Treba li reformirati negatorijsku zaštitu od imisija u svjetlu konvencijske zaštite prava na život u zdravoj životnoj sredini?

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TREBA LI REFORMIRATI NEGATORIJSKU ZAŠTITU OD IMISIJA U SVJETLU EUROPSKE KONVENCIJE ZA ZAŠTITU LJUDSKIH PRAVA I TEMELJNIH SLOBODA I ZAŠTITE PRAVA NA ŽIVOT U ZDRAVOJ ŽIVOTNOJ SREDINI?***

***SAŽETAK**:* Autorice u radu polaze od rezultata znanstveno-istraživačkog rada kojim su zaključile da, iako između nacionalnog uređenja zaštite od imisija i konvencijske zaštite, koja se pruža pravu na život u zdravoj životnoj sredini, postoje važne razlike, a imajući u vidu ulogu Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda (načelo supsidijarnosti) nije nezamislivo da se zaštitom ovog prava (koje su države dužne štititi) osnaži položaj našeg ovlaštenika negatorijske zaštite (npr. mogućnost da se na manje složen način utvrde pretpostavke relevantne za negatorijsku zaštitu; otklone diskrepancije, kao npr. zahtjev da stvarnopravnoj zaštiti od imisija prethodi ona po posebnim propisima, i sl.). U ovom pravcu analiziraju noviju konvencijsku praksu i uspoređuju uređenje negatorijske zaštite

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(zaštite prava vlasništva od uznemiravanja) sa zaštitom specifičnog konvencijskog prava – prava na život u zdravoj životnoj sredini tumačenog u praksi Europskog suda na temelju čl. 8. Konvencije i zaštite prava na poštovanje privatnog i obiteljskog života i doma. Iscrpno analizirajući pravo na život u zdravoj životnoj sredini, detaljno objašnjavaju kojim se metodama i načelima tumačenja Europski sud vodi kada ga štiti, odnosno kako ga uopće razumije i tumači, nastavljajući ovako svoje istraživanje i s obzirom na ovo pitanje. Posebno se usredotočuju na obilježja prava koja su od ranije postulirana: zahtjev da utjecaji i smetnje iz okoliša i životne sredine ograničavaju konvencijsko pravo (tj. postojanje specifične konvencijske uzročne veze); kategorija minimalnog stupnja ozbiljnosti; osciliranje tog kvantuma (minimalnog stupnja ozbiljnosti) u okviru konvencijskih varijabli te opseg (i vrsta) zaštite prava na život u zdravoj životnoj sredini kroz paradigmu pozitivnih/negativnih obveza država ugovornica, naravno, imajući u vidu novije predmete pred Sudom. U zaključku autorice odgovaraju na pitanje kojim su naslovile rad.

***Ključne riječi**:* pravo na život u zdravoj životnoj sredini, negatorijska zaštita, imisije, Europski sud za ljudska prava

UVOD[1]

U pravnoj teoriji već se dulje vrijeme[2] analiziraju građanskopravni aspekti zaštite okoliša i uloga negatorijske zaštite, a posebno one od imisija. Okoliš kao objekt pojačane zaštite u kojem se integrira pravo odnosno zahtjev

[1] V. rezultate istraživanja objavljene u: Mihelčić, G., Marochini Zrinski, M. (2018). Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini. *Zbornik PFR-a*, vol. 39, br. 1, 241–268.

