Monograph

25 years of the Aarhus Convention in South Eastern Europe

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University of Belgrade Faculty of Law - Jean Monnet Chair in European Environmental and Climate Change Law

Monograph

25 years of the Aarhus Convention in South Eastern Europe

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Foreword

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) was adopted on June 25, 1998. It is one of the most important pillars of today's environmental law. It established the foundations for the development of legal institutes that guarantee the right to access environmental information, the right to broad public participation in decision-making on activities that have or may have a negative impact on the environment, and the right to equal access to environmental and climate justice. Active participation by the public in making environmental decisions includes various models of public involvement that ensure transparency in the work of administrative bodies, informing the public about the state of the environment and the effects that an environment of a certain quality has on human health, informing the public about planned activities that intervenes in the environment. In this way, by involving the public, first of all, awareness is created and expanded about activities that affect the environment and interventions that change the state and conditions of the environment, as well as about the capacity of the environment as the limited ability of the environment to accept certain amounts of pollutants in a certain time interval in a certain area, through which irreversible damage to the environment occurs. This, in turn, affects the raising of environmental awareness and the formation of attitudes and behaviour of the public about the need for environmental protection and about the negative impact that activities affecting the environment have on people's health and development conditions. The involvement of the public, finally, leads to changes in environmental policies and public policies whose formulation, in accordance with the principles of environmental law, has as a starting point different elements and aspects related to the needs of environmental protection as a public interest.

On May 8, 2023, with the support of the OSCE Mission to Serbia in Belgrade, a scientific conference was held at the Faculty of Law of the University of Belgrade, which included legal experts from the region. At the conference, the results of the transposition and implementation of the pillars of the Aarhus Convention in the Western Balkans were analysed. The scientific committee of the conference consisted of Dr. Mirjana Drenovak-Ivanović, full professor at the Faculty of Law, University of Belgrade, Dr. Maja Kostić-Mandić, full professor at the Faculty of Law, University of Montenegro, and Dr. Tatjana Jovanić, full professor at the Faculty of Law, University of Belgrade. The conference was also the first in a series of events within the Environmental Hub. The Environmental Hub was formed at the Faculty of Law of the Univer-

sity of Belgrade, with the support of the OSCE Mission to Serbia, as a platform for dialogue on challenges in the application of environmental law and a place of meeting and discussion that brings together alumni of the program in the field of environmental protection (*Jean Monnet Chair in European and Climate Change Law*). The conference was an introduction to a dialogue with prominent experts in the field of environmental law, who were among the first to give a scholarly opinion on the Aarhus Convention and to point out to the professional public the possible importance of its application. The conference was also attended by participants who are at the beginning of the legal profession, and who face complex challenges in the application of environmental law in their daily work.

Encouraged by the discussion initiated at the conference, over the following year, a group of authors conducted research on certain aspects of the application of the Aarhus Convention in the Western Balkans, and new challenges in the application of its pillars, on the basis of which this monograph was created. The opinions presented and thoughts expressed in the monograph reflect only the authors' own views.

Editor
Prof. Dr. Mirjana Drenovak-Ivanović

Prof. Dr. Stevan Lilić *

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How do the “three pillars” of the Aarhus Convention stand today

Today, marking the 25-year anniversary of the "three pillars" in the convention adopted in the Danish town of Aarhus, compliance with environmental rights and obligations matters more than ever.

The Aarhus Convention, i.e. the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in the Danish city of Aarhus on 25 June 1998, is a unique agreement that sets out legal obligations linking human rights and the environment of the 47 parties to the Convention, including the European Union and all its member countries, the vast majority of countries in Eastern Europe and Central Asia, all of the countries in the Caucasus, as well as South-Eastern and Northern Europe countries. Additionally, any United Nations member state may join the Convention.

It should be emphasized that the Aarhus Convention is the first international treaty to recognize the rights of both present and future generations to an environment suitable to their health and well-being. A key component in the Convention's achievements is the Aarhus Convention Compliance Committee, which was established in 2001. Recent aspects of the implementation of the Conventions include the establishment of the world's first rapid response mechanism to protect environmental defenders in 2021 and the election of a Special Rapporteur on Environmental Defenders in 2022 as key milestones in upholding environmental rights. It should also be noted that the European Aarhus Convention went global as, *inter alia,* it inspired the adoption of the Escazú Agreement in Latin America and the Caribbean in 2018. Together with its Protocol on Pollutant Release and Transfer Registers, the Aarhus Conven-

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tion protects every person's right to live in an environment suitable to his or her health and well-being. The Convention and Protocol are the only global legally binding instruments on environmental democracy that put Principle 10 of the Rio Declaration on Environment and Development in practice. [1]

Today, the world is facing major environmental problems related to: a) global warming and high concentration of harmful gases; b) harmful effect of UV radiation on flora and fauna; c) excessive exploitation of non-renewable natural resources; d) excessive pollution of water, air and ground; e) lack of drinking water, g) presence of heavy metals in the food chain, etc.[2] Access to information that would point to this type of problem, at least in part, would represent the initial and basic element of action in order to eliminate these problems. Bearing in mind that the environment is everything that surrounds us, i.e. everything on which human activities are directly or indirectly directed, it is clear why environmental information is important. Without it, there would be no possibility of knowing, or increasing our knowledge about everything that surrounds us, on which we depend, and whose slightest change affects human life. Considering the importance of these two areas, and their legal regulation and harmonization, it is important to look at the provisions of the Aarhus Convention when it comes to its first pillar, which refers to access to environmental information, but also to review the close connection, i.e. the cause-and-effect relationship with the other two pillars of its foundation.

Access to information held by public authorities, i.e. freedom of information, is recognized as a basic human right which is protected by numerous international documents. Lack of information, i.e. the inability to access it, is the basis of an individual's powerlessness, considering that if a person does not know what is happening regarding the environment and in society, there will hardly be a possibility to realize basic human rights. From there comes the fact that throughout history the secrecy of data was the basis of the power of all those in power. The right of access to information available to the public authorities is widely recognized as a basic human right. One of the oldest constitutional guarantees is contained in the French Declaration of Human Rights from 1795, according to which the citizen had the right to demand from every official of public administration a report on his work, as well as an explanation for the procedure in the performance of public office.[3] On the basis of this freedom, citizens, in addition to the legislative, executive and judicial authorities, become the "fourth authority" that controls those political subjects whom they trusted in the elections. With this right,

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1 Cf: United Nations Economic Commission for Europe (https://unece.org/environment-policy).

2 S. Lilić, *"The Aarhus Convention and Access to Environmental Justice in the EU and Serbia",* in: K. Krisčiunas, R. Daugeliene (Eds.), *European Integration Studies - Research and Topicalities,* Kaunas, 2007, 7-15, p. 8.

3 Z. Rutović, *Free Access to Information as a Basic Human Right,* Podgorica, 2012, p. 59.

citizens have the opportunity to directly control their elected representatives and their work because "the will of the people is the basis for the authority of the government, the possibility for the electorate to access information",[4] as well as to obtain relevant information of public importance in order to provide an "...effective insight into the work and actions of those subjects whom the citizens trusted in free and democratic elections to perform the functions of government on their behalf...".[5] The very possibility of accessing information, and the control of ensuring the implementation of the voter's will, makes the government representatives act legally and transparently. Laws on free access to information of public importance represent and provide a broader form of direct implementation of the principle of public authority. The assumption from which they start, unless the public authority proves otherwise, is that all information was created in the work or in connection with the work of the public authority, is of public importance. The right to access information, like any other right, implies the obligation of the other party, in this case the government. In doing so, it is necessary to distinguish between two possible situations: a) governments must not make it difficult for the public to obtain information, and b) more broadly, governments are obliged to obtain and distribute all relevant information related to public and private projects, which may affect to the environment."[6]

The issues facing the environment extend not only to politics and economics, but also to law. What is indisputable is that the crisis into which our environment has fallen is of global proportions, and therefore requires a solution of equal scale.[7] The problems causing the environmental crisis require a solution through international cooperation at the world level in the field of the environment and an international organized framework and mechanism for action.[8] Therefore, the aspiration to regulate access to information related to the environment with one international agreement was finally realized when the representatives of the governments of thirty-five countries and the European Union at the fourth ministerial conference, within the project "Environment for Europe", in the Danish city of Aarhus in 1998, adopted the Convention on the Availability of Information, Public Participation in Decision-Making and the Right to Legal Protection in Environmental Matters, otherwise known as the "Aarhus Convection". The very idea of including all provisions of this kind within the framework of one international document and thus connecting these two areas (the environment and

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4 *Ibid.,* p. 66.
5 Z. Jelić, "*Looking Forward to Legal Regulation of Free Access to Information of Public Importance",* in: Ž. Rutović, *Free Access to Information as a Basic Human Right,* Podgorica, 2012, p. 66.
6 B. Tubić, *Right to Information on the Environment in International Documents,* Proceedings of the Faculty of Law in Novi Sad, 3/2012, p. 347.
7 S. Lilić, *"The Aarhus Convention and Access to Environmental Justice in the EU and Serbia",* in: K. Krisčiunas, R. Daugeliene (eds.), *European Integration Studies - Research and Topicalities,* Kaunas, 2007, 7-15, p. 8.
8 *Ibid.*

human rights) is a significant novelty, not only in international environmental law, but also in the broad and sensitive field of international environmental regulation.[9]

We can look at the Aarhus Convention in two ways. We can look at it as an instrument of environmental protection because it proclaims instruments of environmental protection. On the other hand, we see it as an instrument for promoting and developing democracy.[10] The specificity of the Aarhus Convention is that it regulates not only issues that in general concern the environment and its protection (i.e. the right, as stated in the preamble, to live in an environment that corresponds to health, well-being and duty and the obligation to improve it), but adds three "new" human rights: a) the right to access information of public importance on environmental issues, b) participation in decision-making and c) the right of access to environmental justice.

The first pillar of the Convention is dedicated to the most important element when it comes to a suitable environment, and it is a right to access environmental information of public importance. According to the provisions of the Aarhus Convention, this right means that any natural or legal person can request access to environmental information without the need to prove a special interest, within a period that cannot exceed one month, except in exceptional cases when it can reach up to two months from the moment of submitting a request to a competent authority.[11]

The second pillar refers to the participation of the public in activities related to environmental protection, given that the realized rights of the first pillar would not excessively contribute to the democratization of the order without the possibility of influencing decision-making related to the environment. Through three articles of the Convention, the possibility of public participation in activities related to the environment is broadly defined. With regard to participation in decision-making related to special activities, the Convention determines the entire procedure, which includes notifying the public at an early stage about the start of the decision-making procedure, the possibility of participation, the time of the public hearing, on the body to which comments can be sent, etc.[12] On the other hand, the Convention encourages the public itself to provide information regarding the objectives for the adoption of requests,

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9 V. Vukasović, *International Regulation of the Right to an Adequate Environment,* Međunarodni problemi, 55(1), Belgrade, 2003, p. 89-103, p. 94.

10 R. Kurtović, *Aarhus Convention in the Legal System of the Republic of Serbia,* University Review, *12 (2) 2013,* Novi Pazar, p . 1-12, p. 2. Available at: http://www.ceeol.com/aspx/Indexlists.asp.

11 *Aarhus Convention,* Article 4, Section 2.

12 *Aarhus Convention,* regulated through the provisions of Articles 6, 7 and 8 .

and to determine the public interest and to discuss it before making a decision.[13] Special activities are regulated by Annex 1 of the Convention and refer to the energy sector, metal production and processing, minerals industry, etc.[14]

The third pillar of the Convention envisages the availability of justice (legal protection) and thus closes the circle when it comes to shaping issues related to the environment. Thus, the Aarhus Convention represents a comprehensive approach to environmental information issues, expressed in the preamble as follows: "Every person has the right to live in an environment suitable for his/her health and well-being and duties, both individually and in the community with to others, to protect and improve the environment for the benefit of current and future generations. In order to realize the aforementioned right and respect duties, citizens must have access to information, the right to participate in decision-making, and access to the justice on issues related to the environment."[15]

The acceptance of the above as human rights, the Convention imposes a duty on governments to respect them. From there, another specificity of the Convention arises, which is reflected in the fact that, unlike other international documents that impose rights and obligations of a mutual character among the contracting parties, it formulates the rights and obligations of the contracting parties towards the citizens. This is precisely why the Convention represents an essential element not only of environmental protection, but also of the democratization of society and the building of civic institutions.[16]

The Aarhus Convention became an integral part of the legal system of the Republic of Serbia with its ratification in 2009.[17] It should be pointed out that due to its unsettled status at the time (with the "empty chair" status in the United Nations), the Federal Republic Yugoslavia was not a participant in the ministerial conference that resulted in the Convention, nor could it in any way influence its preparation or drafting. However, in spite of this, the then federal ministry whose jurisdiction included the area of the environment, initiated confirmation procedure of the Aarhus Conversion. Consequently, the aspiration of becoming a member of the European Union, later influenced Serbia to speed up the process of harmonizing its legislation with the legislation of the EU, including in the area of the environment and the Con-

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13 *Aarhus Convention,* Article 6, Section 5.
14 *Aarhus Convention,* Annex 1.
15 *Aarhus Convention,* Paragraphs 8 and 9 of the Preamble.
16 V. Vukasović, *International Regulation of the Right to an Adequate Environment,* Međunarodni problemi, 55(1), Belgrade, 2003, p. 89-103, p. 94.
17 Law on Confirmation of the Convention on Availability of Information, Public Participation in Decision-Making and the Right to Legal Protection in Environmental Matters (Aarhus Convention), *Official Gazette of the Republic of Serbia - International Treaties,* no. 38/2009.

stitution of the Republic of Serbia (2006), which stipulates that every citizen has the right to a healthy environment and timely and complete information about it, presents a legal basis in this context.[18] The Law on Environmental Protection, as well as the Law on Free Access to Information of Public Importance, which provides access to environmental information available to public authorities are the most significant national legislation documents concerning the environment. Given the proximity of the legal solutions that preceded the ratification of the Aarhus Convection, it can be said that the "spirit" of the Aarhus Convention was present in the legislation of Serbia before its official ratification.[19]

Concluding, in the wake of the 25th anniversary of the Aarhus Convection, we can say that the "three pillars" in the landmark convention adopted in the Danish town of Aarhus, regarding the right to access information of public importance on environmental issues, participation in decision-making and the right of access to environmental justice, for the environmental future of our world, matter more than ever.

18 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* No. 83/2006, Article 74.
19 S. Lilić, *"The Aarhus Convention and Access to Environmental Justice in the EU and Serbia",* in: K. Krisčiunas, R. Daugeliene (Eds.), *European Integration Studies - Research and Topicalities,* Kaunas, 2007, 7-15, p. 12.

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[1] Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 83/2006, Article 74.

[2] Jelić, Z., "Looking Forward to Legal Regulation of Free Access to Information of Public Importance", in: Ž. Rutović, Free Access to Information as a Basic Human Right, Podgorica, 2012, p. 66.

[3] Kurtović, R., Aarhus Convention in the Legal System of the Republic of Serbia, University Review, 12 (2) 2013, Novi Pazar, p. 1-12, p. 2. Available at: http://www.ceeol.com/aspx/Indexlists.asp.

[4] Law on Confirmation of the Convention on Availability of Information, Public Participation in Decision-Making and the Right to Legal Protection in Environmental Matters (Aarhus Convention), Official Gazette of the Republic of Serbia - International Treaties, no. 38/2009.

[5] Lilić, S., "The Aarhus Convention and Access to Environmental Justice in the EU and Serbia", in: K. Krisčiunas, R. Daugeliene (Eds.), European Integration Studies - Research and Topicalities, Kaunas, 2007, 7-15, p. 8.

[6] Rutović, Z., Free Access to Information as a Basic Human Right, Podgorica, 2012, p. 59.

[7] Tubić, B., Right to Information on the Environment in International Documents, Proceedings of the Faculty of Law in Novi Sad, 3/2012, p. 347.

[8] Vukasović, V., International Regulation of the Right to an Adequate Environment, Međunarodni problemi, 55(1), Belgrade, 2003, p. 89-103, p. 94.

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The impact of the jurisprudence of the European Court of Human Rights on the protection of the right to a safe, clean, healthy and sustainable environment in the judicial practice of the Republic of Serbia

Abstract: The paper presents research findings that highlight key principles from the jurisprudence of the European Court of Human Rights relevant to protecting the right to a safe, clean, healthy, and sustainable environment. It emphasizes the significance of the ECtHR's rulings as a means of interpreting human rights provisions, focusing particularly on the cases *Eólica de S. Julião v. Portugal* (2024), *Cangi and others v. Turkey* (2023) and *KlimaSeniorinnen Schweiz v. Switzerland* (2024). These cases examine the roles of participants in the environmental impact assessment process and the legal implications of the decisions made, shedding light on the margin of appreciation doctrine in environmental contexts.

In the second part, the paper shifts to recent Serbian judicial practices related to the environmental protection. It analyses several notable cases: one where a non-governmental organization sued for health risks posed to citizens by excessive sulphur dioxide emissions (2023); another where residents filed a lawsuit over noise pollution affecting their right to a peaceful home (2021); a case involving the dismantling of a private property fence during an environmental protest, raising questions about freedom of expression versus property rights (2023);

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and a case concerning whether an NGO could seek judicial review over alleged violations in the protection of cultural heritage (2021).

Finally, the paper concludes by assessing how courts in Serbia consider ECtHR practices when dealing with legal consequences arising from environmental damage and climate instability.

Keywords: Eólica de S. Julião v. Portugal, Cangi and others v. Turkey, KlimaSeniorinnen Schweiz v. Switzerland, a lawsuit for endangering the health of the citizens of the Republic of Serbia, SLAPP lawsuits and environmental protection

1. Introduction

The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Aarhus Convention) was adopted on June 25, 1998. It represents a significant pillar of contemporary environmental law, establishing the foundation for legal frameworks that guarantee the right to access environmental information, the right to meaningful public participation in decision-making on activities that may negatively impact the environment, and the right to equal access to environmental and climate justice.

After 25 years of implementing the standards outlined in the Aarhus Convention, we are encountering a different environmental, economic, social, cultural, and scientific framework, both globally and locally. Factors such as technological advancement, increased natural resource exploitation, population growth, urban expansion, heightened energy demand, and new consumption patterns (like electric vehicles and cryptocurrencies) highlight the need to develop a new approach to assess the environmental impacts of planned projects. Public participation, timely access to accurate and updated information, and environmental justice are gaining prominence. However, the fundamental principles of the Aarhus Convention remain unchanged, continuing to guide domestic lawmakers in establishing procedural sequences for assessing ecological, social, economic, and cultural aspects of environmental impact assessments.

In current practice, three elements emerge as potential barriers to the application of Aarhus Convention standards. First is timeliness, referring to the suitable timeframe necessary for accessing environmental information, ensuring meaningful public involvement in environmental decision-making processes, and achieving effective protection in administrative and judicial procedures.

The second element involves the capacity of individuals, groups, and associations to act as protectors of collective and broader public interests. This is rooted in the legislative framework that governs the active standing of representatives for collective interests in relevant legal proceedings. It also includes legal provisions that provide guarantees for the participation of representatives of collective and public interests, regardless of their financial capacity. This framework recognizes the importance of legal aid for parties acting as advocates for broader public interests and initiating public interest disputes and litigations.

The third element concerns the formal and informal tactics employed by companies or investors to deter individuals, environmental organizations, and civil society from seeking access to information, participating in decision-making, or initiating legal protection proceedings. A notable concern in this regard is Strategic Litigation Against Public Participation (SLAPP). The Global Witness report highlights that over 2,100 land and environmental defenders have been killed globally from 2012 to 2023, with 196 attacks in 2023 alone.[1] Simultaneously, UN Human Rights Treaty Bodies are clarifying states' obligations in climate governance, reinforcing the need for legal frameworks that protect environmental advocates. Additionally, new guidance for employers on the UN's Resolution regarding the human right to a safe, clean, healthy, and sustainable environment underscores the importance of aligning business practices with human rights standards.[2] These developments underscore an urgent need for stronger protections for environmental defenders and a commitment to uphold human rights in climate action, ensuring that advocacy for environmental justice is met with safety and respect.

Building on these elements, we will examine recent practices of the European Court of Human Rights (ECtHR) and the recently introduced Strasbourg Principles to determine whether there have been advancements in protecting fundamental human rights in environmental matters. The trends identified will then be analysed through the lens of domestic administrative and judicial practices.

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1 *Human rights and the environment*, https://www.genevaenvironmentnetwork.org/resources/updates/human-rights-and-the-environment/

2 Kobylarz, N. (2023). Anchoring the right to a healthy environment in the European Convention on Human Rights: what concretized normative consequences can be anticipated for the Strasbourg Court?. In *Environmental Law Before the Courts: A US-EU Narrative* (pp. 153-199). Cham: Springer International Publishing.

2. Aarhus Principles in Recent Practice of the European Court of Human Rights

In the jurisprudence of the European Court of Human Rights (ECtHR), elements have emerged that are significant for the establishment of a connection between the public's right to access environmental information, participation in environmental decision-making, and the right to legal protection with fundamental human rights.[3] This has strengthened the legal standing of the public as active participants in environmental protection.

To establish the foundations linking human rights with the deteriorating state of the environment, a group of experts in human rights and environmental protection published the Strasbourg Principles on Environmental Protection in International Human Rights Law after the "Human Rights for the Planet" conference in 2020. These principles are based on views expressed in the decisions of domestic courts in high contracting states, as well as in the jurisprudence of the ECtHR and the Inter-American Court of Human Rights.[4]

We will explore how the legal stance of the public on environmental issues has evolved, particularly as recognized by the ECtHR in national case law. This discussion will highlight the connections between human rights and environmental protection.

2.1. Access to Environmental Information in Environmental Impact Assessment Jurisprudence of the ECtHR

The foundation for public involvement in decision-making processes that affect the environment lies in the right to access environmental information. For nearly two decades, the application of the standards set by the Aarhus Convention in Serbia has been based on the right to access information of public interest, with specific protections for environmental information.[5] However, the development of environmental legislation opens new avenues for access

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3 Lavrysen, L. (2024). Greening the European Convention on Human Rights: how to determine the substance of environmental human rights?. In *The Right to a Healthy Environment in and Beyond the Anthropocene* (pp. 53-71). Edward Elgar Publishing.

4 Drenovak-Ivanović, M. (2023). Analiza strazburških principa zaštite životne sredine u međunarodnom pravu ljudskih prava. Zbornik radova Perspektiva implementacije evropskih standarda u pravni sistem Srbije, knjiga 13, urednik S. Lilić, 78-90.

5 Drenovak-Ivanović, M. (2016). *Environmental Impact Assessment in Serbian Legal System: Current Issues and Prospects for Revision*, Annals of the Faculty of Law in Belgrade – Belgrade Law Review 3, 126–139.

not only to environmental information as public interest data but also to information held by companies that indicates their impact on the environment and climate change.[6]

In the practice of the ECtHR, we find cases that highlight the importance of the right to access information, which extends beyond the environmental impact assessment (EIA) process to include the right to access information in judicial reviews of decisions affecting the environment. In the case Cangi and Others v. Turkey (2023), a group of citizens filed a complaint regarding the EIA process, arguing that the technical commission's experts did not consider the opinions presented or respond to questions raised by members of the public who participated in the EIA process.[7] They believed that an illegal decision had been made and initiated an administrative dispute.

These representatives of the public, recognized as having standing in the administrative dispute, posed several questions to the experts that they deemed relevant to the assessment of the legality of the EIA decision. However, they were denied responses. The Administrative Court took the view that the questions were not clearly articulated or based on relevant facts. The Supreme Court upheld this decision.

When deciding on the application, the ECtHR held that the administrative dispute in question was a contradictory process in which the concerned public, granted legal standing, held a status akin to that of a party with interests opposed to those of the operator who benefited from the EIA decision. In such an administrative dispute, it is necessary to examine the facts and circumstances relevant to the EIA decision in a contradictory process. The right to a fair trial implies that parties have the right to know and comment on all evidence or observations submitted to influence the court's decision. Consequently, considering that the applicants in this case did not have the opportunity to fully review the evidence in the case files relied upon by the main experts, the Court concluded that there was a violation of Article 6, paragraph 1.

The analysis shows that, according to the rule of audiatur et altera pars, representatives of collective and broader public interests have the right to participate in the examination process, which includes the right to present facts and receive answers to questions pertinent to the administrative matter concerning the legality of the EIA decision.

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6 Bylund, K. (2024). From Climate to Consumer and Market: The EU's Approach to Greenwashing: A Discourse Analysis of the Empowering Consumers for the Green Transition Directive; Schilling-Vacaflor, A., & Gustafsson, M. T. (2024). Towards more sustainable global supply chains? Company compliance with new human rights and environmental due diligence laws. *Environmental Politics*, *33*(3), 422-443.

7 *Cangi and others v. Turkey* 12961/19 [2023] ECHR.

2.2. Legal Standing of Representatives of Broader Public Interests in the Jurisprudence of the ECtHR

In the practice of the ECtHR, there are foundations for the legal standing of associations and organizations and various forms of collaboration aimed at environmental protection as a collective and broader public interest. The practice indicates that the status of legal standing applies to individuals, groups, non-governmental organizations (NGOs), and legal entities if they can demonstrate that their fundamental rights and freedoms, guaranteed by the European Convention on Human Rights (ECHR), have been violated. In other words, the basis for obtaining legal standing arises from the status of a victim, which is determined in each specific case.[8] The principle of actio popularis has not been accepted. This means that associations and organizations with legal personality can only have legal standing when the rights and freedoms they represent, by their nature, can also belong to legal entities (such as property rights, the right to a fair trial, freedom of expression, etc.).

The first in a series of cases presented to the ECtHR that raised the question of who can be considered a victim of global impacts to the environment (GMO, air pollution) and climate change is the case Cordella. In this case, the ECtHR held that the long-term toxic emissions from the Ilva steel plant not only threatened the health of the applicants but also the entire population of the municipality of Taranto, which should be recognized as an area of high environmental risk. [9] The case was initiated by a complaint from 180 individuals who lived or live in the municipality of Taranto. They believed that the operations of the local Ilva steelworks resulted in the release of significant amounts of toxic emissions, negatively impacting the health of the local population and the environment. Over the years of operation of the steel plant, they were not provided adequate access to information regarding pollution and associated health risks, nor did they have the right to appropriate legal remedies. The ECtHR found that the continued operation of the steel plant at such emission levels would jeopardize the health of the applicants and the entire population living in endangered areas. This opened the way for the expansion of legal standing to broader groups of individuals who, due to long-term exposure to emissions or negative environmental impacts, could be considered victims.

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8 Drenovak-Ivanović, Mirjana. (2021). *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine*. Beograd, 89-96. *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox c. France*, 75218/01 [2007] [Section II] ECHR; *Association Burestop 55 et autres c. France*, 56176/18 [2021] ECHR; *Gorraiz Lizarraga and others v. Spain* and *L'Érablière A.S.B.L. v. Belgium*; *Bursa Barosu Başkanlıği and Others v. Turkey*, 25680/05 [2018] ECHR

9 *Cordella et al v. Italy*, 54414/13 and 54264/15 [2019] ECHR. See: Heri, C. (2023). Climate Cases as Public Interest Litigation before the European Court of Human Rights. In *Public Interest Litigation in International Law* (pp. 317-344). Routledge.

This stance led to the establishment of criteria relevant to obtaining legal standing in cases where the human rights and freedoms of a large number of individuals are threatened by a degraded state of the environment and climate change, as seen in another case, Verein KlimaSeniorinnen Schweiz v. Switzerland.[10] This was the first case in which the ECtHR held that climate change mitigation is an obligation that represents a positive duty of the state to protect the rights to private and family life, in accordance with Article 8 of the ECHR. The Court established criteria crucial for determining the status of organizations as applicants before the ECtHR. Initially, the Court held that in climate disputes, states have an obligation to allow NGOs to participate in legal proceedings for the protection of fundamental human rights, regardless of whether their members have the status of victims. For NGOs to obtain legal standing, they must: "1) be established in accordance with the law on associations and organizations or have the right to participate in such capacity; 2) be established for the purpose of protecting fundamental human rights, their members, or other individuals whose rights are violated by climate change; 3) demonstrate that based on their participation in previous legal protection proceedings and activities aimed at establishing conditions for adequate legal protection in these areas, they can be considered qualified and representative representatives of the concerned public." Individuals will have standing in climate change mitigation cases only if there is (a) a high intensity of exposure of the applicants to the harmful effects of climate change; and (b) an urgent need to ensure individual protection for the applicants."[11]

The jurisprudence of the ECtHR and the development of EU environmental *acquis* influence the further development of rights arising from the Aarhus Convention and the development of new approaches in determining participants in environmental decision-making processes and access to environmental information. Thus, with the development of European legislation addressing the legal regulation of sustainability by establishing strict rules on taxonomy, the concept of shareholder in environmental decision-making and the concept of environmental information is also being expanded. The adoption of the Corporate Sustainability Due Diligence Directive (CSDDD) in May 2024 formally begins the application of a broader understanding of collective participation in decision-making and implementation of an environmental decision.[12]

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10 *Verein KlimaSeniorinnen Schveiz v. Switzerland*, 53600/20 [2024] ECHR; Hoffmann, A. (2024). Five key points from the groundbreaking European Court of Human Rights climate judgment in Verein KlimaSeniorinnen Schweiz v Switzerland. *Environmental Law Review*, 14614529241257112.

11 *Verein KlimaSeniorinnen Schveiz v. Switzerland,* par. 478-488

12 Drenovak-Ivanović, M. (2024) Pristup klimatskoj pravdi kao novi izazov u primeni Arhuske konvencije. *Pravo i javne delatnosti - Liber amicorum Jovica* Trkulja (ur. Slobodan Vukadinović). Beograd, 183-202.

2.3. Lawsuits dissuading critics and negative publicity brought by individuals and entities and ECtHR jurisprudence

Access to environmental and climate justice can be hindered or significantly limited by formal and informal procedures that discourage individuals, environmental organizations, associations, and civil society from requesting free access to information, participating in decision-making, or initiating legal protection procedures. Among these, particular attention should be paid to Strategic Litigation Against Public Participation (SLAPP).

SLAPP lawsuits are filed by corporations or public officials against associations, organizations, or individuals expressing critical views about the environmental impact of certain activities. A key element in SLAPP lawsuits is the disproportionate power dynamics, which place representatives of collective and broader public interests at a disadvantage.[13] Such lawsuits typically incur significant costs, which deter defendants and those who might be sued for expressing critical opinions from participating in processes according to the standards arising from the Aarhus Convention.

One of the cases in the ECtHR practice that can impact environmental protection practices involves the described power imbalance. This is the case *Eólica de S. Julião v. Portugal* (2023).[14] In this case, the complaint was made by a company that had received permission to operate a wind farm with four turbines, with the obligation to assess the acoustic impact on the environment and to continuously report to the competent authority about noise impact and measures taken to mitigate negative effects. Since the company did not comply, the competent authority revoked the permit. The company argued that it was subjected to conditions that did not guarantee legal certainty and that its right to peaceful enjoyment, guaranteed by Protocol 1 to the European Convention on Human Rights, was violated.

In addressing the complaint, the ECtHR stated that a permit issued with conditions cannot be considered property and thus does not fall under the provisions of Protocol 1, Article 1, which regulates the right to peaceful enjoyment of one's possessions. The complaint was dismissed due to lack of *ratione materiae*. This analysed case is particularly significant for numerous instances where a company attempts to downplay environmental impact by dividing a project into smaller parts contrary to environmental impact assessment rules or by initiating multiple procedures simultaneously to present conditionally issued permits as unconditional in subsequent environmental impact assessment processes (e.g., integrated permitting process).

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13 Pasqua, M. (2023). The Proposed EU Directive on SLAPPs: A (First) Tool for Preserving, Strengthening and Advancing Democracy. *Athena: Critical Inquiries L. Phil. & Globalization*, *3*, 209.

14 Eólica de S. Julião, Lda v. Portugal 33545/14 [2024] ECHR.

3. Standards of the Aarhus Convention and the Application of ECtHR Jurisprudence in Administrative and Judicial Practice in Serbia

The creation of a culture of cooperation and solidarity in Serbia since 2004 has been encouraged by the development of positive law influenced by the standards of the Aarhus Convention. To ensure an environment that supports the health and well-being of current and future generations, it is essential to implement the three key pillars: access to information, public participation, and access to justice. The framework also addresses issues related to the prosecution, punishment, and harassment of individuals trying to exercise these rights. To enhance the legal capacity for the application of these pillars in national case law, a significant number of courses have been developed. The curricula for Environmental Law, Climate Change Law, the Legal Clinic for Environmental Law, and Master's Studies in Environmental Law at the Faculty of Law, University of Belgrade, incorporate practical work with students on situational cases that require the application of European Court of Human Rights (ECtHR) rulings.[15] This method has proven effective, as graduates working in environmental NGOs now utilize ECtHR perspectives in their legal arguments. Programs supported by the OSCE Mission to Serbia aim to educate Judicial Academy participants about the significance of ECtHR rulings in environmental protection.[16] Given the positive outcomes, it is suggested that an additional course be introduced in the Judicial Academy to further explore current ECtHR practices regarding environmental and climate change issues. Notably, some key judgments from various courts in Serbia reflect analyses aligned with ECtHR standards. We will highlight the most significant and the most important of these rulings.[17]

3.1. Right to peaceful enjoyment of possessions and environmental protection in Supreme Court of Cassation case law

Analysing national case law, one may find a case where a number of issues on the relationship between the right to peaceful enjoyment of possession and the right to safe, clean, healthy, and sustainable environment were raised. In a significant case, the owner of a plot of land located

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15 Jean Monnet Chair in European Environmental and Climate Change Law, https://environment.ius.bg.ac.rs/

16 The OSCE Mission to Serbia conducted a study on the Environmental Law Clinic, examining its work and outcomes. This research culminated in the report titled "Cultivating Serbia's Future Environmental Guardians: OSCE Mission's Lasting Impact Through the Environmental Law Clinic," which was presented in February 2024. The report highlights the clinic's contributions to environmental advocacy and is accessible online. One may find it at the OSCE's official website available at: https://www.osce.org/mission-to-serbia/562842

17 A detailed overview of the cases is provided in M. Drenovak-Ivanović, "Human Rights and Sustainable Environment in South-East Europe, Framework for Country Baseline Analysis Reports - Serbia", which was supported by the Council of Europe and will be published in early 2025.

within a nature reserve sought compensation equivalent to the market value of the property, claiming that the government's regulation amounted to *de facto* expropriation without following proper expropriation procedures.[18] Initially, the court maintained that the plot was designated as part of a nature reserve and outside any construction zone. The land was classified as wetland, which several environmental laws restricted from agricultural activities.

The court examined the legal framework surrounding compensation for restrictions on property rights, noting the owner failed to provide evidence that they were unable to exercise their ownership rights. The court also considered decisions from the European Court of Human Rights, specifically referencing cases like Matos e Silva LDA et al. v. Portugal and Elia S. rl v. Italy. However, it concluded these cases were not applicable, as the landowner in this case faced no uncertainty regarding property rights; the limitations were explicitly defined by law due to the land's status.

As a result, the court rejected the compensation request, emphasizing the need to balance property rights with environmental protection obligations. This ruling illustrates the complexities surrounding the right to peaceful enjoyment of possessions in light of environmental conservation efforts.

3.2. Right to a fair trial and environmental protection in Administrative Court and Supreme Court case law

The evolving role of environmental NGOs in legal disputes regarding construction permits became apparent following the 2016 amendments to the General Administrative Procedure Act (GAPA), which provided these organizations with legal standing in matters of environmental protection. A landmark case involved an environmental association challenging a construction permit for a cable car in Kalemegdan Park, arguing that the permit was issued unlawfully without a required environmental impact assessment (EIA).[19]

The Administrative Court swiftly ruled in favour of the environmental group, recognizing the potential for irreversible harm to cultural heritage and environmental interests. The court suspended construction pending a final decision on the legality of the permit, establishing a precedent for NGO participation in administrative procedures.

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18 Judgement of the Supreme Court of Cassation Rev 3985/2021 of April 21, 2023.
19 Decision of Administrative Court, April 19, 2019.

However, the Supreme Court later clarified that while environmental associations may not have a direct right to file lawsuits against construction permits, they could attain legal standing in specific cases requiring an EIA.[20] This distinction was supported by references to ECtHR judgments, affirming that environmental NGOs could seek legal recourse to protect public interests in environmental matters. The rulings underscore the intricate relationship between environmental advocacy and the right to a fair trial in administrative law.

3.3. Right to Effective Remedy and new approaches to environmental protection: The very first actio popularis claim in the Higher Court case law

A pivotal development in Serbian legal practice occurred with the recognition of an actio popularis claim, allowing environmental NGOs to act on behalf of collective public interests. For the first time, the Higher Court ruled in September 2022 on such a claim, affirming the right of an environmental organization to seek judicial intervention to mitigate risks of environmental harm.

The case arose from allegations that the National Emissions Reduction Plan (NERP) was not being properly implemented, leading to significant environmental threats. The court assessed whether a lawsuit was the sole means of ensuring compliance with Article 13 of the ECHR, which guarantees the right to an effective remedy. It concluded that existing laws, particularly concerning air quality, lacked adequate enforcement mechanisms, thus validating the NGO's claim. The court ordered the defendant to align operations with environmental standards to safeguard public health.[21]

This ruling not only marked a milestone for *actio popularis* claims in Serbia but also raised important questions about future climate litigation and the broader implications for environmental justice.

3.4. Right to life and the right to drinking water in the Basic Court case law

In a case concerning the quality of drinking water, the Basic Court deliberated whether users could request reduced bills if the supplied water failed to meet safety standards.[22] The court concluded that the utility company had delivered substandard water, which compromised the

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20 Judgment of the Supreme Court 41/2023 of August 8, 2023.
21 Judgment of the Higher Court, no. 181/21 of September 22, 2022.
22 Judgment of the Basic Court in Vrbas, P. 372/2019 of June 5, 2017.

users' rights. It stated that access to clean drinking water is fundamental to human survival, highlighting water's vital role in ensuring the right to life.

The judgment established that the utility provider could not impose charges for services that do not meet necessary health and safety standards. This case reinforced the link between environmental quality and fundamental human rights, emphasizing the court's role in protecting citizens from violations related to essential services.

3.5. Right to respect for quality of private and family life and harmful effects of the unpermitted noise level in the Basic Court case law

Analysing Serbian case law on may find very interesting case where residents of a neighbourhood plagued by excessive noise from local catering establishments initiated a lawsuit against the city for failing to address the noise issue. They sought compensation for non-material damages, citing violations of their personal rights due to prolonged exposure to noise levels exceeding legal limits.

The court found that the city's inaction directly impacted the residents' quality of life, infringing on their right to respect for their home and personal dignity.[23] It acknowledged that the right to a home encompasses both physical space and the quality of enjoyment within it. The judgment referenced ECtHR practice, recognizing that violations could stem from non-physical factors like noise pollution. Ultimately, the court awarded compensation to the plaintiffs, affirming that noise disturbances significantly affect residents' health and well-being, and reinforcing the legal recognition of the right to a peaceful living environment.

3.6. Freedom of assembly and freedom of expression in the Basic Court case law

In a case involving protests against a fence obstructing public access to a mountain trail in a national park, the Basic Court examined the interplay between freedom of expression and property rights. The protesters removed the fence as a symbolic act to assert public access to natural resources.

The court evaluated whether the protesters' actions constituted illegal interference with property rights or were a legitimate exercise of free expression.[24] It drew upon the standards established by the ECtHR regarding the balance between protecting property rights and upholding

23 Judgment of the First Basic Court in Belgrade, 56 P no. 20265/2020 of March 30, 2021.
24 Judgement of the Basic Court in Novi Sad P. 51978/2021 of December 23, 2022.

the right to freedom of expression. The court found that the protesters' actions served a public interest by highlighting issues related to access to public land and environmental stewardship.

As a result, the court dismissed the request to penalize the protesters, emphasizing the importance of allowing peaceful protest as a means of expressing dissent and advocating for environmental causes. This case illustrates the judiciary's role in navigating the complexities of conflicting rights in environmental matters.

4. Conclusion

The implementation of the Aarhus Convention standards into Serbian law has fostered a culture of cooperation and solidarity surrounding environmental governance. Over the years, Serbia has made notable strides in aligning its legal frameworks with the principles of access to information, public participation, and access to justice, as mandated by the Convention. The establishment of educational programs, including courses in Environmental Law and practical training in legal clinics, has significantly enhanced the capacity of future legal professionals to engage with the nuances of environmental issues through the lens of the ECtHR jurisprudence.

The implementation of these principles faces significant barriers, notably in areas such as timeliness of access to information, the capacity for public representation, and the strategic use of litigation to stifle public participation. The ECtHR has begun to address these challenges through its jurisprudence, recognizing the interconnection of human rights and environmental protection. Cases such as *Eólica de S. Julião v. Portugal*, *Cangi and others v. Turkey* and *KlimaSeniorinnen Schweiz v. Switzerland* underscore the Court's evolving interpretation of public legitimacy in environmental matters, expanding the criteria for who may claim victimhood in the face of environmental degradation. These cases broaden the criteria for who can be considered a victim of environmental harm and clarify the rights of involved parties during both the decision-making process and the review of environmental decisions. Furthermore, in line with the principle of *audiatur et altera pars*, the ECtHR emphasizes that representatives of collective and broader public interests have the right to participate in the examination process.

Furthermore, the emergence of SLAPP lawsuits poses a serious threat to public engagement and environmental advocacy, revealing the stark power imbalances between corporations and citizens. The ECtHR's decisions reflect a growing awareness of these dynamics, affirming the need for robust legal protections against such tactics.

Key rulings in Serbian courts illustrate the active application of these standards in addressing environmental and human rights issues. The Supreme Court of Cassation's decision regarding property rights in the context of environmental conservation emphasizes the need for balancing individual rights with collective environmental responsibilities. Similarly, the Administrative Court's recognition of environmental NGOs' standing to contest unlawful permits demonstrates a commitment to enhancing public participation in environmental decision-making, reinforcing the idea that civil society plays an essential role in safeguarding environmental integrity.

A landmark development was the recognition of *actio popularis* claims, allowing environmental NGOs to advocate for public interests. This pivotal ruling in 2022 marked a significant shift in Serbian legal practice, highlighting the judiciary's recognition of the importance of collective action in addressing environmental threats. Moreover, cases that affirm the right to clean drinking water and the right to a peaceful living environment underscore the interconnectedness of environmental quality and fundamental human rights, particularly the right to life and personal dignity.

Judicial responses to noise pollution and the defence of freedom of assembly illustrate the courts' increasing sensitivity to the socio-environmental context. These cases reflect a growing awareness that environmental issues are not merely regulatory challenges but are deeply entwined with individual and collective rights, thereby enhancing the legal landscape for environmental justice in Serbia.

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Challenges in the implementation of the Aarhus Convention in Montenegro - good intentions and questionable practices?

Abstract: The Aarhus Convention, as a unique International Environmental Law convention containing procedural tools for the protection of environmental rights and serving as a link to the protection of human rights, deserves a brief overview of its history and its introduction to Montenegro. This is an atypical situation when it comes to international conventions because preparatory activities for ratification and the creation of conditions for the early implementation of this convention began a whole decade before it was formally ratified in 2009. Among other things, this is thanks to several international organizations that have recognized the significance of the Aarhus Convention not only for the protection of the environment and human health but also for the general democratization of society in the region. It can be concluded that never before has similar importance been attached and groundwork prepared for the implementation of a legal regulation in Montenegro as is the case with the Aarhus Convention. Even the Constitution of Montenegro from 2007, adopted before the ratification of this convention, was enriched with a provision outlining the three pillars on which the Convention rests.

Next, we will highlight the legal framework in Montenegro that enables the implementation of the Aarhus Convention and point out certain shortcomings, as well as the challenges in the application of regulations, in the domain of access to information, public participation in decision-making in a narrow sense (primarily in the field of Environmental Impact Assessment), and the legal protection of rights under the Convention and, in general, the environment.

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I will also point out the differences between national law and practice in the implementation of the Aarhus Convention in comparison to the legal framework of the European Union, taking into account the evolution of the Aarhus Regulation concerning the application of the provisions of the Aarhus Convention to Community institutions and bodies.

Additionally, I will provide guidelines towards specific improvements in the legal framework and practices of the relevant authorities in Montenegro regarding the implementation of the Aarhus Convention.

Keywords: Aarhus Convention, Montenegro, early implementation, access to information, access to justice, caselaw

1. Introduction

In the celebratory spirit of marking the anniversary of the implementation of the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)[1] in the region, this paper will, among other things, strive to preserve from oblivion some of the activities undertaken to prepare our countries and the public for the implementation of this convention, using Montenegro as an example. The author of this paper, for whom this convention has marked a significant part of their professional career, feels a particular moral obligation to emphasize the importance of organizations that no longer operate in their previous capacity, such as the Regional Environmental Center for Central and Eastern Europe (REC).[2] Thanks to REC's projects, the Aarhus Convention became the subject of interest for the professional community in Montenegro even in the period preceding the confirmation of the Aarhus Convention (1998-2009).[3] Several analyses of the national legal framework and its alignment with the Aarhus Convention have been conducted.[4] Additionally, as part of developing a strategy for the early implementation of the Convention, Manuals for the application of the Convention were prepared for pub-

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1 It was enacted on June 25th 1998, by the Fourth Ministerial Conference "Environment for Europe". The Convention came into effect on October 30th 2001 and Montenegro ratified it in 2009.

2 REC was established in 1998, as the Regional Environmental Center for Central and Eastern Europe (REC CEE), with its seat in Hungary. This international organization worked in the field of promoting cooperation among governments, non-governmental organizations, businesses and other environmental stakeholders, and supported the free exchange of information and public participation in environmental decision making.

3 Zakon o potvrđivanju Konvencije o dostupnosti informacija, učešću javnosti u donošenju odluka i prava na pravnu zaštitu u pitanjima životne sredine, "Službeni list Crne Gore - Međunarodni ugovori", br. 003/09.

4 Non-exaustive list of related projects include: Support Developing Strategies for the Implementation of the Aarhus Convention (REReP 2.2), 2001; Support to Implementation and Accession to the multilateral treaties in South Eastern Europe (REReP 1.12), 2002; Development of Environmental Legislation in Serbia and Montenegro (Yugolex), 2003/2004; Developing activities for Protocol on Pollutant Release and Transfer Registers-PRTR Protocol in Montenegro, Aarhus project, REC, 2006.

lic authority representatives, as well as for non-governmental organizations. It is noteworthy to emphasize that the author of this paper, in their capacity as a member of parliament and a member of the special committee of the Parliament of Montenegro tasked with drafting a new constitution, contributed to incorporating the concept of public participation in environmental matters and the three pillars of the Aarhus Convention into the Constitution of Montenegro from 2007.

Moreover, the period both preceding and following the ratification of the Aarhus Convention in Montenegro was filled with activities, alongside the REC, of the Organization for Security and Co-operation in Europe (OSCE).[5] It supported the establishment of the Aarhus centres, which at one point amounted to five centres,[6] while presently only two of them remain operational. In the post-confirmation period of the Convention, the focus was on analyses and recommendations for improving legal protection (implementation of Article 9 of the Convention).[7]

In the following presentation, I will briefly touch upon the legal framework in Montenegro, issues in the implementation of the Convention, and provide recommendations for specific improvements.

2. Legal Framework for Public Participation in a Broader Sense

One of the peculiarities of the Montenegrin legal framework is that the three pillars of the Aarhus Convention – access to information, public participation and access to justice in environmental matters are guaranteed by its Constitution. Montenegro as a self-proclaimed "ecological state" (by the 1991 declaration of the Parliament of Montenegro, as well as by its 1992

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5 Relevant activities include, among others: The Analysis of the Harmonization of Legal Framework of Montenegro with the Aarhus Convention, OSCE, Podgorica, 2009; M. Kostic-Mandic, Challenges in Exercising the Right to a Healthy Environment in Montenegro – Public Participation and Prosecution of Environmental Crime and Offences, OSCE - Mission to Montenegro, Podgorica, 2011.

6 The OSCE, in close partnership with the UNECE and other partners in the Environment and Security Initiative, has been supporting the establishment and operation of a network of Aarhus Centers since 2002. There were five Aarhus Centers in Montenegro: the Aarhus Centers in the cities of Podgorica and Nikšić were established in 2011; one year later, 2012, the Aarhus Centre in Berane was opened, followed by the Aarhus Centres in Pljevlja and Kolašin. The Centers in Podgorica and Berane were regional and institutionally established as an organizational unit of the Agency for Nature Protection and Environment, while others were established by the NGOs. The focus of all centers was on strengthening partnerships among civil society, government and other stakeholders to reinforce the implementation of the Aarhus Convention.

7 Research Framework for the Access to Justice Studies in the SEE Region, REC, 2013-2014, ENVSEC1 Programme "Transforming Environmental and Security Risks into Cooperation in the South Eastern European Region (SEE) (phase II), 2013-2015" REC, UNECE and OSCE, 2013-2014; 'Better Access to Justice in the South Eastern Europe' implemented by The Regional Environmental Center (REC), 2016-2017.

and 2007 Constitution)[8] treats the right to a healthy environment as a human right in common provisions on human rights and freedoms. Compared to the provisions from the 1992 Constitution, the Article 23 paragraph 2 of the 2007 Constitution,[9] strongly influenced by the wording on the three pillars of the Aarhus Convention develops the concept of public participation in environmental decision-making. Thus, to the right to timely and complete information which was also part of the previous Constitution, the possibility of making an impact in the decision-making process and access to justice in environmental matters have been added. These rights are reinforced by the Article 23 paragraph 3 of the 2007 Constitution that the duty to preserve and promote the environment applies to everybody and especially to the State. In that way the three pillars of the Aarhus Convention became part of the national legal system even before Montenegro ratified the Convention in 2009. The Aarhus Convention now provides a general legal framework for the right to access information, public participation and access to justice in this field, as pursuant to the Article 9 of the Constitution the ratified international agreements make an integral part of the internal legal order, have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation.

The legal framework for access to information in the law of Montenegro, in addition to the Constitution, the Aarhus Convention,[10] and other relevant ratified conventions, also includes several laws, some of which are general, while others specifically pertain to the environment.[11] Based on constitutional provisions, the right to access information on the environment, as well as the legal protection of that right, are inseparably linked to the right to a healthy environment. The content of the right to a healthy environment is understandably not addressed by the Constitution but is detailed by national regulations and ratified international conventions. Furthermore, the Constitution of Montenegro at Article 51 makes clear that "Everyone shall have the right to access information held by the state authorities and organizations exercising public authority". The only limitations on this right are those that can be justified on

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8 M. Kostic-Mandic, *Environmental rights in the new Constitution of Montenegro*, Entwicklungen im Europäischen Recht, Developments of European Law, Développements en Droit européen, ed. Rainer Arnold, Universitätsverlag Regensburg, 2010.

9 Constitution of Montenegro, "Official Gazette of Montenegro", br. 001/07, 038/13.

10 The Aarhus Convention legally binds Montenegro as of February 2, 2010.

11 Among the general laws in this field, the following are significant: the Law on State Administration, the Law on Local Self-Government, the Media Law, the Law on Classified Information, as well as the General Administrative Procedure Act, the Administrative Dispute Act, the Criminal Code, and others. Regarding laws related to the environment that contain provisions on access to information, these include: the Law on Nature Protection, the Law on Environmental Impact Assessment, the Law on Strategic Environmental Impact Assessment, the Law on Integrated Prevention and Control of Environmental Pollution, and others. See more: Maja Kostić-Mandić, *Implementation of the Aarhus Convention*, European Movement in Montenegro, Podgorica, 2015, 7-24.

grounds of "protection of life; public health; morality and privacy; carrying of criminal proceedings; security and defence of Montenegro; foreign, monetary and economic policy." These rights are exercised based on national regulations, and in the case of Montenegro, the right to access information is governed by the Environmental Law[12] and the Law on Free Access to Information.[13] The protection of the right to access information in general, including in the field of the environment, is primarily ensured by the Law on Free Access to Information.

The provisions of the Law on Free Access to Information, which generally address information access, should be considered in conjunction with the relevant provisions of the Environmental Law, which complement them to align with the provisions of the Aarhus Convention. Thus, the Environmental Law defines, among other things, what constitutes information on the environment (Article 67), specifies the information that the Environmental Protection Agency is obligated to disclose (Article 68),[14] and includes a specific provision dedicated to rejecting requests for access to environmental information (Article 70),[15] aligning the right with the Aarhus Convention.

According to the Law on Free Access to Information, the right to access information is treated as a fundamental right and is guaranteed at the level of principles and standards contained in international documents on human rights and freedoms,[16] even though that was the initial intention of the legislator in 2012. However, all the good provisions contained in this law (the law specifies grounds for restricting access to information, the procedure for accessing information, as well as penal provisions), which were supposed to ensure effective implementation and protection of this right, have been called into question due to amendments to Article 1 of this law in 2017. These amendments further exacerbated the initial issue from the original version of the 2012 law. Although the law includes a test foreseeing that, in the application of grounds for refusing to provide information, the public interest in disclosing informa-

12 Environmental Law, "Official Gazette of Montenegro", br. 052/16, 073/19, 073/19.

13 Law on Free Access to Information, "Official Gazette of Montenegro", br. 044/12, 030/17.

14 The obligation to provide and submit data, as well as maintaining public records, is established by other regulations that protect specific segments of the environment (including, among others, the Law on Air Quality, the Law on Waters, the Law on Environmental Impact Assessment, the Law on Strategic Environmental Impact Assessment, and others). Non-compliance with this obligation entails misdemeanor liability.

15 Article 70 of the Environmental Law reads: "The request under Article 69 of this law will be rejected in cases determined by the law regulating free access to information. If the request pertains to information, documents, or other data in the process of preparation, the rejection will specify the authority preparing the information, document, or other data, as well as the time required for their completion. The request for access to environmental information cannot be refused if it pertains to emissions of pollutants into the environment. An appeal against the decision rejecting the request for access to environmental information can be filed with the competent authority."

16 Article 1 of the Law on Free Access to Information.

tion will be considered (Article 16), and whether the requested information relates to environmental harm (Article 17, paragraph 1 (7)), it does not stipulate that the grounds for refusal will be interpreted restrictively, as provided in the Aarhus Convention (Article 4.4.2 of the Aarhus Convention). This inconsistency with the Aarhus Convention became particularly pronounced after the amendments to this law were adopted in 2017. Thus, following the statement in Article 1, sentence 1, which reads: "Right to access and reuse information held by public authority bodies shall be exercised in a manner and in accordance with a procedure specified by this Law," the amendments, among others, in Article 1 paragraph 2 introduce that: "The provisions of this law shall not apply to: …2. information that must be kept secret, in accordance with the law regulating the field of classified information;…" Obviously, this is in contravention of the Montenegrin Constitution, international standards, and even this and other provisions of the Law on Free Access to Information as it is acceptable to classify information but such classification must always be reviewed pursuant to a request for the information, with the harm and public interest being evaluated. Furthermore, the comparative jurisprudence limits the use of general presumptions of non-disclosure.[17] This new provision led to the massive increase in number of classified information by all the governments of Montenegro since 2017. Moreover, in the previous period, there was a tendency to expand the concept of secret information in proposals for changes to the law, and in practice a significant amount of information was declared secret internally. This was particularly characteristic during the 41st Government of Montenegro, in the period 2016-2020. The new amendments to the provisions in Article 1, which should address this issue are still awaiting in 2023.

Other provisions of this law, in practice, do not pose a problem.

3. Access to justice

The right to legal protection has been guaranteed by Article 9 of the Aarhus Convention, which encompasses legal tools for enforcing the rights for access to information and participation, challenging the environmental legality of public decisions, as well as general infringements of national environmental law before courts and non-judicial instances. The core of the procedural participatory democracy within the Aarhus Convention is the possibility that non-governmental organizations and members of the public – deemed as "public concerned" according to their national legislation may have a legal standing to challenge the substantive and procedural legality of any decision, act or omission of public authorities under condi-

17 *Law on Free Access to Information Of Montenegro – Analysis*, Access Info Europe, Network for Affirmation of NGO Sector – MANS, Podgorica, 2018, 8, available at: https://www.mans.co.me/wp-content/uploads/2018/06/AIE-MANSanalysis.pdf

tion that they have a sufficient interest or, alternatively, are maintaining impairment of a right. Moreover, members of the public have access to administrative or judicial procedures to challenge acts and omissions by public authorities which contravene provisions of its national law relating to the environment. The timely rendered decisions shall be in writing and the court decisions shall be publicly accessible.[18] However, Article 9(3) of the Aarhus Convention, which guarantees access to justice is not directly justiciable as its provisions are rather general and instructive, so it is up to the national judiciaries to implement them according to their respective legislation, practically the sole scrutiny procedure of their compliance with the provisions of the Convention being the procedure before the Compliance Committee.[19]

The legal framework of Montenegro related to the third pillar of the Aarhus Convention is in line with the requirements of the Aarhus Convention, and below, I briefly reflect on the practice of Montenegro's state authorities in this area, primarily in the domain of access to information. Previously, it should be noted that decisions on requests for access to information are made in an expedited administrative procedure, and the deadlines for decision-making prescribed by the Law on Free Access to Information are short, significantly shorter than those set by Article 4.2 of the Aarhus Convention.[20] If the competent authority denies access to information, it is obliged to provide an explanation regarding the reasons for refusing the request. The costs related to the procedure for exercising the right to access information are borne by the requester, with these costs limited to the actual expenses of the government authority (copying, transcription, translation).

Access to justice regarding access to environmental information in the Montenegrin legal framework is in compliance with the Article 9 of the Aarhus Convention. The *locus standi* is wide, and it encompasses individuals, a group of individuals and NGOs. They can appeal to an independent supervisory authority - the Agency for the Protection of Personal Data and

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18 *See* Art. 9 (2), (3), (4) respectively.

19 *Guide to the Aarhus Compliance Committee*, UNECE, 2010, available at: https://unece.org/DAM/env/pp/Publications/Guide_to_the_Compliance_Committee__second_edition__2019_/English/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf

20 The public authority is obliged to decide on the request for access to information within 15 days from the date of submission of the request, and in exceptional cases, this period can be extended by 8 days (due to the volume of the requested information, if any of the data in the information is classified as confidential, or if finding the requested information requires more time).

Access to Information.[21] In the case of a negative decision by the Agency, the party has the right to initiate administrative proceedings before the Administrative Court.[22] However, in exceptional cases where the requested information/documents are classified as confidential, leading to the rejection of the request by the government authority, the party has the right to directly file a lawsuit with the Administrative Court.[23] Against the decision of the Administrative Court, the party can lodge an extraordinary legal remedy - a request for extraordinary review of the court decision, which is decided by the Supreme Court of Montenegro. Additionally, a proceeding can be initiated before the Constitutional Court, citing a violation of the human right to access information. The Law on Free Access to Information also stipulates misdemeanour liability for government authorities obstructing the exercise of the right to access information.[24] When discussing information accessibility, it is noteworthy that the Criminal Code of Montenegro includes a specific criminal offense, "violation of the right to be informed about the state of the environment."[25]

Based on the previous practice in Montenegro, legal protection of the right to access information is usually sought before the Agency for Personal Data Protection and Access to Infor-

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21 For example, in one case, the Agency accepted the complaint from the NGO Network for the Affirmation of the Non-Governmental Sector (MANS) and instructed the Secretariat for Spatial Planning of the Municipality of Pljevlja to issue a decision on the request for free access to information. In this case, the NGO MANS submitted a request for access to information to the Ministry of Sustainable Development and Tourism and the Municipality of Pljevlja, specifically to the Secretariat for Spatial Planning, seeking a copy of the operating permit for the first block of the Pljevlja Thermal Power Plant. The Secretariat for Spatial Planning of Pljevlja declared itself incompetent on this matter. MANS filed a complaint with the Agency for the violation of procedural rules - the failure of the Secretariat to issue a decision.

22 In case no. 292/15, the Court considered the allegations of the lawsuit that the plaintiffs were not allowed to participate in the proceedings and that they were not provided with the updated versions of the Environmental Impact Assessment Reports. However, it found the claims of the lawsuit to be unfounded. The Court stated that in the case files, there are duly signed delivery receipts, which serve as evidence that the plaintiff was informed, and the decision to grant approval was published on the website of the Environmental Protection Agency and in the printed editions of the daily newspapers "Vijesti" and "Dan," thereby enabling them to pursue and protect their interests. In another case, no. 2314/15, resolving the administrative dispute on the complaint filed by MANS against the decision of the Personal Data Protection and Access to Information Agency, number UPII 1527/15-1 dated July 28, 2015, the Administrative Court issued a judgment that the lawsuit is accepted, and the decision of the Agency is annulled.

23 Article 34 of the Law on Free Access to Information.

24 Article 47 of the Law on Free Access to Information.

25 Article 317 of the Criminal Code states: "(1) Anyone who, contrary to regulations, withholds data or provides false data about the state of the environment and phenomena necessary for assessing environmental hazards and taking measures to protect the life and health of people shall be punished by a fine or imprisonment of up to one year."
(2) The punishment prescribed in paragraph 1 of this article shall also apply to anyone who disseminates false information about the state of the environment to the public, thereby causing panic or significant disturbance to citizens." Criminal Code of Montenegro, ("Official Gazette of the Republic of Montenegro," No. 070/03 of December 25, 2003, 013/04, 047/06, "Official Gazette of Montenegro," No. 040/08, 025/10, 073/10, 032/11, 064/11, 040/13, 056/13, 014/15, 042/15, 058/15, 044/17, 049/18, 003/20 of January 23, 2020, 026/21, 144/21, 145/21).

mation, and sometimes before the Administrative Court. Based on the available data from the research conducted for the purposes of this paper, it can be conclusively determined that the constitutional appeal procedure for the violation of the human right to access environmental information has not been utilized so far, nor have international procedures been initiated. Also, in official databases of judicial practice and based on inquiries made to the presidents of the two courts with the highest caseloads in Montenegro (Basic Court in Podgorica and Basic Court in Bijelo Polje), I was unable to find judgments related to the criminal offense "violation of the right to be informed about the state of the environment" from Article 317 of the Criminal Code of Montenegro, even though there were criminal reports.[26]

Considering that in the majority of cases, non-governmental organizations initiate proceedings to protect the right to access information, it is not surprising that they typically commence proceedings before extrajudicial bodies, where specialized legal knowledge is not required, thus avoiding representation costs and other expenses associated with legal proceedings. As it appears in practice, we can see based on the following data. According to information obtained from the Agency for Personal Data Protection and Access to Information, they processed 74 requests related to access to environmental information from 2013 to the end of August 2017. In the majority of cases, the request was positively resolved, and the request for access to information pertained to the content of impact assessment reports as well as acts containing information about the state of the environment. The most common applicants are non-governmental organizations (with MANS taking the lead), but there are also requests from individuals. The latest data indicates a significant increase in the number of requests to this agency: from September 1, 2017, to May 1, 2023, 386 requests for access to environmental information were submitted. Out of these, 196 were approved, and 104 requests were denied.

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26 In the first proceeding initiated based on this criminal offense, the NGO MANS filed criminal charges on July 3, 2005, against the assistant minister for environmental protection. This was because the request for information from the documents "Determination of the current state of the environment" and "Environmental impact assessment," which contained the results of the due diligence analysis for one of the then-largest environmental polluters in Montenegro undergoing privatization, was rejected. The refusal was justified by stating that the requested information was not in the possession of the Ministry. The same NGO also filed a criminal complaint against the director of the Center for Ecotoxicological Studies, who refused to provide the Baseline Environmental Status Study for the same company, stating that the owner of that information is the Government of Montenegro and they should contact it for information. The plaintiff considered that only the part of the criminal complaint relating to the responsible person in the line Ministry had merit, and after the investigation, submitted a proposal for indictment to the Basic Court in Podgorica. However, on April 7, 2008, the basic state prosecutor responded to MANS's inquiry about the status of the procedure, stating that the proceedings were terminated because they had withdrawn from the criminal prosecution during the process. See: *Studija slučaja-Krivično djelo povrede prava na informisanje o stanju životne sredine*, MANS, 27, 30, https://www.mans.co.me/wp-content/uploads/mans/publikacije/zeleni_lavirint/4%20Studija%20slucaja%20Krivicno%20djelo%20povrede%20prava%20na%20informisanje%20o%20stanju%20zivotne%20sredine.pdf

However, when analysing the data and cases presented by non-governmental organizations, especially in the earlier period, I encounter not only examples of good practice but also negative examples. Information has been sought from relevant institutions, among other things, regarding payments of environmental pollution fees by some polluters, as well as copies of reports on investments in environmental protection. In most cases, the institutions either did not have the information or declared themselves as not having jurisdiction.[27] This especially applies to the Environmental Protection Agency and the ministry responsible for environmental protection. Indicative are the data regarding the actions of public authorities in the case of requests for access to information about citizens' health. In these cases, the Ministry of Health and the Institute of Public Health declared themselves as not having jurisdiction, while the Health Center Pljevlja responded that it did not have the requested information.[28] Such actions by institutions in response to requests from non-governmental organizations constitute a violation of the Aarhus Convention, which stipulates that even if a public authority does not possess the requested information, it does not exempt it from obligations towards the requester. Because the public authority is obligated to promptly inform the requester which authority possesses the requested information or to forward the request to the competent authority and notify the requester accordingly.

The practice regarding access to information in the recent period, especially after the amendments to Article 1 of the Law on Free Access to Information, is particularly indicative. This is best illustrated by the case of the devastation of the Tara River during the construction of the only Montenegrin highway. Given that the wider public was not informed about the fact that a part of the highway would pass through the bed of the nationally and internationally protected Tara River until October 2018, they were not only deprived of the right to information but also the opportunity to participate in decision-making. Since the revelation of the river's devastation, which lasted continuously for several years during the construction of the highway section, the NGO MANS was attempting to obtain environmental data using the Law on Free Access to Information. In numerous procedures related to this issue, the NGO refers to the Constitution of Montenegro and the Aarhus Convention[29], which guarantee the right to access information in the field of the environment. However, state institutions then began the

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27 *Zagađenje u opštini Pljevlja - Izvještaj o kvalitetu vazduha u Opštini Pljevlja 2009–2012,* NVO Breznica, 2013, http://www.mans.co.me/wp-content/uploads/spi/IPAMonitoring/Breznica/IPABreznicaMN.pdf

28 The NGO Breznica requested data on the number of lung cancer cases, the number of prematurely born children, and the number of children born with anomalies in the municipality of Pljevlja. Ibid.

