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THE RIGHT TO A BEAUTIFUL DANUBE AS A HUMAN RIGHT

The Right to a Healthy Environment, as a Human Right

Emphasizing legal respect for human rights and the environment had been a remarkable feature of constitutional development in countries of Central and Eastern Europe during the last decade of the previous century. Some of these countries proclaimed the right to a healthy environment, as a human right.[1] Recently, the constitutional law of Serbia and Montenegro has acknowledged the right to a healthy environment. Serbian internal law has elaborated on this right. The international context of the right to a healthy environment is composed of two frameworks: environmental regional international treaties and the relevant practice of the European Court of Human Rights. Some regional international treaties, related to the environment, have offered an opportunity for the public's engagement in environmental issues. One of them has recognized a few

[1] Article 55 of the 1991 Bulgarian Constitution guarantees that citizens have the right to a healthy and favourable environment, corresponding to the established standards and norms. In Part III, para. 69 of the 1991 Croatian Constitution, the Republic of Croatia ensures citizens the right to a healthy environment. Article 18 of the 1949 Hungarian Constitution says that the Republic of Hungary shall recognize and implement the individual's right to a healthy environment. Article 44 of the 1992 Constitution of the Slovak Republic recognized that everyone has the right to an auspicious environment. Article 72 of the 1991 Constitution of Slovenia declares that everyone has the right to a healthy living environment in accordance with the law.

individual rights. The European Convention for the protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950, does not protect the right to an appropriate environment, but the European Court of Human Rights has confirmed that a State may be responsible for breaches of human rights, caused by environmental pollution.

This paper serves to explore the legal content of the right to a healthy environment in Serbia. As the right is extending to two legal fields i.e. environmental law and human rights, the research has to focus on both.

Constitutional Determination of the Right to a Healthy Environment in the State Union of Serbia and Montenegro

Paragraph 2 of Article 46 of the Charter on Human and Minority Rights and Civil Liberties declares that everyone has the right to a healthy environment.[2] The 2003 Charter on Human and Minority Rights and Civil Liberties (further Charter) is part of the Constitutional Charter of the State Union Serbia and Montenegro[3]. It is a constitutional codex of human rights in the State Union.

Human rights enjoy a privileged status in any legal system. The fact that the right to a healthy environment is established in a family of human rights produces significant legal consequences. According to Article 2 of the Charter, human and minority rights, guaranteed by the Charter are directly applicable. It means that an individual may invoke paragraph 2 of Article 46 of the Charter before the court or a competent authority to enforce or protect his/her right to a healthy environment. Two other constitutional provisions contribute to the affirmation of the high legal position of human rights. Article 10 of the Charter provides that human and minority rights, guaranteed by the Charter, shall be constructed in accordance with the valid international guarantees for these rights and practice of international bodies supervising their implementation. According to this Article, the practice of the European Court of Human Rights

[2] Article 46 of the Charter on Human and Minority Rights and Civil Liberties is as follows:

„Everyone and the State Union and Member States in particular, shall be responsible for environmental protection.

Everyone shall have the right to a healthy environment and to receive timely and full information about its status.

Everyone shall be bound to protect and improve the environment.“ http://www.mfa.gov.yu /Facts/ charter_min.pdf.

[3] http://www.mfa.gov.yu/Facts/const_scg.pdf.

may be relevant to understanding the European human rights context of the right to a healthy environment. Article 8 of the Charter says that it is not permissible to restrict human and minority rights, guaranteed by generally accepted rules of international law or international treaties in force in the State Union and valid laws and regulations, on the pretext of their not being guaranteed by the Charter or being guaranteed to a smaller extent. The first part of this Article is an expression of general rules laid down in Articles 16 and 10 of the Constitutional Charter of the State Union Serbia and Montenegro. According to Article 16, the ratified international treaties have precedence over the law of Serbia and Montenegro, including the laws of the member states. And, according to Article 10, the provisions of international treaties on human and minority rights and civil freedoms, in force in the territory of Serbia and Montenegro, are directly applicable. The second part of the Article, according to which laws and regulations will prevail over the Charter if they guarantee human rights which are not guaranteed by the Charter or they are guaranteed to a lesser extent, is an expression of the special rule that a legal norm providing the highest standard of human rights will prevail no matter what its position is in the normative hierarchy. It is also significant that the Charter provides the right to judicial protection and elimination of the consequences of violation of human and minority rights. According to Paragraph 1 of Article 9 of the Charter, everyone has the right to effective judicial protection in the case of violation or denial of any human right guaranteed by the Charter, as well as the right to elimination of the consequences of such a violation. Paragraph 2 of the same Article is even more important and states as follows: „*Anyone who is of the opinion that any of his/her rights guaranteed under this Charter has been violated or denied by an individual deed or action of a State Union institution, or a Member State agency or organisation exercising public powers, shall have the right to lodge a complaint with the Court of Serbia and Montenegro, unless other legal protection is provided in the Member State concerned, in accordance with the Constitutional Charter*." If no other remedy is provided for a violation of the right to a healthy environment, a constitutional complaint is at disposal.

