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ENVIRONMENTAL PROTECTION UNDER CONSTITUTIONAL LAW[**]

ABSTRACT: This paper explains the importance of the protection of the environment under constitutional law. In the context of the protection of the environment under constitutional law, the general ratio legis of the response of criminal law to environmental pollution is analyzed, which, as usual, is based on general constitutional provisions.

The paper defines the basic elements of environmental protection rights both in national legal frameworks and from the perspective of the effects of relevant international legal sources, which are applied in accordance with constitutional rules, either through so-called implementation mechanisms or sometimes directly.

The paper specifically explains the role of the Constitutional Court in the protection of the environment, illustrated by examples of relevant decisions of this Court, both in the realm of normative control of constitutionality and legality and in proceedings initiated through constitutional appeals.

Keywords: Constitution, environment, constitutional law, protection under constitutional law, protection through criminal law

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INTRODUCTION

The issue of environmental crimes, or pollution of the environment in the 21st century, is becoming one of the greatest threats facing humanity and civilization since their inception.[1] This is the main reason for the development of so-called environmental law, especially in the last decades of the 20th century and during the 21st century. The problem of mass and massive environmental pollution originated much earlier, during the first and second industrial revolutions, and of course during those periods, but it reached its peak in the second half of the 20th century, which then continued into the first decades of the current 21st century, unfortunately marked by the largest war in Europe after World War II,[2] involving Russia and Ukraine. This war not only poses a huge threat to world peace, potentially even leading to a new third world war, but it also causes enormous damage to the environment.[3]

[1] Aleksić, Ž., Škulić, M. (1996). *Kriminalistika.* Belgrade: Faculty of Law, University of Belgrade, 357.

[2] Before this war, whose end, unfortunately, is still not in sight, Europe was the scene of a civil war in the former SFRY. This armed conflict subsequently culminated in 1999 with NATO's aggression on the Federal Republic of Yugoslavia, which was the largest war in Europe since World War II until the outbreak of the war in Ukraine. The aggression of the North Atlantic Pact on Serbia and the FRY caused significant environmental consequences, among other things. Numerous military actions by NATO, besides direct destruction, also caused severe environmental damage. A drastic example is the use of munitions containing depleted uranium, which is now also anticipated in Ukraine, where the use of such munitions is planned for certain types of Western tanks – primarily American "Abrams" and British "Challengers". During NATO's aggression on the FRY, such munitions made from a special alloy containing depleted uranium were fired from the air, i.e., by a component of the US Air Force, which had developed this type of munition during the Cold War, primarily for an effective response in case of war with the Eastern Bloc, or forces opposed to NATO's Warsaw Pact which, among other things, had a large number of tanks and other armored vehicles, leading NATO to fear a kind of blitzkrieg in Europe in case of direct military confrontation with such a Cold War adversary. This munition and weapons capable of firing it were never used in conflict between the great powers of the Cold War era, which does not mean they were not used at all.

The most notorious examples of the use of depleted uranium munitions to date were the war between Western allies and Iraq under Saddam Hussein's rule, and, unfortunately, NATO's military action during the aggression on the FRY in 1999. In some parts of Serbia, primarily in Kosovo and Metohija, such weapons were used for aerial attacks. These were 30 mm rounds with a uranium alloy core, extensively fired from *GAU-8/A* Avenger rotary cannons mounted on A-10 aircraft. For more on these weapons, see: Babić, V. K. (1990). *Avijacija u lokalnim ratovima.* Belgrade: Vojnoizdavački i novinski centar, 74.

[3] For more, see: Škulić, M. (2023). „Upotreba besposadnih letilica u ratu / oružanom sukobu – analiza sa stanovišta međunarodnog krivičnog prava". *Zbornik radova sa međunarodne naučne konferencije: „Raskršća međunarodnog krivičnog i krivičnog*

Environmental pollution problems are fundamentally global, so despite the efforts of developed countries to relocate so-called dirty technologies beyond their borders, primarily to "third world" countries, the most dangerous forms of disturbances of environmental balance know no boundaries.[4] This behavior and reasoning of corporations from powerful industrial nations not only clearly indicate that in the race for profit no means are spared, but it also vividly illustrates a certain naivety of all attempts to fully impose the "cost" of industrial development, and thus environmental pollution, on someone else.

However, the fact remains that the immediate consequences of environmental disasters are suffered by those who are spatially and environmentally most exposed to this pollution – a horrendous example is the tragedy that occurred in India in Bhopal (the case of toxic gas leakage from a chemical plant), as well as the severe nuclear disaster in Chernobyl which affected not only the then USSR but also the majority of Europe, as well as parts of other continents.

All major problems arising from environmental pollution, both through environmental disasters of enormous proportions and those types of pollution that even somewhat routinely occur due to technical and technological failures, have had their criminal law components for decades, reflected in the establishment of a whole range of so-called environmental crimes, but also generally crimes of that nature, meaning that it includes some misdemeanors as generally less severe punishable acts than criminal offenses. Such is the case in Serbia, whose criminal legislation, among other things, contains a large number of environmental crimes, which are characterized by a number of common fundamental characteristics but also a large number of differences, just as all these criminal offenses sometimes have very similar, and sometimes significantly different, *ratio legis*.

When it comes to studying the response of criminal law to environmental pollution, but also from the etiological and phenomenological components of this type of crime, systematic criminological research dedicated to so-called environmental crime is highly prevalent today, metaphorically referred to as green criminological analyses, and when it comes to monographic and other papers dedicated to this problem, they are defined as green criminology.[5]

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prava – reforma pravosudnih zakona Republike Srbije". Belgrade, Palić: Udruženje za međunarodno krivično pravo, 28–59.

[4] Škulić, M. (2022). *Kriminalistika.* Belgrade: Faculty of Law, University of Belgrade, 467.

[5] For more, see: Lukić, N. (2023). *Zelena kriminologija.* Belgrade: Faculty of Law, University of Belgrade, 8–9.

THE RIGHT TO A HEALTHY ENVIRONMENT

Defined by the Constitution and relevant international legal sources, guaranteed human rights form a very important segment of the overall body of norms inherent to a legal state (*Rechtsstaat*) characterized by the rule of law. It is now common to speak of "two generations of human rights," where one includes civil and political rights, and the other economic, social, and cultural rights. There is also a developed concept of a "third generation of human rights," often including *the right to a healthy environment*.[6]

The readiness of national and international communities to rationally satisfy human needs is rapidly increasing with the general progress of society, leading to the recognition of new rights, such as the right to a healthy environment and the right to development, or demands for the recognition of new rights, such as the right to food or water, thus speaking of a new – third generation of human rights.[7]

The right to a healthy environment could be considered a combined right in terms of the division into "two generations of human rights," as it is related

[6] During the Cold War and the drastic ideological-political opposition between the two blocs and two worldviews, the issue of human rights was highly politicized and ideologized, leading to a kind of competition between two extremes. On one side, only political rights such as the right to free multi-party elections, freedom of speech, and the freedom of political association were considered significant. On the other side, only certain socio-economic rights were deemed important, such as the right to work and the right to healthcare.

There are two diametrically opposed views on this issue. One extreme position holds that economic and social rights are far more important because, for example, people who are extremely poor or literally starving do not care about freedom of speech, just as the right to participate in elections is irrelevant to those who are homeless.

According to the other extreme reasoning, only civil and political rights are truly human rights and only they have the significance of universal human rights, while economic and social rights are not, because if people were absolutely guaranteed a certain economic and social position, it would be completely contrary to the idea of a free market and the concept of market competition, leading to harmful state interventionism, which could, in turn, eventually restrict the level of achieved civil and political rights.

It is also pointed out that every universal human right presupposes the duty of the state to ensure its realization (for example, if a citizen has the right to vote, the state is obliged to ensure free elections). It would not be possible for a state to absolutely guarantee certain economic and social rights in a market economy, as this would amount to state management of the economy. This issue is largely connected to the global social system of values, the issue of dominant ideologies in the modern world, and questions of political and state organization. After the end of the Cold War, these opposing views largely became irrelevant, but of course, new challenges in the 21st century, especially the new significant polarization in the world, will undoubtedly have repercussions on the issue of human rights valuation, which in turn produces certain consequences regarding the right to a healthy environment.

