

Lana OFAK*

The approach of the Constitutional Court of the Republic of Croatia towards the
protection of the right to a healthy environment**

Abstract

This paper analyzes provisions of the Croatian Constitution related to environmental protection, as well as their application in the case law of the Constitutional Court of the Republic of Croatia. The main aim is to examine whether the Constitutional Court considers Croatian Constitution as prescribing the right to a healthy environment although it only explicitly prescribes the right to a healthy life. The paper shall also explore the Constitutional Court's interpretation of other environmental provision that are enshrined in the Croatian Constitution. For the purposes of writing this paper, 94 decisions of the Constitutional Court containing the word 'human environment' were examined. However, the paper dealt in detail with only those decisions that explicitly referred to the application of environmental provisions of the Constitution. The paper ends with conclusions which can be drawn from the case law of the Constitutional Court with an important observation that the conclusion concerning the constitutional protection of the right to a healthy environment in Croatia unfortunately cannot be deduced due to the extreme lack of cases in which applicants call for protection of this right in their constitutional complaints.

Keywords: Consitutional Court, Republic of Croatia, healthy environment, protection, human environment.

1. Introduction

The right to a healthy life environment was introduced in the Croatian Constitution in 1974, at a time when Croatia was still a federal unit within the former Socialist Federal Republic of Yugoslavia (hereinafter 'SFRY'). Constitution of the Socialist Republic of Croatia¹ prescribed the following (§ 276): "Human beings have the right to a healthy living environment. The community provides the conditions for exercising this right. Everyone who uses land, water or other natural resources is obliged to do so in a way that ensures the conditions for work and life of humans in a healthy environment. Everyone is obliged to preserve nature and its goods, natural sights and rarities and cultural monuments. Misuse of natural resources and introduction of toxic and other harmful materials into water, sea, soil, air, food and objects of general use are punishable."

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* Associate Professor, PhD, Faculty of Law, University of Zagreb, Croatia, e-mail: lana.ofak@pravno.hr, ORCID: 0000-0001-7585-6370.

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¹ Official Gazette (*Narodne novine*, hereinafter 'OG') no. 8/1974.



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On 25 July 1990 the newly constituted parliament passed the Decision to Commence the Procedure for Adopting the Constitution of the Republic of Croatia for the purpose of developing a political and economic system based on the principles of parliamentarism, market economy, respect for human rights and the rule of law. A new Constitution of the Republic of Croatia (Ustav Republike Hrvatske) was passed by the Parliament of the Republic of Croatia on 22 December 1990.² This Constitution, with five revisions and amendments,³ is still in force. Croatia became an independent and autonomous state on 8 October 1991. It has been a full member of the Council of Europe since 6 November 1996 and a full member of the European Union since 1 July 2013.

Croatian Constitution of 1990 guaranteed the right to a healthy environment in the following way (§ 69): *“Everyone shall have the right to a healthy life. Republic of Croatia shall ensure the right of citizens to a healthy environment. Citizens, government, public and economic bodies and associations are obliged to pay special attention to the protection of human health, nature and the human environment, within the scope of their powers and activities.”*

In the environmental rights context, the Constitutional Amendment from 2001 was relevant, when the State’s duty to ensure citizens the right to a healthy environment was replaced with the duty to ensure the conditions for healthy environment (§ 69/2). In the next paragraph, the words “citizens, government, public and economic bodies and associations” were replaced with the word ‘everybody’ (§ 69/3). Thus, the Constitutional provision relating to the healthy environment since 2001 reads as follows: *“Everyone shall have the right to a healthy life. The State shall ensure conditions for a healthy environment. Everyone is obliged, within the scope of their powers and activities, to pay special attention to the protection of human health, nature and the human environment.”*

One could assume that the change from ensuring “the right” to ensuring “the conditions for” healthy environment was a major step back for the constitutional recognition of environmental rights. It is interesting to note that the 2019 UN Environment report does not include Croatia in the list of countries with the constitutionally protected right to a healthy environment.⁴ However, the right to a healthy life (§ 69/1) can be interpreted as a constitutional recognition of the right to a healthy environment. The precondition for a healthy life is healthy environment. Croatian legal theory considers that the right to a healthy environment is protected by the Constitution.⁵ Omejec considers that taking into account the content of Article 69 of the Constitution in its entirety, it can be concluded that the right to a healthy life is a special constitutional expression of the broader right called ‘right to a healthy environment’.⁶

² OG no. 56/1990.