[2] U hrvatskoj pravnoj teoriji, v.: Gliha, I., Josipović, T. (2003). Građanskopravna zaštita okoliša, u: Lončarić-Horvat, O., Cvitanović, L., Gliha, I., Josipović, T., Medvedović, D., Omejec, J., Seršić, M. (2003). *Pravo okoliša*, 3. izd., Zagreb: Organizator; dalje: Lončarić-Horvat et al., 187. et seq. Proso, M. (2015). Građanskopravna odgovornost u području zaštite okoliša. *Zbornik radova Pravnog fakulteta u Splitu*, vol. 52, br. 3, 705–719, 712. et. seq*;* Maganić, A. (2017). Procesnopravni aspekti građanskopravne zaštite okoliša, u: *Građanskopravna zaštita okoliša.* Okrugli stol održan 7. lipnja 2017. u palači Akademije u Zagrebu, Barbić, J. (ur.). Zagreb: HAZU, 22; Omejec, J. (2015). Zaštita okoliša u praksi Europskog suda za ljudska prava, u: *Upravnopravna zaštita okoliša – gdje smo bili, a gdje smo sada?*. Okrugli stol održan 23. listopada 2014. u palači Akademije u Zagrebu, Barbić, J. (ur.). Zagreb: HAZU, 71–99; Šago, D. (2013). Ekološka tužba kao instrument građanskopravne zaštite okoliša. *Zbornik radova Pravnog fakulteta u Splitu*, vol. 50, br. 4, 895–915, 901. et seq; Kačer, H. (1996). Ekološka tužba – čl. 156. Zakona o obveznim odnosima. *Godišnjak 3, Aktualnosti hrvatskog zakonodavstva i pravne prakse.* XI tradicionalno savjetovanje – Opatija, 1996, Organizator, 285; Czoboly, G., Poretti, P. (2013). Procesnopravni aspekti zaštite okoliša u hrvatskom i mađarskom pravnom sustavu, u: *Pravo – regije – razvoj,* Župan, M., Vinković, M., (ur.). Pečuh, Osijek: Pravni fakultet Sveučilišta u Pečuhu i Pravni fakultet Sveučilišta u Osijeku, 360).

za život u zdravoj životnoj sredini sve više postaje opći nazivnik zaštite koja se udaljava od zaštite subjektivnog imovinskog prava pojedinca i njegova nositelja odnosno ovlaštenika u tradicionalnom građanskopravnom smislu.[3]

U radu objavljenom 2018. citirali smo zaključak koji iznosi Cvetić o odnosu kolektivne i pojedinačne zaštite.[4] Rečenice u kojima autorica kaže da

> „...štiteći svoj interes (...) pojedinac doprinosi ostvarenju općeg interesa (...) te da (...) pri tome, ne treba podcijeniti zainteresiranost privatnih subjekata za reakciju kojom se ostvaruje zaštita prirodne okoline, kroz zaštitu privatnih interesa,“ [5]

i sada nam predstavlja relevantnu tezu. Rezultati ovog istraživanja trebali bi dati odgovore o prednostima koje se za zaštitu okoliša mogu ostvariti zaštitom subjektivnog prava ovlaštenika, prava na nekretnini od uznemiravanja/imisija i postoje li prednosti uopće. Ovo će zahtjevati analizu dosega građanskopravne zaštite *de lege lata* polazeći od toga da je načelo supsidijarnosti europskog prava i izravna primjena Konvencije za zaštitu ljudskih prava i temeljnih sloboda (dalje: Konvencija ili EKLJP)[6] u nacionalnom pravnom sustavu donijelo posebnu supranacionalnu zaštitu mješovite naravi.

Negatorijsku zaštitu od imisija u hrvatskom pravu uređuju stvarnopravna pravila koja štite vlasnika od uznemiravanja,[7] te ona o susjedskim odnosima.[8] Odmah se može reći da u ova pravila (jednako kao i ona obveznopravne

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[3] Gajinov, T. (2016). Građanskopravna odgovornost za imisije (doktorski rad). Novi Sad: Pravni fakultet Univerziteta u Novom Sadu, 11–16. Gajinov, T. (2016). *Građanskopravna odgovornost za imisije i zaštita životne sredine.* Beograd, 13. et seq.; https://www.researchgate.net/publication/342364863_Tamara_Gajinov_-_Gradjanskopravna_odgovornost_za_imisije/link/5ef0fc01a6fdcc73be94baca/download (pristupljeno: 30. svibnja 2022.). Medić, D. (2014). Zaštita prava svojine u pravu Republike Srpske. *Godišnjak Fakulteta pravnih nauka*, vol. 4, br. 4, 17–38; Cvetić, M. R. (2015). Značaj negatorijske tužbe za zaštitu životne sredine. *Zbornik radova Pravnog fakulteta.* Novi Sad, vol. XLIX, br. 4, 1583–1595; Cvetić, R. (2014). Održivi razvoj i ekološka šteta. *Zbornik radova Pravnog fakulteta u Nišu*, vol. 53, br. 68, 291–302; Rašović, Z. (2006). Negatorna tužba. *Arhiv za pravne i društvene nauke*, br. 1–2, 964, cit. prema Medić, D. (2011). Zaštita prava svojine u pravu Republike Srpske, 32; Lazarević, D. (2011). *Službenosti i susedsko pravo,* prvo izdanje. Beograd, 468. Cit. prema: Medić, D. (2011). *Zaštita prava svojine u pravu Republike Srpske*, 31.