[7] Etinski, R. (2010). *Međunarodno javno pravo.* Belgrade: Službeni glasnik, 222.

on one hand to some basic civil rights, like the right to life and the right to bodily integrity, but on the other hand, logically, it is also related to economic and social rights, as environmental pollution is often linked to economic activities, and the consequences of pollution are primarily directed at human health, meaning there is a connection of this right with some social rights.[8]

As previously explained, the right to a healthy environment is increasingly classified into the so-called third generation of human rights, but it seems that there are still many significant dilemmas in this regard.

It is not entirely certain whether there is a right to a "healthy environment" as a distinct human right, and even if there is an appropriate right related to the environment, it would be difficult to say that this right concerns an environment that is exactly healthy, or absolutely/dominantly unpolluted, given the extreme complexity of this issue and its connection with a whole body of other economic and social problems, and issues related to the effects of usual natural circumstances such as, for example, volcanic activity, earthquakes, cyclical alternation of global cooling, or global warming, etc. In fact, this right exists sometimes at a declarative level, even in our Constitution, but its realization in practice is highly questionable.

Even if there is a "right to a healthy environment," often referred to as a current human right from the so-called third generation of human rights, it is questionable whether it can be considered a universal human right. On one hand, it is not formally prescribed in the most important international legal sources related to fundamental human rights, but from some of their provisions, it can indirectly be concluded that it exists. On the other hand, in the modern world, it is indisputable that industrial development, a range of new technologies, transportation, and other similar factors significantly impact environmental pollution, and they cannot be eliminated, neither completely nor significantly (especially not quickly), so it could easily be concluded that even if it were claimed that man has the right to a healthy environment, this right is not only regularly violated in practice, but other rights may be in collision with such a right. For example, if the use of nuclear energy were banned in the context of major environmental pollution in Japan, and around the world due to the disaster at the Fukushima nuclear plant, and previously based on the tragic experience from Chernobyl,[9] the world would be instantly engulfed in

[8] Škulić, M. (2011). Pravo na zdravu životnu sredinu kao ljudsko pravo. *Zbornik: „Priručnik za zaštitu životne sredine".* Belgrade: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 95.

[9] In Yugoslavia, following the Chernobyl disaster, the construction of nuclear facilities was banned, and this ban remains part of the positive law in Serbia today, forming the basis for the *ratio legis* of the criminal offense of unauthorized construction of nuclear facilities. This is considered by some to be an expression of so-called "moral panic", a

a dramatic energy shortage, which would consequently lead to problems, for example, in food supply, manufacturing, heating, etc., and as a result, rights such as the right to work, social security, and even the right to life, etc., would quickly be jeopardized. The same applies to the problem of excessive use of fossil fuels, some means of transport, the use of pesticides and herbicides in agriculture, etc.

On the other hand, it is indisputable that major environmental pollution can also result from force majeure, or certain natural phenomena, such as earthquakes, floods, etc., so how can citizens be guaranteed the right to a healthy environment when its violation can occur completely independently of the state, and when it comes to major natural disasters, even the most developed countries cannot prevent them. Therefore, it is entirely clear that one cannot speak of the right to a healthy environment, as the existence of a certain right implies that a certain subject has the obligation to preserve such a right, its protection or improvement, and in the context of human rights, this should certainly be the state. Not to mention that such a right would logically imply that there indeed exists a "healthy environment" in countries that recognize this right to their citizens, but today in every modern country, a healthy environment is possible only in certain regions and represents an exception rather than the rule.

Moreover, as in many situations, environmental pollution can occur completely independently of the state's activities in such a way that the state cannot prevent it, as is the case with major natural disasters, then it is unrealistic and impossible to a priori impose such an obligation on the state. Furthermore, completely independent of any activity of the state, and even people in general, there are parts, i.e., regions in every country that are less or more healthy, conducive to life, etc. For example, the air is generally far cleaner in the mountains than in the plains or in a swampy area. However, this does not mean that states do not have certain obligations concerning the environment, i.e., concerning citizens living in a particular natural environment.

States should generally have the obligation to prevent further pollution of the environment, the duty to preserve parts of the environment that are still

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well-known criminological and criminal-political phenomenon. It involves *specific legislative responses*, often under pressure from the lay public and usually related to specific cases in practice, where laws are quickly modified, often focusing on creating conditions for "tightening legal penal policy." This falls within a broader social phenomenon known in criminology as "moral panic", a term originally formulated in English and not entirely adequate from the standpoint of the meanings of the noun "moral" and the adjective "moral", as well as the word "panic" in the Serbian language, but it has become quite established in Serbia as well. For more on so-called moral panic, see: Hagan, Frank E. (2008). *Introduction to Criminology – Theories, Methods and Criminal Behavior,* 6th Edition. Thousand Oaks, California: Sage Publications, 450.

unpolluted, and the obligation to create a proper balance between the need for development and the necessity that this development is not destructive to the environment, the duty to create conditions for the expansion of environmentally friendly technologies that minimally pollute the environment, etc.[10]

One could only possibly speak of the existence of a human right to an "adequate environment," i.e., an environment that is as little polluted as possible, which boils down to rational so-called environmental minimalism, but it is not at all possible, except at a purely declarative level, to consider that a person has an unconditional right to a healthy, preserved, completely unpolluted environment, as that would obviously be quite unrealistic.

On the other hand, a series of international acts and national regulations are aimed at environmental protection, which in the modern world is done in such a way as to find an appropriate balance between the need for necessary activities that are essential but simultaneously associated with lesser or greater environmental pollution (such as, for example, energy production by burning fossil fuels, or using nuclear power plants,[11] means of transport, etc.), and the necessity to preserve the environment. Today, this is primarily achieved by developing the concept of *sustainable development*, which boils down to creating conditions that give preference to so-called clean technologies, so that on one hand, the current environmental pollution is reduced to a necessary minimum, and on the other hand, at the same time, with appropriate measures and procedures, the already existing pollution, which is often the result of not just years but, considering the start of the industrial revolutions even centuries-long pollution,[12] often of dramatic proportions, is reduced.

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[10] For more, see: Škulić, M. (2011). Međunarodnopravna zaštita životne sredine – prava i obaveze države. *Zbornik: „Priručnik za zaštitu životne sredine"*. Belgrade: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 105–140.

[11] In this regard, there are some very striking paradoxes. Advocates and supporters of widespread use of nuclear energy argue that, on one hand, it is far safer today than it used to be, while on the other hand, in practice, it is far less destructive to the environment than the use of fossil fuels. This is particularly illustrated by comparing the level of usual pollution (amount of carbon monoxide, degree of global temperature increase, etc.) resulting from the operation of thermal power plants that use coal or fuel oil, with the pollution that occurs under normal circumstances from the operation of nuclear power plants, which is indeed minimal.

However, the problem with nuclear power plants in this regard is similar to the story of a cow that produces a lot of milk but eventually kicks over and spills all the milk. Just one major incident at a nuclear facility (like the one in Chernobyl or later in Fukushima, Japan, and it is possible, unfortunately, to imagine even darker scenarios) can cause dramatic environmental consequences that cannot be remedied for tens of thousands of years, which from the perspective of our usual human lifespan appears more than daunting.

[12] This historical component is significant even today. For instance, China is currently indisputably one of the largest global polluters, often facing sharp criticism in the

Particularly significant in relation to the human right to a healthy environment is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted within the UN Economic Commission for Europe in Aarhus, 25 June 1998), by which the contracting states committed to accept that every person has the right to live in an environment adequate to their health and wellbeing, and the duty, individually and in association with others, to protect and improve the environment for the benefit of present and future generations.

To contribute to protecting the right of every person of present and future generations to live in an environment adequate to their health and wellbeing, the contracting parties guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters, whereby the contracting parties are required to ensure that their public authorities, upon request, make environmental information available to the public.[13]

States that have acceded to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters have several basic duties, which simultaneously means that the citizens of these states have the right to demand the fulfillment of the duties that the states possess.[14]

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international community. However, China asserts its right to industrial development, arguing that such development comes with a cost, and that historically, other industrial powers of their times were also major polluters. For example, the infamous "London smog" was a consequence of England's rapid industrialization.