Individual Rights Recognized by Regional International Treaties

International treaties, concluded within the framework of the UN Economic Commission for Europe in the last decade of the 20th century, have opened the door to the public in environmental issues.[4]

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in Aarhus on 25 June 1998[5], has gone a step further in opening the way for individual environmental rights. In the Preamble of the Convention, Contracting Parties have recognized that adequate protection of the environment is essential to the enjoyment of basic human rights, including the right to life. They have con-firmed also that every person has the right to live in an environment adequate to his or her health or well-being. By this Convention, the Contracting Parties have guaranteed three rights in environmental matters: the right of access to information, the right to public participation in decision-making and the right to access to justice.

As Serbia and Montenegro is not a party to the mentioned treaties, research of these treaties cannot be of key importance for finding substance of the right to a healthy environment within the framework of law of Serbia and Montenegro. Still, they are not quite irrelevant. They have produced an environmental spirit that must be taken into account in the whole of Europe when one considers environmental issues in the context of human rights. Besides this, many of their provisions have been incorporated into the internal law of Serbia.

The State Union is a State Party to the Convention on Cooperation for the Protection and Sustainable Use of the Danube River, adopted in Sofia in 1994.[6]

[4] The Convention on Environmental Impact Assessment in a Transboundary Context, adopted in Espoo on 25 February 1991, has provided the public with an opportunity to participate in environmental impact assessment procedure. State Parties to the Convention on the Protection and Use of Transboundary Watercourse and International Lakes, done at Helsinki on 17 March 1992, accepted to ensure that information on the conditions on transboundary waters, measures taken to prevent, control and reduce of transboundary impact and on effectiveness of these measures are made available to the public. The Convention on Transboundary Effects of Industrial Accident, adopted in Helsinki on 1992, secures that adequate information is given to the public in the areas under risk of an industrial accident, as well as an opportunity to the public to participate in relevant procedures with the aim of making known its views and concerns on prevention and preparedness measures. Also, Parties to the Convention accepted to provide natural or legal persons who are being or capable of being adversely affected by the transboundary effects of an industrial accident in the territory of a party, with access to, and treatment in the relevant administrative and judicial proceedings, including the possibilities of starting a legal action and appealing a decision affecting their rights, equivalent to those available to persons within their own jurisdiction.

[5] Entered into force in 2001.

[6] Entered into force on 22 October 1998.

The Contracting Parties to the Convention have obliged themselves to „*ensure that their competent authorities are required to make available information concerning the state of the quality of riverine environment in the Danube Basin to any natural or legal person, with payment of reasonable charges, in response to any reasonable request, without that person having to prove an interest, as soon as possible*." The exhaustive list of reasons that justify refusal of the request for information is added.[7] These provisions have been incorporated into the below described internal laws of Serbia.

Pollution of Environment Prohibited by „Old Human Rights"

The European Convention on Human Rights does not protect the right to an adequate environment as a human right. However, the European Court of Human Right has accepted that pollution of the environment may be a kind of interference in guaranteed human rights. Also, it has confirmed that protection of the environment may be a legitimate aim that may excuse an intervention of the State in order to protect human rights. By its practice, the European Court of Human Rights has established European the human rights context which may be relevant for the construction of the right to a healthy environment. Prevention of environmental pollution in the human rights context includes a possible violation of the right to life, the right for respect for private and family life and home or the right to peaceful enjoyment of possession.[8]

The European Court of Human Rights has underlined that a violation of the right to life can be envisaged in relation to environmental issues. According to the settled practice of the Court, a State is in a breach of the right to life, protected by Article 2 of the European Convention on Human Rights, if „*the authorities knew or ought to have known at the time of the existence of a real and*

[7] Para. 3 of Article 14 of the Convention: The provisions of this Article shall not affect the right of Contracting Parties, in accordance with their domestic legal systems and applicable international regulations, to provide for a request for such information to be refused where it affects: (a) the confidentiality of the proceedings of public authorities, international relations and national defence; (b) public security; (c) matters which are or have been „sub judice" or under enquiry including disciplinary enquiries, or which are the subject of preliminary proceedings; (d) commercial and industrial confidentiality as well as intellectual property; (e) the confidentiality of personal data and/or files; (f) material supplied by a third party without that party being under a legal obligation to do so; (g) material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.

