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THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW AND GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW ON CONSTITUTIONAL PROVISIONS PROTECTING THE ENVIRONMENT

-abstract-

In the second half of the 20th century, as a response to the increasing degradation of the environment, a process of constitutionalization of environmental protection began. According to data from several authors, more than 150 constitutions today contain provisions that protect the environment. However, the form and content through which environmental protection becomes part of the constitutions differ. It can be realized by recognizing a special right to a healthy environment, establishing an obligation for individuals and states to protect the environment, and setting up safeguards for using and managing natural resources. Simultaneously, international law also developed in two directions. The first is by introducing the right to a healthy environment in the corpus of rights of international human rights law, and the second is through the development of international environmental law. This paper describes and explores the relationship between international human rights law and the principles of international environmental law with references to the protection of the environment embedded in the national constitution. Through the analysis of 193 constitutions and secondary data sources, attempts to answer whether international law, primarily international human rights law, and international environmental law, impact the content of the adopted constitutional provisions. The paper finds that the role of international human rights law differs from region to region, depending on whether a specific right to a healthy environment is recognized within the regional human rights protection system. In addition, the principles of international environmental law, such as the principle of sustainable development, prevention, polluter precaution, and intergenerational equity, which are increasingly becoming part of the constitutional texts, play a growing role.

Keywords: Environmental rights; Environmental law; Environmental constitutionalism; Comparative constitutionalism.

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I. INTRODUCTION

The Italian Constitution of 1947, establishing the state's obligation to protect natural landscapes (*paesaggio*), became the first national constitution to introduce an environmental reference into a constitutional text.[1] Only a handful of states adopted similar constitutional provisions in the following two decades.[2] The process gained momentum after the Stockholm Declaration 1972[3], which underlined the mutual conditionality[4] of human rights and environmental protection.[5] The constitutions of Portugal in 1976 and Spain in 1978 were the first constitutions to establish a separate "right to a healthy environment" at the constitutional level[6]. From the 70s until the 2010s, 135 countries introduced reference to environmental protection into their constitutions. This process is labeled as a "revolution of environmental protection rights" that responds to the degradation of nature through the use of the language of human rights and within the framework of constitutions.[7]

Raising the level of environmental protection from the legislative into the constitutional realm is described as "constitutionalization of the environment."[8] It was initially associated with recognizing a special right to a healthy environment as part of the corpus of human rights.[9] However, during the 2010s, a series of authors expanded its meaning. Kotzé sees the provisions related to the protection of the environment as a means for directing the content of laws, as a way to establish legal, moral, and ethical obligations about the environment, and especially a legal basis and competence that will enable accurate fulfillment of these obligations.[10]

What are the critical internal and external factors that influence whether or not a particular state will enshrine environmental protection in the constitution? Some authors have answered this

[1] Article 9 paragraph 2 of the Italian Constitution of 1947 reads "It (the Republic) shall protect the natural landscape and the historical and artistic heritage of the nation". In February 2022, the Parliament of Italy passed an amendment that expanded the scope of protection provided for in Article 9. For more see Piscitelli, P. 2022. "Italian Constitution amended to include environmental and health protection: A model for Europe." *The Lancet Regional Health - Europe* 16.

[2] Kuwait (1962), Malta (1964), Switzerland (1971) and the United Arab Emirates (1971). The 1962 Constitution of Kuwait provided for the obligation of the state to care for and protect natural resources. This determination was also mirrored in the United Arab Emirates Constitution of 1971 which indicates regional "borrowing" considering that the economy of both countries is largely based on the exploitation of crude oil. On the other hand, in the 1964 Constitution of Malta the inspiration from Italy can be seen with the introduction of the obligation to protect "areas (landscapes)" in the part of the Constitution that refers to the basic principles.

[3] Declaration of the United Nations on the Human Environment adopted in Stockholm on June 16, 1972.

[4] The first principle from the Stockholm Declaration reads *"Man has the basic right to freedom, equality and adequate conditions for life, in an environment of quality that enables dignity and well-being, and for this he has an obligation to protect and improve the environment for present and future generations".*

[5] Kiss, Alexandre, and Dinah Shelton. 2004. *International Environmental Law, 3rd edition.* New York: ransnational Publishers. p. 667.

[6] Boyd, David R. 2012. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Enviroment.* Vancouver: UBC Press. p. 95.

[7] Ibid.

[8] The constitutionalization of environmental protection is elaborated especially by May and Daly in their works, Global Constitutional Environmental Rights, in *Routledge Handbook of International Environmental Law* 603–616 (2012). ; Vindicating Fundamental Environmental Rights Worldwide, 11 OR. REV. INT'LL 365–440 (2010) ; Constitutional Environmental Rights Worldwide, in *Principles of Constitutional Environmental Law* 329–358 (2011); and Constituting Fundamental Environmental Rights Worldwide, 23 PACE ENVTL. L. REV. 113 (2006).

[9] Anton, Donald K., and Dinah L. Shelton. 2011. *Environmental Protection and Human Rights.* Cambridge University Press.

[10] Kotzé, Louis, J. . 2012. "Arguing Global Environmental Constitutionalism." *Transnational Environmental Law* 199-233. p. 208.

question to a significant extent.[11] One of the many issues that require additional research is the impact of international law on the content of constitutional provisions relating to the environment. Does international law, especially international law on human rights and international environmental law, shape the content of the constitutional provisions, or did genuine internal motivations and needs guide it?