Moreover, in the context of globalization, the wealthiest countries in the world, primarily the USA along with numerous Western European nations, have relocated many of their industrial operations (often significant polluters) to China and other countries commonly referred to as "developing countries." This is because labor is considerably cheaper there, and China has also become a major market (especially for automobiles, for example). As a result, China, which has become a kind of global "workshop", is not only at the forefront of production but also significantly contributes to global pollution. This situation serves as an excellent example of the need to consider *the issue of responsibility* not only in terms of individual countries but also in relation to major global corporations. These corporations have their industrial operations worldwide and strategically choose locations characterized by cheap labor, a lack of insistence on workers' social rights, and lenient environmental regulations.

[13] For more, see: Etinski, R. (2010). *Međunarodno javno pravo.* Belgrade: Službeni glasnik, 405–406.

[14] The Chernobyl disaster serves as a poignant reminder, especially for our country, of the old wisdom that "history is the teacher of life". Therefore, we must not forget the actions taken in response to the nuclear catastrophe in Chernobyl, Ukraine, which was part of the USSR at the time of the reactor explosion on April 26, 1986.

The Chernobyl accident had severe consequences. Dozens of people involved in the cleanup died from radiation exposure, and thousands were victims of radiation sickness. A

These include the following basic duties, with correlative certain rights of the citizens:[15]

1) States have the duty to make available to the public relevant information about the state of the environment – correlative to this state duty, citizens have the right of access to information, i.e., the right to receive information upon their request.

2) States are obligated to have in their legal system, in addition to the mechanism for making transparent information related to the state of the environment, also appropriate legal mechanisms to challenge the decision by which relevant information is not made available to a particular person – in relation to this state duty, citizens have the correlative right to legal remedy in case their request for relevant information is denied.

3) States are obligated to establish a system for obtaining information about activities that may harm the environment, and in relation to this duty, citizens have the right to use such a system upon request to become acquainted with the information stored in it.

Finally, in theory, when it comes to international legal "instruments" that regulate pollution processes that arise in various ways and sometimes have a "transboundary character" – a certain activity can optionally: 1) be prohibited, 2) be dimensioned, so that it is allowed up to a certain extent, and beyond that, it is prohibited, and 3) be selectively regulated.[16]

The Fundamentals of the Right to Environmental Protection and the Fundamental Elements of Its Relationship with Environmental Protection through Criminal Law

Environmental law represents a forward-looking legal discipline studied at numerous universities worldwide, and in European legal concepts, it is typically referred to as "environmental law": in German – *Umweltrecht*; in

large part of Ukraine, as well as Europe at large, suffered irreversible environmental pollution. Unfortunately, at that time, Yugoslavia was also a victim of pollution through the atmospheric transmission of radioactive particles, but the population was not properly informed. The authorities were primarily guided by the need not to disturb the public. In Serbia today, the Agency for Protection from Ionizing Radiation is now operating, which would have to promptly inform the public about any increase in radiation levels. This is particularly relevant today in light of the disaster at the Japanese nuclear power plant following an earthquake and tsunami, which will undoubtedly have greater global consequences.

[15] Škulić, M. (2011). Međunarodnopravna zaštita životne sredine – prava i obaveze države. *Zbornik: „Priručnik za zaštitu životne sredine"*. Belgrade: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 127.

[16] Etinski, R. (2010). *Međunarodno javno pravo.* Belgrade: Službeni glasnik, 559.

French – *droit de l'environnement*; in English – *Environmental Law*; in Italian – *diritto dell ambiente*; in Portuguese – *Dereito do Ambiente*.[17] Moreover, in contemporary legal systems of rule-of-law states, the last few decades have seen a particular development in the *criminal law segment* of environmental protection, which has gained its "terminological citizenship," for example, *Umweltstrafrecht* (German) or *Environmental Criminal Law* (English).[18]

For some countries that are oriented toward Anglo-Saxon law, such as the USA, strict liability is typical when it comes to the protection of the environment through criminal law. In fact, in the USA, the concept of strict liability is not otherwise established factually as *a form of liability*, i.e., from the standpoint of the formal exclusion of the *mens rea* element as a segment of the general concept of a criminal offense contained in general substantive criminal law. Rather, this concept is linked to the special part of criminal law and the formulation of certain specific types of criminal offenses for which one is "strictly liable," i.e., where it is sufficient for the perpetrator to perform a specific action (which constitutes a segment of the *actus reus* as the objective element of a criminal offense), without the need for the perpetrator to also exhibit a specific subjective relation to that action, as is otherwise necessary when dealing with other usual types of offenses, which in American criminal law theory, is associated with one of the general divisions of criminal offenses into *mala in se* and *mala prohibita*.[19] Namely, American criminal law theory classifies those criminal offenses that are based on strict liability in the criminal law of the USA as the most typical crimes that are of a *mala prohibita* character.

In the USA, offenses that are subject to *strict* liability are mainly "regulatory type" offenses, such as those related to certain food, health, and environmental standards.[20] Although literature justifiably emphasizes that the existence of many different models of the protection of the environment through criminal law implies that it is a relatively new phenomenon,[21] it is practically indisputable today that all contemporary legal systems recognize certain forms of environmental offenses.

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[17] For more, see: Rakić-Vodinelić, V. (1995). Ekološko pravo kao pravo čoveka. *Pravni život,* no. 9. Belgrade, 245–265.

[18] Heine, G., (Hrsg.) (1997). *Umweltstrafrecht in mittel – und südeuropäischen Länder.* Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, VII.

[19] Škulić, M. (2023). *Krivično pravo Sjedinjenih Američkih Država.* Belgrade: Službeni glasnik, 56.

[20] Sheb, J.M. (2011). *Criminal Law and Procedure*. Wadsworth, Belmont, CA, 86.

[21] Faure, M., Heine, G. (2000). *Environmental Criminal Law in the European Union.* Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1.

When it comes to the European Union, in recent decades, there have been marked legal efforts aimed at establishing strong cooperation in environmental protection (e.g., the Stockholm Declaration),[22] which has its evident legal consequences in the field of substantive criminal law.[23] Moreover, in recent years, literature has also discussed the special place of environmental protection within *international criminal law*. This tendency is particularly noticeable following the experiences of the war that took place in the spring of 1991 between Iraq and multinational forces led by the USA, during which Iraqi forces deliberately set fire to a number of Kuwaiti oil wells, leading to severe environmental consequences[24] noting, of course, that Iraqi armed forces were technically and technologically inferior to their wartime opponent (coalition troops led by the USA), and the burning of oil wells was both an expression of frustration due to military impotence and possibly an attempt to disrupt the air strikes of the superior aerial forces of the attacker with the resulting smoke.

Doctrinally, it is considered that

> " ...contemporary state organizations and modern legal systems in recent decades have consistently constituted the right to a healthy environment as one of the elementary human rights,"[25]

and this right is also referred to as "a special personal right of every citizen."[26]

Theory emphasizes that harming environmental balance, i.e., criminal offenses against the environment, not only harms nature but also constitutes an attack on human freedom.[27] Somewhat euphorically, German literature also highlights that the modern state must not only be economic and financial but must also become environmental (*Umweltstaat*).[28]

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[22] Ipsen, K. (1990). *Völkerrecht.* Munich: Verlag CH Beck, 843.

[23] Principle 21 of the Stockholm Declaration, adopted at the United Nations Conference on the Human Environment held on June 16, 1972, states that countries, in accordance with the UN Charter and the general principles of international law, have the sovereign right to exploit their own natural resources pursuant to their own environmental policies. However, they also have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.

[24] Reichart, M. (1999). *Umweltschutz durch völkerrechtliches Strafrecht.* Frankfurt am Main, Berlin, Bern, New York, Paris, Vienna: Peter Lang – Europäischer Verlag der Wissenschaften, 1–3.

[25] Herdegen, M. (2000). *Völkerrecht.* Munich: Verlag CH Beck, 319–320.

