse gas emissions by encouraging measures of energy efficiency in all sectors of energy consumption. It also prescribes that efficient use of energy is in the interest of the Republic of Croatia. In the instant case, contested provisions stipulated that, for multi-residential buildings, the decision on entering into energy performance contracts and contracts on energy efficient renovation is made by co-owners by a majority vote calculated according to ownership shares and number of co-owners. The Constitutional Court decided that the legislator predicted two criteria for deciding on entering into contracts, whereas the two criteria may be in mutual conflict. The Constitutional Court concluded it was unclear how majority vote would be achieved by counting according to two criteria, and whether one of them had priority. Such a provision is therefore subject to different interpretations, which could lead to problems in its implementation.

4.5. Law on genetically modified organisms[50]

The Constitutional Court rejected the applicant's request to institute proceedings to review the constitutionality of the law, namely, article 52, paragraph 8 of the LGMO.[51] The applicant claimed that Article 52c[52] of the Law on genetically modified organisms derogates from and violates constitutional rights and obli-

48 The Energy Efficiency Act, Official Gazette No. 127/2014, 116/2018; hereinafter EEA.

49 Constitutional Court Decision No. U-I-663/2020 from 23 March 2021.

50 Law on genetically modified organisms, Official Gazette No. 70/2005, 46/2007, 137/2009, 28/2013, 47/2014, 15/2018, and 115/2018; hereinafter LGMO.

51 Constitutional Court Decision No. U-I-2535/2018 from 26 February 2019.

52 Article 52c prescribes restriction or prohibition of cultivation of GMO crops, goals of environmental and agricultural policies, development of resistance, use of land, etc.

gations of municipal authorities. The Constitutional Court found that reasons stated in Article 52, paragraph 2, points a), c), d), e), f), and g) of the LGMO, for which Article 52c, paragraph 8 of this law prescribes the Croatian Government's authority to decree the restriction or prohibition of the cultivation of GMO crops in part of or all the territory of the Republic of Croatia, fall within the state's obligation to ensure conditions for a healthy environment prescribed by Article 69, paragraph 2 of the Constitution. The Constitutional Court decided that the prescription of the Government's authority did not conflict with the right of municipal authorities to perform activities from their local scope which directly meet citizens' needs and which concern spatial and urban planning and protection and improvement of the natural environment, guaranteed by Article 129a, paragraph 1 of the Constitution.

4.6. Regulation on commercial sea fishing with coastal seine nets[53]

The Constitutional Court rejected the applicant's request to institute proceedings to review the constitutionality of a piece of secondary legislation – the Regulation on commercial sea fishing with coastal seine nets.[54] The applicant claims that fishing with "migavica" seine nets was forbidden in an unconstitutional way, because no study was done to show these nets do not damage Neptune grass. The Constitutional Court found that goals of fishing policies are determined at the state level, as are methods of management and protection of renewable biological resources and other issues relevant to sea fishing. The disputed Regulation was adopted with the express purpose of harmonizing fishing policies with those of the European Union, a goal consistent with public interest – to ensure sustainability of biological resources caught by coastal seine nets within safe biological limits, and according to conducted scientific studies and analyses. It follows that restricting fishing in specific zones, periods, or with specific tools is proportional to the legitimate aim sought by the Regulation.

4.7. Water Services Act[55]

The Constitutional Court rejected the request of 4 applicants to institute proceedings to review the constitutionality of disputed articles of the Water Services Act.[56] The applicants claimed that disputed articles of the WSA prescribed an obligation

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[53] Regulation on commercial sea fishing with coastal seine nets, Official Gazette No. 30/2018, 49/2018, 78/2018, 54/2019, 27/2021.

[54] Constitutional Court Decision No. U-II-6841/2021 from 7 March 2023.

[55] Water Services Act, Official Gazette No. 66/2019; hereinafter WSA.

[56] Constitutional Court Decision No. U-I-3379/2019 and others from 8 June 2021.

to merge all existing public water service providers with a public provider that will be determined by the Regulation on service areas, and that citizens and their representative bodies were prevented from independent, free and self-governing decision-making on the arrangement and performance of communal services of water supply and drainage – activities of immediate interest to the local community, which were also defined by the Constitution as activities of local scope. They believe the WSA has no legitimate aim, and that any statement of such is based on vague, indeterminable, and unverifiable information. They also claim the concept of "water affordability" belongs to the category of fundamental human rights. The Constitutional Court reminded that the legislator has a right and an obligation to regulate ways in which waters, as an asset of interest to the Republic of Croatia (Article 52, paragraph 1 of the Constitution), can be used and exploited, especially when such use and exploitation regards public water supply (especially in the aspect of ensuring its sanitation) and public drainage (especially in the aspect of purifying waste water to an environmentally safe level). The Constitutional Court decided that the contested provisions of the WSA do not derogate from the right to local self-government in the water services sector, placing a restriction only on the right to choose the institutional framework and geographical area for providing services (service area) for the sake of common and public interest. In conclusion, the Constitutional Court found the applicants' claims of non-compliance of the disputed articles with Article 3 of the Constitution unfounded, and rejected the rest of the proponents' claims on the grounds of no conditions for examining the merits of the case.