³ Amendments to the Constitution of the Republic of Croatia of 12 December 1997, 9 November 2000, 28 March 2001, 16 June 2010 and 1 December 2013. English version of the Croatian Constitution is available at <<https://www.usud.hr/en/the-constitution>>

⁴ UNEP 2019, 158.

⁵ Omejec 2003, 57–62.; Bačić 2008, 727–743.; Rajko 2007, 22–27.

⁶ Omejec 2003, 59.

The aim of this paper is to examine whether the same view regarding the right to a healthy environment can be found in case law of the Constitutional Court of the Republic Croatia (hereinafter 'Constitutional Court'). The right to a healthy life is contained in a provision concerning the protection of the environment in general, which is found in the part of the Constitution relating to the protection of human rights and fundamental freedoms (i.e. economic, social and cultural rights). Human rights are not only those that are explicitly guaranteed, but also those that are implicitly protected, i.e. those whose existence can be concluded through the interpretation of legal norms. Thus, for example, the principle of proportionality which must be respected when fundamental rights and freedoms are being restricted was not explicitly contained in the Constitution until its Amendment in 2000. Nevertheless, the Constitutional Court found that restrictions on fundamental freedoms and rights must be proportionate to the legitimate aim pursued by them.⁷ Likewise, although the Constitution does not contain explicit provisions regarding the protection of personal name, the Constitutional Court concluded that the protection of personal and family life, dignity, reputation and honor, which is guaranteed by Article 35 of the Constitution, also applies to the protection of one's personal name.⁸ Accordingly, this paper shall explore whether the Constitutional Court in its case law considers Article 69 of the Croatian Constitution as prescribing the right to a healthy environment although it only explicitly prescribes the right to a healthy life. It shall also examine the Constitutional Court's interpretation of other environmental provision that are enshrined in the Croatian Constitution.

Against this background, the paper begins with a brief explanation of the types of proceedings that may arise before the Constitutional Court in environmental matters. The central part of the paper analyzes constitutional provisions related to environmental protection, as well as their application in the case law of the Constitutional Court. For the purposes of writing this paper, 94 decisions of the Constitutional Court which included the word 'human environment' were examined. However, the paper contains only those decisions that explicitly referred to the application of environmental provisions of the Constitution. The paper ends with conclusions that can be drawn from the case law of the Constitutional Court with one important exception i.e. the conclusion concerning the protection of the right to a healthy environment unfortunately cannot be deduced due to the extreme lack of cases in which applicants call for protection of this right in their constitutional complaints.

2. Types of procedures in environmental cases before the Constitutional Court

The Constitutional Court of the Republic of Croatia consists of thirteen justices elected by a two-thirds majority of the Members of the Croatian Parliament from among notable jurists, especially judges, state attorneys, attorneys and university law

⁷ „Although the principle of proportionality is not directly regulated in the Constitution of the Republic of Croatia, its ubiquitous significance cannot be denied.“ – Decision of the Constitutional Court, no. U-I-1156/1999, 31 January 2000.

⁸ Decision of the Constitutional Court, no. U-III-484/1998, 11 July 2007.

professors pursuant to the procedure and method set forth by the Constitutional Act on the Constitutional Court of the Republic of Croatia.⁹ The term of office of a Constitutional Court justice is eight years.