[8] M. Geistlinger, Impacts of the European System of Human Rights Protection on the Law of Environment, Evropski sistem zaštite ljudskih prava, Niš, 2005, p.15

immediate risk to the life of an individual or individuals and that they failed to take measures within the scope of their powers which might have been expected to avoid that risk." In the Öneryıldız case, the Court explored the responsibility of the State to protect the right to life in environmental circumstances. It has considered the issue in light of recent development of European standards that confirmed an increased awareness of the duties of the national public authorities in the environmental field, particularly with regard to installations for the storage of household waste and the risks inherent in operating them.[9] On 28 April 1993, a methane explosion occurred at the waste collection site near Istanbul. Thirty-nine people died, including nine members of the Öneryıldız family. In a 1991 expert group report, established by the competent Turkish authority, it was found that the rubbish tip did not satisfy the technical requirements set forth in related Turkish Regulations and that it imposed a serious risk for inhabitants of the area, especially those living in dwellings situated near the mountain of refuse. It expressly mentioned the danger of a possible methane explosion. On 27 May 1991, the city council was made aware of that report.[10] Considering whether Turkey breached the right to life, the Court noted *inter alia* that it failed to respect the public's right to information. One of the points stressed by the Court was that informing the public in general is not enough and that it is necessary to inform people directly exposed to the risk.[11] This finding of the Court is very relevant for understanding the right of the public to be informed on environmental issues. The Court also investigated the adequacy and effectiveness of the legal remedies used. It found that criminal justice did not bring forth the required remedy. The criminal court punished two mayors with pecuniary sentences amounting to less then 10 euros. They were punished due to their negligence in performing public duty and not for the loss of lives of the applicant's relatives.[12] The administrative court awarded compensation to the applicant for non-pecuniary and pecuniary damage. However, as the award was not done in a

[9]Under the recent development of European standards, the Court thought on resolutions of the Parliamentary Assembly, especially on Resolution 587 (1975) on problems connected with the disposal of urban and industrial waste, Resolution 1087 (1996) on the consequences of the Chernobyl disaster, and Recommendation 1225 (1993) on the management, treatment, recycling and marketing of waste and, among recommendations of the Committee of Ministers, Recommendation R (96) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment. Also, it referred to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the Convention on the Protection of the Environment through Criminal Law.

Op. cit. paras. 63, 64.

[10] Öneryildiz v. Turkey, Judgment of 18 June 2002, paras. 9- 17

[11] *Op. cit*. para. 84

[12] *Op. cit*. paras 101 - 111

reasonable time, the Chamber found this remedy to be ineffective. Finally, the Chamber adjudged that Turkey was responsible for the breach of the right to life of Öneryıldız's relatives. It found also that the applicant's right to property was breached. [13]

In the Hatton and others case,[14] the applicants, whose sleep had been disturbed by noise caused by aircrafts using Heathrow airport in early morning hours, alleged a violation of the right to respect for private and family life, guaranteed by Article 8 of the European Convention on Human Rights. Article 8 of the Convention provides that „*everyone has the right to respect for his private and family life, his home ….*" Paragraph 2 of this Article states that „*there shall be no interference by a public authority with the exercise of this right except*

[13]On 12 September 2002 the Turkish Government requested under Article 43 of the European Convention that the case be referred to the Grand Chamber. The panel of the Grand Chamber declared the request admissible. The Government argued that the Chamber's finding that „all situations of unintentional death" was covered by Article 2 of the European Convention extended the obligations inherent in that provision in an unprecedented way. Also, the Chamber's reasoning departed from settled practice of the Court. Rejecting these arguments, the Grand Chamber said that Article 2, in the first sentence of its first paragraph, laid down an obligation on State to take measures to protect the lives of those within its jurisdiction. The Grand Chamber considered that this obligation is applicable in the context of any activity, whether public or not, in which the right to life may be at stake. Further, the Government argued that the Chamber's assessment failed to test the criteria of „immediacy" and „reality" of the danger posed by the municipal rubbish tip. As there was no an immediate danger, the Government was not obliged to take preventive measures. It was obliged to deal with problems and identify solutions in the context of general policies. The Government asserted that previous cases disclose that the Court had always confined itself to ascertaining whether a regulatory framework had been in place and had been complied with. The Court had never examined whether there was a causal link between the deaths in question and any negligent conduct. The Government emphasized that swiftly removing thousands of citizens from their endangered homes at waste-disposal site and redeveloping a whole settlement was impossible. Rejecting these arguments, the Grand Chamber repeated that Article 2 imposes an obligation on a State to establish a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. The obligation is valid, also, in the context of dangerous activities. In addition, the Grand Chamber underlined that „*special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.*" The Grand Chamber emphasised the public's right to information and it agreed with the Chamber „*that this right, which has already been recognised under Article 8 …, may also, in principle, be relied on for the protection of the right to life, particularly as this interpretation is supported by current developments in European standards...*" The Grand Chamber confirmed the breach of Article 2 of the European Convention. Öneryildiz v. Turkey, Judgment of 30 November 2004

[14] Hatton and others v. The United Kingdom, (Application no. 36022/97), Judgment of 2 October 2001

such as in accordance with the law and necessary in a democratic society in the interests of ... the economic well-being of the country ... or for the protection of the rights and freedoms of others." „*In the particularly sensitive field of environmental protection*," as the Court stated, „*mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others.*" The Court considers *„that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.*" [15] The Chamber found that the Government had not carried out a proper research of its own as to the reality or extent of the economic interest for increasing early morning flights. The Chamber concluded that whilst it is likely that night flights contribute to a certain extent to the national economy as a whole, the importance of that contribution has never been assessed critically. As to the impact of the early morning flights on the applicants, the Chamber found that only limited research had been carried out. „*In particular, the 1992 sleep study, which was prepared as part of the internal Department of Transport review of the restrictions on night flights, was limited to sleep disturbance, and made no mention of the problem of sleep prevention – that is, the difficulties encountered by those who have been woken in falling asleep again.*"[16] As there is no evaluation of the economic benefits from increased early morning flights, neither a complete investigation on the impact of increased noise to applicants, the Chamber concluded that, without these quantifications, the Government was not in a position to weigh conflicting interests, neither to strike a fair balance between the United Kingdom's economic well-being and the applicants' right to privacy. The Chamber found that Article 8 was breached.