[4] Mihelčić, G., Marochini Zrinski, M. (2018). Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini. *Zbornik PFR-a*, vol. 39, br. 1, 247, bilj. 29.

[5] Cvetić, M. R. (2015). Značaj negatorijske tužbe za zaštitu životne sredine. *Zbornik radova Pravnog fakulteta.* Novi Sad, vol. XLIX, br. 4.

[6] *Narodne novine*, dalje: NN, Međunarodni ugovori, dalje: MU, br. 18/97, 6/99. – pročišćeni tekst, 8/99, 14/02, 13/03, 9/05, 1/06. i 2/10.

[7] V.: Čl. 167. Zakona o vlasništvu i drugim stvarnim pravima, NN, br. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15. – pročišćeni tekst i 94/17, dalje: ZV.

[8] Susjedska prava uređuju čl. 100. do 113. ZV-a. Imisije uređuje čl. 110. ZV-a.

naravi) od posljednjeg istraživanja (zapravo i puno prije) zakonodavac nije intervenirao. Zaštita od imisija šira je od zaštite pružene vlasniku zbog uznemiravanja. One, kao i druga susjedska prava, predstavljaju ovlast vlasniku da u izvršavanju svog prava vlasništva, radi uzajamno obzirnog izvršavanja prava, zahtijeva od vlasnika druge nekretnine u njegovu interesu nešto trpjeti, propuštati ili činiti na svojoj nekretnini (čl. 100, st. 1. Zakona o vlasništvu i drugim stvarnim pravima u daljem tekstu: ZV).[9] Odnosno, da mu ne izlaže nekretninu (nedopuštenim) imisijama. Posebnost imisijske zaštite jest to što se ostvaruje i putem obveznopravnih pravila tj. zahtjevom na uklanjanje opasnosti od štete (čl. 1047. Zakona o obveznim odnosima[10]) i odgovarajućom primjenom pravila o izvanugovornoj odgovornosti za štetu.

Definicija imisija postoji i u jednom drugom sustavu, u čl. 4, st. 1, t. 7. Zakona o zaštiti okoliša,[11] gdje ih se određuje kao koncentraciju tvari na određenom mjestu i u određenom vremenu u okolišu. Ovaj sustav zaštite ima drugi objekt zaštite (okoliš), drukčiji sadržaj i zaštitne ovlasti.[12] Ipak, ograničavajući se u istraživanju građanskopravnim poimanjem imisija,[13] ne može se izostaviti da se u građanskoj pravnoj teoriji sve više naglašava fluidnost granice između sustava, a europski pristup je gotovo potire.[14]

Naime, u nacionalni pozitivnopravni okvir značajne novine unio je konvencijski *acquis* tj. primjena Konvencije i prakse Europskog suda za zaštitu ljudskih prava (dalje: Europski sud ili Sud). Utjecaj počiva na tri temeljne pretpostavke: Konvencija štiti pravo na život u zdravoj životnoj sredini; riječ je o pravu kreiranom njezinim tumačenjem primjenom načela tumačenja (načela živućeg instrumenta (evolutivnog tumačenja), načela autonomnog tumačenja, primjenom polja slobodne procjene, te načelom učinkovitosti); pravo se zaštićuje postoji li dovoljna konvencijska uzročna veza, ako je povreda barem minimalno ozbiljna i posljedica narušavanja pravične ravnoteže.