29 *Slobodan pristup informacijama u vezi sa devastacijom rijeke Tare projektom izgradnje autoputa*, MANS, Podgorica, 2020, 2, https://mans.co.me/wp-content/uploads/2020/05/Slobodan-pristup-informacijama-u-vezi-sa-devastacijom-Tare-studija-sluc%CC%8Caja.pdf; *Da li će Tara preživjeti auto-put*? MANS, Podgorica, 2019, 18, https://mans.co.me/wp-content/uploads/2019/11/Studija.pdf

practice of declaring information about the environmental condition as "business secrets".[30] The Ministry for Environmental Protection rejected the request for providing the Main Project of subsection 4.4.1 and the Report on its revision, citing the need to protect the safety of the highway. This was the information that the NGO sought to gain insight into how the design of the bridge supports crossing the bed of the Tara River was permitted. Still, it left open the possibility of reviewing the documentation without copying or transcribing. While in the initial period, the Administrative Court issued decisions in favour of this NGO, this court drastically changed its practice in cases related to the highway, making even more information inaccessible to the public.[31]

Access to justice in the context of public participation, in a narrower sense, in Montenegro primarily pertains to cases related to Environmental Impact Assessments. National law in this area is fully aligned with European Union law,[32] and the Law on Environmental Impact Assessment establishes liability for a wide range of entities for various offenses, including legal entities that are project proponents, responsible persons in legal entities, entrepreneurs, individuals, as well as responsible persons in administrative and local government bodies.[33] Since 2018, misdemeanour courts, while adjudicating in misdemeanour proceedings, have issued 23 court decisions. In 18 cases, the courts imposed fines on the defendants, in four cases, they rendered acquittals, while in one case, the proceedings were terminated.[34] It is interesting to note that in a significant number of cases, courts have imposed minimal fines, with the option to pay 2/3 of the fine within 15 days, further reducing the amount of the penalty. This, for large investment projects and anticipated profits (such as in the case of hotels, concrete production facilities, etc.), represents a negligible cost for the project proponent, and in some instances, courts have even imposed fines lower than the legally prescribed minimum.[35]

30 The European Parliament also recognized the poor practices of the institutions, emphasizing in its resolution on Montenegro, among other things, that "accurate and timely information regarding the impact of highway construction on the Tara River must be shared with the wider public." Ibid.

31 *Put bez kraja*, MANS, Podgorica, 2020, 40-42, https://mans.co.me/wp-content/uploads/2020/10/Cetvrti-izjvjestaj-o-izgradnji-autoputa-PUT-BEZ-KRAJA.pdf

32 In Montenegro, the environmental impact assessment was initially regulated by the law of the same name from 2005. After several amendments, the Environmental Impact Assessment Law of 2018 is currently in force ("Official Gazette of Montenegro" No. 75/18). According to the National Strategy for the transposition, implementation, and application of the acquis of the European Union in the field of the environment, this law is fully aligned with Directive 2011/92/EU.

33 Arts. 35 and 36 of the Environmental Impact Assessment Law.

34 *Projektna procjena uticaja na životnu sredinu (Analiza zakonodavnog okvira i primjene kaznene politike*), Eko tim, 2023, Podgorica, 24.

35 Ibid, 25.

4. Access to justice in Aarhus Regulation and Montenegro

Montenegro has been a candidate country for EU accession since 17 December 2010. In order to keep a positive spirit regarding Montenegro eventual accession to the EU, I shall briefly address the legal framework regarding *locus standi* according to the Aarhus Regulation, which enables application of the provisions of the Aarhus Convention to Community institutions and bodies. In order to ensure the full compliance of the Aarhus Regulation with the Aarhus Convention, it has been revised by adopting the 2021 amendment.[36] The amendments to the Article 10 of the 2006 Aarhus Regulation now enable other members of the public, beyond NGOs to request internal reviews of administrative acts if they meet prescribed conditions. Here we have two different situations depending on individual or public interest at stake. In a first case scenario the legal standing of private parties is conditioned by meeting two cumulative requirements: that the members of the public demonstrate an impairment of their rights caused by the alleged contravention of environmental law and that they are directly affected by such impairment in comparison with the public at large. With this wording the 2021 Aarhus Regulation "without establishing an actio popularis, bypasses the severe (in)admissibility criterion of the Plaumann case."[37] The second case scenario provides that members of the public demonstrate a sufficient public interest and that the request is supported by at least 4,000 members of the public residing or established in at least five Member States, with at least 250 members of the public residing or established in each of those Member States. In both cases, the members of the public shall be represented by an NGO or a lawyer.

5. Conclusions

The legal framework of Montenegro related to all three pillars of the Aarhus Convention is generally in line with the requirements of the Aarhus Convention and is aligned with international standards in this area. The main area for improvement concerns amendments to two provisions of the Law on Free Access to Information. First, it is necessary to delete in Article 1 paragraph 2 that the provisions of this law shall not apply to "information that must be kept secret, in accordance with the law regulating the field of classified information" as a general presumption of non-disclosure, even more as the said law does not address informa-

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36 Regulation (EU) 2021/1767 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R1767. The amendment entered into force on 28 October 2021, with the exception of Article 1, point (3)(a), which shall apply from 29 April 2023.

37 Georges Dellis , *Greening Luxembourg? Environmental rights after the 2021 amendments of EU Aarhus Regulation*, available at: https://www.chemins-publics.org/articles/greening-luxembourg-environmental-rights-after-the-2021-amendments-of-eu-aarhus-regulation

tion deemed to be secret. This provision is in contravention of the Montenegrin Constitution, international standards, and even this and other provisions of the Law on Free Access to Information as it is acceptable to classify information but such classification must always be reviewed pursuant to a request for the information, with the harm and public interest being evaluated. Furthermore, the prospective amendments to the Law on Free Access to Information should also include adding a new paragraph to the Article 14, with the wording in compliance with the Article 4, paragraph 4(2) of the Aarhus Convention that "the aforementioned grounds for refusal shall be interpreted in a restrictive way" in addition to the existing test on the public interest served by disclosure and taking into account whether the information requested relates to impairment of the environment. As the final clause of Article 4, paragraph 4 of the Aarhus Convention instructs Parties and public authorities on how to interpret all of the exceptions to access to information under that paragraph. Therefore, it should ensure that the Law on Free Access to Information makes clear that every request for information, be it information previously classified or not, previously refused or not, must be taken on a case-by case basis and there must be an evaluation done at the time that the request is received.

Based on the above, it is clear that the Law on Free Access to Information provides adequate legal and judicial protection in case of violations of the right to access information in the field of the environment. It would be beneficial to conduct an analysis of the Administrative Court's actions to determine whether there has been a shift in the handling of information access lawsuits, which was previously affirmative, due to the amendments to this law in 2017 or if there are other reasons at play. Also, in the realm of access to justice, the emphasis should be on training and specialization of state authorities, especially judges handling environmental cases, to avoid situations where misdemeanour courts impose minimal fines or even further reduce them. This is evident in the application of criminal provisions of the Law on Environmental Impact Assessment, making the fines negligible for project proponents, especially for large investment projects and anticipated profits. And, with such penal policy, the purpose of punishment and deterrence of the same behaviour by future offenders is certainly not achieved. Additionally, representatives of non-governmental organizations invoke the Aarhus Convention in practice, but not the courts.

And finally, the non-governmental sector and the interested public, in general, struggle to access legal assistance and representation, without which a good national legal framework remains a dead letter on paper. The latest example, that some of them failed to obtain a lawyer to represent them in the proceedings they wanted to initiate due to air pollution, best illustrates the aforementioned. Also, the free legal aid to NGOs and individuals, as well as groups of individuals, is mostly tied to specific project activities that are temporally and financially limited. Considering the mentioned, it should be considered how these shortcomings could

be rectified or mitigated. Possible solutions to this problem could include revitalizing almost dormant Aarhus Centres, which could provide legal assistance; networking NGOs with counterparts from other countries, especially from the region, whose experiences could be utilized in proceedings, reducing costs and overcoming language barriers; and connecting with the legal clinic at the Faculty of Law, University of Montenegro, where students, under the guidance of professors, offer free legal assistance.

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25 years since the Aarhus Convention - challenges for Bosnia and Herzegovina

Abstract: By acceding to the Aarhus Convention, Bosnia and Herzegovina has taken a significant step toward the development of environmental democracy. Given the complexity of its state-legal organization, the promotion of participatory democracy, and the enhancement of environmental awareness both locally and globally, the issue of properly implementing the Aarhus Convention should be considered within the context of these dimensions. Recognizing the multifaceted challenges facing Bosnia and Herzegovina, this paper first provides a brief overview of these dimensions and then examines the state of implementation of the Convention's provisions. This analysis utilizes positive legal regulations, national reports on the Convention's implementation, and shadow reports. The paper gives a brief overview of the situation in Bosnia and Herzegovina without considering in detail pillars of the Aarhus Convention or the relationship between substantive and procedural rights, which would require a more detailed analysis.

Keywords: complexity of the state structure, environmental democracy, environmental awareness, implementation of the Aarhus Convention

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1. Introduction

Since the adoption of the Aarhus Convention 25 years ago[1], the international legal framework in the field of environmental protection has been firmly established. For Bosnia and Herzegovina, accession to the Aarhus Convention in 2008[2] was undoubtedly a significant step toward the development of environmental democracy. Given that this step was taken in a multidimensional environment, it is reasonable to ask: How many steps have we taken? How far have we come? And how many steps are still ahead of us?

Challenges in implementing the Convention in Bosnia and Herzegovina should be viewed from the perspective of at least three dimensions. First, it is the complexity of the administrative structure of Bosnia and Herzegovina which also affects the area of environmental protection. Second, despite the positive legal framework, participatory democracy is still underdeveloped, as is the awareness of the importance of environmental protection. Finally, on the third side is the socio-economic context and the era we live in, where the pursuit of the highest possible living standards and economic development has increasingly intensified the pressure on the environment.

2. Complexity of the administrative structure of Bosnia and Herzegovina

The first challenge that Bosnia and Herzegovina faces is related to the complexity, distinctiveness, and nuanced nature of its administrative structure, which also impacts the field of environmental protection. According to the Constitution of Bosnia and Herzegovina, the state is administratively organized into two entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska (RS); along with the Brčko District of Bosnia and Herzegovina (BD) as a local self-governing unit. Article III of the Bosnia and Herzegovina Constitution[3] defines the competencies of the state and its administrative units. At the state level environmental protection does not enjoy direct constitutional protection because the Bosnia and Herzegovina Constitution does not explicitly mention the right to a healthy environment or its protection. However, the right to a healthy environment is implied within the right to life, as prescribed in Article II/3. a) of the Bosnia and Herzegovina Constitution. Therefore, Bosnia and Herzegovina and its administrative units are committed to ensuring the highest levels of internationally

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1 The Aarhus Convention was adopted at the Fourth Ministerial Conference "Environment for Europe" on June 25, 1998. in Aarhus (Denmark), and entered into force on October 30, 2001. after it was ratified by 16 states.

2 Bosnia and Herzegovina acceded to the Aarhus Convention on September 15, 2008. (Official Gazette of Bosnia and Herzegovina-MU, number: 8/08)

3 Constitution of Bosnia and Herzegovina, Article III (1) b), c), d), e)

recognized human rights and fundamental freedoms[4] which are directly applicable in Bosnia and Herzegovina and take precedence over all other laws. Since there is no state-level law on environmental protection, this responsibility falls to the administrative units.

Thus, the Constitution of the RS explicitly mentions the environment in Chapter II Human Rights and Freedoms[5], indirectly refers to the human environment in Chapter III[6], and establishes the RS's responsibility for regulating and ensuring environmental protection in Chapter IV[7], along with the authority of municipal government bodies in this area[8].

Although the Constitution of the Bosnia and Herzegovina, as well as the constitutions of the 10 cantons in the Bosnia and Herzegovina, do not provide a specific definition of environmental rights, the Constitution of Bosnia and Herzegovina defines the responsibilities of this entity and its cantons in the field of environmental protection[9].

As for BD, the Statute of the Brčko District[10] provides this administrative unit with the same competencies as entities, municipalities (and cantons in Bosnia and Herzegovina) regarding environmental protection[11].

In addition to constitutional provisions, environmental protection at the level of administrative units is regulated by a series of legal[12] (and by-law) acts. The provisions of these laws are generally compatible with each other in terms of regulating protection and preservation, methods of use and management, as well as the rights and obligations of authorities in environmental matters.

The institutional framework is defined by the constitutional distribution of competencies between different levels of government. At the state level, the Ministry of Foreign Trade and

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4 The European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols are directly applicable in Bosnia and Herzegovina and have priority over all other laws (Article II/2 of the Bosnia and Herzegovina Constitution)
5 Article 35: "Man has the right to a healthy environment. Everyone, in accordance with the law, is obliged to protect and improve the environment within their capabilities."
6 Article 52 paragraph 1 and 59 paragraph 1
7 Article 68
8 Article 102 point 5
9 Part III Division of competences between the federal and cantonal levels of government
10 The supreme law of the Brčko District based on the General Framework Agreement on Peace, the Final Decision of the Arbitration Court for the dispute over the inter-entity border line in the area of Brčko and the Constitution of Bosnia and Herzegovina
11 Article 8 point 1 h) of the Statute states that environmental protection is one of the responsibilities of public authorities in the District, but this area is not elaborated in detail
12 Law on Environmental Protection of Bosnia and Herzegovina (Official Gazette of Federation of Bosnia and Herzegovina, 15/21), Law on Environmental Protection of RS (Official Gazette of RS, 71/12, 79/15, 70/20), and Law on Environmental Protection of BD (SGBD 24/04, 19/07, 1/05, 9/09)

Economic Relations of Bosnia and Herzegovina is responsible for conducting activities and tasks related to defining the policy, and basic principles, coordinating activities, and harmonizing the plans of entity authorities and institutions on environmental protection at the international level. At the Federation of Bosnia and Herzegovina level, the Federal Ministry of Environment and Tourism is responsible for the environmental issues, while in the RS, it is the Ministry of Spatial Planning, Construction and Ecology, and in the BD the Department for Spatial Planning and Property and Legal Affairs.

3. Participatory Democracy and Environmental Awareness

Participatory democracy, a form of democracy that involves citizens in decision-making, has gained increasing importance over time, as recognized in both EU and UN documents. Despite historical differences between countries regarding human rights and democracy, there has been a noticeable increase in citizens' participation in certain issues, such as environmental matters. The adoption of the Aarhus Convention created an international legal framework in the field of environmental protection, establishing democratic cooperation between the public and decision-makers. This convention implements Article 10 of the Rio Declaration[13], emphasizing that sustainable development is achievable only when all members of society are involved. Therefore, citizens' participation (and their associations) in decision-making on environmental matters along with cooperation with decision-makers is a prerequisite for the development of environmental democracy.

To support the implementation of the Aarhus Convention in Bosnia and Herzegovina, a Network of Aarhus Centres was formed in 2013, in cooperation with the OSCE Mission to Bosnia and Herzegovina[14]. This network serves as a platform for the exchange of information between competent authorities and the public, promotes transparency in the public authorities' activities, and enables citizens to express their views and concerns about decisions that may impact the environment[15].

13 "... each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

14 The network of Aarhus centers in Bosnia and Herzegovina consists of four Aarhus centers with headquarters in Banja Luka, Sarajevo, Tuzla and Zenica. Aarhus centers are part of a wider network that covers 15 countries in Southeast Europe, Eastern Europe, Central Asia and the South Caucasus.

15 „Aarhus Centers in Bosnia and Herzegovina", Center for the Environment, Association Resource Aarhus Center in Bosnia and Herzegovina, Center for Ecology and Energy, Eco Forum Zenica, in cooperation with the OSCE Mission to Bosnia and Herzegovina, https://www.osce.org/files/f/documents/c/4/445744.pdf, p. 6

While Bosnia and Herzegovina has a positive legal framework for environmental protection and ratified the Convention in 2008, it is still evolving within an underdeveloped participatory democracy. The network of Aarhus Centres in Bosnia and Herzegovina has identified numerous shortcomings in the Convention's implementation. These include limited public awareness of their rights under the Convention, a lack of capacity or general unwillingness on the part of public authorities to fully enforce the Convention's provisions, as well as barriers to accessing environmental justice. These imperfections lead to environmental degradation, jeopardizing the quality of life, health, and safety of the people in Bosnia and Herzegovina.[16]

Furthermore, awareness of the importance of environmental protection remains insufficiently developed, and environmental concerns are not adequately linked to long-term existential issues. Namely, strengthening awareness of environmental issues is crucial not just as a technical matter (as environmental issues are sometimes viewed), nor solely as a question of resources (which are scarce) utilization and their unreasonable depletion, or the impact of the anthropogenic factors. Rather, it requires a fundamental shift in our approach to nature and what it provides. Despite ongoing environmental concerns and the adoption of various normative and strategic documents, comprehensive knowledge and skills for developing environmental democracy - requiring greater public participation – are still lacking.

It is a fact that numerous international agreements focus on environmental protection, but the uniqueness of the Aarhus Convention lies in the mechanisms it establishes, empowering non-governmental organizations and citizens to take an active role in enforcing environmental protection laws. Strengthening awareness of the importance of the environment and increasing public participation in decision-making contribute to a more responsible approach by public bodies when making decisions. Therefore, the Convention is undoubtedly directed towards securing the right to live in a healthy environment for future generations.

How to achieve greater public participation? Strengthening awareness of the significance of environmental issues and an understanding of the role of individuals in society are prerequisites for a constructive dialogue with decision-makers.

4. Global milieu

In the current socio-economic context, the pressure on the environment is intensifying as we pursue higher living standards and the level of economic development. Concerns about

16 Ibid, p. 5

the environmental consequences of various economic activities are valid and growing. We contemplate future scenarios, make projections at the global and national levels, and discuss paths toward sustainable development, a green economy, and the fight against climate change. However, critical questions arise: Are we succeeding in preserving the environment? Do states resolve environmental issues/problems promptly and efficiently enough? Have states forgotten one of their essential roles - safeguarding the public interest?

Bosnia and Herzegovina faces environmental challenges similar to those of other countries. By assuming international obligations, Bosnia and Herzegovina encounters additional environmental demands and challenges, striving to fulfil them as it affirms its commitment to aligning with global and European environmental protection trends. Although Bosnia and Herzegovina has charted its course towards harmonizing with these trends and adapting to opportunities, it remains to be seen whether the outlined plans will be fully implemented. Given the specific circumstances, addressing numerous environmental issues and challenges is a shared responsibility to preserve the environment and ensure the prosperity of the entire social community, for which we are all individually and collectively responsible.

5. Implementation of the Aarhus Convention in Bosnia and Herzegovina

Considering the aforementioned dimensions, and existing limitations, it can be said that some progress has been made in recent years regarding the implementation of the Convention in Bosnia and Herzegovina. While the progress may not be sufficient, it is still noteworthy. National reports, as well as shadow reports on the implementation of the Convention in Bosnia and Herzegovina, testify to the progress and steps taken toward full implementation of the Convention.

The First national report identifies "…a considerable degree of incorporation of the Convention's provisions into domestic legislation, with a considerable rate of practical implementation. This could be explained by Bosnia and Herzegovina's goal to join the EU and its efforts to harmonize its regulations with those of the EU, which align with the Aarhus Convention's provisions. Considerable efforts have been made in Bosnia and Herzegovina to improve its implementation, particularly given the lack of qualified staff in public institutions, financial constraints, and the need to raise awareness among civil servants and the public about the importance of the Convention "[17].

17 The First report on the implementation of the Aarhus Convention in Bosnia and Herzegovina, p. 2

There are three dimensions in which the situation in Bosnia and Herzegovina should be observed, corresponding to the three pillars of the Aarhus Convention: access to environmental information, public participation in environmental decision-making, and access to justice.

Regarding the right to access environmental information in Bosnia and Herzegovina, information can be obtained under the Freedom of Access to Information Act[18] and environmental protection laws at the entity and cantonal levels[19]. The Fourth national report states that: Competent authorities in Bosnia and Herzegovina distribute environmental data (including regulations, policy instruments, etc.) via internet sites, by responding to requests and by participating in seminars, workshops, and news programs in the media. Most institutions have a designated public relations officer. The creation of electronic databases that will be accessible via the Internet is in progress. Nevertheless, representatives of the NGO sector have raised concerns about the lack of information available on the websites, despite being previously directed there by competent institutions. Furthermore, according to the Fourth national report, there is no uniform compliance across administrative units in terms of maintaining records of information requests, nor has a functional PRTR database (Pollutant Release and Transfer Register) been established at the Bosnia and Herzegovina, which would enable reporting to the European Environment Agency (EEA) on annual amounts of pollutants released into the air, water, soil, and other relevant data.[20]

According to the document "Environmental Democracy in Bosnia and Herzegovina Shadow Report on the Implementation of the Aarhus Convention 2021" for the period 2017-2020, there are still certain exceptions in the proper application of the Freedom of Access to Information Acts (RS, Federation of Bosnia and Herzegovina, BD) due to misinterpretation of the law by the competent authorities such as the unjustified extension of deadlines for providing answers and other challenges. In practice, there are issues such as delays in providing answers, unjustified determination of exceptions for providing information, and the "silence of the administration". These mistakes are often corrected only at higher court levels through

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18 Freedom of Access to Information Act, Article 4 (Official Gazette of RS No. 20/01, Official Gazette of Federation of Bosnia and Herzegovina No. 32/01, 48/11, Official Gazette of Federation of Bosnia and Herzegovina No. 28/00, 45/06, 102/09, 62/ 11, 100/13

19 For more in: Environmental Democracy in Bosnia and Herzegovina Shadow report on the implementation of the Aarhus Convention in 2021, https://arnika.org/en/publications/environmental-democracy-in-bosnia-and-herzegovina p. 12 - 14

20 For more in: Fourth report on the implementation of the Aarhus Convention in Bosnia and Herzegovina, p. 29-31

lawsuits or extraordinary legal remedies.[21] However, improving the exchange of information is crucial because only an informed public can actively participate in decision-making processes.

In Bosnia and Herzegovina and its administrative units, legislative amendments have enabled greater public involvement in decision-making processes regarding environmental protection. Public participation is now required at the early stages of the Environmental Impact Study (EIS) preparation, as well as during the approval of the EIS and the issuance of environmental permits. The public is also involved in the adoption of water acts and laws regulating energy permits. However, public involvement is notably absent in issuing permits related to the construction and commissioning of facilities.[22] Although the legislation provides for mandatory public participation in the development of environmental strategies and spatial planning documents at early stages, this is not adequately implemented, particularly in granting concessions. This lack of involvement prevents citizens from participating in these critical policies from the outset. The public can participate in drafting laws and by-laws, typically prepared by competent ministries or local governments.[23] However, it is common for legislative and executive authorities to adopt such laws through urgent procedures, bypassing public participation, even when the laws in question are systemic and crucial for environmental preservation.[24]

The fourth national report notes a lack of detailed data on public participation as defined by Article 6 of the Convention and on procedures from which the public is excluded. Civil society representatives have highlighted practical issues in organizing public hearings, particularly at the local level. There is often inadequate cooperation in informing the public and facilitating its participation in decision-making processes. Public hearings, for instance, are sometimes only held in the locality where a project is planned, regardless of potential effects on neighbouring areas.[25]

Challenges remain in applying public participation principles effectively, raising public awareness of participation opportunities, and building trust between the public and authorities. Financial constraints also limit the scope and effectiveness of public participation. Addressing

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21 For more in: Environmental Democracy in Bosnia and Herzegovina Shadow report on the implementation of the Aarhus Convention in 2021, https://arnika.org/en/publications/environmental-democracy-in-bosnia-and-herzegovina, p. 26
22 Ibid, p. 14 - 15
23 Ibid
24 Ibid, p. 26-27
25 For more in: Fourth report on the implementation of the Aarhus Convention in Bosnia and Herzegovina, p. 51

these challenges is essential to fully realizing the principles of the Aarhus Convention in Bosnia and Herzegovina.

The judicial system in Bosnia and Herzegovina is complex, reflecting the constitutional division of powers among different administrative levels. Access to justice in environmental matters is regulated through administrative proceedings and administrative disputes. Ministries at the entity and cantonal levels in Bosnia and Herzegovina are responsible for environmental issues, making decisions in the first and second stages of administrative procedures, with district and cantonal courts handling appeals initiated by dissatisfied parties. Further appeals can be made to the entities' supreme courts using extraordinary legal remedies.[26]

Despite laws being mostly harmonized with the Convention's third pillar, courts sometimes interpret legal situations differently. In administrative disputes against Environmental Impact Studies or environmental permits, some courts do not recognize the right of active legitimation (the right to file a lawsuit) for citizens' associations that participated in public hearings, despite their rights under Article 9 of the Convention. Additionally, administrative disputes, whether related to environmental matters or access to environmental information, are often unreasonably long. Even when a court rules in favour of the civil sector, the significance is often diminished because the process or dispute does not halt ongoing projects, leading to potential environmental damage. In information access cases, the lengthy dispute process can render court rulings meaningless, as projects are often in advanced stages of construction by the time a decision is made.[27]

However, the Fourth national report states that Bosnia and Herzegovina has made progress in ensuring access to justice, allowing citizens and NGOs to challenge administrative decisions in the environmental field. The judicial system positively influences the implementation of the Convention in Bosnia and Herzegovina, often correcting errors and inaction by administrative bodies. The Ombudsman's office also plays a significant role by submitting recommendations to public administration, which, although not legally binding, have proven effective in pressuring authorities to act by the law.[28]

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26 For more in: Environmental Democracy in Bosnia and Herzegovina Shadow report on the implementation of the Aarhus Convention in 2021, https://arnika.org/en/publications/environmental-democracy-in-bosnia-and-herzegovina, p. 15

27 Ibid, p. 27

28 For more in: Fourth report on the implementation of the Aarhus Convention in Bosnia and Herzegovina, p. 67-68

The civil sector, however, highlights the lack of judges, prosecutors, and lawyers specialized in environmental law, as well as a general lack of judicial sensitivity in this area. [29] The length, complexity, and costs of legal procedures can also be barriers to accessing justice for many citizens and organizations. Therefore, additional efforts are required to simplify and expedite these procedures and reduce associated costs.

Numerous factors hinder the full implementation of the Convention in Bosnia and Herzegovina, including individual interests, profit motives, neglect of the public interest, widespread corruption, the influence of lobbies, and the rise of SLAPP (Strategic Lawsuit Against Public Participation) lawsuits. These factors should be carefully considered as they jeopardize the comprehensive enforcement of the Convention's provisions.

6. Conclusion

Let us try to close this circle with the following questions: What have we accomplished? How far have we come? How can we chart the path toward fuller implementation of the Convention? Challenges in implementing the Convention exist for all countries, regardless of their level of development and organization. However, the Convention will not be truly effective until openness, transparency, and accountability in environmental decision-making become daily practices, as the Convention is a living instrument.

Fifteen years have passed since Bosnia and Herzegovina acceded to the Convention. While steps have been taken, they are not sufficient. Is the complexity of the Bosnia and Herzegovina's state-legal system a justification for insufficient implementation of the Convention, or is the lack of political will merely an alibi to conceal responsibility? Does environmental protection represent a public interest, or is it significant only from the perspective of personal gain?

Public participation in environmental issues is crucial for the development of a democratic society and environmental democracy. Strengthening the civil sector represents a significant corrective factor in creating good practices in environmental protection and realizing the right to a healthy environment. Citizens' awareness of environmental issues is gradually increasing, and the public is becoming more involved. The foundations provided by the Convention play a very important role in their struggle to preserve living space.

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29 Shadow report on the implementation of the Aarhus Convention in Federation of Bosnia and Herzegovina 2014-2016, http://eko.ba/publikacije/190-demokratija-zivotne-sredine-napredak-neprijavljen

The architecture of the fight for the environment is based on the pillars of the Convention, enabling the right to access on environmental information, participation in the various stages of environmental decision-making, and the use of legal remedies in procedures for environmental protection. The relationship between public authorities, civil society organizations, citizens, and international partners should function to strengthen the Aarhus Convention's implementation in Bosnia and Herzegovina and to make more effective and higher-quality decisions about the environment.

Timely identification of problems and challenges, finding appropriate solutions based on common values, and awareness of the importance of policies for the realization of the public interest are necessary for a fair and efficient relationship with the environment.

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[1] Constitution of Bosnia and Herzegovina

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[6] Law on Environmental Protection of RS (Official Gazette of RS, 71/12, 79/15, 70/20)

[7] Law on Environmental Protection of BD (SGBD 24/04, 19/07, 1/05, 9/09)

[8] Freedom of Access to Information Act of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina No. 28/00, 45/06, 102/09, 62/ 11, 100/13)

[9] Freedom of Access to Information Act of Bosnia and Herzegovina (Official Gazette of Federation of Bosnia and Herzegovina No. 32/01, 48/11)

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[11] The Aarhus Convention (Official Gazette of Bosnia and Herzegovina - MU broj 08/08)

[12] The Rio Declaration On Environment And Development (1992)

[13] „Aarhus Centres in Bosnia and Herzegovina", Center for the Environment, Association Resource Aarhus Center in Bosnia and Herzegovina, Center for Ecology and Energy, Eco Forum Zenica, in cooperation with the OSCE Mission to Bosnia and Herzegovina https://www.osce.org/files/f/documents/c/4/445744.pdf

[14] The First report on the implementation of the Aarhus Convention in Bosnia and Herzegovina https://aarhusclearinghouse.unece.org/national-reports/reports?field_nr_report_language_aux_2_value=en&field_nr_report_language_aux_value=en&field_nr_party_target_id_verf%5B%5D=17469&combine=

[15] Fourth report on the implementation of the Aarhus Convention in Bosnia and Herzegovina https://aarhusclearinghouse.unece.org/national-reports/reports?field_nr_report_language_aux_2_value=en&field_nr_report_language_aux_value=en&field_nr_party_target_id_verf%5B%5D=17469&combine=

[16] Environmental Democracy in Bosnia and Herzegovina Shadow report on the implementation of the Aarhus Convention in 2021 https://arnika.org/en/publications/environmental-democracy-in-bosnia-and-herzegovina

[17] Shadow report on the implementation of the Aarhus Convention in Bosnia and Herzegovina 2014-2016 http://eko.ba/publikacije/190-demokratija-zivotne-sredine-napredak-neprijavljen

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The Aarhus Convention and the Courts of the European Union: The opportunities and limitations of access to justice in climate matters

Abstract: This paper weighs in on the obligations arising for the EU as a contracting party to the Aarhus Convention with regard to granting broader possibilities to private parties (individuals and non-governmental organizations) to appear before the EU Courts (the Court of Justice and the General Court) in matters pertaining to the climate domain. This relates to those cases where, by virtue of claiming a breach of their Aarhus Convention rights, private applicants consider themselves "directly" and "individually" concerned by a specific climate legal act adopted by the EU institutions.

In this vein, the paper explores the relevance of Article 9(3) of the Convention for the EU climate litigation context, including whether and how this provision can trigger the duty of the EU Courts to make access to justice more widely available to private applicants launching climate lawsuits before them. Article 9(3) requires each contracting party to ensure that, where they meet the criteria laid down in its national law, members of the public have access to administrative or judicial procedures to appeal against "acts and omissions by (...) public authorities which contravene provisions of its national law relating to the environment." Applied with respect to the EU as a party to the Convention, this provision can be interpreted as creating an obligation for the EU institutions which extends beyond strictly the "environmental matters" realm to equally cover the climate one.

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To test this hypothesis, the paper takes a critical view on two cases brought before the EU Courts – *Carvalho et al. v Parliament and Council* and *Sabo et al. v. Parliament and Council*, scrutinizing the legal options available for private applicants to seek a full or partial annulment of EU legislative acts which they allege hinder the EU's climate ambitions as well as "directly" and "individually" affect them as applicants. In this sense, the EU Courts' hitherto missed opportunities for extending the Aarhus Convention obligations to the climate arena will be discussed, including the yet untapped potential of these courts to act as fora for climate litigation at the EU supranational level.

Keywords: Aarhus Convention, Article 9(3), access to justice, climate litigation, EU Court of Justice, legal standing

1. Introduction

The present paper aims to question the scope of obligations arising for the European Union as a result of its participation in the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention),[1] with regard to granting broader access to private parties (individuals and non-governmental organizations) before the EU Courts (the Court of Justice and the General Court), in matters involving the climate domain. Unarguably, the access-to-justice principles and standards inaugurated by the Aarhus Convention serve as a benchmark for the protection of the procedural environmental rights of natural and legal persons, before the courts of the Member States and the EU Courts alike. What this paper sets out to investigate is the possibility for extending the reach of the Aarhus Convention's access-to-justice rules beyond strictly the environmental domain to equally cover matters pertaining to the climate. The point of departure for this analysis is Article 9(3) of the Aarhus Convention and relates to cases where, by virtue of claiming a breach of their Convention rights, private applicants consider themselves 'directly' and 'individually' concerned by a specific legal act adopted by the EU institutions in the pursuit of the Union's climate policy objectives.

Making a clear shift in perspectives (from the environmental towards the climate domain), this analysis reviews the possibilities for the application of the Convention's access-to-justice rules to the EU's climate litigation context specifically. It zooms in on the EU Courts' evolving jurisprudence in climate matters by assessing the extent of the Aarhus Convention's relevance and (by consequence) applicability to climate cases before the EU Courts. Thus, the

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1 The EU officially acceded to the Aarhus Convention in February 2005 (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27).

significance of Article 9(3) of the Convention to the EU's supranational climate litigation is examined in relation to whether and how this provision can be said to trigger the duty of the EU Courts to make access to justice more widely available to the private applicants launching climate lawsuits before them. Namely, Article 9(3) requires each Convention Party to ensure that, where they meet the criteria laid down in its national law, members of the public have access to administrative or judicial procedures to appeal against "acts and omissions by (...) public authorities which contravene provisions of its national law relating to the environment." Since the EU is a party to the Convention alongside its Member States, yet is not itself a nation-state, this provision can be interpreted by analogy, so as to create access-to-justice obligations for the EU's administrative and judicial bodies that extend beyond just the environmental realm and also cover the climate one.

To test the foregoing hypothesis, the paper takes a critical view on two cases decided by the EU Courts – *Carvalho et al. v Parliament and Council* and *Sabo et al. v. Parliament and Council*. These cases draw on the options available to private applicants under the current EU system of legal remedies to seek a full or partial annulment of EU legislative acts that they consider 'directly' and 'individually' affect them and which they claim hinder the EU's climate ambitions. The paper is organized as follows. The first part provides an overview of the legal bases from which flows from the EU Courts' duty to provide broader access to justice for private litigants involved in environmental and climate disputes before the EU Courts. The second part inspects the commonalities between *Carvalho*[2] and *Sabo*[3] as cases representative of the EU courts' budding climate jurisprudence, followed in the third part by a commentary on the EU Courts' consistently rigid approach towards the legal standing of natural and legal persons appearing before them and probing the extent to which this approach can indeed be considered as an 'inherent' limitation of the EU system of judicial remedies. The fourth and concluding part discusses the various implications that result from the EU Courts' refusal to relax the rigid standing criteria in order to accommodate broader access to justice in climate matters at the EU level. It is argued that such a restrictive stance, in effect, precludes extending the Aarhus Convention obligations to the climate sphere and subverts the EU Courts' potential to act as fora for climate litigation at the supranational level.

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2 T-330/18 Armando Carvalho and Others v European Parliament and Council of the European Union, ECLI:EU:T:2019:324; C-565/19 P Armando Carvalho and Others v European Parliament and Council of the European Union, ECLI:EU:C:2021:252.

3 T-141/19 Peter Sabo and Others v European Parliament and Council of the European Union, ECLI:EU:T:2020:179; C-297/20 P Peter Sabo and Others v European Parliament and Council of the European Union, ECLI:EU:C:2021:24.

2. The legal bases from which the EU's duty to provide broader access to justice for private litigants in the climate domain can be derived

2.1. Article 263(4) of the Treaty on the Functioning of the European Union

This analysis will start by looking at the specific legal base from which the EU Courts' duty to strive to guarantee broader access for private parties in the environmental and climate domain flow from. Therefore, an overview of the relevant (international and EU) legal framework will be provided, starting with the principal EU law provision in this regard, *Article 263(4) TFEU* which states that any natural or legal person may institute proceedings i) against an act addressed to them *or* which is of direct and individual concern to them; or ii) against a regulatory act which is of direct concern to them *and does not entail implementing measures.* While none of the Union Treaties provide a definition of the terms 'direct concern' and 'individual concern', over the years, the Court of Justice of the EU (CJEU)[4] assumed the task of fleshing out these notions through case law. In 1963, the CJEU introduced the famous *Plaumann* doctrine which accompanies the TFEU provisions on legal standing and which it has unwaveringly upheld ever since. According to the *Plaumann* doctrine, natural or legal persons satisfy the condition of "individual concern" only if the contested Union act affects them due to certain attributes that are *peculiar to them* or by reason of *circumstances in which they are differentiated from all other persons*, meaning that as a result of these factors the contested act *distinguishes them individually* just as in the case of the addressee.[5] Next, for a person to be deemed "directly concerned" by a Union measure, the latter must *directly affect their legal situation* and leave *no discretion to the addressees* of that measure who are entrusted with the task of implementing it, "such implementation being purely automatic and resulting from [Union] rules without the application of other intermediate rules."[6] It follows that, save for Union regulatory acts which do not entail implementing measures and which are of direct

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4 The terms 'European Union (EU) courts and 'Court of Justice of the European Union (CJEU)' will be used interchangeably throughout the article to refer to actions and statements of either the Court of Justice or the General Court of the European Union. Pursuant to Art. 19(1) TEU, the Court of Justice of the European Union includes the Court of Justice (CJ), the General Court (GC) and specialized courts.

5 C-25/62 *Plaumann* v *Commission*, EU:C:1963:17, p. 223; of 3 October 2013 (part 1 of judgment); C583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, EU:C:2013:625, para.72; C132/12 P *Stichting Woonpunt and Others* v *Commission*, EU:C:2014:100, para.57; C133/12 P *Stichting Woonlinie and Others* v *Commission*, EU:C:2014:105, para.44.

6 See, to that effect, a number of CJEU judgments, in particular, C-92/78 Simmenthal v Commission [1979] ECR 777, paras. 25,26; C-113/77 NTN Toyo Bearing Company and Others v Council [1979] ECR 1185, paras. 11, 12; C-118/77 ISO v Council [1979] ECR 1277, para. 26; C-119/77 Nippon Seiko and Others v Council and Commission [1979] ECR 1303, para.14; C-55/86 Arposol v Council [1988] ECR 13, paras. 11-13; C-207/86 Apesco v Commission [1988] ECR 2151, para.12; C-152/88 Sofrimport v Commission [1990] ECR I-2477, para.9; C-386/96 P Société Louis Dreyfus v Commission [1998] ECR I-2309, para.43.

concern to the applicants, the conditions of direct and individual concern for private applicants are cumulative and must be considered jointly.[7] Ever since its *Plaumann* ruling, in examining the foregoing standing criteria, the way the CJEU typically proceeds is by first assessing whether the condition of individual concern has been satisfied; should the applicant be found not to be individually concerned by the contested measure, it then becomes unnecessary to establish whether they are directly concerned.[8]

A contentious aspect concerning the application of Article 263(4) TFEU is the absence of a definition for the term "regulatory act", which by consequence creates confusion as to the relevant criteria to be employed to determine whether a particular regulatory act entails implementing measures (Vedder 2010, 297; Barents 2010, 722). It has been argued that the restrictive scope of the type of act open to challenge under Article 263(4) TFEU presumably only leaves the delegated or implementing acts adopted pursuant to Articles 290 and 291(2) TFEU to be considered amenable to direct judicial review, making it doubtful whether Article 263(4) TFEU could indeed be extended to Union legislative acts (Poncelet 2012, 301). For example, in *Carvalho* and *Sabo*, which will be considered in greater detail below, direct judicial review was sought for EU legislative acts and therefore, given that such acts require implementing measures, it was necessary for the applicants to demonstrate direct and individual concern as they were not themselves addressees of the contested acts.

2.2. Article 9(3) of the Aarhus Convention

In following, reference will be made to those international and EU legal provisions, which, read in conjunction with Article 263(4) TFEU, can be regarded as establishing a legal duty for the EU Courts, to strive to provide to the optimal extent possible, in legal disputes relating to the climate, broad(er) access to private litigants affected by specific Union climate measures. Starting with the international level, a particularly important provision is *Article 9(3) of the Aarhus Convention.* As concerns the access to justice rights that private parties enjoy under the Convention, Article 9(3) requires each contracting party to ensure that, where they meet the criteria laid down in its national law, members of the public have access to administrative or judicial procedures to appeal against "acts and omissions by (...) public authorities which contravene provisions of its national law relating to the environment." With the EU being a party to the Aarhus Convention alongside its Member States, this provision can arguably be

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7 See e.g., C583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, para.76.

8 See to that effect, C-25/62 *Plaumann* v *Commission*, EU:C:1963:17, Part I of judgment; C583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, EU:C:2013:625, para.76; See to that effect, T-330/18 Armando Carvalho and Others v European Parliament and Council of the European Union, ECLI:EU:T:2019:324, para.44.

seen as creating an obligation for the EU institutions that pertains not only to environmental but also, by extension, to climate matters.[9] In so far as the EU is concerned, seeing as it itself is not a nation-state, the requirements flowing from this provision should be considered as binding on the EU institutions *per extensiam*. Regarding the option for private applicants to challenge EU legislative acts adopted in the climate domain, it is important to underline that bodies and institutions acting in a legislative capacity are excluded from the Aarhus Convention definition of "public authority", but at the same time, in the spirit of achieving greater transparency and accountability, the Convention's preamble nevertheless *invites* legislative bodies to implement the Convention principles in their proceedings.

2.3. Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Union institutions and bodies (Aarhus Regulation)

Coming to the EU level, of equal importance is the (now amended) *Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Union institutions and bodies (Aarhus Regulation*),[10] originally adopted in 2006 as one of a set of Union legislative measures enacted to transpose the obligations arising from the Aarhus Convention to the EU legal order, applying exclusively to the Union institutions and bodies. The amending Regulation (EU) 2021/1767[11] modifies the original Aarhus Regulation (EC) No 1367/2006 in limited respects. Guided by the importance of taking decisions relating

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9 In relation to this, it is important to recall the Declaration issued by the European Community in 2005, upon the approval of the Aarhus Convention, which specifies that the Community legal instruments in force (at the time) "*do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention* as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community" and that, consequently, the EU Member States "are responsible for the performance of these obligations *at the time of approval of the Convention by the [then] European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.*" As a result, the European Community is considered "responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force. *The exercise of Community competence is, by its nature, subject to continuous development.*" (United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, 2014 (second edition), ECE/CEP/72/Rev.1, p.248 [emphasis added]).

10 Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, L 264/18 EN Official Journal of the European Union, 25.9.2006.

11 Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 356, 8.10.2021, p. 1–7.

to the environment closer to the citizens, the amendments introduced (in force since October 2021) have the objective of expanding the legal opportunities for private parties to challenge the acts of EU institutions and bodies that contravene EU environmental law.[12] Importantly, Article 2(1)(f) of the Aarhus Regulation defines "EU environmental law" as encompassing "[Union] legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of [the Union] policy on the environment set out in Article 191(1) TFEU," among which is the promotion of "measures at the international level to deal with regional or worldwide environmental problems, *and in particular combatting climate change*".[13] It follows that rules enacted for the purpose of combatting should also be understood as included in this definition.[14] This approach of binding the environmental objectives together with the climate objective of Article 191(1) TFEU is especially significant seeing as the Union Treaties do not presently provide a separate chapter dedicated to the EU's climate policy and therefore do not offer an autonomous legal basis for the formulation and development of this policy as one that is independent from the EU's environmental policy.

In its *Explanatory Memorandum* to the Proposal for an amending Aarhus Regulation, the Commission acknowledges the consensus among the key EU institutional actors over the need to engage with members of the public for the purpose of achieving the goals outlined in the European Green Deal.[15] [16] For this to be accomplished, the public as the driving force for the transition to a more sustainable and climate neutral EU should be able to have at its disposal the means to get actively involved in developing and implementing new policies.[17] Engaging with the public is understood as not only engaging with individuals but also engaging with civil society, and, notably, environmental non-governmental organisations (ENGOs) who play "a crucial advocacy role regarding the environment."[18] In addition, the Commission has emphasised that by adopting the amending Aarhus Regulation, the EU endeavours to address the concerns expressed by the Aarhus Convention Compliance Committee (ACCC)[19]

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12 Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, Brussels, 14.10.2020 COM (2020) 642 final 2020/0289 (COD), p.1.

13 Emphasis added.

14 Explanatory Memorandum, p.6, at footnote 17.

15 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM/2019/640 final.

16 Explanatory Memorandum, p.1.

17 Ibid.

18 Ibid.

19 The Compliance Committee is the Aarhus Convention body charged with reviewing the Convention Parties' compliance with the Convention rules.

regarding steps to be taken by the EU to ensure full compliance with its Convention obligations, which is to be carried out in a manner "compatible with the fundamental principles of the EU legal order and the system of judicial review under EU law."[20]

What are the changes that the amending Regulation introduces? By virtue of the 2021 amendments, members of the public and ENGOs are now entitled to submit a request for internal review to the Union institution or body that adopted an administrative act or, in the case of an alleged administrative omission, should have adopted such an act, on the grounds that such an act or omission contravenes EU environmental law within the meaning of Article 2(1)(f) of the Aarhus Regulation.[21] In other words, the amending Regulation increases the options available to private parties to seek administrative review of administrative acts of 'individual scope' (acts directly addressed to a person or where the person affected can be distinguished individually) and administrative acts of 'general scope,' adopted by the Union institutions and bodies.[22] The newly inserted Article 2(1) defines 'administrative act' as *any non-legislative act adopted by a Union institution or body*, which has legal and external effects and contains provisions that may contravene EU environmental law – meaning that acts of both general and individual scope are covered.[23] Under the previous version of the Aarhus Regulation, administrative review could only be requested *for acts of individual scope*.[24] Likewise, 'administrative omission' relates to any failure of a Union institution or body to adopt a non-legislative act which has legal and external effects, where such failure may contravene EU environmental law.[25]

In terms of the *conditions* that NGOs and members of the public need to fulfil in order to be able to make an internal review request, a *certain degree of interest* (individual or general) in the matter needs to be established.[26] As one of the mandatory criteria for NGOs, Article 11 requires that the subject matter in respect of which the request for internal review is made is covered by the organization's objectives and activities. For members of the public making such

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20 Explanatory Memorandum, p.1.
21 Ibid.
22 Ibid.
23 Explanatory Memorandum, p.1,2.
24 Ibid.
25 Ibid.
26 Concerning how environmental NGOs have recently been making use of the standing options available under the amended Aarhus Regulation, e.g., the ENGO ClientEarth has filed an internal review request to the European Commission for unlawfully labelling bioenergy, bio-based plastics and chemicals used to make plastics as "sustainable" in the EU's sustainable finance taxonomy, a list outlining economic activities to be considered as "green" investments (https://www.clientearth.org/latest/press-office/press/environmental-lawyers-take-first-step-to-challenge-eu-taxonomy-in-court/?utm_source=twitter&utm_medium=social&utm_campaign=taxonomy).

a request, Article 11 requires that they are able to either i) demonstrate impairment of their rights caused by the alleged contravention of Union environmental law by the Union institution or body and that they *themselves have been affected* by such impairment in comparison to the public at large; or, ii) demonstrate a *sufficient public interest* and prove that their request is supported by at least 4 000 members of the public residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States. Concerning the time period for processing such requests, Article 10(2) provides that the Union institution or body must consider the request for internal review, unless it is manifestly unfounded or clearly unsubstantiated, and is obligated to state its reasons in a written reply no later than 12 weeks after receiving the request. Furthermore, Article 12 stipulates that, where the Union institution or body fails to act in accordance with these obligations, the NGO or other members of the public that made the request for internal review may institute proceedings before the Court of Justice.

2.4. Article 47 of the EU Charter of Fundamental Rights

Seeing as climate change is equally (and especially) a human rights issue (see Peel, Osofsky 2018; Wewerinke-Singh 2019; Parihar, Dooley 2018), another key provision of EU law that serves as grounds for establishing a duty of EU institutions to aim at affording broader access to justice for private parties is Article 47 of the EU Charter of Fundamental Rights (CFREU). Pursuant to Article 47 CFREU, a horizontal provision of EU primary law, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before an independent and impartial tribunal – the Union courts, inter alia, being such courts. For example, the applicants in *Carvalho* and *Sabo* relied on this provision to reinforce their claims for direct access to the Union courts.[27] The requirements of Article 9(3) of the Aarhus Convention and Article 47 CFREU clearly complement each other: the applicants in *Sabo* relied on the interplay between these two provisions to justify demanding a more flexible reading of the Art 263(4) TFEU standing criteria.

In its 2020 *Communication on improving access to justice in environmental matters in the EU and its Member States*,[28] the Commission highlighted the relevance of Article 47 CFREU to the access of justice in environmental matters, asserting that being entitled to an effective remedy and a fair trial is a fundamental right of the EU legal order and that effective judicial

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27 The applicants in *Carvalho* and *Sabo* relied on Art.47 CFREU and Article 9(3) of the Aarhus Convention as some of the legal bases supporting their claim for standing before the Union courts.

28 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Improving access to justice in environmental matters in the EU and its Member States", Brussels, 14.10.2020 COM(2020) 643 final.

systems play a crucial role in safeguarding the rule of law as a fundamental value of the EU.[29] However, as concerns the stakeholders on whom rests the primary obligation to make the EU's system of access to justice in environmental (and, arguably, by extension, climate matters) more consistent with the rules of the Aarhus Convention, the Commission stressed that the chief responsibility of improving the implementation of the relevant EU rules is carried by Member States[30] – a nod to what can be described as a "judicial subsidiarity" approach (Bogojević 2015, 6), which, for the most part, absolves the EU Courts from bearing the primary responsibility themselves in this regard.

3. The commonalities between *Carvalho* and *Sabo* as cases representative of the emerging climate litigation in the EU Courts

The analysis will now turn to the options relative to the access of justice in climate matters for private litigants appearing before the EU Courts, examined in the light of the *Carvalho* and *Sabo* judgments, delivered by the General Court (GC) in the first instance and the Court of Justice (CJ) in the second and final instance. The Court of Justice's conclusions in both cases confirmed those made by the General Court in the first instance. It is important to mention that *Carvalho* and *Sabo* are cases which are representative of the emerging trend of climate litigation taking place in the Union courts.[31] The two cases share many common elements and, taken together, can be considered as reflective of the CJEU's stance regarding the possibilities for private applicants to bring climate claims before the Union courts. Namely, the applicants in both cases were individuals and NGOs seeking full or partial annulment of Union legislative acts, claiming to be directly and individually concerned with the contested EU acts and demanding that the EU Courts reconsider the *Plaumann* doctrine and provide a more extensive interpretation of the restrictive standing requirements for private applicants prescribed under EU law.

More precisely, the applicants in *Carvalho* and *Sabo* challenged before the EU Courts the validity of a number of EU legislative acts enacted to meet the climate change goals pledged

29 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Improving access to justice in environmental matters in the EU and its Member States*, Brussels, 14.10.2020 COM(2020) 643 final, p.2.

30 Ibid.

31 Aside from the two cases in focus, see, inter alia, C-5/16 Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2018:483; T-9/19 ClientEarth v European Investment Bank, ECLI:EU:T:2021:42.

by the EU under the Paris Agreement.[32] The actions for annulment brought by the applicants were declared inadmissible as neither the GC nor the CJ deemed that the applicants had standing to bring the actions in question as it was found that the applicants could not prove to be individually concerned with the contested acts and therefore did not meet the *Plaumann* criteria. While empathizing (to a certain degree) with the applicants' situation and the adverse conditions suffered by them as a result of climate change, the GC and the CJ were not convinced that the effects of climate change being different from one person to another was sufficient grounds to grant standing for bringing an action before them to challenge EU measures of general application.[33] Any approach different than this one, would, in CJEU's opinion, have the result of rendering the requirements of Article 263(4) TFEU meaningless and would create *locus standi* for all without the criterion of individual concern, within the meaning of the *Plaumann* line of case law.[34]

In spite of the urgent nature of the climate change predicament and the increasingly devastating consequences resulting from it, as well as the well-substantiated claims made by the applicants, the CJEU could not be swayed to modify the *Plaumann* formula. Quite the opposite, the CJEU was satisfied that the Union has in place a comprehensive system of legal remedies and procedures designed to ensure that the EU courts provide effective judicial review of the legality of the acts of the EU institutions.[35] Nevertheless, the CJEU was prepared to offer guidance to the applicants in both cases on how they can avail themselves of the legal remedies currently available under EU law, applicable to such instances where they, as natural and legal persons, do not meet the Article 263(4) TFEU conditions and are therefore unable to directly challenge Union legislative acts.[36] The CJEU essentially proposed two main routes.

The *first route* concerns the possibility to plead the invalidity of Union acts indirectly before the EU Courts, pursuant to Article 277 TFEU.[37] This provision allows any party involved in CJEU proceedings in which an EU act of general application is at issue, to plead the inapplicability of that act before the CJEU. This would mean that, in order for the applicants to be entitled to bring a direct action before the EU Courts, under the conditions set out in Article 263(4) TFEU, they would have to challenge the implementing measures adopted by the Union institutions in relation to the legislative act concerned, only to thereupon rely on Arti-

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32 Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ 2016 L 282, p.1.
33 Carvalho (General Court), para.50.
34 Carvalho (General Court), para.50.
35 Carvalho (General Court), para.53.
36 Carvalho (General Court), para.53.
37 Carvalho (General Court), para.53.

cle 277 TFEU by pleading, in support of that action, the illegality of the legislative act in question.[38] The *second route* is for the applicants to bring an action before their national courts, which themselves have no jurisdiction to declare Union acts invalid, and ask of them to request a preliminary ruling from the Court of Justice under Article 267 TFEU.[39] By being employed by the applicants in this way, the preliminary ruling procedure as a judicial remedy becomes, just like the actions for annulment, a means for reviewing the legality of EU acts.[40] Presumably, this second route would only apply to instances where the responsibility for the implementation of a Union legislative act falls on the Member States.[41] Having proposed the preliminary ruling option to the applicants, the CJEU adheres to the "judicial subsidiary" approach, now with respect to climate disputes, encouraging private litigants to avail themselves of the judicial protection provided by their national courts rather than obtain direct judicial review by the Union courts (See Bogojević 2015, 6).

Curiously, the applicants in *Carvalho* had anticipated the suggestion of the second route and in their statements made during the court proceedings repudiated the effectiveness of the preliminary ruling procedure as an option for challenging the legality of EU legislative measures. To them, any such action to be initiated before the national courts would be unfeasible given that the result that they are seeking to obtain is a *collective* one (reduction of the EU's total GHG emissions).[42] Taking into account the diverse composition of applicants coming from different Member States, they argued that to accomplish the desired result through the preliminary ruling procedure would require each of them to bring proceedings before the courts of all of the Member States.[43] The applicants identified an additional limiting factor which is the patchwork of different national procedural rules and judicial remedies of the Member States which itself fails to guarantee an effective legal remedy and a timely resolution – an argument that goes to the core of the (un)suitability of the preliminary ruling procedure as a means for legally challenging an EU legislative act.[44]

The EU Courts were not receptive to the applicants' arguments encouraging a more flexible reading of the standing criteria, borne out, among other things, by the devastating and irre-

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38 Sabo (General Court), para.43.
39 Carvalho (General Court), para.53; The Court refers, to that effect, to: Order in case C64/14 P von Storch and Others v ECB, EU:C:2015:300, para.50; C-50/00 P Unión de Pequeños Agricultores v Council, EU:C:2002:462, para.40; C-263/02 P Commission v. JégoQuéré, EU:C:2004:210, para.30).
40 Sabo (General Court), para.43; See also C583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, EU:C:2013:625, para.95.
41 Sabo (General Court), para.43; See also C583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, EU:C:2013:625, para.93.
42 Carvalho (General Court), para.32.
43 Carvalho (General Court), para.32.
44 See, Carvalho (General Court), para.32.

versible effects of climate change and the urgent need for the EU to adopt more appropriate legislative measures that accord better with the EU's climate objectives. Its refusal to offer a climate-friendly interpretation of the *Plaumann* test in *Carvalho* and *Sabo* signifies a missed chance for the CJEU as it charts out the limits of CJEU's influence on EU climate policy-making (see Stoczkiewicz 2023, 133).

4. Is the narrow approach to standing an inherent limitation of the EU system of judicial remedies?

The *Carvalho* and *Sabo* rulings confirm the EU Courts' unwavering reliance on the rigid *Plaumann* test, undeterred by the distinctive nature of the climate change phenomenon (see Fisher et al. 2017) and the urgency that goes along tackling it. As regards the pertinence of the legal avenues recommended to the applicants in *Carvalho* and *Sabo*, namely that the applicants have at their disposal the preliminary reference procedure as an adequate route for resolving their claims concerning the legality of EU legislative acts that affect their legal situation. Surrounding the suitability of the suggested avenue, it is worth recalling ACCC's assertion that, with respect to decisions, acts and omissions by EU institutions and bodies, the EU's system of preliminary ruling "neither in itself meets the requirements of access to justice in Article 9 of the [Aarhus] Convention, nor compensates for the strict jurisprudence of the EU Courts regarding access to justice."[45] Conversely, the EU side has always refuted such type of arguments, referring to the "special nature" and "very characteristics of the European Union legal order"[46] as elements that preclude the EU Courts from reconsidering their approach to Article 9(3) of the Aarhus Convention (Schoukens 2019, 116). Further, in its assessment of the EU's compliance with the Convention, the ACCC declared that the CJEU's access-to-justice case law "could not give the legal community a coherent system of interpretation" of all the relevant issues of access to justice. The EU's response was that a statement to that effect ignores "the very purpose and effect of the [CJEU] rulings and the very characteristics of the European Union legal order."[47] In this vein, the EU has consistently maintained that its judicial system is a complete system of legal remedies and procedures designed to ensure review of the legality of the acts of the Union institutions.[48]

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45 Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union1 Adopted on 14 April 2011, point 90.

46 Findings and recommendations with regard to communication ACCC/C/2014/123 concerning compliance by the European Union Adopted by the Compliance Committee on 24 May 2017, point 71,72.

47 Ibid, point 71.

48 Ibid, point 72.

Still, over the past years, the EU has endeavoured to address some of the inconsistencies noted by the ACCC regarding its compliance with the obligations arising from the Aarhus Convention. In the Explanatory Memorandum to the Proposal for the amending Aarhus Regulation, the Commission expressed the EU's willingness to improve its compliance with the Aarhus Convention – however, the former can only be done in a manner consistent with the fundamental principles of the EU legal order and the system of judicial review under EU law.[49] Recalling the limitations of the EU's system of judicial remedies with respect to access to justice in environmental matters, the Commission has reiterated that judicial and administrative procedures concerning access to justice in environmental law "currently fall primarily within the scope of national law".[50] In this way, national courts are seen as those bearing the primary responsibility, when implementing EU environmental law, to guarantee the principles and standards of access to justice in environmental matters as these flow from Articles 9(2) and 9(3) of the Convention,[51] which makes any improvements regarding access to administrative and judicial review done at EU level *complementary* to the access-to-justice mechanisms in environmental matters available before the national courts of the Member States.[52]

The claim could be made that, in spite of the EU's best efforts, the Union's approach in the matter continues to disregard the *substance* of the ACCC's findings and recommendations relating to the comprehensiveness of the EU system of legal remedies applicable to the environmental (and, by extension, the climate) domain. CJEU's continuous refusal to offer a less stringent reading of the standing criteria for private applicants – in matters pertaining to the environment and the climate alike – shows that the Court's *Plaumann* doctrine is still very much 'good law', in spite of repeated calls for a change in approach coming from various quarters: international bodies such as the ACCC, ENGOs and legal academia (see, among others, Schoukens 2019; Poncelet 2012). It is certain that, as concerns environmental and climate issues, there currently exists an inherent limitation in the Union system of legal remedies preventing EU citizens and NGOs from enjoying comprehensive judicial protection within the scope of EU law. Somewhat ironically, this limitation finds its origins in the very constitutional principles that underpin the EU legal order and is the product of the special nature and unique characteristics of said legal order (see Schoukens 2019).

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49 Explanatory Memorandum, p.1.
50 Ibid, p.2.
51 Ibid.
52 Ibid; With respect to EU administrative acts, in the existence of national implementing measures concerning an EU administrative act, the Commission directs the NGOs concerned to first seek redress before the competent national court of the Member State that adopted the implementing measure. It is only in this way that they will be able to thereupon have access to the CJEU following the preliminary reference procedure of Article 267 TFEU (Explanatory Memorandum, p.2).

5. Conclusion: The implications of failing to broaden the private applicants' access to EU Courts in matters relating to the climate

To a certain extent, judgments like *Carvalho* and *Sabo* paint a pessimistic picture about the comprehensiveness and effectiveness of the judicial protection afforded to private applicants appearing before the EU Courts in cases involving climate issues. In *Carvalho* and *Sabo*, the EU Court of Justice affirmed its deference to Member States' courts as the more appropriate forum for private applicants to initiate the judicial review of EU climate legislative acts they consider themselves affected by. Such an approach sits uneasy with the urgency of tackling climate change and fails to take into account the complex nature of the climate change phenomenon as one that transcends geographical borders and affects the many rather than the few. As a consequence, climate issues arising at the EU level cannot be adequately resolved by resorting to employing a restrictive approach to EU law's standing criteria. In fact, in matters pertaining to the climate, Article 263(4) TFEU should be interpreted and applied in a less restrictive fashion since the climate legislative acts being challenged are, presumably, by their very nature, likely to be of concern to a large number of persons.[53]As things presently stand, the paradoxical result arising from the CJEU's excessively stringent interpretation of Article 263(4) TFEU is the more widespread the detrimental effects of an EU act are, the more restricted the access to the EU Courts becomes.[54] Absent the standing hurdles, *Carvalho* and *Sabo* would have likely had the potential of becoming the CJEU's "constitutional" climate cases, an EU equivalent to the US Supreme Court's *Massachusetts v EPA*.

In addition, it has been proposed that hindering the EU Courts from attempting to influence the making of effective climate policy choices at the EU level are the constitutional and jurisdictional limits imposed by EU law, which are in turn a distinctive characteristic of the EU legal culture (Bogojević 2013, 189) and represent a limitation inherent to the EU's system of judicial remedies. While the argument surrounding this 'inherent limitation' certainly holds significant merit, this paper has underscored the need for reforming the CJEU's rigid approach to standing, which will over time become increasingly untenable and disconnected from the pressing realities of climate change. Already in 2019, the European Parliament adopted a Resolution declaring a climate and environmental emergency[55] and calling on the Commission, the Member States and all global actors to urgently take concrete action to fight and contain the climate threat. The foregoing further reinforces the need for the EU Courts'

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53 Carvalho (Court of Justice), para.57.

54 See Carvalho (General Court), para.32.

55 European Parliament Resolution of 28 November 2019 on the climate and environment emergency, 2019/2930(RSP).

approach regarding the standing of private applicants bringing climate claims before them to be brought fully in line with the Aarhus Convention's access-to-justice rules – most especially, Article 9(3) and, in the case of climate legislative acts, the Convention preamble's encouragement to legislative bodies to implement its principles in their proceedings. Undoubtedly, a reformed approach which takes cognizance of the unique nature of the climate change challenge would steer the EU Courts towards becoming fora for activist climate jurisprudence at the supranational level.

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Application of the Aarhus Convention in criminal proceedings for criminal offenses against the environment

Abstract: The paper analyses the application of the three pillars of the Aarhus Convention in proceedings for criminal offenses against the environment. The Aarhus Convention contains three groups of rules pertaining to the right of citizens to access information, the right of citizens to participate in environmental decision-making and the right to legal protection in the event that the previous two rights are violated. Attention is particularly drawn to the case of hazardous waste found buried in the ground on the territory of the Obrenovac Municipality, i.e., informing the public about environmental matters in a passive and proactive manner in this case. The issues concerning the interrelation between the public's right to access environmental information, on the one side, and the protection of the interests of judicial proceedings and participants' rights, on the other, and achieving a balance between them are discussed here as well. We analyse the possibility of increased involvement by citizens and non-governmental organizations in environmental crime-related proceedings at different stages of the process. This paper further examines options for interested persons to file objections against decisions of the public prosecutor's office on the dismissal of criminal complaints and the failure of criminal prosecution. Finally, measures are proposed regarding information about the environment and participation of interested persons in proceedings on environmental crimes, in terms of making them more accessible to the public. Proposals aiming to advance cooperation between criminal prosecution authorities and environmental protection inspection are also found here, as well as an analysis on the possibility of expanding the application of Law on seizure and confiscation of the proceeds from crime to certain environmental crimes.

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Keywords: Aarhus Convention, illegal dumping of hazardous waste, environmental crime, access to environmental justice via criminal proceedings, criminal liability for environmental offences

1. Introduction

The Constitution of the Republic of Serbia prescribes in its Article 74 paragraph 1 the right to a healthy environment and the right to timely and full information about the state of the environment.[1] The Constitution also standardizes the right to legal protection in Article 32. Environmental protection is dealt with by a large number of laws and by-laws, and Chapter 24 of the Criminal Code stipulates criminal offenses against the environment, and certain criminal offenses are also stipulated by secondary criminal legislation. Environmental crimes are usually of a blanket nature, that is, the Criminal Code refers to special laws and by-laws, which regulate environmental protection. Environmental protection is important at the global level, which has led to the adoption of a number of international documents pertaining to environmental protection. One of these international legal instruments is the Convention of the United Nations Economic Commission for Europe (UNECE) on access to information, public participation in decision-making and access to justice in environmental matters, adopted on 25 June 1998, in the Danish city of Aarhus at the Fourth Ministerial Conference "Environment for Europe". The Convention entered into force on October 30, 2001.

The Aarhus Convention protects the right to an suitable environment, connects it with human rights and regulates the rights and obligations relationship between the state and its citizens.[2] The Convention ensures the availability of environmental information (the right of citizens to environmental information), public participation in environmental decision-making (the right of citizens to participate in the development of plans, programs, policies and legislation that may affect the environment) and legal protection (the right of citizens to object if their rights regarding access to information or public participation is violated).

In recent years, there have been multiple criminal proceedings conducted for environmental offenses, and they have revealed challenges in the use of the Aarhus Convention pillars in criminal proceedings.[3] One of these criminal proceedings was conducted by the Basic Public Prosecutor's Office in Obrenovac in the case of illegally dumped hazardous waste near the end

1 Constitution of the Republic of Serbia, *Official Gazette of the RS*, nos. 98/2006 and 115/2021.
2 Gorgenyi, I. 2022. Environmental human rights and the protection of the environment through criminal law in the light of recent developments. *J. Agric. Env't L., 17*, p 42.
3 Schalk-Unger, L. 2022. The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention. *Opole Stud. Admin. & L., 20*, p. 211.

of 2017. The proceedings attracted a lot of public attention, because there was a large amount of buried hazardous waste, and the cases dealing with hazardous waste are considered the most dangerous type of environmental criminal offenses.