This paper explores the interdependence and relations between international law, particularly international human rights law instruments, international environmental law principles, and the constitutional amendments related to environmental protection in national constitutions. Combined theoretical and empirical methods were used. First, a detailed review and analysis of the available academic literature related to the subject matter of this research was conducted to build the research framework.

Through the use of the open database of constitutional texts (constituteproject.org), the provisions of the constitutions of all states that have provisions relating to the environment were identified and analyzed. Using textual analysis, the author assessed whether and to what extent the human rights established by international law and the basic principles of international environmental law are incorporated in the constitutional texts of the countries. Verifying translations and versions was performed by accessing the web pages of the representative bodies and using secondary data sources.

The paper first describes the different forms through which the environment is protected in the constitutions and their classification. Then, it provides a theoretical review of the migrations of constitutional ideas in the context of the process of constitutionalization of environmental protection. Next, it describes the existing international norms that refer to both human rights in the context of environmental protection and general principles of international environmental law, followed by presenting the data from the analysis of 193 constitutions. Lastly, the author summarizes the conclusions of the research.

II. HOW THE ENVIRONMENT IS PROTECTED IN THE CONSTITUTIONS?

Several taxonomies are proposed in the theory, classifying the various forms of environmental protection embedded in national constitutions.[12] This paper uses the classification offered by O'Gorman, according to which the forms through which the environment is protected in the constitutions are (1) Environmental rights, (2) Obligations regarding the environment, (3) General principles, and (4) Environmental protection as a basis for limiting rights.[13]

1. Environmental rights

The right to a healthy environment includes three separate types of rights: (1) Substantive right to a healthy environment, (2) Procedural rights, and (3) Rights of Nature.[14] The roots of the right to a substantive right to a healthy environment can be found in Principle 1 of the Stockholm

[11] See Gellers, Joshua C. 2015. "Explaining the emergence of constitutional enviromental rights: a global quantitative analysys." *Journal of Human Rights and the Environment, Vol. 6 No. 1* 75-97.

[12] See Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Enviroment* and May and Daly *Constitutional environmental rights worldwide.*

[13] O'Gorman, Roderic. 2017. "Enviromental Constitutionalism: A Comparative Study." *Transnational Enviromental Law* (Cambridge University Press) 6 (3): 435-462.

[14] Rodriguez-Rivera, Luis E. . 2001. "Is the Human Right to Environment Recognized under International Law?" *Colorado Journal of International Environmental Law & Policy* 12 (1): 1-45.

Declaration. Substantive environmental rights envisage a certain level of quality of environmental protection, which can be, depending on the adjectives used, named "adequate," "healthy," "harmonized," and "or sustainable." Many states have provided such a provision in their constitutions, including the Constitution of the Republic of North Macedonia of 1991.
Procedural rights include the three pillars of the Aarhus Convention (access to information, participation, and access to justice). Procedural rights are necessary to realize the constitutional determination for a healthy environment. Access to information includes timely and accurate information on environmental conditions from state authorities.[15] The right to participate should provide a substantial opportunity to influence the authorities' decisions that affect the environment.[16] Access to justice should allow access to court proceedings in cases where the right to a healthy environment is not respected.

The beginnings of the discussion about the existence of special rights of nature can be found in the work of Stone in the early 1970s.[17] Their theoretical source is ecocentrism (as opposed to the anthropocentrism of human rights), according to which nature alone can be the holder of rights. The radicality of this idea, the serious debate it caused in theory, and the question of whether recognizing nature's rights, in reality, will result in increased protection. It has yet to reach the point of being present in national constitutions with one particulate exemption. In 2008, Ecuador became the first country to recognize several inalienable rights of nature in its Constitution, including the right to "comprehensive respect for its existence, maintenance, and regeneration of its life cycles, structures, functions, and evolutionary processes."[18]

2. Obligations of the State

The most common form of constitutional provision is the imposition of an obligation on the state to take care of and be responsible for protecting the environment. This modality is found in over 140 constitutions.[19] There are differences regarding the level of detailing of the obligations in the Constitution itself. Thus, the Constitution of the Republic of Macedonia from 1991 is an example of a Constitution with a general obligation of the Republic to *"provide conditions for the realization of the citizens' right to a healthy living environment, "*while the detailed regulation of the state's obligations is left on a legislative level. The Constitution of Portugal provides an extensive list of commitments in 8 different areas. Even in countries where the Constitution does not expressly provide for such an obligation if a right to the environment is recognized, the obligation can be derived from the very concept of rights, where rights cannot exist without a

[15] Access to information on environmental issues is recognized as a right in the Constitution of Georgia, Art. 37(5); Environmental Charter (France), Art. 7; The Constitution of Azerbaijan, Art. 39; The Charter of Fundamental Rights and Freedoms of the Czech Republic Art. 35(2); The Constitution of Latvia, Art. 115; The Constitution of Moldova , Art. 37(2); and the Constitution of Montenegro, Art. 23.
[16] Constitutions that provide for the right to participate in processes related to the environment are the Constitution of Finland , Art . 20(2); The Charter for the Protection of the Environment (France) , Art. 7; The Constitution of Eritrea, Art. 10(3).
[17] Stone, Cristopher D. 1972. "Should Trees Have Standing - Toward Legal RIghts for Natural Objects." *Souther California Law Review Vol.45:450* 450-501.