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[9] Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (2007). *Stvarno pravo*, sv. 1, 2. izmijenjeno i dopunjeno izd. Zagreb: *Narodne novine*, 645. et seq*;* Gliha, I. (2003). Novo uređenje susjedskih odnosa u svjetlu prilagodbe hrvatskog građanskopravnog poretka europskim. *Das Budapester Symposium, Beiträge zur Reform des Sachenrechts in den Staaten Südosteeuropas*, Budipeštanski simpozijum, Doprinos reformi stvarnog prava u državama jugoistočne Evrope, Editio Temmen, Bremen, 48. et seq.

[10] *Narodne novine*, br. 35/05, 41/08, 125/11, 78/15, 29/18. i 126/21, dalje: ZOO.

[11] *Narodne novine*, br. 80/13, 153/13, 78/15, 12/18. i 118/18, dalje: ZZO.

[12] Za upravnopravni okvir, Medvedović, D. (2015). Razvoj upravnopravne zaštite okoliša u Hrvatskoj, u: *Upravnopravna zaštita okoliša – gdje smo bili, a gdje smo sada?*. Okrugli stol održan 23. listopada 2014. u palači Akademije u Zagrebu, Barbić, J. (ur.) poseban otisak, Zagreb: HAZU, 41, et seq.

[13] Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (2007). *Op. cit.,* 662.

[14] *Ibid*. V. još čl. 5. st. 4. i 5. ZZO o primjeni obveznopravnih pravila.

NAČELO SUPSIDIJARNOSTI I IZRAVNA PRIMJENA KONVENCIJE – OKOSNICE USKLAĐENJA KONVENCIJSKE I NEGATORIJSKE ZAŠTITE ODNOSNO ZAŠTITE OD IMISIJA

Govoreći o ulozi Konvencije i njezine prakse na nacionalno pravo u predmetu *Habulinec i Filipović protiv Hrvatske*[15] Europski sud Konvenciju smatra sastavnim dijelom hrvatskog pravnog sustava,[16] pri tom naglašavajući da je njegova praksa sastavni dio sustava Konvencije. Dakle, i Konvencija i praksa Suda integralni su dio našeg pravnog sustava.[17] Temeljem načela supsidijarnosti primijeniti ih valja kada postoje potrebne pretpostavke,[18] a polazeći od toga da supsidijarnost podrazumijeva da je mehanizam zaštite ljudskih prava i temeljnih sloboda uspostavljen Konvencijom supsidijaran nacionalnim sustavima zaštite ljudskih prava. Odnosno, da su države ugovornice te koje su primarno odgovorne za učinkovitu provedbu Konvencije, pa Sud djeluje tek kao „konačni osigurač" kako bi otklonio one povrede koje nisu ispravljene na nacionalnoj razini.

U pojedinim slučajevima Konvenciju i pripadajuću praksu Suda trebati će primijeniti izravno. To će biti onda kada se nacionalno uređenje ne podudara s konvencijskim, pa se izravnom primjenom Konvencije ispravljaju nedostatci nacionalnog uređenja i otklanja prijeteća povreda Konvencijom zaštićenih prava. Pri tome treba zapamtiti da

> „...Konvencija državama članicama ne određuje unaprijed zadan način kako u svom pravu osigurati djelotvornu provedbu Konvencije (...) izbor

[15] Zahtjev br. 51166/10, odluka od 4. lipnja 2013.

[16] Polazeći od odredbi „čl. 14, čl. 35. i čl. 140. Ustava Republike Hrvatske (*Narodne novine*, br. 56/90, 135/97, 8/1998. – pročišćeni tekst, 113/00, 124/00. – pročišćeni tekst, 28/01. i 41/01. – pročišćeni tekst, 55/01. – *corrigendum* i 76/10, dalje: Ustav/10), čl. 62. Ustavnog zakona o Ustavnom sudu (*Narodne novine*, br. 29/02, dalje: UZUS/02) i čl. 5. Zakona o sudovima (*Narodne novine*, br. 3/94, 100/96, 131/97, 129/00, 17/04. i 141/04, dalje: ZS/04)" te „ustavnosudske prakse iz odluka U-I-892/1994 od 14. studenog 1994. (*Narodne novine*, br. 83/1994) i U-I-130/1995 od 20. veljače 1995. (*Narodne novine*, br. 112/1995) u kojima je Ustavni sud presudio 'da sva prava zajamčena Konvencijom i njenim Protokolima treba smatrati i ustavnim pravima koja imaju jednaku snagu kao i odredbe Ustava', (*Habulinec i Filipović protiv Hrvatske*, paras. 10–11)". Sud kaže: „Konvencija je sastavni dio hrvatskog pravnog sustava, u kojem ima prednost pred svakom suprotnom zakonskom odredbom (čl. 140. Ustava/10…) te je izravno primjenjiva (čl. 5. ZS/04). *Habulinec i Filipović protiv Hrvatske*, para. 30."