2. Specificities of criminal proceedings for environmental criminal offenses

Criminal groups find environmental crimes attractive due to the difficulties in detecting and proving these crimes, insufficient cooperation of competent institutions, and high financial profit from engaging in this type of crime. The blanket nature of these crimes requires familiarity with numerous regulations in the field of environmental protection and knowledge necessary both for detecting and proving those criminal acts, as well as for suitable action to prevent damage to the environment and remove harmful consequences.[4] Achieving these goals requires considerable human and material resources, which is why a multisectoral approach and the participation of all relevant institutions are necessary from the earliest stages of the procedure.

Given the complexity of environmental criminality, the legislation should allow the application of instruments used for serious forms of crime, such as the confiscation of property resulting from a criminal offense and the application of special evidentiary actions.[5]

3. The case of hazardous waste in Obrenovac

In the course of 2017, the Basic Public Prosecutor's Office in Obrenovac received a notification that a large amount of hazardous waste was buried on private property in the town of Vukićevica. In order to verify the allegation, it was necessary to carry out an inspection of the property. The complexity of the investigation led by the Public Prosecutor required a multidisciplinary approach, and for that reason, cooperation was obtained from nine relevant institutions prior to the investigation for purpose of efficient and safe engagement. In addition to the Public Prosecutor and the defendant, the investigation was attended by the representatives of the Ministry of Internal Affairs, the Department for Emergency Situations, the Republic Inspector for Environmental Protection, a company registered for the transport and treatment of hazardous waste, experts from authorized and accredited institutions for taking

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4 Sinđelić, Danijela. 2020. "Course of criminal proceedings for environmental crimes with special reference to the case of hazardous waste in Obrenovac". Drenovak-Ivanović, M. (ed.) Practicum on the application of environmental law - case studies. Belgrade. pp. 127–152.

5 Bošković, Mićo. 1993. Methodology for the detection and clarification of environmental criminality, Higher School of Internal Affairs, Belgrade.

waste samples for analysis, a company registered for magnetometric surveying, a company with appropriate machinery and trained workers for excavation, emergency services and an emergency fire response unit. In the course of the inspection, a total of 24,672.00 kg of hazardous waste was found, deposited in barrels and containers that had been damaged, such that the contents of them had reached the soil. Samples of the substances found were forwarded to accredited and authorized professional institutions for expert examination. Soil was also taken for analysis, both from the surface and underground. The Prosecutor's Office detained the defendant – the owner of the property for criminal offense of bringing dangerous substances into Serbia and the unlawful processing, depositing, and stockpiling of dangerous substances from Article 266 paragraph 1 of the Criminal Code. His detention was ordered, and a critical procedure initiated. An expert examination established that the samples, among other substances, contained compounds from the class of aromatic hydrocarbons, which are dangerous to human health due to their chemical properties (benzene - carcinogen, mutagen), toluene (toxic for reproduction), cyclohexane (especially toxic for ecosystems, acutely toxic for central nervous system, flammable). The existence of compounds from the class of chlorinated organic compounds and the class of phenols was determined. Polychlorinated organic compounds belong to the group of polluting substances in the environment and are dangerous for human health because they are carcinogenic, mutagenic and cause skin irritation.

After the investigation, the Prosecutor's Office submitted an indictment proposal to the Basic Court in Obrenovac for the aforementioned criminal offense, and the Basic Court in Obrenovac, after the main trial, declared him guilty with verdict K No. 74/18 of April 30 2018 and sentenced him to a prison term of four years and six months and a fine in the amount of 600,000 dinars as secondary and imposed the security measure of confiscation of the item - hazardous waste. The aforementioned judgment became legally binding by the judgment of the Higher Court in Belgrade KŽ1 No. 561/18 dated 2 October 2018, in which the appeals of the parties were rejected. By the verdict of the Supreme Court of Cassation KZZ No. 1472/18 of 22 January 2019, a request to protect the legality of the defendant's counsel was rejected as unfounded.

4. Informing the public on the case of hazardous waste

Article 10 of the European Convention on Human Rights does not grant a general right of access to information. It does not automatically impose positive obligations on Member States to collect and disseminate information.[6] However, in recent jurisprudence of the European

6 Falletti, E. 2014. The Aarhus Convention and the Democratic Involvement in Environmental Issues: The Italian Case. *Available at SSRN 2411318*.

Court of Human Rights, it was emphasized that the Convention is a living instrument that should be interpreted in the light of today's conditions, which authorized it to adopt a broader interpretation of the term: "freedom to receive information" which includes granting the right to access information. Deviating from its previous judicial practice, the Court took a clear position that the right to access information held by state bodies now falls within the framework of Article 10 of the Convention.[7]

The Criminal Code prescribes the violation of the right to be informed about the state of the environment as a criminal offense in Article 268 of the Criminal Code.[8] The mentioned case of hazardous waste attracted a lot of public attention, but in this particular case, in addition to the common requests for notification and the course and outcome of the procedure, the media and the public were interested in information about the impact on the environment and life and health of people.

When the first reports on waste testing arrived and the three-day investigation was complete, a press conference was convened. Representatives of the Prosecutor's Office, the Ministry of Environmental Protection, representatives of the authorized and accredited laboratory that performed the characterization of hazardous substances were present. A proactive approach to the Aarhus Convention was applied, providing the public with information about what was being done, and which hazardous substances were found, as well as about their dangerous properties for life and health of people and the environment. It was also communicated that the soil sample was taken for analysis both from the surface and from the ground, and that it would be checked when the results come back whether it was necessary to decontaminate the soil, as well as that the water sample from the surrounding wells of the locals would be taken for analysis. In this way, the public was informed in a timely manner about the environment and activities with a potential impact on the environment, life and health of people, and the right to information was recognized as part of the right to freedom of expression regulated by numerous international acts in the field of environmental protection.

After the water from the surrounding wells had been analysed, the public was informed in a timely manner that it was not polluted, but for preventive reasons, the authorized institutions ordered that it be used as non-potable water, and that drinking water be supplied to the citizens by tankers. The public was informed that water analysis would be performed regu-

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7 Council of Europe Platform to promote the protection of journalism and safety of journalists. The right to access information, a key prerequisite for freedom of expression. https://rm.coe.int/pravo-na-pristup-informacijama-22mar21/native/1680a1dc7a last accessed on 18 October 2023.

8 Criminal Code, *Official Gazette of the RS*, nos. 85/2005, 88/2005 - corrected, 72/2009, 111/2009, 121/2012, 108/2014, 94/2016, 35/2019.

larly from the surrounding wells and the results announced to the citizens immediately. When the soil analysis arrived, the absence of contamination was established, and the public was informed about it.

The Prosecutor's Office, in cooperation with other authorities and institutions, thus provided verified information immediately, without waiting for the parties to ask or potentially refer them to the institution that may have the information.

For the purpose of comprehensively updating the public about the state of the environment, the representatives of the Ministry of Environmental Protection proactively informed the public through television programs about the measures and actions taken within their jurisdiction. Representatives of professional institutions informed the public about the properties of the substances found and their impact on the environment and human health.

The Prosecutor's Office took the initiative to keep the public informed through the media and cooperated with the police and the Ministry of Environmental Protection and other entities in preparing press conferences and issuing other announcements with the aim of providing clear and unambiguous information and presenting coordinated activities, in order to prevent circulation of false information.

In addition, citizens, journalists, and non-governmental organizations addressed the Prosecutor's Office with a small number of written requests regarding the state of the environment related to the aforementioned case. They were responded to immediately upon receipt of the request, thus exercising the passive approach provided for by the Convention. The reason that there were only a small number of written requests can be found in the decision of the Prosecutor's Office to inform the public without delay through the media about all facts related to the state of the environment.

Article 16 of the Law on Free Access to Information of Public Importance stipulates, among other things, that if the request refers to information that, based on the data provided in the request, can be assumed to be of importance to environmental protection, the authority must inform the requester of the possession of that information, to provide him with a document containing complete and accurate requested information, or to issue him a copy of that document no later than within 48 hours of receiving the request.[9]

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9 Law on Free Access to Information of Public Importance, *Official Gazette of the RS*, nos. 120/2004, 54/2007, 104/2009, 36/2010, 105/2021

Achieving a balance between the public's right to information about the course of criminal proceedings and the environment, on the one hand, and the right to of the accused in respect to the presumption of innocence, on the other, poses a particular challenge. In this case, a special degree of attention was necessary due to a great concern for health and the environment among citizens.

In communication with the public, a premature dissemination of information was avoided in order not to violate the right to a fair trial. Additionally, media representatives were provided with assistance regarding the correct use of terminology. The information was communicated in a way that increased public confidence in the work of the judiciary and state authorities. Only verified and accurate information was communicated to the public in an easy-to-understand manner, avoiding statements about the future outcome of the proceedings. The media were informed about all important actions in the procedure of detaining the suspect, determining detention and the filing of the indictment. In cooperation with other institutions, the public was immediately informed about the results of testing of substances found and their presence in soil and water, and about measures to reduce the risk of soil and water pollution.

The greatest interest of the public in the actions of the Prosecutor's Office took place during the investigation phase, while the main trial was open to the public and was attended by media representatives. Thus, all the information possessed by the institutions was made available to the citizens without delay, which ensured their right to information about the environment in a proactive manner and demonstrated responsibility and transparency in the work of the authorities.

5. Participation of citizens and non-governmental organizations in environmental criminal proceedings and legal protection

The second pillar of the Aarhus Convention is about ensuring the participation of the public and non-governmental organizations that promote environmental protection in the decision-making process, and the third pillar prescribes legal protection in case of rights violations. Although these principles can be applied in regulations on environmental protection and administrative acts, i.e., civil procedures, we believe that there is room for an increase in the participation of the public concerned in procedures for environmental crimes. The stated principle is inextricably linked with the availability of information to the public, because, without informing the public, participation in procedures related to environmental protection is unthinkable. Making information more available helps citizens learn about the environment, as well as about the importance of its protection. Apart from that, state bodies need to build

the trust of citizens in their work in order to gain higher participation, which is achieved in the above-mentioned manner.

After the public had been informed about the case of hazardous waste in Obrenovac, the locals began to address the Prosecutor's Office sharing their insights about the disposal of hazardous waste. A case was opened for each instance, all allegations checked, and based on information from citizens, information was obtained concerning witnesses previously unknown up to that point.

Given that the prosecution of environmental crimes is undertaken ex officio, the question arises as to whether citizens and non-governmental organizations promoting environmental protection can file objections against the Public Prosecutor's decision to dismiss criminal charges or not initiate criminal prosecution.

In accordance with Article 3 point 28 of the Law on Environmental Protection [10], the public concerned is defined as the public that is affected, or that may be affected by the decision of the competent authority or that has an interest in it, including the association of citizens and social organizations that deal with the protection of the environment and which are registered with the competent authority. Also, the provision of Article 81 of the same law prescribes that "the public concerned in the process of exercising the right to a healthy environment, as a party, has the right to initiate the procedure of review of the decision before the competent authority, that is, by a court in accordance with the law.

Article 2 paragraph 1 of the Law on Associations stipulates that an association, in the sense of that law, is a voluntary and non-governmental organization based on the freedom of association of several natural or legal persons, established for the purpose of achieving or promoting a certain common or general goal or interest that is not prohibited by the Constitution or by law. [11]

The provision of Article 2 paragraph 1 of the Criminal Procedure Code prescribes that the injured party is a person whose personal or property rights have been violated or jeopardized by a criminal offense.[12]

10 Law on Environmental Protection, *Official Gazette of the RS*, nos. 135/2004, 36/2009 – as amended, 72/2009 – as amended, 43/2011 – decision of the Constitutional Court 14/2016, 76/2018, 95/2018 - as amended.

11 Law on Associations, *Official Gazette of the RS*, nos. 51/2009, 99/2011 as amended and 44/2018 – as amended.

12 Criminal Procedure Code, *Official Gazette of the RS*, nos. 72/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - decision of the Constitutional Court, 62/2021 - decision of the Constitutional Court.

The practice of the Public Prosecutor shows that environmental associations, established as associations of citizens, emerge as legal representatives of citizens harmed by environmental crimes,[13] which grants them a right to object to a decision of Public Prosecutor to dismiss criminal charges or not to initiate criminal proceedings, thus meeting the requirement of the Convention to make decisions available. Furthermore, another obligation envisaged by the Convention is to have the decisions' reasoning done in writing. Prosecutor's decisions to dismiss criminal charges and not to initiate criminal proceedings are provided along with the reasoning and in written form, thus meeting the requirement envisaged by the Convention.

In international legal instruments, put together under the auspices of the Council of Europe, there is a tendency of states to anticipate participation of citizens and associations in criminal proceedings related to environmental crimes. Namely, this possibility is prescribed in the Resolution of the Committee of Ministers of the Council of Europe (77) 28 on the Contribution of Criminal Law to the Protection of the Environment and in the Council of Europe Convention on the Protection of the Environment through Criminal Law (1998).

6. Conclusion

Environmental crimes are among the types of criminal activity that "produce" the largest profit and the fastest growth. Generally, they represent an obstacle to achieving the goals of sustainable development.[14] An increase in this type of criminality can be expected in the coming period.

In order to suppress and prevent these crimes more effectively, it is necessary to improve society's response to this type of challenge.

Domestic legislation does not provide for the possibility of temporary or permanent confiscation of property resulting from this type of criminal act. By expanding the range of criminal offenses to which the Law on Seizure and Confiscation of the Proceeds from Crime is applied to the most serious of environmental crimes, a normative framework would be created to reduce the financial power of perpetrators and make it more difficult to finance future criminal activities.

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13 Tsiatsianis, D. 2022. Who qualifies as an environmental victim? a cross-jurisdictional case-study in the waste sector. *The resolution journal*, p 3.

14 United Nations Office on Drugs and Crime. 2022. Fight against waste smuggling. Guidelines for good legal practice. Vienna.

In order to make it easier and more efficient to detect and prove an environmental crime, it would be expedient to prescribe the possibility of applying special evidentiary actions for the most serious of environmental crimes.

A multi-sector approach and the cooperation of the police, the public prosecutor's offices and environmental protection, inspection and other relevant subjects is necessary when investigating environmental crimes, as well as suitable specialization, training, and technical equipment of services specialized for detecting this type of crime.

Our opinion is that the public should be informed repeatedly about the state of environmental criminality and the state of the environment through the media, internet and periodically issued reports, in order to raise public awareness of environmental protection and the dangers of environmental crime and to increase public participation in decision-making of importance for the environment through the media and to educate the public about legal protection.

A successful and energetic activity of all competent subjects in the domain of solving environmental problems and more effective environmental protection, implies prior knowledge of the overall environmental situation, and especially the forms of environmental pollution.

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341.24:502.14(4-6EU)

Parliament and the Aarhus Convention: Contribution to good governance and parliamentary oversight

Abstract: This paper analyses the relationship between the Aarhus Convention and the parliament, starting from the point of the convention's parliamentary ratification. Through this process, the convention is introduced into the legal framework of the state as a law of confirmation, becoming an integral part of its legal system. Besides its aim to ensure the accessibility of information, public participation in decision-making, and the right to legal protection in environmental matters, the Aarhus Convention, through its first two pillars, also contributes to good governance. This paper explores parliamentary oversight mechanisms through which the parliament monitors and controls the implementation of the Aarhus Convention. Beyond promoting good governance within its own institution and as a representative and legislative body, parliament significantly contributes to realizing the principles of good governance at the state level by exercising parliamentary oversight and control over the executive branch. By holding the executive accountable, parliament plays a crucial role in achieving the principles of good governance at the state level. In this context, the paper analyses existence and activities of a specific working body, the Environmental Protection Committee, are discussed, the posing of parliamentary questions, consideration of ministry reports, organization of public hearings, holding committee sessions outside the parliament's headquarters, the mechanism of the 'green chair', and various ways in which parliament can involve citizens. In addition to reviewing past achievements, this paper highlights ways in which parliaments can take an active role in achieving the goals of the Aarhus Convention and exercising parliamentary oversight over its implementation. Practical recommendations for parliament are provided to continuously improve the state of environmental protection and citizen involvement. Beyond

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the perspective of the national parliament, the paper examines the current efforts and actions of the Inter-Parliamentary Union in the pursuit of environmental protection.

Keywords: Aarhus Convention, parliament, parliamentary oversight, accessibility of information, transparency, good governance, ecology, environmental protection

1. Introduction: The Aarhus Convention and the role of parliament

The Aarhus Convention (AC)[1] was adopted in 1998 by the United Nations Economic Commission for Europe and entered into force in 2001.[2] The Republic of Serbia acceded to the AC on July 31, 2009. In addition to the National Assembly enacting the Law on the Ratification of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,[3] through which the Republic of Serbia (RS) ratified the AC, the Government of the RS also adopted the Strategy for the Implementation of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[4] In addition to its goal of environmental protection, the AC contributes to the good governance, which is encouraged not only by the convention's ratification but also by changes in the regulatory framework. These changes include the enactment of new laws and sublegal acts related to the subject matter of the first two pillars of the AC.

The role of parliament in the adoption and establishment of prerequisites for the implementation of any convention is indispensable. When we talk about the role of national parliaments, it, in accordance with the importance of the parliament in articulating public interest and its representative function, manifests in the parliament first recognizing the importance of a particular issue, bringing it into focus, and initiating a debate on that issue. Furthermore, in a formal legal sense, the role of parliament is crucial regarding the ratification of an international convention as a legal method by which the convention is introduced into the legal sys-

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1 Entered into force on 30 October 2001, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The text of the Convention is available at: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

2 The AC has been ratified by both the European Community (in 2005) and all member countries. Considering all countries, as of 3 July 2023, there are 47 Parties to the AC. 38 Parties to the Protocol on Pollutant Release and Transfer Registers (PRTRs) and 32 Parties to the amendment on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMOs). The Protocol entered into force on 8 October 2009. See: https://unece.org/environment-policy/public-participation/aarhus-convention/status-ratification and https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27.

3 *Official Gazette of the Republic of Serbia – International treaties*, no. 38/2009.

4 *Official Gazette of the Republic of Serbia*, no. 103/2011.

tem of the state and becomes an integral part of it. This is followed by ensuring the appropriate conditions for achieving the goals through the adoption of the annual budget, monitoring the implementation, and exercising parliamentary oversight, i.e., the control function of parliament. Although historically, parliament's involvement in international affairs has been limited, especially in negotiations, as these matters traditionally involved the executive branch, the increasing international interconnectedness and developments, as well as the activities of international parliamentary organizations and forums, attest to the need for parliamentary involvement in international affairs. Consequently, the role of parliament and parliamentarians is evolving, not only in negotiations during the adoption of conventions but also in promoting their implementation, as an integral part of parliamentary diplomacy.[5]

The importance of ratification[6], or confirmation, of international conventions from the perspective of domestic law lies in the fact that, according to our constitution, ratified international treaties (as well as generally accepted rules of international law) are an integral part of the legal system of the RS and apply directly.[7] In this sense, the ratification of international treaties falls within the competence of the Parliament as the legislative branch of government, explicitly prescribed by the Constitution. Specifically, the National Assembly (NA) confirms international treaties when a legal obligation for their confirmation is provided by law.[8] The Law on the conclusion and implementation of international treaties, [9] in the section regulating the confirmation of international treaties, it stipulates that the NA confirms international treaties of military, political, and economic nature, treaties creating financial obligations for the RS, treaties requiring the adoption of new or the amendment of existing laws, and treaties amending existing legal provisions.[10]

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5 In contemporary parliamentary law, there is a tendency for the parliament to be active and efficient at three levels: national, local, and international. See Beetham (2006, 155).

6 Although negotiating the conclusion of international treaties is traditionally associated with the Government as the executive branch, with the victory of bourgeois revolutions, the development of parliamentarism, and the democratization of foreign affairs, ratification ceases to be merely the confirmation of the work of the ruler's agents. It becomes an act by which the state freely decides to finally commit itself to the treaty. Broadly speaking, ratification is the ultimate expression of the will of the state that participated in the negotiations and signed the treaty to accept as its international obligation the previously established text of the international instrument. Constitutional ratification is the consent, acceptance, confirmation, approval of the content and form of an international treaty given by the state authority, or several of them, specified by the constitutional order to bind their own state to respect and implement the international treaty. See Đurić (2007, 171-172 and 219-220).

7 Ratified international treaties must be in accordance with the Constitution. See Article 16 of the Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, no. 98/2006 and 115/2021.

8 Article 99, paragraph 1, point 4 of the Constitution of the Republic of Serbia.

9 *Official Gazette of the Republic of Serbia, no.* 32/2013.

10 While international treaties that do not fall under the aforementioned category are not subject to the ratification process, information about these treaties is provided by the Government to the relevant committee of the NA. See Article 14 of the Law on the Conclusion and Implementation of International Treaties.

The described legal-political solution is understandable and logical, as it involves a form of legislative activity, given that the signed (concluded) international treaty, or convention, is incorporated into the legal order by enacting, or coming into force, a law confirming the international treaty. The confirmation of an international treaty represents a specific legislative procedure that is specially recognized and regulated by the Rules of Procedure of the NA[11], which contain specific provisions about it. Namely, in the ninth part of the Rules of Procedure, which regulates procedures for adopting acts and other procedures, a special (third) part[12] is dedicated to the procedure for confirming international treaties. The specific features of this procedure can be summarized in the following characteristics: (1) the proposal for the law confirming the international treaty includes the text of the international treaty being confirmed, with a translation into the Serbian language (thus, bilingual content), (2) the proposal for the law confirming must be justified, so that the justification includes the reasons for proposing the confirmation of the international treaty, whether the international treaty creates financial obligations in its implementation, as well as an estimate of the necessary financial resources for its implementation; (3) no amendment can be submitted to the text of the international treaty;[13] (4) a single consideration, which involves simultaneous consideration of the general and detailed considerations; (5) other issues related to the procedures for enacting laws confirming international treaties are governed by the rules of the procedure for enacting laws.[14]

2. Contribution of the Aarhus Convention to good governance

The role and contribution of the parliament to the goals of the AC are particularly reflected in the context of the first two of its three pillars, namely the principles and objectives of the Convention. This concerns the issues of access to information and participation in the legislative decision-making processes.[15] Essentially, in the context of this topic, the goal of the AC is to strengthen the role of both individual citizens and civil society organizations (CSO), or the

11 *Official Gazette of the Republic of Serbia*, no. 20/2012-3.

12 Regarding the system and order of regulating procedures for adopting acts, (1) the first procedure is the one for amending the Constitution, followed by (2) the procedure for law adoption, then (3) the procedure for ratification of international treaties, followed by (4) the procedure for adoption of the budget of the RS and the final financial statement, after which (5) the procedure for determining the budget of the NA is regulated, then (6) the procedure for adopting Development plan of the RS and the Spatial plan of the RS, (7) the procedure for granting prior consent to the statute of an autonomous province, (8) the procedure for adoption of declarations, resolutions, recommendations, and strategies, (9) the procedure for adoption of Rules of procedure and other general acts, (10) the procedure for authentic interpretation of laws, (11) the procedure for adoption of Unique methodological rules for drafting regulations, followed by other procedures.

13 See Article 169 of the Rules of Procedure of the National Assembly.

14 See Article 170 of the Rules of Procedure of the National Assembly.

15 Excluding the issue of legal protection, i.e., the third pillar of the Convention, which is not the subject of this paper and will not be the focus in this work.

public,[16] in environmental matters. In this sense, the AC is based on the principles of transparency and participatory democracy. It is a legally binding international treaty that establishes the principle of participatory environmental governance. It could be said that the AC is understood as an expression or symbol of democratic procedures in the field of environmental protection. Such questions posed to the parliament regarding environmental protection represent an additional or specific role in deliberative democracy. These efforts, as part of participatory democracy, have been in focus worldwide for the past two decades. Moreover, it can be said that it is a concept of human rights and the environment, providing a framework to encourage public participation not only in environmental protection but also in the broader achievement of Sustainable Development Goals. In addition to granting rights to the public, the Convention imposes obligations on public authorities regarding access to information, public participation, and the right to legal protection. Today, especially in the European Union, efforts are being made to integrate environmental protection as an essential aspect of all other public policies.

The above indicates a regional and global trend of connecting environmental protection issues with democratization and good governance, more broadly speaking, and the role of parliaments in involving the public in the consideration and decision-making regarding environmental issues. Public participation in shaping public policies and decisions related to the environment contributes not only to a higher level of democracy and the consolidation of the democracy deficit, a characteristic of modern representative democracies, but also enhances transparency and accountability in the decision-making process. This, in turn, contributes to building a system based on the principles and values known as good governance. Essentially, these are principles and standards that are advocated not only in environmental management but have been promoted in all spheres (both horizontally and vertically) in recent years, denoted by the term good governance. Every progressive society strives towards good governance.[17] Firstly, it should be noted that good governance as a concept is not merely a poten-

16 Regarding the legal definition of 'public' in the context of the role and significance of the public in environmental protection, see Lilić, Drenovak-Ivanović (2014, 247-249).

17 As a matter of fact, it is measure of the efficiency of any administration and in a democracy, citizens elect their representatives upon this assurance of good governance. Further, a democratic set-up requires an informed citizenry based on the fact that citizens are the direct stakeholders in every public authority and therefore, have the right to know the process of working of the government. See Jain (2012, 506).

tial characteristic related to administration[18] or government bodies; it extends to all state bodies and institutions, including parliament as a state institution. The essence of good governance involves transparency in operations, the availability of information, and the involvement of the public. Although the AC precisely focuses on these issues concerning environmental protection, the concept of good governance goes a step further, as it implies such a mode of operation regarding all matters. It is not limited solely to environmental issues but extends to broader contexts, and discussions about it take place at both the national and local levels. In terms of good governance at the local and regional level, The European Committee on local and regional democracy (Council of Europe) prepared in September 2011 a strategy for innovation and good governance at the local level. Based on the argument that good democratic governance is a necessity at all levels of public administration, the Centre of Expertise for Local Government Reform (established by the Council of Europe) prepared "The 12 Principles of Good Democratic Governance".[19] Addink (2019, 99-182) outlines six principles of good governance (as parameters of good governance): (1) the Principle of Properness, (2) the Principle of Transparency, (3) the Principle of Participation, (4) the Principle of Effectiveness, (5) the Principle of Accountability, (6) the Principle of Human Rights.

When chronologically analysing the sequence in which institutes contributing to public involvement and transparency are introduced, it could be said that, among other factors, the process of adopting the AC and the parliamentary discussions surrounding it has, to a certain extent, contributed to the application of the concept of good governance. Mechanisms such as public hearings, the 'green chair', public-private partnerships, informal parliamentary groups, and the parliament's proactive approaches with the aim of information accessibility have all

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18 When it comes to administration, we are not only talking about good governance but also about good administration, as a concept that is opposed to the concept of bad administration. In the context of public administration, Davinić (2010, 389-390) emphasizes that in every country there exists an appropriate standard in the activities and behaviour of the administration that public servants strive to achieve, and which citizens expect from them. Therefore, it is emphasized that public administration bodies are obligated to act in accordance with the legitimate expectations of the users of their roles. The concept of good administration has emerged from the need to improve the functioning of public services and thereby facilitate the realization of citizens' rights. Simply put, good administration involves achieving the most desirable results in the best possible way. Compliance with all relevant laws, rules, and procedures does not, by itself, constitute good administration. This concept also implies high integrity, efficiency, honesty, and openness of public servants who apply these general acts in practice.

19 Which include: (1) Participation, Representation, Fair Conduct of Elections, (2) Responsiveness, (3) Efficiency and Effectiveness, (4) Openness and Transparency, (5) Rule of Law, (6) Ethical Conduct, (7) Competence and Capacity, (8) Innovation and Openness to Change, (9) Sustainability and Long-Term Orientation, (10) Sound Financial Management, (11) Human Rights, Cultural Diversity and Social Cohesion, (12) Accountability. See: https://rm.coe.int/12-principles-brochure-final/1680741931.

contributed to strengthening transparency and led to the gradual opening of the NA, enhancing communication with citizens.[20]

Furthermore, at this factual level of parliamentary practice in the NA, when examining the period after the ratification of the AC in the RS, significant changes in Serbia's legal system can be clearly observed, moving towards strengthening public participation in decision-making. In this sense, it could be said that the AC has spurred further development of the legal system to involve the public in decision-making and shaping public policies, thus realizing the principles of good governance. This issue has broader implications and significance, not only for raising awareness about the importance of environmental protection but also for the development of democracy and citizen participation. The issue of consultation in the process of creating public policies in the RS is regulated by the Law on the planning system of the RS,[21] adopted in 2018, followed by accompanying sub-legal acts, such as the Regulation on the methodology of public policy management, analysis of public policy effects, and the content of individual documents of public policy, enacted in 2019,[22] as well as the Rulebook on good practice guidelines for public participation in the preparation of draft laws and other regulations and acts.[23] The Government of the RS, in 2014, upon the proposal of the Office for cooperation with civil society, adopted a Conclusion establishing Guidelines for the involvement of CSOs in the legislative process.[24] Simultaneously, it recommended that, in addition to state administration bodies, autonomous province bodies, and local self-government bodies should ensure the participation of CSO in the preparation of regulations within their jurisdiction and adhere to the principles outlined in the Guidelines. To guide the work of state administration bodies towards further improvement of CSO involvement in the processes of drafting regulations and documents of public policies defined by the Guidelines for the involvement of CSO in the legislative process since 2014,[25] the Government of the RS adopted a Conclusion on the adoption of Guidelines for the involvement of CSOs in working groups for the preparation of draft documents of public policies and drafts of regulations[26] on January 30, 2020. In addition to the aforementioned regulations related to development documents, the legal framework for public consultation in Serbia includes the Regulation on the structure, methodology of preparation, the manner of harmonization of development documents, the conduct of pub-

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20 Within the parliamentary project where the United Nations Development Programme provides technical and development assistance to the NA, and in the context of responsible governance, the Strategy for building and sustaining public participation in the work of the NA through social media has been published.
21 *Official Gazette of the Republic of Serbia*, no. 30/18.
22 *Official Gazette of the Republic of Serbia*, no. 8/19.
23 *Official Gazette of the Republic of Serbia*, no. 51/19.
24 *Official Gazette of the Republic of Serbia*, no. 90/14.
25 *Official Gazette of the Republic of Serbia*, no. 90/14.
26 *Official Gazette of the Republic of Serbia*, no. 8/20.

lic consultations, as well as the manner and deadlines for public display of regional development documents,[27] and the Rulebook on the procedure for public insight, presentation, and public discussion on the environmental impact assessment study.[28] It is important to note that the Regulation on the structure, methodology of preparation, harmonization of development documents, the conduct of public consultations, as well as the manner and deadlines for public display of regional development documents, contains principles of public consultation. It prescribes the following fundamental principles applied during public consultations: (1) the principle of partnership (involving representatives of the public and civil sector in public consultations); (2) the principle of information and publicity (public notification about the subject and progress of public consultations); (3) the principle of transparency (public accessibility of development documents subject to public consultations).[29] Finally, it should be emphasized that in 2021, the Government of the RS adopted the Regulation on public participation in the development of certain plans and programs in the field of environmental protection.[30] This regulation outlines the procedure for public participation in the decision-making process regarding the development, amendment, supplementation, review, and adoption of air quality plans, regional and local waste management plans, hazardous waste management plans, the national waste management plan, waste prevention programs, action plans for environmental noise protection, and plans for the protection of water from pollution.

The presented facts lead to the conclusion that, considering the timeframe after the ratification of the AC in Serbia, there has been improvement both at the normative and practical levels through the implementation of new mechanisms (public hearings, sessions outside the headquarters, the 'green chair', etc.). Additionally, the previous analysis shows that good governance extends beyond state administration; it is a principle, a set of principles, and a way of functioning that applies to all state institutions, including parliament. Good governance serves as a common term for a system of interconnected principles, namely the principles of good governance, which include accountability, transparency, openness, and participation. These principles are related to issues of equality, lead to predictability, efficiency, and effectiveness, creating overall conditions for corruption prevention. [31] It is considered that the AC is a convention in the service of citizens, just as good governance can be described as a form of governance that serves the citizens.

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27 *Official Gazette of the Republic of Serbia*, no. 15/11.
28 *Official Gazette of the Republic of Serbia*, no. 69/05.
29 See Article 14 of the Regulation on the structure, methodology of development, manner of harmonization of development documents, manner of conducting public discussions, as well as the manner and deadlines for the presentation for public inspection of regional development documents.
30 *Official Gazette of the Republic of Serbia*, no. 117/2021.
31 Regarding the implementation of these principles at the local level, see Jerinić, Vučetić, Stanković 2022.

3. The importance of transparency, access to information, and good governance for enhancing responsibility and accountability

The availability of information and the access to information represent essential prerequisites for the transparency of work.[32] When considered together, transparency and information availability are prerequisites for citizen participation in shaping public policies and making regulations. Thus, strengthening democracy, or empowering representative democracy through mechanisms of participation and deliberative democracy, contributes to an ongoing relationship between citizens and their representatives in parliament even after elections.[33] The concepts of the rule of law, democracy, and good governance are cornerstones of the modern state.[34]

In the context of parliamentary law, transparency is now considered one of the fundamental requirements sought by modern parliaments. Specifically, the Working Group on the Contribution of Parliaments to Democracy, formed by the Inter-Parliamentary Union, after conducting global research in which the Serbian Parliament participated, identified five key characteristics of a modern parliament: (1) ensuring adequate representation, (2) being open and transparent, (3) being accessible, (4) being accountable, and (5) being efficient at all levels (national and local).[35] The importance of these principles and their further development is evidenced by the fact that in October 2023, the Inter-Parliamentary Union, in partnership with other leading organizations in parliamentary development,[36] published "The Indicators for Democratic Parliaments." In total, there are 25 indicators, but they are grouped into seven targets that cor-

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32 There is a direct and undeniable link between the right to information, transparency and good governance. A transparent public system of governance promises a democratic and accountable state (Jain 2012, 506).

33 See Vukadinović (2012, 240-272).

34 Good governance is not only about further development of the rule of law and democracy but it also includes the elements of accountability and efficiency of the government. Good governance is significant because it is both a norm for the government and a citizen's right. This justifies good governance as a genuine third cornerstone (Addink 2019, 3-4).

35 See more: Beetham (2006, 13-181).

36 Commonwealth Parliamentary Association (CPA), Directorio Legislativo Foundation, Inter Pares / International IDEA, National Democratic Institute (NDI), United Nations Development Programme (UNDP), UN Women, Westminster Foundation for Democracy (WFD).

respond to the adjectives used in of the Sustainable Development Goals (SDGs)[37]: effective, accountable, transparent, responsive, inclusive, participatory and representative.[38]

On the operational level, measures taken to increase transparency involve, on the one hand, a systematic and proactive approach to information accessibility (via a website, the creation of an information booklet, the adoption of specific strategies), and on the other hand, compliance with requests for access to information of public importance. In this context, it is important to note that the NA has enacted the Law on access to information of public importance.[39] This law regulates the rights to access information of public importance held by public authorities, aiming to realize and protect the public's interest to know and the achievement of a free democratic order and an open society.

To fulfil the right to access information of public importance held by public authorities, this law establishes the Commissioner for information of public importance as an independent state body, independent in the exercise of its competencies. Simultaneously, to facilitate the realization of the public's interest to know, the law stipulates that all public authorities should publicly disclose and thus make available to the public all information about their work considered information of public importance, in accordance with the provisions of this law. To achieve this, the NA has published an information booklet on its website, designated an individual who is authorized to handle requests for free access to information in the NA, and opened a special email address regarding information access.[40]

The aforementioned is crucial as a prerequisite to good governance and citizen involvement because, for citizens to make informed decisions, they must be informed. Given the quantity and complexity of information in contemporary society and rapidly changing circumstances, digitalization and modern communication methods, the demand for information can be considered partially satisfied if there is adequate information availability and transparency

37 Targets 16.6 and 16.7.

38 The complete list of indicators includes: (1) Parliamentary autonomy, (2) Members of parliament, (3) Parliamentary procedures, (4) Parliamentary organization, (5) Administrative capacity and independence, (6) Law-making, (7) Oversight, (8) Budget, (9) Representative role of members of parliament, (10) Relations with other branches of government, (11) Key parliamentary powers, (12) Parliamentary ethics, (13) Institutional integrity, (14) Transparency of parliamentary processes, (15) Parliamentary communication and outreach, (16) Access to parliament, (17) Valuing public concerns, (18) Inclusive law-making, oversight and budgeting, (19) Inclusive institutional practices, (20) Parliamentary environment for public participation, (21) Public participation in parliamentary processes, (22) Participation of diverse groups in the work of parliament, (23) Electoral integrity, (24) Composition of parliament, (25) Composition of parliamentary bodies. See: https://www.parliamentaryindicators.org.

39 *Official Gazette of the Republic of Serbia*, no. 120/2004, 54/2007, 104/2009, 36/2010 and 105/2021.

40 See: http://www.parlament.gov.rs/aktivnosti/informator/lice-odredjeno-za-zastitu-podataka-o-licnosti-u-narodnoj-skupstini-.1023.html.

in operations. However, when it comes to significant decisions, a proactive approach and targeted prior notification are necessary.

It is considered that transparency has a positive impact not only on openness but also on accountability, a culture of responsibility, and public ethics. In the context of continuous improvement with the aim of achieving principles of good governance, ethical rules and codes are adopted at various levels of government. When it comes to the legislative branch, the adoption of ethical codes has become common practice in many contemporary parliaments. In this context, the NA has enacted the Code of Conduct for MPs[41], established the Ethics Commission,[42] and prepared a Guide for the Implementation of the Code of Conduct for MPs.[43] Additionally, transparency is a prerequisite for combating corruption, leading parliamentarians to form the Global Organization of Parliamentarians Against Corruption (GOPAC), whose National Chapter was established in 2013 within the NARS.[44] On the other hand, concerning other informal[45] bodies and parliamentary groups (networks), and addressing the accessibility of information, the parliament has recognized the issue of unsuitable and inappropriate information for children on the Internet as particularly important. Thus, on March 30, 2021, in the NA was formed the Parliamentary Network for Digital Security as a voluntary, non-partisan, informal parliamentary

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41 *Official Gazette of the Republic of Serbia*, no. 156/20 and 93/21. In addition to the ethical rules for parliamentarians, there are also rules that apply to employees of the NA Service, which are outlined in the Regulation on the basic principles of work, conduct, and dress code for employees of the NA Service and individuals engaged in performing duties in the NA. This regulation includes the basics of business ethics, business-ethical rules, and standards of personal and professional integrity and conduct for employees of the NA Service.

42 See: http://www.parlament.gov.rs/upload/images/announcements/slike/Kodeks_SluzbeniGlasnik.jpg.

43 The Guide for the implementation of the Code of Conduct for Members of Parliament is also available on the website of the NA, at the following link: http://www.parlament.gov.rs/upload/documents/dokumenta/28.10.2021.%20Vodic%20za%20primenu%20Kodeksa.pdf.

44 About the activities of GOPAC Serbia, see: https://gopacsrbija.wordpress.com.

45 Informal parliamentary groups are characterized by non-compulsion; they are not appointed by the Rules of Procedure of the NA or the Law on the NA. The number of their members varies, and often there is no limitation. Further specifics of informal parliamentary groups include that their composition does not require proportional representation (which is taken into account in committees), they are not formed by the plenary of the NA, and their focus is specific, emphasized, and different from the scope of committees (usually narrower or related to topics of broader social significance that encompass a larger number of committees). Additionally, informal parliamentary groups hold meetings (while committees operate in sessions), and usually, no quorum is required for their work, although the group may adopt its internal rules. Due to all the mentioned reasons, informal parliamentary groups sometimes have more political than legal significance. In addition to the National GOPAC Branch and the Parliamentary Network for Digital Security, other informal parliamentary groups have been formed in the NA, such as the Women's Parliamentary Network, the Green Parliamentary Group, the Economic Caucus (Parliamentary Group for the Economic Development), and the Parliamentary Forum for the Energy Policy of Serbia (Energy Forum). About the Economic Caucus of the NARS as an effective mechanism for public-private dialogue aimed at improving the legal framework for economic development, see Knežević Bojović, Vukadinović (2016, 285–300). By applying qualitative and quantitative analysis of the work and results of the Economic Caucus, the paper identifies the innovations and improvements in the legal framework for business initiated by this caucus. Specifically stated, the study shows that in 85.51% of cases, the NA has accepted amendments proposed by members of the Economic Caucus.

group of Members of Parliament. Its establishment aims to actively contribute to improving conditions for online security and ensuring the safe use of the internet.

Publicity and transparency in the work of institutions are prerequisites for deliberative and participatory democracy, not only in the context of environmental protection but also more broadly. The mentioned democratic values and methods of citizen participation, along with the availability of information, further promote transparency in decision-making and responsibility at all levels. This contributes to accountability and ultimately helps reduce the risk of corruption, which, as a concept of good governance,[46] should provide benefits by ensuring that decisions are made in the common interest of people and the environment. Certain studies indicate that levels of development are associated with higher levels of democracy and good governance. Moreover, the relationship between good governance and development is notably stronger and more significant than the relationship between democracy and development.[47]

4. Parliamentary oversight mechanisms for monitoring the implementation of the Aarhus Convention and good governance

In addition to promoting good governance within its own institution and in its function as a representative and legislative body, parliament contributes significantly to the realization of the principles of good governance by exercising parliamentary oversight and control over the work of the executive branch, holding the executive accountable. In order to monitor the implementation of laws, including the law on the ratification of the AC, parliament, in carrying out its oversight function,[48] has various mechanisms of parliamentary control at its dis-

46 For explanations why parliaments are crucial to the achievement of good governance, on the example of Africa, see: Economic Commission for Africa, *The Role of Parliament in Promoting Good Governance*, available at: https://archive.uneca.org/sites/default/files/PublicationFiles/role-of-parliament-in-promoting-good-governance.pdf.

47 Pelizzo, Stapenhust 2007. Based on evidence, these authors suggest that in order to promote development in Africa it is even more important than in the rest of the planet to promote good governance.

48 The control function is one of the fundamental functions of the parliament, as stated in Article 7 of the Law on the NA, emphasizing that the NA, within its jurisdiction, performs the representative, legislative, electoral, and control functions. When considering the relationship between the electoral and control functions, a theoretical question arises as to whether the electoral function is independent or part of the control function. In terms of terminology, the Rules of Procedure of the NA use both the terms "control" and "oversight." Both terms are often used interchangeably, but there is no clear criterion in legislation or theory for choosing between these two terms. However, there is an opinion that they are not entirely synonymous. "Oversight" is often understood as careful observation or monitoring, while "control" implies taking active actions, verification, and examination. Another perspective argues that oversight is a broader concept, while control is narrower, with control being considered the most intense form of oversight. Therefore, the term "control" is often used in the context of the parliament-executive relationship because the parliament not only monitors but also takes active measures using various mechanisms to correct the work of executive bodies and ensure compliance with the constitution and laws.

posal. Considering the existence of a dedicated working body for environmental protection, through which parliamentary oversight is exercised in this area, it can be said that, in terms of the legal framework, there are multiple mechanisms within the NA for exercising the oversight function[49] in the field of environmental protection. They are normatively well-established, and their number is comprehensive in the sense that, when the mechanisms in domestic law are compared with those in comparative parliamentary law, it cannot be said that anything essential is lacking in the normative part (Law on the NA, Rules of Procedure). However, even though the mechanisms exist, it appears that there is a need to work on their suitable implementation and the availability of data about them. This is considering that their application, as well as the effectiveness of parliamentary control, varies from one convocation to another, as a consequence of the political structure of parliament, which is a characteristic of a parliamentary democracy.

Parliamentary oversight and the control function of parliament involve various forms, ranging from asking questions, seeking information, monitoring the situation, making requests, to voting on motions of no confidence. Modern parliamentary development, driven by the need for greater specialization, is characterized by sectoral control, which involves: (1) control through the committee system and (2) control through and over independent state bodies. Parliamentary oversight is considered essential for realizing the principles of good governance and ensuring efficient, transparent, and accountable public administration. Within the OECD's[50] The Principles of Public Administration, principle 16 states: The parliament, ombudsman and supreme audit institution effectively scrutinise public administration. Regarding the parliament, the aforementioned Principle 16 implies two specifications: (a) The parliament and its committees effectively scrutinise the executive and monitor the quality of its work, through hearings, questions to government, parliamentary inquiries, evaluations of public policies and

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49 It is interesting to note that in the Second Global Parliamentary Report, published in 2017, the NARS is highlighted in multiple instances, particularly in the section addressing parliamentary oversight on page 24: 'Building Public Trust in the Parliament in Serbia.' The report notes that the RS actively worked on enhancing political institutions to strengthen public participation and build public trust. Efforts were directed towards achieving transparency in operations, accountability, and involving civil society (non-governmental sector). In the context of achieving these goals, the introduction of public hearings is emphasized. Special attention is given to the Rules of Procedure of the NA, which institutionalizes the organization of public hearings to obtain information and expert opinions on legislative proposals, as well as in the context of monitoring the implementation of regulations. Furthermore, it is highlighted that, with the support of UNDP in Serbia, the first committee sessions outside the parliament's headquarters were held, enabling the Assembly to conduct parliamentary oversight throughout the country. Innovations based on public involvement have led to an increasing level of public support for the parliament, as evidenced by public opinion polls. The conclusion is drawn that these initiatives have contributed to establishing connections and improving relationships between representatives of citizens and the public, resulting in more effective resolution of both local and national issues. See Inter-Parliamentary Union (2017, 24).

50 The Organisation for Economic Co-operation and Development.

budget oversight. (b) The parliament actively supports the ombudsperson and the supreme audit institution (SAI) in their oversight functions by ensuring adequate resources, considering their reports and urging the government to correct the deficiencies identified by the oversight bodies.[51]

In contemporary parliamentary development, committees are considered crucial to specialized oversight, emphasizing the importance of the strength of committees.[52] The existence and effectiveness of specialized committees are the first indicators of the parliament's ability to play a significant role in shaping national policies. A well-institutionalized structure of standing committees should parallel the structure of the executive branch.[53] Parliamentary control is believed to be more effective, developed, and detailed when conducted at the level of parliamentary committees. Control through the committee system is independent of the dynamics of plenary sessions and the legislative agenda, surpassing the frameworks of the parliament's plenary session agenda. Committees establish their own programs and priorities concerning the oversight function; they independently decide whom to invite for public hearings;[54] they independently decide whether the sessions will be open to the public or not, etc. In many parliaments in modern democracies, efforts are made to ensure that the chairpersons of committees crucial for parliamentary control are not from the ruling party because the effectiveness of control often depends on this in practice.[55]

According to the Rules of Procedure of the NA, a committee, within its scope, does the following: considers draft laws and other regulations, monitors the implementation of the policies pursued by the Government, monitors the execution of laws and other regulations, examines the work plan and report of the relevant ministry and other state bodies, organizations,

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51 OECD (2023, 28).

52 It is pointed out that the critical importance of committee systems in determining the ability of parliaments to hold governments accountable. Committees tend to be strong when party control over committees is weak, especially in parliamentary systems. Specifically, single party dominance tends to weaken committees. See: Parliamentary Centre – World Bank Institute (2020, 26).

53 DCAF's Parliamentary Staff Assistance Programme (2012, 29).

54 Regarding the differences between public debate and public hearing, see Vukadinović (2016, 36-43).

55 Generally, at a theoretical level, it can be said that the jurisdiction, or more precisely, the scope of the committee's work implies that committees: (1) propose decisions to the plenary on matters within their purview and provide opinions on draft laws; (2) are mainly responsible for formulating recommendations regarding the work of the executive branch; (3) committee reports and opinions are generally the starting point for the debate on draft laws during plenary sessions; (4) Ministries submit reports and information about their work to the committees (in Serbia, ministries provide information about their work to the relevant committee of the NA every three months, and at least once a year, they submit a comprehensive report). Committees monitor the work and activities of the executive branch within their areas of expertise, as well as the work of other state authorities or bodies. Committees oversee the implementation of ministry programs, request information from the executive branch, if necessary, demand documentation and reports, invite government representatives to their sessions, and require them to explain and justify their work.

and institutions, reviews the annual work program of the NA, grants approval to acts of state bodies, organizations, and institutions that, in accordance with the law, submit these acts to the NA for approval, initiates and submits proposals to the NA in accordance with the law and these rules, considers initiatives, petitions, submissions, and proposals within its scope, and discusses other matters within the competence of the NA.[56]

Parliamentary control strategies through the committee system encompass: (1) Proactive approach ("police patrol") where the committee works regularly and systematically, holding sessions to discuss draft laws, the state of affairs, and further development, examining regular reports submitted to the committees, etc., and (2) Reactive approach ("fire alarm") where the committee organizes public hearings or initiates a parliamentary inquiry into issues that arise during parliamentary debate, in the media, or are brought to attention through petitions or reports. In practice, most committees combine proactive and reactive approaches in exercising parliamentary control.

The possibilities of the NARS, aimed at improving the monitoring of the implementation of the AC, encompass mechanisms of parliamentary oversight within the legislative framework. The existing mechanisms of parliamentary oversight and the institutions through which the NA exercises its control function include: 1. Interpellation regarding the work of the Government or a member of the Government; 2. Voting of no confidence in the Government or a member of the Government; 3. The right of MPs to request information and explanations; 4. Reporting to the NA on the work of the Government;[57] 5. Examination of reports from state bodies, organizations, and institutions; 6. MP's question; 7. MP's question related to a current topic (question time); 8. Establishment of an inquiry committee and commission; 9. Information provided to the committee about the work of the ministry (every three months); 10. Public hearing; 11. Adoption and control of the execution of the budget as well as the final account of the budget of the RS; 12. Control of the security sector.

Firstly, in line with the global trend in contemporary parliamentary development, where the focus of parliamentary work shifts from the plenary sessions to working bodies, it is essential to highlight that the NA has a dedicated permanent working body: the Environmental Protection Committee. The fact that the Parliament consistently (across multiple convocations) maintains a dedicated permanent working body, i.e., the Environmental Protection Committee, both in a system with 30 committees and the current system with 20 committees (includ-

56 Article 44 of the Rules of Procedure of the NA.

57 The Government submits a report to the NA when requested by the NA or on its own initiative, at least once a year.

ing the Committee for the rights of the child as a separate working body)[58], demonstrates that the Parliament recognizes the importance of environmental protection issues. Regarding information accessibility, it should be noted that written information about each committee session is available on the Parliament's website. Additionally, every committee session can be directly (live) monitored, with video recordings also accessible on the NA's website under the archive section. Through this described approach and information availability, it can be affirmed that the committee's work is transparent.

In carrying out the oversight function of Parliament, the Environmental Protection Committee reviews the annual report of the Ministry on the state of the environment, as well as reports from special organizations (the Environmental Protection Agency). Additionally, the committee considers quarterly environmental status updates. Besides holding regular sessions, typically at the NA headquarters, the Environmental Protection Committee (like all working bodies of the NA) has the option to convene sessions outside the NA's premises.[59] These off-site sessions, sometimes colloquially referred to as "mobile sessions,"[60] have demonstrated triple significance in practice. Firstly, they enable the committee to directly familiarize itself with the actual conditions on the ground, practical issues that can be relevant for considering legislative proposals and regulations. Secondly, these sessions serve, in a way, as parliamentary oversight throughout the country, strengthening the parliamentary control role. This allows the parliament to monitor both the implementation of laws and other regulations. Thirdly, committee sessions held outside the NA's premises allow representatives of the national parliament to identify specific issues at the local level and determine whether there is a need to amend national regulations to improve the local situation. The situation where representatives of different institutions and levels of government meet in person at one location can contribute to the creation of a specific constructive synergy in addressing issues and can help avoid so-called jurisdiction shifting. Instead, it encourages everyone to take responsibility and agree on specific steps to be taken "on the spot." In this way, off-site committee ses-

58 The number and structure of committees as permanent working bodies represent a part of the parliament's right to self-organization.

59 See Article 42, paragraph 4, of the Rules of Procedure of the NA, *Official Gazette of the Republic of Serbia*, no. 20/12- consolidated text.

60 The Third Global Parliamentary Report, published in 2022, which focuses on public participation and inclusion in the work of assemblies and parliaments (participation, encouraging citizen involvement in shaping public policies), highlights the initiative of parliamentary committees to go outside their headquarters to listen and engage, citing examples of good practices from the Republic of Serbia: committee sessions held outside the headquarters and public hearings (see page 29). This report identifies five global trends regarding public participation and inclusion in parliamentary work: (1) involving youth, (2) "leave no one behind" (inclusive representation), (3) transforming communication and work methods in line with contemporary technological changes (digital tools), (4) encouraging innovation, and (5) connecting and networking. See Inter-Parliamentary Union (2022, 8-9).

sions contribute to improving coordination and collaboration among different levels of government, all aimed at solving specific life problems and creating better living conditions for people. In this sense, this mechanism facilitates the more efficient resolution of both local and national issues simultaneously.[61]

Up to May 7, 2023, nine sessions of the Environmental Protection Committee were held outside the premises of the NA. Among these, four sessions took place during the current XIII convocation (since August 1, 2022): in Žagubica (April 25, 2023), Babušnica (March 30, 2023), Loznica (November 25, 2022), and Majdanpek (September 29, 2022). The remaining five sessions were held in earlier convocations in Čačak (July 23, 2021), Sremska Mitrovica (June 4, 2021), Novi Sad (March 23, 2017), Subotica (September 24, 2013), and Pančevo (October 10, 2008). During the observed period, the committees of the NA held a total of 101 sessions outside the premises of the NA. [62] Based on this data, the conclusion is drawn that the share of such "mobile" sessions of the Environmental Protection Committee is 8.91%. The video recordings of most mobile sessions are also publicly available on the website of the NA.

When it comes to the sessions of the Environmental Protection Committee, whether held at or out of the headquarters of the NA, a mechanism of special significance is the "green chair."[63] The term "green chair" refers to a designated seat in the NA's Environmental Protection Committee, reserved for a representative of the civil sector on a rotating basis. This representative actively participates in the committee's work, poses questions, attends mobile sessions and public hearings, thereby articulating interests and providing better information to the committee members.[64] Available data indicates that over 50 CSOs (NGOs)[65] are involved through the "green chair" mechanism in the work of the Environmental Protection Committee.

The "green chair" mechanism is legally regulated both by the Rules of Procedure of the NA and a specific Regulation on the Green Chair adopted by the CSOs collectively involved in

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61 Vukadinović (2022, 27.)

62 Information about all sessions of all committees of the NA outside the headquarters of the NA is available atTop of Form: *http://www.parlament.gov.rs/aktivnosti/narodna-skupstina/radna-tela/sednice-odbora-van-sedista-narodne-skupstine.4146.html*, 6.7.2023.

63 The Green Chair is also cited as an innovative example from Serbia in the Third Global Parliamentary Report, within the context of parliamentary committees and consultative processes, as an effort to promote greater inclusivity. See Inter-Parliamentary Union (2022, 27).

64 As an example of joint action within the Green Chair mechanism, a case from February 2016 can be mentioned when, following a meeting and discussions with experts, organizations gathered around the Green Chair sent proposed amendments to environmental protection laws to the Committee. These comments were considered by the relevant Ministry and discussed at the Committee meeting, where the Ministry presented proposed amendments to the laws. To see more about this, refer to: *https://zelenidijalog.rs/zs/pravilnik/*, 1.6.2023.

65 See: https://zelenidijalog.rs/zs.

the "green chair" mechanism. According to the Rules of Procedure of the NA, the Committee may allow the presence and participation of representatives of citizens and citizen associations in its sessions, discussing specific environmental protection issues.[66] Essentially, the "green chair" can be seen as an institutional mechanism for the participation of environmental CSOs in the work of the parliamentary Environmental Protection Committee. The Regulation on the Green Chair[67] defines the basic principles of this mechanism's operation, as well as the rights and obligations of network members.

Another crucial aspect of parliamentary work, regarded as a unique mechanism for exercising parliamentary oversight, is the conduct of public hearings. Public hearings, particularly in the area of environmental protection, serve a dual purpose of significance. Firstly, they can be structured as legislative-consultative sessions to meticulously identify and define issues, with the overarching goal of formulating more effective systemic legal resolutions for the identified problems. Secondly, they function as a supervisory tool, scrutinizing the application of laws and responses to potential implementation challenges. This facilitates direct insights for MPs into the necessity for amendments and supplements to existing laws, or even the initiation of new legislation, a prerogative available to any MP.[68] As of May 7, 2023, the committees of the NA have convened a total of 132 public hearings. Within this total, the Environmental Protection Committee has overseen 25 environmental public hearings. Statistical data reveals that, despite being one of the 20 committees in the NA, the Environmental Protection Committee has overseen nearly one-fifth, precisely 19% (18.94%), of the overall total of public hearings within the NA. Comprehensive video recordings of all public hearings, encompassing the 25 environmental sessions, are publicly accessible on the NA's website. Each recording is accompanied by an agenda and written documentation detailing the proceedings of every conducted public hearing, thus ensuring the public availability of information on all matters discussed.[69] These described mobile sessions and public hearings actively engage citizens, including repre-

66 See Article 63, paragraph 2, of the Rules of Procedure of the NA.

67 The regulation is designed to address the following 10 questions: (1) What does participation in this network enable for civil society representatives? (2) How does the mechanism function in practice? (3) How are committee sessions scheduled, and the agenda determined? (4) How are representatives of the Green Chair delegated to participate in committee sessions? (5) How many representatives of CSOs can attend a session? (6) The selection of network representatives during committee sessions. (7) What are the expectations from the representatives of the Green Chair during the session, and what are their obligations afterward? (8) Apart from participating in committee meetings, what other activities are undertaken by network members? (9) In what way can an organization become a member of this network? (10) Reasons for the exclusion of an organization from network membership.

68 About different types of public hearings, the evolution of this institute in the Republic of Serbia, as well as comparative solutions and rules on public hearings, see Vukadinović (2021, 69-117).

69 See *http://www.parlament.gov.rs/aktivnosti/narodna-skupstina/radna-tela/javna-slusanja.3013.html*, 3.7.2023.

sentatives of the public, and CSOs. Simultaneously, the disseminated information is publicly accessible through the NA's website.

All of the above has inspired the interest of other parliamentarians who are not committee members, leading to the formation of an informal Green Parliamentary Group. In the NARS, the Green Parliamentary Group was established as early as 2009. Similar to other informal groups, members of the Green Parliamentary Group have included parliamentarians from various parliamentary groups, representing different political parties. In the Assembly of the Autonomous Province of Vojvodina, the Green Parliamentary Group was formed in 2017, and in 2022, the Green Council Group of the City Assembly of Sremska Mitrovica[70] was constituted. In addition, it is important to mention the organization of special conferences, gatherings, and meetings dedicated to the AC, contributing to the promotion of its goals. For instance, on November 16, 2016, a national conference, "Aarhus Mirror," on the implementation of the AC in Serbia was held in collaboration with the organization Young Researchers of Serbia. Furthermore, on December 18, 2018, the Green Parliamentary Group held a working meeting commemorating the 20th anniversary of the adoption of the AC. Such mechanisms and all the activities mentioned undoubtedly contribute to the popularization of environmental issues.[71]

Regarding citizen involvement and accessibility, a contact form has been published on the NA's website for contacting committees (working bodies) and MPs. The contact information for committee secretaries has been disclosed, including their direct email addresses and phone numbers. A dedicated section of the NA's website, titled "Cooperation with Civil Society," has been created. In this section, a form is provided for interested CSOs to fill out, informing the parliament about their field of activity and desired collaboration methods. This has led to the establishment of a unified database for CSOs collaborating with the NA. An email address[72] has been provided for submitting the completed form and the organization's registration certificate. Additionally, a citizen petition form[73] has been published on the NA's website.

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70 It can be concluded that the mentioned activities have stimulated the process of transferring best practice examples from the national to the local level, as seen in terms of public hearings, green chairs, green parliamentary groups, etc.

71 It would be useful to conduct research on the number of parliamentary questions related to environmental protection, as such analytical data would be valuable for monitoring the situation, drawing conclusions about tendencies and trends, and gaining a broader understanding of public participation and the significance of environmental issues. About the significance of public hearings for local self-governments and the transfer of good practices from the national to the local level, see Vukadinović (2015, 39-41).

72 E-mail: civilnodrustvo@parlament.rs.

73 See: http://www.parlament.gov.rs/gradjani/pitajte/inicijative,-peticije,-predstavke-i-predlozi.1098.html.

5. Current contribution of the Interparliamentary Union

Taking into account the initiator of the AC (UNECE) and the number of countries that have ratified it in Europe, the undeniable contribution of this convention to a common European response to environmental protection issues is evident. However, it can also be said that it aligns with global or international efforts aimed at collective action, strengthening the awareness that environmental protection issues transcend national borders. It underscores the need for joint and concerted efforts to address matters of significance to humanity.

In addition to the previous well-known efforts of the Inter-Parliamentary Union in the field of environmental protection, primarily related to the adoption of the Resolution on the role of parliaments in environmental management and in combating global degradation of environment, a new initiative in 2023 is the global action named "Parliaments for the Planet." This initiative includes a media and social media campaign aimed at mobilizing parliaments to take action on the climate emergency. As part of this campaign and the presentation of case studies from around the world, the IPU has released case studies from 44 parliaments or countries.[74] Additionally, the IPU is releasing two-minute video clips featuring one parliamentarian each, explaining specific measures and actions taken by their parliament for the planet in response to the question: "How is climate change affecting your country?" So far, 54 video interviews have been published,[75] and at the end of June 2023, a compilation of experiences of parliamentarians worldwide was prepared, titled: *My parliament, my planet, our future!* In the described manner, MPs and parliaments, by their own example, demonstrate a greater commitment to environmental protection issues, enabling the exchange of experiences and encouraging other parliamentarians and parliaments to engage in global efforts for environmental protection and improvement in this field. For those who wish to join this campaign and share their experience with the community, the IPU has prepared a toolkit of communication and social media assets.[76] That environmental issues are one of the most important priorities for the IPU is evidenced by the fact that the Cremer-Passy Prize, which is awarded annually under the auspices of the IPU, was presented to a parliamentarian who made an outstanding contribution to promoting the goals of the IPU and those 'who contribute to a more united, peaceful, sustainable, and equitable world.' This recognition was awarded in October 2023 for exceptional achievements in the fight against climate change.[77]

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74 The state of affairs as of 15.11.2023. See: https://www.ipu.org/news/case-study.
75 The state of affairs as of 15.11.2023. See: https://www.youtube.com/playlist?list=PLLwJpE_EfvM5NZB8YLHreSg-zJMRZ_F4f.
76 Available at: https://www.ipu.org/sites/default/files/2023-10/IPU%20Toolkit%20%20FINAL.pdf.
77 See: https://www.ipu.org/news/press-releases/2023-10/tuvalu-speaker-wins-mp-year-award.

In addition, in 2023, the IPU released a special guide titled *'10 Actions for Greener Parliaments (and those who work in them),*' outlining concrete steps and key actions that institutions and individuals can consider and take to adopt 'greener' policies and embrace a culture of sustainability. This aims to address climate crises and pave the way for stronger climate action. The guide is currently available in four languages: English, French, Spanish, and Arabic. In this regard, consideration could be given to translating it into Serbian. These 10 actions are organized into three groups: (1) Institutionalizing the 'greening' of parliaments; (2) 'Greening' the way parliaments and their members work; (3) Leading and fostering a culture of sustainable change. Essentially, the IPU emphasizes that parliament leads and promotes a culture of sustainable change, ecological, and climate awareness. This can be achieved by the parliament undertaking regular activities focused on raising awareness among parliamentarians and staff about global and national trends and issues related to environmental protection, holding meetings on parliament's sustainability plans and practices, engaging parliamentarians in their communities and involving their constituents in discussions on environmental issues, finding opportunities for dialogue with civil society representatives, environmental experts, and youth to hear and understand their experiences and needs regarding environmental protection. As a specific step, it highlights the importance of prioritizing collaboration, knowledge exchange, and transfer related to environmental protection, working at multiple levels: within parliamentary groups to expedite initiatives and advocate for better legislation in this domain, building partnerships with local, national, regional, and international stakeholders to improve conditions; parliamentarians sharing their experiences with the IPU and other parliaments, using international forums and conferences for dialogue and knowledge exchange, etc. The guide provides concrete guidelines and steps on how to answer the question *'Where to start?*' specifically for: speakers of parliament, parliamentarians, secretaries general of parliaments and parliamentary staff, and offers a list of additional information sources.[78] Additionally, beyond all the aforementioned, an electronic database of all national laws and documents related to climate change has been established, encompassing all countries. As of November 14, 2023, it contains over 5,000 documents.[79]

Climate action has been recognized as the top policy priority for the IPU.[80] The IPU helps parliaments make progress on the Paris Agreement as well as other climate treaties, accelerate decarbonization and reduce the carbon footprint within parliaments themselves through its

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78 See: https://www.ipu.org/resources/publications/reference/2023-03/10-actions-greener-parliaments.
79 Available at: https://climate-laws.org/.
80 The ultimate goal of the IPU's action on climate change is to allow all people to live on a healthier planet with warming limited to 1.5 degrees Celsius above pre-industrial levels. See: https://www.ipu.org/impact/climate-change.

research, tools and meetings. All year, the IPU organizes events for parliamentarians to come together and exchange good practice when it comes to legislating, budgeting or scrutinizing government action on climate change.[81]

Finally, some national parliaments, in connection with ecology, enact specific laws related to the environmental aspects of business and human rights. This not only attests to the priority of national legislators but is also evident in information about legal proceedings, indicating an approach to environmental protection from the perspective of human rights. For example, in Germany, as of January 1, 2023, the new German Corporate Due Diligence Act to prevent human rights violations in supply chains came into legal force. This law is considered the most ambitious undertaking in the global trend of regulating the duties of legal entities to prevent human rights violations and is the most recent law in this area in the EU as of today. The aim of the law is to protect internationally recognized human rights, including environmental rights, by prescribing extraterritorial obligations to German business entities to respect these rights. In this regard, the German legislator establishes direct responsibility for companies for breaches of the duty of care prescribed to prevent human rights violations.[82] This law highlights the current trend of integrating environmental law, corporate law, and consumer rights, all from the perspective of human rights. In addition, the German Bundestag offers an interesting case study in how to reduce energy consumption and minimize environmental impact. The measures implemented by the Bundestag since July 2022 encompass building operations and vehicle management, reflecting the institution's commitment to sustainability.[83]

6. Conclusion and recommendations for further development

The relationship between parliament and the AC is diverse, given that parliament plays various roles not only related to the AC but also in the broader context of environmental protection. Today, in line with the principles of participatory and deliberative democracy and citizen involvement in decision-making processes, not only in the field of environmental protection, the primary role of the parliament lies in the process of ratifying the AC. By enacting laws of confirmation, the NA incorporates the convention into the legal framework of the

81 See: https://www.ipu.org/events.

82 It does not establish a specific legal liability of a civil nature but is limited to public-law sanctions such as fines and administrative measures restricting participation in public procurement. The subject of the duty of attention for companies in the field of the environment includes pre-defined risks by law, such as conditions where, based on actual circumstances, there is a sufficiently high probability of violating one of the legally established prohibitions on human rights violations and environmental protection breaches (Tomić, 2023, 213-214).