[18] Article 71 of the 2008 Constitution of Ecuador reads *"Nature or Pacha Mama, where life reproduces and emerges, has the right to comprehensive respect for its existence, as well as for the maintenance and regeneration of its life cycles, structures, functions and evolutionary processes"* .
[19] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Enviroment,* p. 52.

corresponding obligation. Many of the Constitutions also contain an obligation to everyone to protect the environment.

3. General principles

This provision provides goals and guidelines for public policies that states should fulfill, although they can only be implemented with appropriate legislation. In this direction are the provisions that contain determinations for "achieving sustainable development," protecting the "natural balance," protecting "biodiversity," providing conditions for the prosperity of future generations, etc. Although not directly applicable, these provisions direct the legislator's work to enact laws that serve the constitutionally declared commitments. An example of this is the elevation of the arrangement and humanization of space and the protection and improvement of the environment and nature to the level of a fundamental value in the Constitution of the Republic of North Macedonia.

4. Ground for limiting rights

Fundamental constitutional rights can be restricted under conditions provided for in the constitutions. So, one of the primary restrictions is the protection of the environment. According to Art. 55 of the Constitution of the Republic of North Macedonia, the freedom of the market and entrepreneurship can be limited by law, among other things, to preserve nature, the environment, or people's health. The Constitution of Montenegro from 2007 uses a similar wording. On the other hand, the Constitution of Estonia protects the environment as one of the bases for limiting the freedom of movement.

III. MIGRATIONS AND LEGAL TRANSPLANTS IN THE CONTEXT OF CONSTITUTIONALIZATION OF THE ENVIRONMENT

1. Migrations as a phenomenon in comparative constitutional law

To understand the relationship between international law and national constitutions, it is necessary first to consider the concept of migrations and legal transplants, which is the subject of comparative constitutional law. According to the famous American legal theorist Rosco Pound, the history of one legal system is essentially a history of borrowing ideas and institutions from other legal systems[20]. In more detail, for Chouldhry, the migration of constitutional ideas between different legal systems occurs when foreign constitutions are used as models in adopting constitutions and when interpreting constitutions. Migration occurs horizontally, between national constitutions, and vertically, between national and supranational levels. The most recognizable example is the preparation of a draft of the Constitutional Treaty of the European Union, primarily based on the constitutional principles and traditions of the member states.[21]
With the strengthening of constitutionalism in the 20th century, examples of the circulation of legal norms and ideas changed not only legal systems but also the course of history.[22] This is very

[20] Perju, Vlad. 2012. "Constitutional Transplants, Borrowing, and Migrations." In *The Oxford Handbook of Comparative Constitutional Law*, edited by M Rosenfeld and A Sajó, 1304-1325. p. 1305.
[21] Choudhru, Sujit. 2006. "Migration as a new metaphor in comparative constitutional law." In *The Migration of Constitutional Ideas*, edited by S Choudhry, 1-36. Cambridge University Press. p. 13.
[22] Perju, *Constitutional Transplants, Borrowing, and Migrations.*

easy to see by reading the constitutional texts. It is straightforward to notice how similar their content and language are. In addition to adopting constitutions, mutual influence is observed through the increasing application of comparative constitutional law by the courts/authorities that perform constitutional-judicial control. So, courts from all over the world, from Israel to Brazil and South Korea to Canada, very often follow and consult the work of their colleagues when interpreting similarly worded constitutional provisions.

The most common vertical migrations originate from the supranational to the national level when the state must constitutionally implement the human rights obligations undertaken under the international agreement. However, these can also be complex migrations. One example is the spread of the proportionality test from national to supranational jurisdictions, such as the European Court of Justice. Horizontal migrations occur between similarly situated jurisdictions.

2. Migrations in the context of environmental protection

Migration processes in which legal innovations (constitutional, legal, and judicial) at any level and region contribute to further constitutionalizing environmental protection. Wiener vividly describes these developments as *a* two-way process in which national ecological law is uploaded *into international* law. At the same time, international principles are downloaded into national and regional systems.[23] According to the same author, although related, this "vertical borrowing" process is essentially different from "horizontal borrowing" studied within the framework of comparative constitutional law. The result of these processes is "global environmental law" as a particular legal field that is simultaneously international, national, and transnational.[24]

O'Gorman, analyzing the factors that influence the introduction of the constitutionalization of the environment, makes a distinction between external and internal factors. This paper will highlight only the external factors as an example of vertical and horizontal migration. There are four critical paths of transnational influence: coercion, competition, learning/persuasion, and emulation. Coercion exists when strong states influence the behavior of weak states by highlighting the advantages of adopting a specific act with the consequences of its adoption. Coercion is predominantly present within the framework of the role of international organizations. For example, the European Union may require constitutional amendments to harmonize the obligations of the member states with the responsibilities of member states.[25] However, research shows that so far, there has been no case where the obligation of the state to introduce a provision in the constitution that protects the environment has been imposed.[26] Gellers, using statistical research, determined that no correlation could be established between a particular state's dependence on international aid and the likelihood that it would enshrine the right to environmental protection in the constitution.[27]

The competition as a path is constructed by the premise that by taking foreign constitutional solutions, the states attempt to be attractive to foreign capital and secure export markets. In the

[23] Wiener, Jonathan B. 2001. "Something Borrowed for Something Blue: Legal Transplants and the new Evolution of Global Enviromental Law." *Ecology Law Quarterly* 27: 1295-1372.