[17] *Habulinec i Filipović protiv Hrvatske*, para. 30

[18] Sud kaže da je „načelo supsidijarnosti jedno od temeljnih načela na kojima se osniva sustav Konvencije (...) što znači da je sustav zaštite temeljnih ljudskih prava uspostavljen Konvencijom supsidijaran nacionalnim sustavima koji čuvaju ljudska prava." V. *Habulinec i Filipović protiv Hrvatske*, paras. 26–32.

najprikladnijeg sredstva, u načelu je, na domaćim vlastima (neposredni uvid i bolje poznavanje nacionalnog uređenja.“[19]

Jedno od prvih pitanja u hrvatskim predmetima bilo je ono o primjeni Konvencije *ratione tempore.* Konvencija obvezuje Republiku Hrvatsku od 5. studenog 1997. godine,[20] (a kako kaže Sud) imajući u vidu činjenice koje čine miješanje,[21] (…) budući da pružanje pravne zaštite pretpostavlja utvrđenje da je miješanje bilo nezakonito na temelju prava koje je bilo na snazi kada se miješanje dogodilo (*tempus regit actum*).[22]

Dakle, uz pretpostavku primjene Konvencije *ratione tempore,* te da između miješanja države u pravo na život u zdravoj životnoj sredini postoji uzročna veza koja vodi zaključku o neopravdanom miješanju države, nacionalni sud izravno primjenjujući Konvenciju može pružiti zaštitu kakvu u svojoj praksi Europski sud pruža pravu na život u zdravoj životnoj sredini.

UREĐENJE IMISIJA U HRVATSKOM PRAVU

Stvarnopravno pravilo iz čl. 110, st. 1. ZV zabranjuje služiti se ili koristiti nekretninu tako da na tuđu nekretninu dospiju imisije, dim, neugodni mirisi, čađa, otpadne vode, potresi, buka i sl. Imisije su zabranjene kada su prekomjerne, ali ne i bez iznimke, već s obzirom na namjenu primjerenu nekretnini, odnosno, ovisno uzrokuju li znatniju štetu ili su nedopuštene na temelju posebnih propisa. Riječ je o tzv. prekomjernim posrednim imisijama.

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[19] V. vrlo važno: „Prema čl. 35. st. 1. Konvencije Sud može rješavati neku stvar tek nakon što su iscrpljena sva domaća pravna sredstva. Svrha čl. 35. Konvencije je dati svim državama ugovornicama priliku za sprečavanje ili ispravljanje povreda prije nego što navodi o povredama budu dostavljeni Sudu.“ V. *Habulinec i Filipović protiv Hrvatske*, paras. 26–32. Primjerice, u predmetu *Mastelica i drugi protiv Srbije,* odluka od 10. prosinca 2020, zahtjev br. 14901/15, Sud naglašava kako „nije potrebno raspraviti o vladinom prigovoru u pogledu iscrpljivanja domaćih pravnih lijekova, jer su zahtjevi podnositelja u svakom slučaju neprihvatljivi“, *Mastelica i drugi protiv Srbije*, para. 47.