83 See: https://www.ipu.org/news/case-studies/2023-11/bundestag-blueprint-sustainability.

RS. This role can be considered legislative, including the enactment of other laws that establish a regulatory framework for environmental protection and citizen involvement. An important role is also budgetary, as when passing budget laws, it is crucial to plan and allocate the necessary resources to achieve the goals set by the laws. In this way, it can be analysed, taking into account the share in the overall budget, whether environmental protection is one of the priorities. Furthermore, a crucial role of parliament is oversight, implying that, through parliamentary oversight, it monitors the implementation and enforcement of laws. Thus, parliament holds the executive accountable, contributing to good governance.

When examining what the NA has done in the period after ratifying the AC, aiming at transparency, information accessibility, and citizen and civil society engagement, several normative advancements and useful examples from parliamentary practice are evident. These have been recognized as good practice examples in several reports by the IPU. The principles and objectives of the AC, in the context of parliamentary development, contribute to transparency and citizen participation in shaping public policies and enacting regulations, thereby enhancing democracy and improving representative democracy through participatory mechanisms. Greater access to information and transparency leads to increased accountability, all of which contribute to accountability and, consequently, the fight against corruption. Simultaneously, parliamentarians have at their disposal mechanisms of parliamentary oversight and control to monitor the implementation and enforcement of laws they have enacted. Besides being legally established, it is crucial that these mechanisms are functional, ensuring their practical implementation without difficulties. Although it is evident from the above that much has been accomplished, improving performance is an ongoing process. Therefore, further steps are possible towards enhancing the monitoring of the implementation of the AC and the application of prescribed rules on information accessibility and citizen participation. In this context, addressing the question of how Parliament can help make information publicly available as a prerequisite for citizen involvement, it would be beneficial to consider some of the following ideas:

(1) It would be beneficial for the entire legislative process, considering the theme of this paper related to environmental issues but also extending more broadly to all laws, to be easily accessible to the public on the Parliament's website. This entails not only the proposal of laws and the final text of the adopted law but also all submitted amendments (regardless of whether they were later adopted or rejected) with explanations. This would ensure that citizens are promptly informed and have the opportunity to express their opinions and participate in shaping the final text of the law. This aligns with citizens' rights to participate in the development of plans, programs, policies, and legislation that may impact the environment, as proclaimed by the AC.

(2) Consider the possibility for all submitted MPs' questions and responses to MPs' questions related to environmental information to be publicly disclosed and accessible on the website of the NA. This directly derives from citizens' right to information on the environment held by state authorities, as proclaimed by the AC.

(3) Consider the possibility for all reports, conclusions, and decisions of the committee responsible for environmental protection issues to be published and accessible on the parliament's website. While it may be technically demanding to make all this information available on the website, it is essential to consider the positive effects of having official, relevant, and credible information publicly accessible on the government's website (as it reduces the risk of spreading unverified and inaccurate information). It is commendable and positive that committee sessions and public hearings are publicly available on the website of the NARS, both in real-time and in their archived recordings.

(4) Continual work on issuing and publishing (on the Parliament's website) public invitations to citizens, institutions, and CSOs to provide their opinions, comments, recommendations, and suggestions regarding ways to improve the environmental situation. It is important that such invitations are issued in a timely manner, allowing participants enough time to prepare and submit their suggestions and observations, which can be highly valuable both to MPs and the committee as a working body in legislative and oversight functions. It is particularly important that invitations for public hearings are sent well in advance to ensure participants have sufficient time to prepare, making their testimonies and expert opinions more valuable to MPs in their decision-making and oversight roles. Consider exploring new methods and channels of communication, such as electronic communications and social media, to facilitate engagement with citizens.

(5) Based on the information received from citizens and the public, the committee could establish a registry of open issues in the field of environmental protection. This registry would be transparent and used not only in the work of the current convocation but could also facilitate the institutional transfer of achievement, knowledge, and identified issues among parliamentary convocations. This would enable the new convocation to be fully and transparently informed about the current state of affairs and continue its work seamlessly. Alongside identified open issues, the committee's staff could document changes in the situation and compile recommendations for addressing identified problems.

(6) Consider the possibility of establishing a registry of experts and scientific institutions in the field of environmental protection as a prerequisite for greater engagement of sci-

entific institutions and scientists in committee work. Members of such a registry could be directly invited when the need arises, for example, when making certain decisions or considering draft laws. This possibility would also be beneficial to other committees dealing with their respective areas of expertise.

(7) In addition to forming the previously mentioned registry for inviting experts as needed, consideration could be given to establishing advisory councils for the Committee. These councils could consist of experts who are competent and interested in providing continuous expert support to the committee when addressing professional issues. They would serve as an extended composition of the committee, including individuals who are not MPs but have the right to participate in committee work without voting or decision-making rights.

(8) Consider the possibility of organizing specialized training sessions for MPs in the field of environmental protection and access to information in each convocation of the NA, particularly for members of the Environmental Protection Committee and other MPs interested in these areas. Additionally, consider incorporating these topics to some extent into the introductory (basic) training (seminar) for all newly elected MPs. This is crucial, especially for a specialized seminar for committee members because they may not necessarily be legal experts or have prior experience or knowledge. Information about the environment can often be of such technical expertise that it exceeds the understanding of the average person. Still, in this case, we are talking about elected representatives, members of the relevant committee for this area, who are expected to delve deeply into environmental protection issues. Therefore, it is essential that they can understand such information thoroughly at all times, serving as a starting point for their further work, especially given the importance of such information and its potential consequences for human health.

(9) Consider options for increasing the capacity of parliamentary staff providing expert support to the Environmental Protection Committee. Focus on their continual training and acquisition of necessary knowledge to provide adequate expert support to MPs, taking into account frequent changes in the legal framework and new developments in this field.

(10) Consider the possibility of creating a specialized guide for parliamentarians that would present, in an adapted manner, the information they need for the performance of their duties.

(11) Strengthening continual two-way communication between citizens and MPs because holding elections should not mark the end of interest in who will represent them in parliament but rather the beginning of ongoing communication. In this context, it would be beneficial to consider the possibility of (re)opening parliamentary offices outside the headquarters of the NA and other mechanisms and channels of communication to facilitate access and direct communication with the MPs.

(12) Consider the possibility of developing guidelines or a guide for participation in public hearings, tailored to various target groups of participants, to enhance the effectiveness of public hearings and assist those invited to prepare suitably and focus on the relevant issues.

(13) It would be useful for the Parliament, within the context of parliamentary oversight, to monitor the implementation of the Law on the planning system of the RS, to observe the organization of public consultations, and to track activities and measures taken to inform and involve the public. In addition to this law, consider the general possibility of regular preparation of *ex post* analyses of law implementation for the purpose of post-legislative scrutiny – monitoring the enforcement and application of laws.

In the previously described ways, with greater availability of information and incentives for more transparency and awareness, parliament would contribute not only to applying a set of principles referred to as good governance within the institution itself but would also, through effective utilization of existing mechanisms of parliamentary oversight and control, directly influence the executive branch to implement the principles of good governance.

With everything highlighted in this work, I want to emphasize that my focus is on parliament as the central institution of democracy, the first branch of government that establishes the constitution and laws. Debates and discussions in parliament on environmental protection issues and considering ecological aspects in carrying out parliamentary functions contribute to raising awareness among citizens about environmental issues. Both parliament and other state institutions, including the judiciary, as well as educational and CSOs, should do everything within their competence, domains, and scopes to strengthen intersectoral collaboration, encourage constructive dialogue among all relevant actors, all with the goal of a comprehensive approach to preserving and enhancing environmental conditions and protection, and involving citizens in decision-making processes that affect them.

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Collective redress in Serbian environmental law Presentation at the conference "25 years of Aarhus Convention"

Abstract: The Republic of Serbia has ratified the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters in 2009, which aims to empower citizens to the protection of the environment. One of the ways to pursue this aim is to enchase access to justice. This analysis aims to assess if access to justice has improved for environmentalists in litigation proceedings in Serbia since the ratification of this convention.

Keywords: collective redress, Aarhus Convention, standing, organizational claim, access to justice

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1. Introduction

The Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, dated 25 June 1998, was ratified by the Serbian parliament in 2009 („Official Gazette of the Republic of Serbia“ no.38/09). This Convention established obligations regarding access to information, access to justice, and public participation in environmental matters.[1] Those are the three pillars of the Aarhus Convention.[2]The idea underpinning the provisions of this convention is that citizen empowerment is a key element of environmental protection.[3]

Empowering citizens through the Aarhus Convention also includes enhancing access to justice. The Convention's Preamble states that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected, and the law is enforced." This analysis examines access to justice in environmental matters in litigation proceedings in the Republic of Serbia, even though litigation is not the only option to pursue this aim.

2. Enhancing access to justice in environmental matters

There are different ways to enhance access to justice in litigation proceedings. This could be done by changing the provisions on standing and introducing new procedural tools. Cappelletti wrote how organizational claims are used to improve environmentalists' and consumers' access to justice.[4] It allows associations to seek injunctive relief in litigation proceedings. Furthermore, it is uncommon for organizational claims to be used for compensation. The organizational claim is only one of the numerous methods of collective redress in litigation proceedings. American class action is among non-lawyers considered the synonym of collective redress in litigation proceedings. The reason for this is probably not only Hollywood with its movie “Erin Brockovich” about the water pollution case and the great victory of the class against the powerful company. The reason is also the effectiveness of class action in the U.S. and the decades-long discussion on its (in)compatibility with the principles of the most European civil procedure systems[5]. In Europe, administrative bodies usually deal with similar

1 Mirjana Drenovak Ivanovic, Implementation of the Aarhus Convention in the Republic of Serbia, European Energy and Environmental Law Review, April 2011, 58.
2 Stevan Lilić, Mirjana Drenovak Ivanović, Ekološko pravo, Beograd, 2014, 45.
3 Directorate General for the Internal Policies, Collective Redress in the Member States of the EU, Brussels, 2014, 45.
4 M Cappelletti, *International Encyclopaedia of Comparative Law, Volume XVI, Civil procedure*, 66-67.
5 See. Branka Babovic, Kolektivizacija sudske zaštite od diskriminacije, Pravni život 11/2012, 1011-1012 and in more detail about the sectoral reception of class action in Europe, see Branka Babovic, O uvođenju grupne tužbe anglosaksonskog tipa u prava država članica EU, Pravo i privreda 4-6/2017, 521-532.

issues as the American class action[6]. However, we are evidencing the expansion of all kinds of collective redress mechanisms within the EU, including class action.

Nevertheless, organizational claims are no longer part of Serbia's legal system. This paper will examine whether and how access to justice is granted in litigation proceedings beyond individual claims.

3. Court proceedings in environmental matters

When using the term court proceedings, one usually thinks of litigation as a method for dispute settlement between individuals or legal entities. However, proceedings in environmental matters are initiated by different entities and involve various kinds of proceedings before different courts.

Climate change is only one of the environmental issues that are supranational. So, even the proceedings in which states have standing are being initiated for climate protection. The Republic of Vanuatu has been leading the initiative at the UN International Court of Justice for an Advisory Opinion on the Obligations of States relevant to climate action. The goal of this initiative is the issuance of an Advisory Opinion on the state's obligations regarding climate change and to clarify the obligation and legal consequences of states regarding climate change[7].

Obligations of states regarding climate change have become the subject of proceedings before the Swiss court and, consequently, before the European Court of Human Rights ("ECtHR"). In 2021, an association established under Swiss law- KlimaSeniorinnen (Senior Women for Climate Protection) and others lodged an application against Switzerland stating that legislative actions of the Swiss government were not adequate for the protection of these senior women from heat waves that are influencing their health. The Association of KlimaSeniorinnen won the case since the ECtHR found that the Swiss government has violated human rights since it did not take adequate steps to adopt and implement legislation aimed at mitigating climate change.

The petition was filed under several provisions including Art. 6 of the European Convention on Human Rights ("ECHR") for violating access to the court because the Federal court had

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6 Alan Uzelac, Stefaan Voet, Collectivization of European Civil Procedure: Are We Finally close to a (Negative) Utopia? in (A. Uzelac, S Voet, eds.) Class Action in Europe- Holy Grail or a Wrong Trail?, Springer, 2021, 11.

7 https://www.vanuatuicj.com/vanuatu (1.09.2024).

"not taken their case seriously, stating that they were not sufficiently affected in their rights". Even though the petitioners claimed that their claim was dismissed on arbitrary grounds and the arbitrary decision was the main issue discussed before the ECtHR, it was not the only one. The issue of no guarantee of *actio popularis*, neither in Switzerland nor under the ECHR, was also discussed in the case. When there are no *actio popularis* in the legal system, the other option for the applicants would be to resort to political institutions, which can be burdensome.[8] Indeed, the arguments that imposed the application before the ECtHR were that legal action was of an *actio popularis* nature and aimed at achieving something that should have been achieved more appropriately, not by legal action but by political means.

The Association of Klimaseniorinnen and others were parties to the administrative proceedings in Switzerland. However, the pleadings in this case are elevated to the more abstract level of public interest in environmental cases and if there would be a dispute concerning civil rights.[9] In this key case, the ECtHR has established that disputes concerning environmental matters were genuine and serious because the consequences would affect the right granted by Art.8.[10] Furthermore, ECtHR argued that Art. 6 does not apply to environmental protection as a public interest value.[11] However, it was pointed out that the organizations which are part of the civil society play an important role in today societies, particularly in environmental law "*inter alia* by defending specific causes before domestic authorities or courts"[12].

This opens the question if the organizations have standing before courts in the Republic of Serbia to defend those causes.

4. Collective Redress Mechanisms in Serbian Law

Access to justice in environmental matters can be pursued in administrative proceedings as well as in court proceedings. Nevertheless, court proceedings are not always traditional two-party litigation. A wide range of collective redress mechanisms also apply to environmental litigation in comparative legal systems.

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8 KlimaSeniorrinen vs Switzerland, Information Note on the Court's case-law 261.
9 https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20240409_Application-no.-5360020_press-release-1.pdf, 6.
10 ECtHR, The case of KlimaSeniorinnen and others vs Switzerland, Judgment of 9.4.2024., para 604.
11 ECtHR, The case of KlimaSeniorinnen and others vs Switzerland, Judgment of 9.4.2024, para 602.
12 ECtHR, The case of KlimaSeniorinnen and others vs Switzerland, Judgment of 9.4.2024, para 600-604. It is pointed out that this is in line with the court case law in case of Gorraiz Lizarraga and others v. Spain were the

However, collective redress in litigation proceedings has yet to take root in Serbia. It was introduced in 2009[13] in anti-discriminatory law, in 2010 in consumer protection[14], and in 2011, in the Law on Civil Procedure[15]. Each of these laws introduced the organizational claim. After sparse case law in this field, the Constitutional Court found the Civil Procedure Law provisions providing for the organizational claim contained in the Law on Civil Procedure unconstitutional. What followed was the abolishment of collective redress both in anti-discriminatory law, as well as on the horizontal level through abolishment of the provisions on organizational claims contained in the Law on Civil Procedure. In the field of consumer protection, the organizational claim was replaced by the administrative proceedings before the Ministry of Trade, Tourism and Services[16].

The introduction of collective redress in Serbian law had many disadvantages, including inconsistent law and sparse case law. However, the Constitutional Court's decision had long-reaching consequences and was not appropriately reasoned [17].

In the same decade, the developments of collective redress were going quite differently in the EU. In 2013, the European Commission issued a Recommendation for Injunctive and Compensatory Collective Redress Mechanisms in Member States. This recommendation contains common principles on compensatory and injunctive relief concerning violations of EU law, including environmental protection, according to introductory clause no 7[18]. The development of collective redress mechanisms is the EU did not go smoothly. However, since 2018, an injunctive consumer collective redress mechanism has been available in all member states. Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance) further reshaped the field of consumer collective redress.

13 Law on Gender Equality (Official Gazette of the Republic of Serbia 104/2009).
14 Law on Consumer Protection (Official Gazette of the Republic of Serbia 73/2010).
15 Law on Civil Procedure (Official Gazette of the Republic of Serbia 72/2011).
16 Branka Babović, Legislative Changes in the field of Consumer Collective Redress in Serbia, Annals of the Faculty of Law, University of Belgrade 62/2014, 215-228.
17 Branka Babović Vuksanović, Blast from the Past Consumer Collective Redress, in (Cristina Poncibo, Mateja Durovic, eds.) European Convention on Human Rights and Private Law, Hart Publishing, 2024, 153-175.
18 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), Official Journal of the European Union L 201/60, 26.7.2013.

In environmental law, collective redress mechanisms are available in France, Hungary, Portugal, Spain, and Slovenia[19]. Moreover, environmental collective redress mechanisms have been available in all substantive claims, including environmental, in several EU member states.[20] Furthermore, compensatory collective redress mechanisms are also available across the EU[21].

In Serbia, the organization pursuing the aim of environmental protection does not have standing before national courts using organizational or any other claim. The only claim recently filed by an organization in ecological matters was based on the provisions of the Law on Contracts and Torts, which provided for the request to eliminate the danger of damage. For the first time in its 40-year history, this provision was applied as an *actio popularis*[22]. We will see whether this means that Serbian society is ready for the (re-)introduction of collective redress.

5. Conclusion

Since 2009, when the Aarhus Convention was ratified in Serbia, collective redress has been introduced and abolished in litigation proceedings. Currently, there are no provisions on the organizational claims in the litigation proceedings in the Republic of Serbia, which means that the environmentalist would need to pursue their aims in other kinds of proceedings. However, one organization found a way to the civil court in litigation proceedings by using provisions on the request to eliminate damages contained in the Law on Contracts and Torts. Having in mind that there was only sparse case law on the collective redress in litigation proceedings in the short time it was part of the litigation proceedings, this might be a sign that environmental organizations are much more active in pursuing their aims nowadays than they were before.

19 Linda Mullenix, For the Defense: 28 Shades of European Class Action, Alan Uzelac, Stefaan Voet (eds.) Class Action in Europe, Holy Grail or a Wrong Trail?, Springer, 2021, 59.
20 *Ibid*., 58.
21 *Ibid*., 59.
22 Branka Babović, Zahtev da se ukloni opasnost od štete - procesni aspekti, Pravo i privreda 4-6/2015, 154-167.

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[2] Branka Babovic, Kolektivizacija sudske zaštite od diskriminacije, Pravni život 11/2012, 1011-1012 and in more detail about the sectoral reception of class action in Europe, see Branka Babovic, O uvođenju grupne tužbe anglosaksonskog tipa u prava država članica EU, Pravo i privreda 4-6/2017, 521-532.

[3] Branka Babović Vuksanović, Blast from the Past Consumer Collective Redress, in (Cristina Poncibo, Mateja Durovic, eds.) European Convention on Human Rights and Private Law, Hart Publishing, 2024, 153-175.

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Uncovering environmental crimes: The role of non-governmental organizations, activists and citizens in criminal proceedings against polluters in Europe

Abstract: The Aarhus Convention has enabled non-governmental organizations (NGOs), its activists and citizens, to be recognized as an interested public (party) that can demand from authorities that they rectify an environmental issue, through several legal mechanisms. But how active is (could it be) their role in criminal proceedings?

This paper will research the factual state of environmental crime in Europe, possibilities in the phases of the criminal proceedings for, primarily, the NGOs to actively initiate it and participate when they discover evidence of environmental crimes, why more recent strategic lawsuits against public participation (SLAPP) have been submitted against NGOs, its activists and citizens (who actively participate in protecting the environment), as well as the direction that the relevant judicial practice, through representative cases, has taken so far regarding this issue, with a specific aspect on Serbia.

Keywords: activists, criminal proceeding, environmental crime, non-governmental organizations (NGO), strategic lawsuits against public participation (SLAPP)

1. Current state of environmental crimes in Europe

In order to understand in what manner the (interested) public can fight environmental crime, it is important to understand its scope and factual state regarding the apprehension, prosecu-

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tion and conviction of polluters in Europe. Statistics of processed cases and lost annual revenues (to the State) are indicators that can show how much European states (both EU Member States and accession ones through different cooperation mechanisms[1]) are equipped to fighting environmental crimes through criminal proceedings. Environmental crimes rarely stay localised in one country and are often, by nature of the organized crime groups, a transnational concern which was stated even in the Environmental Crime Directive (ECD)[2].

1.1. Statistics

The Report on Eurojust's Casework on Environmental crime from January 2021 clearly states that in the time frame from January 1st 2014 to December 31st 2018, there were a total of 57 crime cases referred to Eurojust that were opened by 16 EU Member States. The Netherlands, France and Germany opened the most cases of all EU Member States.

"Environmental crime cases represented less than 1% of Eurojust's total casework during this 5-year period…The number of environmental crime cases referred to Eurojust may be considered insufficient in view of the current estimate that environmental crime is the fourth largest criminal activity in the world, worth up to USD 258 billion annually."[3].

Environmental crime is in the top four of criminal activities in the world with first place belonging to narcotics trafficking (344 billion USD), followed by counterfeit crimes (288 billion USD) and human trafficking (157 billion USD)[4] and is valued to be of "…up to twice the amount of global Official Development Assistance (ODA). It is rising by 5-7 per cent annually and is increasingly threatening not only governments' revenues, legitimate businesses and sustainable development, but also peace and security."[5]. With that in mind the disparity between less than 1% of cases that were referred to Eurojust and with environmental crimes

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1 The European Union Trade in Wildlife Information Exchange (**EU-TWIX**) is a database developed in Belgium to assist national law enforcement agencies… Information is shared between designated enforcement officers from all 28 EU Member States, plus Montenegro, Norway, Serbia, Switzerland and Ukraine, see pg. 13, LIFE-ENPE, Environmental prosecution report, tackling environmental crime in Europe, March 2017.

2 The Community is concerned at the rise in environmental offences and at their effects, which are increasingly extending beyond the borders of the States in which the offences are committed. Such offences pose a threat to the environment and therefore call for an appropriate response, see para. (2), Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Text with EEA relevance).

3 The Report on Eurojust's Casework on Environmental crime, January 2021, see pg.7.

4 Nellemann, C., Henriksen, R.,Kreilhuber, A., Stewart, D., Kotsovou, M., Raxter, P., Mrema, E., and Barrat, S. (Eds). 2016. *The Rise of Environmental Crime – A Growing Threat To Natural Resources Peace, Development And Security.* see pg. 7.

5 INTERPOL-UN Environment (2016). *Strategic Report: Environment, Peace and Security – A Convergence of Threats*, see pg.8.

revenues of up to 259 billion USD globally is an indicator that there are serious challenges, especially with different jurisprudence, of bringing perpetrators of such crimes through criminal proceedings to a viable conviction[6]. The annual loss of revenue for any country is significant and is directly undermining the economy and society beside the direct impact it has on the health of the citizens and its surrounding environment, flora and fauna[7].

1.2. Indicators

Indicators that can show, in the majority of cases, that environmental crimes are "under the radar" of enforcement agencies and the judiciary can be seen in the summary of Sanctions available to Member States and Assessment of Effective, Proportionate and Dissuasive (EPD) nature of penalties[8] which was done by LIFE-ENPE, an Environmental prosecution report, tackling environmental crime in Europe. This data shows that there is a visible disproportion and lack of harmonized solutions regarding criminal offences in each EU Member State with Criminal Code (CC), Criminal Procedure Law (CPL) and penalties-both monetary and imprisonment, for the perpetrators of environmental crimes. One thing especially stands out: the polluter, as a legal person, is rarely liable as much as a natural person for the same level of a criminal offence and more prone to monetary punishments/fines that are not necessarily correlated to the seriousness of a criminal offence i.e. environmental crime[9]. This is encouraging for the perpetrators of environmental crimes, who are rarely localised in their activity and are mostly transnational and organized to avoid countries with the strictest legislation[10], even though the fines are the most common punishment and there have been rarely imprisonment of the perpetrators[11].

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6 https://www.unep.org/news-and-stories/press-release/unep-interpol-report-value-environmental-crime-26

7 How tax revenues from this activity could have been used for schools, infrastructure investments, health care and business development, see pg.15, Nellemann, C., Henriksen, R.,Kreilhuber, A., Stewart, D., Kotsovou, M., Raxter, P., Mrema, E., and Barrat, S. (Eds). 2016. *The Rise of Environmental Crime – A Growing Threat To Natural Resources Peace, Development And Security,* UNEP and INTERPOL Rapid response assessment.

8 Table 13: Summary of Sanctions available to Member States and Assessment of Effective, Proportionate and Dissuasive (EPD) nature of penalties, LIFE-ENPE, Environmental prosecution report, tackling environmental crime in Europe, March 2017.

9 Table 3: Penalties for Article 3f for Natural and Legal Persons; Table 4: Penalties for Article 3g for Natural and Legal Persons: Table 5: Penalties for Article 3h for Natural and Legal Persons, LIFE-ENPE, Environmental prosecution report, tackling environmental crime in Europe, March 2017.

10 2014 Belgium court case- how defendants profited and took advantage of the lack of political priority and thus enforcement of the CITES regulations, see pg.24, LIFE-ENPE, Environmental prosecution report, tackling environmental crime in Europe, March 2017.

11 EUROJUST (2014) has argued that such inconsistency between jurisdictions is leading to 'forum shopping' amongst environmental offenders and organised crime groups, see pg. 88-89, LIFE-ENPE, Environmental prosecution report, tackling environmental crime in Europe, March 2017.

2. The active role of an NGO, activists and citizens in criminal proceedings: factual possibilities of its initiation and participation

As previously stated the complexity of environmental crimes often makes them very difficult to detect and process in a timely manner by competent authorities, enforcement agencies and the judiciary. On the other hand the very concept of the NGOs, its activists/citizens (victims[12]), enables them to activate their capacities for a particular goal much faster than the ones that the competent authorities have and that are limited by numerous time-consuming administrative requirements. Bearing that in mind the main questions of criminal proceeding and its initiation and participation by (interested) public: NGOs, activists/citizens (victims) is in what form can its activities take shape so that it is acceptable in court? Do they need a ""life line" that would be in a somewhat formal connection to the police and/or a Public prosecutor's office from the beginning of its activities against the polluter? And if an NGO/activists/citizens (victims) are a formal submitter of a criminal report against the polluter can it be considered, by itself, as a party that has a court recognized quality to continue, in its criminal prosecution of the polluter even if the Public prosecutor's office aborts the case after the (pre) investigation phase or the indictment[13]? To answer these questions this paper will research representative court cases in Europe with a specific aspect on their latest developments in this area in Serbia.

2.1. Gathering evidence in environmental cases: the scope of an NGOs mandate and expertise

In order for an NGO to fulfil the criteria for enforcement agencies and the judiciary to be considered as a credible interested party is the scope i.e. the goals of their mandate set in its founding documents and/or registering it for more visibility on their website or within a local (agencies) registry. For example, protecting the environment has to be somewhat described in the registered activities/goals at least in a broader sense if it's not an NGO that has a specific expertise in the field with its own team of well-known experts. Considering what would be a credible registered activity of an NGO there are several different types of mandate to differentiate: the one that is delegated and given by the State (competent authority) and that can conduct its own official investigations, the one that participates in investigations in a formal

12 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by UN General Assembly resolution 40/34 of 29 November 1985

13 About environmental NGOs combination of advocacy and enforcement roles in relation to environmental crime and the practical limitations of environmental regulatory bodies, see pg. 20, Smith, L. and K. Klaas. (2015). Networks and NGOs Relevant to Fighting Environmental Crime. Study in the framework of the Efface research project, Berlin: Ecologic Institute.

way and in the ones who participate in an informal way. Questions posed in the beginning of this section are applicable only for the NGOs that haven't been given a mandate by the State to conduct their own investigations in order to uncover environmental crimes, which is most frequently the case[14].

2.2. Case of Legambiente

The most adequate example of the significance that an NGO can have in fighting environmental crime is the case of the Italian NGO Legambiente[15] "… Legambiente actively assisted in the prosecution of the mafia syndicate 'Ndrangheta in Calabria for charges of illegal radioactive waste dumping in the 1980s and 1990s. In this particular case, the Italian government sponsored agency, Agenzia nazionale per le nuove tecnologie, l'energia e lo sviluppo economico sostenibile (ENEA), (National agency for new technologies, energy and sustainable economic development) was complicit in the dumping of toxic waste, paying criminals to take waste off their hands. Given the complexity of involved actors, the NGO Legambiente took it upon itself to independently collect evidence over the course of a decade and provided the public prosecutor's office with all the data collected since 1994, concerning the disappearance and assumed sinking of some 40 ships in the Mediterranean."[16]

This example shows how NGOs can successfully bypass even corrupt elements of state institutions (or their passivity) and take on an active role in official prosecution, but also a danger which lies in the taking on the very actions that were traditionally in the hands of governmental bodies. Also, it should be noted that it can serve as a corrective element that reaches out to parts of society that are even at civil war and not accessible to international organizations. The case of Somali based NGO Daryeel Bulsho Guud represents that. Not only that it continued to investigate the claims of Legambiente that the toxic waste dumped by the "eco-

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14 The role of NGOs in Criminal Enforcement see pg. 21, Smith, L. and K. Klaas. (2015). Networks and NGOs Relevant to Fighting Environmental Crime. Study in the framework of the Efface research project, Berlin: Ecologic Institute.

15 https://www.legambiente.it/english-page/

16 Cooperation and Collaboration between actors in Environmental Crime see pg. 23, Smith, L. and K. Klaas. (2015). Networks and NGOs Relevant to Fighting Environmental Crime. Study in the framework of the Efface research project, Berlin: Ecologic Institute.

mafia[17]" had to some extent reached Somali shores (that were most visible after tsunami hit in 2004) but used its integrity within the local community and even navigated through different warring clans, by conducting a survey in 2006. "…it was able to identify 15 containers of 'confirmed nuclear and chemical wastes' in eight coastal areas" even though a year before, in 2005, "…the UN Development Programme (UNDP) concluded its own on-the-ground investigation in Somalia. Despite being stymied by local political interests and finding no tangible proof, it concluded that the 'dumping of toxic and harmful waste is rampant in the sea, on the shores and in the hinterland.'"[18].The role of the NGO is enhanced when competent authorities are reluctant or non-responsive to the demands of the public especially in cases where the health of citizens is directly endangered. This can lead to a series of issues regarding criminal proceedings if a country's judicial practice isn't developed enough to recognize NGOs and its activists as relevant actors and active participators in criminal proceedings[19].

2.3. Legal framework

The essence of the legal framework for non-governmental organizations, activists and citizens in Europe to actively participate in uncovering environmental crimes are: The Aarhus Convention (if ratified and incorporated into local legislation and mechanisms of each state individually)[20], the rapid response mechanism of that Convention[21], for the EU Member States: Environmental Crime Directive [22](ECD) and on state level the Criminal Code (CC) and Criminal Procedure Law (CPL).

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17 "The expression Ecomafia is meant to define a systemic variety of illicit practices, actions, and socio-economic activities that endangers the health of a community and its environment…The term Ecomafia was coined and used for the first time in 1994 in a report 'Le ecomafia – il ruolo della criminalità organizzata nell'illegalità ambientale' ['Ecomafie: the role of organized crime in environmental illegal activities] conducted by the Research Institute of the Italians, namely Eurispes, the National Italian gendarmerie, and the historic Italian environmental NGO, Legambiente, an association founded by activists, journalists, and scientists, that started its campaigns in 1980 on the edge of the antinuclear protests and first organized green social movements across Italy and Europe." https://www.ecomodlang.com/resources/ecomafia/

18 https://theecologist.org/2009/mar/01/somalia-used-toxic-dumping-ground

19 Cooperation and Collaboration between actors in Environmental Crime see pg. 23, Smith, L. and K. Klaas. (2015). Networks and NGOs Relevant to Fighting Environmental Crime. Study in the framework of the Efface research project, Berlin: Ecologic Institute.

20 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

21 https://unece.org/environment/documents/2022/10/pp-aarhus-convention-mop7-decision-vii9-rapid-response-mechanism-deal .

22 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Text with EEA relevance).

2.3.1. The Aarhus Convention

The Aarhus Convention enabled NGOs, and their activists, to be recognized as a party that can demand from the authorities' rectification of an environmental issue, mainly through civil and administrative (court) proceedings, but it hasn't specifically stated that they can initiate criminal proceedings as one. This comes into focus especially in cases when a public prosecutor is reluctant to initiate or continue with criminal proceedings against the polluter. Vague legal notions can create dualistic interpretations. On one hand it can be fertile ground for a positive legal context when judicial practice takes on the role of giving clear stances on the Aarhus Convention, and its mechanisms, in its extensive, not restrictive, interpretation of the NGO role, its activists and citizens (victims). This would further clarify the matter when set into a local context of existing laws and court proceedings by interpreting it in the interest of the people (or public interest) - by acknowledging the role of the (interested) public in criminal proceedings. On the other hand, if positive legal context isn't created in such a way, it can create negative manoeuvring space that the polluter will repeatedly use and it will serve as a justification for the passivity of the Public Prosecutor's Office (PPO) when they are reluctant to "pursue" the polluter. Without the participation of a public prosecutor, as a representative of public interest, in prosecuting the polluter, this would subsequently lead to the deniability of legal remedies particularly for an NGO trying to carry out the criminal proceeding before the court to its end in order to reach a conviction.

2.3.2. The Rapid Response Mechanism for environmental defenders under the Aarhus Convention

The rapid response mechanism has set a pivotal definition for environmental defenders and in this way went one step further from the one initially set in the Aarhus Convention. An environmental defender is not only an NGO recognized in the field but also "*Recognizing* that an "environmental defender" is any person exercising his or her rights in conformity with the provisions of the Convention"[23]. This does address the need for the environmental defenders to act individually, outside of a particular NGO, and when recognized as an environmental defender, to practice their activities in a safe environment, safe from persecution that can come from those activities: reporting a crime, alerting public attention, which has therefore enabled their protection against the backlash of a polluter. But even with this mechanism there was a missed opportunity to put the legislative "burden" onto states (Convention sig-

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23 Excerpt from the addendum to the report of the seventh session of the Meeting of the Parties (ECE/MP.PP/2021/2/Add.1). Decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, see pg.2.

natories) to create legislative solutions to define an environmental defender as someone who can continue with the prosecution of the polluter if the PPO doesn't want to initiate criminal proceeding or aborts the case during that proceeding. In this way each country's local legislator and/or judicial practice would have a clear basis from which it could justify an active role of the NGO from the (pre) investigation phase to the end of the criminal proceeding, and in some cases to use a full spectrum of appeals. On the other hand establishing a Special Rapporteur on environmental defenders, especially its authorization to issue immediate/ongoing protection measures and reports, is a significant tool in fighting the polluter by subsequently annulling or minimising its impact on the activities of environmental defenders and creating a legal manoeuvring space for these tools to be used in situations when "Such penalization, persecution or harassment may arise from the acts or omissions of public or private entities or individuals." [24].

2.3.3. Environmental Crime Directive

The Environmental Crime Directive [25] (ECD) was created as an effort to set minimum rules[26] for EU Member States to respect the basis that was set in the Treaty regarding a high level of environmental protection. It has, among other things, acknowledged concerns of the rise of environmental crime, its transnational aspect and a non-effective system of penalties[27] therefore paving the way for a harmonization of common rules on criminal offences in order to reach effective investigation and assistance for the prosecution of perpetrators across the territory of EU Member States. The ECD, among other things, has enhanced the importance of legal elements of criminal offence such as: substantial damage, failure to comply (with a legal duty to act) and for it to be equally treated as an active wrongdoing, intention or serious negligence[28]. Even though the ECD established a basis for minimum rules in order for them to be adopted on an individual (Member States) level there were issues of harmonising vague legal

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24 Excerpt from the addendum to the report of the seventh session of the Meeting of the Parties (ECE/MP.PP/2021/2/Add.1). Decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, see pg. 4.

25 See Content of The Directive: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/environmental-crime_en#:~:text=The%20Environmental%20Crime%20Directive,-Directive%202008%2F99&text=The%20Directive%20aims%20at%20supplementing,the%20protection%20of%20the%20environment.

26 Directive provides minimum rules, and freedom for Member States to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment see para. (12) of the Directive 2008/99/EC of the European Parliament and of the Council.

27 About the existing systems of penalties as not sufficient to achieve complete compliance with the laws for the protection of the environment, see para. (3) Directive 2008/99/EC of the European Parliament and of the Council

28 See para. (4), (5), (6) and (7) of the Directive 2008/99/EC of the European Parliament and of the Council.

notions that made it difficult for a Member States to coordinate and work through jurisdictions and limitations within one country's CC and CPL[29].

In the latest effort by the European Commission to make the ECD more efficient in fighting environmental crimes, among other solutions, it was proposed that: "Other ***natural or legal*** persons may also possess valuable information concerning potential environmental criminal offences. They may ***include*** members of the community affected***, civil society organisations, including nongovernmental organisations,*** or members of society at large taking an active part in protecting the environment."[30], measures should be included to: "…support and assist people who report environmental offences and cooperate with the enforcement. It also enables, at certain conditions, the public concerned to be present in proceedings linked to the prosecution of crime cases where appropriate, pursuant the rules set out in Member States". The need for public participation and "more precise rules regarding the definition of environmental criminal offences and the type and levels of sanctions" was among the things that were also recognized in this Proposal[31] which was adopted[32]. Once the amendments[33] of this Proposal get fully integrated into the necessary legislation they will, in my opinion, play a pivotal role in the fight against environmental crimes because it will address its crucial points:

a) Harmonized definitions in the essential elements of criminal offences and the type/level of sanctions which will therefore enable unhindered cross border cooperation,

b) Noting of third country factor[34], i.e. that the conduct[35] can happen by a Union natural or legal person in a third country, and damaging (legally protected area) in a third country[36],

c) Recognizing the key role of the public in reporting and cooperating with the enforcement on discovering environmental crimes and therefore giving them an opportunity to

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29 About Directive not having much effect in practice see The Evaluation of the Directive in web link ref. 23.

30 See Amendment 28, Proposal for a directive Recital 25, https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html.

31 What will facilitate the practical implementation of the Directive, lead to more successful detection, investigation and prosecution of environmental crimes and support more effective and dissuasive sanctioning see:https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_6745

32 https://www.euractiv.com/section/energy-environment/news/parliament-adds-ecocide-to-eus-draft-list-of-environmental-crimes/ by Romano Valentina, 30 March 2023.

33 https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html

34 See Amendment 48, Proposal for a directive, Article 12 – paragraph 3 b (new) *Justification: Environmental crimes are very often cross-border in nature. To avoid the externalisation of environmental damage, it should be possible to prosecute a legal or natural person for crimes committed in a third country, in particular in the case of ecocide.* https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html

35 See Amendment 28, Proposal for a directive, Article 2.

36 See Amendment 38, Proposal for a directive, Article 8.

participate in criminal proceedings whilst providing them protection in connection to their activities.

2.3.4. Criminal Code and Criminal Procedure Law

The question of the active role of NGOs, their activists and citizens/victims (directly impacted by the pollution) in criminal proceedings poses a somewhat contradictory role against the very structure of the majority of Criminal Procedure Law (CPL) in Europe even though the public (i.e. any person) can report any crime. The reason for this is that the official prosecutor and a representative of the interest of the society and of the public interest in criminal proceedings, and their protection, is the Public Prosecutor's Office (PPO)[37].

So if we look at the activities that can lead to the monetary penalty or a conviction of the polluter the public has a dualistic role in a criminal proceeding: as a reporter of an environmental crime and as a (passive) participator of that proceeding - based on the formal recognition of the Aarhus Convention.

The role that the NGO, activists and citizens (victims) have as reporters of an environmental crime is clear even within the existing judicial practice when it comes to submitting evidence that they have gathered, which is discussed in this paper based on representative cases.

The (passive) quality that public has as a participator in criminal proceeding comes as a result of the current and traditional restrictions of European countries that are prescribed by the Criminal Code - with its definitions of a specific environmental crime and the Criminal Procedure Law - with its strict definitions of who initiates i.e. who is the "bearer" of the initiation of the criminal proceeding. Apart from the "citizen's arrest"[38] in a factual "null" phase of the pre-investigation, these laws don't officially recognize the possibility that the public can independently and officially participate in the (pre) investigation phase with the police, and a criminal proceeding phase before the court without, at least formal, participation of the PPO.

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37 Prosecutors act on behalf of society and in the public interest to respect and protect human rights and freedoms as laid down, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the case-law of the European Court of Human Rights, from the Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors. https://rm.coe.int/168074738b

38 Zakonik o krivičnom postupku, Criminal Procedure Law, Serbia, *Official Gazette RS* number 62 from 17/06/2021, see Art.292.

Even in the case of the Italian NGO Legambiente [39] it was clear that even though the NGO could bypass the National agency for new technologies, energy and sustainable economic development (because of the then complicit i.e. corruptive connections with the mafia 'Ndrangheta[40]) they needed the PPO to be the official connection with the criminal proceeding in order that the "chain of evidence/custody"[41]-that was independently collected by that NGO during a decade, would be acceptable in court.

For example in Serbia, in its formality, the CPL[42] prescribes the possibility for the continuation of a criminal proceeding, without further participation by the PPO in a much clearer way, and the victim is given the right, within specific conditions and time frame, before and after the indictment, to continue to criminally pursue the perpetrator/defendant. This is because the core of victims' rights are visible and rooted in the intention of the legislator that in those specific situations (regarding criminal offenses) they shouldn't, and don't, end with the decision of a PPO to dismiss a case. In my opinion, such reasoning of the legislator is rightfully preserving the essence of the victims' rights because they can't be fully transferred to the PPO, mainly because of the personal quality of that right. Also, a PPO's decision to dismiss a case (dismissal of the criminal report/investigation or the indictment) can be faulty by itself because of various factors that can't be overcome at that specific time. These factors can concern evidence (prolonged analysis, corruptibility of collected samples etc.) and is also subjected to circumstances that can rapidly change and have impact on the outcome of the case which would subsequently lead to complete annulment of victims' rights if not for such solution of the legislator that can bypass such standstill and enable the continuation of those rights. Because of the endless variety of such situations, the legislator left a last possibility for the PPO to "step in" before the end of a criminal proceeding i.e. last hearing (trial) if any (new) evidence emerges that shows that the case, in spite of the previous dismissal by the PPO, in fact falls within the category of a criminal offences under their jurisdiction. This way the victim is enabled to be represented again with the full capacity of PPO mechanisms to prosecute the defendant which are always much broader in scope and efficiency than when pursued solely by the victim. That is why, for example, the Serbian Criminal Code (CC) gives the opportunity, in specific situations such as new evidence etc., for the PPO (in spite of previously aborted the case) to take over the criminal prosecution (i.e. represent the indictment) from the victim that used their

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39 *See ft.16.*

40 https://www.theguardian.com/world/2007/oct/09/italy.nuclearpower by Tom Kington, 9 October 2007.

41 INTERPOL, Environmental Security Sub Directorate, Pollution Crime Forensic Investigation Manual, Volume I of II, Introduction, Scenarios, see pg.12.

42 Zakonik o krivičnom postupku, Criminal Procedure Law, Serbia, *Official Gazette RS* number 62 from 17/06/2021, see Art.50, 52.

rights after the PPO initial dismissal and continued independently with the prosecution of the defendant[43].

This solution, that the victim can continue with the prosecution of a perpetrator even without the help/participation of the public prosecutor, is unfortunately not the case with prescribed environmental crimes[44] even though they can severely impact individuals. Even though the protected entity within those environmental crimes, so to speak, is the health of the citizens, or a healthy environment, to which all citizens in Serbia, and in majority of European states, have a constitutional right to, the public interest in prosecuting polluters is seemingly an exclusive right of the PPO. This leaves a realistic possibility of a factual annulment of guilt of the polluter because of several criteria:

1) The prescribed punishment is monetary and/or minimum imprisonment, therefore subjected to the statute of limitations counted from the day that the alleged criminal offence took place. Considering the complexity of environmental crimes (timely discovery, transnationality etc.) this can be reached in a short period of time. For example those limitations for criminally prosecuting basic environmental criminal offences are: relative one (if reached a criminal prosecution can't be initiated) is from two to five years, absolute one (after which no criminal prosecution can be initiated or concluded) is up to ten years[45].

2) Challenging judicial practice[46], in overlapping cases of penal law (commercial/misdemeanour/criminal), and whether statute of limitations can be qualifying ground for the application of the legal principle *ne bis in idem* [47] so that current/future criminal proceedings against that polluter, in any way connecting to that critical event and time frame are highly questionable because of that principle (equivalent of the legal principle "double jeopardy" in the UK[48]).

3) No delegation onto the victims to continue the criminal proceeding.

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43 Zakonik o krivičnom postupku, Criminal Procedure Law, Serbia, *Official Gazette RS* number 62 from 17/06/2021, see Art.62.

44 Krivični zakon, Criminal Code, Serbia, *Official Gazette of the RS* number 35 from 21/05/2019, see chapter 24 of the Criminal Code, see Art. 260-277.

45 Krivični zakon, Criminal Code, Serbia, *Official Gazette of the RS* number 35 from 21/05/2019, see Art.103-104.

46 Presuda Privrednog apelacionog suda, Pkž 385/2022 od 8.3.2023. godine - Bilten sudske prakse Privrednog apelacionog suda br. 4/2022, Judgment of the Commercial Court of Appeal, Pkž 385/2022 dated 8 March 2023. year - Bulletin of court practice of Commercial Court of Appeal no. 4/2022.

47 The old Roman law principle, retained in European law, stating the right not to be prosecuted or tried twice for the same criminal conduct https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100226645

48 https://www.cps.gov.uk/legal-guidance/retrial-serious-offences

So this leaves the factual possibilities in which the public (NGOs, its activists and citizens (victims)) are left to fight the polluter, whether it is a factory or organized crime groups, in civil litigation (in most cases) that is from the start depriving them of enforcement agencies and public prosecutors' mechanisms that can bypass an expected reluctance of the polluter to provide necessary accessibility to pollution sites, documents and information. Also, in civil litigation they are more exposed to the financial superiority of the polluter because the bearer of the initial costs of submitting the lawsuit, and gathered evidence, are NGOs/activist or citizens (victims) contrary to criminal proceeding where the State will be the bearer of the costs of the proceeding.

Bearing in mind that with the UN Human Rights Council resolution 48/13, a healthy environment was proclaimed as a human right[49], it would, and should be possible, in my opinion, to implement such a solution of the legislator that would, at least, prescribe that the citizens - who are victims of the pollution (based on probable cause) have the right to be the alternative pursuer for environmental crimes. NGOs and their activists have legal teams[50] which often help victims of pollution from the very beginning and in such way can be enabled, at least through the official procedural status of the victim, to participate in the criminal proceeding and pursue the polluter. This would significantly change the advantage of the polluter in criminal proceedings and pave the way for more accountability and prevention. This would also shorten the path of establishing basic facts in court proceedings: identifying the culprits, victims and the initial damage done to the environment. These facts can sometimes be very difficult to establish in civil litigation because of the very nature of environmental crimes, its fleetingness and transnationality. Pollution seldom stops at the borders of a country making it difficult to obtain evidence once it is out of one's country's jurisdiction or the quality of samples that are susceptible to corruption [51].

The shortcomings of understaffed and insufficiently trained environmental inspectors, police, deputy public prosecutors and judges[52] would benefit significantly from the goal oriented and specifically trained NGOs and activists who are, in the vast majority of cases, directly linked

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49 https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right

50 https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos

51 INTERPOL, Environmental Security Sub Directorate, Pollution Crime Forensic Investigation Manual, Volume I of II, Legal samples and chain-of-custody documentation, see pg.105.

52 About Sanctioning and Judicial Practice see pg.9, LIFE-ENPE, Environmental prosecution report, tackling environmental crime in Europe, March 2017.

to the local community i.e. victims and regional NGO networks [53]. In this way NGOs/activists and victims could pursue the polluter regardless of the current capacity of the judiciary or sometimes even beyond its jurisdiction[54]. The Aarhus Convention did recognize that an environmental NGO doesn't have to be restricted in its activities by place of registration precisely because of the transnational character of pollution i.e. the polluter[55].

3. Strategic lawsuits against public participation (SLAPP) – a tool of the polluter to obstruct the discovery and processing of environmental crimes

Strategic lawsuits against public participation (SLAPP) [56] are increasingly becoming a tool for polluters to obstruct the discovery and processing of environmental crimes, and at their core, they are contrary even to the General provisions of the Aarhus Convention that clearly states: "… persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement [57] and they will have access to justice in environmental matters" [58]. The new amendments to the ECD [59] recognize that environmental defenders are under threat from such lawsuits by the polluter and are emphasising the need for their protection under civil and criminal law (proceedings).

When analysing SLAPP several main characteristics single out as their purpose against NGOs, activists/ citizens:

a) Targeting and intimidation.

b) Submitting lawsuits/ criminal reports.

c) Financial and emotional exhaustion in fighting the polluter.

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53 About NGOs variety of services and humanitarian functions, analysis and expertise, and influence see pg. 18, Smith, L. and K. Klaas. (2015). Networks and NGOs Relevant to Fighting Environmental Crime. Study in the framework of the Efface research project, Berlin: Ecologic Institute.

54 Type of level of operation for NGOs see, pg. 18, Smith, L. and K. Klaas. (2015). Networks and NGOs Relevant to Fighting Environmental Crime. Study in the framework of the Efface research project, Berlin: Ecologic Institute.

55 Convention on access to information, public participation in decision-making and access to justice in environmental matters, see article 3, point 9.

56 https://www.law.cornell.edu/wex/slapp_suit

57 Convention on access to information, public participation in decision-making and access to justice in environmental matters, see article 3, point 8.

58 Convention on access to information, public participation in decision-making and access to justice in environmental matters, see article 3, point 9.

59 See Amendment 22, Proposal for a directive, Recital 24 b (new) (24b) in its resolution of 11 November 2021 in which the European Parliament noted that environmental defenders could also be subject to abusive lawsuits and threats, and should be protected from such abusive practices, also known as Strategic Lawsuits Against Public Participation. https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html

Bearing that in mind, the main issue of SLAPP is its timely identification of the PPO and/or the Court in which the polluter is submitting the lawsuit. If not identified on time NGOs, activists/citizens are in a perpetual "race with time" in proving that their actions, as environmental defenders, are preciously the reason for those lawsuits submitted against them by the polluter. Furthermore, the lawsuits of the polluter are subsequently being enhanced by the continuous actions of the environmental defenders in stopping the polluter i.e. the pollution in question. This creates a never-ending cycle for environmental defenders, while fighting pollution, having to justify themselves to the competent authorities instead of the polluter having to do so.

3.1. Case of an environmental defender in Serbia

The Serbian NGO "Battle for Košutnjak" and its activists have been questioning for some time the construction of a sports centre to be built next to the existing Institution for Sport and Medicine, in an area that is decreed by local regulations to be a park/monument of nature. They claimed that constructors didn't have the necessary permits and the whole process was without adequate public debate and transparency. Unfortunately the competent authorities haven't reacted to this claim and thus the NGO organized a protest. In the summer of 2019, its activists received information from citizens[60] that there have been a number of trees cut from the park area by unknown persons. An activist from the NGO called the police whilst preventing the tree cutting and the transportation from the site while recording the whole event and broadcasting it live on their Facebook channel. The Institution for Sport and Medicine, who was party to the project for the construction of the sports centre, submitted a criminal report against the aforementioned activist for the criminal offense of "Violent behaviour[61]" The issue with this criminal report is that it concerned the same event and that it resulted in two different cases before the same municipal PPO, but different deputy public prosecutors, in which in one case the activist was the defendant that allegedly behaved violently during the blockage of the tree cutting site and in the other case he was the claimant to an alleged environmental crime. It took a significant proactive approach from the activist and his lawyer to track down, and prove, not only a parallel existence of the two cases about the same critical event in the same municipal PPO, but a substantial gathering and submission of evidence to those cases in

60 Mileusnić D., Mišljenović U., Vasić M., Nicović N., Mijatović M., Partneri Srbija, "Studija slučaja: Strateški postupci protiv učešća javnosti u Srbiji (SLAPP)", Partners Serbia: "Case study: Strategic lawsuits against public participation in Serbia (SLAPP)", April 2021, see pg.7.

61 Krivični zakonik, Criminal Code, Serbia, *Official Gazette RS* number 35 od 21/05/2019, see article 344, Violent behavior, stance (1): Whoever, by grossly insulting or abusing another, perpetrating violence against another, causing a fight, or by insolent or reckless behavior significantly endangers the peace of citizens or more seriously disrupts public order and peace, shall be punished by imprisonment for up to three years.

order to show that the real intention of the criminal report against him was intimidation. Such evidence aimed to prove the activists: "…innocence and the reasons for his actions that day: recordings, photographs, tender documentation related to the construction of the Košutnjak Sports Center, opinions of competent institutions regarding its construction…" as well as the number of trees scheduled for cutting due to that construction, that according to the activists' opinion, did not coincide i.e. add up with those they found in the tree cutting site. The outcome was that the case where the activist was the defendant ended in a dismissal of the criminal report submitted by the Institution for Sport and Medicine who then appealed the decision which was again dismissed by a higher PPO. The other case, where the activist was the reporter of the environmental crime, also ended in dismissal of the criminal report (criminal offense devastation of the forests) in which the PPO didn't even acknowledge him as a witness and in such way missed out to have crucial information about the case in question[62].

Environmental crimes are complex in their effects upon humans, animals and the overall environment, therefore they need to be addressed on multiple fronts: as time sensitive, with viable judicial decisions and of suitable compensation. Initial (emergency) measures that can be found in the very construction of criminal proceeding and their mechanisms can provide a basis for these crucial points and that will provide halting the pollution, isolation of the pollution sites as crime scenes, gathering of evidence, and precise expert estimates on the scale and type of the pollution in question[63].

In my opinion, the possibility for NGOs/activists/citizens (victims) to play an active role could be analysed by legislators from several aspects: the importance of gathering evidence in environmental cases, which is crucial in any court proceeding against the polluters because of the nature of the evidence itself - it is frequently susceptible to corruptibility and fleetingness. Also, the direct connection that NGOs/activists/citizens (victims) have with the local community and regional NGO networks can enable the collection and submission of evidence to the authorities in a much faster way than the ones that are initially done by the PPO and the police by themselves[64]. Communities are more prone to an informal and reactionary functioning/manner, than an official one, which is of crucial timing regarding environmental crimes

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62 Mileusnić D., Mišljenović U., Vasić M., Nicović N., Mijatović M., Partneri Srbija, "Studija slučaja: Strateški postupci protiv učešća javnosti u Srbiji (SLAPP)", Partners Serbia: "Case study: Strategic lawsuits against public participation in Serbia (SLAPP)", April 2021., see pg.8.

63 Zakonik o krivičnom postupku, Criminal Procedure Law, Serbia, *Official Gazette RS* number 62 from 17/06/2021, see Art.113-120, 123, 133-137.

64 About NGOs actions and difference between their legal set of rules from those governing entities such as Interpol or a local police unit, see pg.24, Smith, L. and K. Klaas. (2015). Networks and NGOs Relevant to Fighting Environmental Crime. Study in the framework of the Efface research project, Berlin: Ecologic Institute.

and is mirrored in the essence of the one of the pillars of the Aarhus Convention - public participation and access to justice[65]. This way benefits of direct connection that the NGOs/activists/citizens (victims) and the local community have in identifying culprits, victims and the initial damages done to the environment are of immense importance to law enforcement and the judiciary and are an essential moving force that will bring to life prescribed criminal proceedings, and its measures against the polluter, that were specifically designed by the legislator for uncovering environmental crimes.

65 https://environment.ec.europa.eu/law-and-governance/aarhus_en

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Second and third parties in administrative proceedings and administrative disputes from the aspect of the Aarhus Convention

Abstract: The importance of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, in the European Union as well as in the Republic of Serbia, is undoubtedly increasing through the years since its ratification have passed. The right to legal protection guaranteed by the Aarhus Convention in administrative proceedings and administrative disputes has been actualized both in administrative proceedings and administrative disputes case law in the Republic of Serbia. This paper will analyse the position of second and third parties in administrative proceedings and administrative disputes in the context of the right to legal protection from the Aarhus Convention and the directions of further development of legal practice in this area.

Keywords: Aarhus Convention, environmental law, administrative procedure, administrative dispute

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1. Introduction

More than thirteen years have passed since the adoption of the Law on Confirmation of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (*Official Gazette of the RS,* 38/2009, hereinafter: The Law)[1] and even slightly more than twenty-four years since the adoption of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter: Aarhus Convention).[2] In the year of the twenty-fifth anniversary of its adoption, it is important to examine the role of the Aarhus Convention in improving certain relevant areas of law in the countries that ratified the convention, among which is the Republic of Serbia. This is indicated in order to look at the impact of the Aarhus Convention on numerous issues in the field of the environmental and related areas of law that its makers wanted to recognize, accept their challenges, and finally solve them or make them more acceptable by giving answers that would provide more suitable environmental protection.

One of the areas of law on which the Aarhus Convention has had an impact in the Republic of Serbia is the area of administrative law. This influence was not exerted by simply adopting the rules from the Aarhus Convention into the administrative legislation of the Republic of Serbia, not because there was no interest in it, but because such a thing was not possible. The Aarhus Convention sets standards in the field of environmental protection, while the countries that have ratified the convention are obliged to adopt those standards by ensuring their respect and application of the regulations that they adopted or amended. When we talk about the system of legal protection of environmental law, institutes of environmental law play the dominant role in that system. This includes the institutes that provide the basis for the establishment of a system that would guarantee the right to access environmental information, the right of the public to be involved in decision-making procedures on environmental matters and the right to legal protection in matters of the importance for environmental protection. [3]

We are witnessing a rise in public attention concerning environmental issues, both globally and in the Republic of Serbia, due to the increasingly frequent negative impacts on the environment that largely affect all segments of society. That is the questions asked in this paper, as well as a number of other questions from the sphere of influence of the Aarhus Convention,

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1 Zakon o potvrđivanju Konvencije o dostupnosti informacija, učešću javnosti u donošenju odluka i pravu na pravnu zaštitu u pitanjima životne sredine (*Official Gazette of the RS*, 38/09).

2 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, https://unece.org/environment-policy/public-participation/aarhus-convention/text, 30. 09. 2023.

3 M. Drenovak Ivanović, *Ekološko pravo*, Faculty of Law – University of Belgrade, Belgrade, 2021, 52.

are gaining more and more importance. Therefore, it is necessary to analyse these questions in order to determine whether they are relevant to interested parties from the perspective of the standards of the Aarhus Convention given the right to be active participants in administrative proceedings and administrative disputes in the Republic of Serbia. It is important to point out that in the Common Position of the European Union (hereinafter: EU) for Chapter 27, which refers to the environment and climate change, the EU itself emphasized how important public participation is in accordance with the acquis of the EU and the Aarhus Convention.[4]

The application of the standards of the Aarhus Convention related to parties in administrative proceedings and administrative disputes in the Republic of Serbia has already been the subject of scientific analysis.[5] In this paper, an additional analysis of this issue will be carried out and the appropriate standards application of the Aarhus Convention to the issues regarding second and third parties in administrative proceedings and administrative disputes in the Republic of Serbia will be observed.

2. Participation of the public and public concerned in environmental matters decision-making

The question of whether the public should participate in decision-making is as old as civilization itself. If we look at the roots of democracy itself, we will see that it was developed and took place through the direct participation of the public in decision-making, but slowly that role became indirect, among other things due to the growth of the population, and therefore moved to indirect public participation in decision-making.[6]

Human development has created permanent values that require immediate protection by the wider social community, which is constantly expanding and taking on new forms as society itself progresses. Among these values, a healthy environment has found its place, which, according to the undivided global thinking, must be given the widest possible protection. The proclamation of this value has been especially actualized in recent decades, due to the increasingly frequent threats to the environment. In response to this challenge, the legal framework proclaiming and protecting these values is expanding.

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4 Zajednička pozicija Evropske Unije, Poglavlje 27- Životna sredina i klimatske promene, https://www.pregovarackagrupa27.gov.rs/dokumenta/., 31. 09. 2023.

5 See especially: M. Drenovak Ivanović, *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine*, Faculty of Law – University of Belgrade, Belgrade, 2021, 29-49.

6 On the development of the institute of public participation please see: K. S. Quick, J. M. Bryson, Theories of Public Participation in Governance., *Handbook on Theories of Governance*. (edited by: Jacob Torbing and Chris Ansell), Northampton, MA : Edward Elgar, 2016, Chapter 12.

Public participation in decision-making that affects the environment is therefore extremely important for application of the right to a healthy environment. Equally important is the participation of the public concerned whose participation in making environmental decisions is of exceptional practical importance. This is because the public concerned, with its active participation in environmental decision-making: a) influences the provision of transparency in the work of administrative bodies and informs the public, b) transmits knowledge about local conditions based on life experience and c) contributes to the protection and advocates the law of nature.[7] The Aarhus Convention is just one of the many tools to ensure the right of the public and the public concerned to participate in environmental decision-making but it is certainly not the only one. Many countries of the world are constantly improving their legislation through mechanisms in which the public, or the public concerned, will be able to participate and more suitably contribute to protect environment.[8]

One of the studies dealing with the importance of public participation in decision-making related to the environment highlights the following as key messages: a) engagement of civil society is the key to achieving goals of sustainable development and environmental protection. Governments cannot achieve environmental protection goals by themselves - they need support and guidance from the public. b) increased public participation ensures citizen engagement, increases the legitimacy of decisions and helps to ensure the policy makers possess valuable local knowledge; c) public participation in environmental decision-making includes both formal participation and participation through the mobilization of engaged citizens; d) policy makers should invest resources in building the capacities necessary to facilitate fair and inclusive public participation; and e) policy makers should strive for transparency in how public input is applied to improve the legitimacy of the public participation process.[9] Such messages represent a clear roadmap for state authorities in which direction the role of the public concerned shall go when making decisions in environmental matters. In the future, we should therefore see more and more positive examples of the involvement of both

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7 See: M. Drenovak Ivanović, *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine*, *op. cit.*, 15-28. The author cites three grounds for the inclusion of various forms of representatives of collective and broader public interests in environmental decision-making: a) the moral duty of citizens to protect the environment in which they were born, b) environmental pollution does not threaten the circle of citizens who can be identified in advance, and c) the need to achieve ecological justice.

8 One of the positive examples of this practice is the Republic of China, see more about the way of public participation in environmental decision-making in: L. Feng, Q. Wu, W. Wu, W. Liao, Decision-Maker Oriented vs. Collaboration: China's Public Participation in Environmental Decision-M.aking, *Sustainability*, 2020, 12, 1334.

9 Stockholm Environment Institute study: L. H. Berry, J. Koski, C. Verkuijl, C. Strambo, G. Piggot, *Making space: how public participation shapes environmental decision-making*, Stockholm Environment Institute, Stockholm, 2019.

the public and the public concerned in the creation or adoption of environmental policies and their implementation.

3. Obligations of the Republic of Serbia arising from the Aarhus Convention

The Aarhus Convention was adopted under the auspices of The United Nations Economic Commission for Europe[10], after many years of advocacy for its adoption by the numerous countries that ratified it, the United Nations itself, the scientific and professional public, the Council of Europe and numerous global and local organizations that deal with environmental protection. The motive for its adoption was the need to include a wider interested public in decision-making and other actions of public authorities related to environmental protection issues, due to the increasing presence of negative effects on the environment itself and, consequently, on the general public.

The Aarhus Convention rests on three basic pillars:

- The right to access environmental information and the right to be informed about the state of the environment; [11]
- The right for the public and public concerned to participate in environmental decision-making; [12]
- The right to review administrative and judicial decisions in environmental matters. [13]

All these three pillars or standards, although elaborated to a certain extent within the provisions of the Aarhus Convention itself, are set in principle, and the contracting parties of the Aarhus Convention are obliged to adequately transfer these standards into their legislation and ensure their compliance. Provisions 14 and 15 of the Aarhus Convention regulate establishment of the Aarhus Convention Compliance Committee (hereinafter: Committee) in order to ensure the method of transferring standards into national legislation is not unequally and insufficiently harmonized. The Committee was formed almost four years after the adoption of the convention.

10 *UNECE - United Nations, Economic Commission for Europe.*
11 The Aarhus Convention, Art. 4.
12 The Aarhus Convention, Art. 6.
13 The Aarhus Convention, Art. 9.

As a significant number of countries that have signed the Aarhus Convention come from the EU, bearing in mind the fact that the EU is a member of the Aarhus Convention in its own right, it is important to draw attention to the fact that in recent years the EU has had numerous initiatives to adopt the minimum standards prescribed by the Aarhus Convention, which process was ongoing in parallel with the harmonization of the legislation of the EU member states with the provisions of the Aarhus Convention. [14] There are numerous products of these initiatives, such as, for example, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.[15] For the purposes of transferring the minimum standards of the Aarhus Convention, the EU adopted the Regulation on the application of the provisions of the Aarhus Convention to Community institutions and bodies. [16]

As the Republic of Serbia aspires to becoming a member of the EU, it is obliged to comply with EU legislation, including the EU regulations related to the adoption of standards from the Aarhus Convention, as well as to familiarize itself with the existing practice of applying the Aarhus Convention in the EU.[17] In this way, minimum legal uniformity will be achieved between the regulations of the EU member states and the Republic of Serbia, including standardization with all three pillars of the Aarhus Convention.

By signing and ratifying the Aarhus Convention and later passing the Law, the Republic of Serbia committed itself to strict and unreserved compliance with the standards set by the Aarhus Convention. [18] In this way, the Republic of Serbia has placed itself on the list of those countries that directly advocate for public participation in making decisions related to the

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14 See more about the adoption of the Aarhus Convention standards in the EU at: L. Lavrysen, The Aarhus Convention: Between Environmental Protection and Human Rights, Liège, Strasbourg, Bruxelles: Parcours Des Droits de l'homme., *Anthemis*, 2010, 647–671.

15 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25 June 2003, *https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32003L0035&from=EN,* 30. 09. 2023.

16 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies L 264/13, 25 September 2006, *EUR-Lex - 32006R1367 - EN - EUR-Lex (europa.eu),* 30. 09. 2023.

17 See more about the application of the Aarhus Convention in the EU in: M. Drenovak Ivanović, *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine*, *op. cit.*, 73-87.

18 Although the Federal Republic of Yugoslavia signed the Aarhus Convention, it is considered that the Republic of Serbia did so as its legal successor.

environment, as well as for informing the public about making those decisions. It is important to point out that in recent years, the Republic of Serbia has signed, ratified and adopted in the form of law many other international conventions related to environmental protection, which standards are also obliged to be respected and incorporated into its national legislation. [19]

When discussing about ensuring the participation of the interested public in the administrative proceedings and administrative disputes in the context of the Aarhus Convention, bearing in mind the minimum standards prescribed in Article 9 of the Aarhus Convention which refer to the right to legal protection of representatives of the interested public, by passing the Law on General Administrative Procedure (hereinafter: LGAP)[20], representatives of collective and wider interests of the public were introduced as parties to the proceedings.[21] Although this legal provision is broadly defined, these representatives can certainly also be representatives of the public's interests in the field of environmental protection, hence in this part the legislation of the Republic of Serbia is harmonized with the provisions of the Aarhus Convention. In addition to the position of the party, representatives of collective and broader interests could be found in other roles in the administrative procedure, depending on the circumstances of the specific case.