[26] Kloepfer, M., (Hrsg.), (1994). *Umweltstaat als Zukunft – juristische, ökonomische und philosophische Aspekte,* – CF Gethmann, *Individuele Freihat und Umweltschutz aus philosophischer Sicht.* Bonn: Economica Verlag, 42.

[27] Kloepfer, M., (Hrsg.), (1994). *Umweltstaat als Zukunft – juristische, ökonomische und philosophische Aspekte,* – CF Gethmann, *Individuele Freihat und Umweltschutz aus philosophischer Sicht.* Bonn: Economica Verlag, 67.

[28] *Ibid*., 70.

The evolutionary movement of state organization is similarly explained – from a police to a legal and social state, which, with further development and the aspiration for full respect of civil rights, must evolve into a so-called environmental state.[29]

Of course, it is highly questionable to what extent such theoretical views, like those mentioned above, boil down in practice to a list of good intentions. This applies both generally to the legal aspects of environmental protection and to the response of criminal law to environmental pollution, which, like other forms of protection through criminal law, is fundamentally based on general constitutional legal provisions. As always, response through criminal law represents an *ultima ratio* mechanism in the function of environmental protection. Finally, when it comes to constitutional legal norms related to environmental protection (Article 74, paragraph 2 of the Constitution of Serbia), they are, as always when it comes to constitutional provisions, largely norms of predominantly declarative character[30] but, of course, when a certain action or omission amounts to harming or endangering the environment, and it has the necessary degree of relevance in a criminal legal sense, the protection of the environment through criminal law comes into play.

In a legal state, or a state characterized by the rule of law, the environment is protected and improved through various legal mechanisms, sometimes even through criminal law, which, in this respect as well, has the *ultima ratio* character.

The primary function of criminal law is its *protective function* in relation to the most important goods and values that could be damaged or endangered by specific criminal offenses. This means that "criminal law provides protection for all the more significant values of society."[31] This applies also to

[29] Kloepfer, M., (Hrsg.), (1994). *Umweltstaat als Zukunft – juristische, ökonomische und philosophische Aspekte, –* CF Gethmann, *Individuele Freihat und Umweltschutz aus philosophischer Sicht.* Bonn: Economica Verlag, 3.

[30] Certainly Of course, declarative appeals and commitments have always been present, even within the most important legal regulations of our legal system. However, the significant question that always arises is how much they are actually applied in practice.

Merely granting a person the right to a healthy environment does not make the environment healthier, cleaner, or more preserved; instead, it is necessary to create conditions for the preservation and improvement of the environment through concrete and adequate regulations and practices based on their application.

Specifically, norms contained in constitutional acts require their supplementary concretization through the adoption of a series of other regulations, primarily regulations that specifically protect the environment by creating certain rules of behavior for potential polluters through the establishment of firm technical and technological criteria and standards, then regulations that establish the protection of the environment through criminal law, as well as other forms of sanctioning behaviors that disturb the environmental balance.

[31] Babić, M., Marković, I. (2013). *Krivično pravo – opšti dio.* Banja Luka: Faculty of Law, University of Banja Luka, 23.

the protection of the environment through criminal law, as a preserved environment, or the preservation of the environment to an objectively possible extent, is one of the societal goals associated with the human right to a healthy environment.[32]

Modern criminal law achieves its protective function both by stipulating certain criminal offenses and by prescribing general norms related to both objective and subjective characteristics of criminal offenses, bases for excluding unlawfulness, etc., but all this only under the condition of the existence of the perpetrator's *guilt*, where the degree of guilt is significant for sentencing.[33] It is particularly important to note that modern criminal law is based on the principle of guilt.[34] In principle, this applies to the protection of the environment through criminal law as well. As always, this form of protection through criminal law, i.e., the protection of the environment through mechanisms of criminal law, involves the action of both substantive criminal law and procedural criminal law. This includes considering the direct link between substantive criminal law and procedural criminal law. Finally, this is related to the definition of procedural criminal law in a functional sense, directly related to its purpose of existence, with direct reliance on the goal of substantive criminal law.[35] Thus, in theory (C. Roxin) it is highlighted that:

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[32] In our criminal law theory, it is rightly noted that "the protection of the environment through criminal law, provided by numerous criminal offenses in Chapter XXIV of the Criminal Code, is still not complete". Thus, "they do not provide protection against noise", which means that this "important form of environmental endangerment is not criminalized by any other provision from secondary criminal legislation, and has remained at the level of protection through misdemeanor law". Stojanović, Z., Perić, O. (2009). *Krivično pravo – posebni deo,* XIII edition. Belgrade, 260.

When it comes to protection from noise, the situation is different in some European criminal/penal legislations. For example, in the German Criminal Code (*StGB*), the provisions contained in Paragraph 325° provide for protection from noise as a specific form of endangering/disrupting the environment.

In the first form of the criminal act of causing noise, vibrations, and non-ionizing radiation (Para. 325a Abs. 1 *StGB*), it is stipulated that the perpetrator who, in the operation of a facility, especially a power unit or machine, violates obligations under administrative law and causes noise that is likely to harm the health of another outside the area belonging to the facility, will be punished alternately with: 1) a prison sentence (deprivation of liberty) of up to five years, or 2) a fine.

[33] Roxin, C., Greco, L. (2020). *Strafrecht – Allgemeiner Teil – Band I – Grundlage – Der Aufbau der Verbrechenslehre,* 5. Auflage. Munich: Verlag CH Beck, 1–2.

[34] Jescheck, H. H., Weigend, T., (1996). *Lehrbuch des Strafrechts – Allgemeiner Teil*, Fünfte vollstellung neuberarbeitete und erweiterte Auflage. Berlin: Duncker & Humblot, 24.

[35] Škulić, M. (2022). *Krivično procesno pravo,* XIII edition. Belgrade: Faculty of Law, University of Belgrade, 5.

> "Substantive criminal law, whose fundamental rules are contained in the Criminal Code, establishes the characteristics of punishable acts,[36] and prescribes legal consequences (punishments and security measures) associated with the commission of a criminal offense. For these norms to fulfill their function of creating fundamental conditions for peaceful coexistence among people, in the event of a criminal offense being committed, they must not only exist on paper. Primarily, a legally regulated procedure is needed through which the existence of a punishable act can be established, and the legally prescribed sanction can be implemented. Such a legally regulated procedure can be understood in three aspects: its provisions must be formulated in such a way as to appropriately support substantive criminal law in being implemented; they must simultaneously establish the limits of the criminal justice organs' right to interfere in the protected freedoms of individuals; and they must ultimately create the possibility, through a legally binding decision, to restore the disturbed legal peace."[37]

Therefore, there is an organic connection between substantive criminal law and procedural criminal law, as well as between both procedural and substantive criminal law and criminology, whose rules in practice enable the efficient discovery, clarification, and proof of criminal offenses in general, including those criminal offenses related to the environment, or those that facilitate the protection of the environment through criminal law. Additionally, both fundamental branches of criminal law, observed in its "totality," meaning both substantive and procedural criminal law, have their strict constitutional foundation. This also applies to the protection of the environment through criminal law, based, among other things, on the effect of relevant constitutional norms that generally create the overall legal environment of a state characterized by the rule of law, within which all relevant forms of protection of the right to a healthy environment are realized.[38]

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[36] When it comes to the current Serbian criminal law system, punishable actions should be understood to include actions (commission or omission, i.e., punishable neglect) that constitute the commission of a crime or participation in a crime, as well as actions that represent a significant characteristic of a misdemeanor, or an economic offense, as specific types of delicts. In a broader sense (especially in the context of the *ne bis in idem* principle in light of the case law of the European Court of Human Rights, which is also accepted by the Constitutional Court of Serbia), this could sometimes include other types of delicts when they are punishable with relatively severe sanctions, such as cases of disciplinary punishment of convicted individuals, but also some other disciplinary procedures, as in certain situations some measures that objectively have a penal character, even though they are not formally formulated as penalties/sanctions.

[37] Roxin, C. (1998). *Strafverfahrensrecht*, 25. Auflage. Munich: Verlag C.H. Beck, 1–2.