In principle, environmental cases can appear before the Constitutional Court through two procedures. The first one is the procedure of abstract constitutional control of legal norms. In this regard, the Constitutional Court decides on the conformity of laws (i.e. legislative acts of the Parliament) with the Constitution and may repeal a law if it finds it to be unconstitutional. It also decides on the conformity of other regulations (i.e. sub-legislative normative acts of state bodies) with the Constitution and law and may repeal or annul any other regulation if it finds it to be unconstitutional or illegal. It is interesting to note that according to the Constitutional Act on the Constitutional Court every individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations (§ 38/1). Upon the proposal, the Constitutional Court shall, at its Session, adopt the ruling whether to accept the proposal and institute proceedings. Then it shall inform the applicant about the initiation of proceedings or about the refusal of the proposal as might be the case (§ 43).

The second type of procedures through which environmental cases may be brought before the Constitutional Court are instituted by a constitutional complaint. Everyone may lodge a constitutional complaint before the Constitutional Court if he or she deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (hereinafter 'constitutional right'). If some other legal remedy is provided against violation of the constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted. The Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated (§ 62 and § 63).¹⁰

⁹ OG no. 99/1999, 29/2002, 49/2002 (consolidated text).

¹⁰ English version of the Constitutional Act on the Constitutional Court of the Republic of Croatia is available at <<https://www.usud.hr/en/constitutional-act>>.

3. Environmental provisions in the Croatian Constitution and their meaning in the Constitutional Court's case law

3.1. Highest values of the constitutional order

The Constitution (§ 3) prescribes conservation of nature and the human environment as the highest values of the constitutional order of the Republic of Croatia, next to freedom, equal rights, national and gender equality, peace, social justice, respect for human rights, inviolability of ownership, the rule of law and a democratic multiparty system. These highest values of the constitutional order are the foundation for interpreting the Constitution.

According to the well-established case law of the Constitutional Court, the provision on constitutional values does not contain human rights and fundamental freedoms and the Constitutional Court does not provide protection of these values in procedures initiated by constitutional complaints.¹¹ Nevertheless, these values are important because they role is to inspire judges when interpreting any individual provision of the Constitution and to guide the judges in resolving their specific cases.¹²

Additionally, the aim of the constitutional values is to guide the Croatian Parliament when, in its laws, it elaborates rights and freedoms.¹³ The Constitution (§ 2/4) gives the Parliament the authority to independently decide on the regulation of economic, legal and political relations in the Republic of Croatia. As the Constitutional Court observes, in regulating these relations, the Parliament is obliged to respect the requirements set before him by the Constitution, especially those arising from the principle of the rule of law and the constitutional values.¹⁴ Thus, conservation of nature and the human environment as the highest values of the constitutional order may be applicable in the procedures of abstract constitutional control of legal norms. It is also important to note that, pursuant to the well-established case law of the Constitutional Court, when the legislator decides on the regulation of economic, legal and political relations, the Constitutional Court's assessment of the constitutionality of a law does not imply an assessment of the chosen legislative model, that is, an assessment of whether a particular legislative concept is the best for regulating certain issue and whether the legislative powers in a particular issue should have been exercised in a different way. The Constitutional Court, in this regard, only checks whether the solution offered by the legislator remained within the constitutionally acceptable limits.¹⁵

¹¹ This legal position was expressed by the Constitutional Court in its decision, no: U-III-1125/1999 of 13 March 2000.

¹² Constitutional Court of the Republic of Croatia, Role of Constitutional Courts in upholding and applying constitutional principles, Answers to the Questionnaire for the XVIIth Congress of the Conference of European Constitutional Courts, Batumi, 29 June to 1 July 2017.

¹³ Constitutional Court (fn. 12).

¹⁴ Decision no. U-I/4597/2012, 4 November 2014.

¹⁵ This principle position on the jurisdiction of the Constitutional Court in assessing the purposefulness of legislative models was stated in its Decision no. U-I-2921/2003 et al. of 19 November 2008.