[24] Yang, Tseming, and Robert V. Percival. 2009. "The Emergence of Global Environmental Law." *Ecology Law Quarterly* 615-664.

[25] Karrlson, Christer. 2014. "Comparing Constitutional Change in European Union Member States: In Search of a Theory." *Journal of Common Market Studies* 52 (3): 566-581.

[26] Bogojevic, Sanja, and Rossemary Rayfuse. 2018. *Environmental Rights in Europe and Beyond.* Bloomsbury Publishing.

[27] Gellers, *Explaining the emergence of constitutional enviromental rights: a global quantitative analysys,* p. 96.

context of the subject matter of this paper, strong constitutional and legal protection of the environment can achieve these benefits. However, due to the very contradiction between economic growth and environmental protection, this path is not used in the context of the constitutionalization of the environment. Learning and persuasion are identified explicitly as external drivers of the migration of political ideas. Impact learning assumes that states see the benefits of constitutional changes undertaken by other nations and make similar changes to their constitutions.[28]

Imitation in the context of constitutional change is the adoption of external ideas not based on costs or benefits, as in the case of coercion and competition, respectively, but because of the potential for social benefit. The concept of emulation is described as the adoption of a global culture that contains a broad consensus about a set of appropriate social actors, appropriate social goals, and the means to achieve those goals—it suggests a similar dynamic. As such, the two are discussed together.[29] Unlike coercion, countries are not pressured to change. This is evidence that environmental protection has become a "world cultural institution" enacted by the state rather than driven by a bottom-up approach.

IV. INTERNATIONAL LAW AND THE ENVIRONMENT

1. The right to a healthy environment in international human rights law

The processes of recognition and protection of the right to a healthy environment in the corpus of international human rights law are driven by two practical reasons. Global and regional systems for protecting human rights establish (with different effectiveness) control mechanisms that ensure respect for the rights subject to protection. The existence of commissions, courts, and other institutions that can act on petitions from individuals and NGOs gives weight to these systems, which in turn is an argument why the advocates of the idea of the existence of a special right to a healthy environment seek its recognition at the international level.[30] The second reason is that the sovereignty of the states essentially limits the norms resulting from international environmental agreements (they are not universally accepted, significant reservations exist, and their enforcement instruments are limited). In contrast, international human rights law can limit what states can do within their sphere of sovereignty.

Many international environmental law instruments emphasize the connection between human rights and the environment. However, there has yet to be a consensus among the authors on whether the right to live in a healthy environment as a substantive human right is recognized by international law. The critical question is whether this right is lex lata (right as it is) or lex ferenda (right as it should be). The current consensus is that, at the moment, this right is somewhere in between; it appears as a special right, but only in some regions of the world.[31]

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[28] Simmons, Beth A., Geoffrey Garret, and Frank Dobbin. 2006. "The International Diffusion of Liberalism." *International Organisations* 60 (4): 781-810. p. 795.

[29] Ibid.

[30] Shelton, Dinah. 2006. "Human Rights and the Environment: What Specific Environmental Rights have been Recognized?" *Denver Journal of International Law and Policy* 35 (1): 129-171. p. 130.

[31] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Enviroment,* p. 398.

i. Global human rights instruments

The key international human rights instruments within the framework of the UN system were negotiated and adopted when the dynamics and extent of human-caused damage to nature still needed to be generally recognized.[32] For that reason, it should not be surprising that they do not provide for a special right to a healthy environment. Three global international conventions (the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Geneva Conventions) indirectly refer to the existence of a certain minimum level of environmental quality as a prerequisite for the realization of fundamental human rights. However, from how these provisions are formulated, it can be concluded that the environment is seen above all as a prerequisite for the realization of the already recognized human rights (right to life, right to health, right to decent living conditions, right to respect of private and family life and home). However, despite this right not being provided as a separate right in an international agreement, the UN General Assembly adopted a resolution in July 2022 recognizing the existence of the "right to a clean, healthy, and sustainable environment."[33] Whether this document will impact global international human rights law remains to be seen.

ii. Regional human rights instruments

To a certain extent, the right to a healthy environment is present, either explicitly or implicitly, in the framework of regional agreements to protect human rights in Africa, America, Europe, and the Middle East. These treaties bind states that have ratified them and establish a formal process for handling complaints.

Article 24 of the African Charter on Human and Peoples' Rights of 1981[34] reads, "All persons shall have the right to an enabling environment necessary for their development." The Charter is the first regional agreement that expressly recognizes the right to live in a healthy environment. The phrase "all persons/peoples (all peoples)" opened the question in the theory of whether it is a collective or an individual right. The African Commission considers this right protected as an individual and a collective right. According to some authors, the rapid process in which the constitutions of the countries of Sub-Saharan Africa acquired provisions related to the environment is a consequence of the Charter.[35] The direct influence of the Charter can also be observed in the constitutions of Benin, Cameroon, and the Democratic Republic of the Congo, whose constitutional provisions were adopted after the ratification of the Charter and have very similar texts.[36]

In 1988, the signatory states of the American Convention on Human Rights acceded to the so-called Protocol of San Salvador.[37] Article 11 of the Protocol recognized the right of every person

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[32] The Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) .