4.8. Constitutional Court Decision No. U-III-1114/2014 from 27 April 2016[57]

The Constitutional Court ruled in the proceedings instituted via constitutional complaint by the Croatian Society for the Protection of Birds and Nature from Osijek. The constitutional complaint was lodged against the High Administrative Court's decision No. Us-9789/2011-5 from 26 September 2013 dismissing the applicant's complaint against a decision by the Ministry of Environmental Protection, Physical Planning and Construction in a case regarding assessment of the environmental impact of irrigation works in the Lower Neretva – Koševo-Vrbovci subsystem. The case preceding the constitutional court proceedings was instituted on proposal by the project owner, the institution Hrvatske vode d.o.o., to assess the environmental impact of irrigation works in Lower Neretva – Koševo-Vrbovci subsystem, from 26 July 2010. According to the report on the public hearing

[57] Published on [www.usud.hr.

held on 25 January 2011, during the session opinions, comments and statements from the public and interested parties were recorded, among them the applicant's comments – Croatian Society for the Protection of Birds and Nature – claiming that the Study was poorly done and scientifically unfounded; that the solutions it proposes do not solve any problems related to the use and maintenance of water quality in the Lower Neretva, deterioration of hydrological conditions, loss of water from the system, the system's inefficiency; that the Study completely ignores the fact that the Lower Neretva area is considered a wetland of international importance; that it fails to properly address the problem of intensive agricultural production with respect to sustainable use of natural resources; that it fails to provide alternative solutions; that the study derogates from provisions of national legislation, conservation objectives of the Ecological Network, and international obligations. The proponent claims in her constitutional complaint that the High Administrative Court violated her economic, social and cultural right guaranteed by Article 52 of the Constitution. The Constitutional Court found that the proponent had the opportunity to participate in the process of adopting the disputed decision; that she had the opportunity to make comments on the conducted study and the planned works, which she did, and that the Ministry gave reasoned answers to her objections. The fundamental conclusion of the Constitutional Court is that all the proponent's comments and objections were responded to during the public hearing and in supplements to the Study, and that both the Study and the decision from 27 May 2011 were made by professionals qualified for conducting such studies.The High Administrative Court emphasized that the Government initiated the National program of irrigation and management of agricultural land and waters, and that four national pilot irrigation projects were set up, one of which is the Lower Neretva irrigation system. Therefore, relevant expert bodies performed checks and found that the pilot irrigation project of Lower Neretva will not harm the delta of the Neretva River as a wetland of international importance. The Constitutional Court concluded that the proponent's constitutional right to fair trial, guaranteed by Article 29, paragraph 1 of the Constitution was not violated, and decided her objections with respect to Articles 18, 19 (1), 118 (3), 141 and 145 of the Constitution were unfounded.

4.9. Environmental pollution as a violation of the right to private and family life

At the time of this writing, the Constitutional Court has not yet been presented with a case related to violation of the right to privacy, family life and home in the sense of environmental pollution reaching a level that affects conditions for enjoying privacy, family life and home, which would, according to the ECHR, consti-

tute a violation of said right. The ECHR has, however, initiated proceedings following a complaint by applicants Tolić and others[58] and declared their application inadmissible. The applicants claimed that domestic authorities did not adequately and effectively respond to their allegations and that they were exposed to a serious health risk for several years due to water pollution in their residential building.[59]

The applicants cited a violation of Articles 8[60] and 13[61] of the Convention,[62] however, the Court assessed that their complaints should be examined under Article 8 of the Convention. The applicants were owners of flats in residential buildings in Zagreb (Vrbani III), built in 2005 and 2006. In May 2006, a sanitary inspection found that the water in the flats did not meet sanitary and health standards. However, the competent office of the City of Zagreb issued a permit for use of the building (occupancy permit), effective from 26 February 2007. In September 2007, the applicants received a notice from the Sanitary Inspectorate not to use the water in their flats because it was contaminated with mineral oils, and that it should only be used for flushing. Subsequent expert reports, ordered in the civil and criminal proceedings, confirmed the presence of mineral oils in the water supply system of the residential buildings in question. The ECHR decided that the applicants did not exhaust all domestic legal remedies available to them in procedures of obtaining and revoking the occupancy permit for the building at issue, and it found their complaint inadmissible in this respect, because it is manifestly ill-founded. The ECHR concluded the Republic of Croatia has taken all reasonable measures[63] to secure the protection of the applicants' rights and that their application is inadmissible.