How are these views of the Constitutional Court applied in practice was best shown in two constitutional cases. The first case concerned the challenging of the constitutionality of the Act on the Treatment of Illegally Constructed Buildings.¹⁶ The Constitutional Court considered this case, inter alia, from the aspect of constitutional values.¹⁷ The applicant who submitted the proposal for the assessment of the conformity of the Act on the Treatment of Illegally Constructed Buildings with the Constitution claimed that the Act was in its very basis a source of inequality of citizens before the law, because it was designed to privilege illegal builders. The content of his proposal showed the applicant's position on the unfairness of the concept of mass legalization of illegal construction. The Constitutional Court did acknowledge that illegally constructed buildings were a living and well-known fact and a mass phenomenon in Croatia, which could rightly be said to endanger and devalue its territory in many ways – its land, coast, forests, its natural, cultural and historical values and the human environment. As Constitutional Court pointed out, it was the State that, through its long-standing administrative practice and a kind of 'official tolerance' of illegal conduct, actually allowed its own bodies not to act, which resulted in citizens' refusal to comply with construction rules. The consequences of such a pattern of behavior was a huge number of illegally constructed buildings that created the need to find a general legal model to solve this comprehensive problem of national proportions. Concerning the constitutional values, the Constitutional Court stated the following: *"...constitutional provisions order the State to provide special care and protection to the values and goods highlighted in them. On the other hand, the threat to the territory of the Republic of Croatia by illegal construction as a fact, in itself, is an obvious negation of these same constitutional requirements. At the same time, there are a number of reasons why illegal construction cannot be largely eliminated by prescribing and applying measures of an exclusively coercive nature, i.e. by demolishing illegal structures. Among other things, the massive scale of illegal construction in the Republic Croatia and the longevity of such a situation almost exclude the possibility of applying such coercive measures which would have the required degree of effectiveness, which would be proportionate in scope and degree of repression, which would apply to all equally, which would have adequate effects within a reasonable time and which would not lead to their effects manifesting as further devastation of space. This contradiction put the State and the legislator in a legally difficult political task to find such a form of legal arrangements that will, as much as possible, meet the requirements of a fair balance between the goals set, enshrined in the Constitution, and the measures by which these goals will be sought to be achieved."*¹⁸

In relation to the content of the Act on the Treatment of Illegally Constructed Buildings, the task of the Constitutional Court was to answer the question were the envisaged legal measures constitutionally acceptable and did they have a legitimate aim in accordance with the public or general interest? The Constitutional Court has taken the position that the challenged Act can be considered as acceptable from a constitutional point of view. Its goals were undoubtedly legitimate – they perceived the legalization of illegal construction as a "lesser evil" than the mass demolition of illegally

¹⁶ OG no. 86/2012 and 143/2013.

¹⁷ Decision of the Constitutional Court (fn. 14).

¹⁸ Decision of the Constitutional Court (fn. 14) at [4.1].

constructed buildings and were, from that point of view, economically and socially justified and, as such, in line with the interests of the State and society as a whole.¹⁹

The second, and most recent case concerned the challenging of the constitutionality and legality of the Governmental Decree on Municipal Waste Management.²⁰ Among other things, this case dealt with contesting constitutionality and legality of the provision of the Decree which referred to the stimulating fee for the reducing the quantity of mixed municipal waste.²¹ Pursuant to the Sustainable Waste Management Act (hereinafter 'SWMA'),²² the stimulating fee for reducing the quantity of mixed municipal waste is a measure designed to stimulate units of local self-government to implement, within the scope of their competences, measures to reduce the quantity of mixed municipal waste generated in their respective areas (§ 29/1). Units of local self-government are obligated to pay this fee, depending on the excessive amounts of mixed municipal waste. The stimulating fee was introduced with the adoption of the Decree on Municipal Waste Management, which, inter alia, lays down the method for calculating the fee.