[33] UN General Assembly, Right to a clean, healthy and sustainable environment. 2022.

[34] African Charter on Human and Peoples' Rights ("Banjul Charter"), adopted on 27 June 1981 and entered into force on 21 October 1986. 21 ILM 58. The Charter has been signed by 54 countries.

[35] O'Gorman, *Enviromental Constitutionalism: A Comparative Study,* p. 14.

[36] Gellers, Joshua. 2012. "Greening Constitutions with Environmental Rights: Testing the Isomorphism Thesis." *Review of Policy Research* 29 (4): 522-543.

[37] The inter-American system for the protection of human rights was established with the adoption of the American Declaration on the Rights and Duties of Man in 1948. The USA and Canada are not part of this regional system. In 1959, the Inter-American Commission on Human Rights was established, and in 1969, the American Convention on

" *to live in a healthy environment and access essential public services. "* In the same article, it is required that the states promote the "protection, preservation and improvement of the environment." The protocol has been ratified by only 16 of the 24 signatory states of the American Convention. The article itself, although at first glance, indicates a clear articulation of the right to live in a healthy environment, needs to be more assertive compared with other articles of the protocol.[38] It also requires progressive implementation of rights, and there is no right of individual appeals for violation of the right to a healthy environment.

Regardless of the objective progress that European countries, especially EU member states, have achieved regarding environmental protection, the critical instruments of regional human rights law still do not recognize a special right to a healthy environment. Although the *Charter of Fundamental Rights of the European Union* requires a high level of protection and improvement of the quality of the environment, it does not stipulate a special right to a healthy environment. Environmental organizations and legal experts have criticized this approach.[39] *The European Convention on Human Rights* does not provide for a special right to a healthy environment either. Within the framework of the Council of Europe, on several occasions (1970, 2009, and 2021), proposals were developed for the adoption of a particular protocol to the European Convention on Human Rights, which will establish a special right to a healthy environment without any success.[40] However, the role of the European Court of Human Rights must not be overlooked. By interpreting the European Convention on Human Rights, it has already established a solid jurisprudence according to which, although the ECHR does not protect a specific right to a healthy environment, it is an element of a series of other rights protected by the Convention.[41] Based on the decisions in the cases of Lopez Ostra[42] and Oneryildiz[43], the Court, for less than 30 years, built a particularly rich jurisprudence which, although it contributed to the legal protection of the environment.[44]

An attempt to overcome the gap caused by the absence of the right to a healthy environment understood in a substantive sense, was made with the signing of the Aarhus Convention on Access to Information, Public Participation in the Decision-Making Process, and Access to Justice in Environmental Matters. The preamble to the convention recognizes the right to "life in an environment suitable for his or her health and well-being." However, in the normative part, the Aarhus Convention recognizes and regulates the so-called procedural rights to a healthy environment, the right to access information, participation, and justice in matters related to environmental protection.[45] As Pallemaerts notes, " The Aarhus convention is the first multilateral

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Human Rights was adopted, which established the foundations for the Inter-American Court of Human Rights, located in San Jose, Costa Rica.

[38] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Enviroment.*

[39] European Council on Environmental Law. 2000. "The Right to Environment: A Fundamental Right in the European Union. Resolution on the Right to Environment."

[40] For the arguments in favor of adopting a protocol, see Balfour-Lynn, Harry and Willman, Sue, The Right to a Healthy Environment: The Case for a New Protocol to the European Convention on Human Rights (September 1, 2022).

[41] Article 2 (right to life); Article 6 (Right to a fair trial); Article 8 (Right to respect for private and family life); Article 10 (Freedom of expression); Article 11 (Right to peaceful assembly); Article 13 (Right to real complaint); and Article 1 of Protocol 1 (Right to Property);

[42] López Ostra v. Spain. Application No. 16798/90. Judgment 9.12.1994.

[43] Öneryildiz v. Turkey. Application No. 48939/99. Judgement 30.11.2004.

[44] For an insight into the jurisprudence see European Court of Human Rights . 2022. *Guide to the case-law of the European Court of Human RIghts - Environment.*

[45] More about the content and meaning of the Aarhus Convention, its relationship with EU law as well as regarding access to information, justice and participation in various policies, see Pallemaerts , M (2011) The Aarhus Convention

international agreement whose main purpose is to establish the obligations of the signatory states towards their citizens."[46]
Article 38 of the 2004 Arab Charter on Human Rights expressly recognizes the right to a healthy environment: *"Everyone has the right to an adequate standard of living for himself/herself and his /her family that ensures their well-being and a decent life, including food, clothing, housing, services and* ***the right to a healthy environment."*** The Arab Charter entered into force in 2008 and established an Arab Committee on Human Rights with a mandate to consider reports from contracting parties with limited ability to protect the rights protected by the charter.

