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LEGAL INSTRUMENTS FOR THE ENVIRONMENTAL PROTECTION



Government of the Republic of Croatia
Office for Cooperation with NGOs

**LEGAL
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PROTECTION**

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I. INTRODUCTION

This publication has been created as a part of the project “Advocacy NGOs Networks for Sustainable Use of Energy and Natural Resources in the Western Balkan and Turkey -ETNAR”. The main purpose of this publication is to help non-governmental organizations from Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Turkey, Macedonia, Albania and Kosovo in environmental protection and sustainable management of energy and natural resources advocacy. Legal instruments can be a powerful tool for advocacy activities of environmental NGOs if they know how and when to use them within advocacy campaigns.

In a publication on Legal instruments for the environmental protection which we published in 2013, within first 2 years of implementation of ETNAR project, we focused on environmental law in four countries in the region: Croatia, Bosnia and Herzegovina, Serbia and Montenegro. Although these four countries were in different stages of the EU integration process and there are many differences among them, in legal sense they have numerous similarities, as the legal bases are largely inherited from the common former state, and environmental legislation among the states converges due to the harmonisation with environmental legislation of the European Union. This publication is an extended version of the publication published in 2013, as it also includes Turkey, Macedonia, Albania and Kosovo which are also in different stages of EU integration process. Furthermore, in this publication we want to make a short comparative overview of the most important aspects of environmental law in these eight countries, but also to prepare a manual on legal instruments that will serve organizations in Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Turkey, Macedonia, Albania and Kosovo in their local advocacy campaigns for environmental protection. At the beginning of this publication, there is an overview of environmental laws in eight countries in the context of joining the EU, which is the reason why environmental legislation in the countries in the region, as well as EU member states, converges. This is followed by a detailed overview of useful legal instruments for the protection of the environment from the domain of constitutional law, as all lower-level legal regulations on environmental protection derive from the constitution. The overview of constitutional instruments is followed by the review of legal instruments of the administrative law, which are used in practice by environmental organizations the most. This is followed by an overview of legal instruments of the criminal law as the “last line of defence”, i.e. environmental protection, which are increasingly used by environmental NGOs, although these are a relatively new legal instruments. At the end of the publication there is a brief overview of legal instruments from the domain of civil law, which are used by NGOs the least, because the use of these instruments is usually associated with high legal costs.

Legal instruments are an important advocacy tool for non-state stakeholders such as non-governmental organizations. They can be used as a tool to influence public policy that comprises not only what is written in strategies and laws, but also what government institutions and other stakeholders do in practice. Legal instruments in the domain of environment are a part of the legal branch called **environmental law**. It is a very “young” legal branch, originating in the 1970s, when environmental issues came into the focus of modern legislation, although before that time there were some restrictions regarding some pollutants very early in the history. For example, in England Edward I (1239-1307) imposed the **death penalty** for anyone found guilty for burning **coal**. But in the 1970s it was the very first time that the environmental pollution issues received critical attention from the general public, so the politicians in developed countries tried to win over voters with legislative initiatives. Therefore, the period from 1970 to 1980 is called the “decade of environmental protection”. Environmental law is not a part of any traditional legal branch, but its elements can be found in many branches of law, such as the rules of constitutional law, international law, criminal law, administrative law, civil law, etc. Environmental law is a multidisciplinary and extensive branch of law, but it has not been explored enough and it is constantly changing and evolving.

Please note that for some countries covered within this publication there is a lack of information, so not all the countries are covered in the same manner.

II. ENVIRONMENTAL LEGISLATION IN THE CONTEXT OF ACCESSION TO THE EUROPEAN UNION

Environmental protection is a matter of great importance in the European Union; both the objectives and principles for the implementation of environmental policies are defined in the very EC Treaty (Title XIX). The implementation of environmental policy is based on: **the precautionary and the preventive action principles**, the integration of environmental protection in all other development policies, the polluter pays principle, pollution prevention at the source, shared responsibility and the promotion of sustainable development.

When a country decides to become an EU member, it must meet key criteria for membership. These are: **political criterion** - to have stability of institutions guaranteeing democracy, the rule of law, respect of human and minority rights and to accept objectives of the EU; **economic criterion** - to establish efficient market economy and the capacity of market forces to cope with competitive pressure and market rules within the EU; **administrative criterion** - to adjust the appropriate administrative structures to ensure the conditions for gradual and harmonious integration, and **legal criterion** - which includes the adoption, implementation and enforcement of the entire *Acquis Communautaire*. In this handbook we will consider only legal criterion for the membership in the EU associated with environmental protection.

To become an EU member state, a candidate country must adopt the entire Community Acquis i.e. *Acquis Communautaire* (hereinafter: *the acquis*). The term is of French origin, literal translation would be “what has been agreed”. *The acquis* includes regulations, directives, decisions and guidelines, and is constantly changing and amending in order to improve the quality of life of EU citizens. As the EU legislation grows, *the acquis* itself grows, and it is important to say that approximation to *the acquis* requires significant investments of the candidate country. Its institutions, administrative and legal systems must be harmonised with the EU standards, on the national as well as on lower levels of government. Each country decides independently how this is to be done, but it must also convince the EU that it is able to implement the *acquis*, which requires coordination between many institutions on all government levels.

For the purposes of negotiations with Croatia (and Turkey) about their accession to the EU, *the acquis* was divided into 35 chapters. Environmental protection policy is covered in Chapter 27, and its objective is to promote sustainable development and protect the environment for present and future generations in member states as well as in candidate countries. Chapter 27: Environment is from the point of view of administration, finances and law one of the most demanding chapter. It comprises a number of important legal acts which concern eight broad categories: horizontal legislation, water and air quality, waste management, nature protection, industrial pollution and risk management, chemicals and genetically modified organisms, noise and forestry. Each of these eight categories comprises a number of regulations that a candidate country must incorporate into its legislation. Regulations and directives, as a part of EU legislation, are mentioned most frequently, so we will briefly explain what they refer to.

Regulations are acts of general application binding in their entirety and directly applicable in member states, because their purpose is to uniform laws of member states. Regulations are not incorporated into national laws, but are directly enforced as European law, as they are published in the Official Journal of the EU. Candidate countries usually adopt an act that confirms that a regulation comes into force, as this is a type of rule that substitutes national legal norms; moreover, countries are required to abrogate previously existing legal norms that are in conflict with new regulations.

Directives are acts which by the results which should be achieved are binding for all member states to which they are addressed, but leave to the national authorities the choice of content and form (new act, amendment to the act, by-laws etc.) as a way of achieving those results (objectives). Their purpose is convergence, but not complete uniformity of member states' laws on national level.

Each of the previously mentioned eight categories usually has one umbrella act - for instance a framework directive or regulation - and a number of sectoral directives which regulate specific subcategories in detail. For example, the category of waste management includes the Waste Framework Directive (2008/98/EC), but also additional detailed legislation on landfills, waste collection and numerous special types of waste (batteries and accumulators, end-of-life vehicles, waste electrical and electronic equipment, packaging and packaging waste, etc.).

Horizontal legislation of the EU, which will be the subject later on in this handbook, includes three major directives: Directive on Environmental Impact Assessment (EIA Directive) (2011/92/EU) (bear in mind that there is also the **Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment**), the Strategic Environmental Assessment (SEA Directive) (2001/42/EC) and the Directive on Public Access to Environmental Information (2003/4/EC). The EIA Directive requires the identification and assessment of direct and indirect effects of public and private projects on humans, fauna and flora, soil, water, air, climate, material assets and cultural heritage. On the other hand, the SEA Directive is a process with the objective of assessing and reducing or eliminating possible significant effects of plans and programmes on the environment. Finally, 2003/4/EC Directive on Public Access to Environmental Information defines principles of the right to access environmental information and regulates access to information about the environment and dissemination of such information in public.

It is clear from all of the above that the Chapter on the Environment is an exceptionally large and demanding field, and since the legislation is constantly changing, actions in this field do not stop even when a country becomes a member of the EU. At the moment, there are 802 regulations in force within the field of the EU environmental legislative. In addition, there are another 25 regulations on animal protection, 184 regulations on human health, not to mention the legislation that regulates the issues of transport, energy, etc. In fact, as we noted at the beginning, one of the principles of the EU environmental policy is the integration of environmental protection in all other development policies, and the EU, at least regarding legislation, indeed implements that.

III. CONSTITUTIONAL LAW INSTRUMENTS FOR ENVIRONMENTAL PROTECTION

Considering the legislation hierarchy, it is logical to start a review of legal instruments for environmental protection with an overview of the legal instruments from the domain of constitutional legislation on environmental law. It is important how constitutional law of a particular country regulates environmental protection because all of the acts and other norms must be fully harmonized with the constitution as the highest legal act of any country. Constitutional protection includes deciding whether a law is in accordance with the constitution, whether other regulations are in accordance with the constitution and the law, and whether laws are in accordance with international treaties. It also includes deciding on constitutional complaints/appeals/appeals to the constitutional court.

1. Environmental protection in the constitutions

Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Turkey, Macedonia, Albania and Kosovo, unlike some countries, have codified written constitutions, but the issue of environmental protection is to some extent treated differently.

In Croatia environmental protection is in the category of the highest values of a constitutional order. Article 3 of the Constitution defines “conservation of nature and the environment” as the highest value of the constitutional order of the Republic of Croatia and as the basis for the interpretation of the Constitution. According to the Article 50 of the Constitution “entrepreneurial freedom and property rights may exceptionally be restricted by law in order to protect the interest and security of the Republic of Croatia, its nature, the human environment and human health”. Also, state responsibility to protect the environment is strictly regulated, as Article 69 of the Constitution states: “the state provides the conditions for a healthy environment”. The same article also stipulates: “everyone shall, within the scope of their powers and activities, devote special attention to the protection of human health, nature and the human environment”. Croatian Constitutional Court is responsible for the protection of constitutionality.

In Serbia environmental protection is not listed as a category of the highest constitutional values, as they are not specifically defined in the Constitution. However, the right to a healthy environment is defined on the constitutional level; Article 74 of the Constitution says: “Everyone has the right to healthy environment and the right to timely and complete information about its condition”. This formulation suggests that, along with the right to a healthy environment, the right to information about the state of the environment is defined on the constitutional level. Here the state has the highest obligation to protect the environment, but it is not the only one - everyone is responsible for environmental protection, as the same article defines further on: “everyone, and especially the Republic of Serbia and autonomous province, is responsible for environmental protection”. Same as in the Croatian Constitution, Article 83 states that the entrepreneurship may be restricted by law in order to protect the environment and natural resources. It is interesting that Serbian Constitution states also in Article 97 that the Republic of Serbia regulates and provides, among other things, **sustainable development**; system of protection

and improvement of the environment; protection and improvement of flora and fauna. Constitutional Court of the Republic of Serbia is responsible for the protection of constitutionality.

In Montenegro environmental protection is particularly protected by the constitutional law. Article 1 of the Constitution, among other things, defines Montenegro as an ecological state. Article 23 of the Constitution of Montenegro defines that “everyone has the right to a healthy environment”. Although this is, by its nature, economic and social right, creators of the Constitution included it in a part defining the basic provisions on human rights and freedoms, guided by Article 1, because this general right greatly affects other rights and limits their execution. The same article of the Constitution stipulates, as in the Serbian Constitution, that “everyone has the right to be timely and fully informed about the state of the environment”, but also adds two more rights from The Aarhus Convention: “a possibility of exerting influence during the decision-making on the issues of importance to the environment, and to legal protection of these rights”. The same article defines, just as in the constitutions of Croatia and Serbia, that “everyone, especially the state, is obligated to preserve and improve the environment”. Article 59, as in the Croatian and Serbian Constitution, defines that the freedom of entrepreneurship may be restricted in order to protect the environment and natural resources. Constitutional Court of Montenegro is responsible for the protection of constitutionality.

In Bosnia and Herzegovina environmental protection is not directly protected by the constitutional law on the state level; BiH Constitution does not mention the right to a healthy environment or its protection. However, the right to a healthy environment is contained in the right to life, which is directly defined in Article II/3.a) of the Constitution. In addition, international acts which the Constitution of Bosnia and Herzegovina directly refers to are directly implemented in Bosnia and Herzegovina, especially the Convention for the Protection of Human Rights and Fundamental Freedoms, which has precedence over all other acts in Bosnia and Herzegovina. Environmental protection is regulated by the constitutions of entities, although neither the Constitution of the Federation of Bosnia and Herzegovina (hereinafter: the Federation) nor the constitutions of the 10 cantons in the Federation stipulate a concrete definition of the right to environment. Only the Constitution of Republika Srpska (hereinafter: RS) defines this right in Article 35: “everyone has the right to a healthy environment”. Unlike the constitutions of Croatia, Serbia and Montenegro, the Constitution of Republika Srpska does not stipulate the specific responsibility of the state or entity for such right. The same article defines: “everyone has a duty to protect and improve the environment, in accordance with the law and within his or her possibilities”. Constitutional Court of Bosnia and Herzegovina is responsible for the protection of constitutionality on the state level; Constitutional Court of Federation of Bosnia and Herzegovina and the Constitutional Court of Republika Srpska are responsible on the level of entities. It should be emphasized that the jurisdiction of the Constitutional Court of BiH and entities’ constitutional courts is different.

The Turkish Constitution contains provisions for the environmental protection, particularly in its Article 56 which states “Everyone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the natural environment, to protect the environmental health and to prevent environmental pollution”. Also the Article 63 of the Constitution asserts that “The State shall ensure the protection of the historical, cultural and natural assets and wealth, and shall take supportive and promoting measures towards that end. Any limitations to be imposed on such privately owned assets and wealth and the compensation and exemptions to be accorded to the owners of such, because of these limitations, shall be regulated by law”. Constitutional Court of Turkey is responsible for the protection of constitutionality.

In Macedonia the protection and advancing of environment is enshrined as core value of the constitutional arrangement, brought to the same level as all other human rights and freedoms as stipulated in Article 8, Paragraph 1, item 9 of the National Constitution of the Republic of Macedonia: „the arranging and humanization of the space and protection and advancing of environment and nature“. By treating it at a level that is equal with other human rights and freedoms, the Constitution of the Republic of Macedonia also directly guarantees the right for every citizen to a healthy environment, and the State provides conditions for implementation of this right. Article 43 of the Constitution of the Republic of Macedonia defines the right to a healthy environment: „every person has a right to a healthy environment“, every person is obliged to protection and advance the environment and nature” and “the state provides conditions for implementation of the right of the citizens to healthy environments”. Constitutional Court of Macedonia is responsible for the protection of constitutionality. In Albania the Constitution states in Article 59 1 that “*the state, within its constitutional powers and the means at its disposal, and in order to supplement private initiative and responsibility, aims at: a.....d. a healthy and ecologically adequate environment for the present and future generations; dh. the rational exploitation of forests, waters, pastures and other natural resources on the basis of the*

principle of sustainable development.” Constitutional Court of Albania is responsible for the protection of constitutionality. The Constitution does not classify the environment as a fundamental right directly actionable before the courts. Therefore, taking into consideration these constitutional provision and the way they are written down, the environmental protection can be understood not only as a measure to protect fundamental rights, but also an environment as such. The right to have a clean and healthy environment [6, 121], to ensure the health and quality of life does not enjoy Constitutional protection as the basic higher rate, but it leaves this warranty to other legal norms under the hierarchy of the Constitution, as conventions, codes and laws. Environmental laws in the matter are transversal laws, they must protect the environment from global developments and exploitation of natural resources, health and quality of life , and “the principle of mutual responsibility”.