The applicants essentially pointed out that the challenged provision of the Decree, which prescribed the method of calculating the fee, violated equality before the law of all local self-government units and that the method of calculating the stimulating fee did not take into account the success of individual local self-government units in separate collection of useful waste fractions. In its decision the Constitutional Court reiterated its position that the Constitutional Court's assessment of the conformity of a by-law (sub-legislative regulation) with the Constitution and the law does not imply an assessment of the selected model of collection and calculation of stimulating fee, especially not its justification and purposefulness. The Constitutional Court is not competent to assess whether a certain concept prescribed by the Government by a Decree is the best for regulating a certain issue, i.e. whether the powers of the Government, which it received on the basis of SWMA, should have been used in a different way. Nevertheless, the Constitutional Court is authorized to assess whether the existing solution or the prescribed manner of calculating the incentive fee is in accordance with the Constitution and the law (SWMA). The Constitutional Court in its assessment noted that it was not clear what was the justification for the stimulating fee in the way it was prescribed by the Government's Decree. The fee was not sufficiently stimulating for local self-government units to implement measures within their powers to reduce the amount of mixed municipal waste generated in their area. Additionally, the fee was not fair in terms of equal treatment of local self-government units in competition for incentives. Thus, in the case of a disputed provision of Article 24 of the Decree, the Constitutional Court found that the prescribed manner of calculating the stimulating fee was inappropriate for achieving the ultimate goal, which is to encourage local self-government units to implement measures to reduce the amount of

¹⁹ Decision of the Constitutional Court (fn. 14) at [5].

²⁰ OG no. 50/2017 and 84/2019.

²¹ Decision of the Constitutional Court no. U-II/2492/2017 et al., 23 March 2021.

²² OG no. 94/2013, 73/2017 and 14/2019.

mixed municipal waste. It repealed the provision of the Decree as unconstitutional and not in accordance with Article 29/1 of the SWMA.

3.2. Restrictions of entrepreneurial freedoms and property rights in order to protect nature, environment and human health

The Constitution prescribes that free enterprise and proprietary rights may be exceptionally restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature and the human environment and human health (§50/2). According to the Constitutional Court, the rule contained in Article 50 paragraph 2 of the Constitution, recognizes the legislator's power to, without the obligation to pay any compensation, restrict property rights and entrepreneurial freedoms by law only "exceptionally", i.e. when it comes to necessary measures that must be undertaken for the protection of certain constitutional values or protected constitutional goods (e. g. nature and the human environment and human health). Article 50 paragraph 2 of the Constitution speaks, therefore, of the protective function of property and entrepreneurship, which is inherent in the public interest of the community as a whole or a part of it. The Constitution does not guarantee compensation for such restrictions.²³ However these restrictions must fulfill certain requirements in order to be considered as constitutional. This means that measures restricting free enterprise and proprietary rights must be necessary in a democratic society and that the goals they seek to achieve cannot be achieved by any means or measures that would be more lenient for the owner, or that would less interfere with their property rights and entrepreneurial freedoms. At the same time, along with the necessary nature of the measures, the Constitution requires that those measures in a democratic society may be taken only for the protection of the public interest, i.e. certain common values that arise from life in an organized social community (in this case, for protection of interests and security of the Republic of Croatia, nature, human environment and human health).²⁴

In this regard, the Constitutional Court found that the Ordinance on Packaging and Packaging Waste²⁵ restricted entrepreneurial freedom in the form of obligations related to waste collection and storage. However, the aim of these restrictions was to protect the values contained in Article 50/2 of the Constitution (nature, human environment and human health), in connection with Article 3 (preservation of nature and human environment) and Article 69 (guarantee of the right to a healthy life, and the duty of everyone to pay special attention to the protection of human health, nature and the human environment as part of their powers and activities). The Constitutional Court, thus, concluded that the legitimacy of the purpose of the Ordinance on packaging cannot be disputed either as a whole or in relation to individual provisions.