[38] As indicated by the title of Chapter XXIV of the Criminal Code of Serbia, which is dedicated to the protection of the environment, the legislator aims, through the creation

The environment can be viewed in a broader and a narrower sense, which has implications for criminal law because some of the criminal offenses in Chapter XXIV of the Criminal Code relate to the protection of the environment in a broader sense, while others protect the environment through criminal law in a narrower sense.[39]

According to the extensive definition formulated by the UNEP Expert Group[40], the environment

> "…includes biotic and abiotic components, including air, water, soil, flora, and the ecosystem created by their interaction and may also include cultural heritage, landscape features, and a comfortable living environment,"

while according to the restrictive definition contained in the Stockholm Declaration of 1972, the environment

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of this group of criminal offenses, to protect the environment as such, meaning in a kind of "totality", within the operation of criminal law in its predominantly *protective function* in relation to the fundamentally most important social goods and values.

[39] It is indeed more accurate and logical to define the environment in broader terms because, in the civilized world, especially in the modern era, it is difficult, if not practically impossible, for a clean or completely "intact" environment to exist, reduced only to external and natural elements, without any human influence.

It is virtually impossible for the environment to merely serve as a backdrop for human activities without being modified by them in some way, to a lesser or greater extent. This modification usually involves adapting certain elements of the environment to human needs or altering the environment to some degree and in certain ways due to human activities. These activities, as a byproduct or as their goal and purpose, change the environment in which they are carried out.

For instance, even in the deepest parts of the Amazon rainforest, where there are practically no humans (though such areas are now quite rare, and even there, where there are no modern humans, there typically are so-called indigenous peoples), there is still a certain human impact on the environment. For example, the Earth's atmosphere is largely unique, and although there are parts of the atmosphere that are more or less polluted, it is impossible to identify any part of the atmosphere that is not at least partially polluted. Thus, even the part of the atmosphere above completely uninhabited rainforest areas is, to some extent, modified by human activity in the form of certain (in this case, quite insignificant, but nonetheless real) pollution.

On the other hand, if there are absolutely no results of human activities, even minor ones, in a certain natural area, then such an environment would not practically be considered an environment from the human perspective. Humans create the concept of the environment for its protection, and in this case, there would be no need for any protection, nor would there be a need to classify such an environment under any legal category.

[40] *United Nations Environmental Program.* For more, see: https://www.unep.org/interactives/things-you-can-do-climate-emergency/?gclid=EAIaIQobChMIpr2xntzT_gIVFcDVCh1NjwvuEAAYASAAEgIfIfD_BwE. Accessed May, 1 2023.

> "...provides physical sustainability to humans and offers the opportunity for intellectual, moral, social, and spiritual progress."[41]

Broadly understood, the environment represents an appropriate unity and relevant combination of external, physical, and naturally existing elements, as well as those elements that result from human activities, which are essentially just a certain extension of those previously existing natural, or physical elements, whether through their combination, creation of new elements, appropriate division or multiplication, physical or chemical action on them, or in any other way that amounts to their modification.

Narrowly understood, the environment implies exclusively external physical elements that represent only an appropriate natural setting, an appropriate natural ambiance, or a natural framework for human action.

In general terms, protection of the environment through criminal law implies protecting the environment from certain forms of destructive action against it through criminal law norms, primarily related to pollution of the environment to a degree high enough to warrant a corresponding reaction of criminal law, but this includes other forms of "attacks" on environmental elements as well.[42]

Environmental pollution involves any human action that destructively impacts the environment, compromising its integrity or quality, whether by releasing substances or energy into the environment (for example, discharging liquids, gases, creating chemical vapors, combustion products, radioactive or ionizing radiation, etc.), or through certain destructive mechanical actions on the environment (for example, devastating deforestation, creating landfills, accumulating waste, etc.), resulting in danger or concrete adverse consequences for human life and health, causing damage to other living beings and ecosystems, or disrupting the legal and legitimate use of natural resources, or disturbing existing natural conditions and ambiance for life and production in a specific area.[43]

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[41] Kreća, M. (2010). *Međunarodno javno pravo*, Fourth Revised Edition. Belgrade: Faculty of Law in Belgrade, 639.

[42] Škulić, M. (2001). *Krivičnopravna zaštita životne sredine – dokazni aspekti.* Belgrade: *Pravni život* , no. 9, Volume I, 257–280.

[43] If environmental pollution extends across the territories of multiple countries, or encompasses border areas, then this constitutes environmental incidents with an international component, which requires the existence of special regulations at the international legal level. This represents a specific case of transnational/multinational environmental delicts/incidents. Already in the second half of the 19th century, bilateral, as well as multilateral international treaties on boundary waters were established, which included rules for the protection of fish from pollution. The relatively rapid development of environmental protection from pollution at the international level became especially pronounced after World War II, when a whole series of very significant sources of international law related to environmental protection emerged.

When it comes to criminal offenses protecting the environment, today, regarding the determination of their protective object, it is no longer controversial in theoretical terms or according to legislative systematics that they do not protect certain typical legal goods – human life and health (from some forms of attacks on them, realized by endangering the environment or inflicting environmental damage in general). Rather, these criminal offenses protect a particular good that can be considered independent from the standpoint of the need for protection, including through criminal law norms, which is the environment as such, or the human right to an environment that would be preserved to the greatest possible extent.

The protective object of criminal offenses against the environment, therefore, is no longer the protection of classical goods through criminal law, such as life and body, which are often harmed or endangered and thus by environmental criminal offenses. Rather, it is the environment itself. It is therefore considered that the protective object of these criminal offenses is the environment as an independent good, which essentially boils down to the protection of "the right of man to a preserved environment."[44] Moreover, "criminal offenses that protect the environment along with some other primary protective object have been known in criminal legislation for a long time," including criminal offenses against human health, criminal offenses against the economy, against general safety, and other criminal offenses.[45] Given the significant importance of the environment as such, and the importance of its preservation, especially in the era of major industrial, technical and technological, and other challenges that are potentially or currently relevant to destructive actions directed against the environment, all modern criminal legislations now prescribe special "environmental criminal offenses," such as criminal offenses against the environment in Serbian criminal legislation. Such criminal offenses were first established in 1977, in the former SFRY, at the level of the republican and provincial criminal legislations. Criminal offenses of this type remained in the last Yugoslav criminal code, in the Criminal Code of the FRY, and now exist in all countries that emerged on the territory of the former SFRY.

One of the characteristics of certain criminal offenses against the environment in Chapter XXIV of the Criminal Code is that they are *delicti propria*, meaning they cannot be committed by just anyone. They can only be committed by a person who has the appropriate status, which is most often an official or responsible person, as is the case with the criminal offenses of failing to take measures to protect the environment (Article 261 of the Criminal Code) and illegal construction and commissioning of facilities and installations that

[44] Stojanović, Z. (2022). *Komentar Krivičnog zakonika,* 12. revised edition. Belgrade: Službeni glasnik, 860.

[45] Stojanović, Z. (2008). *Krivično pravo.* Podgorica: CID, 531.

pollute the environment (Article 262 of the Criminal Code). In criminological terms, such criminal offenses can also fall into the category of white-collar crime, and in some situations, when it comes to legislations that recognize such a possibility, then legal entities can also be held responsible for these criminal offenses. Moreover, most of the criminal offenses against the environment contained in Chapter XXIV of the Criminal Code are of a *blanket nature*. This particularly concerns classical types of such offenses, like the basic environmental offense, which is environmental pollution. This is most often done through appropriate by-laws that regulate in detail the permissible level of emissions of certain substances harmful to the environment, prohibit certain activities that are destructive to the environment, regulate the response in case of accidents in industrial installations, define procedures for mitigating existing environmental damage, and govern waste management in general, especially hazardous waste, such as medical waste, etc.

CONSTITUTIONAL CHARACTER OF THE RIGHT TO A HEALTHY ENVIRONMENT IN SERBIA

The right to a healthy environment finds its *declarative foundation* primarily in constitutions and other supreme legal-political acts.[46] For instance, Article 52, paragraph 1 of the former Constitution of the Federal Republic of Yugoslavia stated that "man has the right to a healthy environment," along with the right to "timely information about its state." Similarly, Article 31 of the former Constitution of the Republic of Serbia established that man has the right to a healthy environment, imposing a duty on everyone to protect and improve the environment in accordance with the law. The right to a healthy environment is also prescribed by the current Constitution of Serbia.