Legal instruments for environmental protection in Kosovo derive from the Constitution of the Republic of Kosovo which clarifies that one of the main values on which the Kosovo state is constituted is the “protection of the environment”, Article 7, Values. This Article in fact explains the principles on which the society is built on and the principle of protection of the environment contains also the principles of integrity (the state institutions ensure the integration of the environmental protection and the improvement of the living environment), the principle of prevention and preventive measures, the principle of protecting the natural resources, the principle of sustainable development etc. In realizing the right for a healthy environment, a special importance is given to the principle of information which allows everyone to be informed about the state of the environment and to be part of the decision-making processes whenever they affect the living environment. The principle of environmental protection is therefore part of the key values which constitute the state. Additionally, Article 52 (Responsibility for the Environment) states that “*nature and biodiversity, environment and national inheritance are everyone’s responsibility*”, “*everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live*” and that “*the impact on the environment shall be considered by public institutions in their decision making processes*”. The Constitutional Court of Kosovo is responsible for the protection of constitutionality.



River Zeta, Crna Gora

2. The protection of constitutionality and legality of regulations

In Croatia the Constitutional Court decides on the compliance of laws with the constitution, on the compliance of other regulations with the constitution and laws, and on the compliance of laws with international treaties. There are three ways to institute the procedure of assessing the constitutionality and legality at the Constitutional Court: by the request of authorised institutions, by the decision of the Constitutional Court based on the proposal of any natural or legal person, and by the initiative of the Constitutional Court itself.

Authorised persons for filing a **request** to institute the procedure of the assessment of the constitutionality and legality are one-fifth of the members of the Croatian Parliament, a working body of the Croatian Parliament, the President of the Republic of Croatia, the Government (in relation to by-laws, but not laws), the Supreme Court or another court (if the question of constitutionality and legality appears in court process), the ombudsman and the representative bodies of local and regional government (about the issues of structure, scope and funding of local authorities). The Constitutional Court shall make a decision on such request following an urgent procedure, within 30 days. Everyone, i.e. any natural or legal person, may submit a **proposal** to the Constitutional Court to institute the procedure of assessment whether laws comply with the Constitution and whether other regulations comply with the Constitution and laws. The Constitutional Court decides at a session whether to accept the proposal and start the procedure, in which case it will begin the procedure no later than within a year from the date of filing the proposal.

The request and the proposal to assess the compliance of laws with the Constitution, and the compliance of other regulations with the Constitution and laws must contain the following: the provision the constitutionality or legality of which is disputed should be specified, as well as the provisions of the Constitution or laws which are claimed to have been violated, the reasons why it is claimed the disputed regulation is not in accordance with the Constitution and the law, and the signature and the seal of the applicant. The applicant may specify in the request other facts relevant to the particular assessment and his or her opinion on whether the disputed regulation should be repealed or annulled. The disputed act must be attached to the request for the assessment of the constitutionality and legality of other regulations. Pending the final decision, the Constitutional Court may decide to suspend the execution of individual acts or actions undertaken on the basis of the law or regulation whose constitutionality is being reviewed, if the consequences of the execution would be severe and irreparable.

If by the decision of the Constitutional Court a law is proclaimed unconstitutional - it shall be repealed. If some other regulation (by-laws) is found unconstitutional or illegal - it shall be repealed or annulled (ceases to be valid from the date of the promulgation). The difference between a repeal and annulment is that if the regulation is annulled, it is as if that regulation has never been in force at all, and all the legal consequences that occurred between the date of becoming effective and the date of annulment are also annulled. However, if the regulation is repealed, the relevant moment is the date of the decision of the Constitutional Court. All legal consequences that occurred prior to that moment remain in force, but the regulation is from that date onward without any legal effect. Legal consequences of the repeal/annulment are such that anyone whose **rights have been violated by a legally binding act** based on repealed or annulled regulation or law has the right to file a request with competent authority for **amendment** of that act. The proposal may be filed within six months from the moment the decision of the Constitutional Court is announced, if no more than one year passed between the date of the delivery of the individual act by which the process is completed and its resolution is legally binding to the date of the request for the assessment of the constitutionality, based on which the law or other regulation was repealed; if the regulation was annulled no more than two years can pass.

In Serbia, the Constitutional Court is responsible for the assessment of the compliance of laws with the Constitution, the compliance of other general acts with the Constitution and law, and of the compliance of laws with international treaties. Similarly as in Croatia, the procedure of constitutionality and legality assessment can be instituted in three ways: by a proposal of authorized proposer, by the decision of the Constitutional Court based on the initiative of any natural or legal person, and by the initiative of the Constitutional Court itself.

Unlike in Croatia, authorized institutions use **a proposal** to institute the procedure of constitutionality or legality assessment, and all other natural and legal persons have the right to refer **the initiative** to

the Constitutional Court and propose the initiation of the procedure. Institutions authorized to institute the procedure of the assessment of constitutionality or legality of a general act by the proposal are similar to those in Croatia, but not so precisely defined. Authorized proposers are state bodies, bodies of autonomous provinces and local governments and 25 parliament members. Any natural or legal person is entitled to initiate the procedure of constitutionality or legality assessment, and the Constitutional Court in a session makes a decision whether to accept the initiative and institute the procedure.

The proposal and the initiative to institute the procedure of constitutionality or legality assessment must contain the following:

- the name of the general act the constitutionality or legality of which is being disputed
- the name and issue number of the official gazette in which the general act was published, if it was published in the official gazette
- provision(s) of the general act the constitutionality or legality of which is disputed
- provisions of the Constitution or law based on which constitutionality or legality of the general act is disputed
- the reasons for the disputing and other data relevant to constitutionality or legality assessment of disputed general act
- proposal or request about what should be decided
- information on the initiative proposer or applicant
- signature of the proposer or applicant of the initiative.

If the general act the constitutionality or legality of which is being disputed is not published in the official gazette, a certified copy of this act shall be attached to the proposal. The Constitutional Court may, until the final decision and under the conditions specified by law, suspend the execution of a particular act or action taken on the basis of the law or other general act the constitutionality or legality of which is being reviewed.

The law or other general act which is not in the accordance with the Constitution or law shall cease to be valid on the date when the decision of the Constitutional Court is published. Anyone whose rights have been violated by the **final or legally valid individual act** based on law or other general act which the Constitutional Court found not in accordance with the Constitution, with generally accepted rules of international law, ratified international treaties or law, has the right to request the **change** of that particular act of the competent body, in accordance with the rules of procedure by which such particular act was passed. The proposal to change the final or a legally valid individual act adopted on the basis of law or other general act which the Constitutional Court found not in accordance with the Constitution, generally accepted rules of the international law, ratified international treaties or law can be filed within six months from the date of publication of the decision, if from the moment of the delivery of that particular act to the date of filing a proposal or initiative to institute the procedure no more than two years pass.

In Montenegro the Constitutional Court decides on the assessment of the compliance of the law with the Constitution, compliance of other general acts with the Constitution and law, and compliance of laws with international treaties. Similar to Croatia, and the same as in Serbia, the procedure of constitutionality and legality assessment can be instituted in three ways: by a proposal of authorized proposer, by the decision of the Constitutional Court based on the initiative of any natural or legal person, and by the initiative of the Constitutional Court itself.

Similar to Serbia, authorized proposers who may submit a **proposal** to institute the procedure of constitutionality and legality assessment are courts, other state bodies, local government bodies and five parliament members. Just like in Serbia, any natural or legal person may submit an **initiative** to institute the procedure of constitutionality or legality assessment which is submitted to an authorized proposer at the Constitutional Court or to the Constitutional Court itself, and the Constitutional Court shall make a decision.

The proposal and the initiative for the assessment of the compliance of a law with the Constitution and ratified and published international treaties and the compliance of other regulations with the Constitution and the law shall contain: the name of the act or other regulation, the provision, the name and issue number of the official gazette in which it was published, the reasons on which the proposal or initiative is based on and other data relevant to constitutionality or legality assessment. During the procedure, the Constitutional Court may order the suspension of the execution of an individual act or action carried out on the basis of law, other regulation or act the constitutionality or legality of which is in being evaluated, if the consequences of their execution may be unrecoverable and harmful.

The Constitution stipulates that with the date of the publication of the decision of the Constitutional Court that the law which was found not in accordance with the Constitution or the ratified and published international treaty, or other regulation of which is found not to be in accordance with the Constitution and the law, such law ceases to be valid. Just like in Serbia, anyone whose rights have been violated by the **particular final or legally valid individual act** based on law or other regulation for which, based on its initiative, the Constitutional Court decided that it was not or it is not in accordance with the Constitution, ratified and published international treaties or law, has the right to request from the competent body the **change** of that particular act. The proposal to change the final or legally valid individual act adopted on the basis of law or other regulation which the Constitutional Court found not in accordance with the Constitution, ratified and published international treaties or law, can be filed within six months from the date of the publication of the decision, if from the moment of delivery of individual act to the moment the initiative to institute the procedure was filed no more than one year passes.

Compared to other countries, in Bosnia and Herzegovina the situation is different because, along with the Constitution and the Constitutional Court on the state level, there are also constitutions and constitutional courts on the level of entities - Federation and RS -, as well as the Statute of the Brčko District of Bosnia and Herzegovina, which is actually the document that represents a constitution. Compared to Croatia, Serbia and Montenegro, the difference also lies in the fact that the BiH Constitution does not explicitly define the right to a healthy environment, nor does it explicitly mention the environment in any context. Nevertheless, the procedure of the constitutionality and legality assessment on which the Constitutional Court of Bosnia and Herzegovina decides is essential for the environment protection because the right to a healthy environment is related to some other constitutionally guaranteed rights, as it was mentioned previously, but also because regulations must be in accordance with environmental laws and international treaties related to the protection of the environment. The Constitutional Court of Bosnia and Herzegovina, among other things, decides whether a provision of the Constitution or laws of one of the entities and Brčko District are in accordance with the BiH Constitution. The procedure of the constitutionality and legality assessment, unlike in Croatia, Serbia and Montenegro, can be instituted in two ways: by the request of authorized institutions, or the request of any court in BiH on the compliance of that law, on which their decisions depends, with the Constitution, the European Convention on Human Rights and Fundamental Freedoms and its Protocols or with the laws of BiH, as well as on the existence or scope of a general rule of public international law relevant to the court's decision.

The procedure of the assessment of the constitutionality of any of the entities' constitutions and laws may be instituted by the **request** of the following authorized institutions: a member of the Presidency, the Chairperson of the Council of Ministers, the Chairperson or Deputy Chairperson of one of the chambers of the Parliamentary Assembly, one fourth of members/delegates of one of the chambers of the Parliamentary Assembly or one fourth of one of the chambers of the legislature of one entity. The procedure of the assessment of the compliance of laws with the Constitution of Bosnia and Herzegovina, BiH laws and international treaties on which a judicial decision depends may be instituted by the **request** of any court in Bosnia and Herzegovina.

The request for the assessment of the constitutionality of any of the entities' constitution or law must contain the following: the name of the act that is the subject of the dispute, the name and issue number of the official gazette in which it was published; provisions of the Constitution which are found violated; statements, facts and evidence on which the request is based; the signature of the authorized person, i.e. applicant. The request for the assessment of the constitutionality, legality and conformity with international treaties of the court should contain provisions of the law which is the subject of the compliance assessment, name and issue number of the official gazette in which it was published; provisions of the Constitution, the European Convention on Human Rights and Fundamental Freedoms and its Protocols and laws of Bosnia and Herzegovina, which is the subject of the compliance assessment; the existence or scope of a general rule of public international law relevant to the Constitutional Court's decision; statements, facts and evidence on which the request is based on; signature of an authorized person.

General act or some of its provisions may be fully or partially repealed by the decision on non-compliance of the Constitutional Court, based on the procedures instituted by the request of authorized institution or court. The repealed general act or its repealed provisions cease to be valid the day after the date the decision of the Constitutional Court is published. Anyone whose rights have been **violated by the final or legally valid individual act** passed on the basis of provisions which ceased to be into force, has the right to request from the competent body to **change** that particular act, and the competent

body is obliged to repeat the procedure and adjust the act to the decision of the Constitutional Court. The proposal for the change of the final or a legally valid individual act shall be filed within six months from the date of publishing the decision of the Constitutional Court, if no more than five years passed between the moment the act was passed and the moment the Constitutional Court made its decision, which is a far longer period than in Croatia, Serbia and Montenegro. Finally, it should be mentioned that the described procedure for constitutionality and legality assessment led by the Constitutional Court of Bosnia and Herzegovina is similar to procedures for constitutionality and legality assessment led by the Constitutional Court of the Federation of Bosnia and Herzegovina and the Constitutional Court of the Republika Srpska.

In Turkey the constitutionality of laws, decree laws and the Rules of Procedure of Turkish Grand National Assembly or the provisions thereof can be challenged directly before the Constitutional Court through an annulment action by persons and organs empowered by the Constitution. There are two procedures for constitutionality review. One of them is Action for Annulment and the other is Contention of Unconstitutionality. Contention of unconstitutionality can be initiated by general administrative and military courts and any party involved in a case being under scrutiny before a court. As a rule, the right to apply for annulment directly to the Constitutional Court lapses 60 days after publication in the Official Gazette of the relevant legislation. Being different from the abstract control of norms, contention of unconstitutionality can be initiated only against laws and decrees having the force of law; and it can not be appealed by other courts to the Constitutional Court on the grounds of defect in form.

The right to apply for annulment directly to the Constitutional Court lapses 60 days after publication in the Official Gazette of the contested law, the decree laws, or the Rules of Procedure of Parliament. The examination and verification of laws as to form is restricted to consideration of whether the requisite majority was obtained in the last ballot; the verification of constitutional amendments is restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed. Verification as to form may be requested by the President of the Republic or by one-fifth of the members of the Parliament. Applications for annulment on the grounds of defect in form can not be made after ten days have elapsed from the date of publication of the law; and it can not be appealed by other courts to the Constitutional Court on the grounds of defect in form.