The Law on Administrative Disputes (hereinafter: LAD)[22] still does not explicitly recognize representatives of collective and broader interests of the public as parties in an administrative dispute and harmonization of the LAD in this area is expected. However, due to the nature of the rights they protect and their specific position, representatives of collective and broader interests could find themselves on different sides and in different roles in an administrative dispute, which will be discussed later.

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19 For example, Law on the Ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (*Official Gazette of the FRY,* 2/99 - *International Treaties*), Law on the Ratification of the Convention on Biological Diversity (*Official Gazette of the FRY, 11/01 - International Treaties*) and Law on Confirmation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (*Official Gazette of the FRY, 11/01- International Treaties*).

20 Law on General Administrative Procedure, *Official Gazette of the RS*, 18/16, 95/18 – authentic interpretation and 2/23-44 (US).

21 The LGAP, art. 44.

22 Law on Administrative Disputes, *Official Gazette of the RS*, 111/2009.

4. Second and third parties in administrative proceedings and administrative disputes in the Republic of Serbia from the aspect of the Aarhus Convention

In every administrative procedure conducted we have two sides. In the first place it is the authority that conducts the procedure, and in the second place is the person whose right, obligation or right-based interest is being decided. When we talk about an administrative dispute, the situation is similar, on one side we have the plaintiff and on the other the defendant. Of course, in the administrative procedure itself and in the administrative dispute, one or more persons could be found on both sides, but here we will talk about their unique roles, keeping in mind the side they are on.

In addition to these persons that we certainly find in administrative proceedings or disputes, we will often meet a certain number of other persons who are there for various reasons imposed by the law or the needs of the proceedings or disputes. For example, it often happens in the administrative procedure or dispute, expertise is needed in areas in which the authority or the court is not competent, and therefore an opinion is ordered by an expert of a certain profession. Also, the presence of a court interpreter for a specific language may be required because, for example, the defendant in an administrative dispute does not speak Serbian.

However, here we will talk about specific second or third parties that can be involved in administrative proceedings or disputes, from the aspect of the right to legal protection guaranteed by Article 9 of the Aarhus Convention. In this sense, it is necessary to analyse those situations when the interested public in the sense of the mentioned article of the Aarhus Convention is not actively legitimized in the administrative procedure, i.e. it is not on the side of the plaintiff or the defendant in the administrative dispute.

The question arises whether there is a public, for representatives of public interests in the field of the environment, to be participants in administrative proceedings or administrative disputes, both on the side of second or third parties. The public interest is directly protected by the LGAP and the LAD, while in the LGAP it is also proclaimed in the form of the principle of realization of the public interest. [23] We speak of public interest when the value that concerns the majority of the social community is protected, with the aim to ensure the general well-being of that social community.[24] The goal of achieving a certain public interest would therefore ensuring the general welfare of the population.

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23 The LGAP, art. 7.

24 Zoran Tomić, *Javni poredak – Pojam i struktura*, Anali Pravnog fakulteta Univerziteta u Beogradu, No. 2, Beograd, 2019, 36.

Considering the importance of the Aarhus Convention, the importance of the values it protects, as well as the growing need for global environmental protection, it seems that all those actions, procedures, efforts and initiatives, that aim to improve the environment, should be recognized as public interest of the Republic of Serbia. Therefore, in judicial and administrative proceedings, this interest would have to be specially protected and its realization would have to be taken into account. In this regard, special focus should be on initiatives and procedures in which representatives of the public interest, in the field of the environment, emphasize their requests to appear as a party in administrative proceedings or administrative disputes, i.e. to have the position of second or third parties in administrative proceedings or an administrative dispute.

4.1. Second and third parties in the administrative proceedings of the Republic of Serbia from the aspect of the Aarhus Convention

In the provisions of the LGAP we can find provisions that refer to other participants in the procedure and a smaller number of provisions that refer to second parties.[25] Thus, when we talk about second parties in this paper, we are actually referring to other participants in the administrative procedure. A significant number of provisions in the LGAP also refer to third parties, most often in the context of the legal interests of third parties in administrative proceedings.

In the context of the LGAP, other participants in the procedure are participants in the procedure, as opposed to third parties who are not represented as participants in the procedure. This difference is very significant from the aspect of the legal interests of these persons in the administrative procedure, and the possibility of their protection and position in the procedure. The question arises whether some persons can have the exclusive position of a party in the proceedings, other participants in the proceedings or third parties, or whether these persons can choose which role they will play in the context of the legal interests they want to achieve in the proceedings. We consider this issue: the status of these persons in the context of the legal standards of the Aarhus Convention.

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25 The term second parties is used in Article 63, which refers to the minutes drafting, Article 76, which refers to indirect delivery, Article 77, which refers to the delivery note, Article 109, in the context of other persons who are required to attend the hearing, Article 197, which refers to execution through other persons, as well as in Articles 198 and 199, which refer to execution by direct and indirect coercion. In all these situations, it can be concluded that these provisions relate to third parties in the context of the LGAP by logical interpretation, and not to the second parties which can be concluded by language interpretation.

It is clear from the above-mentioned provision of the LGAP that representatives of collective interests and representatives of wider interests of the public[26] can have the status of party in administrative proceedings.[27] This is not proven by showing the outcome of the procedure can have an impact on a right or a right-based interest of the representatives of the collective and wider interests of the public, but it is observed whether the outcome of the administrative procedure can have an impact on the very interests they represent. When it comes to environmental non-governmental organizations, their legal interest is assumed in advance, i.e. it is only determined whether they are registered in accordance with the law for activities related to environmental protection. However, in practice, it has been shown that in certain administrative procedures there were difficulties in determining the party identification of representatives of collective interests and representatives of wider interests of the public, [28] and therefore additional education related to administrative bodies is sometimes required.

Representatives of collective interests and representatives of wider interests of the public may also appear as other participants in the administrative proceedings. For example, there are no obstacles, if the legal requirements are met, for representatives of wider public interests to appear in the place of witnesses. In situations where representatives of collective interests and representatives of wider interests of the public appear as other participants in the proceedings, they do not have the same procedural rights as in situations where they are recognized as parties, and then the scope of their action remains limited and refers to a specific role in the proceedings in where they found themselves.

The situation with third parties in administrative proceedings is similar. Namely, these persons do not formally represent the participants in the procedure, but the decision in the administrative procedure may concern the exercise of their rights or interests based on rights. For example, when we talk about the procedure for issuing a waste management permit, decisions in those procedures can have a significant impact on the environment in the specific area where such permit is issued. If a local non-governmental organization for environmental protection does not take part in a specific administrative procedure (or is denied participation), it will find itself in the position of a third party in relation to that procedure, whose right-based

26 See the commentary on Art. 44 Par. 3 LGAP regarding representatives of collective interests and representatives of wider interests of the public in: Zoran Tomić, *Komentar Zakona o opštem upravnom postupku*, Službeni glasnik, Belgrade, 2022.

27 The position of representatives of collective and wider interests of the public has already been dealt with in detail, as we have already stated, in: M. Drenovak Ivanović, *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine, op. cit.*, 29-49.

28 Please see an example of negative decision on the party identification of an association for environmental protection in the procedure of issuing an energy permit in the Judgment of the Administrative Court 20 U. 4584/12 of April 23, 2013.

interest may be affected by such a decision. Such third party cannot take over those actions in the procedure that are guaranteed by law to the participant of the administrative procedure.

These examples show the practical importance of the standards determined by the Aarhus Convention. The interested public, which protects the environment through its actions, must have the right to take part in the administrative procedure in which issues related to the environment are decided, but it also has the right not to participate in that procedure and to play a different role in the procedure. In doing so, account must be taken of the opportunities that are made available to the representatives of wider interests of the public in different roles in the procedure. It is up to the representative itself to weigh the importance of the issue to be decided in the specific case and the importance of the role he can play in the procedure, and accordingly choose the role in the procedure that suits him or her in the specific case.

Another question that arises is whether the representatives of the collective and wider interests of the public can themselves choose in which role they will find themselves or whether such decision belongs to the administrative body. In practice, there were situations in which the administrative authority did not recognize the status of a party to a representative of the wider public interest with various explanations, such as, for example, that the applicant for the recognition party status did not prove that the outcome of the proceedings in question could affect his or her right or legal interest.[29] In those cases, the representative of the wider public interest remains in the role of a third party in the administrative procedure, i.e. another participant in the procedure if legal prerequisites exist.

The development of administrative practice in this area and better understanding of administrative authorities in this matter, as well as the possible conclusions of the Committee on these issues, will lead to the fact that, when environmental matters are in question, in the future a much larger number of interested persons will be in the role of a party in administrative proceedings. Until then, it seems that these persons will meet more often the roles of other participants in the procedure, i.e. third parties, without all the opportunities that the position of a party in an administrative procedure brings.

4.2. Second and third parties in the administrative dispute of the Republic of Serbia from the aspect of the Aarhus Convention

As we stated earlier, representatives of collective and wider interests of the public are not designated by the LAD as possible participants in an administrative dispute, but they can actu-

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29 Secretariat for inspection affairs, H/09 no. 501.9-107/2020 conclusion of March 9, 2020.

ally be found in different procedural roles. It is not disputed that representatives of collective and wider interests of the public could be plaintiffs in an administrative dispute if they participated as a party in the administrative procedure, even if they had not filed an appeal in the administrative procedure in the case when the administrative matter could be resolved equally to all participants in the procedure. Representatives of collective and wider interests of the public could also initiate an administrative dispute if they have not previously participated in the administrative procedure. They could also appear as interested parties on the defendant side in the procedure if a right or a right-based interest that they represent has been violated. The literature has already discussed various aspects of the plaintiff role of representatives of collective and wider interests of the public in an administrative dispute, [30] while here we will discuss other procedural roles in which representatives can be found.

In addition to the plaintiff and the defendant in an administrative dispute, the LAD recognizes an interested person as a person who would be directly harmed by the annulment of the contested administrative act.[31] The interested person is also a party in the proceedings, and the LAD gives him or her the rights and obligations of the party in the course of the proceedings. In a broader sense, we could talk about an interested person as a third party in an administrative dispute, because it can be in the dispute as a party in addition to the plaintiff and the defendant.

However, bearing the above in mind, we cannot speak of an interested person in the narrower sense as a second or third party in an administrative dispute, because even though it is a person whose outcome of the dispute may affect a right or an interest based on a right, he is given the position of a party and hence the possibility to directly participate in the procedure. Therefore, in this paper, we will not deal with situations when representatives of public interests in the field of environment find themselves in the role of an interested person in an administrative dispute.

In the procedural position of the second party in the administrative dispute, i.e. the other participant in the administrative dispute, representatives of public interests in the field of the environment, do not seem to be found often. This is because most often they appear in the proceedings if evidence is presented at public hearing in an administrative dispute, which is not such a common case. They could be found in e.g. roles of witnesses or experts and qualitatively influence the outcome of the administrative dispute. We will not specifically deal with

30 See in: M. Drenovak Ivanović, *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine*, *op. cit.*, 50-55.

31 The LAD, Art. 13.

some other possible procedural positions of representatives of the public interest in the field of environment as other participants in the administrative dispute, e.g. the position of court interpreter, because those roles do not have a direct impact on environmental protection.

It is not disputed that representatives of the public interest in the field of the environment can find themselves in the role of a third party in an administrative dispute, i.e. not be a party to an administrative dispute, even though they believe that they should have active identification in a specific administrative dispute. Sometimes the administrative court itself will decide against the wishes of the environmental organization and not recognize its active legitimation, which will leave them formally out of the dispute and hence they will play the role of a third party.

In some other situations, the environmental organization itself will eventually decide to be in the procedural position of a third party in an administrative dispute. These can be situations when the environmental organization had the position of a third party in the previous administrative procedure, and wanted to keep the position of a third party in the administrative dispute despite the fact that it could highlight its active identification in the specific procedure. On the other hand, it can be a situation when the environmental organization was a party in the administrative proceedings, and the active legitimation in the administrative dispute had, for example, some other environmental organization that has been recognized as a plaintiff. In that case, the environmental organization that participated in the administrative procedure would have the legal position of a third party in the administrative dispute.

Most often, in practice, there are no situations where an environmental organization decides not to participate in an administrative dispute without having the right to do so, but it is mostly about situations when the administrative court does not recognize the status of an environmental organization as a party in a specific dispute. The reform of the LAD should also address this topic and facilitate the access of such organizations to administrative justice. Harmonization of legislation in the field of administrative disputes with the Aarhus Convention will certainly contribute to this process. When it is explicitly stated in the LAD that representatives of collective and wider interests of the public can have the position of a party, it seems that administrative judges will be more flexible in recognizing the active legitimacy of these persons in an administrative dispute.

5. Conclusion

International conventions play an important role and create a framework in which, and in accordance with which, fighters for the protection and preservation of the quality of the environment are given the opportunity to achieve them. The Aarhus Convention, as already one

of the traditional instruments of the fight for a healthy environment by enabling the availability of information, public participation in decision-making and the right to legal protection in environmental matters, has already achieved a significant number of positive effects on the way to reach these goals. With the adoption of the Law and its implementation, the Republic of Serbia is included in the list of countries that are active participants in this process.

The right to legal protection promoted by the Aarhus Convention has been the focus of the Committee several times, where in the proceedings before the Committee it has been shown that even numerous EU member states have not fully implemented the minimum standards of the Aarhus Convention in this area, although the EU has been an active promoter of the values represented by the Aarhus Convention for decades. Therefore, it is necessary to constantly improve and analyse the legislation of the EU member states in this area so the goals, which are the basis of the adoption of the Aarhus Convention, are achieved as soon as possible.

Although the latest amendments to the LGAP gave representatives of the public interest in the field of the environment the procedural opportunity to be participants in the proceedings, the right is still not explicitly guaranteed by the LAD. This actually does not represent an obstacle based on general legal provisions for these persons to find themselves in the role of a party in an administrative dispute. It is a common situation that these persons find themselves in the position of second or third parties in administrative proceedings or administrative disputes, either because they were not given active legitimation in administrative proceedings or administrative disputes, or because they willingly decide to take on these procedural roles.

The conclusions from this paper tend to indicate the challenges representatives of the public interest in the field of the environment face during, sometimes successful and sometimes not so successful, attempts to ensure the right to legal protection in administrative proceedings or administrative disputes. Strengthening the institutional capacities of administrative bodies and the administrative judiciary, as well as the necessary legislative reform, should certainly contribute to the immediate realization of this right, that is, to the full implementation of the Aarhus Convention in the Republic of Serbia, at least when it comes to the right to legal protection. Then, it seems, we will meet representatives of the public interest in the field of environment more often in the role of a party in an administrative procedure or in an administrative dispute than in the position of second or third parties.

The issues addressed in this paper become even more important when placed in the context of the global fight against the consequences of climate change. In every sphere of life, even in every sphere of law, there is an effort to find solutions that will contribute to the fight against climate change and at the same time preserve the environment as an important factor in this

fight. In this sense, strengthening the development of environmental law, including administrative law in the context of environmental protection, is an important process that can contribute to the achievement of global climate goals.

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349.6(4-6EU)
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Can the public participate in the procedure of the issuing of a construction permit?

Abstract: The Planning and Construction Act does not stipulate whether the public (concerned) can participate in the procedure of issuing a construction permit. Frequently, the issuing of construction permits results in tensions between the investor and the public (concerned), especially in cases where environmental interests are at stake. Generally applicable legislation should therefore be interpreted to see whether and to what extent the public can take place in the construction permitting process. Through analysis of laws and court practice, this paper will show what form of public participation is possible under Serbian law, and which situations are vague. It will differentiate between the cases where environmental impact assessment is (or can be) required, and those where this assessment is not applicable. It will also provide de lege ferenda suggestions aimed at ensuring legal certainty while properly securing interests of both the investors and the public.

Keywords: construction permit, public, interested public, public participation, Aarhus Convention

1. Introductory notes

The construction of buildings is a complex process that (in most cases) requires obtaining a construction permit. A construction permit is an administrative act, issued following an administrative procedure upon request of (in majority cases) of investors – individuals or legal persons who have proper title to the land (usually ownership) and wish to construct a building on that land. Evidently, such process has, as a trigger, particular interests of the investor, however, does it also concern the public, and if so, can the public participate in the pro-

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cess and in what way? On one hand, ownership rights are guaranteed by the Constitution of the Republic of Serbia.[1] Legally, such rights include the owner's right to possess, use, and dispose of the property (in this case, land). This certainly includes the right to (under conditions stipulated by the law) construct buildings on the land. Such right is to be exercised under the conditions prescribed by the Planning and Construction Act[2] (PCA). Therefore, why should the public have any influence over what, how, and whether someone builds on their own land? On the other hand, every construction means certain changes in space, and may have impacts that go beyond the land on which the building is constructed - from blocking light or views for neighbours, to the cases where the planned building has negative impacts on the environment, and consequently on the lives and health of the wider population. Therefore, isn't it logical that the public has the right to participate in the procedures for issuing permits necessary for construction?

It is obvious that, even at this very general level, there is tension between the investors' right to build on their own land and the interests of not only the directly affected persons (e.g. neighbours), but also of the (interested) public, to prevent that such construction causes violation of rights and legitimate interests of the wider community.

However, the PCA, as a key piece of legislation for the matter of construction permits, does not provide answers to the above-mentioned questions, nor does it address the tension between the rights and interests of investors on one hand, and the public on the other.

Through the analysis of relevant regulations, available case law, and texts of legal theory authors, this paper will demonstrate that the public can and ought to, in certain cases and/or to a certain extent, have the right to participate in the process of obtaining construction permits, but also that in certain cases, the right to participate is questionable even though it shouldn't be. In addition, this paper will dare to propose certain improvements to judicial practice and legal texts in order to eliminate some inconsistencies and clarify certain dilemmas in existing regulations.

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1 Ustav Republike Srbije [Constitution of the Republic of Serbia], Official Gazette of the RS no. 98/2006 and 115/2021, Article 58.

2 Zakon o planiranju i izgradnji [Planning and Construction Act], Official Gazette of the RS nos. 72/2009, 81/2009, 64/2010, 24/2011, 121/2012, 42/2013, 50/2013, 98/2013, 132/2014, 145/2014, 83/2018, 31/2019, 37/2019, 9/2020, 52/2021 and 62/2023.

2. Definition of the public in the relevant regulations

The PCA itself does not define the public, nor does it use that concept in the context of construction permits.[3] Therefore, it is not surprising that the commentator of that law does not pay attention to the public in the procedures of obtaining construction permits.[4] According to Article 135 of the PCA, a party in the construction permitting process is the investor and the person who has interest based in law to participate in the process – there is no clear guidance in the text of the PCA whether this could include the public.

The Law on General Administrative Procedure (GAPA)[5] also does not define the public, although this term is widely used (less commonly as public in itself, more often as public interest, public significance, etc.). From that, for the purposes of this paper, it is important to mention the public in the context of defining a party in administrative proceedings: Article 44, paragraph 3 of the GAPA recognizes the status of a party to be representatives of broader public interests,[6] organized in accordance with regulations, if the outcome of the administrative proceedings may affect the interests they represent. Since GAPA, pursuant to its Article 3, is, in principle, applicable to all procedures in administrative matters, it follows that the concept and definition of the role of public in GAPA is also applicable to administrative proceedings for the issuing of construction permits.

Although neither the PCA, which directly deals with construction permits, nor the GAPA, as a general regulation, contain a definition of the public, regulations in the field of environmental protection can provide assistance – they are closely related to the construction process, considering that construction may potentially affect the environment. For instance, the Environmental Protection Act[7] defines the public as "one or more physical or legal persons, their associations, organizations or groups," and the "public concerned" as "the public affected or likely to be affected by, or having an interest in, the decision of the competent authority, including citizens associations and social organizations dealing with environmental protection, registered with the competent authority."[8] Similar definitions are contained in the Envi-

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3 The term "public" appears eight times in the text of the PCA, but usually in the context of preparing planning documents, never in the context of issuing construction permits.

4 Petrović, Nevenka, 2020, *Komentar Zakona o planiranju i izgradnji sa novelama iz 2020. godine*, Poslovni biro– in the part of the Comment that deals with location conditions (pp. 114-123) and building permits (pp. 255-296), there are no sections that deal with the public.

5 Zakon o opštem upravnom postupku [General Administrative Procedure Act], Official Gazette of the RS nos. 18/2016, 95/2018 and 2/2023.

6 Role of party is recognized under same conditions also for protectors of collective interests.

7 Zakon o zaštiti životne sredine [Environmental Protection Act], Official Gazette of the RS nos. 135/2004, 36/2009, 36/2009, 72/2009, 43/2011, 14/2016, 76/2018, 95/2018 and 95/2018.

8 Zakon o zaštiti životne sredine [Environmental Protection Act], Article 3 paragraph 1 points 26 and 28.

ronmental Impact Assessment Act (EIA Act),[9] the Strategic Environmental Impact Assessment Act,[10] and the Act on Integrated Prevention and Control of Environmental Pollution.[11]

Given that the PCA does not mention the public in the context of issuing construction permits (but rather refers to persons with certain interest), that the GAPA (while not defining the public), does recognize *locus standi* to certain forms of public, and further, that environmental regulations provide quite broad definitions of the public and the public concerned, it would be good to see the positions of legal theory as to whether the public can participate in administrative procedures at all.

3. The possibility for the public to participate in the administrative process: positions in legal theory

In modern literature of Serbian authors dealing with this issue, the author did not find positions arguing that the public does not have the right to, at least to a certain extent or form, participate in administrative procedures that may have an impact on collective or broader interests. Some authors argue that *ratio legis* for public participation can be found in the functional interdependence of the process of informing and involving the public in the process of making environmental decisions.[12] According to this author's understanding, this interdependence arises from the public's interest in knowing what is happening with the environment, the ability to learn this through obtaining information from relevant authorities, and the ability to then, when they become aware of a (potential) problem, influence the process of making or changing decisions that affect the environment. The following theory's standpoint may be

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9 Zakon o proceni uticaja na životnu sredinu [Environmental Impact Assessment Act], Official Gazette of the RS, nos. 135/2004 and 36/2009 - Article 2, paragraph 1, point 1, defines the public in the same way as the Environmental Protection Act, and in point 7 of the same paragraph, it defines the public concerned very similarly to Environmental Protection Act as "the public that is affected or likely to be affected by the project, including non-governmental organizations dealing with environmental protection and registered with the competent authority".

10 Zakon o strateškoj proceni uticaja na životnu sredinu [Strategic Environmental Impact Assessment Act], Official Gazette of the RS nos. 135/2004 and 88/2010 - Article 3, paragraph 1, point 5 defines the public in the same way as the Environmental Protection Act, and in point 6 of the same paragraph, it defines the public concerned very similarly to the Environmental Protection Act as "the public influenced or potentially influenced by a plan or program and/or having an interest in making decisions related to environmental protection, including non-governmental organizations dealing with environmental protection and registered with the competent authority.

11 Zakon o integrisanom sprečavanju i kontroli zagađivanja životne sredine [Act on Integrated Pollution Prevention and Control], Official Gazette of the RS nos. 135/2004, 25/2015 and 109/2021 – Article 2, paragraph 1, point 16 defines the public in the same way as the Environmental Protection Act, and in point 17 it defines the public concerned almost identically to the EIA Act.

12 Lilić, Stevan., Drenovak, Mirjana, 2010, *Pravo učešća javnosti u procedurama*, in collection of works *Ekološki izazovi Srbije*, Otvoreni univerzitet, p. 106.

taken as confirmation of this understanding: that involving the public in the making of administrative acts ensures "transparency of the process and reporting to the public about the state of the environment and planned interventions, and provides an opportunity to consider both local and broader impacts of planned activities on the environment and human health."[13]

Historically speaking, the public did not have an equally significant role in administrative procedures, and one can spot an evolutionary process in the development of the role of the public in administrative procedures that touch upon collective or broader interests. Perhaps the best example for this are the procedures involving protection of environmental interests, which undoubtedly fall under the concept of broader interests.[14]

From the comparative law perspective, the origins of the legal regulations of the role of the public in administrative procedures were identified in the 1866 Swedish law, when citizens were given the right to access information and documentation in the possession of the administrative authorities. However, the breakthrough in this field was made only in the last decades of the 20th century with the widespread acceptance of the concepts of human rights, good governance, and transparency,[15] as well as access to justice.[16] Some authors see this break-

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13 Drenovak-Ivanović, Mirjana, 2021, *Ekološko pravo*, Pravni fakultet Univerziteta u Beogradu, p. 57.

14 Drenovak-Ivanović, Mirjana, 2021, *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine*, Pravni fakultet Univerziteta u Beogradu, pp. 15-16, cites three foundations that legitimize the public's need to be involved in processes related to environmental protection - the moral duty of people to protect the environment they were born into, the fact that pollution does not only threaten individuals or a predetermined group of people, and the need to achieve environmental justice.

15 Lilić, Stevan, Drenovak, Mirjana, 2010, *Ekološko pravo*, Pravni fakultet Univerziteta u Beogradu, p. 291.

16 For additional information on access to justice from comparative law perspective, see Samvel, Gor, 2021, *Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice*, in *Transnational Environmental Law*, no. 9(2), pp. 2011-238; Pánovics, Attila, *The Missing Link-Access to Justice in Environmental Matters*, in *EU and Comparative Law Issues and Challenges Series (ECLIC)*, no. 4, pp. 106-127; Bechtel, Sebastian D., 2021, *Access to Justice on EU Level: The Long Road to Implement the Aarhus Convention*, in the *Opole Studies in Administration and Law*, no. 19(2), pp. 19-42; Hadjiyianni, Ioanna, 2020, *Multi-Level Governance in Action: Access to Justice in National Courts in Light of the Aarhus Convention*, in *European Public Law*, no. 26(4), pp. 889-920; van Wolferen, Matthijs and Eliantonio, Mariolina, 2019, Access to *Justice in Environmental Matters–The EU's Difficult Road Towards Non-Compliance With the Aarhus Convention*, in *Research Handbook on European Environmental Law* (Edward Elgar 2020), pp. 148–163.

through in the field of public participation[17] in procedures related to environmental protection as a right to freedom of expression, guaranteed by Article 19 of the International Covenant on Civil and Political Rights.[18] This right, according to Gračan and Vizjak (2010) implies (with certain limitations) the freedom to seek, receive, and disseminate information and ideas of all kinds. [19] Similarly, this right is regulated by Article 10 of the European Convention on Human Rights and Fundamental Freedoms.

In her paper, Drenovak-Ivanović (2015) divided the development of the right of the public to participate in environmentally significant procedures in the Republic of Serbia into three phases.[20] In the period before 2004, i.e. before the adoption of the Environmental Protection Act and regulations on integrated prevention and control of pollution, environmental assessment and strategic assessment, the right of the (concerned) public to participate as a party in administrative procedures was not recognized in administrative-legal practice. The Serbian administrative authorities considered that the public had neither rights nor obligations nor legal interests affected by the decisions of the administration authorities.[21]

The second period begins in 2004 with the adoption of a set of environmental laws,[22] which define the public and public concerned, as well as their right to participate in the procedures for adopting environmental administrative acts, as well as to (in case of public concerned) pur-

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17 For additional information on public participation from comparative law perspective, see Ryall, Áine, 2023, *A Brave New World: The Aarhus Convention in Tempestuous Times*, in *Journal of Environmental Law*, no. 35(1), pp. 161-166; Akerboom, Sanne and Craig, Robin Kundis, 2023, *How Law Structures Public Participation in Environmental Decision Making: A Comparative Law Approach*, in *Environmental Policy and Governance*, no. 32(3), pp. 232-246; Suškevičs, Monika., Ehrlich, Triin, Peterson, Kaja, Hiiemäe, Olavi, and Sepp, Kalev, 2023, *Public Participation in Environmental Assessments in the EU: A Systematic Search and Qualitative Synthesis of Empirical Scientific Literature*, in *Environmental Impact Assessment Review*, no. 98; Squintani, Lorenzo, and Perlaviciute, Goda, 2020, *Access to Public Participation: Unveiling the Mismatch between What Law Prescribes and What the Public Wants*, in *Research Handbook on EU Environmental Law*, pp. 133–147; Perlaviciute, Goda, and Squintani, Lorenzo, 2020, *Public Participation in Climate Policy Making: Toward Reconciling Public Preferences and Legal Frameworks*, in *One Earth*, no. 2(4), pp. 341-348; Jones, Michael, 2019, *The European Landscape Convention and the Question of Public Participation*, in *Justice, Power and the Political Landscape*, pp. 231-251.

18 Article 19, paragraph 2 of the Act on Ratification of the International Covenant on Civil and Political Rights, Official Gazette of the SFRY no. 7/71 states: " Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

19 Gračan, Danijela, Vizjak, Sonja, 2010, *Pravo na pristup pravosuđu u pitanjima okoliša*, in *Zbornik radova Pravnog fakulteta u Splitu,* year 47, 1/2010, p. 176. Truth to be told, the authors discuss the right to access to justice, but in the opinion of this author, their thoughts equally apply to administrative procedures.

20 Drenovak-Ivanović, Mirjana, 2015, *The Development of the Right to Public Participation in Environmental Matters as a New concept of Administrative Decision Making in Serbia*, in *Transylvanian Review of Administrative Sciences*, no. 44 E/2015, p. 77.

21 Such as the approval of the construction of a gas station, for example, ibid., p. 77.

22 Environmental Protection Act, EIA Act, Strategic Environmental Impact Assessment Act, and Act on Integrated Pollution Prevention and Control.

sue legal remedies and initiate administrative disputes.[23] This legislative revolution launched as a principle for protecting the right to a healthy environment and access to justice,[24] but also left a certain degree of complexity and inconsistency, which meant insufficiently effective procedures for informing the public and enabling its participation in environmental decision-making.[25] Certainly, it should be noted that in 2009, after the adoption of a set of environmental laws and before the adoption of the GAPA, the Republic of Serbia ratified the Aarhus Convention,[26] which, with its three pillars - the right to access to information in the field of environmental protection, the right to participate in decision-making procedures relevant to the environment, and the right to legal protection, undoubtedly influenced the position and rights of the public in environmental administrative procedures and paved the way for further improvement of that right.

The third period begins on 1 June 1 2017, with the entry into force of GAPA[27] and its expansion of the concept of a party in administrative proceedings. With the adoption of the GAPA, it seems that the issue of public participation in administrative proceedings that may affect collective or broader interests has, in principle, become resolved, as the GAPA in Article 44, paragraph 3 explicitly defines representatives of collective interests and representatives of broader public interests as parties (provided they are organized in accordance with regulations, and that the outcome of the administrative proceedings may affect the interests they represent). Jerinić sees the procedural role of those representatives as being similar to the role of an interested party, a concept that was familiar even before the existing GAPA was in force.[28]

In his Commentary on the GAPA, Tomić (2022) provides examples and confirmation of the role of these types of parties: as protectors of collective interests, he sees national minorities councils, NGOs, various associations (e.g. for consumer protection), while as protectors of broader public interests, he sees the Red Cross, the Center for Children's Rights, the Belgrade Environmental Center, etc., of course, in each case provided that the specific administrative

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23 Drenovak-Ivanović, 2015, pp. 78-79.
24 Article 9 paragraph 1 point. 11 and Article 87a of the Environmental Protection Act.
25 Lilić, Drenovak, 2010, pp. 296, 298.
26 Zakon o potvrđivanju konvencije o dostupnosti informacija, učešću javnosti u donošenju odluka i pravu na pravnu zaštitu u pitanjima životne sredine (Aarhuska konvencija) [Act on Ratification of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)], Official Gazette of the RS – International Treaties, no. 38/2009.
27 Drenovak-Ivanović, 2015, p. 76.
28 Jerinić, Jelena, 2020, *U ime javnosti: Legitimacija zastupnika kolektivnih interesa i širih interesa javnosti u upravnim stvarima*, in *Pravni zapisi*, year XI, no. 2, Pravni fakultet Univerziteta Union, p. 508.

matter is related to the interests they represent or protect.[29] Other authors have delved deeper into the nuances of representatives of collective interests and representatives of broader public interests as parties in the proceedings, and the connection of these concepts with the concept of public concerned, as defined by environmental regulations. For example, Drenovak-Ivanović (2021) equates (of course, in the context of environmental administrative issues) the public concerned with the representative of public interest or representative of collective interests, in which she sees the rounding off of the legal framework regarding the entrusting of care for the environmental protection interest to various forms of associations engaged in protection, improvement, and promotion of environmental protection, as broader interests of the public. Drenovak Ivanović (2021) emphasizes the distinction between the concepts of the public (which is defined quite broadly) and the public concerned (with a slightly narrower definition, where the significance is placed on the quality of the relationship of this category of the public with the relevant administrative matter)[30], emphasizing the consequences of such a distinction in terms of the ability to participate directly in the process of making environmental decisions and the right to legal remedy, which is reserved only for the public concerned, not for the public in general (this is also in line with the Aarhus Convention).[31] For protectors of collective interests and representatives of broader public interests, the assumption is made that associations acting as such representatives have a legal interest in participating in the proceedings, and that they are not obliged to prove that the outcome of the proceedings affects their rights, obligations, or interests, but that it is sufficient for the outcome to potentially affect the interests they represent.[32] Drenovak-Ivanović warns about the imprecisions of the GAPA, i.e. the absence of a definition for the representative of public interests and the representative of collective interests, bearing in mind that the Constitutional Court declared unconstitutional a provision of the Civil Procedure Act in 2013 that granted certain entities the right to protect collective rights. [33]

Judging from the reviewed legal theory, public, or at least public concerned, should be able to participate in the construction permit process, at least to some extent. The following chapter

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29 Tomić, Zoran, 2022, *Komentar Zakona o opštem upravnom postupku sa sudskom praksom i registrom pojmova*, Službeni glasnik, p. 321. See also Tomić, Zoran, 2020, *Opšte upravno pravo*, Pravni fakultet Univerziteta u Beogradu.

30 Drenovak-Ivanović, 2021, *Ekološko pravo*, p. 57.

31 Lilić, Drenovak, 2010, p. 294.

32 Drenovak-Ivanović, 2021, *Ekološko pravo*, p. 58. The basis for such regulation, according to Drenovak-Ivanović, lies in granting *locus standi* to trade unions in the previous GAPA, where this *locus standi* applies not only when protecting their own interests or the interests of their members, but also when representing the interests of workers in general - Drenovak-Ivanović, 2021, *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine*, p. 31.

33 Drenovak-Ivanović, 2015, p. 86, Similarly, Drenovak-Ivanović, 2021, *Pravni položaj zastupnika kolektivnih i širih interesa javnosti u zaštiti životne sredine*, p. 30.

will analyse whether this is truly so, both from the perspective of the letter of the law, and from the perspective of judicial practice.

4. Possibilities of the public to participate in the construction permitting process

4.1. Possibility to learn that the construction permitting procedure has been initiated

Ever since Serbia introduced e-construction permitting, everyone can see whether a request for issuing construction permit has been filed with the competent authorities, and whether it has been approved.[34] This is possible assuming that one has knowledge of at least some relevant facts, such as name of the investor, or cadastral details on the land (later should not be an issue, given that cadastral maps and data are also available online). Therefore, it follows that the public can fairly easily learn of a construction permit. However, in order to do so, it is necessary to regularly monitor the status of certain permits on the website of the Central Records of Integrated Procedures. In light of the quite short periods for the authorities to issue construction permits (there is a statutory deadline of five days following the investor's request), this can prove to be quite a challenge.

4.2. Possibility to inspect case files

PCA does not regulate the right of public or public concerned to inspect case files. According to paragraph 6 of Article 64 of GAPA (which applies to construction permitting as *lex generalis*), any interested person who can prove legal interest in the matter is entitled to inspect the case files. This would mean that the public in general would not have such right, since not every person has legal interest in each construction permit.

Nevertheless, each individual could, under the conditions laid down by the Act on Free Access to Information of Public Significance,[35] obtain information of public significance from the construction permit issuing authority. This law defines information of public significance as a piece of information at the disposal of the public authority, that originates from the work or in relation to the work of the authority (regardless of the source or manner of finding out of the information), related to anything the public has justified interest to know. It is deemed by law that justified interest exists in case of information at the disposal of the public authorities

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34 Available at https://ceop.apr.gov.rs/ceopweb/sr-cyrl/home, last visited on 26 October 2023.
35 Zakon o slobodnom pristupu informacijama od javnog značaja [Act on Free Access to Information of Public Significance], Official Gazette of the RS nos. 120/2004, 54/2007, 104/2009, 36/2010 and 105/2021.

related to (inter alia) protection of the environment. That being said, in environmental matters, public has the legal basis to access information at disposal of public authorities, including the authorities in charge of issuing construction permits. There are, of course, certain exceptions when the authorities are not obliged to share the information e.g. classified information, defence concerns, etc.[36]

4.3. Possibility to assume position of party

4.3.1. Law and judicial practice

As mentioned before, the GAPA has enabled the representatives of collective interests and representatives of broader public interests to be a party in administrative procedure if the outcome of the administrative proceedings may affect the interests they represent. One would think that such a broad concept should be enough to enable public concerned, i.e. all those NGOs, associations and other entities engaged in environmental protection, to participate in the construction permitting process. However, the recent development of case law has shown that things are not simple as they might seem.

In its decision from March 2023, the Supreme Court of Cassation upheld the decision of the Administrative Court, by which the construction permit for preparatory works on the gondola at Kalemegdan Fortress (cultural asset) in Belgrade was annulled based on the suit of an environmental NGO (Gondola case).[37] In doing so, the Supreme Court of Cassation also upheld the position of the Administrative Court that the NGO had standing to sue in that case – a matter that was disputed by the issuer of construction permit. The Administrative Court took the position that the public concern claiming that there was a violation in protection of immovable cultural assets is entitled to sue in administrative dispute.[38] In reaching this conclusion, the Administrative Court concluded that the EIA study and approval of that study, was not enclosed to the request for issuing a construction permit. In this author's view, such conclusion was not in line with the law, because the PCA, applicable at the time, did not require that EIA study approval be submitted along with the request for a construction permit, but allows for the approval to be submitted later, when the notification of works commencement is filed. The same follows from the EIA Act, which allows the EIA study approval to be submitted either with the request for construction permit **or** with the notification of works com-

36 Ibid., Article 9.
37 Judgement of the Supreme Court of Cassation of the Republic of Serbia no. Uzp 132/2021 dated 17 March 2023.
38 Judgement of the Administrative Court of the Republic of Serbia no. 7 U 6063/19 dated 12 February 2021.

mencement. Thus, the Administrative Court's finding that EIA study and its approval were necessary at the time of a construction permit, was incorrect. The Supreme Court of Cassation did confirm that the NGO had standing to sue, but for different reasons: it found that an association for environmental protection (i.e. public concerned as per environmental legislation, or protectors of collective and broader interests from the GAPA) do not have direct right to be a plaintiff in a case against a construction permit – the Supreme Court found that direct right of public concern to participate in procedures and disputes in cases where such right is prescribed by law. The court found that such direct right exists under the environmental legislation, and since the PCA (which the court classifies as not being an environmental law) does not contain such entitlement, the court found that there was no direct right to be a plaintiff. However, the court found that an NGO could have an indirect right to participate in the relevant procedures: in cases of construction permits for projects where EIA is (or could be) applicable, an NGOs may have standing to sue if there is a relevant link between the plaintiff or the interests it aims to protect, with the subject matter of the challenged administrative act (which needs to be evaluated on a case-by-case basis). Practically, in relation to the case at hand, it is necessary to see whether the construction permit violates the interests which the plaintiff aims to protect (this being environment), which is based on the PCA (this being the law applied for rendering the challenged construction permit). To put it in another way: plaintiff could have indirect standing to sue, if there is a violation of the interest that NGO is aiming to protect, which interest is based in the PCA. By applying this criterion, the Supreme Court found that the NGO did have standing to sue in the Gondola case, for the following reason: the investor did not provide an EIA study along with its request for issuing the construction permit, which it was obliged to do according to the PCA (the court explicitly made a remark that the investor was obliged to provide EIA study, and not the approval of EIA study, because the approval can be provided at a later stage). Since the obligation to enclose the EIA study is derived from the PCA, and the performance of works in the absence of such study could violate environmental interests, the court found that plaintiff, in that case, had standing to sue. Such reasoning of the court is compatible with the provisions of the EIA Act: Article 5 of the EIA Act prohibits implementation of projects (for which EIA study approval is necessary) before the EIA study approval is procured, and Article 18 states that the EIA study and the EIA study approval (or decision that EIA is not necessary) have to be enclosed to the request for issuing the construction permit or the notification of works commencement – the PCA, to which the Supreme Court focused, implemented the requirements from the EIA Act by splitting them into two time periods: the PCA requests the EIA study as enclosure to the request for issuing the construction permit, and the EIA study approval as enclosure to the notification of works commencement. Such a solution enabled the court to confirm the standing to sue – not in the direct entitlement set by the PCA, not in the fact that the EIA study approval

was not submitted, but in the fact that the EIA study was not submitted even though it had to be submitted by a letter from the PCA.

Evidently, in the Gondola case, the Supreme Court of Cassation took a rather restrictive approach by linking the interests of NGOs that justify their standing to sue only to the law on the basis of which the contested administrative act was issued.

In another recent case concerning a waste water treatment facility, the Supreme Court of Cassation denied that an environmental NGO has standing to sue.[39] In that case, the NGO contested the construction permit due to the fact that the EIA study approval was not enclosed with the request for construction permit (in the case at hand, the EIA study (but not its approval) was enclosed with the request for construction permit). The Administrative Court dismissed the lawsuit, arguing that the plaintiff did not have standing to sue. The court found that the construction permit did not violate the interests of the NGO based on law, that the investor provided all documentation that was necessary to be enclosed with the request for a construction permit, and that there was no obligation to enclose an approval of an EIA study neither according to the PCA nor according to the EIA Act. The court also stated that public concerned can contest an EIA study approval in accordance with the EIA Act, but concluded that the PCA and the EIA Act do not provide for a direct and legally grounded interest for the NGO to contest the construction permit. Following a challenge of this decision by the NGO, the Supreme Court of Cassation confirmed the decision of the Administrative Court and upheld the position that the NGO did not have standing to sue in that case. The court repeated the position from the Gondola case that NGOs do not have direct right to sue in the construction permitting procedure, regardless of even where an EIA procedure is applicable, but could have such right if the construction permit violates the environmental interests based in the PCA. The court found that there is no such interest in the case at hand where the plaintiff is contesting the construction permit due to the fact that the EIA study approval was not enclosed with a request for its issuance – the court found that there is no relevant link between the issued construction permit and the interest to protect the environmental from the aspect of the PCA, because the EIA study approval needs not be enclosed with the request for a construction permit, while on the other hand, based on the EIA Act, construction cannot start before the EIA study approval is obtained. The court also clarified why this case is different from Gondola case – in the Gondola case, the investor failed to provide the EIA study along with the request for a construction permit – and this is a violation of the PCA (more precisely, its bylaws), which is not the case here – here the EIA study was enclosed).

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39 Judgement of the Supreme Court of Cassation of the Republic of Serbia no. Uzp 41/2023 dated 8 August 2023.

In essence, the Supreme Court of Cassation applied the same test as it did in Gondola case, but since the decisive facts were significantly different, the test gave a different result.

4.3.2. Take-aways from the Supreme Court of Cassation's decisions

In the view of this author, the position maintained by the Supreme Court of Cassation is correct, but is the reasoning that could have been better. Namely, the key question for assessing whether a person has standing to sue is whether the outcome of the administrative proceedings may affect the interests they represent (as per criterion from GAPA), i.e. whether its rights or interests based in law are violated by the relevant administrative act (as per criterion from the Administrative Disputes Act). To say that a construction permit, especially one related to projects where an EIA is or can be required, is obviously an administrative act which affects environmental interests, would be jumping to conclusions. With such an approach, any administrative act issued throughout the lengthy and complex construction process (such as e.g. energy permit, water conditions, fire-fighting approval) would be vulnerable to suits from environmental activists, which, coupled with an overburdened Administrative Court, would effectively stop many, if not most, projects, including those which are aimed at improving the environment (e.g. waste water treatment plants, renewable energy production, etc.). Following the test introduced by the Supreme Court of Cassation in the decisions analysed in this paper, it seems that this risk is reduced. However, perhaps not with the full explanation.

To say that a construction permit can affect environmental interests (and thus enable public concerned to challenge it) would mean that such permit can actually harm the environment. However, when laws are analysed in detail, it follows that, in cases where an EIA is or can be required, the construction permit itself cannot harm the environment. This is because the environment would be harmed only by doing actual construction works. In cases where an EIA is or can be required, works cannot commence before the EIA study approval is obtained.

The EIA process is also an administrative process, governed by the EIA Act and its bylaws, in which the authorities assess whether the relevant project has a significant impact on the environment and if so, whether and under which conditions the project can be implemented. According to Article 5 of the EIA Act, if an EIA procedure is mandatory or could be ordered for a project (list of such projects is specified in EIA Act bylaws), investors cannot implement such a project before the EIA procedure is completed. According to Article 18 of the EIA Act, an EIA Study and the decision on its approval, or, where applicable, a decision that an EIA procedure is not required, are to be enclosed along with the request for issuing a construction permit OR the notification of the commencement of a project's implementation. According to Article 148 of the PCA, the decision on the approval of an EIA study is to be submit-

ted along with the notification of commencement of works on the construction of the building. This notification is mandatory and is chronologically being given after the construction permit is issued.

If works do commence without the required EIA study approval, the environmental inspection is authorized to prohibit the implementation of the project, and the investor becomes liable for an economic offense (Articles 37 and 40 of the EIA Act). Further, if the works commence without proper notification of works commencement, according to Article 176 of the PCA, the construction inspection is authorized to stop the works.

It follows that the law does prohibit realization of projects without an EIA study approval for which an EIA is or may be required, but it clearly allows the investor to provide this approval after the issuance of a construction permit, i.e. at the time of the works commencement notification. The lawmakers clearly wanted to prohibit the implementation of the projects without the EIA study approval, and have identified the works commencement as the moment when the project implementation commences.

That said, it follows that the construction permit itself, in projects for which an EIA is or may be required, cannot be implemented without an EIA study approval, which is another administrative act. In such cases, the construction permit is a *conditio sine qua non*, but not a sufficient condition for implementing a project. Since the project cannot be implemented before the EIA study approval, it cannot harm the environment, and consequently, it is not affecting the interests of the public concerned. But this does not mean that the interests of the public concerned are disregarded – they just need to be protected in the EIA study approval procedure (and not in the construction permitting procedure), which is the one that will definitely allow the project to be implemented and thus potentially harm the environment.

This conclusion is, on a broader level, in line with the position maintained by the Supreme Court of Cassation in the decisions analysed above. However, it also shows a blind spot of such position: what about cases where an EIA study approval was procured even before the construction permit, but then the construction permit is not in compliance with that approval? Wouldn't it be a legitimate interest of public concern to have standing to sue against such a construction permit, knowing that there is no further administrative act down the road which could stop the implementation of the construction permit, which could harm the environment?

In such cases the public concerned would have no other avenue which could give it the chance to protect the environment. Therefore, in such cases, there is no rationale for a restrictive

approach in recognizing the *locus standi* to public concerned. To do so would be in line with the criteria from the GAPA and the Administrative Dispute Act, because in such cases, there are no further barriers to the implementation of construction permits, and such implementation could affect the interests of the public concerned. Consequently, there is justification to the public concerned to step into, as a party, the construction permitting process where environmental challenges are present and there is no (further) EIA process down the road which could alleviate such challenges. Constitutional duty of any person to protect and improve the environment[40] gives legitimacy to the interests of the public concerned to participate in such procedures.

5. Concluding remarks

The public and the public concerned can, in certain cases and to a certain extent, participate in those construction permitting processes which touch upon public interests, especially those where environmental interests are engaged. This is true in relation to the ability to learn that the permitting process has been initiated and in relation to accessing case files. However, due to a restrictive position of the Supreme Court of Serbia, it seems that the most valuable form of participation – *locus standi* – is not readily available to the public concerned.

While this can be justified in cases where the EIA process is yet to follow the construction permit, in view of this author, there is no such justification in cases where the EIA process has already been finished– in such cases, the public concerned should have standing to sue if the construction permit is contrary to the EIA study approval and hence may violate the environment. Such approach would, on the one hand, preserve the current position of the Supreme Court of Serbia and streamline the protection of the environment towards the EIA process (thus also relieving the investors from challenges of each and every administrative act during the construction process) in cases where the EIA procedure is applicable, but would also secure that public concerned can protect the environment by challenging construction permits in cases where EIA has been done before the construction permit issuance. This approach could be procured either with a more nuanced approach of the judicial practice, or via amendments to the environmental legislation or the PCA.

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40 Article 74 of the Constitution of the Republic of Serbia.

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Granting legal personality to protected natural areas - reinforcing the pillars of the Aarhus Convention (case of Spain)

Abstract: This paper deals with the second and third pillar of the Aarhus Convention: namely public participation and access to justice; it examines the contracting parties' obligation to report its provisions; it presents national reports from two subsequent periods and for comparison lists obstacles encountered; and, provides examples from Spain and Serbia.

Furthermore, it embraces the legal trend of the rights of nature and the granting of legal personality to natural areas, analyses how it can contribute further in the implementation of public participation and access to justice, taking into consideration the model of legal personality adopted by Spain, as well as the work of its judiciary, inasmuch this country is a party to the Aarhus Convention. Instead of merely perceiving natural areas as objects, reasons for choosing this approach, organisational schematics, as well as the expected results are also discussed, thus finally reflecting important factors in achieving environmental goals and dealing with these challenges.

Keywords: Aarhus Convention, access to justice, Mar Menor, public participation, rights of nature

1. Introduction

The world is facing growing environmental concern and even environmental laws are changing their core meaning in safeguarding and shifting the overall mindset. The existing legal

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solutions can provide adequate protection in their normative sense, but the reality can prove their effect to be insufficient for the desired attainment in these matters. What more can be done could be seen by way of a complementary strategy, turning to different actors that are capable of taking up on the role, searching for a novelty or other tool in resolving these issues.

Apart from the existing laws and legal mechanisms, a possible remedy to advanced environmental protection could come from legal doctrines, more precisely the emerging rights of nature laws and especially legal personhood. Different countries rely on their specific political, social and legal background and accepting a novel trend might even seem overwhelming or adverse, but if adequately analysed can even fit into the existing legal framework and be merged. Even though the concept is not new and has deep roots, it can help alleviate the moral grief over the vast degradation happening globally, and more so, create proper legal effects that are borne in mind and acceptable to every environmentally conscientious person, whether they represent activists, scholars, the general public or other.

2. Public participation and access to justice in environmental matters

The Convention on Access to Information, Public Participation in Decision – Making and Access to Justice in Environmental Matters (Aarhus Convention)[1] apart from its first pillar addressing access to environmental information[2], provides public participation in its second pillar[3], and consequently the third pillar addressing access to justice[4] which can be observed as safeguarding the previous, bearing in mind that the first two pillars would lack effect if decisions of public authorities could not be challenged before a court or other independent body. To put it another way, what is one without the other? The Parties to the Aarhus Convention must abide by various duties provided therein, one of which is the obligation of reporting at regular intervals not exceeding three or four years.[5] Reporting could serve as scrutiny especially when comparing reports from subsequent periods, shedding light on whether a party

1 Convention on Access to Information, Public Participation in Decision – Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.
2 Aarhus Convention, Art. 4.
3 Aarhus Convention, Art. 6-8. adress public participation in decisions on specific activities, public participation concerning plans, programmes and policies relating to the environment and public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments. For the purpose of this article, these three public participation rights shall be regarded as public participation in general notion.
4 Aarhus Convention, Art. 9.
5 Aarhus Convention, Art. 5. para. 4 provides that Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

solves the problems, whether it has the will and capacity to do so, or for example the glitch is more systemic in nature.

With regard to the United Nations Economic Commission for Europe (UNECE) Aarhus Convention National Reports (2017, 2021), being publicly available, we can draw some comparative conclusions and ascertain where a country stands in its environmental progress in relation to every article of the Aarhus Convention. For instance, analysing Spain's and Serbia's latest national reports, from 2017 and 2021, respectively, one can acquire significant information.

In Spain's report from 2017, concerning public participation, some of the mentioned obstacles were as follows: as identified by local authorities in the application of the Aarhus Convention, the lack of detailed knowledge of the terms of the Aarhus Convention and the lack of interest by a considerable proportion of the population[6]; at times, argued by the public concerned, the time frames for public participation were not sufficient due to the volume or complexity of the information related to the project or activity[7]; even though several environmental awareness campaigns have been promoted, it would be desirable to further stress the necessity of a better understanding of the rights of all three pillars, especially at the level of local governments, given its proximity to citizens[8].

Furthermore, the main obstacle for the full implementation of the provision on access to justice lies in the excessive length of judicial proceedings, while the cost of the process poses a barrier as well. It is also mentioned that in 2014 there were over 900,000 applications for legal aid. Although legal aid enables non-governmental organisations - NGOs to act in environmental matters, there was a problem in the practical application and access to it due to the text of two laws regulating legal aid not being reconciled.

In the following report from 2021, the previously mentioned obstacles and issues were once again portrayed, adding the lack of human and technical resources concerning public participation in some cases.

Taking a closer look at Serbia's report from 2017, with regard to public participation some of the mentioned obstacles were: insufficient institutional and other capacities of the relevant ministry and the competent local self-government bodies; low public participation in the environmental impact assessment - EIA procedures at the level of the autonomous province

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6 In relation to Aarhus Convention, Art. 6.
7 In relation to Aarhus Convention, Art. 7.
8 In relation to Aarhus Convention, Art. 8.

with one of the possible factors being the absence of the obligation to inform the public concerned about the assessments in writing; a low level of participation by bodies and organisations concerned except professional organisations; concerning EIA insufficient public participation due to being uninformed, uninterested, late inclusion in the course of the case after the deadlines for the right to complaint, including lack of trust in the work of the competent body[9]; incompatibility of sectoral regulations that provide the basis for the adoption of plans and programmes with the Law regulating strategic environmental impact assessment - SEIA (public participation problems occur for plans and programmes of different sectors where the laws applying to these sectors do not provide for public participation); limited possibilities of protecting the right to equal treatment in administrative and judicial procedures because the public participate only in the phase - decision on the strategic impact assessment report[10]; the obligation of ensuring public participation procedure is carried out is not incorporated in all pieces of legislation that may be of importance in the environmental area; some associations consider the procedure of informing the public concerned and collecting opinions in the process of preparing and adopting legislation or regulations in environmental matters is not implemented consistently and that the public lacks possibilities to influence that adoption; the public has relatively low interest to participate in the procedures related to drafting legislation; insufficient knowledge of the public concerned about the procedure for submitting opinions[11].

Concerning access to justice, some of the considered obstacles as well as important ways for overcoming them were: costs of proceedings that are deterrent; necessity of trained staff; collaboration of organisations of judges, prosecutors and civil society organisations; forming a special judiciary department for environmental protection; amending penal policy making it stricter.

In the report from 2021, all of the obstacles were once again stated, except for the lack of institutional and other capacities.

3. Rights of nature and legal personality (legal personhood) of parts of nature – views and comparative examples

The idea of nature being a legal subject, not just a mere object for the dominion of man can be traced back to work of Christopher Stone (Drenovak – Ivanović 2021, 19), and although

9 The previous in relation to Aarhus Convention, Art. 6.
10 The previous in relation to Aarhus Convention, Art. 7.
11 The previous in relation to Aarhus Convention, Art. 8.

the idea of rights of nature did not originate with him, he was the first to analyse it within the modern legal framework of the United States of America – USA (Kronk Warner, Lillquist 2023, 331). The idea is emerging globally and has the potential to change the anthropocentric approach of current environmental law which predominantly focuses on human needs ignoring others, shifting it to a more ecocentric approach where all other living things also have an interest in the environment (Bradshaw 2022, 1444). Rights of nature laws are generally consisted of two elements, that is legal personhood for nature referring to standing in court, and substantive rights for nature (Kronk Warner, Lillquist 2023, 326-327). Countries that adopt rights of nature laws, adopt either one of these elements, some adopt both (Kronk Warner, Lillquist 2023, 341). In terms of legal personality, natural entities gain independent existence in the eyes of the law, holders of their own rights which may be asserted in courts and other fora, and it's not just a mechanism for improving their environmental protection, but a new kind of relationship that will alter the way humans interact with them (Geddis, Ruru 2019, forthcoming). This doesn't mean nature should be separate from people, but it cherishes that interconnectedness and raises our responsibility to sustain nature, which will sustain us in turn (Takacs 2021, 577). The underlying beliefs could either have deep historical roots, for example depicted in the ways of indigenous tribes, or they are modern inventions triggered by the cataclysmic scenario announced by ecological scientists or by ecological degradation we are all witnesses of (Takacs 2021, 579).

The manner in which different jurisdictions internationally have adopted these ideas has been done through either one of the branches of power (legislative, executive or judicial) naming for example some of them: Ecuador, Bolivia, the *Whanganui* River in New Zealand, the *Atrato* River in Colombia (Drenovak-Ivanović 2021, 19-28). Apart from recognising this legal trend in many countries, international tribunals and institutions are also taking this view, especially linking it to Sustainable Development Goals – SDGs (Ochoa 2021, 83)[12]. In the nearby surrounding, the Economic and Social Committee of the European Union (EESC) is active in this field having a project to create a Charter of Fundamental Rights for Nature "Towards a Charter of Fundamental Rights of Nature in the EU" (Vicente Giménez 2023, 442). Comparative examples, however shaped they are, could all be lessons worthy to aid the society and legal systems to better protect nature (Iorns Magallanes 2021, 1-2).

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12 According to Christiana Ochoa (2021, 83) the United Nations General Assembly (UNGA), in connection with its Seventh Interactive Dialogue on Harmony with Nature stated that "recognition of nature's rights in local, national, and international law" will aid in reaching the 2030 SDGs, and as Vicente Giménez (2023, 442) pointed out, the Harmony with Nature Program has been monitoring this new paradigm from 2009.

4. Mar Menor - environmental degradation and gaining legal personality

Mar Menor is a saltwater lagoon located in the region of Murcia, considered the largest in Europe, and it is noteworthy to mention that it is the object of protection by the European Commission's (EC) Network Natura 2020[13] and also by the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)[14]. Despite this protection, it is an area affected by spills from agriculture as well as from residential tourism, which was further aggravated by changes in climate, especially torrential rains. Different authors have connected residential tourism with significant environmental impacts to ecosystems, including landscape degradation, reduction in biodiversity, increase in contamination of surface and subterranean waters and other (Millán Escriche 2021, 101-102). Mar Menor has suffered great ecological and socioeconomic damages caused by contamination from different intensive activities in its area including historical mining activity and deficient sewage systems. Nitrates from agriculture have since the summer of 2015 in various occasions provoked eutrophication[15] leading to the catastrophic deaths of fish, crustaceans and other living organisms, and the affects go beyond and trigger economic losses, reduction in tourism and other, affecting everyone residing nearby the lagoon (Vicente Giménez, Ortuño 2022a, 3-9).

These aggravating effects have led people and different environmental organisations[16] to protect the lagoon, eventually turning for help to University of Murcia – Legal Clinic, Teresa Vicente Giménez and Eduardo Salazar Ortuño. Realising that existing mechanisms haven't produced the desired effect for protection, they embraced the ecocentric idea and sought to enact this by legislature, through popular legislative initiative (gaining over 500,000 signatures) for the recognition of legal personality as well as rights for this natural entity, find-

13 According to the EC, Natura 2000 is the largest coordinated network of protected areas in the world, a network of core breeding and resting sites for rare and threatened species, and some rare natural habitat types which are protected in their own right, and it stretches across all 27 EU countries, both on land and at sea (See, https://ec.europa.eu/environment/nature/natura2000/index_en.htm).

14 Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, Iran, 2 February 1971 as amended by the Protocol of 3 December 1982 and the Amendments of 28 May 1987.

15 The process of eutrophication as explained in Kinell *et al.* (2012, 5-6) is usually caused by excessive nutrient loading and the negative results in coastal areas include excessive phytoplankton growth, with nuisance blooms (sometimes toxic), loss of macrophytes due to the decreased water transparency, and spreading hypoxia in bottom waters, resulting in destruction of fauna and changed biogeochemical cycling of nutrients.

16 Citizens organized in numerous groups have been active in the defense of the lagoon since 2016 (Vicente Giménez, Salazar Ortuño 2022b, 22).

ing the basis in the Ecological Justice[17] and Earth Jurisprudence (Vicente Giménez, Salazar Ortuño 2022a, 1-4).[18]

Since the popular legislative initiative is a tool of participatory democracy, this goes in line with the views of legal personhood enacted by means of law to have more credibility stemming from its democratic value. According to Catherine Iorns Magallanes (2021, 20) an additional factor in favour of statutory recognition is the democratic mandate that it can give.[19] The legislative way of upholding legal personhood for natural entities could even be perceived in a pragmatic sense as the anything - goes approach according to which anything can be a legal person if the legislator (or other competent legal actor) says so, and the reasoning behind this lies in two different arguments. Firstly, it is up to those legal authorities to determine which entities can be legal persons, and secondly, using the corporate argument by which corporations as fictive entities are considered legal persons (Kurki 2021, 526-527).[20] Notwithstanding the practicality of this vision, one might find it simplifying the intrinsic values that lie beneath the rights of nature legal movement as well as the argumentation.

The reasoning was elaborately put by the proponents for the popular legislative initiative, stating every protection that had been granted before, and every legal mechanism that has proven to be ineffective due to a number of different reasons, pointing out that various legal regimes towards Mar Menor have led to the concurring competencies of different administrative authorities and the ineffective duty of coordination led to the lagoon's endangerment. Even national and international recognition of its value poorly led to proper protection, and the inefficacy in prevention justified court proceedings (Vicente Giménez, Salazar Ortuño 2022a, 9- 14).

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17 Following Whitney Richardson and Camilla Bustos (2023, 231-233) Environmental justice theory is ultimately concerned with the equitable distribution of environmental 'goods' (benefits) and 'bads' (burdens, risks) across human society considering time, space, and societal dimensions (e.g., current and future generations, race, class, gender, etc.) while ecological justice seeks the fair distribution of environmental 'goods' and 'bads' across non-human nature considering time, space, and ecological dimensions—including current and future generations, species, natural elements (i.e., atmospheric, hydrologic, etc.).

18 According to Vicente Giménez (2023, 440) from the Theory of Justice, this change responds to a new legal paradigm based on the recognition of the relationship between human beings and Nature, which has its roots in ecological awareness and ecological ethics. Also, as emphasized by Ochoa (2021, 66) environmental ethics is not, or ought not to be focused on human values and the value of nature to humans.

19 In terms of the method for creating legal personality for nature, Iorns Magallenes (2021, 19) points out that the enactment in a statute or an ordinance, or even a constitution, can establish the parameters of legal personality, or define its relevant rights more comprehensively than a court hearing a set of arguments on one particular pleading.

20 Visa Kurki contests the anything-goes approach (See, Kurki 2021).

Although some authors (Spitz and Peñalver 2021) prefer to use generally applicable existing legal mechanisms[21], as the request for acknowledging legal personality might shine the light more on its rhetorical aspect, not undermining this aspect if that was sought in terms of drawing attention. In this case the question of legal personality was put before a court, and the authors added the argument of expensiveness of environmental litigation, in both time and money, apart from choosing the right strategy, which is why legislation may be a better choice. The existing legal mechanisms can be favoured. Unfortunately, if they lack efficiency for whatever reason like the Spanish example, maybe it is the right time to choose another path, or at least a complementary one.

Principle motives given by the proponents of the popular legislative initiative is the switch from the anthropocentric to the ecocentric model, and the urge to make changes because of the fall of current political and legal solutions, making the normative revision well needed. Also, they point out that most environmental laws have served to reduce contamination and deterioration of ecosystems on which people are dependent on, and that might be the catch why laws haven't been able enough to deliver adequate protection, for the idea of unlimited exploitation of natural resources hasn't been able to abandon the system (Vicente Giménez, Salazar Ortuño 2022a, 16).

The popular legislative initiative proposed legal personality for Mar Menor and its basin, as well as a set of rights. This was meant not only to bring respect for the lagoon, but to convey power to citizens making them the advocates for promoting its respect and safeguarding, whilst empowerment and direct participation is also seen through decision making and access to justice bringing this solution in accordance with the Aarhus Convention (Vicente Giménez, Salazar Ortuño 2022b, 23), and making this exemplary for reinforcing the core pillars, mainly public participation and access to justice. On the one hand, the public participation segment was enacted in the formation of various bodies all with different roles, consisted of different actors. On the other hand, access to justice was proclaimed by enabling every person to speak up and bring action[22] in the name of Mar Menor, introducing *actio popularis* to the Spanish legal system (Krämer 2023, 11-12). Although the idea was not new

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21 Mechanisms within property law, like conservation easements and the doctrine of "trust" more precisely "public trust", speaking in the context of the common law system and pertinent legal framework, considering it a more stable strategy to fight for same goals (Spitz, Peñalver 2021, 71-74).

22 In the USA we can observe opposite examples as a reactive form where certain states (Florida and Missouri being the first, for instance) via legislation prevent the recognition of standing or rights in nature, as well as prohibit the ability of human persons to take this kind of legal action (Ochoa 2021, 82).

to Europe[23], the law that followed was the first one in Europe to recognise the rights of nature (Vicente Giménez 2023, 439).

The Law for the recognition of the legal personality of Mar Menor and its basin came into force on October 2022[24] and its Preamble elaborated various motives strengthening these foundations[25], calling upon the meaning of constitutional provisions interpreted by the Supreme Court expressing that the human being is an integral part of nature, and not a being made for the domination of nature, which paved the way for an ecocentric path. In this sense, one might conclude that the proposition wasn't at all alienated from the domestic legal framework.[26] Moreover, the interpretations given by the competent court more than two decades ago demonstrated they were essentially already prepared.

First of all, Law 19/2022 acknowledges legal personality for this natural entity, declares it a subject of rights and enumerates the rights of nature[27] destined for Mar Manor and its basin, namely the rights to protection, conservation, maintenance and restoration, the right to exist as an ecosystem and to evolve naturally, and gives detailed notion of these rights.[28] Secondly, it establishes three bodies of representation and governance with different functions, all consisted of various types of stakeholders, more precisely the Committee of Representatives, the Monitoring Commission and the Scientific Committee, which all together form the Tutorship[29] of Mar Menor[30]. Finally, it poses certain obligations on Public Administration for further protection of Mar Menor.[31]

The Committee of Representatives has 13 members: namely three from central government, three from Autonomous Community and seven from civil society, initially coming from the popular legislative initiative promoting group. The jurisdiction of this body includes proposing actions for the protection, conservation, maintenance and restoration of the lagoon, as

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23 We can find examples of rights of nature in different European countries, just to name some: France, Sweden, Netherlands, Swiss (see especially Drenovak-Ivanović 2021).