2. Principles of international environmental law

The principles of international environmental law are established by agreements, legally binding acts of international organizations, state practices (customs), court decisions, as well as by resolutions, declarations, and other forms of the so-called *soft law*.[47] The principles have particular importance for a legal field such as environmental law, which needs to constantly adapt to scientific discoveries and respond to various challenges accordingly. The principles direct the content of ecological law norms and attempt to establish a balance between economic development on the one hand and protection of the environment and natural resources.[48] Specific general rules and principles with broad and universal meaning and support can be derived from the broad spectrum of international agreements and other acts. For this paper, we will use the principles identified by Wolf and Stanley.[49]

i. Sustainable development

The principle of sustainable development attempts to reconcile the two often conflicting goals: economic growth and environmental protection. Most authors find the sustainable development principle's source in the Brundtland Report.[50] According to this report, sustainable development "meets the needs of the present without compromising the needs of future generations." Although this principle initially had a function in creating policies, it has been incorporated into several acts at the level of a legal principle.[51] The principle of sustainable development contains four constituent elements. The first is intergenerational equity, i.e., conservation of natural resources for future generations. The second is sustainable use, that is, careful and responsible use of resources. The third element is intra-generational equity, which includes using one's resources without causing negative consequences for other countries. The last element is integrating the environment into all development plans, programs, and projects.

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at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law. Europa Law Publishing, Groningen.

[46] Pallemaerts, Marc. 2002. "The Human Right to the Environment as a Substantive Right." In *Human Rights and the Environment*, edited by M Déjeant-Pons and M Pallemaerts, 11-22. Strasbourg: Council of Europe Publishing. p. 18.

[47] Kravchenko, Svitlana, Tareq M.R. Chowdhury, and Jahid Hossain Bhuyian Bhuyian. 2013. "Principles of international enviromental law." In *Routledge Handbook of International Enviromental Law*, edited by S Alam, J Bhuiyan and T Chowdhury, 105-132. Routledge. p. 105.

[48] Wolf, Susan, and Neil Stanley. 2011. *Wolf and Stanley on Enviromental Law - 5th edition.* London & New York: Routlege. p. 14.

[49] Ibid. pp. 14 – 17.

[50] World Commission on Environment and Development (1987) Report of the World Commission on Environment and Development: Our Common Future. Oxford University Press.

[51] Ibid. p. 15.

ii. Prevention

The Stockholm Declaration of 1972 and the World Charter for Nature of 1982 established the prevention principle. The essence of this principle lies in the obligation of states to take appropriate measures to prevent damage to the environment by reducing, prohibiting, limiting, or controlling activities that can cause such damage. The prevention principle seeks to minimize environmental damage as an end in itself. The state should have established an appropriate legal, regulatory, and administrative apparatus to achieve this goal. In practice, the principle of prevention is realized through procedures for granting work permits, adoption of international standards, access to information, and primarily through implementing mandatory environmental impact assessments about certain risky activities. The prevention principle can take different forms through punishments, responsibilities, and work bans.[52]

iii. Precautionary

This principle requires the state to take measures whenever there is a risk to human health or the environment, regardless of whether it is uncertain whether that risk will materialize and what its consequences will be. There are different forms in which this principle is defined, but what is expected is that they all provide a cost-benefit test to limit the possible consequences of strict and consistent observance of this principle.[53] Principle 15 of the Rio Declaration provides, "... wherever there are dangers of serious and irreparable harm, lack of scientific certainty shall not be used as a reason to delay cost-effective measures to prevent environmental endangerment." The Precautionary Principle attempts to bridge the gap between scientists on the one hand whose findings can change continuously and decision-makers who want to decide on what is safe and what is not.[54] In terms of law, the precautionary principle requires that all activities and substances that may cause environmental hazards be regulated and, where necessary, prohibited, even without convincing evidence of damage or probable damage that may be generated.[55]

iv. Polluter pays

The "polluter pays" principle establishes the rule that the pollution costs should be borne by the person responsible for causing the pollution. The meaning of the principle and its application in particular cases and situations remain open to interpretation, particularly about the nature and extent of the costs involved and the circumstances in which the principle, perhaps exceptionally, will not apply. Nevertheless, the principle has attracted widespread support and is closely related to civil liability rules for environmental damage. The practical implications of the "polluter pays" principle are in its distribution of economic obligations about environmentally harmful activities, especially in terms of liability, the use of economic instruments, and the application of rules relating to competition and subsidies. The "polluter pays" principle has not received the same degree of support or attention that has been given over the years to the principle of preventive action or the attention that has recently been given to the precautionary principle. However, its use is now being taken up in other regional agreements.[56]

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[52] Sands, Philippe. 2003. *Principles of International Enviromental Law.* Cambridge University Press. pp. 246 – 252.
[53] Wolf and Stanley, *Environmental Law*, p. 15.
[54] Naseem, Mohammad, and Naseem Saman. 2018. *International Enviromental Law.* Wolster Kluwer. pp. 242-248.