Contention of unconstitutionality can be initiated by the general, administrative and military courts *ex officio* or upon the request of parties involved in a case that is heard by the relevant court. Applications are made by correspondence. According to Article 152 of the Constitution, if a *court a quo* finds that the law or the decree law or a provision thereof to be applied in a pending case is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality that may be submitted by one of the parties, it applies to the Constitutional Court to decide on constitutionality and it postpones the proceeding of the case until the Constitutional Court decides on the issue.

The Constitutional Court should decide on the matter within five months of receiving the contention. If no decision is reached within this period, the applicant *court a quo* should decide the case under existing legal provisions. No allegation of unconstitutionality may be made with regard to the same legal provision unless ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits.

In Macedonia the Constitutional Court is the body in charge of establishing conformity of the laws with the Constitution and with other legal acts. Initiative can be raised towards the Constitutional Court for assessment of the legality of particular law or other act with the Constitution. Anyone can raise initiative for assessment of the legality and constitutionality of a law or other act, according to Article 12 of the Rules and Procedures of the Constitutional Court. The content of the motion for initiating a procedure for assessment of constitutionality and legality towards the Constitutional Court is regulated in Article 15 of the Rules and Procedures of the Constitutional Court: "The motions in front of the Constitutional Court are filed in writing, in two copies. The motion for initiation of procedure for assessment of constitutionality of a law and of the constitutionality and legality of a piece of legislation or other general act includes the following elements: reference to the actual law, regulation or general act i.e. its particular provisions being disputed, reasons for such dispute, the actual provisions from the Constitution i.e. the law being violated with that act, and the name i.e. title and address of the filer of the initiative."

In Albania the Constitutional Court initiates a proceeding only on the request of the President of the Republic, the Prime Minister, not less than one-fifth of the deputies, the head of High State Control, any court (under Article 145, Paragraph 2 of the Constitution), the Ombudsman, the local government bodies, the religious communities bodies and political parties. The first step to address the Constitutional Court is the submission of a written application. Any subject would be able to perform this action by filling in the form available at the Constitutional Court website, or by compiling a written application respecting its formal elements, according to the provisions of the Law No.8577, dated February 10th 2000 "On the organization and functioning of the Constitutional Court." The application is filed with the Constitutional Court at the Judicial and Documentation Department. All the applications must have the respective documents attached, in conformity with the requests of Article 29 of the Law No.8577, dated February 10th "On the organization and functioning of the Constitutional Court". The applications can also be sent by mail at the mailing address of the Constitutional Court.

In Kosovo the Constitution gives the right to the Assembly of Kosovo, the President of the Republic of Kosovo and the Government and the Ombudsperson to refer the question of the compatibility of the laws with the Constitution, the decrees of the President or Prime Minister and the regulations of the Government. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed. In cases where the legal content or procedure is found to be contrary to the Constitution or the principles of the Constitution the Constitutional Court will declare those dispositions invalid. The most known case was where a group of members of the Assembly initiated the procedure of conformity of some articles in the newly adopted Law No. 04/L-125 on Health. The contested dispositions determined a new principle on working in the medical system. The doctors would have to choose between working in the public sector or the private one. The Constitutional Court found that these dispositions were not in line with the Constitution and declared them invalid. The passed law could not enter into force and the Ministry of Health was forced to resend the revised version. Article 16 defines the Supremacy of the Constitution as the highest legal act in the Republic of Kosovo. Depending on the nature of violation, one can be subject to a criminal investigation if the violation of the constitution is "serious" as defined by the Constitution. The prosecution process, however, is conducted based on the criminal law.



Sutjeska, Bosnia and Herzegovina

3. Constitutional complaint/ appeal/appeal to the Constitutional Court

In Croatia, Serbia, Montenegro, Macedonia and Kosovo a **constitutional complaint/appeal**, which is an instrument for protecting constitutionally guaranteed human rights and fundamental freedoms, can be filed with the Constitutional Court. In Serbia, except for the protection of constitutionally guaranteed human rights and fundamental freedoms, this instrument is used also for the protection of minority rights. In Bosnia and Herzegovina there is not a classical instrument of constitutional complaint/appeal, but there is something similar - **an appeal to the Constitutional Court** (an instrument also existing in Serbia and Montenegro), used for the protection of human rights and fundamental freedoms guaranteed by the Constitution of Bosnia and Herzegovina, as well as international treaties that are in use in BiH. One must remember that the BiH Constitution does not define explicitly the right to a healthy environment so the Constitutional Court is not directly responsible for violations of the rights issues, but appeals may be submitted also for violations of other rights, such as the right to a fair trial, which can be violated during the exercising of rights from the environmental domain.

The constitutional complaint/appeal may be submitted by **everyone**, i.e. any legal or natural person whose constitutional rights and freedoms have been violated by the decision of state government bodies, local government or legal person with public authorities, which includes court judgements, decisions of administrative bodies or other individual acts. Appeals to the Constitutional Court of Bosnia and Herzegovina are submitted mainly about court judgements of other courts in BiH, but sometimes about the decisions of other public bodies, too. To submit a complaint/appeal in Croatia, Serbia, Montenegro, Bosnia and Herzegovina, Turkey and Kosovo, all other regular legal instruments and remedies must be exhausted first.

The **deadline** for submitting this instrument, i.e. the constitutional complaint/appeal in Croatia, Serbia and Turkey is 30 days after the date the decision that violated human rights or fundamental freedoms is received. The constitutional appeal/appeal to the Constitutional Court in Montenegro and Bosnia and Herzegovina may be submitted within 60 days from the date the delivery of individual act or verdict/court decision. In Croatia, Serbia and Montenegro, if someone misses the deadline for filing the constitutional complaint/appeal due to a reasonable cause, the Constitutional Court will approve reinstatement, if the reinstatement proposal is submitted within 15 days after the cause for missing the deadline ceases and the constitutional complaint/appeal is filed at the same time. After the expiration of three months following the missed deadline, the reinstatement cannot be proposed. The constitutional complaint/appeal in Croatia, Serbia and Montenegro does not prevent the execution of the disputed act, but, on the proposal of the constitutional complaint/appeal applicant, the Constitutional Court may postpone the execution until the decision is made, if the execution would cause to the constitutional complaint/appeal applicant damage which would be difficult to repair. In constitutional complaint/appeal in Croatia and Serbia there are additional conditions: the postponement should not be contrary to public interest nor would cause major damage to anyone.

When the constitutional complaint/appeal is upheld and the disputed act is repealed, the Constitutional Courts of Croatia, Serbia, Montenegro, and Bosnia and Herzegovina shall, in the explanation of the decision, state which human right and fundamental freedom guaranteed by the Constitution has been violated, and return the case for the renewed process to the body that had passed the repealed act. In the process of adopting a new act, the competent body shall respect the legal opinion of the Constitutional Court stated in its decision to repeal. Finally, it should be noted that in Bosnia and Herzegovina, despite the existence of the constitutions of different entities, on the entity level there are no instruments such as the constitutional complaint/appeal, nor an instrument like the appeal to the Constitutional Court of Bosnia and Herzegovina, which every natural or legal person is entitled to. This means that the Constitutional Court of the Federation and the RS Constitutional Court deal with the assessment of constitutionality and legality, but not with constitutional complaints/appeals.

The content of the constitutional complaint/appeal in Croatia, Serbia and Montenegro

- citizen's name, surname, and personal identification number
- domicile or temporary residence, or name and registered office of the applicant, if it is legal person
- authorized person's name and surname
- identification of the disputed decision, i.e. number and date of the act that is the subject of constitutional complaint/appeal and the name of the body which passed the disputed decision
- identification of the violated constitutional right or freedom
- reason for the complaint/appeal, with indication on the violation or denying the right
- request that shall be decided on by the Constitutional Court
- signature of the applicant of the constitutional complaint/appeal.

The following documents should be attached to the constitutional complaint/appeal:

- evidence that all available legal remedies have been exhausted
- evidence of timeliness and other evidences important for the decision
- the disputed act in original or in a certified copy.

The content of the appeal to the Constitutional Court of Bosnia and Herzegovina

- the disputed verdict passed by a court in Bosnia and Herzegovina
- provisions of the Constitution and/or international documents on human rights which are enforced in Bosnia and Herzegovina
- indications, facts and evidence the appeal is based on
- in the lack of disputed verdict/decision, reasons for the appeal
- signature of the applicant of the appeal.

Constitutional complaint (individual application) was introduced into the Turkish legal system by the 2010 constitutional amendments and September 23rd 2012 was the first day of receiving applications. Article 148 of the Constitution stipulates that anyone who considers that his/her constitutional rights set forth in the European Convention on Human Rights have been infringed by a public authority will have a right to apply to the Constitutional Court after having exhausted other administrative and judicial remedies.

The Law on Establishment and Rules of Procedure of the Constitutional Court (No. 6216) provides the conditions and procedures of the individual application. The jurisdiction of the Court *ratione materiae* comprises fundamental rights and liberties which are regulated by both the Constitution and the European Convention on Human Rights. But some acts of public power are exempted from the scope of individual application. No application can be lodged against legislative acts and regulatory administrative acts. The rulings of the Constitutional Court and transactions that have been excluded from judicial review by the Constitution cannot be the subject of individual application. The jurisdiction of the Court *ratione personae* comprises both real and legal persons. However, public legal persons cannot lodge individual applications while, private-law legal persons may apply solely on the ground that their rights concerning legal personality have been violated. Foreigners may not lodge individual applications concerning rights exclusive to Turkish citizens. Private legal persons (associations, foundations, commercial partnerships, etc.) may file individual application on the grounds that the rights granted only for legal persons such as freedom of association or right to legal remedies were violated. Public legal persons are not entitled to the right to individual application. Therefore, applications filed by public legal persons are found inadmissible on the grounds of "incompetence *ratione personae*".

In Macedonia the "constitutional complaint" as an instrument of environmental protection actually does not exist. If we take into account that the procedure in front of the Constitutional Court is initiated with a motion that can be filed by anyone (this refers to any individual or legal entity), the initiative/motion can include all acts for which the initiating person deems are non-conforming to the Constitution. There is a procedure for protection of the freedoms and rights from Article 110, Paragraph 3 of the Constitution of the Republic of Macedonia, but Article 110 does not explicitly define the right to a healthy environment as a right for which protection can be sought in front of the Constitutional Court. According to Article 110, Paragraph 3, it "protects the rights and freedoms of the person and the citizen pertaining to freedom of belief, consciousness, thought and public expression of the thought, political affiliation and acting, and prevention of discrimination of the citizens on the basis of gender, race, religious, ethnic, social and political background." Since aforementioned article does not mention environmental protection, it is not clear can an individual seek for protection of environment before the Constitutional Court.

In Albania the complaint must be presented to the Constitutional Court in written form, in Albanian language, in clear and understanding language, in as many copies as there are parties involved and it should include:

- a. the court to which the application is presented,
- b. name, surname (denomination), residence or place of living of the applicant,
- c. name, surname (denomination), residence or place of living of the entities interested in the case,
- d. the object of the application
- e. the content of the application and presentation of reasons, and
- f. specification of documents and other evidence, which accompany the application.

Example from practice

Plomin C – Croatia

Plomin C is the name of a planned thermal power block with the capacity of 500 MW, which would be built at the location of Plomin power plant, after a shutdown of 125 MW block built in 1970. Planned energy-generating product for block C of Plomin thermal power plant is coal, one of the most harmful fossil fuels to human health and the environment. Coal combustion results in significant greenhouse gas emissions, therefore the coal-fired power plants are one of the substantial causes of climate change. Despite all of this, the investor in the thermal power plant Plomin C, the national electricity company HEP, decided to use coal as an energy-generating product, and submitted a request to the Ministry of Environment and Nature Protection for the appropriate assessment of the project with respect to the environmental.

The request was filed at the end of 2010. The Decision on Integrated Environmental Protection Requirements, the so-called environmental permit (which also contained the decision that this project was environmentally acceptable) was passed in September 2012. Public consultations about the Environmental Impact Study were conducted at the end of 2011, and lasted for 30 days, which is the necessary minimum required by law. It is therefore reasonable to question whether this minimum period in such a complex case was indeed a reasonable time-frame for the public to prepare for and participate effectively in the environmental decision-making (Article 6, Paragraph 3 of the Aarhus Convention). The Environmental Impact Study contained about 1500 pages of highly technical and specialized text.

NGOs *Zelena akcija/ Friends of the Earth Croatia* and *Zelena Istra* (Green Istria) were actively monitoring the entire process of issuing of the environmental permit and even participated in some meetings of the expert advisory committee which were open to the public, as representatives of the public. In the process of public debate, they sent comments on the Environmental Impact Study in the prescribed manner. All comments submitted by *Zelena akcija/ Friends of the Earth Croatia* and *Zelena Istra* were dropped, and the process was completed by passing an environmental permit, which stated that the project was environmentally acceptable, and the measures for environmental protection were defined. Dissatisfied with such a decision, *Zelena akcija/ Friends of the Earth Croatia* and *Zelena Istra*, together with the representatives of the locals, filed a lawsuit against the Ministry of Environment and Nature Protection with the Administrative Court in Rijeka.

In court, they primarily argued that the assessment process was not even supposed to be carried out because one of the requirements for the appropriate assessment of a project for the environment is that such project is planned in valid spatial planning documentation. This is in accordance with the prescribed function of spatial plans as instruments of environmental protection, too. Spatial plans define four times less power in Plomin thermal power plant, compared to the power that would be realized by building Plomin C, and it should use gas as an energy-generating product.

In addition, the Physical Planning Strategy and Program, as key Croatian documents on physical planning, strictly prohibit the construction of new coal power plants in Croatia. Plaintiffs also argued at the court that the process of environmental impact assessment had not been carried out properly. The plaintiff's claim was rejected by the Administrative Court in Rijeka. In the process, the Court did not take in consideration at all the issue of compliance with physical planning documents, arguing that the issue of compliance should not be determined in the process of environmental impact assessment, while other requests were rejected because the court found that the process had been conducted according to the legally stipulated procedure.

Dissatisfied with this judgement, in December 2013 the plaintiffs filed a constitutional complaint because they believed that the Court should have considered their objection that Plomin C was clearly not in accordance with the physical planning documents. To be more precise, if the appropriate assessment processes are conducted only for projects that are in accordance with physical planning documents, than proving that a project is not in accordance with these documents should also be allowed. This is guaranteed by the Aarhus Convention, stipulating the right to access to justice in order to challenge “substantive and procedural legality of any decision, act or omission” (Article 9, Paragraph 2). The right to access justice guaranteed by the Aarhus Convention is not exhausted by the very fact that the plaintiffs could file a complaint with a court, but is also executed through substantial examination of the legality of certain decision. Whether there was such a substantial examination in the case of lawsuits filed by *Zelena akcija/ Friends of the Earth Croatia* and *Zelena Istra* against environmental permit for Plomin C, is a matter that will be evaluated by the Constitutional Court.