24 Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca (Law 19/2022), *Boletin Oficial del Estado* num. 237.

25 The needed protection of Mar Menor had been emphasized before in the previous law (Krämer 2023, 17).

26 In New Zealand for example, speaking of Maori reclaiming control of the *Whanganui* River, however unsuitable that may seem, was done by ownership and was aligned with their claims and as close as fit as can be considering the existing legal system (Iorns Magallanes 2020, 11).

27 For comparison, Ecuador was the first country to acknowledge rights of nature as a substantive constitutional right, and following Ecuador, Bolivia on the basis of its Constitution enacted the rights of nature in Mother Earth Law, enumerating those rights (Drenovak-Ivanović 2021, 19-22).

28 Law 19/2022, Art. 1-2.

29 Appointing an official guardian can express more the side of responsibility to nature rather than its rights (Iorns Magallanes 2020, 17).

30 Law 19/2022, Art. 3.

31 Law 19/2022, Art. 7.

well as the monitoring and control of compliance of its rights based on the contributions (inputs) provided by the other two bodies.

The Monitoring Commission consists of members from adjoining municipalities and the economic, social sector and environmental protection. In more detail, one member and one alternate representing every one of the envisaged eight municipalities that form part of the lagoon basin and their mandate is renewable according to municipal elections, and one member and one alternate representing the economic sector, social sector and environmental, namely: business associations, trade unions, neighbourhood, fishing associations, agricultural, stockbreeders, environmental defence (protection), the fight for gender equality and youth groups, therefore nine in total. All of them are appointed by agreement by their most representative associations, for a renewable period of four years. In comparative examples, we can find a similar one in the *Whanganui* River in New Zealand where members of commerce are also included.[32]The function of this body includes dissemination of information on Law 19/2022, monitoring and control of respect for the rights, periodic information on compliance, taking into account the indicators defined by the Scientific Committee.

By way of formation and their members, these models can be observed as a pragmatic approach in including diverse actors from the very start, a multiparticipant platform for dialogue with the potential of alleviating conflicting interests of different stakeholders where every one of them has a right to say, and the mandate is renewable allowing for change when appropriate. Combining efforts from various stakeholders can create a unique forum for these important questions and help overcome the obstacles concerning public participation.

The Scientific Committee comprises scientists and independent experts specialised in Mar Menor, proposed by universities and scientific institutions[33], for a renewable period of four years. The independence of this body is guaranteed by conditions for its members, that is their recognised scientific reputation and no remuneration. Its role is to advise the other two bodies, and the identification of indicators on the ecological status of the ecosystem, its risks and appropriate restoration measures, which it reports to the Monitoring Commission.

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32 There is an additional body consisted of 17 members coming from across commercial, recreational and indigenous stakeholders in the river's use (Geddis, Ruru 2019, forthcoming).

33 According to Law 19/2022, Art. 3. they are proposed by University of Murcia and Alicante, the Spanish Oceanographic Institute (Oceanographic Centre of Murcia), The Iberian Society of Ecology, and the Spanish National Research Council.

This concludes that the role of science and experts is still important in order to ascertain the parameters of ecosystem health in connection with what a certain natural entity might want or need (Takacs 2021, 550).

Furthermore, speaking of the consequences, the infringement of proclaimed rights caused by whatever actor shall constitute penal, civil, environmental and administrative responsibility and appropriate sanctions, adding that whatever act or action of the Public Administration that violates the contained provisions shall be considered invalid and reviewed in administrative or judicial ways.[34]

Another important aspect is the novelty introduced with *actio popularis,* by proclaiming that every natural or legal person[35] is entitled to defend Mar Menor in terms of its rights and prohibitions, seeking action before Public Administration or court, and this action is sought in the name of Mar Menor as the rightfully interested party. There is also a possibility of recovering all of the litigation costs (for example the fees of lawyers, experts, witnesses)[36], and this approach could be perceived as eliminating the financial obstacles to justice to a certain extent. However, this possibility is meant for court proceedings, while administrative are not mentioned, and is dependent on their successful outcome, meaning that citizens and environmental organisations continue to bear the cost risks (Krämer 2023, 17-18). Addressing the potential faultiness of this provision and the extent it will reach, will be visible more in the future allowing for appropriate revision eventually. Likewise, this begs the question on how this will be interpreted and what stand will be taken in practice especially in the context of courts. The first case where a judge applied Law 19/2022 occurred in September 2023 in a judicial procedure investigating contamination (Roda 2023).

5. Creative power of the judiciary – Spain's Supreme Court

The judiciary is meant to act as the guardian of laws, and apart from being the branch of power for interpreting and implementing the law, one cannot undermine the creative side to it, bringing positive outcomes in seeking justice. As mentioned above concerning some access to justice obstacles Spain has encountered, the financial ones that pose a burden to non-profit

34 Law 19/2022, Art. 4-5.

35 This right is not limited to persons living next to Mar Menor, in the Region of Murcia, or to Spaniards, but is organized as a right that is available to everybody, allowing for an interested person who lives in Latin America to bring a case before court in favour of Mar Menor (Krämer 2023, 17).

36 Law 19/2022, Art. 6.

NGOs, one of the reasons was that two different laws that provide legal aid[37] were not aligned, although there was an intent to reconcile their texts.

According to UNECE Task Force on Access to Justice case summary (2019), the Aarhus Law 27/2006 incorporates most of the Aarhus Convention provisions into the Spanish legal system and NGOs that fulfil standing requirements set therein have a right to legal aid under conditions provided by Spanish Legal Aid Law 1/1996. To be granted legal aid accordingly, provisions state conditions that an applicant NGO has to provide evidence of insufficient means for litigation, but also stipulate an obligation to pay the court costs based on the recipient´s financial status, namely when such status improves within three years from the end of the judicial procedure. The Supreme Court of Spain changed its doctrinal approach in a ruling from 2019 and took the view that a non-profit environmental organisation that has recognised legal aid under Aarhus Law 27/2006 doesn't have to bear the court costs regardless of its economic resources, or else this would be contrary to the Spanish legal system. This means that previous conditions do not apply in these situations, because the legal aid is directly devised from the Aarhus Law 27/2006. The practical implication is that the loser pays principle inherent to procedure law will not apply to these types of NGOs even though their lawsuit has been dismissed. As we can tell, this ruling was expected to have positive effects on further cases and access to justice, eliminating the financial burdens. Whether this was only a manner of reconciling two laws and implementing the just one, or there were more motives to this ruling that judges took into account, the outcome brings significant possibilities in strengthening environmental protection.

For comparison, judges of the Colombian Constitutional Court were influenced by the ecocentric approach and concerned for the preservation of biodiversity for its own sake, and the Chief Justice, when interviewed about the *Atrato* ruling, emphasised that his own readings in ecocentrism influenced him. Notwithstanding the influence of ecocentric philosophy, it is noteworthy to mention the judges didn't solely rely on documented submission, but in fact they were aware of the degrading effects on the river because they visited the impacted sites and saw the damages themselves (Takacs 2021, 580-582). This influence is not uncommon in the USA either, and legal developments in other countries are significant for their courts as well (Ochoa 2021, 43). The *Atrato* ruling sparked others in Colombia to seek judicial justice, regardless of the actual barriers, for instance conflicts or further government noncom-

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37 Ley 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente (Aarhus Law 27/2006), *Boletin Oficial del Estado* num. 171 de 19 de julio de 2006 and Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita (Spanish Legal Aid Law 1/1996), *Boletin Oficial del Estado* num. 11 de 12 de enero de 1996.

pliance[38], and brought some changes into the system (see especially Richardson and Bustos 2023).

At the European Union (EU) level, these particular ecocentric developments including concrete examples (Ecuador, Bolivia, Colombia, Canada, New Zealand and Spain) were recognised in the process of drafting legislation concerning environmental crimes and ecocide[39].

6. Conclusion

From what we have observed, on the one hand, there is great potential in civil society joining academia and legal clinics combining their strengths, as the scholarly influence in following a new legal trend proved to be the next step in achieving what the previous postulates failed to do, seeing the proposed popular legislative initiative finally led to adopting the law, even though the odds might have been against this. On the other hand, one cannot argue that powers of the judiciary, whether they are seen partly as academic influence, or in a manner of its creative side in rendering true justice in environmental matters, haven't spoken in right words.

It is important to notice there is causal link in terms of academia as well as judiciary being factors to further strengthening the pillars of the Aarhus Convention, and not by circumventing other laws in the domestic legal order, but upgrading their solutions, enabling these two significant factors to push the legislator and compensate for the failing mechanisms of the executive branch. Finally, if we take a look at the number of signatures collected for the popular legislative initiative that has gone beyond the expectations and the required minimum, and number of actions following the Colombian judgment even though hardship existed in practice, one can conclude that for the proper achievement of these important goals safety may as well be in numbers.

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38 The Atrato ruling sought to deal with the government authorities' inaction, but the implementation has evidenced their ongoing noncompliance (Richardson, Bustos 2023, 260-261).

39 Since nature can be considered a victim of damages caused by environmental crimes, as stated in the Amendment 23 Proposal for a directive Recital 26 a (new) of the Opinion of the Committee on Development (7 December 2022) for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC (COM(2021)0851 – C90466/2021 – 2021/0422(COD)), the Union could take into account the existing legal frameworks in developing countries and in Member States as well as ongoing reform processes within the Union and provide sound legislation that would incorporate a long-term vision by taking into account future legal developments that have begun in the Union.

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A comparative analysis of access to justice in environmental matters in civil proceedings

Abstract: Access to Justice is the third „pillar" of the Aarhus Convention and after the Access to Information and Public Participation in Decision-Making it comes as the last pillar of defence in environmental protection. This paper analyses possibilities in the field of applying the access to justice principles of the Aarhus Convention in civil proceedings. Civil courts play a critical role in enforcing environmental laws and providing remedies for harm caused by environmental degradation. Studying the legal frameworks, procedural requirements, and outcomes of civil cases related to environmental issues in various countries can lead to the identification of optimal legal solutions concerning access to justice, including factors such as speed, cost, burden of proof, standing, and available remedies for affected parties. When addressing the application of the Aarhus Convention in civil proceedings, it is important for countries to consider various options for implementing legislation and developing rules of court and other tribunals practices. Promoting an exchange of ideas can facilitate the development and widespread adoption of best practices in the area of access to justice concerning environmental issues, particularly in Serbia.

Keywords: Aarhus Convention, access to justice, civil proceedings, environmental protection, comparative solutions

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1. Gateway to environmental justice – transformative potential of the Aarhus Convention

"Justice is open to all – like the Ritz hotel"[1]

A quarter of a century since the adoption of the Aarhus Convention marks a significant milestone, providing an opportune moment to assess its implementation thus far and to embark upon a comprehensive analysis of its future application. Twenty-five years of implementation seem sufficient to observe the results of applying the Aarhus Convention and to provide a thorough overview. The Aarhus Convention[2] was adopted in June 1998 under the auspices of the United Nations and entered into force in October 2001. The Republic of Serbia enacted legislation for the ratification of the Convention in 2009 (Drenovak-Ivanović 2021, 132). The Convention legislates on three broad themes or "pillars": availability of information about the environment, public participation in decision-making processes concerning the environment and the right to legal protection in the field of the environment. Examining only these three pillars, it is evident that the provisions of the Convention have a substantial effect on shaping the relationship between citizens and their national authorities in the context of environmental protection. The Convention creates obligations for the State primarily towards the public rather than towards other State parties (Sommermann 2017, 323) and maybe that is the only parallel that can be drawn between the Aarhus Convention and other international treaties related to the sphere of human rights. Human rights find their origins in the natural law tradition within international law, whereas environmental law is the product of a much more state-centred positive law tradition (Bratspies 2015, 48). Unlike human rights law, environmental law does not necessarily protect human beings. Also, the foundational human rights instruments were drafted long before awareness of environmental challenges and as a result they are largely silent about the environment (Bratspies 2015, 49). In the existing paradigm, a dual system manifests, where human rights provisions are frequently used in an inventive manner with the explicit purpose of environmental protection. Nevertheless, the intersection between environmental law and human rights is becoming progressively more pronounced, with an expanding number of overlapping points.

Considering the previously mentioned, along with a meticulous examination of the specificities and differences in civil proceedings of all countries applying the Convention, it becomes

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1 Salmon, Peter. 1998. Access to Environmental Justice. *New Zealand Journal of Environmental Law*, Volume vol. 2, 1-23.

2 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998).

evident that the application of the Aarhus Convention in civil proceedings warrants special attention. The following considerations will ask, whether the provisions of the Aarhus Convention, constituting the third pillar, are applicable in the civil proceedings of each state and to what extent they can be adapted to the specificities of each civil procedure. The further question, within the framework of applying the Aarhus Convention in civil proceedings, is it necessary to use intermediary mechanisms in order to ensure the right to legal protection for the public concerned. To achieve the standardization of the transmission of legal standards outlined in the Aarhus Convention, the Aarhus Convention Compliance Committee – ACCC dedicated to compliance with the convention was established.[3] In the case of access to justice concerning environmental matters, numerous countries rely on their respective national judicial systems, thereby intensifying the burden on the courts of these states.

In this line, the article will first address the third pillar of the Aarhus Convention and its transformative potential, then turn to the overview of legal systems relevant to the analysis and role of courts in practical application of the Aarhus Convention, before finally identifying key areas for improvement of the application of the Aarhus Convention in civil proceedings and considering proposals for reform of civil proceedings provisions.

2. The triumphat pillar – the implementation of the Aarhus Convention within the realm of civil proceedings

The third pillar of the Aarhus Convention represents the final line of defence in environmental protection. For this reason, it is crucial that the court or any other independent and impartial body applying the provisions constituting the third pillar of the Aarhus Convention interprets them with precision.

In general, access to justice means that every citizen possesses the entitlement to pursue legal protection and suitable remedies through judicial bodies (Sziebig 2022, 207). Access to justice has two main components: firstly, right to a fair trial and secondly, right to an effective remedy.[4] Access to justice in environmental matters is a specific form of the right in question and the implementation of access to justice in environmental matters poses the greatest challenge among the pillars of the Aarhus Convention.

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3 For reference see Economic and Social Council, *Decision I/7 Review of Compliance*, ECE/MP.PP/2/Add.8, 2 April 2004.

4 Handbook on European law relating to access to justice. European Union Agency for Fundamental Rights and Council of Europe, 2016, 20–21.

The Convention prescribes the obligation of the party to ensure that any person who considers that his or her request for environmental information has been ignored, wrongfully rejected, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of article related to access to environmental information, has access to a review procedure before a court of law or another independent and impartial body established by law.[5] Upon initial examination, here we observe the adaptive capabilities inherent in the Aarhus Convention. In situations where, according to national legislation, the party cannot ensure for every individual who believes their request for environmental information has been disregarded, wrongfully refused, whether partially or entirely, inadequately answered, or not handled in accordance with the provisions related to access to environmental information, the Convention allows for access to another body as per national legislation. However, the body must adhere to the requirement of being independent and impartial. Parties are also required to ensure that court review procedures must not be too lengthy or costly[6]. Further, each party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions related to public participation in decisions on specific activities and, where so provided for under national law and without prejudice to paragraph 3 of this article, of other relevant provisions of this Convention.[7] What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5[8], shall be deemed sufficient for the purpose of having a sufficient interest. Such organizations shall also be deemed to have rights capable of being impaired where the administrative procedural law of a party requires this as a precondition.[9] Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have

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5 The Aarhus Convention, Article 9 paragraph 1.

6 Again, here we observe the adaptive potential inherent in the Aarhus Convention. The Convention specifies that if the proceedings before a court or any other independent and impartial body cannot be provided free of charge in accordance with national legislation, they should, at the very least, be affordable. This ensures that the right to legal protection is not restricted by prohibitively high procedural costs.

7 The Aarhus Convention, Article 9 para. 2.

8 Article 2 para. 5 of the Aarhus Convention prescribes that non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

9 The Aarhus Convention, Article 9 para. 2.

access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.[10] From paragraph 3, it becomes evident that the third pillar of the Aarhus Convention extends beyond ensuring protection in the event of a violation of the provisions outlined in article 4 of the Convention, which pertains to the availability of information related to the environment. While applicable to a far broader range of acts and omissions than paragraphs 1 and 2, it also allows parties more flexibility in its implementation.[11] Also, paragraph 3 allows a great deal of flexibility in defining which environmental organizations have access to justice. The ACCC in its findings on communication ACCC/C/2005/11 (Belgium), held that the parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment.[12] In the same findings, the ACCC held access to such procedures should thus be the presumption, not the exception.[13]

When considering the nature of proceedings before a court or other administrative body, in which members of the public can challenge acts and omissions by private persons and public authorities that violate national environmental laws, parties maintain significant discretion in determining the forums (whether a court or an administrative body) and the procedural forms (civil law, administrative law, or criminal law) available for challenging the aforementioned acts and omissions.[14]

The Convention also ensures that the procedures before the court or other administrative body shall provide adequate and effective remedies[15], including injunctive relief as appropri-

10 The Aarhus Convention, Article 9 para. 3.
11 United Nations Economic Commission for Europe (UNECE). 2014. Aarhus Convention Implementation Guide. https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf (last visited 19 September 2023).
12 Economic and Social Council, ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 35.
13 *Ibid*, para. 36.
14 Aarhus Convention Implementation Guide, 198.
15 The legal remedy proves ineffective when the validity of the building permit is contested after construction has already commenced.

ate, and be fair, equitable, timely[16] and not prohibitively expensive.[17] Injunctive relief in civil proceedings may be deemed necessary, contingent upon the type, extent, and nature of the environmental damage. When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies must be able to issue an order to stop or to undertake certain action.[18] Injunctive relief is often of critical importance in environmental disputes, as they frequently involve prohibiting activities that pose an immediate threat to human health and the environment. Without injunctive relief, such activities could cause such damage to human health and the environment in which case any compensation would be inadequate.

Considering everything said, we would evaluate the Aarhus Convention as embracing a unified approach to procedural rights in environmental matters. Also, in the case *Taskin v. Turkey* the European Court of Human Rights established the Aarhus Convention as the relevant international standard concerning procedural environmental rights.[19]

At this point, the question that arises is whether it falls upon judges to address all the implementation challenges posed by Article 9 of the Aarhus Convention, or if we require comprehensive, long-term work programs at the national level to address these issues in an acceptable manner.

3. Procedural harmonies and dissonances – a cross-country exploration

The third pillar for many countries holds the greatest transformative potential. If acts and omissions cannot be challenged through judicial procedures, it is certain that every country has its own administrative process, providing the public concerned with access to justice in environmental matters. Moreover, standards such as „adequate and effective remedies,

16 Many countries have already recognized the importance of timeliness to the administration of justice. For example, in Belarus, appeals and complaints regarding environmental administrative decisions must be considered within one month, with a possible extension of an additional two months. In some countries, for example, Ireland, courts have the discretion to pull certain cases from the docket queue and deal with them immediately when the case involves issues of an urgent and time-sensitive nature. See Aarhus Convention Implementation Guide, 201.

17 The Aarhus Convention, Article 9 para. 4.

18 Aarhus Convention Implementation Guide, 200.

19 ECHR, case 46117/99, Taskin and Others v. Turkey, ECLI:CE:ECHR:2004:1110JUD004611799, para 100.

including injunctive relief as appropriate" and "fair, equitable, timely, and not prohibitively expensive" are widely acknowledged by national courts as general principles of law.[20]

However, the Convention itself has the monitoring system which applies to all State parties. The State parties established the ACCC in their first meeting in 2002.[21] The ACCC may examine compliance issues on its own initiative and make recommendations; prepare reports on compliance with or implementation of the provisions of the Convention at the request of the Meeting of the Parties; and monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention. Quite a lot of the findings concern a Central Asian Member state, with the United Kingdom being the most frequently observed among Western States (Sommermann 2017, 329). Considering the situation in the European Union (EU), the ACCC noted the lack of a clear obligation to provide the public concerned with effective remedies, including injunctive relief, in the provisions regarding access to justice in the Environmental Impact Assessment – EIA and Integrated Environmental Pollution Prevention and Control – IPPC Directives.[22]

In addition to the ACCC, the Court of Justice of the European Union – CJEU plays a crucial role in the implementation of the third pillar of the Convention. In the case *Gemeinde Altrip and Others v Land Rheinland-Pfalz*, the Court examined whether it is contrary to EU law that German legislation allows for the annulment of an authorization only in situations where a compulsory environmental impact assessment was completely omitted. The Rhineland-Palatinate Higher Administrative Court dismissed that appeal, taking the view, in particular, that the applicants had no right to appeal since, under paragraph 5(1) of the Environmental Redress Act, they might not plead irregularities affecting the environmental impact assessment carried out as part of an official procedure initiated before 25 June 2005. The Rhineland-Palatinate Higher Administrative Court stated that an action may be brought only in the case of a pure and simple failure to carry out an environmental assessment and would therefore not apply in the case of a mere irregularity in the environmental assessment. The CJEU ruled that Directive 2003/35/EC, which requires public participation in certain environmen-

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20 60% of the State parties of the Aarhus Convention are Members of the European Union and due to the supremacy of Union Law, the Member States will fulfil their conventional obligations by applying Union law, to the extent that the Union law complies with the requirements of the Aarhus Convention and does not leave regulatory gaps. As far as the State parties are concerned that are not members of the European Union, the control of the enforcement of the provisions of the Convention is limited to the soft mechanisms of the Convention and the national instruments of control. (Sommermann 2017, 330).

21 Economic Commission for Europe, Meeting of the Parties to the Decision I/7 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, Decision I/7 – Review of Compliance, adopted on 21.-23.10.2002, UN-Doc. ECE/MO.PP/2/Add.8 of 2.4.2004.

22 See European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2.5.2008, para. 59.

tal plans and programs, should be interpreted to mean that national law rules adopted for its transposition also apply to administrative development consent procedures initiated before June 25, 2005, leading to consent granted after that date. Article 10a of Directive 85/337, as amended by Directive 2003/35, is interpreted as preventing Member States from limiting the application of the provisions to cases where the legality of a decision is challenged due to the lack of an environmental impact assessment, excluding cases where such an assessment was conducted but was irregular.[23]

While the Member States of the EU fulfil their conventional obligations by applying Union law, when it comes to the implementation of the Aarhus Convention's third pillar, the EU's effort to harmonize the relevant legislation of Member States is not satisfactory. For more than a decade, the EU has been unable to adopt a new directive to implement the third pillar of the Aarhus Convention, which aims to harmonize the relevant legislation of Member States. Several excuses followed up the Compliance Committee's critiques, resulting in more negative thoughts from the NGO sphere (Gombos, Sziebig 2020, 22). As demonstrated elsewhere (Gombos, Sziebig 2020, 22), the EU heavily relies on the national judicial systems and does not strive for new legislation.

Once again, we observe the crucial role of the CJEU, which has established doctrines to restrict the scope of procedural autonomy for Member States. Firstly, the rules governing enforcement in the Member States may not be less favourable than in similar domestic cases (*principle of equivalence*) (Havu 2016, 2) or render impossible in practice or excessively difficult the exercise of rights conferred by EU law (*principle of effectiveness*). These criteria can also be concretized in environmental cases, ensuring broad access to justice, outlining the conditions for the principle of effectiveness (Gombos, Sziebig 2020, 22).[24] In case *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* the CJEU ruled that article 10a of Directive 85/337, as amended by Directive 2003/35, precludes a provision of national law which reserves the right to bring an appeal against a decision on proj-

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23 CJEU, case C-72/12, Gemeinde Altrip and Others v Land Rheinland-Pfalz, ECLI:EU:C:2013:712.

24 In case *Alain Flausch and Others v Ypourgos Perivallontos kai Energeias and Others* the CJEU stated that it would be incompatible with the principle of effectiveness to rely on a period against a person if the conduct of the national authorities in conjunction with the existence of the period had the effect of totally depriving him of the opportunity to enforce his rights before the national courts, that is to say, if the authorities, by their conduct, were responsible for the delay in the application. It is apparent from Article 11(3) of the EIA Directive that the Member States must pursue an objective of wide access to justice when they lay down the rules governing review procedures in respect of public participation in decision-making. For reference see CJEU, C-280/18, Alain Flausch and Others v Ypourgos Perivallontos kai Energeias and Others, ECLI:EU:C:2019:928.

ects which fall within the scope of that directive, as amended, solely to environmental protection associations which have at least 2,000 members.[25]

The findings of the ACCC also provide us with interesting insights into the diversity of judicial proceedings among Member States. In one case before the Spanish court, the complainant approached the court with a request for the suspension of a land allotment plan and its modification. The court held that the request was too early and reversed the application on the ground that there would be no irreversible impact on the environment because the construction could not start without additional decisions. Yet, when the Urbanization Project was approved and the communicant requested suspension of the decision until the court hearing was completed, the court held that it was too late, because this decision was subject to consideration and the subject of preceding decisions, namely the land allotment plan and modification which had not been suspended. On appeal, the court endorsed this judgement and did not suspend the decision. In its findings, the ACCC held that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late, it indicates that while injunctive relief is theoretically available, it is not available in practice. As a result, the ACCC found that the Party concerned was in non-compliance with article 9, paragraph 4, of the Convention, which requires Parties to provide adequate and effective remedies, including injunctive relief.[26]

In its findings on communication ACCC/C/2004/6, (Kazakhstan), the Compliance Committee held that allowing a court hearing to start without proper notification did not meet the requirement of a fair procedure under article 9, paragraph 4. It also held that the failure to communicate the court decision to the parties implied a lack of fairness and timeliness as required by the Convention. The ACCC raised concerns about the groundless delay of issues related to the inaction of state bodies by the court for an extremely long period, which was subsequently halted without informing citizens about it.[27]

When it comes to the costs of environmental proceedings, there is an interesting view of the High Court of Australia. In case *Oshlack v Richmond River Council* the proceedings commenced with an application to the Land and Environment Court of New South Wales seeking a declaration that a development consent was void and of no effect. While the application was unsuccessful, the judge, upon a submission to exercise his discretion to award costs against the

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25 Swedish administrative rule guarantees a right of action in environmental matters only associations with at least 2000 members. For reference see CJEU, C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd, ECLI:EU:C:2009:631.

26 See findings on communication ACCC/C/2008/24, Spain, ECE/MP.PP/C.1/2009/8/Add.1, para. 104-105.

27 See findings on communication ACCC/C/2004/6, Kazakhstan, ECE/MP.PP/C.1/2006/4/Add.1, para. 28-29.

plaintiff, determined that there should be no order as to costs. One factor strongly influencing his decision was the public interest nature of the litigation. The New South Wales Court of Appeal reversed this decision holding that the "public interest" motivations of the plaintiff were irrelevant in the exercise of the discretion to award costs, and therefore there was no reason to depart from the general rule that a wholly successful defendant should receive his costs unless good reason is shown to the contrary. The plaintiff successfully appealed the ruling to the High Court of Australia, which recognized that the lower court had appropriately distinguished between private litigation and cases "directed towards public health and comfort and the orderly arrangement of municipal areas".[28]

The comparative analysis has shed light on diverse legal frameworks, revealing both shared principles and distinct nuances across jurisdictions. As we navigate the intricate landscape of environmental litigation, the identified harmonies provide valuable insights into potential best practices, while the dissonances underscore areas where procedural refinement may be improved.

4. Environmental litigation dynamics in Serbia

What is immediately apparent is that the positive provisions within the Serbian civil procedural law, founded upon classical instruments and institutes, lack adaptations suited for proceedings involving environmental elements. It is imperative that suitable solutions are identified and strategies to address barriers to access to justice implemented. This involves making procedures related to the right to environmental protection more accessible, fostering the proper development of judicial practices in environmental protection law within the court's jurisdiction.

The issue in litigation involving the right to environmental protection arises from the outset during the determination of the eligible plaintiff. Serbian Law on Civil Procedure acknowledges the legal capacity of both natural and juridical persons to act as parties. Under exceptional circumstances, associations and organizations may be granted party capacity limited to the specific litigation, provided they possess attachable assets. This implies that natural persons failing to satisfy the specified property criterion are precluded from accessing justice. Furthermore, the Law on Civil Procedure of Serbia does not expressly acknowledge the term "public concerned". Nonetheless, in its capacity as a country having enacted legislation for the ratification of the Aarhus Convention, Serbia implements the provisions of the Conven-

28 High Court of Australia, 114 CLR 582, Oshlack v Richmond River Council.

tion directly. However, the provisions of the Serbian Law on Civil Procedure stipulate that in cases involving compensation for damages, the plaintiff in the proceedings must be the party to whom the damage was caused. Therefore, the optimal method to acknowledge a party's capacity for the public concerned in cases involving compensation for damages is to invoke the provisions set forth in article 156 of the Law on Obligations, which establish an *actio popularis*.[29]

The situation does not improve concerning procedural costs, considering that the provisions of the Law on court fees emerge as a limiting factor in the protection of environmental rights before the civil court (Drenovak-Ivanović, Đorđević, Važić 2015, 75). Above that, the provisions of the Law on exemption from court fees do not extend to juridical persons, which are frequently involved in environmental litigation, and are still subject to tax liability (Drenovak-Ivanović, Đorđević, Važić 2015, 76).[30]

The paper also explores the importance of providing adequate legal remedies, including injunctive reliefs. According to the positive law of the Republic of Serbia, the prevailing practice in deciding on an injunctive relief is to abstain from delving into the substantive merits of the case to avoid prejudicing the court's final decision. Nevertheless, this rule may, in certain situations, present a constraint on the plaintiff's ability to propose an injunctive relief.[31]

Undoubtedly, a significant contribution to the implementation of the Aarhus Convention in civil proceedings would involve elevating the overall societal awareness regarding the imperative of environmental protection, alongside fostering a heightened level of ecological consciousness in the Republic of Serbia (Janjatović 2022, 46).

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29 It prescribes that any individual has the right to request that another party eliminate a source of danger posing a substantial threat to them or an unspecified number of persons, as well as to abstain from activities causing nuisance or potential harm if such occurrences cannot be prevented by suitable measures. See the Law on Obligations (Zakon o obligacionim odnosima), *Official Gazette of the SFRJ,* 29/78, 39/85, 45/89 – CCJ decision and 57/89, *Official Gazette of the SRJ*, 31/93, *Official Gazette of the Serbia and Montenegro and Official Gazette of the RS*, 18/2020, Article 156, para. 1.

30 Here, it is important to emphasize that the legislator had the best intentions to afford protection to natural persons and place them in a more favourable position compared to juridical persons. Nonetheless, considering that juridical persons predominantly assume the role of plaintiffs in environmental litigation, it becomes evident that these provisions necessitate revision and, consequently, adaptation to the nuances of environmental litigation.

31 Such a situation may arise in cases where lawsuits demand the cessation of certain activities that pollute the environment or pose a threat of damage. In such instances, when deciding on injunctive relief, the court would be obligated to delve into the substantive merits of the case. Any other request, apart from the plea to suspend activities until the conclusion of the proceedings, would likely have no effect (Drenovak-Ivanović, Đorđević, Važić 2015, 87).

5. Wind of change – possibilities of improving access to justice in environmental matters

In conclusion, let us revisit the matter of the role of judges in the implementation of the Aarhus Convention. In order to find better mechanisms for the application of the Aarhus Convention in civil proceedings, we may need to look at the other side. Indeed, judges cannot make their own cases. Cases must be brought before them by those who are entitled to do so. Although the situation may be different from one state to another, lawyers, especially those who are dealing frequently with environmental cases, have a growing knowledge of the potentialities of the Aarhus Convention. Not only that, but it is perhaps even more important, they possess knowledge about the possibilities of domestic law. Not only that, but it is certain that they possess an even better understanding of the possibilities within domestic law. In support of that, let us reconsider article 156 of the nearly half-century-old Serbian Law on Obligations, which offers the most robust foundation for elucidating the plaintiff's party capacity in litigation involving the right to environmental protection.

The next crucial step, based on the above, involves informing the public – applying the provisions of the first pillar of the Aarhus Convention. This ensures that environmental protection issues are considered by the courts to the greatest extent possible in order to create a diverse practice. This holds significance even for states outside the Anglo-Saxon legal tradition.

The requirements of article 9, paragraph 4, are maybe the most difficult of all to fulfil. In certain states, the average waiting period for a final court decision is approximately five years. In such circumstances only injunctive relief is an adequate solution. If the provisions of the positive law do not allow for the injunctive relief, there is certainly some legal mechanism available as a judicial tool to restrain further activities causing environmental harm until the conclusion of the litigation.

The exploration of the possibilities for enhancing access to justice in environmental matters reveals a dynamic landscape shaped by legal, procedural, and societal factors. The wind of change is palpable, urging a re-evaluation of existing frameworks and the introduction of innovative mechanisms to ensure strong and equitable avenues for environmental litigation. By recognizing the lessons learned from comparative analysis, countries can use these opportunities to bring about positive changes in the field of environmental justice. As we stand at the intersection of legal evolution and environmental protection, the prospects for a more accessible, effective, and responsive justice system in civil proceedings for environmental matters beckon us forward.

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The right to access environmental information in the practice of the Commissioner for Information of Public Importance and Personal Data Protection*

Abstract: The availability of environmental information provides an opportunity to inform the public about environmental problems. This paper indicates the interest of the international community to achieve visible results and prevent further damage from excessive environmental pollution. The author further shows the importance of the adoption of the Aarhus Convention and its impact on the development of environmental policy in Serbia. Information on the state of the environment prompts the public to actively participate in environmental procedures for the purpose of environmental protection and obtain legal protection. The Law on Free Access to Information of Public Importance prescribes procedures for implementing the procedure and exercising the right to access environmental information. The aim of this paper is to show, through the views expressed in the decisions of the Commissioner for Information of Public Importance, to what extent the access to environmental information is important in practice.

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** The work is the result of the new and updated research conducted by the author as part of her master's thesis: The right to access environmental information in the recent practice of the Commissioner for Information of Public Importance and Personal Data Protection. Additional insights come from personal work as an Independent Advisor in the Sector for Complaints and Enforcement in the Field of Access to Information in the Commissioner's Office.

Keywords: Aarhus Convention, exercising the right to access environmental information, Commissioner for Information of Public Importance and Personal Data Protection, transparency, environmental pollution

1. Introduction

Environmental problems on a global scale have encouraged international cooperation. Special attention is focused on the development of basic human rights, the strengthening of transparency and the role of the public in procedures related to environmental protection. At international conferences, more and more attention is being paid to the consequences of environmental pollution and to the measures that should be taken to prevent further damage. International agreements, establishing a high level of environmental protection, can prevent disruption of ecological stability by harmonizing legal regulations. The biggest obstacle to the accepted provisions is in the implementation (Ortiz 2021, 327-328).

By showing the impact of the Aarhus Convention (AC)[1] in environmental protection, we point out the importance of the convergence of environmental legislation, due to the acceptance of its standards by a large number of countries. The AC reflects the current policy of democratic countries. It connects the areas of human rights legislation and the right to a healthy environment. Particularly, it is important for the individual, since with this international agreement, unlike others, the states make a commitment to harmonize their national legislation with the provisions of the AC and thus ensure guaranteed rights to citizens (Komnenić 2012, 161).

The preamble of the AC emphasizes the need to achieve sustainable development, the preservation of the environment for the benefit of current and future generations, as well as the right of everyone to live in an environment that contributes to their well-being and health.[2] The right to access environmental information held by public authorities contributes to the practical application of regulations, harmonized with the legal standards of the AC. The AC is the first international instrument that regulates the right to legal protection in the case of violation of its guaranteed rights (Drenovak-Ivanović, Đorđević and Važić 2014, 11).

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1 Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention, 1998).

2 The preamble to the Aarhus Convention promotes the application of international standards and indicates the environmental goals to be achieved. See: The preamble to the Aarhus Convention 5-7 paragraph.

Adopting the Law on Ratification of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters,[3] established standards of AC became part of the internal legal order of the Republic of Serbia (Drenovak-Ivanović 2011, 58).[4] The implementation of national legal norms with the requirements of the AC leads not only to the realization of ecological values in Serbia, but also facilitates its procedure for joining the European Union - EU (Drenovak-Ivanović 2015, 10-12).[5]

The direct application of the provisions of the AC in the area of availability of environmental information can be observed in the practice of the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter: Commissioner). Namely, the right to access environmental information is regulated by the Law on Free Access to Information of Public Importance - LFAIPI,[6] which enables the practical application of guaranteed rights.

The ability of the public to be informed about the state of the environment, to be actively involved in environmental decision-making procedures and to be provided with legal protection by an independent and impartial authority, can improve the quality of the environment. Access to objective and accurate information provides insight into the proper operation of public authorities. Consequently, citizens in a certain sense supervise the work of state bodies. It leads to more responsible performance of public functions and adoption of effective solutions in the preservation of the environment (Vučković 2009, 182-186).

The paper aims to show the contribution of exercising the right to access environmental information in environmental protection. Analysing the practice of the Commissioner, we will notice the attitude that environmental information is *par excellence* information of public importance, taking into account its "nature". The availability of environmental information is a necessary condition for creating environmental awareness. It causes the public to become interested in the state of the environment and to get involved in the adoption of environmental regulations. If citizens are informed about the degradation of the environment, the excessive level of polluting substances, the consequences that pollution has on the quality of life

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3 Zakon o potvrđivanju Konvencije o dostupnosti informacija, učešću javnosti u donošenju odluka i pravu na pravnu zaštitu u pitanjima životne sredine [Law on Ratification of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters], *Official Gazette of the RS, International Treaties*, No. 38/09.

4 With the reforms of internal regulations in the field of environment, the rights and obligations stipulated by AC are gradually incorporated into the legal system of our country and their immediate application is regulated.

5 In this way, Serbia will fulfil some of the set requirements, since the improvement of the environment and the development of basic human rights are essential conditions for membership.

6 Zakon o slobodnom pristupu informacijama od javnog značaja [Law on Free Access to Information of Public Importance], *Official Gazette of the RS,* Nos. 120/04, 54/07, 104/09, 36/10, 14/16 and 105/21.

and health of people, they can timely participate in environmental procedures and obtain legal protection due to the violation of prescribed rights.

2. Exercise of the right to access to environmental information

The LFAIPI stipulates the obligation of the public authority to make available the requested information of public importance in its possession, because it is considered a public good and belongs to all citizens. The Commissioner, as an independent state body, is responsible for exercising the rights regulated by the LFAIPI, controlling its implementation.

The Constitution prescribes the unified legal order of the Republic of Serbia,[7] which means that all legal regulations adopted in our country must be mutually harmonized and in accordance with the Constitution. Ensuring the principle of a unified legal order, the jurisprudence of the Constitutional Court took the position that when the law regulates one legal area in its entirety, the given rights cannot be changed or supplemented by the opposite provision contained in the law governing another legal area (Prica 2018, 115-116).[8] In this regard, LFAIPI is a systemic (fundamental) law, because it regulates one legal area in a comprehensive and unique way, i.e. the legal regime of information of public importance, as well as the way of exercising the right to access information of public importance. We are of the opinion that, in the event of a conflict between laws, the provisions of LFAIPI have priority.

The Constitution also foresees that the level of human rights once reached cannot be reduced.[9] Therefore, we draw the conclusion that LFAIPI, as a systemic law, represents the *lex specialis* in relation to all other laws in relation to the mentioned area. Giving priority to the LFAIPI is also in line with international attitudes.[10]

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7 Ustav Republike Srbije [Constitution of the Republic of Serbia] *Official Gazette of the RS,* Nos. 98/06, 115/21 (Amendments I-XXIX), 16/22, Art 4. para. 1 and Art. 194 para. 1.

8 The Constitutional Court uses the formulation: "principally excludes the possibility that a law regulating one legal area can be amended, that is, individual legal solutions contained in a law regulating another legal field" in case No. IУз-225/2005, Judgment of 19. May 2012.

9 Ustav Republike Srbije [Constitution of the Republic of Serbia], Art. 20 para. 2.

10 The United Nations Special Rapporteur on Freedom of Thought and Expression, the OSCE Representative on Freedom of the Media and the Special Rapporteur of the Organization of American States (OAS) on Freedom of Expression adopted in December 2004 the Joint Declaration on Access to Information and Classified Data, which stipulates that the Law on Access to Information should, in case of inconsistency, prevail in relation to other laws, while the same principles are expressed by Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies), which states that the authority should not automatically prevent access to secret document, one must already make sure whether the conditions for secrecy are met, with the application of the public interest test.

2.1. Specifics of the right to access environmental information in the Law on Free Access to Information of Public Importance

A special law which regulates the exercising of the right to the availability of environmental information and the implementation of that procedure has not been adopted in our country. However, this area is certainly regulated by legal norms and is harmonized with the provisions of the AC. The Law on Environmental Protection - LEP, which primarily ensures the right to live in a healthy environment, sets the definitions of environmental information, namely "information about the environment" and "information related to the endangerment or protection of the environment".[11] The formulation of these legal definitions is of practical importance, in order to apply the provisions of LFAIPI as precisely and clearly as possible, which prescribe the realization and the procedure for enforcing the right to free access to environmental information (Drenovak-Ivanović and Đorđević 2018, 15, 33-34).

In the case of information related to the endangerment, or the protection of the health of the population and the environment, there is an irrefutable legal assumption that there is always a justified interest of the public to know. All other environmental information is considered a type of information of public importance, whereby the authority can refuse a request for free access, only if it proves that there is no justified public interest to know the information, which constitutes a rebuttable legal presumption.[12]

Public authorities are obliged to act promptly. The stipulated short deadlines for the authorities to act , and at the latest within 15 days from the date of receipt of the request, give citizens the opportunity to be informed about important issues, while they are still current and in the sphere of their interest. These deadlines are for the benefit of the interested individual who will receive the requested data on the state of the environment in a timely manner and who will then have the opportunity to take part in environmental decision-making procedures (Drenovak-Ivanović and Đorđević 2018, 65).

The LFAIPI provides for a significantly shorter deadline for authorities to act on a request, within 48 hours of receiving the request at the latest, if the requested information is important to protection of life or freedom of a person, endangering or protecting the health of the population or the environment. In case of a complaint, the Commissioner is obliged to make

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11 Zakon o zaštiti životne sredine [Law on Environmental Protection], Official Gazette of the RS, Nos. *135/04, 36/09 – other law, 72/09 – other law, 43/11 – decision of the Constitutional Court, 14/16, 76/18 and 95/18 – other law*). See: Art. 3. its. 33a) and 33d).

12 Zakon o slobodnom pristupu informacijama od javnog značaja [Law on Free Access to Information of Public Importance], Art. 4.

a decision within 30 days from the submission, i.e. within twice the regular deadline.[13] Therefore, this exception includes the defined "information related to the endangerment or protection of the environment".[14] In the practice of the Commissioner, clear views have been formulated that the conditions for action by the authorities within 48 hours of receiving the request are met, only if information is requested in connection with the current situation that directly threatens or can protect the environment, and which is valid at the time of submission demands.[15]

Bearing in mind that the LFAIPI regulates basic human rights, the requester of information commits to paying compensation for the necessary costs of making a copy of the documents in which the requested information is contained and the costs of referral, if any, while viewing the same is free of charge.[16] Exceptions to the obligation to pay necessary costs are also prescribed, among others, to all people when the requested information relates to endangerment, i.e. the protection of the health of the population and the environment. This provision represents another indicator of the importance of environmental information, so that the applicant would not be deterred from submitting a request under any circumstances.

2.2. Refusal of requests for access to information of public importance and limitation of the right to access environmental information

The right to access information of public importance is affirmed by the 2006 Constitution, while the LFAIPI prescribes the exercise of these basic human rights. The importance of the law is confirmed by the fact that it was given a constitutional basis (Davinić 2018, 24). However, human and minority rights under certain conditions can be denied by law.[17] The right to free access to information of public importance is not an absolute right, and situations in which this right can be excluded or limited are regulated by the LFAIPI.[18]

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13 Zakon o slobodnom pristupu informacijama od javnog značaja [Law on Free Access to Information of Public Importance], Art. 16 para 2. and Art 24 para. 2.

14 It is assessed whether the requested information is about a sudden danger that is caused by human activity or is a consequence of natural phenomena, including information about emissions into the environment, which refer to situations of immediate threat to the environment.

15 Commissioner for Information of Public Importance and Personal Data Protection, Decision No. 071-01-470/2021-03, 4. April 2022.

16 The Aarhus Convention provides minimum standards of obligations of the signatory parties and allows the imposition of stricter norms. The provisions of the AC allow authorities to charge for providing the requested information, which does not exceed a reasonable amount.

17 Ustav Republike Srbije [Constitution of the Republic of Serbia], Art. 20. para 1.

18 The provisions of the AC stipulate conditions in which situations it would be possible to refuse a request for access to the requested information, with which our Law has also been harmonized.

If the public authority considers that the request of the information seeker should be rejected, it is obliged to implement the so-called public interest test,[19] by which it weighs the predominant interest in each individual case.[20] In practice, we often encounter that the claimant's right is hindered by the decision of the first-instance authority without implementing the public interest test or due to incorrect implementation, without proving cumulatively fulfilled conditions. By lodging a complaint with the Commissioner, the factual situation in the specific administrative matter will be determined and it will be considered whether the public interest test was properly implemented, i.e. whether all legal requirements for denying the right to access to environmental information are met (Pavlović 2023, 45-52).

The provision of Art. 8 of the LFAIPI prescribes three cumulative conditions when the public's right to know can be exceptionally limited.[21] The first condition implies that the right to access information of public importance, which protects the public's interest to know, can be extremely limited in order to protect some of the interests based on the Constitution or the law. The provisions of Arts. 9 and 14 LFAIPI, interests that may outweigh the interest of the public to know are foreseen,[22] provided that the other two conditions are also met. These provisions do not automatically limit the right of access, but only make the restrictions legal, i.e. established by law.

The second condition is that, in the specific case, it must be proven that the interest provided for by the law would be seriously harmed, if the applicant were to exercise the right to access information of public importance. That is, if the requested information were made available to the public, there would be serious legal or other consequences for the conflicting interest of the requester to know.

Finally, in order to establish that the third condition is fulfilled, it is necessary to weigh the conflicting interests. By explaining the conflicting interests, by placing one against the other, it will be established which interest is more predominant, that is, whether it is justified to deny

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19 In legal theory, the following terms are also used: "proportionality test", "three-part test", "damage test". The term "public interest test" is used in the Commissioner's decisions (Pavlović 2023, 45).

20 By weighing the interests, it is assessed whether the restriction of a human right is suitable, necessary and justified. Compare proportionality tests between Article 20 of the Constitution of the Republic of Serbia, Article 6 of the Law on General Administrative Procedure – LAP and Article 8 of the Law on Free Access to Information of Public Importance.

21 The prescribed exceptions are interpreted restrictively, bearing in mind that the rights guaranteed by law are prescribed in order to achieve and protect the public's interest to know.

22 Particularly important for the protection of the environment are the formal legal conditions regulated by Article 9, its. 6 and 7 of the Law on Free Access to Information of Public Importance, which stipulates that access to information can be denied if its availability to the public would threaten the protection of natural assets and threaten the environment or rare plant and animal species.

the right to free access to information of public importance. In doing so, it is necessary to assess whether denying the right to access information is necessary in a modern democratic society and whether it is proportionate[23] (Milenković 2010, 70-85).

Withholding environmental information can create incalculable harmful consequences for human health and the environment, which is why their availability usually prevails over the opposite interest. The legislator's intention is to ensure the most effective access to environmental information, to make it publicly available on the website of the competent authority so that everyone can be familiar with it, that is, to make it available in a timely manner by submitting a request. Therefore, when the request is for environmental information, its public importance is taken into account,[24] because there is an increased interest of the public to know information related to the state of the environment (Drenovak-Ivanović, Đorđević and Vučković, et al. 2020, 9-10).

3. Recent practice of the Commissioner in the exercise of the right to access to environmental information

Acting as a second-instance authority, the Commissioner decides on the lodged complaint and examines whether the authority acted in accordance with the legal provisions. After the procedure, the Commissioner determines whether the complaint is founded and makes a decision.

In practice, we come across various examples, when the Commissioner established a violation of legal obligations by the public authorities, especially establishing that the request sought environmental information, which due to its nature is of exceptional importance to the public. The possibility of denying the right to access environmental information could be allowed exceptionally, only if it is judged necessary in the spirit and in accordance with the criteria and standards of a democratic society, in order not to violate the overriding interest.

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23 In this regard, free access cannot be denied or organized if it is established that the conflicting interest cannot be protected for certain reasons, that it can be protected in another way or that the right of access would be denied to a greater extent than it is necessary.

24 Laws regulating the area of environmental law of environmental protection by their provisions determine ecological values in order to achieve the standard of environmental quality. The established criteria have a special public interest, because they control the level of polluting materials and protect people's health. The analysis of the value of the interests of environmental protection, through examples in our positive law, comparative law and the practice of the European Court of Justice, see more (Drenovak-Ivanović, Đorđević and Vučković, et al. 2020, 14-21).

An illustrative example of the incorrect implementation of the public interest test can be seen in the case in which the request sought information related to inspection after an extraordinary radiological and/or nuclear event.[25] Namely, the Commissioner annulled the decision contained in the act of the first-instance authority and sent the case back for retrial, because from the content of the appealed act and the response to the appeal, it could not be determined with certainty whether the authority has the above information and whether in that case the conditions for denying access are met. In the appeal act, the first-instance authority only referred to the provision of Art. 9, para. 5 of the LFAIPI, i.e. that it is information that constitutes secret information, without proving other conditions. He also cited Art. 191 of the Law on Radiation Activity and Nuclear Safety and Security,[26] stating that the Directorate for Radiation and Nuclear Safety and Security of Serbia, in cooperation with other competent authorities and organizations, issues guidelines regarding the determination of the degree of confidentiality of data. Due to these allegations, it could not be established that, if it is even about secret information whose secrecy was determined by another authority, whether the authority to which the request was submitted acted in accordance with Art. 16, para. 5 of the LFAIPI.[27] Responding to the allegations of the complaint, he added that he had no information about extraordinary events, and that only the said Directorate was authorized to carry out inspections and provide information regarding source radiation, and the first-instance authority did not take into account that it was not of importance in under whose jurisdiction the information was created, but whether they own it, given that a request for access has been submitted to them, because the requester has the right to choose which authority to turn to.

In a similar case, the authority rejected the request as unfounded, which requested a copy of the designated report on the measurement of noise in the environment created by the decision of the environmental protection inspector.[28] The first-instance authority, referring to the provision of Art. 16, it. 13 of the LFAIPI, stated, among other things, that the contractor prohibited the unauthorized copying of documents and their parts. The Commissioner established that the complaint was founded, annulled the first-instance decision and ordered the

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25 Commissioner for Information of Public Importance and Personal Data Protection, Decision No. 071-11-1832/2022-03, 28. October 2022.

26 Zakon o radijacionoj delatnosti i nuklearnoj sigurnosti i bezbednosti [Law on Radiation and Nuclear Safety and Security], *Official Gazette of the RS,* Nos. 95/18 and 10/19.

27 Novelty introduced by the Law on Amendments to the Law on Free Access to Information of Public Importance, *Official Gazette of the RS*, No. 105/21 prescribe a special procedure for authorities and the Commissioner if the request is for information that constitutes secret information. Read more about the stipulated rules in the provisions of Art. 16, para. 5, 6 and 13 and Art. 24, para 7 of the Law on Free Access to Information of Public Importance.

28 Commissioner for Information of Public Importance and Personal Data Protection, Decision No. 071-11-2139/2022-03, 16. January 2023.

authority, if it has the said document, to provide the applicant with a copy of it, protecting the personal data if it is contained in it.[29] Namely, the Commissioner took this attitude, determining that environmental information is being sought and that in this particular case there is an increased interest of the public to know. At the same time, the availability of the requested report removes any doubt about the legality of the work of the body. The authority did not prove its claim that it was classified information or a business or professional secret, nor did it state the reasons why it should continue to be kept secret, nor the reasons for determining its secrecy. The Commissioner further stated in the explanation of his decision that in this particular case the requested information is of particular importance to the public, as well as that our positive law prescribes the obligation to proactively publish information related to environmental protection. He further pointed to the provisions of Art. 74 of the Constitution, Art. 78 of the LEP, which refers to Chapter V Informing and participation of the public, in the section "Access to information", then Art. 3, para. 1, point 33a) subpoint (2) of the same law, emphasizing that it is prescribed that environmental information is any information about factors such as matter, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other forms of emission into the environment that affect or may affect environmental factors from subsection (1) of this point, finally taking into account Art. 80 of the same law within the section "Dissemination of information on the environment", which is extremely understandable because LFAIPI also affirms the principle of proactive transparency. It was also presented that the widely accepted and ratified AC guarantees the right to the availability of environmental information and obliges the signatory states to harmonize their national regulations with the set standards. In the end, he explained why the allegations of the first-instance authority could not influence a different decision to the Commissioner in a specific administrative matter. More precisely, the written ban on copying the document marked by the contractor on the pages of the report cannot derogate from the LFAIPI, which is the *lex specialis*.

In practice, we come across examples when the authority clearly declares that it has the requested information, but for certain reasons denies access to the requester. In one specific case, reports were requested on the type and amount of pollutants emitted from a registered pollution source of a joint stock company for the years 2020-2022. The authority denied access to the requested information, without establishing all the facts and circumstances of importance for making a correct decision in an administrative matter. Namely, the Commissioner assessed that the first-instance authority primarily made a mistake by referring to Art. 16 of

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29 Zakon o slobodnom pristupu informacijama od javnog značaja [Law on Free Access to Information of Public Importance], Art. 12.

the LFAIPI, leaving the possibility of only the right to examine a document, because it involves a large number of documents. The authority did not have in mind Art. 5 of the LFAIPI, i.e. that the method of exercising the right of access is a matter of choice of the information seeker. In doing so, it only stated that it was a large volume, without stating the exact number of documents (pages, working hours that would be required to act on the request, etc.), because the law allows the authority, when the reasons are justified, to act in a subsequent period that cannot be longer than 40 days. Also, if the authority wanted to act in accordance with the provisions of Art. 16, para. 3 of the LFAIPI, which prescribes that if the request refers to information contained in a large number of documents, which would make the procedure more difficult, it should inform the requester of the number of documents involved, the reasons for the difficult handling, i.e. why it offers him the possibility to examine a document before determining which copies of the documents he needs and to warn him of the legal consequences if the applicant refuses to examine a document.[30]

Now, we will analyse the case where the Commissioner, at the first enacting term of decision ordered the public authority to give certain requested documents if it has them, while at the second enacting term of decision rejected part of the request. The request required documents related to the management program of the protected area Nature Monument "Vrelo Grze" for the years 2018-2022, including copies of the annual management program of the protected area category III, the consent of the competent local government body for the annual program, reports management of the protected area, information on whether the manager of the protected area has adopted management plans or a response that consents and conditions have not been obtained and are not included in the plan management of the protected area, as well as a document showing that the manager of the protected area is involved in the procedure of issuing location conditions, construction permits and the development of plans and programs that have an impact on the protected area, or a written statement that the manager is not involved in these procedures. The authority delivered part of the requested documentation, while in the response to the complaint, it informed the Commissioner that it will give the other requested information as soon as possible, as well as that it does not have any information regarding the consent of the competent authority. On the basis of the above, the Commissioner made a decision by which he ordered the delivery of part of the requested documentation from the first enacting term of decision. The authority should have informed the complainer, not the Commissioner, about the requested information, and by the time the decision was made, it had not submitted proof that the information had been provided to the requester.

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30 Commissioner for Information of Public Importance and Personal Data Protection, Decision No. 071-11-1307/2023-03, 22. May 2023.

Also, the Commissioner found that part of the request cannot be considered as information of public importance, because the authority would be obliged to prepare statements, explanations or answers. The authority is not obliged to make a new document, because in terms of the provisions of Art. 2 of the LFAIPI, at the moment when it is requested, information of public importance must already be contained or materialized in the document.[31]

4. Difficulties in exercising the right to access to environmental information

The adoption of amendments to the LFAIPI, the application of which began on February 17, 2022 was also reflected in the procedure for exercising the right to access environmental information. The range of public authorities to which requests for free access can be submitted has been expanded, competences have been added to the Commissioner in the area of misdemeanours and giving opinions on draft legal acts in matters related to exercising the right to access information of public importance, and an effective procedure has been regulated for the administrative enforcement of the Commissioner's decisions - coercive measure. In connection with environmental protection, the additional possibility of refusing access requests is particularly significant, if the provision of information would endanger the protection of natural assets, the environment or rare plant and animal species.[32] However, in order to improve the realization of the right to access environmental information, additional changes to legal norms are necessary and the correct interpretations of the existing provisions of the law. [33]

Although LFAIPI promotes the publication of information generated in the work of authorities, proactive transparency is insufficiently developed. In order to monitor the environmental situation on the part of the general public, it is necessary to train and acquaint the employees of the authorities with the duties to which the legal procedures oblige them. Publishing information even before the public requests it, strengthens citizens' trust that public authorities carry out their work legitimately and responsibly/ Additionally, it develops citizens' digital literacy and ensures reviewed and fast access to data. Also, by publishing documents on

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31 Commissioner for Information of Public Importance and Personal Data Protection, Decision No. 071-11-8248/2022-03, 27. March 2023.

32 Zakon o slobodnom pristupu informacijama od javnog značaja [Law on Free Access to Information of Public Importance], Art. 9 its. 6 and 7.

33 In the Strategy for the Implementation of the Aarhus Convention from 2011, as well as in the draft Strategy for the Implementation of the Aarhus Convention for the period 2023-2032, inconsistencies in domestic regulations were pointed out, which should be harmonized with the obligations of the Aarhus Convention, and certain remarks were made in the part that related to the availability of information.

the official websites of government bodies,[34] it is ensured that the information is accurate and up-to-date, since we are increasingly encountering fake news that can be found on internet browsers (Lemieux 2020, 173-188).

The area of the right to access environmental information is not clearly defined in some laws, while in some it is not even mentioned at all (e.g. the Law on Strategic Impact Assessment of the Environment and the Law on Sustainable Use of Fish Reserves), and the authorities must take this into account that LFAIPI represents a *lex specialis* in relation to other laws.

The authorities are obliged to submit to the Commissioner, upon his request, all the data necessary to determine the factual situation that may be important in making a decision on the reported complaint, as well as for deciding on the submission of a request to initiate misdemeanour proceedings. However, in some cases,[35] in order to fully determine the factual situation, it is necessary to exercise supervisory powers, which are given by law only to the administrative inspection. Therefore, in the event that the authority informs the Commissioner that it does not have the requested information, the allegation of the authority cannot be consistently verified, even though the LFAIPI expressly prescribes it.[36]

The valid LFAIPI does not provide for the provision on the prohibition of abuse of the right to access information of public importance, which was prescribed before the amendments to this law. In earlier practice, the Commissioner interpreted the defined notion of abuse of rights restrictively, relying on the law and generally accepted legal standards in this area.[37] The mentioned concept of abuse could be taken into account only if it refers to an exceptional situation that requires the investment of disproportionately large efforts of the authorities, which would endanger its normal work, exceeding the limits of what can reasonably be requested.[38]

The work of the Commissioner's Office has been significantly more difficult after the removal of the concept of abuse from LFAIPI, because the right to access information of public impor-

34 A digital information system would facilitate the search for environmental information and harmonize our procedures with EU standards and principles.

35 Commissioner for Information of Public Importance and Personal Data Protection, Decision No. 071-01-1609/2021-03, 14. July 2022.

36 Zakon o slobodnom pristupu informacijama od javnog značaja [Law on Free Access to Information of Public Importance], Arts. 19 and 20.

37 Authorities had to prove the scope of work (number of requested documents, as well as time spent, allocated funds and personnel capacity for processing the request), whether the authority tried to consult with the requester and reduce the requested information to a reasonable measure.

38 Commissioner for Information of Public Importance and Personal Data Protection, Decision No. 071-01-328/2022-03, 6. April 2022.

tance was used contrary to the purpose and spirit of the law.[39] Neither the LAP nor the Law on Administrative Disputes provides for the mentioned concept, and there are no regulated criteria for determining or sanctioning malicious and harmful exercise of administrative law.

We have noticed a large increase in the abuse of the right of access to information after the change in the position of the Administrative Court in Belgrade, in the conclusion of the 105th session of all judges held on June 21, 2022., in connection with reimbursement of costs of administrative proceedings.[40] Namely, during his many years of practice, the Commissioner made decisions in which he rejected as unfounded requests for reimbursement of costs on appeal, reasoning that the costs of the procedure refer, in accordance with the provisions of Art. 84 of the LAP, only to the necessary and justified costs of representing the party, whereby the appellant is not denied the right to authorize an attorney to represent him in the proceedings. We are of the opinion that the proceedings before the Commissioner cannot be considered complex, nor do they require special legal knowledge necessary for the reasoning of complaint allegations.[41] However, the Administrative Court took the position that if the Commissioner determines that the appeal is founded and orders the authority to provide the applicant with free access to information of public importance, he will obligate the costs of the second-instance proceedings to be borne by the first-instance authority, in accordance with Art. 85, para. 6 of the LAP.

Based on the above, in the last year, a large number of complaints were filed on a daily basis exclusively through lawyers, which is why we suspect that the realization of the right to access information of public importance is not the ultimate goal of the information seeker, but the realization of property benefits in administrative and judicial proceedings.

This kind of malice led to the violation of basic human rights, because in addition to burdening the work and functioning of almost all public authorities, which caused multimillion costs and expenses to the public budget, the biggest problem is the difficulty in exercising the rights of other complainants. Due to the quantity of submitted requests and the excessive volume of

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39 Commissioner for Information of Public Importance and Personal Data Protection. 2021. Return Access to Information to its Purpose. https://www.poverenik.rs/en/press-releases/4052-вратити-приступ-информацијама-својој-сврси.html. (last visited 29 October, 2023).

40 Report on the work of the Commissioner for Information of Public Importance and Personal Data Protection for 2022. Available on the website of the Commissioner for Information of Public Importance and Personal Data Protection https://www.poverenik.rs/en/press-releases/3943-извештај-повереника-за-2022-годину.html. (last visited 29 October, 2023).

41 By filling in the existing request and complaint forms, which are available on the official website of the Commissioner, but also with a large number of authorities, the right to access information of public importance can be exercised.

requested information, the authorities are unable to meet the legal deadline for submissions. This particularly affects the right of access to environmental information, because without its availability it is not possible to find out about the current state of the environment (whether there has been an increase in pollution, which source of pollution caused the damage, the consequences that have occurred), which negatively affects human health as well as environmental protection.

5. Summary and conclusion

The AC strengthened the role of the public in the field of environment. The Parties have committed to providing citizens with the right to access environmental information, participate in environmental decision-making and provide legal protection in the field of environment. The AC mainly regulates procedural rights, which means that they are necessary for the successful application of substantive environmental rights.

Increased environmental awareness, like the butterfly effect, increases citizens' concerns about the environmental crisis, but also influences the finding of effective solutions. Following the example of well-known organizations dealing with environmental protection, environmental movements are being formed in Serbia. Although it is still in its infancy in this country, environmental activism has produced positive results, especially at the local level. Collecting environmental information, activists strive to warn the population about polluted and threatened areas. An increasing number of people are interested in learning about the environmental procedures carried out by competent authorities, monitoring their work and actively participating in improving the quality of life and health of people.

The positive regulations of our country regulate the procedures for implementing the guaranteed rights of the AC, in order to achieve its practical application. The importance of LFAIPI is primarily reflected in democratic principles based on the idea that every person has a legal interest in knowing and being informed about information of public importance.

The right to access the information of public importance is an essential part of all regulations related to human rights, and the Commissioner participates in the adoption of new and changes to existing legal norms, expressing an opinion within the area for which he is responsible. By holding professional trainings, the accredited lecturers of the Commissioner's Office indicate the correct application of the provisions of the law and draw attention to the wrong interpretation of the law, through examples in practice. In order to improve and realize the public's right to know, panels are organized so that citizens can find out how they can get the requested information, including access to environmental information.

By setting the concept of environmental information broadly and implementing the procedure by which rights are exercised, the principles of the AC are affirmed, which contributes to the improvement of the environment for the benefit of current and future generations.

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The protection of the right of access to environmental information with specialised ombudsman – advantages and obstacles

Abstract: Given the large number of environmental cases files before the Serbian Protector of Citizens, it seems opportune to consider the introduction of an ombudsman specifically tasked to protect the rights of citizens to a healthy environment.

There are specialised ombudsmen who control the work of the government in certain fields in countries such as Sweden which is the founding father of this institution, in Northern Ireland, Peru and other countries. In Serbia, the institution of the Protector of Citizens is a more recent addition. Therefore, the issue of the introduction of a specialised ombudsman such as an ecological ombudsman is still to be considered.

Bearing in mind the above given facts, this paper will state the reasons which indicate the importance of the introduction of an institution of an ecological ombudsman into the Serbian legal system starting from the practice of the Commissioner and Protector of Citizens in this field. In addition, the paper will indicate certain obstacles which need to be removed as one could think about the introduction of the concept of a specialised ombudsman into the Serbian legal system.

Keywords: Aarhus Convention, environmental information, ecological ombudsman, specialised ombudsman, Commissioner's practice, Protector of Citizens

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1. Introduction

The first pillar of the Aarhus Convention is the right of access to information on the environment. Article 4 of the Convention prescribes the right of the public to be informed on the state of the environment as well as the obligation of public authorities to respond to a request on the information on environment except in prescribed exceptions which should be interpreted narrowly.[1]

In order to enable the public to exercise their right to environmental information, it is necessary to initiate a procedure with a public administrative body which holds the given information. The procedure is initiated with an application which needs to be completed, i.e. which needs to contain all necessary elements which enable action upon it. Following the receipt of such an application, the public administrative body is obliged to act upon in within the prescribed deadline. In the case of 'administration silence', as well as in the case the application is rejected with explanation as to why provided, the applicant filing for a piece of information of public importance has the possibility to initiate a second-instance procedure with the Commissioner for Information of Public Importance.

The grounds of the procedure for the access to environmental information are established by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and, in terms of our legal system, by the Law on Free Access to Information of Public Importance since this is a piece of information of public importance and by the Law on Environmental Protection.[2]

The thing that makes the environmental information different from other information of public importance is its specific definition both in the Directive 2003/4/EC of the European Parliament and Council on Public Access to Environmental Information as well as in the Law on Environmental Protection. In line with this, in the Directive 2003/4/EC, environmental information is defined as any piece of information on the state of elements of environment such as air, water, land, atmosphere, landscape, natural habitats, biological diversity, as well

1 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters *https://www.aarhussu.rs/docs/tina_arhuska_26_12_2007-1.pdf*, the last access on April 24, 2023.