Using the possibility established under Article 43 of the European Convention on Human Rights, The United Kingdom requested that the Hatton and others case be referred to the Grand Chamber of the Court. The Grand Chamber accepted competence in the referred case. In its judgment, the Grand Chamber emphasized that „*there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8*."[17] The Grand Chamber pointed to the settled practice of the Court according to which Article

[15] *Op.cit*. para. 97

[16] *Op.cit*. para. 103

[17] Hatton and others v. The United Kingdom (*Application no. 36022/97*) Judgment of the Grand Chamber of 8 July 2003, para. 96

8 could include „*a right to protection from severe environmental pollution, since such a problem might 'affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'*."[18] The Grand Chamber has repeated also previous general position of the Court that Article 8 may be applicable in environmental cases where the pollution is directly caused by the State or where State responsibility arises from the failure to regulate private industry properly. The substance of such kind of cases is always „*the fair balance that has to be struck between the competing interests of the individual and of the community as a whole*."[19] The State always enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.

However, the Grand Chamber reached an opposite conclusion in this case. It noted that in previous cases in which environmental misconducts violated the Convention, the violation was connected with a failure by the national authorities to comply with some aspects of the domestic regime. In the actual case there was no element of domestic irregularity.[20] Furthermore, the Grand Chamber said that whilst the State is obliged to take care of the particular interests protected by Article 8 of the European Convention, it must be free to choose between different ways of satisfying this obligation. The Court's supervisory function is of s subsidiary nature and it is limited to control whether the particular solution can be regarded as striking a fair balance.[21] It emphasized the following factors. The Government put substantial limitations on airlines' freedom to operate.[22] House prices in the areas near Heathrow had not been adversely affected by the noise. Accordingly, people, disturbed by noise, can move elsewhere without financial loss.[23] Concerning the procedural aspect of the case, the Grand Chamber has confirmed that the Government was obliged to undertake appropriate investigations and studies in order to strike a fair balance between the various conflicting interests at stake. However, it is not necessary for decisions to be taken that comprehensive and measurable data are available in relation to each and every aspect of the matter.[24] Thus, the Grand Chamber did not find that, in substance, the Government overstepped its margin of appreciation by failing to strike a fair balance between conflicting interests of people whose right to respect for their private life and home was affected by night

[18] Ibid.
[19] *Op. cit*. para. 98
[20] *Op. cit*. para. 120
[21] *Op.cit*. para. 123
[22] *Op.cit*. para. 126
[23] *Op. cit*. Para. 127
[24] *Op. cit*. para. 128

flight regulations and the community as a whole, nor did it find that there had been fundamental procedural flaws in the preparation of night flight regulations.[25]

The Jane Smith case shows that environmental concern may justify some family inconveniences. Mrs. Jane Smith and her family followed a travelling lifestyle for many years, stopping on various sites. She bought land to find a long term and secure place for their caravans. Stationing caravans was treated as development by British law for which planning permission was necessary. Planning permission was, however, refused due to environmental reasons. She and her family were required to leave.

Mrs. Smith applied to the European Court of Human Rights alleging breaches of several rights protected by the European Convention on Human Rights, including the right to respect for her private and family life, her home and the right to property. By majority of votes, the Court rejected all claims.[26] The Court explained that „*where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under Article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection.*" The Court found that protection of the environment is obviously a legitimate aim that may justify an interference of the State into protected rights. The Court considered whether an order that the individuals leave their home was proportionate to this legitimate aim. In this context, the Court found it was highly relevant whether the home had been established lawfully. If the home was not established lawfully, it would be very difficult for the Court to grant protection. „*For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community.*"[27] The environmental problem was that occupation of her land by mobile home was harmful to the rural character of the site situated in the Green Belt and this outweighed her interests. The illegality of the occupation of her land was a prevailing element in the Court's consideration. However, there is no doubt that environmental concern may be a limitation of property rights. Some constitutions are explicit about this.[28]

[25] *Op. cit*. para. 129

[26] Jane Smith v. The United Kingdom, Judgment of 18 January 2001

[27] *Op. cit*. para. 109

[28] Para. 50 of the 1991 Croatian Constitution says property rights may be restricted exceptionally by law for the purpose of protecting the human environment. Para. 6 of Article 41 of the Romanian Constitution provides that the right to property compels to the observance of duties relating to environmental protection.