[20] V. predmet *Blečić protiv Hrvatske,* presuda (VV) od 8. ožujka 2006, zahtjev br. 59532/00. Istaknuto je da „u skladu s općim pravilima međunarodnoga prava (…) odredbe Konvencije ne obvezuju ugovornu stranku u odnosu na (…) akt ili činjenicu koji su se dogodili ili (…) situaciju koja je prestala postojati prije stupanja na snagu Konvencije u odnosu na tu stranku.“ Nadalje, da je „u svojim izjavama danim na temelju bivših čl. 25. i 46. Konvencije (…) Hrvatska priznala nadležnost tijela Konvencije da postupaju po pojedinačnim zahtjevima na temelju činjenica koje su se dogodile nakon što su Konvencija i njezini Protokoli stupili na snagu u odnosu na Hrvatsku. Ove izjave ostaju važeće za utvrđivanje nadležnosti Suda (…) na temelju sadašnjeg čl. 34. Konvencije i na temelju čl. 6. Protokola br. 11.“ *Blečić protiv Hrvatske,* paras. 70–71.

[21] *Ibid.*, para. 77.

[22] *Ibid.*, paras. 80–81.

Dođe li do njih, odnosno radi li se o uznemiravanju trajnije naravi, vlasnik (predmnijevani vlasnik[23]/posjednik[24]) može zahtijevati da uznemiravanje prestane (čl. 167, st. 1. u vezi sa st. 4. ZV).[25] Krug ovlaštenika koji mogu tražiti zaštitu od imisija širi je od kruga ovlaštenika koji svoju ovlast na zaštitu crpe s naslova negatorijske zaštite, na aktivnoj strani ovlaštenje pripada svim osobama koje nekretninu posjeduju na temelju prava izvedenoga iz vlasnikova.[26] Jednako je tako i na pasivnoj strani.[27]

Imisijska zaštita razlikuje se i po sadržaju. Obuhvaća zaštitu od neposrednih imisija (koje su uvijek nedopuštene), te prekomjernih posrednih imisija. Ovlasti na raspolaganju onomu tko trpi imisije jesu: zahtijevati da se otkloni njihov uzrok i naknadi prouzročena šteta, ali i da se ubuduće propušta činiti na nekretnini ono što je uzrokom imisija, dok se ne poduzmu sve mjere potrebne da se onemoguće. Iznimka postoji u slučaju kada prekomjerne posredne imisije potječu od djelatnosti za koju postoji dopuštenje nadležne vlasti – dok dopuštenje traje ne može se zahtijevati propuštanje obavljanja djelatnosti, ali je dopušteno zahtijevati naknadu štete, te tražiti da se poduzmu prikladne mjere kako bi se ubuduće spriječile prekomjerne imisije odnosno nastup štete ili da se ona smanji. Najvažnija razlika prema negatorijskoj zaštiti postoji s obzirom na ovlast predviđenu za slučaj kada prijeti predvidiva opasnost s tuđe nekretnine od neposrednih ili prekomjernih posrednih imisija. U tom se slučaju može upotrijebiti zahtjev da se odrede i provedu svrhovite mjere radi sprječavanja imisija.[28]

Čl. 1047. ZOO-a ovlašćuje na uklanjanje opasnosti od štete ili suzdržavanje od određene djelatnosti[29] kao i na poduzimanje mjera radi sprječavanja nastanka štete ili uznemirivanja odnosno uklanjanje izvora opasnosti.[30] Iznimka je slična onoj iz stvarnopravnih pravila – radi li se o prekomjernoj šteti koja

[23] V. čl. 167, st. 4. ZV.

[24] V. čl. 20, st. 2. u vezi sa čl. 21, st. 1. ZV

[25] Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (2007). *Stvarno pravo*, sv. 1, 2. izmijenjeno i dopunjeno izd. Zagreb: Narodne novine, 625. et seq.

[26] V. čl. 100, st. 2. ZV.

[27] V. čl. 100, st. 4. ZV. Pravilima o susjedskim pravima podvrgnuti su i suvlasnici na čijim je suvlasničkim dijelovima uspostavljeno vlasništvo posebnog dijela nekretnine. Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (2007). *Op. cit.*, 625. *Ibidem,* 649. Golub, A. (2012). Zaštita prava vlasništva tužbom za prestanak uznemiravanja (negatorijskom tužbom). *Hrvatska pravna revija*, br. 11., 2–3. V. kod obične negatorije, Gavella pozivom na čl. 37. st. 6. ZV. Gavella, et al., *Op. cit.,* 690. Golub pozivom na čl. 46, st. 1. ZV. Golub, A. (2012). *Op. cit.*, 2–3.