2 Drenovak - Ivanović, Mirjana. 2021. Ekološko *pravo,* Beograd: Pravni fakultet: 179.

as information on the interaction between these elements[3, 4], while, in the Law on Environmental Protection, the environmental information is defined as a piece of information on the state of environment actors such as on air and atmosphere, water, landscapes and natural areas including swamp areas, coastal areas, river and lake areas, biodiversity and its components, geodiversity and geoheritage, genetically modified organisms, as well as on the interaction between these actors[5] (environmental information in a broader sense), while this very Law defines the piece of information which refers to a threat i.e. to environmental protection is defined as a piece of information on sudden danger caused by human activity or as a consequence of natural phenomena including the information about emissions into environment (environmental information in a narrower sense).[6,7]

2. Legal protection in case of violation of right of access to environmental information – Commissioner's practice

The Law on Free Access to Information of Public Importance established an independent state body – Commissioner for Information of Public Importance and prescribed their competence so as the right and interest of the public to get familiar with the information available to public authorities could be exercised. In line with this Law, the Commissioner: 1) monitors the compliance with obligations of authorities determined by this Law and informs the public and the National Assembly on it; 2) makes an initiative for the adoption or amendments to regulations in order to implement and upgrade right to access to information of public importance; 3) proposes measures to authorities which would improve their work regulated by this law; 4) takes measures necessary for the training of staff employed with authorities and getting them familiar with their obligations related to the access to information of public importance in order to provide effective implementation of this Law; 5) settles complaints against decisions of authorities which violate the rights regulated by this Law; 6) informs the public on the content of this Law as well as on the rights regulated by this Law; 6a) issues opinions on drafts of laws and of other regulations as well as of public policy documents if they regulate issues which are important for the exercise of rights to access to information of public impor-

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3 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *Official Journal L* Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC*41, 14.2.2003, p. 26–32.*

4 Barjaktarević, Dragana. 2021. Ekološko *pravo*, Beograd: Fakultet za poslovne studije i pravo Univerzitet „Union-Nikola Tesla": 109.

5 Law on Environmental Protection, *„Official Gazette of RS"*, No. 135/04, 36/09 – other law, 36/09, 72/09 – other law, 43/11 – Constitutional Court, 14/16, 76/18, 95/18 – other law, Art. 3. para. 1. item. 33a.

6 Law on Environmental Protection, Art. 3. Para. 1, item 33d.

7 Drenovak – Ivanović, Mirjana. 2021. *Ekološko pravo*, Beograd: Pravni fakultet: 180.

tance; 7) performs other tasks defined by this Law and other laws, too. In addition, the Commissioner may also initiate a procedure for the assessment of constitutionality and legality of laws and other general acts which regulate issues which are important for the exercise of right to access to information of public importance.[8]

The practice seen in actions made by the Commissioner for Information of Public Importance in case of deprival of environmental information can be recognised by having insight into decisions adopted by this body and which are available to the public.

For example, an applicant filed a complaint with the Commissioner for Information of Public Importance since the first-instance body denied the access to the information they requested. Namely, the applicant filed a request to have access to the information of public importance which implied copies of full documentation related to the procedure initiated by the Ministry of Environmental Protection against a company on an issue of air pollution. Acting upon the given request, the Ministry denied access to the information of public importance as unjustified by issuing such a decision. The applicant filed a complaint against the decision with the Commissioner who, acting upon the complaint, established that the complaint was founded. The Commissioner annulled the decision and returned the case to the first-instance body for repeated procedure with an order issued to the first-instance body to establish without any doubt within a repeated procedure if the provision of requested information to the applicant could endanger the procedure in this concrete case and in which manner starting from the question whether the purpose of the denial of access to requested information to the complaint applicant is to protect some of the interests prescribed by Article 9, item 2 of the Law on Free Access to Information of Public Importance and whether that protected interest would be seriously violated by providing access to the given information, i.e. whether that protected interest is more important than the interest of the public to know…[9]

Within another procedure, acting upon a complaint of a lady journalist against an institute, the Commissioner adopted a decision ordering the institute which holds the given information related to the results of analyses of underground water quality to submit the information to the applicant. Within the explanation for the adopted decision, the Commissioner highlighted that the statements of the institute implying that in this concrete case, being a consultant of a company, the institute is obliged to keep these data based on the contract on data

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8 Law on Free Access to Information of Public Importance ("*Official Gazette of RS*", No. 120/04, 54/07, 104/09, 36/10, 105/21), Art. 35.

9 From the explanation of the decision of the Commissioner for Information of Public Importance and Personal Data Protection Number 071-01-2585/2021-03, of April 24, 2023.

confidentiality and that, therefore, they are not allowed to communicate those pieces of information or make them available in any manner without prior consent of the other contracting party which is the owner of the requested information does not represent the sufficient reasoning itself that could provide grounds for the denial of access to requested information in line with the Law on Free Access to Information of Public Importance. Therefore, in line with the provisions of Article 8 of the Law on Free Access to Information of Public Importance, in their decision, the Commissioner instructed the given institute to prove that such an action, i.e. denial of access to requested information is necessary in a democratic society in order to protect one of more important interests which are prescribed by Article 9, item 5 of this Law, in contrast to the interest of the public to know…[10]

With reference to the jurisdiction of the Commissioner to settle complaints against decisions of administrative bodies by which rights regulated by this Law were violated, an issue of enforcement of Commissioner's decisions arises, i.e. of other legal mechanisms which are available to applicants seeking for information of public importance in case when, following a Commissioner's decision in which an administrative body is instructed to provide free access to information of public importance to an applicant, an administrative body does not submit those pieces of information, i.e. they do not act in line with the Commissioner's decision.

3. Protection of the right of access to environmental information – complaint to the Protector of Citizens

The Law on the Protector of Citizens prescribes that any natural or legal person, either of local or foreign origin who considers that any of their human or minority rights or freedoms is violated by an act, an action or a failure to act of an administration body can file a complaint to the Protector of Citizens.[11] The Protector of Citizens will instruct the applicant to initiate the relevant legal procedure if such a procedure is prescribed which means that the procedure will not be initiated until all legal remedies are exhausted. By way of exception, the Protector of Citizens may initiate a procedure even before all legal remedies are exhausted if irreparable damage would be caused to the applicant or if the complaint refers to the violation of the

10 From the explanation of the decision of the Commissioner for Information of Public Importance and Personal Data Protection Number 071-01-2693/2021-03, of April 20, 2023.

11 Law on Protector of Citizens („*Official Gazette of RS*", No.105/21), Art. 28. para. 1.

principle of good administration, especially to inappropriate treatment of an applicant by an administration body, unduly work or other violation of ethical behaviour of authority staff.[12] [13]

Therefore, in situations when public authorities violate the Law on Free Access to Information of Public Importance and when decisions of the Commissioner cannot be applied by indirect or direct enforcement, the Commissioner has a possibility to address the Administrative Inspectorate *ex officio* asking from the Administrative Inspectorate to monitor the work of the administrative body and order measures for the remedy of irregularities in their work.[14] Along with the Commissioner, an applicant may also address the Administrative Inspectorate asking for inspection of actions of an administrative body which did not act in line with the decision of the Commissioner in terms of requested information. If a reasonable time period passes following the address of the Commissioner to the Administrative Inspectorate or since the address of the natural or legal person who sought certain pieces of information and during this period the Administrative Inspectorate does not initiate monitoring the administrative body which did not submit requested information, each natural or legal person that was indicated as the information applicant in the application for free access to information of public importance can file a complaint to the Protector of Citizens.[15] An example of such action can be seen by having insight into a complaint against a failure to act of the Ministry of State Administration and Local Self-Administration – Administrative Inspectorate by which the right to access to information of public importance which is available to the state body was violated. The complaint was filed with the Protector of Citizens by the Association "Partners for Democratic Changes Serbia".[16]

Another case of acting upon a complaint by citizens can be seen from the insight into recommendations of the Protector of Citizens given to the Administrative Directorate of the Ministry of State Administration and Local Self-Administration after establishing failures in the work of this body, i.e. the Administrative Inspectorate did not initiate inspection over the

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12 Kalajdžić, Kristina. 2021. Pravni mehanizmi za zaštitu prava na pristup informacijama od javnog značaja – na primeru postupanje Državnog pravobranilaštva, https://www.partners-serbia.org/public/news/Pravni_mehanizmi_za_za%C5%A1titu_prava_na_pristup_informacijama_od_javnog_zna%C4%8Daja.pdf, last access: April 25, 2023.

13 Law on Protector of Citizens („*Official Gazette of RS*", No.105/21), Art. 28. para. 9.

14 Ibid.

15 Partneri Srbija, Ninić Ivan, Kalajdžić Kristina. 2019. Kako izjaviti pritužbu Zaštitniku građana zbog nepostupanja Upravnog inspektorata u oblasti slobodnog pristupa informacijama od javnog značaja. *https://www.partners-serbia.org/public/documents/Kako_izjaviti_prituzbu_Zastitniku_gradjana_zbog_nepostupanja_Upravnog_inspektorata_u_oblasti_slobodnog_pristupa_informacijama_od_javnog_znacaja,_Partneri_Srbija.pdf*, last access: April 25, 2023.

16 Available on: https://www.partners-serbia.org/public/documents/Prituzba_Zastitniku_gradjana_Partneri_Srbija,_april_2021.pdf.

monitored body which denied access to requested information of public importance to an applicant and, against their jurisdiction, the Administrative Directorate failed to submit an application for the initiation of offence proceeding against the monitored body which caused expiration of offence prosecution.[17]

With reference to the above given, in case the first-instance body does not act in line with the decision of the Commissioner for Information of Public Importance and does not submit the requested information to an applicant and the Administrative Inspectorate fails to perform monitoring over the work of an administrative body, the applicant can file a complaint to the Protector of Citizens in order to secure protection from this body. In this case, the Protector of Citizens establishes an irregularity and illegality in the work of the administrative body which violates the rights of citizens and, in line with Article 31, paragraph 2 of the Law on Protector of Citizens, the Protector directs recommendations to the administrative body in order to overcome the situation that arose as soon as possible as well as so as to improve the work of the administrative body and to prevent similar failures in the future.

Therefore, the Protector of Citizens can only influence the improvement of the work of administrative bodies by their decisions by enabling the right of access to environmental information. In any case, the decision of the Protector of Citizens cannot replace the decision of the administrative body or court in environmental administrative matters.[18]

4. The importance of the introduction of the institution of an ecological ombudsman into the Serbian legal system

The right of access to information on the state of the environment was established by the Aarhus Convention which was ratified by Serbia with the adoption of the Law on Ratification of Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. In order to enable all citizens to exercise this right under the same conditions, it is necessary to have suitable legal protection. Bearing in mind the number of complaints filed with the Protector of Citizens since the beginning of their work until today which concern environmental protection, and since the number of these complaints has been rising year after year, one may conclude that it would be appropriate to introduce a concept of a specialised ombudsman for environmental protection into our legal system.

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17 Recommendation of the Protector of Citizens No. 36625 of November 22, 2018.

18 M. Drenovak – Ivanović, *Pristup pravdi u ekološkim upravnim stvarima,* Pravni fakultet Univerziteta u Beogradu 2014, page 213.

According to the data from the Regular Annual Report of the Protector of Citizens for 2022, the greatest number of complaints filed with the Protector of Citizens during that year in the field of environment was related to the problems with water, air and land pollution, noise and unpleasant smell and against actions of inspection bodies in the environment field upon reports of individuals or citizen groups. The number of complaints in this field which are filed with the Protector of Citizens year after year indicates that it is necessary to still work continuously on the raise of the awareness of the importance of protection of right to healthy environment, especially in smaller local areas.[19]

By providing mediation between the administration and citizens and advice and opinion on the issues within their competence, the Protector of Citizens holds an important position in the field of environmental protection. A concept of ombudsman specialisation, i.e. specialised ombudsmen for areas of particular importance who would perform tasks in these special areas has not been applied in our country while there is specialisation for the tasks in the field of protection of citizens' rights to healthy environment within the very institution, on the staff level.[20] [21]

Therefore, starting from the number of complaints in the field of environmental protection which were filed with the Protector of Citizens since their introduction and from the ever-greater interest of the public to seek information on the state of environment and particularly from the complexity of administration procedures in this field, one may conclude that it is necessary to introduce a specialised ombudsman for the field of environmental protection, similar to the ecological ombudsman. Thereby, this specialised ombudsman would be obliged to adopt separate reports which would inevitably affect the compliance with the obligations of administrative bodies.[22] The submission of the above-mentioned reports would enable the parliament to acquaint itself with the activities that were taken by the ecological ombudsman as well as with the proposals of this body in order to overcome recognised drawbacks of the ruling regulations in the environmental protection field. On the other hand, a greater opportunity to access information in the environmental protection field would be created since the report would be available to the broader public as well as to the members of the parliament.[23]

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19 Regular Annual Report of the Protector of Citizens for 2022, https://www.ombudsman.rs/index.php/izvestaji/godisnji-izvestaji, last access: April 26, 2023.

20 Gudžulić, Aleksandra. Institucija Zaštitnika građana specijalizovanog za zaštitu životne sredine – mogućnost ili potreba. *http://www.arhusnbg.mis.org.rs/institucija-zastitnika-gradana-specijalizovanog-za-zastitu-zivotne-sredine-mogucnost-ili-potreba/*, last access: April 26, 2023.

21 Drenovak – Ivanović, Mirjana. 2021. *Ekološko pravo*, Beograd: Pravni fakultet: 172.

22 Ibid.

23 Lilić, Stevan, Drenovak – Ivanović, Mirjana. 2014. *Ekološko pravo*, Beograd: Pravni fakultet: 51-52.

Having in mind that the Protector of Citizens is the body that controls the legality and regularity of the work of administrative bodies[24], in terms of the exercise of the right of access to environmental information, an applicant has a possibility to submit a complaint with this body if they consider that the right of access to environmental information was violated, and, in this case, this body can adopt a recommendation related to the work of administrative bodies when they decide on an application for access to environmental information.[25] Even more, this procedure could be faster and more efficient if such complaint would have been filed with an ombudsman specialised for the environmental protection field.

5. Obstacles to the introduction of an ecological ombudsman into the Serbian legal system

Developed countries have established that human rights which also include the right to life in a healthy environment should be protected via a specialized ombudsman on one hand, as well as on different levels, i.e. on national, regional and local self-administration level on the other hand, depending on the type of state order. Sweden as the founding father of this institution takes the lead and has the broadest structure of specialised ombudsmen.[26] In the European Union, European ombudsman within the European Network of Ombudsmen which comprises of both national and regional ombudsmen as well as the Committee for Petitions of the European Parliament offers protection to citizens and enables the exercise of rights guaranteed by the European Union regulations.

In terms of the Serbian legal system, Article 138 of the Constitution of the Republic of Serbia prescribes that the Protector of Citizens is an independent state body that protects the rights of citizens and controls the work of state administration bodies, of the body competent for legal protection of property rights and interests of the Republic of Serbia as well as of other bodies and organisations, companies and institutions with public jurisdiction.[27] A position and jurisdiction of the Protector of Citizens determined in this manner can indicate that there is no prohibition to establish specialised ombudsmen for certain legal areas since this possibility is not excluded by the highest legal act of our country. Further realisation of the establishment of a specialised ombudsman for the environmental protection field depends on the reg-

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24 Law on Protector of Citizens („*Official Gazette of RS*“, No.105/21), Art. 19. para. 1.

25 M. Drenovak – Ivanović, *Pristup pravdi u ekološkim upravnim stvarima,* Pravni fakultet Univerziteta u Beogradu 2014, page 213.

26 Marković, Čedomir, Jugović, Sreten. 2012. Specijalizovani ombudsmani u Republici Srbiji. Žurnal za kriminalistiku i pravo, Beograd: Kriminalističko-policijska akademija: 141-151.

27 Constitution of the Republic of Serbia, „*Official Gazette of RS*“, No. 98/06, 16/22 – other regulation.

ulations which should be the basis for the differentiation of competences between the general affairs ombudsman and specialised ombudsmen.[28]

Therefore, one of the obstacles to the establishment of the institution of an ecological ombudsman refers to the amendment of ruling regulations, above all of the Law on Protector of Citizens.[29] Furthermore, it is necessary to establish the trust of citizens into the institution of a specialised ombudsman whose jurisdiction would include the control of the work of a segment of public administration which performs tasks related to environmental protection.[30] In addition, it is necessary to provide the additional training of staff in terms of their ability to perform tasks in the jurisdiction of an ecological ombudsman. Tackling the above-mentioned obstacles and establishing the institution of an ecological ombudsman would surely be important for the exercise of the right to information on the state of the environment.

6. Conclusion

Given the overall volume of case files before the Commissioner for Information of Public Importance, and taking into account the volume of those that are related to the environment, the case for an ombudsman for environmental protection is merited.

Moreover, it is likely that the establishment of an institution of environmental ombudsman in the Serbian legal system would lead to the settlement of complaints by citizens within a shorter deadline which would enable more efficient monitoring of the work of a segment of public administration within the jurisdiction of environmental protection.

In order to use the above given advantages, it is necessary to overcome certain obstacles which could be both financial and staff-related as well as legislative ones.

Bearing in mind that Serbia was late in comparison to other countries in terms of the introduction of the institution of the Protector of Citizens as the Parliament Commissioner, it is likely that it will take some time before the advantages of the introduction of a specialised ombudsman for environmental protection are observed. And certainly not before all the obstacles are removed. The advantages of the introduction of the institution of an ecological ombudsman would certainly be reflected in better control and monitoring of the enforcement of regula-

28 Petković, Dragana, Milošević, Vladimir. 2018. Različita shvatanja položaja i nadležnosti Zaštitnika građana Republike Srbije. Žurnal za kriminalistiku i pravo, Beograd: Kriminalističko-policijska akademija: 15-34.

29 Institucija Zaštitnika građana specijalizovanog za zaštitu životne sredine – mogućnost ili potreba, *http://www.arhusnbg.mis.org.rs/institucija-zastitnika-gradana-specijalizovanog-za-zastitu-zivotne-sredine-mogucnost-ili-potreba/*, last access: April 27, 2023.

30 M. Drenovak – Ivanović, *Ekološko pravo*, Pravni fakultet Univerziteta u Beogradu 2014, p. 51.

tions; the issuance of recommendations to administrative bodies related to actions in case files concerning the provision of environmental information; as well as more prompt reaction and action to complaints by natural and legal persons. In addition, it would contribute to providing adequate legal protection to applicants requesting access to information of public importance, thereby contributing to the realization of the concept of environmental justice.

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[3] M. Drenovak – Ivanović, *Pristup pravdi u ekološkim upravnim stvarima,* Pravni fakultet Univerziteta u Beogradu 2014, page 213.

[4] Drenovak - Ivanović, Mirjana. 2021. Ekološko *pravo,* Beograd: Pravni fakultet.

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[6] From the explanation of the decision of the Commissioner for Information of Public Importance and Personal Data Protection Number 071-01-2585/2021-03, of April 24, 2023.

[7] From the explanation of the decision of the Commissioner for Information of Public Importance and Personal Data Protection Number 071-01-2693/2021-03, of April 20, 2023.

[8] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. *https://www.aarhussu.rs/docs/tina_arhuska_26_12_2007-1.pdf*, last access: April 24, 2023.

[9] Kalajdžić, Kristina. 2021. Pravni mehanizmi za zaštitu prava na pristup informacijama od javnog značaja – na primeru postupanje Državnog pravobranilaštva, https://www.partners-serbia.org/public/news/Pravni_mehanizmi_za_za%C5%A1titu_prava_na_pristup_informacijama_od_javnog_zna%C4%8Daja.pdf, last access: April 25, 2023.

[10] Lilić, Stevan, Drenovak – Ivanović, Mirjana. 2014. *Ekološko pravo*, Beograd: Pravni fakultet: 51-52.

[11] Marković, Čedomir, Jugović, Sreten. 2012. Specijalizovani ombudsmani u Republici Srbiji. Žurnal *za kriminalistiku i pravo*, Beograd: Kriminalističko-policijska akademija: 141-151.

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[14] Recommendation of the Protector of Citizens No. 36625 of November 22, 2018.

[15] Regular Annual Report of the Protector of Citizens for 2022, https://www.ombudsman.rs/index.php/izvestaji/godisnji-izvestaji, last access: April 26, 2023.

[16] Constitution of the Republic of Serbia, *„Official Gazette of RS"*, No. 98/06, 16/22 – other regulation.

[17] Law on Free Access to Information of Public Importance ("*Official Gazette of RS*", No. 120/04, 54/07, 104/09, 36/10, 105/21).

[18] Law on Environmental Protection, *("Official Gazette of RS", No.* 135/04, 36/09 – other law, 36/09, 72/09 - other law, 43/11 – Constitutional Court, 14/16, 76/18, 95/18 - other law.

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Implementation of the Aarhus Convention in the Republic of Serbia and goals of the strategy and action plan for the implementation of the Aarhus Convention

Abstract: The paper explains the significance of the adoption of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). It presents the requirements of all three pillars of the Aarhus Convention - Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The concept and provisions of the third pillar of the Aarhus Convention, in particular, Access to Justice in Environmental Matters are analysed. The legislative framework of the Republic of Serbia for implementing the Aarhus Convention is presented. The objectives and content of the new Strategy for the implementation of the Aarhus Convention and the Action Plan are stated, as well as its structure and the significance of its adoption.

Keywords: Aarhus Convention, implementation, Strategy, access to justice, public participation

1. Aarhus Convention

The adoption of the Aarhus Convention was preceded by a growing awareness of environmental problems, which was affected by the Chernobyl nuclear disaster and other major industrial accidents. It took more than 24 hours to evacuate the population in Chernobyl and its surroundings, and the authorities of the Soviet Union covered up the extent of the tragedy for over 48 hours. In Seveso (Italy), in 1976, the release of dioxin contaminated the environment

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and poisoned the local population. These cases generated awareness about the importance of access to environmental information for the preservation of human life and health. For the first time, non-governmental organizations participated in the negotiations for the conclusion of the Aarhus Convention, which made an exceptional contribution to the entire process of preparation and adoption of the Aarhus Convention.

The Aarhus Convention is the first multilateral environmental treaty that focuses exclusively on the obligations of states to their citizens and non-governmental organizations.[1] The Aarhus Convention contains several unique mechanisms regarding the role of the general public in environmental decision-making and implementation. The Convention calls for the recognition of numerous rights for individuals and non-governmental organizations with regard to the environment. In a broader sense, the Parties undertake to recognize three groups of rights: the right to access environmental information, public participation and access to justice.[2] The creation of citizens' rights and reciprocal obligations in contracting states is more like traditional human rights instruments than any multilateral treaty seen before.[3] On the other hand, in the Aarhus Convention, for the first time the right of every person "to live in an environment suitable for his health and well-being" becomes a human right.[4] Article 1 of the Aarhus Convention establishes a link between human rights and public participation. Placing environmental issues on a solid basis of individual rights is a long-standing goal of many environmentalists, especially the ability of human rights to directly protect the environment.[5]

Links with human rights represent a key dimension to the rules of the Aarhus Convention. In the preamble of the Convention, this is explicitly stated through the wording that "adequate protection of the environment is of fundamental importance for human well-being and the enjoyment of basic human rights, including the right to life itself" , and in Article 1 of the Convention "the protection of the rights of every individuals of current and future generations to live in an environment suitable to their health and well-being", i.e. "guaranteeing the right

1 Svitlana Kravchenko „The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements", *Colorado Journal of International Environmental Law and Policy,* Vol. 18, No. 1, 2007.

2 Pavlos Eleftheriadis, „Environmental Rights in the EC Legal Order", *University of Oxford Faculty of Law Legal Studies Research Paper Series*, Working Paper No 24/2007, September 2007, P. 4.

3 Veit Koester, „Review of Compliance Under the Aarhus Convention: A Rather Unique Compliance Mechanism", *2 JEEPL*, 2005.

4 Tina Janjatović, „Passing a decree on public participation in the development of certain plans and programs in the field of environmental protection", *Pravni život,* No. 9, Tom I, Beograd 2019, p. 402.

5 J. Holder, M. Lee *Environmental Protection, Law and Policy*, Cambridge University Press, New York, 2007, p. 105.

to access to information, public participation in decision-making and the access to justice in environmental matters", are declared the goals of this international agreement.[6]

The Aarhus Convention [7] was concluded on June 25, 1998 at the fourth ministerial conference "Environment for Europe" (in the city of Aarhus, Denmark) within the activities of the United Nations Economic Commission for Europe, and entered into force on October 30, 2001. The Republic of Serbia ratified the Aarhus Convention in 2009.[8] The Aarhus Convention establishes specific obligations upon member states with regard to three groups of issues: access to environmental information, public participation in environmental decision-making and the access to justice in environmental matters, which constitute the three pillars of the Aarhus Convention.

2. Access to justice within the framework of the Aarhus Convention

The third pillar of the Aarhus Convention – access to justice in environmental matters is arguably the most difficult pillar of the Aarhus Convention to be applied in member states (Article 9).[9] The obligations of the third pillar of the Aarhus Convention were not fully transferred to the EU level because the adoption of the Directive on access to justice [10] in 2003. was unsuccessful and the Directive remained at the proposal stage, leaving the member states to harmonize their legal systems with the provisions of the Aarhus Convention at the level of national legal systems.

The right of access to justice with the Aarhus Convention consists of the following components:

- procedures for reviewing decisions related to requests for information;
- review procedures related to public participation;
- procedures for public review of actions and omissions of natural and legal persons or public authorities;

6 M Drenovak-Ivanović, *Extraordinary cancellation of decisions: the relationship between the public interest and the interest of environmental protection,* Annals of the Faculty of Law in Belgrade, 2/2014, p. 133-145.

7 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 1998).

8 Law on Ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention*), Official Gazette of the RS - International Agreements, No.* 38/2009).

9 Gordana Petković, „The Aarhus Convention in the context of the OSCE/UNECE contribution to the development of international environmental law," The Aarhus Convention in the Law and Practice of the Republic of Serbia, Society for Policy and Environmental Law Equilibrium Serbia, Novi Sad, 2012, p. 25.

10 Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

- minimum standards related to procedures for exercising the right of access to justice, decisions and legal remedies; and
- facilitating the effective exercise of the right of access to justice with the help of information on the availability of administrative and judicial review procedures and the establishment of appropriate assistance mechanisms for the removal or reduction of financial and other obstacles related to the right of access to justice.[11]

Access to Justice in environmental matters is a special issue that has its full meaning, bearing in mind that any of the proclaimed rights relevant to the functioning and realization of democratic principles cannot have full scope without the possibility of simple and fast judicial protection, that is, the functioning of the rule of law. That is why the Aarhus Convention established special rules and standards for the protection of citizens in the following matters: the right to access to justice due to violations of the right to access to information, which includes legal protection before a regular court or some other independent and impartial body; the possibility of initiating an expeditious procedure of reconsideration of requests and rules on the binding nature of the final decision; the right to challenge the legality of decisions related to the exercise of rights regarding public participation in decision-making, which includes the right to a judicial or other independent or impartial procedure; privileged position of non-governmental organizations, not excluding the possibility of initiating a preliminary procedure before the administrative authorities; the right to protection in order to challenge actions or omissions contrary to the provisions of national legislation on the environment. For all three groups of issues, the minimum standards of decision review procedures have been determined, which includes: appropriate and effective legal remedies, judicial interim measures when necessary, fair, timely and fair execution of procedures, costs that will not hinder procedures and decision-making in written form with the provision their public.[12] Special rules establish certain standards relevant to the access to information on the possibility of initiating administrative and judicial procedures and the establishment of mechanisms for providing legal assistance.[13]

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11 Anita Pirc Velkavrh, Slavko Bogdanović, Anđelka Mihajlov, Dragoljub Todić, Ivan Jarić „Strategy for the implementation of the Convention on access to information, public participation in decision-making and access to justice in environmental matters - the Aarhus Convention", Ministry of the Environment, Mining and Spatial Planning, Belgrade, 2011, p. 44-45.

12 M. Drenovak-Ivanović, „East Sussex Country Council protiv Information Commissioner: kriterijumi za naplatu razumnog iznosa za pružanje ekoloških informacija", *Perspectives of the implementation of European standards in the legal system of Serbia*, Belgrade, 2015, p. 231-242.

13 D. Todić, T. Janjatović, „The relationship between the Aarhus Convention and other international treaties ", *Pravni život*, br. 9, Tom I, Belgrade, 2019, 465-469.

3. Implementation of the Aarhus Convention in the Republic of Serbia

The legislative framework for the implementation of the Aarhus Convention was developed in the Republic of Serbia in the period from 2010 to 2021.

The most significant compliance with regard to the access to environmental information was achieved by amendments to the Law on Environmental Protection[14] (LEP) and the Law on Free Access to Information of Public Importance [15] (ZSPIJZ) in the period 2016-2021 year, which introduced the basic legal institutes of the Aarhus Convention into the legal system of the Republic of Serbia. The Law on General Administrative Procedure[16] (LGAP), which was adopted in 2018, provides in Article 44 that representatives of collective interests and representatives of wider interests of the public, who are organized in accordance with regulations, can have the status of a party in administrative proceedings if the outcome of the administrative proceedings affects the interests they represent. With the aforementioned provision, which regulates who can be a party to the proceedings and which includes representatives of collective interests and wider interests of the public, the ZUP is fully compliant with the requirements of the Aarhus Convention. Also, Article 9 of the LEP stipulates that a citizen or groups of citizens, their associations, professional or other organizations, exercise the right to a healthy environment before the competent authority, i.e. the court, in accordance with the law.

The right to information concerning the environment, the first pillar of the Aarhus Convention, is regulated primarily by the Constitution of Serbia (Article 74)[17] which prescribes that everyone has the right to a healthy environment and to timely and complete information about its condition. LEP stipulates that information related to environmental protection is submitted in accordance with the Law on Free Access to Information of Public Importance (LFAIPI).[18] LFAIPI stipulates that the public authority is obliged to provide the requested information without delay and within 15 days at the latest or, if the requested information is extensive, within 40 days. If the request refers to information that is important the endangerment or protection of the health of the population and the environment, the public authority must inform the requester of the possession of that information, provide him with a docu-

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14 *Official Gazette of the RS, No.* 135/04, 36/09, 72/09 , 43/11, 14/16, 76/18 and 95/18.
15 *Official Gazette of the RS, No.* 120/04, 54/07, 104/09, 36/10 and 105/21.
16 *Official Gazette of the RS, No.* 18/16 and 95/18.
17 *Official Gazette of the RS, No.* 98/06 and 115/21.
18 Article 78, paragraph 2.

ment containing the requested information, i.e. issue him a copy of that document at the latest within 48 hours of receiving the request.[19]

The Law on Environmental Protection stipulates that in the Republic of Serbia, an environmental protection information system is established, which is managed by the Environmental Protection Agency, as well as national and local registers of sources of environmental pollution.[20] Once a year, the Government submits to the National Assembly a report on the state of the environment in the Republic of Serbia.[21]

Public authorities are obliged to regularly update and regularly publish information on the environment, in particular: 1) texts of international treaties and agreements, as well as regulations in the field of environmental protection; 2) strategies, plans, programs and other documents related to the environment; 3) reports on the implementation of regulations in the field of environmental protection, including the implementation of international agreements, strategic documents, plans and programs in the field of environmental protection; 4) reports on the state of the environment; 5) data obtained on the basis of monitoring of activities that affect or may affect the environment; 6) permits and authorizations for carrying out activities that have a significant impact on the environment; 7) contracts concluded for the purpose of environmental protection; 8) environmental impact assessment studies and risk assessments related to environmental factors, as well as decisions made in all three stages of the impact assessment procedure.[22]

Public participation in decision-making in environmental matters, i.e. the second pillar, is regulated by the Law on Environmental Protection, the Law on Environmental Impact Assessment, the Law on Strategic Environmental Impact Assessment[23], by the Law on Integrated Prevention and Control of Environmental Pollution [24] and the Regulation on public participation in the development of certain plans and programs in the field of environmental protection.[25]

The basic regulation that regulates the participation of the public in deciding on special activities from Article 6 of the Aarhus Convention is the Law on Environmental Impact Assessment (EIA). The elaboration of the decision from the LEIA was carried out by the provision of bylaws. Environmental impact assessment is a preventive measure of environmental protection

19 Article 16. paragraph 1. and 2.
20 Article 74. and 75.
21 LEP, Article 76.
22 LEP, Article 80.
23 *Official Gazette of the RS, No.* 135/04 and 88/10.
24 *Official Gazette of the RS, No.* 135/04 and 25/15.
25 *Official Gazette of the RS, No.* 117/21.

based on the preparation of studies and the implementation of consultations with the participation of the public with the aim of collecting data and predicting the harmful effects of certain projects on the environment. The impact assessment procedure consists of the following stages: 1) deciding on the need for an impact assessment for projects for which an impact assessment can be requested; 2) determining the scope and content of the impact assessment study; 3) deciding on consent to the impact assessment study. Public participation is prescribed in all stages of the impact assessment.

In terms of access to justice in environmental matters, this pillar of the Aarhus Convention is governed by a large number of Serbian regulations, such as the aforementioned Law on Free Access to Information of Public Importance, the Law on Environmental Protection, the Law on Environmental Impact Assessment, the Law on Strategic Environmental Impact Assessment and the Law on Integrated Prevention and Control of Environmental Pollution. In addition to these laws for the implementation of the third pillar of the Aarhus Convention, laws that do not fall into the field of environmental protection are also important, such as the Law on Administrative Disputes[26], Law on Civil Procedure[27], Law on Obligations[28], Law on Advocacy[29], etc.

Article 22 of the LFAIPI stipulates that the requester of information may file a complaint with the Commissioner for Information of Public Importance if the public authority rejects the application or the submission, as well as in other cases prescribed by this law. Here it is also important to point out that LFAIPI prescribes that an administrative dispute can be initiated against the decision and conclusion of the Commissioner before the Administrative Court. The administrative dispute regarding the realization of the right to free access to information of public importance is urgent.[30]

Article 9 of the LEP prescribes that a citizen or groups of citizens, their associations, professional or other organizations exercise the right to a healthy environment before the competent authority, i.e. the court, in accordance with the law. From Article 81a, it is foreseen that the public concerned in the process of exercising the right to a healthy environment as a party has the right to initiate the procedure of review of the decision before the competent author-

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26 *Official Gazette of the RS, No.* 111/09.
27 *Official Gazette of the RS, No.* 72/2011, 49/2013 - decision CC, 74/2013 - decision CC, 55/2014, 87/2018, 18/2020 and 10/2023 – as amended.
28 *Official Gazette of the SFRY, no.* 29/78, 39/85, 45/89 - decision CC and 57/89, " Official Gazette of the SFRY, no. 31/93, *Official Gazette of SMG* ", no. 1/2003 - Constitutional Charter and *Official Gazette of the RS no.* 18/2020.
29 *Official Gazette of the RS, No.*, br. 31/2011 i 24/2012 - decision CC.
30 Article 27

ity, i.e. the court, in accordance with the law. Also, Article 107 stipulates that anyone who suffers damage has the right to compensation. Claims for compensation can be submitted directly to the polluter. The procedure before the court for damages is urgent.

According to the provisions of Article 156 of the Law on Obligations, anyone can demand from another to remove a source of danger that threatens him or an unspecified number of persons with significant damage, as well as to refrain from activities that cause harassment or danger of damage, if the occurrence of harassment or damage cannot be prevented by appropriate measures (paragraph 1).

Article 13 of the Law on General Administrative Procedure stipulates that the party has the right to appeal against the decision made in the first instance. Article 9 stipulates that the procedure must be conducted without delay and with as few costs as possible for the party and other participants in the procedure, but in such a way as to obtain all the evidence necessary for a proper and complete determination of the factual situation. Provisions on legal aid are contained in several laws, which regulate only certain types of legal aid. Thus, the Law on Local Self-Government[31] in Article 20, point 11, stipulates that the municipality organizes a legal aid service for citizens. Article 73 of the Law on Advocacy [32] stipulates that the Bar Association can organize free legal assistance in its area. Free representation of parties in civil court proceedings is regulated by Article 168 of the Civil Procedure Code [33] and the Criminal Procedure Code.[34]

4. Objectives of the strategy and action plan for the implementation of the Aarhus Convention

The Government of the Republic of Serbia adopted the Strategy for the implementation of the Aarhus Convention in 2011.[35]

The first working version of the new Strategy for the implementation of the Aarhus Convention and the analysis of the effects of the Strategy were prepared with the support of the OSCE

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31 *Official Gazette of the RS, No.,*. 129/2007, 83/2014 - as amended, 101/2016 - as amended, 47/2018 and 111/2021 - as amended.
32 *Official Gazette of the RS, No.,* 31/2011 and 24/2012 - decision CC.
33 *Official Gazette of the RS, No.,* 72/2011, 49/2013 - decision CC, 74/2013 - decision CC, 55/2014, 87/2018, 18/2020 and 10/2023 - as amended
34 *Official Gazette of the RS, No.,* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - decision CC and 62/2021 - decision CC.
35 *Official Gazette of the RS, No.,* 103/11.

organization, which hired an expert team to prepare a revision of the Strategy for the Implementation of the Aarhus Convention.

A public call for public participation in the consultation process related to the development of the Strategy for the Implementation of the Aarhus Convention and the Action Plan and the first working version of the Strategy for the Implementation of the Aarhus Convention and the Action Plan were posted on the website of the Ministry of Environmental Protection of the Republic of Serbia - www.ekologija.gov.rs.

Consultations related to the further development of the Strategy were conducted in the period from October 14 to November 1, 2022.

Video conferences on the first working version of the new Strategy for the Implementation of the Aarhus Convention and the Action Plan were held in the period from October 24 to 28, 2022 in Novi Sad, Belgrade, Subotica, Kragujevac and Nis, organized by the Network of Aarhus Centres of Serbia, which implements the project "Strengthening public participation in environmental consultations related to the Aarhus Convention through public discussions throughout the country", with the support of the OSCE Mission to Serbia. The round table at which the first working version of the Strategy for the Implementation of the Aarhus Convention and the Action Plan was discussed was held on October 26 at the Ministry of Environmental Protection in the presence of representatives of interested public authorities, interested citizens, businesses and civil society organizations.

4.1. Defining the objectives of the Strategy

The general goal of the Strategy was to create conditions for the full application of standards in the field of human rights and the environment contained in the three key pillars of the Aarhus Convention, which refer to: the right to access environmental information; the right to public participation in decision-making in environmental matters; the right to access to justice in environmental matters.

Specific objectives:

1. Implementation of interdepartmental/general activities for the implementation of the Aarhus Convention:

   - Improving human resources, legal and institutional framework, strengthening the role of regional and local communities and associations in the implementation of the Aarhus Convention;

- Improving activities of an anti-discriminatory nature;
- Establishing mechanisms for monitoring the implementation of the Aarhus Convention;

2. Implementation of the first pillar of the Aarhus Convention - Access to environmental information:

- Improving the efficiency of passive dissemination of environmental;
- Improving the efficiency of active dissemination of environmental information;

3. Implementation of the Second Pillar of the Aarhus Convention - Public participation in decision-making in environmental matters:

- Improving the participation of the public or other interested parties in making decisions about the implementation of projects in the environment;
- Improvement and further strengthening of public participation in the adoption of plans, programs and policies related to the environment;
- Improvement and further strengthening of public participation in the adoption of laws, regulations and legally binding acts;

4. Implementation of the third pillar of the Aarhus Convention – Access to Justice in environmental matters:

- Improving Access to Justice due to violations of the right to access to information, including Access to Justice before a regular court or some other independent and impartial body;
- Improving Access to Justice through challenging the legality of decisions related to the exercise of rights regarding public participation in decision-making, including the right to a judicial or other independent or impartial procedure;
- Improving Access to Justice in order to challenge actions or omissions contrary to the provisions of national legislation on the access to information and public participation in decision-making on environmental matters.

Within the implementation of all three pillars, special goals are achieved through a series of legislative, institutional, and administrative measures, including raising awareness and popularizing the environment, as well as improving education on environmental protection.

4.2. Structure and analytical approach

Chapter I states the reasons for adopting the new Strategy for the Implementation of the Aarhus Convention, the realization of measures and activities of the previous Strategy for the Implementation of the Aarhus Convention for the period 2011-2022, the vision and goals of the Strategy, the preparation process and the structure of the Strategy.

In chapter II the planning documents and legal framework relevant to the Strategy are presented, the history of the process of adoption of the Aarhus Convention in other countries is partially presented. It also shows the way in which the Strategy is connected with other relevant conventions and with the implementation of the Aarhus Convention at the level of the European Union. The status of implementation in the Republic of Serbia and obligations to fulfil other international requirements related to the Convention are also explained in this section.

In chapter III an analysis of compliance of the articles of the regulations of the Republic of Serbia with the requirements of the Aarhus Convention, problems in the application of those requirements and gap analysis (analysis of shortcomings and needs) in this connection are presented.

Regarding compliance with the laws of the Republic of Serbia, ending in 2022, this document considers a set of laws that concern the environment and a set that are not from that area, but have points of contact with the aforementioned laws. By-laws are generally not subject to analysis.

The analysis of the institutional framework and other interdepartmental activities was done on the basis of the last change in the institutional organization of the state administration in 2020, reference literature and data are made available on the Internet.

The Genetically Modified Organisms (GMO) Amendment and the PRTR were analysed under existing laws in force in the country

Chapter IV contains the identification and analysis of the effects of public policy measures. All activities of this type are presented in such a way as to clearly indicate the links with the key objectives of the Strategy.

A summary of the analysis of the strengths, weaknesses, opportunities and dangers of the implementation of the Action Plan for the implementation of the Strategy for the Implementation of the Aarhus Convention (SWOT analysis of the situation in the Republic of Serbia) is given. Strong and weak points are discussed, as well as opportunities and dangers that may appear in the future during the implementation of the Strategy.

Mechanisms for the implementation of measures and the way of reporting on the results of implementation are given in chapter V. The results of consultations on the Strategy are contained in chapter VI. An overview of the financial resources required for the implementation of the Strategy are presented separately and are an integral part of the Strategy (chapter VII).

The activity plan is set out in the Annex - Action Plan for the Implementation of the Strategy for the Implementation of the Aarhus Convention (Chapter VIII). Activities are listed in more detail in the Action Plan in the form of a table to illustrate the proposed activities, main implementation tasks, deadlines and responsible institutions and partners that should be consulted and engaged.

Table B.2 contains a list of the environmental laws analysed: Law on Environmental Protection; Law on Environmental Impact Assessment; Law on Strategic Environmental Impact Assessment; Law on integrated prevention and control of environmental pollution; Law on Radiation and Nuclear Safety and Security[36]; Law on protection against non-ionizing radiation[37]; Law on Chemicals [38]; Law on Biocidal Products [39]; Law on Air Protection [40]; Law on Nature Protection[41]; Law on Protection Against Noise in the Environment[42]; Law on Protection and Sustainable use of fish stocks[43]; Law on Waste Management [44]; Law on Packaging and Packaging Waste[45]; Law on Waters [46].

Bylaws are only partially included. Some related laws that do not regulate the environment are also analysed. Such laws include: Law on General Administrative Procedure; Law on Free

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36 *Official Gazette of the RS, No.* 95/2018 and 10/2019.
37 *Official Gazette of the RS, No.* 36/2009.
38 *Official Gazette of the RS, No.* 36/2009, 88/2010, 92/2011, 93/2012 and 25/2015.
39 *Official Gazette of the RS, No.* 109/2021.
40 *Official Gazette of the RS, No.* 36/2009, 10/2013 and 26/2021.
41 *Official Gazette of the RS, No.*36/2009, 88/2010, 91/2010 - cor., 14/2016, 95/2018 - as amended and 71/2021.
42 *Official Gazette of the RS, No.* 96/2021.
43 *Official Gazette of the RS, No.* 128/2014 and 95/2018.
44 *Official Gazette of the RS, No.* 36/2009, 88/2010, 14/2016, 95/2018 and 35/2023.
45 *Official Gazette of the RS, No.* 36/2009 and 95/2018.
46 *Official Gazette of the RS, No.* 30/2010, 93/2012, 101/2016, 95/2018 and 95/2018.

Access to Information of Public Importance, Law on Organization of Courts[47], Law on Seats and Areas of Courts and Public Prosecutor's Offices, Law on Administrative Disputes, Law on Civil Procedure, Law on Enforcement and Security[48], Law on Obligations; Law on the Protector of Citizens [49]; Law on Mediation in Dispute Resolution [50]; Criminal Procedure Code[51]; Criminal Code[52]; Law on Liability of Legal Entities for Criminal Offenses [53]; Law on Advocacy, Law on Local Self-Government and Law on Free Legal Aid.[54]

The Strategy also includes: an assessment of the institutional framework and stakeholder participation in support of the implementation of the Aarhus Convention; an assessment of the development of the information system and the availability of information; an assessment of the requirements of the Aarhus Convention relating to genetically modified organisms; an assessment of education and awareness-raising concerning the right to access information, participation in decision-making and the right to legal protection in environmental matters; and, an assessment of any education aimed at supporting the achievement of the objectives of the Aarhus Convention.

5. Conclusion

Based on the above, it can be seen that in the Republic of Serbia, there is a solid legislative framework for the implementation of the Aarhus Convention, which conveys all the postulates of this convention. A large number of the aforementioned laws are fully aligned with the requirements of the Aarhus Convention. The biggest shortcomings are reflected in the transfer of the requirements of the third pillar – access to justice in environmental matters, in the domain of not introducing low costs of procedures that have as their object environmental protection, which is in line with the situation in all European countries.

A special issue is the implementation of the requirements of the Aarhus Convention in practice, and the new Strategy deals with the activities that need to be undertaken in order to fully implement the Convention in the Republic of Serbia. The new Strategy also deals with the

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47 *Official Gazette of the RS, No.* 10/2023.
48 *Official Gazette of the RS, No.* 106/2015, 106/2016, 113/2017, 54/2019, 9/2020 and 10/2023 - as amended.
49 *Official Gazette of the RS, No.* 105/2021.
50 *Official Gazette of the RS, No.* 55/2014.
51 *Official Gazette of the RS, No.*72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - decision CC and 62/2021 - decision CC.
52 *Official Gazette of the RS, No.* 85/2005, 88/2005 - cor., 107/2005 - cor., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.
53 *Official Gazette of the RS, No.* 97/2008.
54 *Official Gazette of the RS, No.* 87/2018.

analysis of the compliance of national regulations with the requirements of the Aarhus Convention and the related gap analysis, the analysis of the institutional framework and the participation of interested parties to support the implementation of the Aarhus Convention, the analysis of the development of the information system and the access of information, the analysis of the requirements of the Aarhus Convention related to genetically modified organisms, by analysing education and developing awareness about the rights to access to information, participation in decision-making and the right to access to justice in environmental matters and by evaluating education aimed at providing support for the achievement of the goals of the Aarhus Convention.

Bearing in mind that the general goal of the Strategy is to create conditions for the full application of standards in the field of human rights and the environment contained in the three key pillars of the Aarhus Convention, which refer to: the right to access environmental information; the right to public participation in decision-making in environmental matters; the right to access to justice in environmental matters, in the Action Plan for the Implementation of the Strategy for the Implementation of the Aarhus Convention, all necessary activities are listed in order to fully implement the Convention in the Republic of Serbia.

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Effectiveness of legal remedies in strategic impact assessment in Serbia

Abstract: This article examines whether Serbia has duly implemented its obligations regarding access to justice in environmental matters related to strategic impact assessment. Through a recent significant decision, the Serbian government and Ministry of Environmental Protection have shifted its year-lasting practice, claiming that the decision approving a strategic environmental assessment report is not an administrative act and therefore cannot be challenged in administrative procedure. If the government's standpoint is to be accepted there are numerous loopholes to be addressed of which the most important is whether the parties in the strategic impact assessment procedure are deprived of legal remedies. The relevant practice is critically assessed in light of the findings of the Aarhus Convention Compliance Committee and the case law of the European Court of Justice. The author further analyses whether the legal remedies before the Constitutional Court through normative control of the plans and programmes could be considered effective and adequate when challenged by the procedural and substantive elements of strategic impact assessment.

Keywords: access to justice, Aarhus Convention, environmental protection, legal remedies, strategic environmental assessment

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1. The sudden metamorphosis of an administrative act into a *sui generis* act

„Why don't I keep sleeping for a little while longer and forget all this foolishness."[1]

As Gregor from Kafka's Metamorphosis found himself in the irrational world that goes beyond his understanding, in recent years Serbia has found itself in a unique legal metamorphosis when it comes to the legal remedies in relation to the strategic environmental assessment - SEA. Similarly, the government also tries to leave it as is, not fully understanding the reason why or how. Namely, for numerous years the competent authorities were issuing the decisions approving the SEA report as an administrative act.[2] It had all the elements of an administrative act, and it was not subject to any discussion as to whether this decision is the administrative act. When calling upon legal grounds for issuing the document, the competent authority explicitly quoted articles which defined the administrative act and procedure for its issuance. Authorities also consistently integrated the notice on the legal remedy stating that the appeal could be submitted within a 15-day period. However, once the civil society organisations started to utilize their legal right to access to justice in environmental matters, the authorities expressly shifted their narrative and declared that the previous practice was merely an error and that a decision approving the SEA report can only be challenged jointly with a plan or program for which it is issued before the Constitutional Court.

Possibly the best example of the unconventional practice of issuing approval for the SEA report is the approval of the SEA for National emission reduction plan - NERP.[3] Namely, the Ministry of Environmental Protection organized public consultations for the SEA report for NERP almost a year after the plan came into effect.[4] Due to numerous deficiencies, both procedural and substantive, Renewables and Environmental Regulatory Institute - RERI, a Bel-

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1 F. Kafka, *The metamorphosis*, New York: Schocken Books, 1948.

2 For reference see the Ministry of Environmental Protection, Decision no. 350-02-145/13-05, 17 December 2013 and the City Administration of the City of Belgrade, Decision V – 04 no. 501.3-146/2020, 21 December 2020.

3 NERP covers large combustion plants (thermal power plants) that cannot comply with the emission limit values from the Directive 2001/80/EC of the European Parliament and of the Council, on the limitation of emissions of certain pollutants into the air from large combustion plants, *OJ L 309 of 27/11/2001*. Therefore, Serbia, as a Contracting Party to the Treaty establishing Energy Community, opted to apply NERP as an instrument to reduce harmful emissions. The plan prescribes annual emissions ceilings for sulfur dioxide, nitrogen oxides and particulate matter.

4 Development of the SEA report for the first NERP was launched more than six months after the NERP should have entered into force and implemented by power plants' operators. The SEA report developer was hired on 26 October 2018, less than three months before the draft SEA report was announced to the public. The SEA procedure was concluded only in 2020.

grade based think-tank, filed an appeal challenging the decision of the Ministry of Environmental Protection approving the SEA Report for NERP.[5] However, the Ministry of Environmental Protection rejected RERI's appeal as inadmissible, indicating that the decision approving the SEA Report "cannot be appealed" and that the "SEA report is the integral part of the plan and it's documentary basis" and therefore "does not represent an individual administrative act that can be appealed", adding to that it was stated that they "made a mistake and gave incorrect instructions on legal remedy".[6] RERI challenged the decision, but the Government rejected the appeal as unfounded.[7] The Government correspondingly argued that "the report is not an administrative act and that, consequently, the approval of the report cannot be an administrative act", as well as that "SEA Law does not envisage two-tier procedure but only a misdemeanour responsibility in case that competent authority does not include the public in decision-making".[8] Furthermore, the Government fully identified the procedure for issuance of the plan and the SEA procedure arguing that the SEA procedure is "part of the procedure of preparation and issuing of a general administrative act in which there is no place for issuing individual administrative acts", concluding that "the non-administrative affairs of state administration authorities are in question, for which the rules of administrative procedure do not apply".[9] However the issue of the legal nature of the decision approving the SEA report remains a mystery.[10]

2. Legal remedy - now you see me, now you don't

If the government's argument is to be accepted, there are numerous loopholes to be addressed and a lot of questions to be posed. Namely, the Law on General Administrative Procedure defines an administrative act as "an individual legal act by which an authority, directly applying regulations from the appropriate administrative field, decides on the right, obligation, or legal interest of a party, or on procedural issues.[11] Furthermore, as stipulated by the same law, when deciding on the right, obligation, or legal interest of the party the competent authority

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5 Ministry of Environmental Protection, Decision no. 350-02-005/2020-03, 17 January 2020.

6 It is worth noting that incorrect notification on the legal remedy is the basis for the annulment of the final decision according to the Law on General Administrative Procedure (Zakon o opštem upravnom postupku) („*Official Gazzette of the Republic of Serbia*" nos. 18/16, 95/18 and 2/23). See Article 183 para. 1 (11).

7 Government of the Republic of Serbia, Decision 14 no. 353-11169/2021-003, 2 June 2022 - Decision. It shall be noted that besides the notice on the legal remedy the Ministry explicitly as a legal ground for issuing SEA approval for NERP called upon Law on General Administrative Procedure.

8 The Law on Strategic Environmental Impact Assessment (Zakon o strateškoj proceni uticaja) („*Official Gazette of the Republic of Serbia*" nos. 135/04 and 88/10) – SEA Law.

9 *Ibid.*

10 RERI challenged the decision and the procedure before the Administrative Court is still pending.

11 The Law on General Administrative Procedure, Article 16 para. 1. Within the second part of the Article, it is stipulated that "administrative acts are decisions and conclusions", as well as that decisions and conclusions can have another name if this is provided by *lex specialis*.

shall issue administrative acts.[12] Therefore, the key question to be addressed is whether the authority is deciding on the right, obligation, or legal interest of the party?

As a precondition, the party to the procedure shall be identified, which, as it turns out, is no easy task in Serbian legal practice. Indisputably, the party to the procedure is the authority responsible for developing the plan or program. Besides, the party can be the party concerned, which is defined as "the public that is affected or may be affected by the plan or program and/or that has an interest in making decisions related to environmental protection, including non-governmental organizations that deal with environmental protection and that are registered with the competent authority".[13] According to a certain interpretation of the law - once the interested public decides to participate in the SEA procedure and submit its opinion on the SEA report – it can be considered as a party to the procedure.[14] Therefore, the main question remains whether when providing the SEA approval, the authority decides on the rights and interest of the authority requesting the approval and responsible for the development of the plan (right to implement the plan), as well as the interests of the concerned public which participated in the SEA procedure and submitted comments and suggestions (e.g. interest in a clean and healthy environment)?

In order to answer the last question, yet another question needs to be posed - what can be the decision of the competent authority? According to the SEA Law, a decision can be positive (approving the report) or negative (rejecting the approval of the report).[15] If the argumentation of the government is accepted, and the decision on SEA approval is not an administrative act against which it is possible to file an appeal, what happens when the competent authority rejects the approval? One can imagine the situation in which the authority responsible for the development of the plan coordinated the SEA process seamlessly and the report was completely developed in accordance with the law, and then, for whatever reason the com-

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12 The Law on General Administrative Procedure, Article 136.

13 The SEA Law, Article 3 para. 1 6). As opposed to Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment, *OJ L 197 of 21/7/2001* - SEA Directive, Serbian SEA Law differentiate 'public' and 'public concerned'.

14 The SEA Law provides for a public to participate in the procedure and submit its comments and opinion (Article 19), after which the authority responsible for plan and program development develops a report which provides an explanation of all accepted or rejected opinions (Article 20), which is submitted to the responsible environmental protection authority for assessment (Article 21). Based on the assessment the authority responsible for environmental protection decides whether to grant or deny the approval (Article 22). Although the SEA Law differentiates the public and public concerned in practice, the authorities are identifying these two terms and their rights to participate in the procedure. See Report on the Public Consultations on the First Draft of the SEA Law available at: *https://www.ekologija.gov.rs/informacije-od-javnog-znacaja/javne-rasprave/izvestaj-o-javnoj-raspravi-o-nacrtu-zakona-o-strateskoj-proceni-uticaja-na-zivotnu-sredinu* (last visited 10 September 2023).

15 The SEA Law, Article 22 para. 1. It is important to note that the Government within the Decision only envisages the possibility of the competent authority to grant the approval.

petent authority for environmental protection refused to grant approval? Or simply does not issue any decision at all and does not respond to the request?[16] What are the legal remedies that are at the disposal of the plan developer to protect his/her rights and interests? According to the government, there are none. Therefore, not only the concerned public but also the authority responsible for development and adoption of the plan is deprived of a legal remedy. The notion of the existence of the misdemeanour liability, which was raised by the authorities, clearly could not be considered as a legal remedy in SEA procedure, due to the fact that this is an individual liability of the responsible individual within the authority responsible for environmental protection, but which cannot affect the legal existence of the act. Nevertheless, it should not be forgotten that the right to a legal remedy has been declared one of the basic rights guaranteed by the Constitution of the Republic of Serbia.[17]

What are the elements of an administrative act in Serbian legislation? The administrative act is a uniliteral authoritative act of the public authority which bears a legally decisive character; it is an individual act based on the law which regulates the administrative matter of the administrative relationship in the corresponding administrative field (Tomić 2012, 217). An administrative act has a directly resolving character - producing direct legal consequences on the situation of the party concerned – the addressee acquires the right only once the administrative act directly recognizes that right (Tomić 2019, 209). An administrative act is always issued for a specific case, directly regulating the rights or obligations of a specific individual or group of persons (Tomić 2019, 210).

Therefore, the individual character of each act is evaluated in relation to whether it refers to a specific individual or a specific group of persons and directly regulates their rights and obligations, i.e., decides on their legal interest (Tomić 2012, 220). What could be considered as a right/legal interest in SEA procedure? In this case, the first-instance authority could only decide on the right and interest of the authority responsible for the development of the plan and its right to implement or not implement the plan.[18] It could also decide on the interest of the interested public and authorities and organisations elaborated during public partici-

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16 According to the Article 151 para. 3 of the Law on General Administrative procedure the party has the right to appeal if the decision is not issued within the deadline prescribed by the law. Consistent application of the argumentation of the Government would mean that, if the first-instance authority does not issue a decision, the party in the proceedings has no right to file an appeal due to the administration's silence, that is, that it has no mechanism to protect its rights in the event of such illegal conduct.

17 Constitution of the Republic of Serbia (Ustav Republike Srbije) („*Official Gazette of the Republic of Serbia*" nos. 98/06 and 115/21) - Constitution. See Article 36 para. 2.

18 Besides, when there are urban planning acts that are developed on the request of the private legal entity (the urban project prepared for the construction of a public purpose facility) the investors are also to be considered as an interested party to the procedure on which interests and rights the authority is deciding.

pation.[19] It should also be noted that, although claimed differently by the authorities, there is an obvious difference between the report as such and the approval to the report, which contains a decision on giving or not giving consent to the report, i.e. that it contains a decision which decides on the merits as to whether a certain document will have legal force or not - it is decided on the creation of a legal act.

It would be important to consider if not an administrative act, then what? If it contains a general norm, it would be considered as administrative regulation in accordance with Law on State Administration. However, administrative regulation could be brought only in the form of regulation, order, or instruction, and only extraordinarily in the form of a decision.[20] These regulations further elaborate the provisions of the laws addressing the unlimited number of persons and unlimited number of cases. If it is considered as an administrative regulation, this decision would be challengeable before the Constitutional Court. However, the authorities explicitly argued that a decision on the approval of the SEA report could not be challenged by itself before the Constitutional Court, but only as a part of the plan or program.

Although authorities focused their attention on the individual character of the act as a main differentiating element between an individual and a general act, it seems that another constitutive element of the administrative act needs to be assessed further. Namely, whether this is an act deciding in administrative matters? According to the Law on General Administrative Procedure, an administrative matter is an individual situation in which an authority, directly applying laws, other regulations, and general acts, legally or factually influences the position of a party by issuing administrative acts, guarantee acts, concluding administrative contracts, undertaking administrative actions, and providing public services.[21] An administrative matter is also any other circumstance that is determined by law as an administrative matter.[22] On the other hand, the Law on Administrative Disputes contains a rather wider definition and considers as an administrative matter every individual undisputed situation of public interest in which the need to authoritatively determine the future behaviour of a party arises directly

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19 For ex. the interest of the civil society organisation to a healthy and preserved environment. It should be noted that comprehensive protection of procedural rights that achieve environmental protection implies simultaneously strengthening the position of various subjects as parties in the process of making environmental decisions (Drenovak-Ivanovic 2019, 130).

20 The Law on State Administration (Zakon o državnoj upravi) („*Official Gazette of the Republic of Serbia*“ nos. 79/05, 101/07, 95/10, 99/14, 47/18 and 30/18). See Article 16 (See especially Tomić 2012).

21 The Law on General Administrative Procedure, Article 2 para. 1.

22 The Law on General Administrative Procedure, Article 2 para. 2.

from legal regulations.[23] It should be noted that, when issuing SEA approval in numerous cases, the Ministry of Environmental Protection explicitly called upon the Law on General Administrative Procedure as the legal grounds.[24] If this is to be considered as an administrative matter, then the Law on General Administrative Procedure is to be applied on matters that are not explicitly regulated by the SEA Law. In that case, all the procedural questions are efficiently addressed. Namely, the Law on General Administrative Procedure envisages a two-stage procedure unless otherwise prescribed by the law.[25] Therefore, the right to appeal must be expressly excluded (not provided for) either by the Law on General Administrative Procedure or by a special law, in this case by the SEA Law. The SEA Law does not exclude the appeal. Furthermore, it would also need to have all the elements of the administrative act and the competent authority would need to elaborate the reasons for issuing a decision that contradicts the decisions it had previously issued in similar matters.[26] Needless to say, the general principle of the Law on General Administrative Procedure which provides that certain issues of administrative procedure could be regulated by a special law only if it is necessary in certain administrative fields and does not reduce the level of protection of the rights and legal interests of the parties guaranteed by the Law on General Administrative Procedure would apply.[27]

3. How to recognize effective and adequate legal remedy when you see it?

The national or international authority may grant and proclaim the widest and most advanced rights to individuals and organisations, however, without effective access to justice they will remain only wishful thinking and toothless regulations. Without effective redress mechanisms, the authorities responsible for its implementation will not have any legal incentives to comply with the adopted regulation. Therefore, the basic concept of the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters - Aarhus Convention or Convention, is that wherever public authority fails to

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23 The Law on Administrative Disputes (Zakon o upravnim sporovima) („*Official Gazette of the Republic of Serbia*“ no. 111/09). See Article 5. According to Tomić (2012, 318) an administrative matter in the sense of Law on Administrative Disputes could be defined as a single undisputed life situation of public interest which, on the basis of the law, is necessary to be directly and concretely regulated legally.

24 For reference see the Ministry of Environmental Protection, Decision no. 350-02-145/13-05, 17 December 2013 and the City Administration of the City of Belgrade, Decision V – 04 no. 501.3-146/2020, 21 December 2020.

25 Article 13 para. 1 of the Law on General Administrative Procedure stipulates that the party has the right to appeal against the decision issued in the first instance, that is, if the authority in the administrative matter has not decided within the prescribed period, unless otherwise prescribed by the law. The quoted principle of two-stage administrative procedure is further specified in Article 151 of the same law.

26 The Law on General Administrative Procedure, Article 141.

27 The Law on General Administrative Procedure, Article 3 para 2.

respect rights and obligations under environmental laws, there should be the right for individuals and non-governmental organisations to hold them accountable (Pánovics 2020, 111).[28]

The third pillar of the Aarhus Convention is the access to the justice pillar, which provides an obligation to the Parties to the Convention to ensure the review procedure for violations of the rights granted within first two pillars of the Convention (access to environmental information requirements under the first pillar and public participation requirements).[29] In addition, the Convention prescribes the obligation of the party to ensure the possibility to challenge any other acts or omissions by private persons or public authorities which contravene provisions of its national law relating to the environment.[30] The Aarhus Convention requires that members of the public have access to administrative or judicial procedures to challenge acts and omissions by public authorities without listing limitations in regard to the acts or authority.[31] As far as court or court-like bodies are concerned, Parties have flexibility in deciding how to structure their appeal systems.[32] In order to enable effective environmental protection, the Aarhus Convention grants a unique role to organizations engaged in environmental protection.[33]

The Aarhus Convention Compliance Committee - ACCC or Committee is the monitoring authority responsible for reviewing Parties compliance within the provisions of the Convention.[34] The compliance mechanism under the Aarhus Convention has a distinctive feature differentiating it from compliance mechanisms of other international environmental agreements, and although it is not a court, its opinions provide an authoritative interpretation of the provisions of the Convention (Jendrośka 2011, 302). The findings of the ACCC provide

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28 The protection of the public's interests and the enforcement of the law stand behind the obligations contained in the rest of the Convention. See Aarhus Convention Implementation Guide - In 2014 United Nations Economic Commission for Europe (UNECE) published its Aarhus Convention Implementation Guide. The guide is available at: *https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf* (last visited 20 October 2023) – Aarhus Convention Implementation Guide.

29 The Aarhus Convention. See Article 9 para. 1 and Article 9 para. 2.

30 The Aarhus Convention, Article 9 para. 3. The implementation of the provisions of Article 7 on public participation concerning plans, programmes and policies relating to the environment (especially the provisions incorporated from article 6) could be reviewable both under article 9, paragraph 2 and 3. See Aarhus Convention Implementation Guide, 193.

31 The only determination of the scope of review within Article 9 para. 3 is that members of the public shall have access to "administrative or judicial procedures".

32 Aarhus Convention Implementation Guide, 188.

33 The significant role of these environmental protection organizations is a counterweight to the decision to introduce a mandatory *actio popularis* for cases involving environmental protection (Masternak-Kubiak 2018, 367).

34 Decision I/7 of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, ECE/MP.PP/2/Add.8 of 2/4/2004.

important guidance for governments, academia, practitioners, and civil society on how to shape future instruments and enforce current ones (Andrusevych, Jo 2017, 737).

When evaluating the compliance of the concerned Party with article 9 of the Convention, the Committee evaluates overall access to justice, in light of the purpose also reflected in the preamble of the Convention, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced".[35] The ACCC has regularly pointed out that Article 9 (3) "is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment".[36] Therefore, the decisive question is whether the contested decision has the potential to affect the environment. The ACCC has adopted a wide interpretation of the term "law related to the environment".[37] It has held that the term encompasses any law under any policy, such as control of chemicals and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact the environment.[38] Therefore, there is no doubt that the SEA Law amounts to a law related to the environment in the sense of Article 9(3) of the Aarhus Convention.

More specifically, in its findings on communication ACCC/C/2011/58 (Bulgaria) the ACCC has identified that where an SEA is prepared for a plan related to the environment, "the possibility of members of the public to challenge the SEA statement should then be ensured in accordance with article 9, paragraph 3, of the Convention."[39] This unequivocally clarifies that members of the public have a right under Article 9(3) of the Aarhus Convention to challenge

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35 Aarhus Convention, preambular para. 18. See also findings on communication ACCC/C/2006/18, Denmark, ECE/MP.PP/2008/5/Add.4, para. 30.