²³ Decision of the Constitutional Court no. U-I-763/2009, 30 March 2011.

²⁴ Decision of the Constitutional Court (fn. 23) at [53.1].

²⁵ OG no. 115/2005.

Also, starting from the principle of proportionality, the Constitutional Court found that in this particular case the measures prescribed by the Ordinance on Packaging were not more restrictive than necessary in order to achieve a legitimate aim.²⁶

3.3. Special protection of the State to all things and goods of special ecological significance

Pursuant to Article 52/1 of the Constitution, the Republic of Croatia must provide special protection to certain things and goods. These are: (a) the sea, seashore, islands, waters, air space, mineral resources, and other natural goods ; (b) land, forests, flora and fauna, other components of the nature; (c) real estate and goods of particular cultural, historical, economic or ecological significance which are specified by law to be of interest to the Republic of Croatia.

Furthermore, Article 52/2 of the Constitution stipulates that the legal regime of goods of interest to the Republic of Croatia is regulated by law and other regulations based on law. This legal regime prescribes ways in which goods of interest to the Republic of Croatia can be (or cannot be) used and exploited.²⁷

As Omejec points out these goods can be classified into two groups according to their natural and other features, especially the ability to be the objects of ownership and other real rights.²⁸ The first group are certain parts of nature (physical things) cannot be the object of ownership and other real (property) rights, because their natural characteristics do not allow them to belong to any natural or legal person. These are atmospheric air, sea and water in its natural course. Such things also include the seashore, which has characteristic of the common good recognized by the customary law. These things – common goods – serve everyone and no one can dispose of them on any grounds in terms of private law. Although they represent things in the natural, physical sense, they cannot be the object of real rights, because they are not considered as things in terms of law on real (property) rights. If and when there is power in relation to them, that power is not private, but public. It is therefore understandable that the Republic of Croatia takes care and provides special protection to such things, because the State is the holder of a public authority (but not the owner of these things).²⁹

The second group of goods to which Article 52 applies are all other things that may be the object of real (property) rights and that do not belong to common goods. These goods and things are specific in the sense that they can be declared by law as the goods of interest to the Republic of Croatia, within the limits of authority provided by Article 52 of the Constitution. Thus, special protection of the State can be provided to them, and the manner in which those goods may be used and exploited by their owners

²⁶ Decision of the Constitutional Court no. U-II-37/2006, U-II-265/2006, U-II-1131/2006, U-II-64791/2009, 5 July 2011.

²⁷ Article 52/2 reads as follows: „*The manner in which any resources of interest to the Republic of Croatia may be used and exploited by holders of rights thereto and by their owners, as well as compensation for any restrictions as may be imposed thereon, shall be regulated by law*“.

²⁸ Omejec 2003, 62.

²⁹ Omejec 2003, 62–63.

and by holders of rights thereto shall be regulated by law. Declaration of those things as goods of interest to the Republic of Croatia does not mean that it is impossible to acquire ownership and other real rights on them and that those rights which already exist must cease. A separate legal regulation is established for them, which is characterized by restricting or burdening the private property by public law (administrative law) order, where the owner's behavior towards these goods and things is settled by rules of public, primarily administrative law.³⁰

The general meaning of Article 52 is that Republic of Croatia is obliged to protect these resources (goods) from use and exploitation in a manner that is contrary to the constitutional values and guarantees. Therefore, the constitutional obligation to protect them implies the right of the State to prescribe the legal consequences of illicit infringements of these goods through law and other regulations in accordance with the law, and in proportion to the meaning of the protected good.³¹