In February 2014 *Zelena akcija/ Friends of the Earth Croatia* also sent to the State Attorney’s Office (DORH) a Proposal for urgent review of the legality of the above judgement of the Administrative Court in Rijeka. However, the State Attorney’s Office decided not to pursue this case in front of Supreme Court. Three years later the process before the Constitutional Court is still pending.



“Action within campaigning against Plomin C - Croatia”

Prizren Case - Kosovo

In Kosovo, as abovementioned, the Constitution foresees provisions that allow citizens to take a part in decision-making affecting the environment in which they live. These provisions under the Article 52 of the Constitution were used in the Constitutional Case No. KI56/09 “60 citizens of Prizren vs. Municipal Assembly of Prizren”. In April 2009 the Municipal Assembly of Prizren passed a decision to make some changes in the Detailed Urban Plan affecting the Jaglenica (Dardania) neighborhood. The decision stated: “Instead of an existing green environment, provided by the Detailed Urban Plan, it is now envisaged the construction of high buildings”. When a petition was ignored by the municipal officials, 60 citizens appealed the decision in the Constitutional Court claiming Municipal Assembly had violated the Article 52 by not consulting the citizens.

The Court voted in favor of the citizens and imposed some preliminary measures stopping the Municipality of Prizren implementing any construction work in Jaglenica neighborhood. Although it did not have much media coverage, the case had an important impact in fighting against degradation of green areas. Legally speaking, it is the first and only case so far in which the Constitutional Court decided based on the legal means and consequences of the Article 52 of the Constitution - Responsibility for the Environment.

HPP in Rize - Turkey

Constitutional Court gave a historical decision for a switchyard project of HPP in Rize. The Ministry of Forest allocated about 70,000 square meters of forest area for switchyard to the HPP Project Company. The company has an EIA positive decision on the HPP project. However, switchyard and the allocated area were not stated in the EIA report. After the allocation of the switchyard, “EIA not necessary” decision was given by the Ministry of Environment. Therefore, there was no impact assessment for the switchyard. Villagers who live close to the switchyard went to the court against the decision of the Ministry. Administrative court rejected the lawsuit. The justification of the court was that “Existing EIA report is sufficient for impact assessment of the switchyard project and there is no need for a new EIA report and process”. The plaintiffs sued the decision of the administrative court. Council of State accepted the decision of the administrative court and rejected the lawsuit. At that point, Mr. Mehmet Kurt, one of the plaintiffs, made an individual application to the Constitutional Court for the annulment of the decision of the Council of State.

Constitutional Court accepted the application of Mr. Mehmet Kurt and reversed the judgment of Council of State according to Article 17 and Article 56 of the Constitutional Court of Republic of Turkey and the Court requested to retry the suit by administrative court. Article 17 stipulates that “everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence”, and Article 56 says “everyone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the natural environment, to protect the environmental health and to prevent environmental pollution”.

Thermal power plant in Soma district of Manisa - Turkey

There is also the case about a company that planned to construct a thermal power plant in an olive grove area in Soma district of Manisa, Turkey. The site has importance for the local people as means of living, thereby social resistance occurred against the planned thermal power plant. Positive EIA decision was issued in spite of all the objections against this plant by local people, and the company cut the olive trees at midnight. According to Law No. 3573 on Improvement of Olive Cultivation and Grafting of Wild Species, it is forbidden to build a plant at the distance of 3 km and closer on the olive grove area. The company stopped construction of the plant as the result of the reaction by the villagers. The media played an important role by broadcasting and covering on the issue. It was also conceived that the EIA public participation meeting was not inclusive of broad range of locals. As a result of social reactions, the government decided to stop the construction of thermal power plant. The Court issued the injunctive relief, and positive EIA decision was annulled. At the end, six thousand olive trees were already destroyed, but planned thermal power plant project has been rejected by the government.

IV. ADMINISTRATIVE LAW INSTRUMENTS FOR ENVIRONMENTAL PROTECTION

Administrative-law environmental protection is the next important area after the constitutional one, because legal instruments within this domain are the ones mostly used and encountered by the environmental protection organizations. Administrative law covers a large and diverse area that includes everything from managing state registers to organization of public administration, from inspection tasks to various administrative procedures related to the environmental protection as well. The specificity of this legal branch is that on one side there is the state, and on the other side an individual or a legal person. The state authoritatively and one-sidedly decides on the rights and obligations of a particular entity by a form of the administrative act (licenses, etc.), and the parties in administrative procedure are trying to influence its outcome or, later on, in the administrative procedure, to dispute that outcome.

1. Administrative procedure and administrative disputes

Administrative procedures related to environmental protection are usually procedures for issuing environmental permits, or inspection procedures against persons who pollute the environment. General administrative procedure acts in Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia, Kosovo, Turkey and Albania identically prescribe that in the administrative procedure a **party** is any natural or legal person after whose request a procedure is instituted, or against whom a procedure is directed, or who has the right to participate in the procedure to protect their rights or legal interests. Until the adoption of an administrative decision it is possible to affect the outcome of the administrative procedure by participating in it, and after the adoption of the first instance administrative decision, or if the first instance decision has not been adopted within the prescribed time frame, it is mainly possible to submit an appeal to institute an administrative procedure that ends with the second instance administrative decision. Parties in the administrative procedure in Turkey are any natural persons and administrative bodies such as state organizations and public agencies.

An administrative dispute may be instituted against a second instance administrative decision and a first instance administrative decision against which an appeal in administrative procedure is not permitted.

Administrative disputes are court procedures which decide on the legality of administrative acts to ensure judicial protection of citizens' and legal persons' rights violated by individual decisions and actions of public law bodies, and to ensure legality.

Administrative act is an act by which a state body or legal person with public authorities in the exercise of public authorities decides on the rights or obligations of a particular individual or organization in an administrative matter. Administrative act, for example, is a location permit or a building permit or a decision of public authorities by which something is allowed or forbidden. Decisions on studies on

the impact of a project to environmental and nature are also administrative acts, which means that an administrative dispute against them can be submitted. In Serbia and Montenegro, an administrative dispute may be submitted against other individual acts by which the same public bodies decide on the rights, obligations or legal interests of natural or legal person in other legal matters that are beyond the domain of administrative matters, and in Croatia against some general acts, too.

Administrative disputes in Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia, Albania, Kosovo and Turkey define that any individual or legal person who believes that his or her right or direct personal interest based on law is violated by an administrative or other act has **the right to institute** an administrative dispute. Administrative disputes are instituted by an **administrative complaint** which is decided on by administrative courts in Croatia, Serbia and Montenegro, in the case of Bosnia and Herzegovina by administrative divisions of courts (for the proceeding in administrative disputes on the state level in BiH the Administrative Division of the Court of BiH is responsible, on the level of the Federation cantonal courts and Supreme Court of the Federation are responsible, on the level of the RS district courts and the Supreme Court of RS are responsible, and in Brčko District the Appellate Court). In Croatia, Serbia and Montenegro administrative complaint shall be submitted, as a rule, within 30 days from the date a party received the administrative or other act that is disputed. In BiH, administrative complaint, with some exceptions, is filed within 60 days.

It is important to note that in Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Turkey and Macedonia an administrative dispute may be instituted even if a body has not passed an administrative act that it was obliged to pass, in the case of the so-called **administrative silence**. For example, if a second instance body, in Croatia, Serbia, Turkey, Macedonia within 60 days, in Bosnia and Herzegovina and Montenegro within 30 days, or in Bosnia and Herzegovina entities within 60 days, or within a specially prescribed shorter period, failed to render a decision on the party's appeal against the first instance decision, and additionally in Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia such body breaks an additional term of seven days after the repeated request of the party, such party may institute an administrative dispute as if her appeal was rejected. Also, if for example a citizen asks from the ministry responsible in the area for some information about the environment, he has the right to institute administrative dispute due to **"administrative silence"** if the ministry has not decided on the citizen's right to access that information within the term prescribed by law. Finally, it should be noted that for BiH administrative procedure and administrative dispute are described on the state level. On the level of the Federation, RS and Brčko District there are special separate acts on administrative procedures and administrative disputes by which this administrative law area is regulated on the entities level, in a similar way, but separately. The differences are mainly related to time-frames, and the issue of environmental protection is regulated mainly on the entity level.

The content of an administrative complaint in Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia, Kosovo, Albania and Turkey is as follows:

- plaintiff's name, address and place of residence, or plaintiff's name and registered office
- in Croatia, the name of the court and of the defendant
- reference number and date of the act against which the complaint is filed
- reasons for submitting a complaint, proposal on direction and scope of the annulment of the act
- in Croatia and Serbia, the facts and evidence on which the plaintiff's claim is based/in Turkey documents related with the suit
- in Turkey, date of written declaration for the administrative act
- plaintiff's signature.

The following shall be enclosed to the complaint:

- original or a certified copy or photocopy of the act against which the complaint is filed
- if a return of property or compensation for damages is demanded by the complaint, it must include a specific claim for the things or amount of the damage
- a copy of the complaint and all attachments for the sued body and any other interested person, if any
- if an administrative dispute is instituted because an individual decision was not rendered, or it was not rendered within the prescribed time-frame, evidence of the time of institution of the administrative procedure or the request to act shall be also enclosed to the complaint.

Legal fight to save the river Sana – BiH

Centar za životnu sredinu (Centre for the Environment, CZZS), together with Koalicija za zaštitu Sane (Coalition for the Protection of Sana), has been fighting since 2009 against the construction of the hydropower plant Medna in headwaters of the river Sana, which is a highly valuable and protected natural area. The legal fight has so far involved numerous court cases against the decision on the environmental impact study, partial building permit, environmental permit, etc. A particularly interesting process was led about the concession agreement and its annexes, which the Ministry of Industry, Energy and Mining of Republika Srpska (hereinafter: the Ministry) refused to present, which, as a process went on, with increasing certainty showed that those very documents were of great importance.

After the CZZS sent a request to access to information to the Ministry, asking a delivery of the Concession Contract for the construction of a small hydropower plant and its annexes, in accordance with the Freedom of Access to Information Act for the Republika Srpska, the Ministry determined that the requested information contained confidential third party commercial interests, and therefore the third party was invited to comment. Since the third party opposed to the publishing of the required documents, the Ministry in entirety, without consideration of the actual existence of such an exception, refused to approve access to the requested information.

An appeal was filed against such a response of the Ministry, among other things due to an incorrect enforcement of the provisions of the Freedom of Access to Information Act for the Republika Srpska. However, the Ministry did not act on the appeal within the time-frame prescribed by law, so the CZZS filed a petition seeking proceeding on the filed complaint, creating a precondition for the initiation of the administrative dispute due to a so-called administrative silence. At the same time a note was sent to the Administrative Inspection, as well as a plea to the ombudsman of Bosnia and Herzegovina.

In the meantime, the Ministry submitted a note to the CZZS, stating that they considered the complaint and contacted the concessionaire, as a third party, about the delivery of the required documentation with marked protected parts which they considered to be confidential. After that response of the Ministry, competent inspection concluded only that there have not been any violations because the Ministry allegedly acted on complaints and notes of the CZZS. Following the submission of a revised concession contract, with some information that could not be of confidential commercial interests, such as deadlines, was darkened, all without any explanation, CZZS was dissatisfied and submitted to the Ministry a request for publishing some of the darkened information. In its response the Ministry pointed out that the submission of the information and identifying of the exceptions are made in accordance with the law, so the CZZS filed an appeal to the second instance body. There was no decision on the filed appeal, but the appellant was directed to initiate an administrative dispute or file a complaint to the ombudsman of Bosnia and Herzegovina. Using all available legal means, CZZS filed a lawsuit against the Ministry act at the District Court in Banja Luka. After filing a lawsuit and apparently its delivery to the response, the Ministry adopted a decision approving access to the information in its entirety, without identifying a single exception. That way, a year after the information was requested, the procedure was finished. After they obtained the information, the CZZS found that the concession contract for the small hydropower plant had expired and that there was a basis for its termination, which was officially requested by sending a note to the Republic Authority for Inspection Activities, Attorney General, Ribnik and Mrkonjić Grad municipalities, Government of the RS and the competent ministry.

Although these procedures are sometimes long-lasting, they can bring very good and concrete results. Often institutions favour investors and try to avoid the dissemination of information, violating the domestic law and the provisions of the Aarhus Convention. In these procedures it is critical to monitor the deadlines and respond on time, and, of course, to be familiar with the rights and possibilities for action. The local community can be a strong ally and, if possible, should be included in the process.



Campaign for preservation of River Sana

Examples of violation of the right to public participation in decision-making processes - Serbia

There is a constant neglect of the right to access to information and public participation in environmental matters but also violation of access to justice in Serbia. Here, we will name some examples from practice.

Before Administrative Court of Serbia the municipality of Trstenik filed a lawsuit against the Ministry in charge of mining. The lawsuit was dismissed because the Administrative Court found that the local government has no legal interest to attack a decision on the permit exploration of mining operations on its territory (Nickel). This is a clear case of violation of the right to justice for the party which is even by the Law on Administrative Disputes recognized as a prosecutor.

Also, there is a case where the Ministry responsible for environment denies the right of the plaintiff (NGO CEKOR, Subotica) in administrative proceedings before the Administrative Court of Serbia to challenge the legality of the decision on approval of the study assessment of the environmental impact of building the block B3, Kostolac, stating that domestic interested public is not entitled to challenge the decision for failing to meet requirements of the ESPO Convention, ie assessment procedures of environmental impact in a transboundary context. (Impact of future investments to Romania).

Municipal Administration of Prijepolje refused to allow inspection and copying the files of the construction documents of small hydropower plants on the river Gračanica in the area of "Stone Mountain" to representatives of NGOs dealing with environmental protection, on the grounds that the interested public has no interest in access to these files. In addition to this, the Republic Institute for Nature Protection rejected the request of NGO Ecological Movement "Prijepolje" to participate in the administrative procedure of issuing conditions of nature protection to the investor for the construction of small hydropower plants on the river Gračanica, finding that the public concerned is not entitled to participate in this process because participation publicity is required by law that regulates the field of assessment of environmental impact. The attitude of the Institute is totally illegal because the public concerned has the status of party in administrative proceedings, so the participation in this process is undoubtedly possible by the application of general provisions of the Law on Administrative Procedure, in the framework of the bipartisan, adversarial administrative proceedings.

Thermal power plant Ugljevik III - BIH

Ugljevik 3 is a newly planned power plant in the municipality of Ugljevik with output power of 600 MW (2x300 MW). The project investor is the company Comsar Energy Company - Republic of Srpska, which was jointly founded by the Government of the Republic of Srpska with 10% ownership and Comsar with a 90%. The planned location is next to the existing power plant Ugljevik 1 of 300 MW and to the halted construction of Ugljevik 2, on which there is still an ongoing international dispute with Slovenia.