36 ACCC/2005/11, Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para. 28 and ACCC/C/2008/32, European Union, ECE/MP.PP/C.1/2017/7, paras. 98-99 stating that the requirement of Article 9(3) "is to provide a right of challenge where an act or omission - any act or omission whatsoever by a Community institution or body, including any act implementing any policy or any act under any law – contravenes law relating to the environment".

37 ACCC repeatedly emphasized that public participation is not limited to the environmental aspects of the proposed activity, and that review procedures should not be limited to alleged violations of national law that "serve the protection of the environment", "relate to the environment" or "promote environmental protection" , because there is no legal basis for such a limitation in the Aarhus Convention. For reference see ACCC/C/2008/31, Germany, ECE/MP.PP/C.1/2014/8, 4 June 2014 and ACCC/C/2010/50, Czech Republic, ECE/MP.PP/C.1/2012/11, 2 October 2012.

38 See ACCC/C/2011/63, Austria, ECE/MP.PP/C.1/2014/3, para. 52, ACCC/C/2005/11, Belgium, ECE/MP.PP/C.1/2006/4, 28 July 2006 and ACCC/C/2011/58, Bulgaria, ECE/MP.PP/C.1/2013/4, 11 January 2013.

39 ACCC/C/2011/58, Bulgaria, ECE/MP.PP/C.1/2013/4, para. 58.

an act approving an SEA for a plan.[40] However, ACCC took a position that the mere fact that the SEA statement cannot be reviewed separately from the plan does not equal to non-compliance with the requirements of article 9, paragraphs 2 and 3, providing that members of the public can challenge the SEA statement together with the decision adopting the subsequent plan or programme.[41] In addition, in examining access to justice concerning the different types of acts (SEA statements, spatial plans or construction and exploitation permits), the Committee assesses whether a decision should be challengeable under article 9, taking into consideration the legal functions and effects of a decision, not its label under national law.[42] Therefore, in order to find the lack of effective legal remedy there is a need to assess scope and standard of review before the competent court in every case, i.e. to assess what can be brought before the court and whether the court would review procedural and substantive breaches of SEA while assessing legality of plan or program.

However, the mere existence of legal remedy does not provide for access to justice since it needs to be effective and suitable as well. This requirement acknowledges the Aarhus Convention providing that parties to the Convention must provide suitable and effective remedies, including injunctive relief as appropriate, and be fair, equitable and timely.[43] In assessing whether the Convention's requirement for effective access to justice is met by the concerned Party, the Committee evaluates the different possibilities for access to justice, available to members of the public in different stages of decision-making ("tiered" decision-making).[44] In assessing the effectiveness of judicial mechanisms, the scope of remedies and the length of the process should also be taken into account.[45]

The opportunity for members of the public to challenge decisions approving an SEA is established and well-used throughout Europe. Under EU *acquis* the obligation to carry out an SEA is a directly effective obligation under the SEA Directive,[46] which must be enforced in national

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40 The communicant alleged that Bulgaria failed to provide for access to justice with respect to SEA statements for plans and programmes. It contends that the core of the problem is the lack of clear and express wording within the law as to whether an SEA statement is an individual administrative act subject to appeal before a court of law under the Administrative Procedure Code. See ACCC/C/2011/58, Bulgaria, ECE/MP.PP/C.1/2013/4, 11 January 2013.

41 ACCC/C/2011/58, Bulgaria, ECE/MP.PP/C.1/2013/4, para. 60.

42 See ACCC/C/2005/11, Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para. 29 and ACCC/C/2006/16, Lithuania, ECE/MP.PP/2008/5/Add.6, para. 57.

43 The Aarhus Convention. See Article 9 para. 4 and 9 para. 5.

44 See ACCC/C/2011/58, Bulgaria, ECE/MP.PP/C.1/2013/4, para. 52

45 The length of the process, to the extent that expected delay might bar members of the public from using it, is an issue of accessibility as well as effectiveness. Timeliness of review procedures is also very important under Article 9. This requirement reinforces the requirement of Article 9 para. 1 that Parties ensure an "expeditious" review process. See Aarhus Convention Implementation Guide, 35.

46 CJEU, Case C-41/11, Inter-Environnement Wallonie ASBL and Terre wallonne ASBL, ECLI:EU:C:2012:103, para. 42.

courts.[47] With regards to the possibility of challenging the legality of plans and programmes and/or the SEA procedure, it should be noted that, in general, access to a review procedure varies in accordance with the legal nature of the object of the judicial review. More specifically, two scenarios apply in the Member States, depending on the nature of the act within the national legal order: in some Member States, the decisions taken in an SEA procedure are considered administrative acts and thus can be challenged directly, whilst in other Member States, SEA-related acts are considered part of the main act/decision, i.e. the plan or programme itself, and cannot be challenged directly. In such cases, the possibility of challenging the plan or programme itself will also vary depending on the nature of that plan or programme (sometimes the act can be challenged, but only subject to a specific procedure, or the act cannot be challenged at all).[48]

The issue of determining which decisions could be challenged before administrative and judicial authorities is not unique to Serbia. The EU had its own decade-long legal battle when it came to the understanding and definition of the "administrative", under the Aarhus regulation. Namely, according to Regulation 1367/2006/EU, environmental civil society organisations that meet certain requirements could submit a request for 'internal review', i.e. request from the EU authorities to consider whether an administrative act it has adopted is contrary to EU environmental law.[49] The term "administrative act" was defined as „any measure of individual scope under environmental law, taken by an EU institution or body, and having legally binding and external effects".[50] The interpretation of the term before the Court of Justice of the European Union and scope of the review was at the centre of many environmental challenges being brought before the Court, which finally led to procedure before the ACCC.[51] The

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47 Commission Notice, no. C/2017/2616 on access to justice in environmental matters**,** OJ 2017 of 18/8/2017, para. 47.

48 Plans and programmes are, in most cases, considered general administrative measures and can be either challenged directly, with a narrow legal standing (in some countries this is broader in case of spatial plans), and/or incidentally, via the review of an act based on those plans and programmes, with a broader legal standing. When plans and programmes are considered a legislative act or similar, where challengeable, they can normally only be challenged by a very restricted group of persons (which will not include the general public or civil society organisations) and in a specific judicial procedure reserved for challenging legal acts. For example, in Slovenia, the judicial review of plans and programmes was not possible until 2018. See Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters - Final report from September 2019. The study is available at: *https://unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-3_European_Union/Correspondence_with_the_Party_concerned/frPartyM3_28.10.2019/frPartyM3_28.10.2019_C32_att1.pdf* (last visited 20 October 2023).

49 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ L 264 of 25/9/2006* - Aarhus Regulation , Article 10.

50 The Aarhus Regulation. See Article 2 para. 1 (g).

51 For reference see CJEU, Case C-401/12 , Vereniging Milieudefensie and others, ECLI:EU:C:2015:4 and CJEU, Case 25/62, Plaumann and others, ECLI:EU:C:1963:17.

ACCC found that the EU is not in compliance with its obligations under the Aarhus Convention, if the Court of Justice maintains its restrictive interpretation of Article 263(4) TFEU providing only review of the certain permits and authorisation.[52] On 6 October 2021, the Aarhus Regulation, was amended providing a new definition of administrative acts, which now refers to acts having 'legal and external effects', and no longer contains any exception for those provisions that require implementing measures at EU or national level, enabling the public to challenge both acts of general and individual application.[53] The amendments ultimately lead to an increased number of decisions being challenged before the EU authorities.[54]

4. When in doubt – reject!

Serbia ratified the Aarhus Convention in 2009 and partially transposed Article 9 para. 3 into its national legal system through Article 81a of the Law on Environmental Protection providing that "the interested public in the process of exercising the right to a healthy environment, as a party, has the right to initiate the process of reviewing the decision before the competent authority, i.e. the court, in accordance with the law".[55] Sustainable management of natural resources and environmental protection are carried out in accordance with the Law on Environmental Protection, as a general law, and special laws regulating specific areas of environmental protection, including SEA Law.[56] According to the Serbian Constitution, international treaties, ratified according to the constitutional order, are part of the national law and have supremacy over provisions of the national laws which contravene them.[57]

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52 The communicant alleged that in limiting the possibility to resort to the internal review request procedure under Article 10 of the Aarhus Regulation to acts of individual scope, the Regulation in fact limits it to permits and authorisations. Moreover, not all permits and authorisations are considered as administrative acts. Only those addressed to one operator/manufacturer/producer are considered to be such. As a result, very few decisions adopted in environmental matters can be challenged. See ACCC/C/2008/32, European Union, ECE/MP.PP/C.1/2017/7, 14 April 2011.

53 Regulation (EU) no. 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 356 of 8/10/2021, preamble 8 and 9.

54 The civil society organisation ClientEarth published in 2023 an assessment of the application of the ammended Arhus Regulation, available at: *https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/the-amended-eu-aarhus-regulation-one-year-in-new-requests-in-review/#:~:text=On%206%20October%202021%2C%20Regulation,10%20of%20the%20Aarhus%20Regulation* (last visited 21 October 2023).

55 It shall be noted that the right to challenge the omissions was 'lost in translation'. The Law on Confirming the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters ("*Official Gazette of the Republic of Serbia*", International agreements, No. 38/09) and Law on Environmental Protection (Zakon o zaštiti *životne* sredine) ("*Official Gazette of the Republic of Serbia*" nos. 135/04, 36/09, 36/09, 72/09, 43/11, 14/16, 76/18, 95/18 and 95/18).

56 The Law on Environmental Protection, Article 2 para. 2 and Article 10.

57 The Constitution, Article 16 para. 2 and Article 194 para. 4.

In Serbia, normative control of the general acts lies within the Constitutional Court which is authorized to assess compliance of any general act with laws and the Constitution.[58] The public concerned is not *ex-lege* entitled to initiate procedure before the Constitutional Court but can only submit an initiative to assess the legality of the acts of general application.[59] The court could either accept the initiative and commence the procedure or reject the request.[60] It could also reject the request if the argumentation is not supporting the claim that there is a basis for initiating the procedure for the assessment of constitutionality or legality.[61] In the structure of the total resolved cases related to normative control, the largest number of initiatives by far was rejected using this possibility by the Constitutional Court.[62]

Formally, there is no barrier to initiating the procedure of assessment of the plan based on the violation of SEA Law, but the notion of timelines and the scope of the assessment in these specific procedures is yet to be evaluated, having in mind the lack of legal practice in the field. With regards to the availability of injunctive relief, there is a possibility of requesting the suspension of the execution of an individual act or an action undertaken on the basis of a general act whose constitutionality or legality is being challenged. However, the standard of proof is undoubtedly high – the applicant would need to prove that the execution of that act could lead to irreparably harmful consequences.[63] But what if the plan is directly applicable and there is no need to issue individual acts, as is the case with NERP? In that case it appears that injunctive relief would be out of reach to the applicant. However, knowing that the procedure

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58 The Constitution, Article 168.

59 The Constitution, Article 168. It shall be noted that number of initiatives for normative assessment before the Constitutional Court is in considerable decline. The share of cases related to normative control in the total number of cases, observed from 2009 until 2019, is extremely small and ranges from 1.28% in 2019 to 15.53% in 2009. In 2021 Centre for Judicial Research (CEPRIS) published study called "Normative control of constitutionality as a basic(?) competence of the Constitutional Court of Serbia". The study is available at: *https://www.cepris.org/wp-content/uploads/2021/07/CEPRIS-NORMATIVNA-KONTROLA-USTAVNOSTI-KAO-OSNOVNA-NADLEZNOST-USTAVNOG-SUDA-SRBIJE-2009-2019.pdf* (last visited 23 October 2023) – Constitutional Court Study.

60 The Law on Constitutional Court (Zakon o Ustavnom sudu) ("*Official Gazette of the Republic of Serbia*" nos. 109/07, 99/11, 18/13, 103/15, 40/15, 10/23 and 92/23), Article 53.

61 The Law on Constitutional Court, Article 53 para. 2.

62 The number of initiatives rejected by conclusion, in the total number of cases related to normative control, ranges from 35.68% in 2010 to 81.06% in 2015. In the period from 2009 until 2019 most of the resolved cases in the proceedings in which the government's decisions were contested, were concluded by rejection of the initiative with over 50% of the total number of resolved cases in 8 of the 11 observed years, but with a tendency for a continuous and significant increase in the number of cases resolved in this way from year to year (from 9.09 in 2008 to 100% in 2018 and 2019). See. Constitutional Court Study, 16.

63 The Law on the Constitutional Court, Article 56 para 1.

before the Constitutional Court could last for years, certain plans could be fully implemented by the time the Court reaches a decision.[64]

5. If it looks like a duck, walks like a duck and quacks like a duck – it must be a cow?

It is a fundamental fear that environmental concerns are systematically understated, bearing in mind that the environment itself has no voice - and nor do future generations.[65] Therefore it is of the utmost importance to develop effective instruments, procedures and mechanisms to protect the environment. Consequently, the key question arises - who shall lend a voice to the environment if there is legal wrongdoing? Or as L. Kramer asked, "Who watches the watchers?"[66] Administrative authorities also make mistakes, and the purpose of administrative control is higher quality and more effective work of public administration, but also individual protection of the rights and legal interests of citizens and organizations (Tomić 2019, 65).

It is widely recognized that the involvement of the public in environmental matters is essential to the promotion of sustainable development, democracy and a healthy environment. Effective access to justice for members of the public includes many more factors than just legal standing. A crucial question in this context is to what they are entitled when they are allowed to challenge an environmental decision before the court (Darpö 2013, 16). The issue of access to justice, effectiveness and enforcement of the law is a fundamental component of the rule of law (Poncelet 2012, 289), as well as legal certainty.[67] This principle requires that rules of law should be known, clear, precise, stable, certain and predictable and any act of the author-

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64 The Constitutional Court could determine the method of eliminating the consequences that arose due to the application of the general act but some consequences could be irreparable. A high number of cases (29 672) are pending before the Constitutional Court. During 2022, in cases of assessment of the constitutionality and legality of decrees and other acts of the Government, the Constitutional Court issued one decision on the determination of unconstitutionality and illegality, one decision on the rejection of the initiative for initiating the procedure for the assessment of constitutionality and legality, and 11 conclusions on the rejection of initiatives due to the lack of procedural assumptions. See Overview of the work of the Constitutional Court in 2022, available at: *http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/%D0%9F%D1%80%D0%B5%D0%B3%D0%BB%D0%B5%D0%B4_2022.pdf* (last visited 24 October 2023).

65 As Advocate General Sharpston noted at the hearing in the Trianel Case before the Court of Justice of the EU, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV,* EU:C:2011:289*, 'the fish cannot go to court'*

66 Mr. Kramer (2014, 261) argued that as the environment is everybody's, this task can only be assumed by civil society, and the way to do this is to appeal, in the case of disputes between the public authorities and the civil society, to the arbiters – the courts.

67 See the report of the United Nations Secretary-General from 2004 - Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies.". Report is available at: *https://digitallibrary.un.org/record/527647?ln=en* (last visited 25 October 2023).

ities foreseeable (Van Meerbeeck 2016, 280). If the public is deprived of effective legal remedies and is left to the arbitrary decision of each authority, then the rule of law is out of the picture. It is widely accepted that without the rule of law the enjoyment of any other human right, including the right to a healthy environment, is simply not possible.[68]

In Serbia there is a constant tendency to transfer the preventative decision making to the assessment of the impacts of the specific projects to the environment, while strategic environmental assessment is persistently overlooked. However, strategic and planning processes shape projects and appraising them offers the chance to influence the kinds of projects that are going to happen, not just polish the details of such projects (Therivel 2010, 18). Moreover, a SEA deals with impacts that are impossible to assess at the project level.[69] Bearing in mind these differences, it is not enough to have the possibility to challenge only decisions approving EIA studies.

The sudden shift of the Serbian authorities when it comes to the legal remedies in SEA procedure does not contribute to legal certainty. On the contrary, it has resulted in contradictory and unpredictable practice by administrative authorities. The newly adopted practice of government authorities poses more questions than it offers solutions. It seems that while the authorities were trying to maintain the notion of the authority's infallibility, they deprived other actors from the possibility to challenge wrongful decisions. This kind of practice poses a question regarding the accessibility and effectiveness of legal remedies on which the Administrative and Constitutional Court are yet to decide. Another direction would certainly be through legislative reforms, which, this time, seem to have failed to deal with it in a more detailed way, and systematically approach the solution to this problem.[70]

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68 Due to the fact that our global community is threatened by persistent and flagrant human rights violations, increasingly complex conflicts and the triple planetary crisis of climate change, pollution and a dramatic loss of biodiversity the United Nations Secretary General in July 2023 proposed new vision of the Rule of Law which will be people centred. The proposal is available at: *https://www.ohchr.org/en/documents/tools-and-resources/secretary-generals-new-vision-rule-law* (last visited 26 October 2023).

69 For ex. SEA can deal with cumulative and synergic impacts, larger-scale environmental impacts such as those on biodiversity and global warming (Therivel 2010, 18).

70 Although civil society organisations tried to put this matter on the agenda of decision-makers, in the proposal of new Strategic Environmental Assessment Law this issue was not tackled. See Proposal for the new Strategic Environmental Assessment Law available at: *http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/13_saziv/1917-23.pdf* (last visited 20 October 2023).

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Public participation and the right to information shown through the prism of small hydropower projects

Abstract: The right to information and public participation concerning small hydropower projects is regulated by law in most countries. Generally, such regulations require that the public be provided with adequate information about the project, as well as the opportunity to express their opinion about it. Accordingly, investors planning to build small hydropower plants are usually required to conduct a public hearing on the project and provide public access to relevant documentation, such as environmental impact studies and other analyses. In addition, there are legal requirements regarding the right to public participation in the process of issuing permits and building permits. Public participation in small hydropower projects usually includes the opportunity to express an opinion on various aspects of the project, such as environmental impact, use of water resources, and other social and economic factors. Public inspection of the project documentation and the possibility to submit an objection or complaint are also important elements of public involvement in the procedure. All these measures should enable the public to be involved in decision-making on small hydropower projects and to take into account the various interests and concerns of citizens, as well as the possible impact of the project on the environment and socio-economic development.

Keywords: Aarhus Convention, small hydropower projects, public participation, environmental law, information

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1. Introduction: Small hydropower plants

Renewable energy sources are sources that have many advantages over non-renewable energy sources. Their primary advantage is that their impact on the environment is much smaller compared to nuclear and fossil-fuel thermal power plants and other plants that, by burning their energy sources, contribute to polluting the atmosphere, creating greenhouse effects and many other natural disasters that are becoming more frequent lately. Also, the advantage of renewable energy sources is that their potential is enormous and that their resources are replenished at the same time as they are consumed. The reserves of renewable sources are so large that these sources can become primary sources in the production of electricity. However, despite all its advantages and good features, the use of renewable resources can also have some negative effects on the environment.

Water energy (hydropower) is the most important renewable energy source, and at the same time the only one that is currently economical and in electricity production, competitive with fossil fuels and nuclear energy. Plants for converting water energy into electricity are called hydropower plants. According to the installed power, hydropower plants are divided into: small hydropower plants (installed power less than 10 MW) and large hydropower plants (installed power greater than 10 MW). Of course, there are several divisions of hydropower plants by different categories, however, from a legal point of view, the division into small and large hydropower plants is the most significant, because different legal rules and procedures apply to each group. In this paper, only the procedures and legal rules that apply to small hydropower plants are dealt with, and a special focus is placed on the first two pillars of the Aarhus Convention - the right to information and public participation, and how they can influence the very outcome of projects.

This global shift towards the use of small hydropower plants is driven by the perception of their advantages over large dams: almost no carbon emissions, limited environmental impact, lower engineering requirements, shorter construction periods, and lower overall investment costs.[1] When discussing the possibilities for building small hydropower plants, it is important to emphasize that the previous approach, in which the potential of small hydropower plants was generally presented based on the value of technically exploitable potential, is not aligned with contemporary considerations, especially in view of the highly developed environmental awareness of people and the already adopted principles of sustainable development. Namely, several decades ago, when ecology as a science did not carry much weight in the realization of most construction projects on the one hand, and the opinions of the local community were

1 Haines, Scheelbeek 2020, 27

not significantly taken into account on the other, what was considered technically exploitable potential was generally accepted for realization, naturally taking into account the economic feasibility of each project. Nowadays, during the planning and construction processes, investors face a significantly greater number of restrictions, which in many cases limit the initially defined technically exploitable potential to smaller amounts, and in some cases, completely prevent any interventions in the area.[2] These restrictions have been further influenced by the European Union, with which we aim to harmonize our legislation and establish high environmental standards.

The former approach acts as evidence of the marginalization of environmental concerns in the EU enlargement process. This is clear from the lack of mention of environmental concerns in the accession criteria outside the acquis, and in the numerous transitional measures that have either reduced domestic environmental standards in order to prevent trade barriers or allowed delays in the process of harmonization with the Union's higher environmental standards.[3]

2. Procedure and duration of construction of small hydropower plants in Montenegro

Examples from Montenegro were taken as the subject of this analysis of the construction of small hydropower plants, but all the problems that I elaborate in this paper can be applied to the entire Balkans. The legal framework for the design and construction of small hydroelectric power plants in Montenegro consists of a series of procedures: issuing approvals, permits and licenses, observed from the process of awarding the concession to the issuance of the operating permit for the power plant. What can be seen is that the period of design and construction of small hydropower plants is extremely intensive and long. The existing legal framework that directly relates to the preparation and construction of small hydropower plants is a combination of regulations in the field of energy, spatial planning and construction, property-legal relations, water ownership, private investment in the public sector, environmental protection and corporate law. All this cumulatively represents the basis for the realization of the construction of small hydropower plants.

The entire authorization process is divided into five phases: the first phase - includes documents and activities related to location selection, i.e. investigative work, location selection, design (at the level of conceptual technical solution), preparation of a preliminary feasibility

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2 Ministry of Economy of Montenegro, 2006, 4–6
3 Bogojević, Drenovak-Ivanović 2019, 976

study, inclusion in spatial and urban plans and inclusion in the water management base; the second phase – includes documents and activities related to the process of awarding the concession/BOT (Build-Operate-Transfer) contract[4]; the third phase - includes documents and activities related to the preparation and obtaining of location decisions and construction permits and other consents and permits along with the resolution of property-legal relations; the fourth phase - includes documents and activities related to construction, obtaining a use permit, water permit, activity license and concession license or BOT privilege approval and the fifth phase - includes documents and activities related to the handover of small hydropower plants and registration , then operation, supervision, control and maintenance of small hydropower plants during the lifetime of the plant. The duration of the entire authorization process for the construction of small hydropower plants is estimated to be slightly less than six years (minimum time). This assessment assumes that there are hydrological bases for the location where the small hydropower plant is being built, but there are no other necessary bases (geological, data on the state of the environment, etc.). The construction period of one year is also included in the estimation of the duration of the procedure. It should be pointed out that this assessment is tentative and optimistic, because at this stage of elaboration, not all bottlenecks and problems of a procedural nature can be seen, so deadlines are not exactly prescribed for certain parts of the procedure.[5] In all stages of this procedure, the public has the right to be informed and involved, and in some cases this may contribute to delaying the implementation of the project.

From Article 24 line 1 of the Energy Law of the Republic of Montenegro it follows that "the final customer of electricity is obliged to pay a fee for encouraging the production of electricity from renewable sources and high-efficiency cogeneration as an addition to the price of electricity..", this provision obliges citizens to help the development of renewable energy sources, among others, small hydropower plants that can be an expensive investment, with negligible performance (little electricity), and a huge negative impact on the environment. It is necessary to constantly assess the potential of small hydropower plants as a renewable energy source in relation to their impact on the environment, as well as to review the justification of the adopted incentive measures in this area. Here, the public and the right to information can play a key role.

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4 BOT contract (Build-Operate-Transfer) is a type of public-private partnership (PPP) where a private company is responsible for the design, construction, operation, and maintenance of a project, typically infrastructure, for a specified period. After this period, ownership and operation of the project are transferred to the government or the public sector entity.

5 Energy Institute Hrvoje Požar 2006, 12

Property-legal relations include two laws that contain normative solutions that may concern the design and construction of small hydropower plants, namely the Law on Property-Legal Relations and the Expropriation Law. The Law on Property-Legal Relations[6] regulates right of ownership and easement, possession of movable and immovable property, as well as the methods of acquiring, transferring, protecting, and terminating these rights. The right of servitude as an institute entitles the owner of one immovable property (privileged property) to perform certain actions on the immovable property of another owner (servient property) for the needs of that property, or to require the owner of the servient property to refrain from performing certain actions that he would otherwise have the right to perform on its immovable property.[7] The institute of easement is important because it is used during preparatory actions for the construction of small hydropower plants In this regard, it is important to note that easements can be established for a specific period, based on a legal transaction or a decision of a state authority, and that the same right is acquired through registration in a public register or by another method determined by law. The Expropriation Law[8] defines the basic concepts related to expropriation, the procedure for determining the public interest, the preparatory actions that need to be performed for the purpose of expropriation, the expropriation procedure itself, as well as the issue of compensation for the same. The investor of a small hydropower plant resolves the need to regulate ownership relations by means of legal affairs (contracts, agreements) with the holders of the property rights of the immovable property, which is the object of his interest. In case of impossibility of mutual agreement with all participants of the agreement, there is an opportunity to start the expropriation procedure before the competent authorities, if there is a public interest that must be determined by a special law or a decision of the Government. Any need for easement rights is resolved with the owners of servient goods on the basis of a legal transaction with fair compensation.

In the research of the legal framework for the design and construction of small hydropower plants, the Forests Law[9] was found as a law which may eventually affect the construction of the small hydropower plants. Of course, hydropower plants are not mentioned in the law itself, but there are provisions that can have an impact:

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6 Official Gazette of Montenegro, No. 19/2009
7 Article 194
8 Official Gazette of the Republic of Montenegro, No. 55 of December 1, 2000; 12/02, 28/2006, Official Gazette of Montenegro, No. 2 of March 27, 2008
9 Official Gazette of Montenegro, No. 074/10 of 17.12.2010, 040/11 of 08.08.2011, 047/15 of 18.08.2015

Also according to Article 38, the change of use of protected areas of forests, i.e. forest land to construction or other land by clearing, can only be carried out in accordance with a spatial planning document, i.e. the forest development plan in accordance with the law.

Deforestation from paragraph 1 of this article is a procedure that removes all forest trees in a stand due to a change in the use of forest land. The change of purpose referred to in paragraph 1 of this article can be carried out: in cases where it is required by the public interest established by law or on the basis of law.

Article 41 has a similar function, which prohibits the construction of permanent or temporary structures in protected area of the forest, on forest land and on bare land, which are not in the function of forest management, game and hunting, nature protection or in the public interest.

The aforementioned provisions confirm that it is possible to encroach upon forested areas if it serves the public interest, allowing for the construction of small hydropower plants based on the approval of the competent local government authority and with the consent of the ministry responsible for forestry affairs. In accordance with the Energy Law and the Law on the Participation of the Private Sector in the Performance of Public Services, several ways of performing public activities are foreseen in relation to the contractual form (lease agreement, management agreement, concession and BOT). Contractual forms of concessions or a combination of concessions and a contract on construction, operation and transfer are suitable for the implementation of small hydropower projects.

In the Concession Law of Montenegro, energy efficiency is represented in three articles which prescribe, among other things, that: the concession deed, according to the subject of the concession, contains measures for environmental protection and improvement of energy efficiency in accordance with regulations; the criteria on the basis of which bids are evaluated, depending on the subject of the concession, include the program and level of environmental protection and measures to improve energy efficiency; as well as the concession contract that contains rights and obligations regarding the undertaking of measures to ensure and improve energy efficiency.[10] Concession granting is based on the principles of transparency, non-discrimination and competitiveness. Concessions are granted on the basis of the annual plan adopted by the Government, that is, the municipality, and published on the website. The term for which the concession is granted is determined depending on the public interest, the subject of the concession, the time required for the return of the investment and the realization

10 European Fund for the Balkans 2010, 19

of an adequate profit on the basis of the concession activity. The term cannot be longer than 30 years when the decision on granting the concession is made by the Government and the municipality, nor longer than 60 years when the decision on granting the concession is made by the Assembly. The process of granting a concession is initiated by the competent authority by drawing up a concession act. After that, the competent authority submits the concession act to the Government with an analysis of the justification of achieving the public interest by granting the concession; a report on the public hearing; an indication that the planned concession provides appropriate value for the money invested; an analysis of the risk assessment and balancing between the grantor and the concessionaire; and, an assessment of the need for the grantor's participation in the role of the concessionaire company. Among other things, the concession deed should contain measures for environmental protection and the improvement of energy efficiency in accordance with regulations. As for the method of awarding the concession, it is given on the basis of a public announcement, through public bidding in an open procedure; public bidding in a two-stage procedure; and, public bidding in an abbreviated procedure. What is interesting is that in Article 20 paragraph 2 line 7 the possibility is allowed that the procedure of public bidding based on a public announcement can be excluded in the case of using natural resources based on an energy permit issued in accordance with the law regulating energy. The question is whether this provision can support the violation of the principle of competitiveness.

The procedure that is followed in the case of granting a concession to small hydropower plants is a public bidding procedure in a two-stage procedure. A two-stage procedure is conducted in cases of granting a concession for projects that are complex from a technical, technical-technological, legal, financial or other point of view and/or when a large number of bidders is expected. With a public advertisement for a public tender in a two-stage procedure, the competent authority determines the pre-qualification criteria that bidders must fulfil in order to qualify for the tender procedure. Prequalification criteria are determined in accordance with the subject of the concession. Also, there may be a need to conduct a competitive dialogue for the granting of a concession if the competent authority does not have solutions for the realization of a complex object from a technical, technical-technological, legal, financial or other point of view. In fact, the public advertisement for prequalification determines the criteria for the selection of bidders for the competitive dialogue and the subject of the concession with the necessary elements for its realization, for which the appropriate solution should be selected. Article 41 also regulates the possibility of supplementing the plan by an interested person. So that an interested person can submit an initiative to supplement the annual plan to the competent authority. This article actually enables any natural and legal person who

believes they have a location and solution for designing small hydropower plants to participate in the annual plan.

Spatial Planning and Building Construction Law[11] is the main regulation that regulates the spatial planning system of Montenegro and it contains all regulations and procedures that are part of the normative system related to spatial planning. Spatial planning is considered to be the monitoring of the situation in the space, the preparation and adoption of planning documents and the implementation of planning documents.[12] The planning document determines the appropriate organization, use and purpose of the space, as well as measures for arranging, protecting and improving the space. The planning document has the character of a public document. Planning documents must be mutually harmonized, with the fact that the plans of narrower territorial units must be, in terms of the purpose of the space and the concept of its arrangement, harmonized with those of wider territorial units. Planning and arrangement of space must be harmonized with special regulations (area of environmental protection, air, forests, water, etc., protection of energy, mining and industrial facilities, prevention and protection from accidents, etc.). The public has the right to participate in the process of planning and arranging space (preparation and adoption of planning documents, initiatives, opinions, etc.).

Analysing the laws individually, one notices insufficient definition and vagueness of terms and procedures concerning the design of small hydropower plants. Certain parts of this process are under the jurisdiction of various state bodies, and some require further elaboration and clarification. Considering the distribution of the entire process, which is long and quite confusing due to the competences between several bodies of state and local administration, there is a need to unify and direct the construction projects of the hydropower plant through one comprehensive procedure.

3. Guidelines of the energy community on small hydropower plants in the Energy Community (EC)

The Energy Community is an international organization established for the purpose of establishing a common energy market and strengthening regional cooperation in the field of energy in Southeast Europe and Turkey. The organization was founded in 2005 by the Agreement on the Establishment of the Energy Community, which was signed by the countries of the European Union, the countries of Southeast Europe and Turkey. The goal is to harmonize national

11 Official Gazette of Montenegro", no. 64/2017, 44/2018, 63/2018, 11/2019 - amended and 82/2020
12 Article 7

legislation in the field of energy with the legislation of the European Union and thus create a single energy market, which should result in a reduction of costs and ensure energy security.

The Energy Community (EC) has recognized that the effects of small hydropower projects have a cumulative character and can be felt in large parts of river basins or even in the entire area. The re-examination of the attitude towards small hydropower projects was due to strong concerns and criticism about the impact of hydroelectric power plants on nature and quality of life. That is why the Community launched a public consultation. As a result of this public discussion, the document "Guidelines of the Secretariat of the Energy Community on small hydropower projects in the energy community" was adopted on September 17, 2020. This document aims to provide general guidelines for environmental assessment (environmental impact assessments at the project level and strategic environmental assessments at the plan/programme level) applicable to the administrative and permitting procedures of new hydropower projects of the Contracting Parties. Furthermore, these guidelines may qualify as state aid and must therefore be assessed and approved by the competent national government authority. Finally, they provide indications and criteria on which the Secretariat can make its legal assessments in the case of submitted complaints. The contracting parties should respect the targets of energy generated from renewable sources. In the process, additional hydropower projects seem to be obvious candidates. Hydropower is also considered by many to be a cost-effective and reliable solution, which can relieve the increase of intermittent renewable sources. However, environmental protection must be the primary goal in the case of such projects and must be fully compliant with the acquis Communautaire concerning the environment and this represents the minimum in the design, construction and operational phase. The development of small hydropower projects can have a significant impact on a number of different factors, for example: nature and biodiversity, population, human health, agriculture, land, water and landscape. If such impacts and risks are not properly assessed in the development phase of the project, the negative consequences can be even greater and, in certain cases, irreversible. Local communities dependent on the use of small watercourses in remote areas may be disproportionately affected by such damages. Hydropower projects are by definition site-specific and adapted to local conditions. the success of the project depends on several factors: water rights, land trade, access to the site, purchase and support of local municipalities. Consultation and two-way communication throughout the entire project development process is essential, and it starts as early as the planning stage. This requirement is also included in the provisions of the environmental impact assessment directives related to public involvement, the aim of which is to increase the accountability and transparency of the deci-

sion-making process and to contribute to public awareness of environmental issues and support for decisions made.[13]

4. Impact of small hydropower plants on the environment

What characterizes hydropower plants in general is that their location is strictly determined by the configuration of the land and the water flow. In most cases, favourable locations are located in the upper reaches of watercourses, which often means that these are inaccessible and sparsely populated areas. Therefore, there is no large consumption in those parts, nor a well-developed distribution network. It is proven that small sources at such remote ends of the network can contribute to improving voltage conditions and increasing the reliability of the power system.

Small hydropower plants can be completely integrated into the landscape due to their design, which reduces the visual disturbance to a minimum. Small hydropower plants, if the choice of location and technological solution are appropriate, have no major adverse effects on the environment. However, as is known, large hydropower plants can cause great damage to large watercourses, while small hydropower plants can cause damage to smaller watercourses, especially if there are several small hydropower plants on one smaller watercourse. In order to avoid harmful effects, the following things should be taken into account when planning the construction of a small hydropower plant: water flow at the planned location, the risk of mismanagement of water resources, the lack of a biological minimum amount of water and the impact on flora and fauna.[14]

The right to information is guaranteed by the constitution, a fundamental right of citizens. The principle of information and public participation conveys the basis of the Aarhus Convention (1998) on the obligation to include the public in decision-making procedures on activities that carry environmental risks, information on environmental risk and the state of the environment. In order to reduce the harmful effects of small hydropower plants to a minimum, it is necessary to always consult the public, or in the last case, the interested public, during the planning and design of small hydropower plants.

In the Aarhus Convention, the term "public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups, while the term "interested public" means the public that is endangered or likely to be endan-

13 Energy Community 2020, 2-3
14 Green Resource Centre, 14

gered or has an interest in making decisions concerning the environment, whereby the presumption of interest refers to all non-governmental organizations that promote environmental protection and that meet the conditions prescribed by national legislation. The difference between these two concepts in practice is huge, because the interested public gives a presumed legal interest in participating in the procedure - that is, the status of a party in environmental matters, while such a status does not belong to the general public, where such a status of presumed legal interest is not implied and does not give the possibility of acquiring party abilities with all rights and obligations arising from such status.[15]

Involving the public in decision-making often requires detailed assessments of the energy sector's impact on the environment. Public participation in the development of the energy strategy helps to increase the level of information about the impacts of the energy sector on the environment. Such analyses can reveal deficiencies and inefficiencies in the production, transmission, distribution or consumption of energy. In developed EU countries, public participation in the early stages of making important decisions for the energy sector has become a practice, and important information should be presented in a manner appropriate to the mass media so that the public receives accurate, reliable, clear and understandable information.[16]

The participation of the public in the planning and construction of small hydropower plants is of a controlling and preventive nature when it comes to environmental protection. The local population knows best the condition of the rivers and the biodiversity of the specific habitat, and they can play a key role in choosing the location for small hydropower plants.

5. Analysis of the project and construction of the small hydropower plant "Crnja"

an environmental impact assessment is a preventive environmental protection measure based on the preparation of studies and the implementation of consultations with the participation of the public and the analysis of alternative measures, with the aim of collecting data and predicting the harmful effects of certain projects on the life and health of people, flora and fauna, soil, water, air, climate and landscape, material and cultural assets and the interaction of these factors, as well as to determine and propose measures by which harmful impacts can be prevented, reduced or removed, taking into account the feasibility of those projects.

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15 Drenovak-Ivanović, Đorđević 2018, 67-68
16 Green Resource Centre, 2

By-laws determine the characteristics of projects for which an environmental impact assessment must be carried out and those for which it can be requested. When it comes to projects for which the implementation of an environmental impact assessment is not mandatory, the administrative body decides at its discretion whether the procedure will be initiated.[17]

In the Regulation on projects for which an environmental impact assessment is carried out[18] for projects for which an assessment can be requested (list II) there are facilities for the production of hydroelectric energy with a power of over 1 MW. This gives the opportunity to determine for small hydropower plants whether an environmental impact assessment is really necessary. The project of a small hydroelectric power plant in the Crnja river basin in the Municipality of Kolašin, according to the Regulation on projects for which an environmental impact assessment is carried out, is in List II among projects whose hydropower generation facilities have a power of over 1 MW. The study for this small hydropower plant, which I will analyse in this part of the work, was completed in January 2011, and the approval of the Commission was received in February of the same year. The planned construction site is located in the municipality of Kolašin, within the Crnja River watershed. More specifically, it falls under the cadastral area of Bare Kraljske. The Crnja River and its tributaries form the Drcka River, which flows just below the Mateševo-Andrijevica asphalt road in this area. The Crnja River's watershed covers the slopes of the Komovi mountain range.

According to Montenegro's Spatial Plan (valid until 2020), the project area is part of the Komovi Regional Park, which is the first regional park established in Montenegro. Additionally, it's important to note that the planned construction site is within a UNESCO-protected area, as it falls under the Tara River watershed.

In the Document of environmental Impact Assessment for the Crnja small hydroelectric plant, many segments of the environment that this project can affect are described, namely: air quality, water quality, landscape, flora and fauna, population, noise and vibrations, soil, water supply and forests. All these segments, as described in the aforementioned document, lead to the conclusion that based on the insight and the situation on the ground and everything presented, that the construction of the small hydropower plant Crnja will not negatively affect the state of the environment in the mentioned locality, nor in the wider environment. The authors distanced themselves from their conclusion by stating that during the preparation of some chapters of the document, they used available data on the existing state of the environment in a wider area due to the lack of certain data for a specific location. They believe

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17 Drenovak-Ivanović 2021, 189
18 Official Gazette of the Republic of Montenegro, no. 20/2007, 47/2013, 53/2014 and 37/2018

that considering the type and purpose of the facility, it is not necessary to carry out additional tests on the location itself, and that they took the data on certain segments of the environment from the existing documentation. Accordingly , it is stated that the impact on flora and fauna will be of a local character, and without a significant impact on the population level. However, they should have kept in mind that the locality is a protected area and that it should be treated with special care, and not lightly come to the conclusion that additional investigations are not necessary. That these doubts were justified was also proven by the opinion of the public after the preparation of the document:

"The task of the impact assessment is to create a zero state - the state before the investment, and to assess the impact of the investment on that zero state. This was not done, because here there are amphibians, birds, mammals, birds... and one type of fish was placed, and the question is whether and it exists in that stream. The author, that is, the editor of the biological part, mainly dealt with invertebrates, which are important, but not as much as amphibians, reptiles, birds, fish and mammals. Out of a total of almost 850 plant and animal species and fungi, the author of that part of the report lists only one leech that is protected. There are no fish, no birds, no large mammals, no mushrooms, there is absolutely nothing. The report is bad, it does not give a real zero state and an investment assessment based on that state."

5.1. The role of the public in the small hydropower project "Crnja"

The Environmental Protection Agency, in accordance with the provisions of the Law on Environmental Impact Assessment, which refer to informing and involving the public in the decision-making process, organized on October 1, 2010a public debate on the Document of environmental Impact Assessment for the construction of a small hydropower plant on the "Crnja" watercourse, KO Bare Kraljske - Kolašin Municipality. The public debate in question was held in the hall of the Cultural Center in Kolašin. The discussion was attended by representatives of the Environmental Protection Agency, representatives of the project holder, a representative of the Municipality of Kolašin, a representative of the Secretariat for Urban Planning of the Municipality of Kolašin, a representative of the document of the Institute "Sigurnost" DOO from Podgorica, a professor from the Faculty of Architecture from Podgorica and representatives of the Forestry Administration.

After the procedure for deciding on the need for an impact assessment and the adoption of the Decision of the Environmental Protection Agency to prepare the document, the project holder submitted a request for the issuance of consent, after which the Agency published in the daily newspaper "Pobjeda" a notice about the place and time of the inspection in the subject elaboration as well as the place and time of this public hearing. Further procedure after

the held public discussion is that the Agency, in order to evaluate the study, forms a multidisciplinary Commission which, after a detailed review of documentation, proposes to the Agency that it be supplemented and amended, that the elaborate in question be approved or that it be rejected as unsatisfactory. All questions raised at the public hearing are forwarded to the Commission, which evaluates them, provided that adequate answers are not given during the public hearing. By organizing a public inspection of the documentation that is the subject of the assessment, they implement the EU Directives on public participation in decision-making, which were implemented in the Law on Environmental Impact Assessment.

What can be seen from the Minutes of the public hearing is that among those present there are no residents of the Municipality of Kolašin, or the general and interested public who will be most affected by this project. The notification was not carried out in the right way, because after obtaining consent to the small hydropower plant, the population objected, the media were also involved, as well as several non-governmental organizations, in order to first stop this project, and then the concession contract was annulled. Also, the issues discussed at the public hearing concerned the characteristics of the equipment and technology that would be used in the construction, and whether the location of the project falls within the borders of the Biogradska Gora National Park, to which a negative answer was given. It is symptomatic that none of those present mentioned the Spatial Plan of Montenegro until 2020, in which it was clearly seen that the location of the small hydropower plant will be declared Komovi Nature Park and be under the protection of UNESCO. This confirms that the participation of the public in such projects and its intervention is of great importance and that only the public can prevent their implementation.

6. Conclusion

When it comes to the practice of designing and building small hydropower plants in Montenegro, it should be emphasized that information and documents that should be public and transparent are not easily obtained. The paper analysed the project of the small hydroelectric power plant Crnja and I believe that it covered and justified all theoretical knowledge as well as doubts. Studying this individual case, we saw how important the influence of the public actually is and that it can play a crucial role in environmental protection. Also what is clear from this example is that in practice, the EIA study is not done thoroughly, that no additional information is sought regarding the habitat of flora and fauna as well as endemic species, that this study is considered a form and that it is not taken into account that in nature these projects can cause a great imbalance that is difficult to replace later.

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Genetically Modified Organisms (GMOs) as environmental information under the Aarhus Convention, and its applicability in the Serbian Law

Abstract: One of the most significant challenges in the adoption of international conventions is the structuring of an internationally binding document in a way that takes into account the diverse systems, interests, and traditions of the countries that have signed it, especially in the context of complex, uncertain and not sufficiently explored issues. This challenge was particularly evident in the context of genetically modified organisms (GMOs).

This paper will research the concept of GMOs as ecological information, its representation in the Aarhus Convention, the evolution of the regulatory framework over time, its position with regard to the three pillars of an Aarhus Convention, with a particular focus on the implementation of relevant provisions into Serbian regulations and practice.

Keywords: GMO, Aarhus Convention, environmental information, Serbian regulations

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1. GMO as environmental information in accordance with the Aarhus Convention

The term "genetically modified organism" (GMO) is used to describe an organism, with the exception of humans, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination.[1] The first GMOs that fell within this definition were invented in the early 1970s in the USA by inserting DNA from one bacteria into another, creating genetically modified bacteria. Further to this invention, products containing GMO were first introduced to the market, in the 1990s with the products available to consumers being tomatoes and corns.[2] The significance of this innovation was swiftly acknowledged on an international scale, given that it was directly introduced to the market for food products intended for human consumption. This stance naturally gave rise to concerns about the potential negative effects of GMOs, and there was a clear need for the urgent regulatory arrangement of such an entity.[3] One of the key elements of the regulatory framework was the obligation of the government to inform the public about the new invention and to facilitate their participation in its development and subsequent market positioning. These obligations were for that purpose addressed in the Aarhus Convention (Convention).[4]

1.1. Environmental information in the view of Aarhus Convention

In the process of drafting the Aarhus Convention, the parties established a narrow definition of terms that would guide readers through the understanding of the Convention itself.[5] Consequently, the definition of the term "environment" was absent. In light of this, defining the term "environmental information" becomes even more crucial, not only in relation to the Convention's provisions concerning information, but also because it represents the closest the Convention comes to defining the scope of the environment.[6]

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1 Directive 2001/18/EC on deliberate release into the environment of genetically modified organisms OJ L 106/1, from 2001, Article 2(2).

2 U.S. Food & Drug Administration - Science and History of GMOs and Other Food Modification Processes, from 2024.

3 In Europe, the first extensive negotiations began in the mid-1990s, and were driven by growing global awareness and concerns over the potential environmental and health impacts of GMOs. These negotiations resulted in the adoption of the Convention on Biological Diversity – Cartagena protocol on biosafety in 2000.

4 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter, Aarhus, Denmark, 1998.

5 The only terms defined within Aarhus Convention were “public authority”, “public”, “public concerned” and “environmental information”.

6 United Nations Economic Commission for Europe – The Aarhus Convention – An Implementation Guide, page 18.

Article 2, paragraph 3, does not attempt to define "environmental information" in an exhaustive manner. Instead, it divides its scope into three categories and provides illustrative lists within each category, which are also non-exhaustive. Therefore, the definition requires a degree of interpretation on the part of the authorities in a given case. Nevertheless, it is evident that the drafters' intention was to create a definition that would be as broad in scope as possible, which should be taken into consideration when implementing the Convention.[7]

Accordingly, the categories of environmental information include (i) information relating to the state of the elements of the environment; (ii) information on human and non-human factors that (likely) affect the above elements; and (iii) information related to human's health, safety and life.[8] Such provided definition of environmental information is considered a minimum requirement; thus, parties may implement a broader definition within their national regulatory scope. The GMO has been categorised within the first category, thereby establishing its status as an element of the environment.

1.2. Presence of the GMO institute in the Aarhus Convention

As previously stated, GMOs are explicitly defined in Article 2, Paragraph 2 (a) of the Aarhus Convention, which lists elements of the environment. Upon examination of the list, it becomes evident that it encompasses the fundamental elements of the environment that have previously been acknowledged as part of the environment and subject to regulation under certain directives.[9] In addition, the only item on this list that is not a common occurrence and the only one for which the term "including" was used is GMO. This enumeration serves to highlight the significance of GMO as an ecological entity, effectively equating it with other fundamental elements such as air, water and soil. Furthermore, the fact that no other alternative elements have been exhaustively listed in addition to the GMO serves to reinforce its importance.[10]

Aside from the *Definitions* section, The Aarhus Convention pays additional attention to this entity in the twentieth paragraph of the preamble. Not knowing the background, this could be considered unusual, taking into account that in practice, international conventions typically

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7 United Nations Economic Commission for Europe – The Aarhus Convention – An Implementation Guide, page 50.

8 All the categories include the illustrative list of things that fall under the certain category (Article 2, paragraph 3. of the Aarhus Convention)

9 Such as Council Directive 76/160/EEC (Regarding water as an element), Council Directive 80/68/EEC (regarding pollution), Council Directive 99/31/EC (regarding landfill of waste) etc.

10 For example, nanotechnology, microplastics, light pollution etc.

dedicate this segment to general principles, ideas behind the creation of the convention itself, and goals that are to be achieved by adopting the convention, not special provisions. Additionally, with the exception of GMO, no other environmental information found its place in the preamble of the Convention.

Finally, this category of environmental information is referenced once more in the concluding paragraph of Article 6, where it is noted that the national legislations have a discretionary power to choose whether GMOs will be permitted to be released in the environment or not. This is one of the few instances in which the Convention employs the principle of subsidiarity in its provisions.

This unusually large presence of GMOs can be explained by the historical interpretation of the Convention. When we consider the date of the Convention's adoption (1998), it becomes clear that the issue of GMOs was still in its early stage of development, and thus insufficiently researched to justify a definitive decision on them. Instead, it is regarded as a matter of great importance, but is currently being considered on a preliminary basis, pending further developments in the situation.

2. Challenges surrounding the regulation of GMOs

The use of GMOs serves as a prime example of the intricacies involved in environmental decision-making, particularly in the context of administrative matters. The application of GMOs is related to a number of factors, including environmental protection and human health, as well as socio-economic considerations. In particular, it is linked to the issue of risks that cannot be predicted. The assessment of the impact of GMOs on human health and vitality is particularly complex due to scientific uncertainty, namely the incompleteness and vagueness of the potential danger of GMOs. It is not possible to determine with certainty the consequences of the interaction between GMOs and the environment, which can cause unpredictable consequences.[11,12]

2.1. Initial regulation of GMO issue

During the negotiation of the Convention, the parties could not reach agreement on the extent to which its provisions should apply to the deliberate release of GMOs into the environment

11 Drenovak Ivanović Mirjana, "Pristup pravdi u ekološkim stvarima", Faculty of Law University of Belgrade, Belgrade 2014, p. 187-188.

12 Wynne, Brian, "Uncertainty and Environmental Learning: Reconceiving Science and Policy in the Preventive Paradigm", Global Environmental Change, n. 2, 1992, p. 114–124.

and they agreed to keep the issue open for further determination in the light of future developments. As a result, in the main text, Article 6 paragraph 11 of the Convention proposed that the countries apply its provisions on public participation "to the extent feasible and appropriate" to decisions on whether to permit the deliberate release of GMOs into the environment.[13] The application of the Convention's provisions to other types of GMO decision-making, such as placing GM products on the market, was left open for future deliberation.

This resolution however, did not solve all the questions regarding the GMO issue, instead, it just postponed it. The Task Force of the Convention identified these open questions, establishing a Working Group on GMOs for the purpose of making clear regulations in this regard. The main issue dealt with by the group established in 1999 was the closer definition of the wording of Article 6, Paragraph 11 of the Convention, i.e. the term "deliberate release", which was defined in such a way that it was not understood to which activities it would be applied, and the working group considered various procedural options to overcome this legal uncertainty. The potential solution to this issue was preceded by several meetings and the establishment of working groups dedicated to the issue of GMOs.[14]

At the second session[15], a legally binding idea regarding decision-making on GMOs was not supported, so at the first subsequent meeting of the signatories in the Italian city of Lucca, in 2002, a compromise was reached by drafting a non-binding Guideline on access to information, public participation and access to justice in regarding genetically modified organisms (Lucca Guidelines).[16] However, by preparing the report on the implementation of the Lucca Guidelines, it was determined that due to their non-binding, i.e. exclusively advisory nature, they failed to provide a minimum standard in access to information and public participation in countries that do not already have national legislation in biological safety.[17] As a result of this finding, the second meeting was held, in which the first amendment to the Convention was finally adopted.

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13 Thus, Article 50 of the Bulgarian Law on Genetically Modified Organisms requires the ministry to organize a public hearing regarding any application for the release of GMOs into the environment. Furthermore, the French Commission for Biomolecular Engineering with regard to the environment and public health is obliged to assess the risks associated with the release of GMOs, including representatives of the public, and make these assessments public. In order to put GMOs into circulation, it is necessary to conduct public consultations that are published on the Internet.

14 First session – Chisinau, April 1999.

15 Second session – Cavtat, Croatia, 2000.

16 "Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms" (ECE/MP.PP/2003/3 (Lucca Guidelines)).

17 ECE/MP.PP/2005/5 (Report on the Implementation of the Guidelines on Access to Information, Public Participation and Access to Justice with respect to GMOs)

2.2. GMO Amendment to the Aarhus Convention

As a result of previous failures, a new working group was established to research options for a legally binding approach to the further development of the application of the Convention in the field of GMOs. At the same meeting, the signatories voted to adopt a new Article 6 of the Convention and Annex I, which ultimately led to the adoption of Decision II/1 in Kazakhstan in 2005, better known as the "GMO Amendment".[18]

Article 6 bis was designed to reinforce public rights. It clarifies the scope of the second pillar of the Aarhus Convention (public participation in the decision-making process) regarding this issue. In practical terms, the legislation requires that the authorities seek the public's opinion before authorising an open field trial or the marketing of a GMO. In contrast to the original version, the revised Article 6 bis introduces an obligation on the parties to inform and involve the public in matters pertaining to genetically modified organisms (GMOs). This obligation is not subject to the discretion of nations to regulate it in a manner that differs from the aforementioned obligation.

The applicability rules would be as follows: GMO amendment will apply to the signatory parties that acceded to the Convention after the entry into force of the GMO amendment, as well as parties that recognized the amendment, after the entry into force of the amendment. If the party does not decide to ratify the amendment, the original Article 6, Paragraph 11 of the Convention will apply. Nevertheless, the aforementioned amendment has not yet entered into force.[19, 20]

3. Three pillars of Aarhus Convention in respect of GMO

In accordance with the new Annex I to the Convention, each signatory state is obliged to provide effective information and public participation before making a decision on whether to

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18 ECE/MP.PP/2005/2/Add.2 (decision II/1).

19 According to Article 14, paragraph 4 of the Convention, the GMO Amendment will enter into force when it is ratified by at least three quarters of the signatories, however, the article does not answer the question of who constitutes the signatories (whether they are the states at the time of the adoption of the amendment or are included in that number and new members). The answer was given only in 2008 at the session of the third session, where the signatories clarified with a new decision (III/1) that the term should be interpreted as members at the time of adoption of the amendment. Since there were 35 parties to the Convention at the time, 27 of them must ratify, accede or approve the amendment before it enters into force. These data are of great importance considering as of 2024, the GMO amendment was ratified by 36 parties, but 26 were parties at the time of adoption of the amendment.

20 For information on the current position of the amendment, as well as whether a particular country has ratified the amendment, see the website of the United Nations Treaty Office at the link: http://www.unece.org/env/pp/ratification.html.

allow the intentional release of GMOs into the environment, as well as placing them on the market. This is all in accordance with Article 6, Paragraph 1 of the Convention, which sets forth two primary principles: (i) the provision of early and (ii) effective information and public participation. The first principle stipulates that states must inform the public at the earliest stage of the decision-making process on an environmental issue, including the issue of GMOs. The second principle represents the duty of the state to present relevant environmental information to the public in an easily accessible and understandable manner, all for the purpose of a transparent decision-making process with active involvement of the public.[21]

Furthermore, in accordance with Article 6, paragraph 2 of the Convention, states are required to implement the above principles in accordance with their national legal framework (related to biosecurity). In accordance with the Guidelines for the implementation of the Aarhus Convention, it is recommended that signatory states directly incorporate the above principles into their national framework.[22] In separate directives, the European Union has already determined the procedure for reporting and public participation in relation to issues of genetically modified organisms, in accordance with the Convention.[23]

The new Article 6 of the Convention stipulates the obligation of public participation in decision-making on placing on the market and deliberate release into the environment of genetically modified organisms and their products. Although the Convention itself did not define the meaning of certain terms, the Lucca Convention defined the most important terms.[24]

Paragraph 1 of Annex 1 of the Convention provides further detail on the obligation to enable public participation. Regardless of the form and procedure of participation (public discussion, dialogues, consensus conferences, etc.), states are obliged to provide an appropriate time

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21 As with all other environmental information, GMO issues also have exceptions from notification, so according to the Convention, if the release of GMOs into the environment was made under special conditions approved by the regulatory framework, and it was also confirmed by a similar release in comparable ecosystems, there is no reporting obligation.

22 United Nations Economic Commission for Europe – The Aarhus Convention – An Implementation Guide, 2014. p. 164.

23 Article 9 and 24 of the Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms, and Regulation 1829/2003/EC on genetically modified food. Relevant concepts are defined in more detail in the aforementioned regulations, as well as the right of the public to be informed and to give an opinion on this issue

24 Thus, "deliberate release" is defined as any intentional introduction of GMOs into the environment, "placing on the market" is defined as the disposal of GMOs to third parties, either free of charge or for a fee, "restricted use" - as an activity undertaken under controlled conditions according to GMOs in which will limit their contact with the outside world. (Ibid., annex I, para. 2 (d), (e), (f))

frame for decision-making.[25] It is clear that enabling access to relevant information is a prerequisite for this right. Many countries have already implemented the process of informing and engaging the public in decisions about GMOs. In Austria, for instance, the public has the right to comment on the intentional release of GMOs into the market within three weeks of the announcement, as well as access to the notification. Should comments be submitted, the public authority is obliged to hold a public hearing.

At the third official session of the signatories in 2008 in Riga, the declaration once again recognised the importance of the issue of GMOs in paragraph 16 of the preamble. This established a high level of public interest in this topic and highlighted the necessity of enabling effective public participation in decision-making in this area. All members who still have not signed the amendment to the Convention were encouraged to do so in order to bring the implementation to the highest level.

4. Compliance of the Republic of Serbia with the Arrhus Convention regarding GMO issues

4.1. The Aarhus Convention as a part of the law of the Republic of Serbia

Prior to the ratification of the Convention, Serbia had already established a framework for environmental protection in its general constitutional provision. Article 74 guarantees the right of all citizens to a healthy environment and to timely and complete information about its condition. Furthermore, it assigns the state the responsibility of environmental protection.

Following the adoption of the Convention in 1998 and its entry into force in 2001, the Republic of Serbia ratified the Convention in 2009. This act commits Serbia to integrating the principles and provisions of the Convention into its legislation. It also requires the government to be responsible and transparent in making decisions of environmental importance in its operations.[26]

The pillars of the Convention are reflected in other national regulations, including the Law on Free Access to Information of Public Importance, the Law on Environmental Protection (Arti-

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25 The time frame may vary depending on the type of decision (e.g. decision on intentional release of GMOs, decision on placing on the market, etc.). In the EU, for example, the public has 30 days to give an opinion on the report on the assessment of information regarding the placing of GMOs on the market by the European Food Safety Agency (EFSA).

26 Law on Confirmation of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Official Gazette of RS, 38/09)

cle 9), the Law on Nature Protection (Article 115), the Law on Environmental Impact Assessment, the Law on Strategic Environmental Impact Assessment, the Law on Integrated Prevention and Control of Environmental Pollution, and others.[27]

The Convention explicitly requires the signatories to provide, through internal regulations, the possibility of involving the public in procedures in which environmental decisions are made. Serbia regulates this right with Article 3 of the Constitution. The right to participate in environmental decision-making is enshrined in the Constitution as part of the principle of the rule of law. It is also protected by specific legislation, including the Environmental Protection Act (Article 9), the Law on Nature Protection (Article 116), the Law on Environmental Impact Assessment and the Law on Strategic Environmental Impact Assessment.

Finally, the third pillar of the Aarhus Convention is also provided at the constitutional level (Article 32) by the general provision that everyone has the right to legal protection before a court within a reasonable time in an independent and fair manner. Furthermore, this right is defined in greater detail by specific legislation. For instance, the Law on Environmental Protection (Article 9) outlines the procedure for protecting the right to a suitable environment before the relevant authority.

From the above, it can be concluded that the Republic of Serbia has not only ratified the Convention, but also implemented the main principles of the Convention in its internal regulations. This has resulted in the issues of the Convention being covered in a regulatory manner. However, there is a view that the issue has been resolved only at the level of regulations, while in practice there is still a lack of progress. The Belgrade Center for Human Rights has highlighted that the majority of municipal courts in the Republic of Serbia are not in compliance with the provisions of the Law on Free Access to Information of Public Importance, which pertain to the expeditious handling of information related to the environment.

27 There are also lex specialis Laws, such as the Law on Protection from Non-Ionizing Radiation (Article 4), the Law on Chemicals (Article 6) and others, which prescribe the obligation of competent authorities to inform the public about the negative effects of specific environmental information (radiation, chemicals...).

4.2. Regulatory compliance of the Republic of Serbia with the Aarhus Convention regarding GMO issues

As stated above, the Republic of Serbia was not an initial signatory to the Convention, However, it did ratify it by law in 2009 and has since implemented it within its legislation. However, Serbia is not one of the 32 countries that ratified the 2005 Amendment to the Convention.[28]

In light of the above, the initial article 6, paragraph 11 of the Convention, which instructs the parties to regulate all relevant GMO issues independently with national regulations, remains valid for Serbia as specified above. During the period between the Convention's entry into force and its ratification, Serbia had the Law from 2001 in force, [29] which after ratification was replaced by a new one from 2009, which is still in force.[30]

In the previous version of the law, there were no provisions involving the public in any way. In fact, there were provisions that very broadly allowed this type of environmental information to be considered a business secret and not be available to the public in any way.[31] The current version of the law is largely in line with the Convention that has been ratified, providing the rights regarding all three pillars of the Convention.

The first pillar is reflected in the mandated obligation of the Ministry to publish the content of the application for the approval of the use of GMOs in closed systems and for deliberate introduction into the environment of the public in at least one daily newspaper that is distributed throughout the country as well as through electronic media.

The second pillar is reflected in the Ministry's obligation to conduct a public hearing for 30 days from the day the content of the application is made available to the public. Additionally, the final opinion is published in the same way as the initial notification. Article 16 of the Law explicitly states that the decision will be made "taking into account the relevant objections of the public". Additionally, Article 32 of the Law prescribes the obligation to register in the Reg-

28 For the list of signatories, including Serbia, please refer to the link: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en.

29 Law on Genetically Modified Organisms ("Official Gazette of the FRY", No. 21/2001)

30 Law on Genetically Modified Organisms ("Official Gazette of the RS", No. 41/2009 dated June 2, 2009)

31 However, even though it is in line with the Aarhus Convention, many experts believe that the change in the law only complicated things in the relationship between the state and international law. Although you might think that EU law would be more restrictive in this area, the newly adopted Law is far stricter than EU regulations, which are themselves considered harsh on a global level. With a new law, Serbia introduced a general ban on any import and export of GMO products, which is contrary to the general rules of the World Trade Organization, which resulted in the freezing of questions for our potential membership in that organization. This is the only issue from the multilateral framework where Serbia's rules are not harmonized with WTO rules - This can be attributed to the European precautionary principle, and even to the principle of prevention.

ister of GMOs and GMO products, which is public and free of charge, and in addition, the list of legal entities that have received permission to use GMOs is also published in the Official Gazette of the RS.

In addition, the third pillar is implicitly respected by looking at the penal provisions, where a prison sentence and a fine are foreseen for a person who places on the market or intentionally introduces GMOs into the environment, without obtaining approval from the Ministry, and thus causes harmful consequences for human health and environment. In the event that a natural person is directly threatened by this action, it is possible to start a civil procedure and thus exercise your rights.[32]

4.3. Practical (non)compliance of the Republic of Serbia with the Aarhus Convention regarding GMO issues

While regulatory compliance is an essential first step towards environmental justice and democracy, legal support is not sufficient in isolation, i.e. it must be accompanied by implementation in practice. In Serbia, the Register of GMOs and GMO products has not yet been established in accordance with the Law, which prevents the public from inspecting legal entities that have received approval for deliberate introduction into the environment. Furthermore, the website of the Expert Council for Biological Safety, a working group established by the Ministry for the purpose of providing opinions and considering professional issues that will help the public to become familiar with this environmental information, has not published any content related to GMO.[33] Furthermore, there is no evidence of any published public discussions on the topic of GMOs or the issue of permits for legal entities on the Internet. From the above, it can be concluded that the principle of environmental justice and democracy in terms of information and public participation in environmental issues has not yet been fully implemented in practice.

It is worth noting that, to date, no legal proceedings have been initiated in Serbia concerning the illicit use of GMOs and their placement on the market or in the environment. However, several incidents have been reported. The most recent inspection by the Ministry of Agriculture's Phytosanitary Inspection department revealed the presence of genetically modified soybeans in 29 fields, despite the cultivation of such crops being prohibited. Consequently, the

32 Articles 45, 46, 47, 48, 49 of the Law on Genetically Modified Organisms ("Official Gazette of the RS", No. 41/2009 dated June 2, 2009).

33 Link from the site, last accessed on June 29, 2024: https://uzb.minpolj.gov.rs/category/unutrasnje-jedinice-uzb/odsek-za-sredstva-za-zastitu-i-ishranu/.

decision was taken to destroy the soybeans and it was announced that criminal charges would be filed against the owner. The relevant Ministry did not issue any press releases or other communications on this matter.

In light of the above observations, it is recommended that the Serbian Government take the initiative to establish and maintain a comprehensive GMO register with the objective of ensuring the timely dissemination of related information to the public. Furthermore, it is recommended that the government engage public in environmental decision-making processes in order to adhere to the Aarhus Convention and its own regulations on the aforementioned GMO aspects.

5. Conclusion

In the context of the environmental information as defined within the Aarhus Convention, the regulation of GMOs is identified as one of the most important and complex issues. The international community has acknowledged the necessity to address the potential risks that GMOs may pose to human health and the overall environment, as reflected in the preamble of the Aarhus Convention. As a signatory, the Republic of Serbia has striven to align its legislation with European Union's, including those governing the issues related to GMOs. However, thus far, this effort has not yet been fully successfully executed. While there is an apparent *de jure* compliance with the Aarhus Convention, it can be seen that in practice, adherence to the established regulations remains insufficient.

Having this in mind, the next necessary step for Serbia's regulatory framework and its *de facto* application is the effective enforcement of existing laws. This should include the establishment of a comprehensive GMO registry providing transparent and accessible information to the (relevant) public. Given the sensitive, and not-yet-fully known nature of the GMO institute, it is equally important for the public to be informed and educated about the effects and current state of this topic. This can be achieved through educational and other programs, ideally set by the proper governmental authority. Lastly, ensuring meaningful and direct public participation in environmental decision-making, alongside strict enforcement of protective measures and penalties for non-compliance is essential step. This approach is important, not only for addressing the specific challenges of GMOs, but also for ensuring Serbia's broader compliance with the Aarhus Convention and its three pillars. However, whether mentioned progress will be achieved in this area, remains to be seen in the future.

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