In one relevant case, the applicants challenged the constitutionality and legality of the Minister's Ordinance on the criteria for determining compensation for damages done to fish and other marine organisms.³² Essentially, among other arguments, they contested the amount of the damages to be paid by the offender. They stated that it was fair for the offender to compensate the damage, but it was not fair for him to compensate the damage at a price many times higher than the real one. The Constitutional Court stated the following: *"If ... we have in mind the important fact that the issue at hand is the protection of a specific marine organism – whose biological cycle is extremely slow and long, and which organism is inaccessible without the simultaneous destruction of its habitat, the rocky sea coast, which is by its nature res extra commercium, it is clear that these goods are such protected resources to which market standards are not and cannot be applied. Moreover, this is not just about protecting marine organisms and their habitats, but about the entire ecosystem of the Republic of Croatia, i.e. an important current and future general interest, which cannot be degraded by reducing it to market standards. The fact that these are invaluable goods implies liability for damage according to criteria other than market ones, but such criteria that in a balanced way combine the meaning of the protected good and the real solvency of individuals or legal entities that need to compensate the damages. Therefore, the claimant's assertion is correct ... that the amounts of compensation for damages to the goods in question in this particular case are not equivalent to their commercial value. However, these fees are not equivalent to the real value of protected goods because the value is inestimable and, hypothetically, fees proportional to that real value would have to be incomparably and inconceivably higher than the fees prescribed by the disputed Ordinance. These fees, from the point of view of the objective meaning and value of protected goods, are in fact symbolic amounts of compensation that enter the state budget and are used for specific purposes related to nature protection and environmental improvement and therefore are not "penalties". ... The nominally high amount of damages, as well as the fact that this amount of the fee is prescribed in advance by the state body, as already explained, are an expression of the importance of the protected good."*

Thus, the Constitutional Court concluded that there are no reasons to indicate the that disputed provisions of the Ordinance are unconstitutional or illegal.

³⁰ Omejec 2003, 63.

³¹ Decision of the Constitutional Court no. U-II-3575/2007 and U-II-3182/2010, 17 May 2011.

³² OG no. 101/2002, 96/2005, 30/2007 and 131/2009.

3.4. The right to a healthy life

It is interesting to note that so far only one constitutional complaint in environmental case has been brought before the Constitutional Court on the basis of Article 69 of the Constitution (i.e. protection of the right to a healthy life).³³ This was a constitutional complaint filed by an environmental association in 2006 in a case concerning challenging an Agreement on determining the relocation of the corridor of the first section of the Zagreb-Sisak motorway. This Agreement was concluded between several local and regional self-government units, *Hrvatske ceste* (company for management, construction and maintenance of state roads) and *Hrvatske autoceste* (company for management, construction and maintenance of state motorways), by which the parties agreed on the relocation of the corridor of the Zagreb-Sisak motorway in the area of the southern entrance to the City of Zagreb. The environmental association claimed, among other things, that their lives would be harder and the environment unhealthy due to sulfur dioxide and nitrogen oxides that would be burned by cars passing by the highway. However, in this case the members of the environmental association chose the wrong way of challenging the project. They filed an action before the Administrative Court of the Republic of Croatia although the Agreement was not an administrative act. Thus, the Administrative Court correctly dismissed their action because the disputed agreement did not concern any right or obligation of an individual or organization in any administrative matter. The Administrative Court also accurately pointed out that the route of the motorway was determined by the spatial plan, i.e. in the procedure of amendments to the spatial plan in which the public concerned had the right to participate in the manner prescribed by law. The decision to change the route must be based on the environmental impact study and specified in the location permit and building permit before construction begins. In all these proceedings, the public concerned may participate in order to protect their rights and interests. Given the validity of the arguments of the Administrative Court, the Constitutional Court justifiably rejected the constitutional complaint. In its reasoning, the Constitutional Court nevertheless touched on the application of Article 69 to this case. Firstly, the Court stated that the provision of the Article 69/1 of the Constitution (everyone has the right to a healthy life) was not relevant in this procedure, because the procedure did not involve a project which had an impact on the healthy life of the members of the association.³⁴ Secondly, the Court asserted that the provision of Article 69/2 (the State ensures conditions for a healthy environment) did not contain freedoms and rights guaranteed by the Constitution to a natural or legal person, which were protected in Constitutional Court's proceedings initiated by a constitutional complaint.³⁵

³³ Decision of the Constitutional Court, U-III/3643/2006, 23 May 2007.