The Constitution of Serbia prescribes in Article 74, paragraph 1, that everyone has the right to a healthy environment, as well as to timely information about its state. When it comes to *the right to a healthy environment*, it is largely a "declarative norm," as the constitutional legislator cannot realistically

[46] In a declarative sense, Montenegro has gone even further, as its Constitution states that it is a "democratic, social, and environmental state," which, of course, in practice mostly boils down to a strictly, or at least dominantly declarative level. This is explained in Montenegrin constitutional law theory as follows: "The Constitution of Montenegro is one of the few that contains a provision on the environmental state, which is intended to oblige the state itself, legal entities and individuals, other institutions and entities on its territory, to respect and preserve natural resources and to act responsibly when it comes to the environment." Vukčević, M. (2015). *Komentar Ustava Crne Gore.* Podgorica: Mediteran University, 53.

absolutely guarantee the right to an environment that is definitely and even absolutely healthy, as this essentially depends on numerous non-legal factors. For example, the environmental state cannot be equally healthy in large cities, especially during the heating season or in industrial centers, compared to mountainous areas where there is no industry, etc.

The state of the environment largely depends on some geographical and climatic factors, so the norm contained in Article 74, paragraph 1 of the Constitution of Serbia, should be understood as the intention of the constitutional legislator to provide everyone with a healthy environment to the extent that is objectively possible and, at the same time, prevent any unnecessary pollution of the environment which, in addition, implies protection of the environment through criminal law from some particularly severe forms of its pollution.

The Constitution treats everyone (everybody), especially citizens and institutions of the Republic of Serbia, as *accountable* for the protection of the environment (Article 74, paragraph 2 of the Constitution of Serbia), and additionally imposes a duty on everyone to preserve and improve the environment (Article 74, paragraph 3 of the Constitution of Serbia). This is generally in line with the principle idea/tendency that "respect for the Constitution and laws is the duty of all individuals and institutions in every state based on the rule of law."[47]

The Role of the Constitutional Court in the Protection of the Environment

The role of the Constitutional Court of Serbia is very important and exceptionally specific, both in general in the legal system of Serbia and in its criminal law segment. It should be noted that the Constitutional Court of Serbia is not a supreme court or a court above other courts in the Serbian legal system, and it is not even part of the regular judiciary within the constitutional framework of the separation of powers.[48] This is the case despite the fact that the Constitutional Court has the authority, in some instances, to annul decisions of ordinary courts, even those of the Supreme Court of Cassation, which is the highest court in the judiciary, when deciding on certain constitutional appeals. However, even then, the decisions of the Constitutional Court of Serbia do not definitively resolve anything but merely formally remove from

[47] Vukčević, M., Armenko, S. (2023). *Komentar Zakona o Ustavnom sudu Crne Gore.* Podgorica: JU Official Gazette of Montenegro, 15.

[48] For more, see: Škulić, M. (2018). Uloga Ustavnog suda u krivičnopravnom segmentu pravnog sistema Republike Srbije. *Bilten Vrhovnog kasacionog suda* no. 2/2018, 205.

the legal system what the Court has deemed unconstitutional or has identified as a violation of a constitutionally guaranteed right, leaving it to the ordinary courts to substantively resolve the specific case.

The so-called *declarative decisions* of the Constitutional Court of Serbia are also important. Additionally, when deciding in the process of normative control of general legal acts, the Constitutional Court can eliminate from the legal order general legal acts of a lower rank than certain laws when they are not in accordance with relevant laws, and it can annul legal provisions that do not comply with the Constitution, i.e., relevant constitutional provisions.

It should always be borne in mind that although the Constitutional Court is not part of the judiciary in the constitutional system of separation of powers, it is certainly a court in a *sui generis* sense, which means even when it comes to constitutional appeals regarding the protection of constitutionally guaranteed rights and freedoms. However, the Constitutional Court *is not a court of last instance; it should not engage in determining/assessing the factual situation*, nor should it generally *negate the free assessment* of evidence by ordinary courts, as expressed in their final decisions.[49]

The role of the Constitutional Court in environmental protection, according to the basic jurisdiction of the Constitutional Court, is directed in two ways, or boils down to two types of actions by the Constitutional Court of Serbia. These are:

1) Normative control of certain general legal acts, from the standpoint of their constitutionality and legality, and

2) Decision-making by the Constitutional Court on relevant constitutional appeals in the realm of possible violations of the constitutional right to a healthy environment.

Normative Control by the Constitutional Court in the Area of Protecting the Right to a Healthy Environment

In the case law of the Constitutional Court, there have been only a few cases of normative control in the area of protecting the right to a healthy environment, which is quite indicative in itself. Furthermore, only a couple of decisions by the Constitutional Court in the area of protecting the right to a healthy environment are of any relevant significance when it comes to normative control of constitutionality and legality by the Constitutional Court.

One interesting decision is related to the *prohibition of constructing nuclear power plants*. The Constitutional Court received an initiative and an

[49] Škulić, M. (2018). Uloga Ustavnog suda u krivičnopravnom segmentu pravnog sistema Republike Srbije. *Bilten Vrhovnog kasacionog suda* no. 2/2018.

addition to the initiative to assess the constitutionality of the Law on the Prohibition of Construction of Nuclear Power Plants in the Federal Republic of Yugoslavia (*Official Gazette of the FRY*, No. 12/95 and *Official Gazette of the RS*, No. 85/05).[50] The initiative stated that the contested Law is inconsistent with the provision of Article 83 of the Constitution of the Republic of Serbia because it restricts free entrepreneurship, given that "one of the three prevailing sources of energy is outlawed." Furthermore, the contested Law restricts free competition in the energy sector and contributes to monopolistic behavior by public enterprises in the energy sector, thereby violating the provisions of Article 84 of the Constitution.

For assessing the constitutionality of the contested Law, the provisions of the Constitution of the Republic of Serbia that establish the following were significant:

– Everyone has the right to a healthy environment and to timely and complete information about its state, and everyone, especially the Republic of Serbia and the autonomous province, is accountable for the protection of the environment and is obliged to preserve and improve the environment (Article 74);

– Entrepreneurship is free and may be restricted by law to protect human health, the environment, natural resources, and the security of the Republic of Serbia (Article 83);

– The Republic of Serbia regulates and ensures a system of environmental protection and improvement, production, trade, and transportation of weapons, poisonous, flammable, explosive, radioactive, and other hazardous substances (Article 7, point 9);

– All laws and other general acts enacted in the Republic of Serbia must be in accordance with the Constitution (Article 194, paragraph 3).

In the decision of the Constitutional Court, which did not accept the initiative to initiate proceedings to determine the unconstitutionality of the Law on the Prohibition of Construction of Nuclear Power Plants in the Federal Republic of Yugoslavia[51] the claims of the initiator that the contested Law on the Prohibition of Construction of Nuclear Power Plants in the Federal Republic of Yugoslavia[52] violates the constitutional principle of freedom of entrepreneurship under Article 83 of the Constitution were unfounded.

[50] The law prohibiting the construction of nuclear power plants in the Federal Republic of Yugoslavia was passed by the Federal Assembly, at the session of the Council of Republics on February 28, 1995, and at the session of the Council of Citizens on March 2, 1995.

[51] Decision IUz-1575/2010, dated April 20, 2011, published in the *Official Gazette of the RS*, no. 50/2011.

[52] *Official Gazette of the FRY*, no. 12/95. and *Official Gazette of the RS*, no. 85/05.

According to this constitutional norm, the legislator is authorized to limit the freedom of entrepreneurship through its regulations in situations where the legislator deems it necessary to protect human health and the environment and ensure the security of the Republic of Serbia, which was done by enacting said law. According to the finding of the Constitutional Court, the contested Law also does not violate free competition by creating or abusing a monopolistic or dominant position in the market, as incorrectly believed by the initiator, because the limitation on the use of nuclear energy is regulated with the aim of protecting the environment from possible nuclear incidents, which is a constitutional obligation of the Republic of Serbia.