Set of New Environmental Laws in Serbia

In December 2004, the Assembly of the Republic of Serbia adopted four basic laws on the environment: the Law on Protection of Environment, the Law on Integral Prevention and Control of Pollution of Environment, the Law on Strategic Assessment of Impact on the Environment and the Law on Assessment of Impact on the Environment. [29] Secondary legislation should follow in 2005.

The 2004 Law on the Protection of Environment is a comprehensive legal act. It regulates the bases of sustainable development and environmental protection. The system of environmental protection is composed of two basic elements: set of provisions, conditions and legal instruments related to sustainable management, preservation of natural balance, totality, diversity and quality of natural conditions needed for survival of living beings and a set of provisions, conditions and legal instruments related to prevention, control, decrease and remedy of all forms of pollution of the environment. The subjects of the system are the Republic, the Autonomous Province, municipality, enterprise, legal persons engaged in commercial and other activities if they are using environmental components, scientific and other organizations and public services, citizens, groups of citizens, their associations, professional and other organization. Generally, all of them are obliged to preserve and improve the environment and they are responsible for their activities that change the state of the environment, as well as for failing to take appropriate measures. The Law has established basic principles in this field. These are principle of integral policy of protection, principle of prevention and precaution, principle of preservation of natural values, principle of sustainable development, principle of liability of polluters, principle that the polluter pays and that user pays, principle of subsidiary responsibility of State authority, principle of stimulatory measures, principle of information and participation of the public, as well as the principle of judicial protection of the right to a healthy environment.

The Law on Integral Prevention and Control of Pollution of Environment regulates conditions and procedure for issuing integral permissions for plants and activities which may have a negative impact on the health of people, the environment or economic goods. The competent authority provides that operating of new plants cannot begin without previously obtained permission and that operating of existing plants, which began operating before the Law has entered into force, has to adjust to the requirements of this Law. Therefore, existing plants also need new permission for operation.

[29] All four laws are published in Official Journal of the Republic of Serbia, No. 135, December 21 2004. „Службени гласник РС“, број 135 од 21. XII 2004.

The Law on Strategic Assessment of Impact on the Environment arranges a procedure of strategic assessment which includes three phases: preparation, a report on strategic assessment and decision-making process. The report on strategic assessment describes and evaluates the impact on the environment, which may be produced by implementation of the plan, and program and it determines measures for decreasing negative impact. The procedure of strategic assessment is completed with the consent of the competent authority to the report on strategic assessment.

The Law on Assessment of Impact on the Environment directs a procedure of assessment of project's impact on the environment. It prescribes content for the study on assessment of a project's impact. Furthermore, it regulates participation of competent institutions and publicity and transfrontier information.

The Right to Information

According to Article 74 of the Law on Protection of Environment, the Republic is obliged to establish an information system on the environment. The Agency for the Protection of the Environment is to conduct the information system. The Agency shall also conduct an integral register of polluters.

The fifth part of the Law on Protection of Environment arranges information and participation of the public in environmental affairs. Article 78 of the Law prescribes that State institutions, organs of the autonomous province and organs of local self-government have a duty to inform the public on the state of the environment on a regular basis, objectively and in due time. They are also obliged to inform on the development of pollution that may endanger life and people's health.

The public has the right to access to registers and records which contain such information. A competent authority is obliged to deliver information related to the protection of environment to an applicant within 30 days or, exceptionally, 60 days from the date of submission of the request. The request may be rejected for reasons exhaustively listed in Article 80 of the Law and which correspond to reasons listed in Paragraph 3 of Article 14 of the Convention on Cooperation for the Protection and Sustainable Use of the Danube River.

Other mentioned environmental laws secure the right to information. The Law on Assessment of Impact on the Environment determines the means for informing the public. According to Article 29, the competent State institution is obliged to inform the public at least by one local newspaper issued in the area that might be affected. This information may be also disseminated by electronic media.

The Right of the Public to Participate in the Decision-Making Process

By a term of the „public," the mentioned laws are referring to one or more natural or legal persons, their associations, organizations or groups. They distinguish „the concerned public", the public that may be affected by pollution. However, this also includes non-governmental organizations registered in the environmental field.

According to Article 81 of the Law on Protection of Environment, the public is authorized to take part in the decision-making process on: 1. strategic assessment of impact of plants and programs on environment; 2. assessment of impact of projects, the realization of which may cause pollution or risk to the environment and the health of people; 3. issuing permission for new or existing plants.

Article 11 of the Law on Integral Protection of Environment and Control of Pollution provides that a State institution has a duty to inform *inter alia* the concerned public on the submitted request. If the concerned public asks, the State institution will deliver a copy of the submitted request. The concerned public may send an opinion to the institution. In drafting the permission, the institution considers the opinion of the concerned public. Additionally, if the concerned public requests this, it will be consulted on the drafting of the permission.