³⁴ Decision of the Constitutional Court (fn. 33) at [7].

³⁵ Decision of the Constitutional Court (fn. 33) at [8].

Although the Constitutional Court justifiably rejected the constitutional complaint due to the availability of other legal remedies (i.e. participation in various procedures concerning the granting of the project, as well as obtaining access to justice in each of them), the reasoning of the Court demonstrated a very narrow interpretation of the right to a healthy life which, in my opinion, was flawed. The right to a healthy life certainly includes issues of noise protection and air quality protection that would be affected by motorway traffic. Even the European Court of Human Rights has developed its case law in environmental matters despite the fact that the European Convention on Human Rights does not enshrine any right to a healthy environment as such.³⁶

To conclude, this is only one case in which the Constitutional Court applied certain (very restrictive) interpretation of the meaning of Article 69 in environmental matters. It cannot be concluded that one decision creates an entire constitutional case law. Moreover, this case was adjudicated nearly 15 years ago, and, on the other hand, issues concerning environmental protection are, nowadays, rapidly becoming more important in both European and international arena. Thus, if the Constitutional Court were again given the opportunity to decide on the application of Article 69 in an environmental case, in my opinion it is very likely that it would adapt its case law to the case law of the European Court of Human Rights granting protection to the right to a healthy environment through protection of rights which may be undermined by the existence of harm to the environment and exposure to environmental risks.

4. Conclusion

In 2001 Croatia took a step backward when it no longer provided the constitutional right of citizens to a healthy environment but only the right to a healthy life. Although Croatian legal scholars consider that the right to a healthy life is a special constitutional expression of the broader right to a healthy environment, there is still no decision of the Constitutional Court of the Republic of Croatia in which such an understanding has been taken.

Environmental cases in Croatia do appear before the Constitutional Court. However, they predominantly concern the assessment of conformity of laws with the Constitution or other regulation with the Constitution and law. In this procedure the Constitutional Court is not competent to assess whether a certain concept prescribed by the Parliament's legislative act or by the sub-legislative regulation was the best for regulating certain issue. Nevertheless, the Court is authorized to assess whether the regulator respected the requirements set before him by the Constitution, especially those arising from the principle of the rule of law and the constitutional values (among which are the conservation of nature and the human environment). Furthermore, the analysis showed that protection of nature and human environment are also constitution values that constitute a legitimate reason for restricting property rights and entrepreneurial freedoms provided that such restrictions are necessary in a democratic society and proportionate to the nature of the need to implement them in each

³⁶ See European Court of Human Rights 2021.

individual case. Additionally, components of nature and human environment belong to the legal regime of goods of interest to the Republic of Croatia to which special protection must be given. This implies that, on the one hand, there is a duty of the State to protect them from use and exploitation which is contrary to the constitutional values and guarantees. On the other hand, the State has the right to prescribe the legal consequences of illicit infringements of these goods proportionate to the meaning of the protected good.

Individual environmental cases arrive before the Constitutional Court through filing a constitutional complaint. However, the analysis showed that, so far, there was only one case in 2006 (decided in 2007) in which the Constitutional Court interpreted the right to a healthy life in an environmental context. This does not mean that environmental cases do not at all appear before the Constitutional Court but that the applicants do not invoke a violation of the right to a healthy environment but violations of other constitutional rights, mainly a violation of the right to a fair trial (§ 29/1 of the Constitution).³⁷ To conclude, the case law of protecting the constitutional right to a healthy environment in Croatia has yet to be developed and one of the future researches could deal with the reasons why the practice of environmental and climate change litigation, which prevails in other European countries, has not come to life yet in Croatia.

³⁷ Decisions of the Constitutional Court, U-III/1114/2014, 27 April 2016 and U-III/5942/2013, 18 June 2019.

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