The legal battle to bring the future thermal power plant in the framework of the regulations of the European Union/Energy Community began when the Ministry of Physical Planning, Construction and the Environment of the Republic of Srpska issued the environmental permit to Comsar Energy in November 2013. Environmental permit was published on the website of the Ministry, and the NGO Center for Environment started an administrative dispute before the District Court of Banja Luka, seeking their right to participate in the procedure according to Article 9 of the Aarhus Convention. The procedure itself was very long, although the average resolution of administrative disputes is one year. After several rush notes Banja Luka District Court firstly in January 2014 issued a decision rejecting the application for a temporary measure and then, almost two years later, in September 2015, ruled that the lawsuit of the Center is refused. The Center used its right to a legal remedy, and sent in November 2015, to the Supreme Court of the Republic of Srpska the request for extraordinary review of a court decision. The process is still ongoing.

The Centre for Environment pointed to several issues in the procedure which Ministry failed to seek before issuing the permit. This primarily refers to the fact that the Environmental Permit was not based on clearly established facts, and that there were significant omissions in the procedure of issuing of environmental permit. From the start, the Centre pointed to the fact that the data submitted with the application for the environmental permit, ie. in the study of environmental impact were defective/incomplete or incorrect and do not represent the real impact of the plant's operation on the environment and population. Among other things, cumulative effect of the two thermal power plants (Ugljevik 1 + Ugljevik 3) on the population and the environment was not considered. Additional and big omission was made in the process of cross-border effect of TPP Ugljevik 3 to the neighboring countries, such as Croatia or Serbia, because this power plant has an output of a facility which is subject to mandatory application of the transboundary assessment according to the ESPOO Convention. Nevertheless, the neighboring countries were not informed of the construction plans, and the study only arbitrarily determines that the plant will not have a negative impact.

This is still an ongoing process and the Center is currently awaiting a response from the Supreme Court on the request for the extraordinary review of a court decision. If the Supreme Court rules on behalf of the Centre, the process is likely to go back to the beginning, which will re-establish the validity of the data submitted with the request for the environmental permit. However, if the Supreme Court rejects the request for an extraordinary review of a court decision, the Centre will continue its legal battle to a higher authority, meaning it will appeal to the Constitutional Court of Bosnia and Herzegovina. The Center also started a complaint procedure towards the Energy Community Secretariat on this matter and is waiting on the ruling.

2. Public participation in administrative procedures on the environment, and the Aarhus Convention

Participatory processes should be built on the classic idea of democratic theory: "...that those who are affected by a decision should have a voice in decisions that affect their lives, because in this way they will become better citizens" (Priscolli, 2004). This idea contains the essence of public participation in decision-making in environmental matters. In this handbook, the procedures which give a possibility of public participation will be presented, because when we talk about legal instruments of environmental protection, it is very important to point out that these are not just lawsuits, criminal charges, complaints etc., respectively "classical legal instruments". Different processes in which the public has a right to participate play a significant role, too. In this regard, it is impossible not to mention the most important convention which deals with the issue of public participation in environmental decision-making about the environment and, therefore, nature matters, the so-called Aarhus Convention.

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was signed on June 25th 1998 in the Danish city of Aarhus, and it is an international legal framework in the field of the of environmental protection. The provisions of the Aarhus Convention are the first legally binding provisions for the promotion of participatory democracy, based on the recognition of the right of the individual to live in a healthy environment. By signing the Aarhus Convention, signatory countries are obligated to inform the public about all procedures in timely manner. The involvement and participation of the public does not only mean that the state makes certain procedural and independent rules, but also an obligation or duty of the government to inform relevant parties using a soft approach, and enable them to participate already at an early stage, when all options are open.

For effective implementation of the Aarhus Convention, good legal basis in sectoral laws is needed, which ultimately allows the creation of best practices for public participation in all procedures regarding renewable natural resources. Today's environmental practices include increasing number of forms of public involvement because competent authorities are more and more aware of the importance and the wider effects of responsible public participation. International practice shows that the participation in environmental and nature matters has multiple benefits, such as, for example, creating alternative solutions, a partnership between decision-makers and citizens, better decisions are adopted and better monitoring is enforced, etc.

The European Union is also a signatory to the Convention and it has been bound to comply with it since 2005, Croatia since 2007, Bosnia and Herzegovina since 2008, Serbia since 2009, Montenegro since 2010 and Albania since 2001. Macedonia accessed to the Convention in 1999 and Turkey and Kosovo are not parties to the Convention yet. The importance of the Convention lies in the fact that for the first time in an international agreement concluded on the European continent the environment is clearly defined as a human right. Since the environment does not recognize national boundaries, the Aarhus Convention prohibits discrimination on grounds of nationality. So for example, Croatian citizens in Bosnia and Herzegovina, but also citizens of Bosnia and Herzegovina in Croatia can use its guarantees.

The Aarhus Convention has opened up the possibility of establishing a surveillance mechanism to monitor its implementation, which will be available not only to governments, but also to individuals and non-governmental organizations. At the first Meeting of the Parties of the Convention in October 2002, Decision I/7 on review of compliance with the Convention conducted was adopted. The Compliance Committee is responsible for the implementation of the review, and the proceedings before the Committee may be initiated in five ways:

1. A party may institute a submission regarding the other party (there are 2 cases so far - Romanian submission on non-compliance of Ukraine (ACCC/S/2004/1) and submission by Lithuania concerning compliance by Belarus (ACCC/S/2015/2);
2. A party may institute a submission regarding its own non-compliance (not a single case so far);
3. The Secretariat may make a referral to the Committee (not a single case so far).
4. Members of the public may make communication concerning a party of the convention - 95 communications filed by now. Measures to protect members of the public from harassment were introduced in procedures at the Committee. Any applicant who is concerned that his or her disclosure of information to the Committee could result in his or her punishment, prosecution or harassment, has the right to request that such information, including information about his or her identity, should be kept confidential. The same applies if the applicant believes that the disclosure of information submitted to the Committee would result in punishment, prosecution or harassment of any other person. The Committee shall respect all requests for confidentiality.
5. The Committee may examine the non-compliance based on its own initiative (not a single case so far).

The authority of the Committee is limited by the fact that the Meeting of the Parties of the Convention is the main decision-making body on the matter of the non-compliance. The Committee, as a rule, holds meetings four times a year, and the Meeting of the Parties is held every three years. Since three years is a relatively long period, the Committee may, for the purpose of resolving cases without prolongation, take certain measures if it finds non-compliance with the Convention during the period between the Meetings of the Parties. Since the nature of the competence of the Committee is only consultative, the Meeting of the Parties does not have to adopt its recommendations. However, so far all Meetings of the Parties decisions of the Committee on non-compliance with the Convention were confirmed and the majority of its recommendations were adopted. Turkey is not a party to the Aarhus Convention yet. Thereby, public participation is not concretely a requirement in environmental legislation except for

the By-law on EIA. For list-1 projects with comparatively higher level of environmental and social risks, public participation is a requisite within the EIA process. Public participation plays an important role in several investment decisions. As another tool, access to information is secured by the Law No. 4982 on the Right to Information that was adopted in 2003 and went into effect in 2004. The law aims to regulate the procedure and the basis of the right to information according to the principles of equality, impartiality and openness that are the necessities of a democratic and transparent government. The Environmental Law also refers to the Law No. 4982 in the context that everyone has the right to access to information related with the environment. However, request for information, such as rare species and their habitats, may be rejected for possible harm on the environment.

Example from the practice

Constant violation of the right to public participation - Macedonia

We are often witnesses that the obligation for implementation of the Strategic Assessment of the Impact the plans have on the environment is not complied to. In the last several years, several important planning documents were adopted - without carrying out environmental impact assessment, such as: Strategy on Use of Renewable Energy Sources by 2020; Operational Program for Regional Development; National Strategy for Investments in the Environment; National Strategy for Sustainable Growth; the Second National Environmental Action Plan, etc.

In most of the cases, the relevant bodies pay attention only to *formal* adhering to the Law, neglecting the real needs of the public concerned. This problem is most obvious in the implementation of the “integrated prevention and pollution control” procedures, which is a quite complex novelty in our legislation and it is unknown as such to the wider public. The relevant bodies very often involve the public in the procedures in order to “stage” legitimacy for the (already adopted) decision. Our experience showed that the public is usually involved in the environmental procedure because “that’s what the Law says”, without leaving opportunities to influence on the *essence of the final decision*.

Such is the example with the environmental impact assessment for the license for the “Boškov Most” hydropower plant. The Ministry of Environment provided specific time frame for the participation of the public, in accordance with the Law on Environment, but in reality the public was not able to influence the final decision. The Environmental Impact Assessment Study was approved without crucial and essential parts that impact the outcome of the procedure.

Still on the public participation topic, we should also mention the often use of the possibility to call on exceptions for access to environmental information, especially when it comes to the information pertaining to projects that have strategic importance for the Government. For example, the Study in Small and Mini Hydropower Plants of Macedonia which sets the locations of over 400 small hydropower plants (many of them located in protected areas) was classified as top secret by the Ministry of Economy after a request for access to information was filed. Another example in this area is the non-provision of access to information related to the nature for the Mavrovo National Park due to copyright infringement issues. The Government intends to do over 20 hydro-energy projects on the territory of the Mavrovo National Park. In order to enable their implementation, the Government, without any legal grounds, degraded a zone from strict protection to a zone of sustainable use by adopting new valorization of the Park. The civil organizations requested access to the expert studies (that were already available before that electronically) in order to prove that the new valorization was done in order to ensure implementation of the planned projects. At that time, the public institution of the Mavrovo National Park, contrary to the Aarhus Convention and the Law on Environment, decided to classify the expert reports under exception, due to copyrights, and did not allow access to them.

For all of the procedures and cases above, an administrative procedure was initiated in front of the Administrative Court in Skopje. We can ascertain that the Administrative Court is working very slowly if we take into account the fact that it has been more than 3 years since some appeals have been filed but the case has not been taken further.

3. Public participation in administrative procedures on the environment

All countries covered in this handbook, that is Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Turkey, Macedonia, Albania and Kosovo, are familiar with various administrative procedures of decision-making on environmental matter in which the public can participate. It seems that the most common procedures in which public and non-governmental organizations in the region participate are procedures of the environmental impact assessment of the project. This is not surprising because this procedure was incorporated in the legislation in the region long before the start of the EU accession process, unlike, for example, Strategic Environmental Assessment, that is assessment of possible significant effects on the environment that may come into existence by the implementation of the plan or program, which got into legislation in the region only in the process of approximation of national legislation with the EU legislation.

In this publication we will not go into details about each of these procedures which are provided in different regulations of the countries in the region, but we will in short review which procedures in the region involve the public's right to participate. None of the four countries included in this handbook have one single method that provides and standardizes all possible procedures of public participation, but each of them has a separate, umbrella law which regulates environmental protection in general and a number of other laws and by-laws (regulations, ordinances) that regulate specific public participation in some sector (for example water and possibilities for participation in issues regarding the water) or regulate specific public participation in some kind of procedure (for example in the environmental impact assessment process).

In the environmental legislation in Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia, the public has a right to participate in these procedures:

- Environmental Impact Assessment, or the assessment of possible significant effects of the specific interventions on the environment, i.e. the impact on: soil, water, sea, air, forest, climate, people, wildlife, landscape, material assets, cultural heritage, taking into account their interrelationships (EIA);
- strategic environmental impact assessment, or the assessment of possible significant effects on the environment that may come into existence by the implementation of a strategy, plan or program;
- procedures for the issuance of environmental permit - which is related to the transfer of the EU IPPC Directive - and whose objective is to prevent and control pollution from industrial and agricultural activities;
- procedures of making laws and implementing regulations and other generally applicable legally binding rules within the authority of the public government bodies, which could have a significant impact on the environment, including procedures for creating amendments; the public also has the right to express their opinion, comments and suggestions to other draft plans and programs relating to the environment which are not a subject of the strategic environmental impact.

Public participation in the procedure of adoption of the spatial plans is particularly important aspect of the administrative-law environmental protection. Public participation is ensured by the legal obligation by which all documents of spatial planning during the process of adopting must undergo the procedure of public debate on the draft spatial plan, which includes the participation of government bodies, lower levels of government, legal persons with public authorities and citizens. In all countries of the region included in this handbook public participation in adoption of spatial plans is regulated by the specific acts on physical planning and construction. Therefore, the process of the participation itself is regulated by these regulations, not regulations on public participation in environmental matters. It is crucial to note that the process of adopting a spatial plan is the first in a series of procedures by which decisions on the environmental matters are made. Namely, in the physical plan possible locations for specific interventions to the environment are determined, and a basis for possible conversion of the land and similar issues is prepared. So, it is very important to be involved in the process of making, changing or modifying spatial plan because it is the basis for all other procedures in environmental matters, in which public participation is possible.

In Kosovo the Law No.03/L-233 on the Protection of the Nature, obliges all public authorities to ensure the participation of citizens in the decision-making as a constitutional right and as one of the law's

principles for the protection of nature. Depending on the institutional level, legally this right can be exercised through public debates, petitions, written requests etc.

It is important to mention here that all countries, except Albania, are familiar with the Code of Good Practice for Civil Participation in the Decision-Making Process (Council of Europe, 2009) passed at the conference of international non-governmental organizations of the Council of Europe, which was approved by the Council of Ministers as a reference document of the Council of Europe in October 2009. The objective of the Code is to enable NGOs to participate in the decision-making process at the local, regional and national level. Therefore, it is an important document for public participation in decision-making in environmental matters. Some countries decided to create their own codes modelled on the aforementioned - Croatia has its own Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts, and separate guidelines for its implementation. Serbia, for example, does not have a code, but Guidelines for Republic Bodies' on Public Participation in the Drafting Laws. In Bosnia and Herzegovina and Montenegro, there are several publications - guidelines for public participation in the decision-making process on environmental matters that have come into existence as a part of various projects and are the product of collaboration of different non-governmental organizations or non-governmental organizations and various levels of government.

In Turkey, there are no tools structured for public participation except for the EIA legislation. City councils can be considered a good practice for urban participatory platforms developed as a result of the Local Agenda 21 Programme. Yet the city councils have been successful only in a few cities, on urban democracy matters, rather than being directly related with the environment.

Such code is not yet introduced in Kosovo's legislation although there is the Government's Strategy 2013-2017 on Cooperation with Civil Society Organizations. In 2011 the Government of the Republic of Macedonia passed a Code of Good Practices for Participation of the Civil Sector in the Decision-Making Process and the text of the Code is actually taken from the Code of Good Practice for Civil Participation in the Decision-Making Process.