[28] V. čl. 110, st. 5. ZV. U teoriji se problematizira dovodi li ovakvo proširenje tužbenog zahtjeva u pitanje negatorijsku narav zaštite. Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (2007). *Op. cit.*, 664.

[29] V. čl. 1047, st. 1. ZOO

[30] V. čl. 1047, st. 2. ZOO

nastane u obavljanju općekorisne djelatnosti za koju je dobiveno odobrenje, naknada štete je moguća prelazi li uobičajene granice.[31] S tim što se može tražiti i poduzimanje društveno opravdanih mjera kako bi se spriječilo nastupanje štete ili da se šteta smanji.[32]

Za imisijsku zaštitu vrlo su važna pravila koja uređuju izvanugovornu odgovornost za štetu. Prema čl. 167. st. 3. ZV, ako je uznemiravanjem prouzročena šteta, vlasnik ima pravo zahtijevati njezinu naknadu po općim pravilima o naknadi štete. Šteta ne mora nužno biti vezana uz nekretninu niti biti imovinska. Zahtjev za naknadu štete moguće je postaviti uz negatorijski zahtjev za prestanak uznemiravanja ili kao samostalan zahtjev u posebnoj parnici radi naknade štete. Za razliku od negatorijskog zahtjeva koji ne zastarijeva (u čemu se krije jedan od razloga u prilog ovoj zaštiti),[33] zahtjev za naknadu štete zastarijeva prema općim pravilima o zastari (iz ZOO).[34]

KONVENCIJSKA ZAŠTITA PRAVA NA ŽIVOT U ZDRAVOJ ŽIVOTNOJ SREDINI

Pravo na život u zdravoj životnoj sredini nije pravo zajamčeno Konvencijom. Čl. 8. Konvencije, kao ni bilo koji drugi, naime, ne pružaju zaštitu pravu na zdrav okoliš ili zdravu životnu sredinu i ovo se pravo u Konvenciji i pratećim protokolima ne spominje. Riječ je o prvoj od više relevantnih točaka koju Europski sud ističe u nizu predmeta,[35] naglašavajući i vitalno značenje pitanja okoliša u današnjem društvu.[36]

[31] V. čl. 1047, st. 3. ZOO.

[32] V. čl. 1047, st. 4. ZOO. Za sudsku praksu: Kontrec, D. (2017). Građanskopravna zaštita okoliša u sudskoj praksi. U: *Građanskopravna zaštita okoliša*. Okrugli stol održan 7. lipnja 2017. u palači Akademije u Zagrebu, Barbić, J. (ur.) Zagreb: HAZU, 85. et seq.

[33] O ovom, kao i za detaljnu analizu kod: Josipović, T. (2017). Građanskopravna zaštita od štetnih imisija, u: *Građanskopravna zaštita okoliša.* Okrugli stol održan 7. lipnja 2017. u palači Akademije u Zagrebu, Barbić, J. (ur.). Zagreb: HAZU, 56.

[34] Medić, D., Zaštita prava svojine u pravu Republike Srpske, *Godišnjak Fakulteta pravnih nauka*, 34.

[35] V. *Kyrtatos protiv Grčke,* zahtjev br. 41666/98, presuda od 22. svibnja 2003; *Hatton i drugi protiv Ujedinjenog Kraljevstva,* zahtjev br. 36022/97, [VV] presuda od 7. ožujka 2003; *Fadeyeva protiv Rusije,* zahtjev br. 55723/00, presuda od 9. lipnja 2005.

[36] V. *Fredin protiv Švedske (br. 1)*, zahtjev br. 12033/86, presuda od 18. veljače 1991, para. 48; *Turgut i drugi protiv Turske,* zahtjev br. 1411/03, presuda od 8. srpnja 2008, para. 90; *Rimer i drugi protiv Turske*, zahtjev br. 18257/04, presuda od 10. ožujka 2009, para. 38.