[55] Sands, *Principles of International Enviromental Law,* p. 272.
[56] Ibid. pp. 279 – 295.

v. Intergenerational equity

Intergenerational equity is a legal principle according to which future generations should have a legitimate expectation of equal access to planetary resources. This is one of the more widely accepted principles of international environmental law that imposes an obligation to preserve natural resources and the environment for future generations. The roots of this principle are in the Stockholm Declaration of 1972, and it is one of the essential elements of the principle of sustainable development. The essence of this principle is that current generations recognize the obligation of the current economic and environmental capacities that enable well-being now, not to be brought to the point of being endangered or destroyed for the needs of future generations. Unfortunately, past and present generations are irreversibly using limited mineral resources, which decreases opportunities for future generations. With this principle, an attempt is made to prevent that process.[57]

V. EMPIRICAL OVERVIEW OF ENVIRONMENTAL PROTECTION IN NATIONAL CONSTITUTIONS

The next step in the analysis is to determine whether and to what extent the right to a healthy environment, in material and procedural terms and the principles of international environmental law, are incorporated in national constitutions. To answer this question, previous empirical analyses and research done by Boyd and O'Gorman, which analyze the frequency of provisions related to environmental protection in national constitutions, were consulted. In addition, a textual analysis of 193 publicly available national constitutions published in English on the open database (constituteproject.org) was conducted using keyword search tools.[58] The summary findings of the research are presented in the table below. Almost 150 states provide environmental protection in their constitutions. A significant exception to this is the states of the Commonwealth of Nations, for which, due to the influence of the Anglo-Saxon legal tradition, issues related to the environment are not considered a constitutional matter and, as a rule, their constitutions do not regulate this issue compared to other states.

Table 1: Frequency of prevalence of provisions relating to the environment in national constitutions

	Europe	Asia	Africa	America	Australia and Oceania	In total
Substantive right to a healthy environment	63.04%	34.88%	64.15%	54.29%	7.14%	51.04%
Procedural rights	39.13%	4.65%	5.66%	25.71%	0.00%	16.67%
Principle of sustainable development	30.43%	23.26%	35.85%	40.00%	7.14%	30.21%
Principle of prevention	32.61%	18.60%	30.19%	45.71%	7.14%	29.17%
Precautionary principle	6.52%	0.00%	15.09%	25.71%	7.14%	10.94%
In principle, the polluter pays	13.04%	2.33%	3.77%	20.00%	7.14%	8.85%

[57] Ibid. pp. 256 – 257.

[58] Elkins, Zachary, Tom Ginsburg, and James Melton. n.d. *Constitute: The World's Constitutions to Read, Search, and Compare.* https://www.constituteproject.org/.

Principle of inter-generational solidarity	36.96%	9.30%	33.96%	28.57%	14.29%	26.56%
Total number of constitutions	47	43	53	35	15	193

1. Substantive right to a healthy environment

According to the analyzed constitutions, as many as 98 or more than half of the constitutions (51.04%) recognize a special substantive right to a healthy environment in contrast to procedural rights, represented in 32 constitutions or only 16.67%. If the data is observed by region, it will be noted that the largest number of constitutions that recognize the right to a healthy environment are in Europe (63.04%) and Africa (64.15%). According to several authors, the significant number of constitutions from Africa that recognize this right is a consequence of the African Charter on Human Rights, which refers both to the period at the level of enactment and to the very similar way in which the right is formulated.[59]

Unlike Africa, that conclusion cannot be drawn for Europe. Regional human rights treaties and European human rights instruments do not recognize a specific right to a healthy environment. The reasons for the widespread right to a healthy environment should be sought primarily in the two phases of intensive adoption of new constitutions, in the 70s with the fall of military dictatorships in Greece, Spain, and Portugal, as well as the fall of socialism in the countries of central and eastern Europe when all the states adopted new constitutions. In both cases, the states had to build an image that they were ready to accept, then already strengthened the demands for greater legal protection of the environment, which is why many states in Europe protect this right. This applies especially to the former socialist countries that faced severe environmental problems. Among the countries of America, if we exclude the Caribbean countries that are part of the Commonwealth of Nations and the United States, there is more than 95% recognition of the right to a healthy environment as a special substantive right. The influence of the San Salvador Protocol, although present, is still limited because it entered into force on November 16, 1999, and by then, 17 countries in the region had already recognized the right to a healthy environment in their constitutions.

2. Procedural rights

In terms of procedural rights (access to information, public participation, and access to justice), the influence of the Aarhus Convention from 1998 can be observed, bearing in mind that in percentage terms compared to other regions, most of the constitutions that contain such provisions are from Europe (39.13%) or even 18 constitutions. Then comes America, with 25.17% of the constitutions. However, in addition to the Aarhus Convention, in this section, the bad experience with hiding environmental disasters (especially in the countries of the former Soviet bloc) that the governments are trying to avoid should not be left out. Most of the contents refer to access to information. For example, Article 56 of the Constitution of Albania provides that everyone has the right to be informed about the state of the environment and its protection. Article 33 of the Constitution of Armenia stipulates that a public officeholder who hides information of importance for the environment will be held accountable. In addition to access to information, the right to initiate a procedure to protect rights is also essential. Article 34 of the Constitution of Bolivia

[59] Brunch, Carl, Wole Coker, and Chris VanArsdale. 2007. *Constitutional Environmental Law : Giving Force to Fundamental Principles in Africa - 2nd Edition.* United Nations Environment Programme. p. 88.

establishes the right of every person, on his behalf or on behalf of a group, to initiate a procedure for environmental protection before a competent court. The right to collective lawsuits exists in Burkina Faso and Portugal, where the Constitution protects the right to actio popularis. In Montenegro, the right to involve citizens in decision-making processes of importance for the environment is also recognized.