Example from the practice

Illegality concerning construction of “problematic” hydroelectric power plants at the river Lim - Serbia

Problems with two projects of the construction of hydroelectric power plants on the river Lim in southwest Serbia promoted by the Canadian company Reservoir Capital Corp. through its subsidiary company registered in the Virgin Islands and in Serbia, Renewable Energy Ventures Ltd. (REV), began in 2010. These projects (Brodarevo 1 (26 MW) and Brodarevo 2 (32.4 MW)) are planned on the problematic part of the river, where new reservoirs, one of 103 hectares, the other of 56 hectares, would have a negative impact on two protected environmental areas, which are already in the process of protection. Also, two sections of the M-21 motorway would as a result be displaced.

The two planned dams, in Junakovina and Lučice, whose height by general project from 2010 is almost double comparing to the initial one (on the basis of which energy permits were obtained) would be built directly above and below Brodarevo, and would clearly have harmful effects on climate and health conditions in this place.

The investment is estimated to around 140 to 180 million Euros and there are indications that the Canadian company, due to a lack of capacity to realize such investment, plans to “sell” the project. According to available information, electricity from these plants should be for export, and not to solve the issue of energy and electricity stability of Serbia.

During the previous period, the local community - residents of Brodarevo and Prijepolje - led by environmental organizations, collected 5000 signatures against the construction of these projects, because of their potentially negative environmental, health and social impacts. But their voices “against” were not accepted, even when this was required by legal procedures, so their fight is still ongoing.

Construction projects of HPP Brodarevo 1 and Brodarevo 2 with their bodies of water have assumed a major impact on the territory of Montenegro; neither the state authorities of the neighboring country, nor local residents were informed about it, despite the fact that the Espoo Convention, signed by Serbia too, obliges to the implementation of the procedure of environmental impact assessment in a cross border context.

Environmental impact assessment procedure (EIA)

EIA procedure for both HPP Brodarevo 1 and Brodarevo 2 projects started in 2010, when Canadian REV Company submitted necessary information needed for the scoping phase to the responsible authority - the then Serbian Ministry of Environment, Mining and Spatial Planning. The Ministry have issued a decision on the terms of reference for an EIA study in September 2010 and local NGO Prijateljji Brodareva (Friends of Brodarevo) who were against these projects have filed the complaint stating procedural omissions in the scoping phase - (failure to publish notification in two official languages as well as organizing public consultation meeting for sharing info about the project only in Belgrade, so far from municipality of Prijepolje, on the contrary of the legal procedure prescribed by the law on EIA) and requesting the EIA scoping phase to repeat. Here the story of repetitions in scoping phase started. The Government's Administrative Commission adopted **the NGO complaint** in April 2011 and returned the EIA procedure back to the beginning. A new scoping phase was initiated and new decision on the terms of reference for an EIA study was issued, but again, as the responsible Ministry violated EIA procedure of informing the public, and violated other laws like the Law on General Administrative Procedure (in time of issuing the Decision, the responsible Ministry as competent authority have ceased to exist due to elections) the NGO filed **second complaint**. The procedure was again returned and set to begin all over. The Responsible Ministry however have made new mistakes: it issued the same Decision on the scope for an EIA study with no reference number, without officially closing the previous administrative procedure, and without informing affected party (NGO) about that.

The repeated procedure was conducted from December 31st 2011, and the public had a chance to look into available documents until January 18th 2012, during winter holidays in Serbia. During that period of public inspection, the officer of the Municipality of Prijepolje in charge of ensuring proper conditions for public consultations and possible clarification of graphical annexes was on vacation, so officially public consultation was not even possible, and above that it was scheduled during a heavy snowfall, when the municipalities of Prijepolje, Užice and Sjenica declared state of emergency as thousands of people were practically cut off from the outside world.

A new, **third complaint** was filed against the scoping decision of the Ministry from February 2nd 2012, based on absolutely essential violations of the provisions of the Law on General Administrative Procedure, violations of the Law on Environmental Impact Assessment and violations of substantive law. Administrative Commission of the Government of Serbia **rejected the complaint** without clear reasons and explanations. Therefore, an **administrative dispute** filed by NGO against the final decision was instituted at the Administrative Court of Serbia. This dispute is still ongoing.

The EIA process was continued, despite this dispute, and the Ministry announced the **public debate for the EIA Study** on August 15th 2012 in Prijepolje. Unfortunately, during this public gathering in a completely inappropriate venue, several NGO activists who wanted to express their opposition for the project were severely beaten by security guards, and suffered injuries and grievous bodily harm. Because of this incident, number of **criminal charges** has been raised in the course of the next 3 years, from both sides. As these are different processes, they will not be explained here, but it has to be mentioned that unfortunately the criminal charges filed by the Municipal Prosecutor's Office for grievous bodily harm were finally **discarded**, in a long process¹, due to unfairness, misinterpreted „ne bis in idem“ and corrupted officers. However, the criminal case filed by the REV Company against NGO representative is still ongoing.

Since the public debate in Prijepolje was not successful, the Ministry decided to organize it again. The **very same EIA study** was announced for public inspection January 1st 2013 and it lasted only eight days, while **new public debate** was scheduled for January 9th 2013, in Belgrade at the Chamber of Economy premises. This public debate was also a total disaster, as representatives of public concerned were not allowed to enter the venue, as there were not previously "listed". The Ministry's brought **Decision on Consent on the EIA Study** for HPP Brodarevo 1 and 2, on May 23rd 2013.

¹ <http://kikindske.org/index.php/component/k2/item/328-prijepolje-%C5%A1to-me-udari-%C4%8Dove%C4%8De>

Although the planned dams on the river Lim are potentially affecting water bodies and the territory of Montenegro, only after the repeated requests and complaints, the procedure of EIA in the cross-border context was initiated and Montenegro side was informed according to the ESPOO Convention. In Montenegro, the special Commission for the assessment of the study was formed, which adopted the Report on the evaluation of environmental impact assessment study for HPP Brodarevo 1 and 2 at the end of April 2013. The Commission found that the study had not elaborated enough on all the elements important for the assessment of the impact of these HPPs on the environment, particularly the impact on biodiversity, induced seismicity, stimulated landslides, rockfalls, sediment transport, denudation, coincidence of high water and accidents, as well as the inconsistency of the study regarding the encroachment of the reservoir into the territory of Montenegro, the capacity of the reservoir, etc. Montenegro Commission issued its Opinion stating that it was necessary to amend the EIA Study to be able to perceive the size and scope of the environmental impact.

The Ministry's Decision on Consent on the Environmental Impact Assessment Study for HPP Brodarevo 1 and 2, from May 23rd 2013, does not even mention the procedure of cross-border EIA process conducted in Montenegro. By this, the responsible ministry drastically violated a set of provisions of the Law on Environmental Impact Assessment (the provisions of Article 32, Paragraph 3 and others). A complaint is not allowed against this decision, so the public as a concerned party filed a lawsuit against it with the Administrative Court of Serbia, challenging the Decision for the aforementioned reasons. In July 2013 the Administrative Court annulled **the energy permit** to the Canadian company REV for both HPP Brodarevo 1 and Brodarevo 2 projects at the river Lim. The court ruled in favour of NGOs, that **demand to participate** in the procedure of issuing energy permit and remitted the case to the repeated procedure and decision-making.

In February 2016, the Ministry again started the impact assessment phase. The **public debate** on EIA Study was organized in Prijepolje on March 4th 2016, where also representatives of Montenegro were present. Also in March 2016, the new energy permit was given by the Ministry of mining and energy. Whether the final version of the study is elaborated and whether opponents of the project will challenge the final decision remains to be seen.



Citizens protest against the construction of the project HPP Brodarevo 1 and 2

Environmental Impact Assessment Consent Decision

There were also numerous violations of the law and standards from the field of impact assessment in the procedure of issuing Environmental Impact Assessment Consent Decision for HPP Brodarevo 1 and 2. Without going into details regarding the violations of mandatory procedure under the Law on General Administrative Procedure and the Law on Environmental Impact Assessment (public inspection was announced on January 1st 2013, lasted eight days, presentation and public debate were scheduled and held in Belgrade, at the Chamber of Economy premises, the entrance to the public presentation was limited with “a list” of those who may enter the building, etc.); another interesting element of this procedure can be seen in the fact that it was conducted without the knowledge of Montenegro, although the planned dams constructions indirectly (bodies of water are alongside the border with Montenegro) or directly (encroachment to the territory of Montenegro) affect the neighboring country. The procedure of Environmental Impact Assessment in a cross-border context was initiated by a number of pleas and complaints from the public concerned, and finally, in January 2013 Serbia delivered documents to Montenegro.

After that, in Montenegro, the Commission for the assessment of the study was formed, which adopted the Report on the evaluation of environmental impact assessment study for HPP Brodarevo 1 and 2 at the end of April 2013. The Commission found that the study had not elaborated enough on all the elements important for the assessment of the impact of these HPPs on the environment, particularly the impact on biodiversity, induced seismicity, stimulated landslides, rockfalls, sediment transport, denudation, coincidence of high water and accidents, as well as the inconsistency of the study regarding the encroachment of the reservoir into the territory of Montenegro, the capacity of the reservoir, etc. Montenegro Commission issued its Opinion stating that it was necessary to return the study for a modification, and after that it would be possible to perceive the size and scope of the environmental impact.

The Ministry’s Decision on Consent on the Environmental Impact Assessment Study for HPP Brodarevo 1 and 2, No. 353-02-01205/2012-02, from May 23rd 2013, does not even mention the procedure of cross-border impacts assessment conducted in Montenegro. This means that the decision conceals the existence of this procedure prescribed by law, which is indispensable when passing the decision on the consent to the environmental impact assessment study. By this, the responsible ministry drastically violated a set of provisions of the Law on Environmental Impact Assessment (the provisions of Article 32, Paragraph 3 and others). A complaint is not allowed against this decision, so the public as a concerned party filed a lawsuit against it in the Administrative Court of Serbia, challenging the Decision for the aforementioned reasons. The procedure is ongoing.

The coalition of non-governmental organizations is during all this time faced with media blockade on the local level, as well as the public service of national media.

In July 2013 the Administrative Court annulled the energy permit to the Canadian company REV for the construction of hydroelectric power plants at the river Lim. The court ruled in favour of NGOs, that demanded to participate in the procedure of issuing energy permit and remitted the case to the repeated procedure and decision-making. The judgement was evaluated as absurd by REV, so they announced an appeal, while the Court stated that the procedure had been legal.

Yavuz Sultan Selim Bridge -Turkey

In Turkey, there are some cases where the right to public participation was neglected. One specific case is the 3rd Bosphorus Bridge Project called "Yavuz Sultan Selim Bridge". The Project was announced by Turkish government as a "Mega Project" before the elections in June 2011 and tendering process was completed in May 2012. Construction started in 2013 before an EIA process was conducted.

Article 10 of the Environment Law No. 2872 published in 1983, states that tendering process cannot be started before having an EIA positive decision to be issued by Ministry of Environment and Urbanization. However, the EIA process for the bridge project was not run by the ministry as it was a "state investment planned before 1997", hence exempted from EIA as of the By-law on EIA. The article of the EIA by-law which allows exemptions to projects taking place in the government development programme was disputed by the lawsuit filed by the Chamber of Environmental Engineers in April 2014. The government ignored the court decision and put the exemption article into the Environmental Law on May 29th 2014 which is also annulled by Constitutional Court on July 3rd 2014 and the decision was announced on July 4th.2015. However, during the tendering and construction stages, there was an exemption on EIA process, which means public participation meeting was not required. EIA exemption was applied also in Gebze-Orhangazi-Izmir Highway Project and in Ilisu Dam Project in Hasankeyf.

V. CRIMINAL LAW INSTRUMENTS FOR ENVIRONMENTAL PROTECTION

Criminal legislation is the society's last line of defence from crime, which also translates to the protection of the environment from the position of criminal law. Criminal law is the youngest branch of law when it comes to environmental protection in Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia, Albania, Kosovo and Turkey. For this reason there is no court practice, there are no statistics, and there are some difficulties when defining crimes and assessing damage. For all these reasons crimes against environment result in a relatively small number of reported crimes and it is assumed that the actual number is quite high. We can, therefore, only guess about the number of such crimes committed annually, as they have never been reported. Criminal law protection of environment includes crimes in the area of ecology, smaller offences and ecological economic misdemeanours.

1. Crimes against environment

Crimes against environment can be classified in three categories:

- Real ecological crimes defined in the provision of criminal acts, which protect the environment as a whole;
- Not real ecological crimes defined in the provision of criminal acts but as a part of crimes belonging to other groups;
- Secondary ecological crimes outside criminal acts in the provisions of secondary legislation, and related to the environment.
- In our overview we will focus on real ecological crimes, i.e. those qualified as such and grouped in criminal acts of Croatia, BiH, Serbia, Montenegro, Turkey, Macedonia, Albania and Kosovo. The Criminal Law of BiH does not define real ecological crimes, save for several exceptions, such as polluting the environment as a result of handling nuclear materials and objects. However, as the Criminal law of FBiH, the Criminal law of RS and the Criminal law of Brčko District BiH define real ecological crimes, these entities' laws will be used in the comparative overview which follows.