The decision of the Constitutional Court IUo-49/2009 is also noteworthy, which determined that certain provisions of the Ordinance on the Protection of the "Šargan Mokra Gora" Nature Park were not in accordance with the Constitution, ratified international treaty, and law. The essence of this decision is that the Constitutional Court states that the Government of the Republic of Serbia has the right to regulate the issue of construction and activities in a specific nature park, but the Government, in some provisions of its Ordinance, did so in a manner that was contrary to other constitutional rights, primarily the right to peaceful enjoyment of property, or the right to property, which can be constitutionally acceptable limited, but only by law, not by ordinance.

The decision of the Constitutional Court IUo-321/2013 is interesting in the context of environmental debates that have escalated in recent years, which determined that the Decision on the Conditions for the Construction of Mini Hydroelectric Power Plants in the Municipality of Kosjerić was not in accordance with the Constitution and the law, because such a decision was made by the Municipal Council, which, in accordance with the Law on Local Self-Government, does not have the right to make such types of decisions.

Deciding on Constitutional Appeals in the Area of Protecting the Right to a Healthy Environment by the Constitutional Court

The Constitutional Court, in principle, cannot/should not engage in establishing facts. In proceedings before it, the principles of orality and immediacy do not fully apply as in a typical court procedure. This means that the Constitutional Court is not, of course, capable of acting like a regular court that is part of the judiciary[53] within the constitutionally established system of

[53] According to Article 142 of the Constitution of Serbia, judicial power belongs to the courts which are independent. Judicial power is unified within the territory of the Republic of Serbia, and court decisions are made in the name of the people. It is generally considered that "the method of selection (appointment) of judges is one of the main

separation of powers. In our constitutional law theory, this is explained by stating that "judicial power is a branch of state power that authoritatively, by the force of state power, resolves disputes in law," where:

> "... it is within the jurisdiction of the judiciary as a form of state action to authoritatively state what the law, right, and justice are and to impose, and in some systems of power, to apply, sanctions."[54]

The Constitutional Court is a court in a *sui generis* sense, meaning primarily that it is not part of the judiciary in the constitutional system of separation of powers. However, under certain conditions stipulated by both the Constitution itself and the Law on the Constitutional Court, the Constitutional Court resolves certain "disputed issues" raised by specific constitutional appeals, and like the courts that are part of the judiciary, "authoritatively states what the law, right, and justice are," but only and exclusively if there is a certain violation of one of the constitutionally guaranteed rights, or an appropriate constitutional legal basis. This also applies to the Constitutional Court's decisions in proceedings initiated by constitutional appeals in the area of protecting the right to a healthy environment.

In some cases, such as in the case of constitutional appeal Už-1424/2008, the Constitutional Court decided on a specific environmental issue that was the subject of other proceedings, which took so long to resolve that the right of the constitutional appeal petitioner to a «trial within a reasonable time» was violated. In the specific case, the petitioner of the Constitutional appeal sued Elektrovojvodina because the proximity of a transformer station and electric cables buried in the ground beneath the house and along the outer wall of the house impaired her health condition. As the proceedings before the regular court took unreasonably long (which is always predominantly *questio facti*), the Constitutional Court found a violation of the petitioner's right to a trial within a reasonable time. Here, no violation of the right to a healthy environment was established, but when making its decision, the Constitutional Court considered relevant legal provisions of this kind contained in the Constitution and based its decision on the analysis of the following constitutional provisions:

1) Article 32, Paragraph 1 of the Constitution, whose violation was indicated by the constitutional appeal, establishes that everyone has the right to a public hearing before an independent and impartial court established by the law within reasonable time which shall pronounce judgement on their rights

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institutional guarantees of the judiciary's independence." For more, see: Petrov, V. (2022). *Ustavno pravo* Belgrade: Faculty of Law, University of Belgrade, 146.

[54] Marković, R. (2022). *Ustavno pravo,* 26th edition. Belgrade: Faculty of Law, University of Belgrade, 514.

and obligations, grounds for suspicion resulting in initiated proceedings and accusations brought against them;

2) Article 74 of the Constitution, which establishes that everyone has the right to a healthy environment and to timely and complete information about its state (Paragraph 1), that everyone, especially the Republic of Serbia and the autonomous province, is accountable for protecting the environment (Paragraph 2), and that everyone is obliged to preserve and improve the environment (Paragraph 3), as well as

3) Article 32 of the Law on Environmental Protection (*Official Gazette of the RS*, Nos. 135/04, 36/09, and 72/09), which stipulates that protection from radiation is implemented by applying a system of measures to prevent endangering the environment and human health from the effects of radiation originating from ionizing and non-ionizing sources and to eliminate the consequences of emissions that radiation sources emit or can emit, and that a legal and natural person may produce, perform, and use sources of ionizing and non-ionizing radiation under prescribed conditions and in a prescribed manner.

In the relatively small number of constitutional appeals filed with the Constitutional Court based on the petitioner's claim that their constitutional right to a healthy environment was violated, as well as certain constitutional rights sometimes associated with that right, such as the right to health care and information, but also the right to property, etc., there is a prevalence constitutional appeals related to the position of high-voltage pylons and certain inconveniences of potential environmental significance, such as electromagnetic radiation, which then occurs in people whose residential buildings are in immediate/potentially excessive proximity to these pylons or the power grid. Thus, in case UŽ 7702/2013, the Constitutional Court made a decision accepting the constitutional appeal due to the violation of the right to a fair trial in connection with the violation of the right to a healthy environment under Article 74 of the Constitution and annulled the judgments of the regular courts. The specific case involved the impact of a power grid on people living nearby, where the regular courts did not sufficiently explain whether the relevant by-laws regulating the permissible level of electromagnetic or non-ionizing radiation were respected in a constitutionally acceptable manner.

INTERNATIONAL LEGAL COMPONENT OF ENVIRONMENTAL PROTECTION AND ITS INFLUENCE ON CRIMINAL LAW MECHANISMS OF AN ENVIRONMENTAL NATURE

The formal sources of international environmental law are essentially the sources of international law, established by Article 38 of the Statute of the International Court of Justice. Thus, it is unjustified to assume there are specific sources of international environmental law because they are based on

> "...the unacceptable logic of the positivist school of environmental law as *a self-contained regime*, existing independently of general international law".[55]

The sources of international public law are quite diverse and heterogeneous, and they include customary international law (international customary rules), general legal principles, case law and doctrine of public international law, and international treaties.[56]

Regarding the international legal component of environmental protection according to the legal system of Serbia and within the legal order of Serbia, it is important to consider relevant constitutional norms. According to Article 194, Paragraph 4 of the Serbian Constitution, ratified international treaties and generally accepted rules of international law are part of the legal order of the Republic of Serbia, but the Constitution of Serbia takes precedence over ratified international treaties, as they may not be in noncompliance Constitution.

Constitutional provisions also establish that laws and other general acts adopted in the Republic of Serbia may not be in noncompliance with ratified international treaties and generally accepted rules of international law.

Key International Legal Acts/Sources of Environmental Law

The most significant international sources of environmental law/international legal acts, i.e., environmental protection laws, are treaties that can be divided into two main types:

1) *Bilateral,* where two states mutually commit or enter into an appropriate contractual relationship whose subject is the regulation of environmental protection, compensation for environmental damages arising when the source

[55] Etinski, R. (2010). *Međunarodno javno pravo.* Belgrade: Službeni glasnik, 640.

[56] For more about sources of public international law, see: Kreća, M. (2010). *Međunarodno javno pravo*, Fourth Revised Edition. Belgrade: Faculty of Law in Belgrade, 76–107.

of pollution is on the territory of one of the contracting parties, issues of applicable law in environmental disputes with a foreign element, etc.; and

2) *Multilateral,* where several states mutually commit in relation to relevant environmental issues with a foreign element, which technically involves certain conventions that come into effect in accordance with usual ratification rules.