The Law on Strategic Assessment of Impact on the Environment provides that institutions competent for the preparation of plans and programs are to ensure the participation of the public in considering the report on strategic assessment. The institution is obliged to submit a report on the public's opinion. Besides this, it has to explain why it accepted or rejected an opinion of the public. The ministry competent for environmental issues has a duty concerning transboundary environmental impact. If implementation of the plan and program may produce a significant negative impact on the environment of another State, or if the State, environment of which may be affected, requests this, the competent ministry shall deliver the relevant information to the other State. The information is to comprise data on the plan and program, nature of the decision that may be adopted and the time limit for the opinion of the informed State. The consulted State shall be informed on the adopted decision with consent given to a report on strategic assessment

The Law on Assessment of Impact on the Environment ensures the participation of the concerned public in the process of assessment of proposed projects on the environment. The competent State institution is obliged to inform

inter alia the public on the submitted request. The concerned public may send an opinion. In deciding on the content of the impact assessment study, the institution will take into account the opinion of the concerned public. It also has to inform the public on the accepted decision.

Responsibility for Pollution

The seventh part of the Law on Protection of Environment regulates responsibility for pollution. The legislator has envisaged two groups of responsible subjects: polluters and subjects that make pollution possible. The polluter is liable for pollution caused to the environment in accordance with strict liability. A legal or natural person is responsible for illegal or improper acts that render environmental pollution possible. Two articles describe the legal content of the polluter's liability. Article 104 relates to obligations of the polluter and provides that the polluter, by whose acts or failure to act pollution has been caused, is obliged to undertake measures to mitigate the damages, to remove further risks and to rehabilitate the damaged environment. If rehabilitation is not possible, the polluter is obliged to compensate for the value of the destroyed natural good. Article 105 is titled as „Liability for damage". It states that the polluter is liable for damages inflicted on the environment and space and is obliged to pay the costs for the evaluation of damages and its compensation, and in particular: 1) expenses of urgent intervention performed in the moment the damager arises, necessary for limiting and preventing the effects of damage to the environment, space and people's health; 2) direct and indirect costs of rehabilitation, establishment of new state or renewal of previous state of environment and space as well as costs of monitoring of effects of rehabilitation and effects of damage to the environment; 3) costs of preventing the same or similar damage to environment and space from arising; 4) costs of compensation to persons directly endangered by damage caused to the environment and space. The polluter is obliged to provide financial or other guarantees for payment of mentioned costs during and after performing such activities. The polluter and plants and their activities which highly endanger the health of people and the environment, has to provide insurance for compensation of damage inflicted to third persons in case of an accident. Article 107 determines who is entitled to compensation, as well as the procedure. Everyone who suffers damage has the right to compensation. A claim for compensation may be submitted directly to the polluter or the insurance company of the polluter. If there are more polluters liable for damages, and if it is not possible to determine their role in causing the damages, the costs have to be paid jointly and separately. Court procedure has to be

expeditious. If there are no special rules on liability provided by this law, general rules provided by the Law on Obligations are to be applied.

The Right to a Healthy Environment in Serbian Law

Article 1 of the Law on Protection of Environment, the framework law in the field of the environment begins as follows: „This law regulates an integral system of protection of the environment which provides realisation of the right of man on life and development in a healthy environment…" There is a difference in the wording of Article 46 of the Charter and Article 1 of the Law on Protection of Environment: the right to a healthy environment and the right to life and development in a healthy environment. On the other hand, Paragraph 11 of Article 9 of the Law on Protection of Environment addresses the right to a healthy environment. It seems that the legislator did not set out from the Charter. If this had been done, Article 8 of the Charter would ensure that the broader meaning prevails.

It is of substantial importance to underline that the integral system of protection of the environment serves the realisation of the right of man to life and development in a healthy environment. The integral system of protection is a comprehensive set of rules. It includes measures and conditions for the protection of the environment. Among other rules, it prescribes that it is necessary to obtain an integral permission for operation of new and existing plants, which may produce negative impact on the health of people and the environment. This permission serves to ensure the prevention and control of pollution. It imposes the establishment of standards on the quality of the environment and emissions. In addition, it provides for administrative control. The administrative supervisor is empowered to prohibit, *inter alia*, emission of pollutants and dangerous matter, waste waters or energy into the air, water or ground, if it is beyond the prescribed limits. Punitive measures for breaches of rules and regulations are included.

The legislator did not define what a „healthy environment" is. It can be presumed that environment polluted over the prescribed standards constitutes an unhealthy environment. Due to this fact, it is of significant relevance a definition of pollution for a construction of the right to life and development in a healthy environment. The Law on Protection of Environment defines pollution as an invasion of polluting substances or energy into the environment, caused by human activity or a natural process that produces or may produce detrimental effects to the quality of the environment and the health of people. Quality of environment is a state of environment which is expressed by physics,

chemical, biological, aesthetic and other indicators. The special Law on Integral Prevention and Control of Pollution of Environment says that pollution is direct or indirect invasion of substances, vibrations, heat or noise in air, water or land, caused by human activity that may be detrimental to the health of people or quality of environment and which may cause damage to economic goods. The difference is obvious. It is not easy to understand why the legislator used two different definitions in the same set of environmental laws. Nevertheless, both of them agree that pollution includes emissions that may be detrimental to people's health. The Law on Protection of Environment has also defined „endangered environment" to be a space where pollution or the risk of pollution surpasses the capacity of the environment. And the capacity of environment is its ability to receive a determined quantity of pollutants without its irreversible degradation.