Criminal laws of Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH), Macedonia, Albania and Kosovo define the following as crimes (real ecological crimes) against environment:

- Contamination/pollution of the environment (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH), Kosovo),
- Excessive use of natural resources (Kosovo)
- Permitting constructions that pollute the environment (Kosovo)
- Endangering the environment with a plant/facility (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH)),
- Destroying protected natural values (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH, Kosovo)),

- Trading with protected natural values (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH)),
- Illegal hunting and fishing (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH), Kosovo) / Prohibited fishing (Albania)
- Killing or torturing animals (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH)),
- Production, sale and entry into circulation of harmful substances for the treatment of animals (Kosovo)
- Damaging buildings and equipment for environmental protection (Kosovo)
- Destruction of flora with harmful substances (Kosovo)
- Sale or issuance of trophies of wild animals outside the Republic of Kosovo (Kosovo)
- Transmitting infectious diseases of animals and organisms harmful for plants (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH)),
- Producing and marketing harmful products for treating animals (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH) / Production of harmful substances for treating of cattle or poultry (Macedonia) / Production, sale and entry into circulation of harmful substances for the treatment of animals (Kosovo)
- Negligent veterinary assistance (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH)),
- Destroying forests (Croatia, Serbia, Montenegro, BiH (FBiH, RS and BD BiH)), - Unlawful Cutting of Forest (Albania)
- Cutting of Decoration and Fruit Trees (Albania)
- Polluting food and water used for feeding animals (Serbia, Montenegro, Federation of BiH, Republika Srpska, Kosovo)
- Stealing in forests (Serbia, Montenegro, Federation of BiH, Republika Srpska)
- Illegal construction (Croatia, Montenegro, Republika Srpska, Albania)
- Misuse of land (Albania)
- Damaging facilities and equipment for environmental protection (Serbia, Montenegro, Republika Srpska)
- Bringing dangerous substances in a country, and illegal processing, disposing of and storing dangerous substances (Serbia, Montenegro, Republika Srpska)
- Endangering the environment with waste (Croatia, Federation of BiH, Republika Srpska) - Endangering of the nature and environment with waste - Macedonia
- Destroying plants and planted grounds (Montenegro, Federation of BiH, Republika Srpska) / Destroying of plantations using harmful substances (Macedonia)
- Illegal providing of veterinary services (Montenegro, Federation of BiH, Republika Srpska, Macedonia)
- Breach of Quarantine for Plants and Animals (Albania)
- Endangering the environment with noise, vibration and non-ionising radiation (Croatia, Federation of BiH and Republika Srpska only for noise)
- Damaging the environment (Serbia, Montenegro)
- Failing to take measures to protect the environment (Serbia, Montenegro)
- Illegal construction of nuclear plants (Serbia, Montenegro)
- Illegal obtaining and use of nuclear materials (Macedonia)
- Violating the right to information about the condition of the environment (Serbia, Montenegro)
- Failing to execute the decision on the measures of protecting the environment (Montenegro, Republika Srpska)
- Negligent acts in pesticide trading (Federation of BiH, Republika Srpska)
- Causing fire in forests (Federation of BiH, Republika Srpska, Macedonia) (Albania - Destruction of forests and forest environment by fire and Destruction due to negligence of forests and forest environment by fire)
- Illegal bringing of wild sorts or GMO into the environment (Croatia, Montenegro only for GMO) - Illegal hunting, keeping and selling of wild animals and birds (Macedonia)
- Illegal trafficking, exporting or transporting of wild flora or fauna (Macedonia)
- Killing or destroying of protected species of wild flora or fauna (Macedonia)
- Releasing pollutants from a vessel (Croatia)
- Endangering the ozone layer (Croatia) - Production, trafficking or use of substances depleting the Ozone layer (Macedonia)
- Endangering the environment with radioactive substances (Croatia)
- Destroying natural habitats (Croatia)

- Changing water regime in Croatia
- Illegal exploitation of mineral sources (Croatia, Macedonia)
- Stealing the protected natural goods (Montenegro)
- Illegal connection of a construction site to technical infrastructure (Montenegro)
- Illegal performing of exploration works and the appropriation of cultural monuments (Federation of BiH)
- Usurpation of real estate (Republika Srpska, Macedonia) - Occupation of land (Albania).
- Air Pollution (Albania)
- Transport of Toxic Waste (Albania)
- Pollution of Waters (Albania) / Pollution of feed or waters (Macedonia) / Pollution of the potable water (Macedonia)
- Illegal production, handling and trafficking of hazardous substances or harmful organisms or seedling or planting material (Macedonia)

According to the Criminal Law (Article 181) of Turkey, articulation for the environmental crimes is stated as: “Any person who intentionally drains refuses or wastes to the ground, water or air contrary to the technical procedure defined in the relevant laws and in such a way to cause environmental pollution, is punished with imprisonment from six months to two years. Any person who engages in transfer of refuses or wastes into the country without permission is punished with imprisonment from one year to three years. The punishment to be imposed according to the above is doubled if the wastes or refuses are observed to have remaining affect in the ground, water or atmosphere. Any person who involves in draining of refuses or wastes to the ground, water or atmosphere by negligence in such a way to cause incurable disease both in human and animals, deterioration of fertility and change of natural characteristics of animals and plants, is punished with imprisonment from one year to five years”.

A separate article (Article 183) is present in the law regarding noise emissions: “Any person who causes noise contrary to the obligations set-forth in the relevant laws, in such a way to result with deterioration of one’s health, is sentenced to imprisonment from two months to two years, or imposed punitive fine.



Arcelor Mittal, Zenica, Bosnia and Herzegovina

2. Criminal procedure and criminal charges

Criminal procedure is usually defined by the criminal procedure acts. As crimes against the environment in BiH are not defined in the criminal law on the state level, the most relevant ones are different entities' laws on criminal procedures. Criminal process law, however, is practically identical in the entire BiH.

Criminal procedure is initiated at the request of authorised plaintiff, and starts with a court decision. In Croatia, Serbia and Montenegro the procedure may be initiated by public prosecutor/state attorney/state prosecutor and private plaintiff, and in BiH and its entities it can only be done by public prosecutor. In Croatia, Serbia and Montenegro for crimes prosecuted ex officio, the criminal procedure is initiated by state attorney/public prosecutor/state prosecutor either ex officio, or after criminal charges, for crimes for which private lawsuit is filed, the criminal procedure is initiated by private plaintiff. There is a third possibility – criminal procedure for crimes prosecuted ex officio can be initiated by “damaged party as plaintiff”, who can take the place of public prosecutor who found there are no grounds for initiating criminal procedure. In BiH there are only criminal actions prosecuted ex officio, so the procedure is always initiated by public prosecutor – either ex officio, or after criminal charges have been pressed.

In Croatia, BiH, Serbia and Montenegro crimes against the environment are as a rule crimes prosecuted ex officio, which means that the procedure is initiated by public prosecutor either ex officio, or after **criminal charges**, if he/she estimates there is reasonable doubt that a crime has been committed. A crime can be reported by **anyone** who has serious and specific knowledge on a crime and the perpetrator; crimes are as a rule reported to authorised public prosecutor. A crime can be reported to the police as well (which is most frequent, for practical reasons), to a court or to unauthorised public prosecutor, who shall immediately forward it to authorised public prosecutor. Reporting on a crime, i.e. filing a criminal report is not an ordinary notification about an event; it has formal effect, as public prosecutor has the duty to determine whether such reporting has grounds. In addition, in criminal laws of Croatia, BiH, Serbia and Montenegro there is a crime of **false reporting of a crime** which refers to the party reporting a crime, when in fact knowing that the information about reported crime or the perpetrator are false. Criminal report can be submitted in writing, orally, personally, over the phone or other means of communication. It is important to emphasise that in BiH the prosecutor has the obligation to inform the party reporting the crime about the decision on not performing the investigation or suspending the investigation, and the party reporting the crime has the right to file a complaint to the prosecutor's office within 8 days.

Criminal procedure laws in Croatia, BiH, Serbia and Montenegro do not define in detail the content of a criminal report, but it is possible to describe its usual content.

Usual content of a criminal report

- Perpetrator's name and surname, and address, if available, age, parents' names, occupation, unique citizen's number (JMBG) and other data on the basis of which it is easier to identify the person;
- Detailed description of events, stating the place and time of the crime, and other circumstances that could help the police and state attorney/prosecutor in their activities;
- Name and article referring to the crime; this, however, is not necessary as the state attorney/prosecutor is not bound by the qualification from the criminal report, as he/she decides about the qualification of the crime, based on the determined data and facts;
- Evidence and facts showing that the report is founded: names of persons who know about the committed crime, all available evidence, documents that can help the state attorney/prosecutor and the police to carry out the investigation;
- Damaged party's name, surname and address;
- Name, surname and address of the party filing criminal report; state attorney/prosecutor and the police shall also take action if the report is anonymous.

Examples from practice

Criminal charges for pollution of the environment from different companies - Montenegro

In 2011 Green Home NGO filed criminal charges against responsible persons in companies DOO Pantomarket - Svinjogojska farma and Kokaprodukt for committing the crime of polluting the environment (Article 303) and the crime of failing to take the measures to protect the environment (Article 304), both committed over a long period of time. The defendants were performing activities contrary to the measures of ecological inspection for finding a technological solution for the treatment and purification of waste waters, the Agreement on business and technical cooperation and the disposing of dangerous and non-dangerous waste, the Act on Environmental Impact Assessment, the Act on Environmental Protection, and the Act on Waste Management.

The reasoning behind the charges included data obtained from continual visits to the River Zeta in August and September of 2011. It had been noticed that companies had been releasing waste waters from production processes without previous treatment; the colour and smell of waste waters indicated the presence of acids, and the disposal of animal waste had also been evident.

Criminal charges were preceded by the initiation presented to the ecological inspection, and the analysis of waste waters showed concentrations of polluting matter above the legally allowed limit. The inspection therefore ordered finding a technological solution for the treatment and purification of waste waters. As these measures were not taken, there were three requests for the initiation of misdemeanour procedure to the Ministry (2008, 2009 and 2011), every time resulting with a new decision ordering the same measure.

For the second company (Kokaprodukt) environmental inspection ordered measuring the impact of the farm activities on the environment. The measures were not implemented, so the environmental inspection started the misdemeanour procedure (2010) with the Ministry of Environmental Protection. The new decision ordered the same measures. For that purpose Hydro Meteorological Institute was asked to perform waste water quality analysis, the content of ammonium in low air, the impact of the farm on the soil and noise analysis. The analysis showed that the concentration of pollutants were above maximally allowed limits. The basic state prosecution rejected the report, explaining there was no reasonable doubt that the crimes prosecuted ex officio had been committed.

In connection with the report, the prosecution asked as witnesses companies' employees who gave biased testimonies and denied the claims. Although the attached photos proved contrary, the prosecution accepted their testimonies. After that, the prosecution used as relevant elements of the 2011 report, after filing the report in which HMZ and CETI (Center for eco-toxicological testing) did not find pollutions on site, as analyses had not been performed in dry weather conditions and there was no regular monitoring of the river, which would prove the suspicion of the impact on the environment. Although it is obvious there is no waste water processing system, and that analyses proved pollution, the prosecution did not initiate a court procedure which would order performing analyses and introduction provisional measures of work suspension pending the completion of the process, or the implementation of the measures of technological solution. The prosecution in fact rejected this and similar reports which are in the area of crimes against the environment, as unfounded.

Green Home did not proceed with private charges, as in 2013, when the prosecution delivered its decision, a bankruptcy process was initiated (plants are no longer in function), and it is in the first on the list of tax debtors.

Criminal charges regarding HPP in Erzurum Tortum - Turkey

Hydropower plant (HPP) project in Erzurum Tortum was the subject of criminal proceedings. Complaint was about the wastes and excavation soil from the Project. From the construction of the HPP, tons of excavation soil and wastes were produced and left on the stream bed. Although the company which is the owner of the project was warned, the manager of the company decided not to remove the excavation and wastes. Villagers exposed to the environmental impact of the HPP construction went to the court. Defendants were the owner of the company which prepared the EIA report and the director of the HPP company. In the court process, on-site expert examinations were performed. The experts also checked the potential conflicts between the commitments in the Environmental Impact Assessment Report and reality of the Project. According to the court decision, the owner of the EIA company was found “not guilty”. However, the manager was found guilty and was sentenced to 1 year in prison. The sentence was reduced to 6 months due to good behavior and commuted to a criminal fine, 12,000 Turkish Liras.

3. Minor offences against the environment

Minor offences are violations of rules which are not criminal offences, but they belong to the criminal law domain. Minor offences in Croatia, BiH, Serbia, Albania and Montenegro are defined in different laws, including the ones from the domain of environmental protection, but also the decisions made at the local government level. Minor offence laws in Croatia, BiH, Serbia and Montenegro define the material and process part of minor offences. It must be noted again that most minor offences against the environment in BiH are defined in the laws of different entities, so Minor Offence Law of FBiH, Minor Offence Law of RS and Minor Offence Law of BD BiH are more relevant than the Minor Offence Law of Bosnia and Herzegovina.

Minor offence procedure in Croatia, Serbia, Montenegro, Albania, Federation of BiH and Republika Srpska may be initiated by:

- State attorney (Croatia), public prosecutor (Serbia), state prosecutor (Montenegro), republic/county prosecutor (Republika Srpska)
- State administrative bodies (Croatia, Serbia, Montenegro, Federation of BiH, Republika Srpska, Albania)
- Authorised inspector or a body authorised for performing inspections (Serbia, Montenegro, Federation BiH, Republika Srpska, Albania)
- Authorised police body (Federation BiH, Republika Srpska)
- Local government body (Montenegro)
- Other legal person with public authority which includes direct execution of or supervision over the execution of laws defining minor offences (Croatia, Serbia, Montenegro, Federation of BiH, Republika Srpska)
- Damaged party (Croatia, Serbia, Montenegro, Republika Srpska, Albania)
- Accused party, by the request for court deliberation (Montenegro).
- Regardless of who the authorised prosecutor is, **anyone** can submit a **minor offence report** to the authorised body. One can report to authorised inspection a minor offence, for instance against the Environmental Protection Act or some other regulation from the area of environmental protection. The inspection will then, if it finds it is reasonable, take further steps to initiate the minor offence procedure. The defendant may be any physical person; responsibility for a minor offence for legal person is based on the guilt of responsible person in that legal person. So legal persons cannot be “guilty” for committed minor offence, but persons employed in legal person may be held responsible.

In Macedonia, for misdemeanors/minor offences defined as such by various laws arranging the area of environment, the mandate to act is vested in the State Environmental Inspectorate (national) and the authorized Environmental Inspectorate (municipal). Performing inspection, the Inspectorate is entitled, when it considers necessary and at any time, to enter rooms and business premises in public and private ownership, locations and transportation means, and to fully and uninterruptedly review the entire documentation pertaining to the subject of the inspection.

Example from practice

Fight for the health of citizens around Big Bačka Canal (Veliki bački kanal) - Serbia

The town of Vrbas in Serbia is at the top of the list of cardio-vascular diseases and six types of cancer. Some specialists from Vrbas confirmed in statistic research ten years ago the link between the pollution of the Big Canal and the incidence of the diseases.

Ekološki pokret Vrbasa (Vrbas Eco Movement) wanted to do something at the end of 2008, so they filed reports to the Republic Inspection for Environmental Protection against oil factory AD Vital (owned by Predrag Ranković Peconi's Invej company) and meat industry AD Carnex for polluting the Big Canal with waste waters.

The Republic Inspection reacted for the first time after these charges, although there had already been around 20 criminal charges, and inspected these two companies. They ordered authorised labs (Public Health Institute of Vojvodina and Belgrade Public Health Institute) to give their opinion after sampling waste waters (effluent) and the canal's reception waters (recipients). At the same time, canal managing company JVP Vode Vojvodine also pressed charges for an economic offence against these two companies, but they were rejected due to procedural defects (incomplete reports).

Two judges from Vrbas were in charge of the procedure, each for one company. The judge in charge of Carnex allowed the participation of Vrbas Eco Movement and as witness and initial reporting party. The other judge did not allow Vrbas Eco Movement to make a statement in the procedure against Vital. Many hearings were postponed because the plaintiffs failed to show up. The procedure against Carnex lasted over a year and ended with the fine of 50.000 RSD for the company (legal person) and 10.000 RSD for director (responsible person), which was below the legal limit of 100.000 RSD! The procedure against Vital lasted around two years and ended with the fine against the company of 50.000 RSD, whereas the responsible person was not fined.