3. Principle of sustainable development

The principle of sustainable development that emerged from the activities of the UN is already an integral part of 58 constitutions around the world. In absolute terms, most of them are located in Africa (19), followed by Europe and America (14). As a principle arising from an international organization that is embodied and defined in several acts that have the status of conventional international law or acts of soft law (resolutions and declarations), it is indisputable that international law plays a role in this process. The formulations used vary. States can refer to the principle in the preambles to the constitutions in defining their function to ensure a balance between economic development and environmental protection in the arrangement of natural resources and obligations of the state. According to Article 12 of the Constitution of Armenia, the state, in managing natural resources, is obliged to be guided by the principle of sustainable development. One of the responsibilities of the Republic of Serbia, defined by Article 97 of the Constitution, is sustainable development.

4. Principle of prevention

The principle of prevention is embedded in 56 constitutions, mostly in America (South and Central America), Africa, and Europe. This principle is integrated into the constitutions when an express constitutional provision requires the state authorities to take appropriate and timely preventive measures to prevent environmental damage. As an example of provisions that implement this principle, article 20 of the Algerian Constitution can be highlighted, according to which the state has an obligation to promote biodiversity, be constantly informed and aware of all risks that may occur, and take appropriate steps. Another way of incorporating this principle is by predicting the criminality of any action that threatens the preservation of the environment as stipulated in the Constitution of Angola. Planning is also a component of the principle of prevention. The Constitution of Colombia establishes the obligation to carry out planning by the principle of sustainable development, conservation, and restoration. The state should monitor the factors that negatively affect the environment and act promptly.

5. Precautionary principle

Integrated into 21 constitutions, most of them in America (9) and Africa (8) and to a lesser extent in Europe (3) and Australia and Oceania (1), this principle usually imposes an obligation on the state whenever there is a risk of a specific action or policy. There is no specific scientific consensus on whether the risk will occur or not to take action, i.e., not to implement the policy. Examples of constitutional provisions are those that protect against the abuse of genetics (Switzerland) and the import and production of genetically modified organisms (Bolivia). Also, importing potentially hazardous waste and radioactive material is prohibited (Argentina). In several African countries, there is a constitutional ban on the import of dangerous waste, having learned from the negative experiences of the previous decades. The Burundian Constitution prohibits contracts for the

storage of dangerous materials. There are similar provisions in the constitutions of Niger and Rwanda. The Constitution of the Ivory Coast contains an express obligation to adhere to the precautionary principle.

6. The polluter pays principle

In 17 constitutions, the polluter pays principle is embodied in specific constitutional rights and obligations. The Constitution of Hungary establishes an obligation for anyone who causes environmental damage to compensate for it and bear the costs. The Constitution of Argentina states that environmental damage gives rise to an obligation to pay. The Constitution of Mexico, in the same way, regulates that the perpetrator must compensate for the damage in accordance with the law. On the other hand, in Bolivia, the Constitution declares that no statute of limitation may apply to claims caused by environmental damage.

7. Principle of intergenerational equity

The principle of intergenerational equity starts from the premise that to promote prosperity and quality of life for all; institutions should balance the short-term needs of today's generation with the long-term needs of future generations. Fifty-one of the analyzed constitutions contain references to the need for inter-generational fairness, which imposes obligations on both the state and individuals and legal entities (corporations) not to endanger future generations' well-being and prosperity. Although this principle is related to the principle of sustainable development, it still has its autonomous existence. Sweden's Instrument of Governance imposes an obligation on state authorities to promote sustainable development to improve the environment for present and future generations. The Norwegian Constitution stipulates that natural resources should be used considering long-term expectations to protect them for future generations. A similar provision is contained in the Constitution of Portugal.

VI. CONCLUSION

It is undeniable that international law has an impact on domestic law. This especially applies to international human rights agreements directly applicable in many countries and are part of the domestic constitutional order. It is also indisputable that international environmental law impacts the laws and policies of states. However, the relationship between international law and constitutions in the context of environmental protection is more complex and nuanced. Bearing in mind the role of constitutions as a direct expression of the sovereignty of citizens in the context of globalization, acts of international law have a certain but not decisive influence on the content of constitutional norms. In the context of the right to a healthy environment understood as a substantive right, international law as an inspiration for the constitution makers was observed only in Africa. On the other hand, in Europe and Latin America, this right was more a consequence of horizontal than vertical migration of constitutional norms. Motivated in part by authentic environmental problems faced by the states and in part to legitimize themselves before the international community, many of these states have accepted this right as part of the corpus of human rights. Regarding the procedural rights of the environment, the situation is different primarily due to the significant influence of the Aarhus Convention, which is an integral part of the legal systems of a large number of countries in Europe. Such influence should be another

argument for why the European Convention on Human Rights must protect the right to a healthy environment.

Regarding the principles of international environmental law, the situation is different. The fact that they (primarily) do not derive from international agreements, but with a gradual repetition in soft-law acts and instruments such as resolutions and declarations, as well as with their application, they grew into generally accepted principles of international law. In addition, they offer practical solutions to reconcile the conflicting interests of economic growth versus environmental protection from a legal point of view. More and more constitutions integrate these principles, although they can also be applied at the legislative level to direct state authorities' policies.

What remains to be explored is the impact and effect of these processes of constitutionalizing environmental protection. Using empirical methods, it is crucial to analyze whether these provisions, in addition to their indisputable political significance within the framework of the constitutions, are applicable in practice. In particular, whether courts refer to international standards and principles when making decisions in cases related to environmental protection. The process of constitutionalization has started and is gaining momentum; it remains to be seen if it will achieve the goals it is aiming for.

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