What does the right to a healthy environment protect? People's health, 'health' of the environment, or both? The right to a healthy environment makes sense if it goes beyond limits of protection ensured by other human rights. It has to protect human health and, even more, to secure life and development in a healthy environment. Any pollution that endangers human health or the environment contravenes the right to life and development in a healthy environment.

Human rights are rights towards a State. The State is obliged itself to respect human rights and to ensure the respect for human rights for all individuals under its jurisdiction. It means that Serbia is obliged to ensure the respect for the right to a healthy environment for all individuals under its jurisdiction. The substance of the right to a healthy environment is an obligation of the State to prevent pollution that endangers people's health and/or environment. Furthermore, the State is obliged to provide effective remedies.

Paragraph 11 of Article 9 of the 2004 Law on Protection of Environment, as one of the principles of environmental protection, laid down that citizens or group of citizens, their associations, professional and other organizations realize their right for a healthy environment before a competent authority or before a court in accordance with the law. Therefore, an individual or group of individuals acquire the procedural capacity to apply with a competent authority or the court asking enforcement of his/her/their right to a healthy environment. It depends on the concrete circumstance who will be defendant. However, in the last resort it will be the Republic of Serbia.

The Right to a Beautiful Danube

The motive underlying this text was born out of two events. According to best recollection of the writer of this text, the first event happened in 2003. The Norwegian Government sent two experts to help the Serbian Government regarding plans for the rehabilitation of the Danube – Tisa – Danube Canal Network. When they saw that untreated waste water had been discharging from plants into the Great Backa Canal, two experts were so shocked that they raised an ultimatum stating that they would leave Serbia if the competent Minister did take measures to stop this kind of pollution. The Minister replied that she would do her best, i.e. meet with operators in order to find a friendly solution, but also indicating that she did not have the legal means to stop it. She added that drafts laws on the environment had been prepared and after their adoption the situation would be changed. The other event occurred in 2005. The inhabitants of Srbobran, a village not far from Novi Sad, protested against the pollution of the Great Backa Canal that runs through their village.[30] It seems that the untreated waste water had turned the Canal into an awful smelling bog. They complained about the odious smell that was spreading from the Canal and that made their life in Srbobran highly unpleasant.

Do these circumstances reveal a breach of the right of the inhabitants of Srbobran to a healthy environment? There are a few rules on water protection in the basic framework law. According to Article 23 of the Law on Protection of Environment, if waste water is properly treated, it may be discharged into the watercourse up to the level that does not endanger the natural processes or renewal quality and quantity of water or use for various purposes. Measures of water protection ensure, *inter alia*, the evaluation of the quality of waste water and its purification. Secondary legislation on water protection should be adopted in 2005. Obviously, Article 23 has been breached in this case. For the resolution of this case no further secondary legislation is necessary. Untreated waste water has destroyed the capacity of the Canal for renewal of quality of its water. As far as the writer of this text is aware, competent authorities have not taken any measure to remedy the situation. An element of illegality and responsibility of State authorities is present. On the other side, the inhabitants of Srbobran are not aware of their legal powers. If they were aware, they would invoke their right to a healthy environment before the court against the responsible operators and would not obstruct a local road while protesting against pollution.

[30] Daily newspaper „Dnevnik“, 21 May 2005

Certainly, good legislation is not enough. The legislator was aware of this fact. In Article 6 of the Law on Protection of Environment, some sort of environmental education program is provided for. It is stated that State authorities, scientific, educational, cultural and medical institutions induce and direct development of awareness on the importance of the environment. In fact, educational institutions, including law faculties carry a part of this responsibility.[31]

[31] On environmental rights linked with the right to life, a global effectiviness of environmental law and ideas on International Court of the Environment see K. F. McCallion, International Environmental Justice: Rights and Remedies, 26 Hastings Int'l&Comp.L.Rev. 427 (2002-2003)

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The Right to a Beautiful Danube as a Human Right

Abstract

In 2004 Serbia adopted four basic environmental laws. 2005 has been reserved for a preparation of implementing legislation. It is promising that a constitutional law of Serbia and Montenegro has recognized the right to a healthy environment, as a human right. This offers a greater legal possibility to remedy environmental wrongs. But, without NGO environmental activism, it may stay just a pure legal potential, i.e. without real effects. A main problem of transitional countries, including Serbia and Montenegro, is not to create good laws. It is the enforcement of good laws. Together with NGO-s universities should take their part of responsibility for effective environmental protection.