There were enough elements in the procedure to determine the guilt, but the judges' explanations stated that the reason for fining the minimum amount was the fact that the plaintiffs had not been prosecuted previously on the same grounds (after 50 years of open pollution of the Canal).

Since then Vrbas Eco Movement has been regularly sending dozens of complaints to different inspections and to water management company, for polluting both the canal and the air, from the Vital plant. Different decisions have been made, but Vital has failed to comply with them.

In the meantime, Carnex solved its problems with pollution by constructing a purification plant and by closing the water release system from the pig farm. Carnex used to be the greatest polluter of the Canal, but this is not the case anymore. Vital is still a problem, environmentalists organise protests every year, address authorised state bodies, and are preparing to tackle corruption, which is, as it can be reasonably believed, deeply connected to this company.

The Movement did not file a lawsuit and go into trial as they could not find a pro bono lawyer (they are usually not familiar with the environmental protection); in addition, it would require obtaining independent studies and assessments of pollution impact on the environment and people's health. Ecologists have been asking for these studies to be made for ten years, unsuccessfully. "In this country eco complaints still cannot find their way to courts", says Ratko Đurđevac of the Eco Movement.

Invej company, the owner of Vital, rejects the accusations that they are the greatest polluter. Invej claims that significant funds are spent every year for the purification of waste waters, so one can only wonder what the canal would look like if it was not being purified.

VI. CIVIL LAW INSTRUMENTS FOR ENVIRONMENTAL PROTECTION

Finally, we will present legal instruments for environmental protection from the domain of civil law. Civil law is probably the most extensive branch of law that regulates different legal relations, mostly in the field of ownership, between private parties, i.e. natural and legal persons. These legal instruments are rarely used by NGOs and citizens' initiatives, for if they lose in court, they have to pay the legal costs.

Civil law environmental protection has a dual function: a preventive one - because the purpose of this kind of protection is the prevention of environmental damage, and a repressive function - for it regulates the liability for damage caused by environmental pollution. Procedures instituted by preventive lawsuits that will be described here, as well as procedures for compensation are civil lawsuit procedures that are in Croatia, Bosnia and Herzegovina, Serbia and Montenegro regulated by civil procedure acts.

1. Lawsuit over harmful emissions and lawsuit over trespassing

The lawsuit over harmful emissions is one of the preventive instruments of the civil law environmental protection. Emissions are harmful effects of gaseous, solid or liquid substance that come from one property and affect the use of neighbouring properties. By the prevention of these harmful emissions, the environment is protected, too. In Croatia, Bosnia and Herzegovina, Serbia and Montenegro this instrument is defined by the laws that regulate the ownership and property-legal relations. In Croatia, that is the Act on Ownership and Other Real Rights, in Serbia the Law on the Bases of Ownership and Proprietary Relations, in Montenegro the Law on Legal Property Relations, in BiH the Law on Real Rights.

It should be noted that in BiH the Law on Real Rights was not adopted at the state level, but the Federation and RS have separate laws on real rights which are quite similar, and in the regulation of lawsuit over harmful emissions identical. The lawsuit over harmful emissions is almost identical and quite explicitly defined in separate articles in Croatia, Montenegro, Federation of Bosnia and Herzegovina and the Republika Srpska. In Serbia, the possibility for a lawsuit over harmful emissions is implicit in Article 5, which defines how property owners should behave regarding the emission from their property which affects the users of other properties.

That type of lawsuit is filed due to an impact of harmful emissions such as smoke, soot, wastewater, odours, earthquakes, noise and alike. Emissions can be direct and indirect. **Direct** emissions are those with direct and immediate action to release solid, gaseous or liquid substances on neighbouring land (for example water pouring, waste disposal, etc.) and they are, as a rule, always prohibited. **Indirect** emissions are those when the neighbouring property is exposed to disturbances that come from the action on the neighbouring property accidentally or caused by natural forces. Indirect emissions can be **common**, which are permitted, and **excessive**, which are not permitted. The major criterion to distinguish them is the normality of usage with respect to the nature and purpose of the property, regarding local circumstances and licence to perform certain activities.

Speaking of lawsuits over harmful emissions, in all countries the authorized **plaintiff** (the person who files a lawsuit) is the owner of the property affected by the harmful emissions. The **defendant** (the person against whom the lawsuit is filed) is the person who is the so-called producer of emissions, that is the person responsible for harmful emissions. In case the emissions already occurred, the lawsuit (claim) usually contains a request for cessation of harmful emissions and damage compensation, restoring a previous condition and the ban of future disturbing by the harmful emissions, and even omitting activities that cause emissions until the measures that prevent them are taken. Preventive role of the lawsuit should be especially emphasized in cases where emissions have not yet occurred. The plaintiff whose property is threatened by the foreseeable danger of direct or indirect emissions from someone else's property, that he or she should not be obliged to tolerate, is authorized to demand that efficient measures for their prevention are determined and conducted.

A big advantage of a lawsuit over harmful emissions is **that the statute of limitation does not apply**, meaning there is no time-limit to file it. The disadvantage of this lawsuit is, if there is approval from the competent authorities for activities which cause harmful emissions (for example the approval of the competent body for the operation of some factory, quarry, etc.), the plaintiff cannot demand cessation of the harmful activity. However, he may demand the compensation for the damage caused by **excessive** emissions, and undertaking of appropriate measures to prevent excessive emissions in the future, to prevent damage from occurring or to reduce emissions.

Apart from the lawsuit over harmful emissions, as an effective preventive civil law environmental protection in Croatia, Bosnia and Herzegovina, Serbia and Montenegro **lawsuit over trespassing** may be used. This lawsuit is also defined by the property laws and can also be filed due to an impact of harmful emissions. Authorized **plaintiff** is the holder/possessor (not necessarily the owner) of the property affected by the harmful emissions. The **defendant** is again the person who is the so-called producer of emissions, meaning the person responsible for harmful emissions. Though this lawsuit, a protection or recovery of the last state of the property, the cessation of harmful actions, the restoring of a previous condition, or the ban of future disturbing by harmful emissions are usually sought. A great advantage of this lawsuit is that the court procedures are urgent, and it is possible to define provisional measures. The disadvantage of this lawsuit is that the lawsuit over trespassing in Croatia, Bosnia and Herzegovina, Serbia and Montenegro has to be filed within the **time-limit** of only thirty days from the date the plaintiff learned of the trespassing and of the perpetrator. After the expiration of one year from the date when the trespassing occurred, the lawsuit cannot be filed anymore.

In **Macedonia**, the Law on Ownership and Other Property Rights introduces the possibility of initiation of appeal due to violation of the ownership. If, when exercising his right, a third person violates the owner, or the assumed owner in some other manner, not by depriving the owner from his possession, the owner i.e. the assumed owner, can request with an appeal for such violation to stop.

When the violation caused damage, the owner is entitled to claim damage compensation in accordance with the general rules for damage compensation. The main guiding principle of the Law is the prohibition to cause damages - it requires from any party to restrain from actions that could cause damage to someone else.

The damage itself and the manner in which occurs is arranged by the Law on Obligations. Damage refers to reduction of someone's property (normal damage) and prevention of its increase (missed benefit), including violation of the personal rights (intangible damage).

2. Environmental lawsuit (the request to eliminate the risk of damage)

Along with a lawsuit over emissions and lawsuit over trespassing, a preventive instrument of civil right environmental protection is also the so-called environmental lawsuit. Unlike lawsuit over emissions and lawsuit over trespassing that belong to the real rights domain of the civil law, environmental lawsuit belongs to obligation law domain of civil law. The term “environmental lawsuit” does not exist in the regulations of Croatia, Bosnia and Herzegovina, Albania, Serbia, Montenegro and Macedonia. It is an informal term that became usual in legal and activist practice for an article in the laws on obligations, which regulate the possibility of eliminating the risk of damage, and it can be easily enforced to eliminate any damage of the environment. This article is identical in all four countries. In Croatia, this is Article 1047 of the Obligations Act, Article 156 of the BiH Law on Obligations, in Serbia Article 156 of the Law on Obligations, and in Montenegro Article 150 of the Law on Obligations.

This article, identical in Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia, is called the Request for the Elimination of Risk of Damage and it states the following:

(1) **Anyone** may request from another to **eliminate a source of danger** that threatens to cause significant danger to him or any number of persons as well as to **abstain** from activities causing disturbance or a risk of damage, if emergence of disturbance or damage can not be prevented by the appropriate measures.

(2) At the request of a person concerned, the court shall **order to take the appropriate measures** for prevention of the occurrence of damage or disturbance, or to **eliminate a source of danger**, at the expense of a holder of the source of danger, if he fails to do it himself.

(3) If damage occurs during performing an activity of public interest for which a **permit from the competent body** was obtained, only a compensation for damage exceeding the usual limits may be requested (excessive damage).

(4) However, in that case, it may be requested to take **socially justified measures** to prevent the occurrence of damage or to reduce damage.

The reason why this civil law instrument got an unofficial name of environmental lawsuit in the first place is broad active legitimacy, i.e. a possibility to have an environmental lawsuit submitted by **anyone**, including environmental organizations, unlike lawsuits over emissions and trespassing. The requirement is that significant damage poses a threat to a number of persons, as is the case with the environmental pollution, which is why the term environmental lawsuit became usual. The defendant (the person against whom the lawsuit is filed) may be **any natural or legal person** who performs the activity which may cause danger of occurrence of the damage. The lawsuit (claim) contains a request to take measures to prevent the occurrence of significant damage. The big disadvantage of this lawsuit is that, if permit of the competent authority to perform harmful activities exists, a termination of this activity cannot be sought, but only compensation for excessive damages and the undertaking of socially reasonable measures to prevent the occurrence of the damage or to reduce the damage.

The amendments of the Law on Civil Procedure of RS from 2013 introduced a lawsuit for the protection of collective interests. By this lawsuit, NGOs, subsidiaries, institutions or other organizations founded in accordance with the law, which, as a part of their registered or legally regulated activity deal with the protection of collective interests and citizens rights defined by law, may, when such licence is explicitly stipulated by a special act and by the terms stipulated by that act, file a lawsuit to protect the collective interests and rights against natural or legal person who, by performing certain activities or operating, proceeding or even omission in general, heavily violates or seriously threatens collective interests and rights. These interests may be interests that concern the environment, but also the moral, ethical, consumer anti-discrimination and other interests guaranteed by law, and which must be heavily violated or seriously threatened by the activity or proceeding of the person against whom the lawsuit is submitted.

3. Repressive instruments of exercising civil law environmental protection

Repressive instruments of civil law protection are mechanisms used when environmental damage has already occurred and it is required to establish liability for the damage caused by environmental pollution and “punish” the polluter, i.e. charge him for the damage in accordance with the “polluter pays” principle. The liability for damage caused by environmental pollution in terms of civil law protection in Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia is regulated by the articles of environmental laws as follows:

- The plaintiff who submits a lawsuit for the compensation of the environmental damage is the state or anyone who suffered damage due to a such environmental damage;
- Provisions of the law on obligations are applied for the compensation of damage to private persons that occurred during environmental damage;
- Lawsuits for compensation shall be filed against natural or legal person that are believed to be responsible for the damage;
- If the damage to the environment is caused by the operator who runs dangerous activities, it is important to establish strict liability. Strict liability (German: Kausalhaftung) is liability for damage for the occurrence of which no guilt of the damaging party is required. Strict liability occurs when the following assumptions are fulfilled, or when the injured party can prove the following: harmful act, damage, causal link between the harmful act and the damage, and illegality of harmful action. Exceptionally, for damage which occurs related to a dangerous activity, a causal link is not proved, but presumed, and that is exactly the case here;
- If the damage was caused by more polluters - the rules of solidary liability are enforced;
- The big advantage is that, for example, in Croatia lawsuits for compensation for the environmental pollution damage are exempt of court fees, and in Serbia and Montenegro procedures for compensation for environmental pollution are urgent procedures;
- Professional help in this type of disputes is very expensive (lawyers) due to the high value of the dispute;
- Usually, this kind of disputes need expert witnesses, which is connected to their high costs;
- Statute of limitation periods for the lawsuit for damage compensation are regulated by the provisions of the laws on environmental protection or by general provisions on deadlines for damage compensation from the obligations law. In Croatia, Bosnia, Serbia and Montenegro the statute of limitation is 3 years from learning about the damage and the perpetrator, and in any case up to 5 years from the damage occurrence in Croatia, Bosnia and Montenegro. In Serbia, the statute of limitation in any case occurs 20 years after the environmental damage.

Examples from practice

Pollution in Veles - Macedonia

In 2010 the Green Coalition from the City of Veles instigated an appeal regarding the long history of pollution caused by the smelter Factory for Lead and Steel located inside the city. The Coalition included seven civil organizations, together with the Municipality of Veles. They requested from the state to be compensated for the three-decades of poisoning caused by the running of the smelter factory (the factory was running from 1974 to 2004). The plaintiffs did not claim money but they demanded from the state to replace the soil - up to 50 cm - in the public areas in the city, around the schools, kindergartens and parks, and also to displace the sludge dumpsite which continues to emit heavy metals. Both the soil/land and the dumpsite are very rich with lead and cadmium which are hazardous to the human health, regardless of the fact that the factory has not been running in the last 8 years.

The court in Veles dismissed the appeal because it was impossible to prove in which time period the pollution of the city actually happened - was it during the time of Yugoslavia or after Macedonia became independent country? The exhibits that were brought to the court were insufficient to conclude which cadaster land parcel - subject of the litigation submission - is actually contaminated, which metal



Campaign SOS for Jadran, Montenegro

Base station in Maltepe - Turkey

contaminated it, up to which percentage above the allowed threshold, up to which depth of the soil and that are the required remediation actions for the public green areas and for the dumpsite, regardless of the fact that, in the time of submission of the appeal, the Institute for Chemistry developed and presented a number of case studies for the pollution of Veles.

In environmental cases, civil law is not used as frequently as before. Generally, civil law could be a reason in cases opened against base stations. Especially, the neighborhood rights, defined after Article 737 in the law, is the main subject in the cases. As a result of lawsuits filed under this law, there are many canceled base stations project. One of them is in Maltepe, Istanbul.

Cemil Demirbaş, who lives in Maltepe, sued a base station built up on adjacent building. The lawsuit continued for three years. One of the reason of the lawsuit was the civil law and neighborhood rights. After three years, civil court of first instance decided to cancel the base station Project. The owner of the Project admitted to the Supreme Court to annul the decision of the court of first instance. However, the Supreme Court upheld the decision of the civil court.

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