Although the Constitutional Court did not rule in the above case, it is worth noting that there is an extensive case-law of the ECHR on the issue, which will

[58] Tolić and others v. Croatia, Application No. 13482/2015, Decision from 4 June 2019.

[59] The "Vrbani water" case.

[60] Article 8 of the Convention guarantees, inter alia, the right to respect for private life, and corresponds to Article 35 of the Constitution.

[61] Right to an effective remedy.

[62] Convention for the Protection of Human Rights and Fundamental Freedoms Official Gazette – International Agreements No. 18/1997, 6/1999 - consolidated text, 8/1999 - correction, 14/2002, 1/2006 and 13/2017.

[63] Allegations of environmental harm in the instant case did not, as such, concern the State's involvement in industrial pollution. The water pollution was caused by private companies, not the State. In such a situation, the ECHR's task was to assess whether the State undertook all reasonable measures to ensure the protection of the applicants' rights in accordance with Article 8 of the Convention.

undoubtedly be applicable in future decisions on violations of the right to healthy environment.[64]

5. CONCLUSION

Despite unquestionable and continuous progress achieved in the last few decades in terms of constitutionalizing the right to a healthy environment, debates about the importance of constitutional provisions on environmental protection continue on two fronts. The first consists of those who see potential benefits of constitutionalizing this right in the increased difficulty involved in changing constitutional provisions as opposed to laws, in better implementation, and greater participation, but also greater responsibility of citizens in decisions concerning the environment.[65] On the other front are the critics who think that, despite its constitutionalization, this right is too vague and general to be successfully protected, that it is unactionable, unenforceable, and most often ineffective, and even represents a threat to democracy due to shifting the balance of power from the (elected) legislator to the judges.[66] Both of them are partly right, because, at first glance, constitutional provisions on environmental protection are lacking and insufficient to achieve real results in the movement towards environmental protection. Still, a closer look makes clear the importance of the constitutional right to a healthy environment. The place of this right in the architecture of human rights provisions in the constitution shows not only the constitution's environmental awareness and the constitutional commitment to sustainable growth, but also a clear roadmap for politicians to design their environmentally aware policies without turning a blind eye to holders of this right and to reality which is anything but optimistic when it comes to the environment.

As one of the environmentally conscious Constitutions, the Croatian Constitution contains a number of "green" provisions, notably Article 3 and the constitutional value of "conservation of nature and the environment". This, and other

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64 See for example Di Sarno and Others v. Italy, Application no. 30765/08, Judgment from 10 January 2012; Guerra and Others v. Italy, Application No. 116/1996/735/932, Judgment from 19 February 1998; Otgon v. The Republic of Moldova, Application No. 22743/2007, Judgment from 25 January 2017; X and Y v. The Netherlands, Application No. 8978/1980, Judgment from 26 March 1985; Pretty v. The United Kingdom, Application No. 2346/2002, Judgment from 29 April 2002; G.B. and R.B. v. The Republic of Moldova, Application No. 16761/2009, Judgment from 18 December 2012; Powell and Rayner v. The United Kingdom, Application No. 9310/1981, Judgment from 21 February 1990; Hatton and Others v. The United Kingdom, Application No. 36022/97, Judgment from 8 July 2000 [https://hudoc.echr.coe.int/eng#{%22appno%22:[%2236022/97%22]}], Accessed 25 March 2023.

65 Boyd, D. R., *op. cit.,* note 8, p. 5.

66 *Ibid.*

constitutional values represent not "merely" "constitutional fundamentals" and the basis for interpreting the Constitution, but also a defining structural element of the Croatian constitutional state – its constitutional identity, so to speak. From this perspective, the selected examples of the Constitutional Court's case-law show an awareness of the importance and scope of the State's obligation to ensure conditions for a healthy environment prescribed by Article 69, paragraphs 2 and 3 of the Constitution, while respecting the values from Article 3 of the Constitution, particularly the principle of the rule of law. Although the Constitutional Court's case-law is currently focused on monitoring constitutionality and legality, it is quite certain that the near future will "tip the scales" towards deciding on constitutional complaints, as is the case in other European countries.[67]

Finally, it would be worthwhile to consider suggestions to upgrade provisions on environmental protection in future amendments to the Constitution. Some suggestions have already been made. Barić, for example, suggests that sustained development, right to water, ban on privatization of drinking water sources, and socially responsible management be added to the Constitution, and that the provision on the state's responsibility for ensuring conditions for a healthy environment be supplemented with the obligation to "encourage comprehensive management of environmental protection and achieving sustainable development and ensuring education and informing of citizens in the area of environmental protection."[68]

Stanišić also suggests constitutionalizing sustainable development and the right to water, as well as restoring the original constitutional provision on the right to a healthy environment, as well as institutionally strengthening environmental protection by establishing a dedicated ombudsman.[69] We cannot but agree with these suggestions, especially those that concern constitutionalizing sustainable development and the right to water.

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