Unfortunately, there is not an effective international control system over environmental rights. But, it does not mean that there are no any international remedies. The European Court of Human Rights might do justice in environmental issues when human rights, protected by the European Convention on Human Rights, are violated. Besides, the Convention on Cooperation for the Protection and Sustainable Use of the Danube River, adopted in Sofia in 1994 provides a compulsory jurisdiction of the International Court of Justice for disputes related to interpretation and implementation of the Convention. Further regional cooperation may put on its agenda the issue of effectiveness of regional environmental law. Before that, countries which have not ratified the existing regional international treaties should do this.

Key words: *Environmental law, human rights, the right to a healthy environment, pollution, protection, regional conventions, practice of the European Court of Human Rights*

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FROM LIABILITY FOR *IMMISSIO* TO LIABILITY FOR *EMISSIONS*

Twenty years ago, at the beginning of my university career, I was present at the very interesting discussion raised by the proposal to initiate a multi-disciplinary research project on environment protection. This discussion gathered lawyers, on one side, and biologists, chemists and technologists, on the other. The debate began by the remark of one of the law professors who said that this was not anything new for lawyers because there has been a civil liability for *immissio*[1] since the Roman times. However, scientists could not understand his point. Then the law professor explained that for nearly two thousand years the owner of the property was to be held liable if there was induction (*immissio*) of smoke, noise or polluting waters from his real estate to the neighboring estate. The scientists concluded that this was the case of liability for *emissions*[2] but not for *immissio*. This debate lasted for a while and, as you can guess, lawyers did not give up on their argument.

The first impression might be that this is nothing more than terminology misunderstanding. However, here we have two completely different legal concepts with substantially different implications for the environment. Further analysis of this problem would certainly prove that one branch of legal theory still relies on old models of thinking despite the fact that social context and legal rules have evolved long time ago.

[1] *Immissio* – to send or let into a place, to introduce, admit, to send or despatch against, to let loose at, discharge at, to cast or throw into

[2] *Emissio* – to give off, send forth or discharge

Classical Roman law enacted the rule on the use of waters which was quite progressive for that time. There was a specific legal action (*actio aquae pluviae arcendae*) which one could bring against the owner of the neighboring property who created a danger of imminent harm by changing the natural flow of waterway, by increasing the power and speed of the stream after having narrowed the bed, etc. Only the owner of the endangered property could ask for legal protection. The respondent was liable for „*immissio*" (bringing in) the water to the neighboring property in the way contrary to the common water regime, which eventually created the imminent danger of harm. There are two important points of law raised by this rule. First, this rule testifies that prevention as such, which has been considered as a primary tool for last few decades, is not the invention of modern legal doctrines, and that some forms of preventive legal protection were developed back in the Roman times. Secondly, this rule shows that Roman lawyers connected liability with activities which consequences affected only neighboring properties. In other words, there was liability for illegal *immissio*, but not for the *emissions*. This normative approach was fully in accordance with individually oriented Roman law.

The Roman concept stayed unchanged for centuries. Liability for *immissio* exists in almost all legal systems. However, last few decades led to certain changes which imply the gradual formation of the new liability model that is more appropriate for given social context. Our legal system followed these trends. The federal Law on Obligations came into force in 1978 which set forth that „(1) Everyone has the right to demand from another person to remove the source of danger which may cause a substantial damage to him or to indefinite number of persons, or demand from another person to abstain from any activity which may cause distress or imminence of danger provided that the cause of distress or danger cannot be removed in any other way. (2) Upon the request of the person with legal interest, the court will order measures in order to prevent damage or distress, or to remove the source of danger at the expense of the holder of danger source if he fails to do it by himself. (3) If damage was caused as the result of the activity undertaken in public interest, which was approved by competent authorities, action for damages can be brought only for the amount which exceeded tolerated value. (4) Even in this case it is legitimate to demand measures which can prevent or decrease damage." [3]

National legal theory argues that this rule introduced *actio popularis* which gives right to every person to request preventive measures.[4] This could

[3] Law on Obligations: Article 156.

[4] See: Jožef Salma, *Obligaciono pravo*, Novi Sad, 2004; Dušan Nikolić, *Građanskopravna sankcija (evolucija i savremeni pojam)*, Novi Sad, 1995; Dušan Nikolić, Uvod u sistem građanskog prava, Novi Sad, 2005.

also mean that there has been a shift in legal reasoning, so that the respondent now can be held liable not for *immissio* but for emissions. This concept provides for more effective environment protection, especially protection of water resources which are vital for the future of our planet.[5]

However, modern legal framework standing alone is not sufficient. There also need to be social awareness and commitment that particular and individual interests should not supersede common social interests. However, there is still much more to do which can be illustrated by the judgment of the Supreme Court of Montenegro: „The plaintiff was right when demanding from the respondent to remove the source of harm…During the proceeding it has been established that this harm can be removed by redirecting polluting waters, through appropriate plastic pipes, to its natural recipient, the river…“

[5] See: Dušan Nikolić, *Stvarno pravo i zaštita životne sredine,* Pravo (teorija i praksa), 7-8/1989, pp. 74-88.