A number of international treaties address various aspects of environmental and nature protection in general, including (listed chronologically):[57]

– White Lead (Painting) Convention (1921),
– International Convention for the Protection of Birds (1950),
– Plant Protection Convention (1951),
– International Convention for the Prevention of Pollution of the Sea by Oil (1954),
– Geneva Conventions on the Law of the Sea (1958),
– International Convention on the Liability of Operators of Nuclear Ships (1962),
– Vienna Convention on Civil Liability for Nuclear Damage (1963),
– Treaty on the Prohibition of Experiments with Nuclear Weapons in the Atmosphere, in Outer Space and Under Water (1967),
– International Convention on Intervention on the High Seas in Cases of Oil Pollution Casualties (1969)
– International Convention on Civil Liability for Oil Pollution Damage (1969)
– Convention on Wetlands of International Importance, Especially as Waterfowl Habitats (1971)
– Convention concerning Protection against Hazards of Poisoning Arising from Benzene (1971)
– Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof (1971)
– Convention concerning the Protection of World Cultural and Natural Heritage (1972), etc.

[57] Krivokapić, B. (2010). *Leksikon međunarodnog javnog prava*. Belgrade: Službeni glasnik, 1171–1172.

Activities of the United Nations for Global Environmental Protection at the International Level

The United Nations has demonstrated its commitment to environmental protection at the global international level by establishing a specialized organization focused on environmental issues within international legal frameworks, known as the United Nations Environment Programme (UNEP). [58]

Moreover, of particular significance regarding the UN's commitment to environmental protection is the increasing international legal understanding of environmental protection as the need to safeguard one of the vital human rights. Today, there is a clear (at least declarative) tendency to consistently protect universal human rights.[59]

United Nations Framework Convention and Kyoto Protocols

The issue of global warming and climate change[60] is addressed by the significant United Nations Framework Convention on Climate Change, whose primary goal is to reduce the emissions of gases that produce the "greenhouse effect" and contribute to the so-called global warming of the planet, which is considered the most serious global environmental problem today.

The state parties to the 1992 United Nations Framework Convention continued negotiations in subsequent years to specify state obligations regarding the reduction of carbon monoxide and other gas emissions into the

[58] Ipsen, K. (1990). *Völkerrecht.* Munich: Verlag CH Beck, 839.

[59] Brownlie, I. (1999). *Principles of Public International Law.* Oxford, New York: Oxford University Press, 568.

[60] However, there are also very reputable scientists who quite convincingly argue that global warming is a perfectly normal phenomenon in the cyclical alternation of different global climate conditions on our planet, and that there have been many such changes in the past and there will be more in the future, completely independent of any human activity, or with a negligible impact of human activities on such cyclical and regular changes.

For example, our famous scientist Milutin Milanković is world-renowned for his theory of regular climate changes (whose occurrence, or alternation, can be very precisely calculated mathematically), according to which, in about ten thousand years, humanity could probably step into a new ice age.

Some experts (who are, however, in the minority), claim that the overall effect of human activities in relation to climate change is quite negligible compared to natural cycles and the impact of normal natural events, such as major volcanic eruptions and, in general, massive tectonic changes. These theories have gained importance in recent years, after it was discovered that a number of "top" climatologists deliberately "manipulated" data on the rise in global temperature, i.e., global warming, in such a way, by further dramatizing the climate situation on Earth, to essentially fraudulently justify increased investments in their expert activities, and thus enable or justify the funding of new projects dedicated to the impact of humans on global warming.

atmosphere. This led to the adoption of certain international legal instruments, the most important of which were the 1997 Kyoto Protocols.[61] These Protocols established specific duties for states until 2012.[62]

Paris Agreement

One of the most internationally significant agreements today is the multilateral agreement concluded in Paris (Paris Agreement), which emerged from the United Nations Conference held in Paris in November and December 2015. This conference was part of the 21st annual session of the UN Climate Change Conference, held periodically since 1995 to achieve the objectives set in the United Nations Framework Convention on Climate Change, adopted in 1992 at the Summit held in Rio de Janeiro, Brazil.[63]

The Paris Agreement became binding when it was ratified by 55 countries that collectively account for at least 55% of global greenhouse gas emissions, which occurred on November 4, 2016.[64]

The Paris Agreement sets three main objectives:[65]

1) States are obliged to limit the average global warming of the Earth to significantly less than two degrees Celsius compared to the "pre-industrial era";

2) The ability of states to adapt to climate change must be strengthened, establishing it as a goal equally important as reducing the emission of greenhouse gases; and

3) It is necessary to align financial-economic objectives with the goal of reducing global warming.

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[61] The rules adopted in Marrakesh in 2001 are very significant, as they have resolved certain practical issues important for the implementation of the Kyoto Protocol.

[62] The basic principle of the Kyoto Protocol was the acknowledgment that responsibility for global environmental pollution and the production of the greenhouse effect is essentially common, yet significantly varies depending on how much certain countries have contributed to environmental pollution in the past, i.e., to what extent they have contributed to gas emissions due to their level of industrialization, and how much they currently do. Since the largest quantity of carbon monoxide and other gases, which are the products of combustion and certain technological and industrial processes, largely originate from the most developed countries, the highest degree of responsibility for reducing gas emissions in the future has been imposed on them. This fundamental principle of the Kyoto Protocol is essentially relevant in the currently active Paris Agreement.

[63] Source: https://www.consilium.europa.eu/de/policies/climate-change/paris-agreement/, accessed on October 10, 2023.

[64] Source: https://www.bmwk.de/Redaktion/DE/Artikel/Industrie/klimaschutz-abkommen-von-paris.html, accessed on October 10, 2023.

[65] *Ibid*.

CONCLUSION

A healthy environment is of immense importance in modern states, which face, among other challenges, significant environmental problems. Environmental pollution issues are fundamentally global, meaning that despite efforts by developed countries to relocate so-called dirty technologies beyond their borders, primarily to third-world countries, the most dangerous forms of environmental imbalance still impact the environment of affluent countries. This behavior and reasoning by corporations from powerful industrial nations not only clearly indicate that no means are spared in the race for profit but also highlight a certain naivety in all attempts to fully transfer the cost of industrial development and, consequently, environmental pollution to someone else. However, it is a fact that the immediate consequences of environmental disasters are borne by those who are spatially and environmentally most exposed to this pollution.

The immense importance of the protection of the environment through criminal law stems from the enormous significance of a healthy and preserved environment for human health. A preserved environment is also crucial for maintaining fundamental humanity, as humans, despite significant technological advancement, are essentially part of nature. This implies that humans must, to the greatest possible extent, preserve nature and refrain from relentless destructive actions towards the environment or nature in a broader sense, which is often sacrificed for economic development, associated standards, etc.[66]

The protection of the environment through legal norms, both constitutional and those from other branches of law, such as misdemeanor and criminal law, is often generally associated with pronounced demagoguery and frequently amounts to a sort of camouflage, primarily to protect the interests of powerful industries, prioritize economic development, etc.

Criminal law, even concerning environmental protection, is not only strictly based on relevant constitutional provisions but also has a distinctly *ultima ratio* character. It should always be considered better if effective environmental protection can be achieved without resorting to criminal law repression, which here, as elsewhere, represents a last resort in protecting the most important legal goods/values from the most severe forms of violation and endangerment.

The role of the Constitutional Court of Serbia in environmental protection is directly linked to the court's general jurisdiction, which concerns both effective normative control of constitutionality and legality and efficient

[66] Škulić, M. (2023). Osnovne karakteristike i dominantan *ratio legis* krivičnopravne zaštite životne sredine. *Zbornik „Kaznena reakcija"*, Part XIII. Belgrade: Faculty of Law, University of Belgrade, Edition Crimen, 10–13.

protection of fundamental human rights and freedoms in the context of the court's decision-making in constitutional appeal procedures.

The case law of the Constitutional Court of Serbia in environmental protection is still very sparse, both in terms of normative control of general legal acts and in deciding on constitutional appeals related to potential violations of the right to a healthy environment. This, in itself, does not necessarily have to be problematic or indicative of a specific anomaly in our legal system, but it is quite indicative in light of other conspicuous phenomena in practice, such as the apparent existence of a large dark figure of environmental offenses, whether in the area of certain misdemeanors or those constituting specific criminal offenses against the environment.

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