Ovo je i jedan od razloga zašto se u okviru Vijeća Europe još od 2009. godine pokušava donijeti Protokol o pravu na zdrav okoliš[37] (dalje: Protokol), no bez uspjeha. Ideja o Protokolu iznesena je 2009. godine kada je Parlamentarna skupština (dalje: Skupština) dala i preporuku za njegovo donošenje, no, Odbor ministara Vijeća Europe (dalje: Odbor) nije poduzeo za to potrebne mjere. Tek je u rujnu 2021. Odbor za socijalna pitanja Skupštine predstavio nacrt prijedloga Protokola[38] dok je sama Skupština (ponovno) u listopadu 2021. usvojila Rezoluciju br. 2396 (2021)[39] kojom se Odbor poziva na usvajanje dodatnog protokola uz Konvenciju kojim bi se uspostavilo utuživo „pravo na siguran, čist, zdrav i održiv okoliš". U Rezoluciji se državama članicama preporučuje da razviju i uspostave zakonodavni okvir, kako na domaćoj tako i na europskoj razini, sve kako bi se zaštitilo pravo na zdrav okoliš. Nadalje, pozivaju se da podrže multilateralne inicijative usmjerene na izričito prepoznavanje i zaštitu prava. Predlaže se uspostava posebnog pravnog okvira za jačanje korporativne odgovornosti za okoliš. U Rezoluciji se navodi da bi usvajanje pravno obvezujućeg i utuživog instrumenta poput dodatnog protokola

> „...konačno dalo Europskom sudu nespornu osnovu za donošenje odluka koje se tiču kršenja (zaštite) ljudskih prava do kojih dolazi zbog štetnih utjecaja povezanih s okolišem na ljudsko zdravlje, dostojanstvo i život."[40]

Odluka je sada na Odboru koji treba donijeti odluku hoće li izraditi novi protokol uz Konvenciju. Ukoliko se novi protokol i usvoji, ostaje za vidjeti koliko će ga država ratificirati i kada, a to je daljnji problem. Znakovito je kako Konvencija (Vijeća Europe) o zaštiti životne sredine putem kaznenog prava (ETS br. 172)[41] iz 1998. još uvijek nije prikupila dovoljan broj ratifikacija za stupanje na snagu.[42]

Do eventualnog stupanja na snagu novog protokola i njegove ratifikacije od strane dovoljnog broja država članica zasigurno će proći dosta vremena.

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[37] Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17777&lang=en, pristup 28. lipnja 2022.

[38] Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=29409&lang=en, pristup 28. lipnja 2022.

[39] Resolution 2396 (2021), Text adopted by the Assembly on 29 September 2021 (27th sitting), https://pace.coe.int/en/files/29499/html, pristup 28. lipnja 2022.

[40] Primijećeno je da „iako gotovo polovica svjetskih zemalja priznaje pravo na zdrav okoliš, Europa je jedina regija na svijetu bez sporazuma koji jamči takvo pravo".

[41] Convention on the Protection of the Environment through Criminal Law (ETS No. 172), https://www.coe.int/en/web/conventions/full-list?module=treaty-detail& treatynum=172, pristup 28. lipnja 2022.

[42] Za isto su potrebne ratifikacije samo tri članice.

Do tada će Europski sud (kao i nacionalni sudovi) veliku većinu zahtjeva vezanih uz povrede prava na život u zdravoj životnoj sredini ipak ispitivati u okviru čl. 8. Konvencije. Kako funkcionira zaštita koja se podnositeljima pruža u okviru tog članka? Prva i najvažnija pretpostavka jest postojanje odgovarajuće uzročne veze između povrede prava i onoga što je u temelju njegove povrede.[43] Velika posebnost jest što temelj povrede u konvencijskom smislu predstavlja specifičnu štetnu radnju *sui generis* – čin ili propuštanje države koje je dovelo do povrede. Obveza je države,[44] a obveza može biti negativna i pozitivna, država ju može ne ispuniti odnosno ne propustiti ispuniti, da ne prouzroči miješanje u pravo pojedinca koje nije sukladno Konvenciji. Nije joj dopušteno niti neopravdano proširiti polje slobodne procjene koje bi dovelo do povrede, ponajprije čl. 8. Konvencije.[45]

Negatorijska zaštita od imisija *versus* konvencijska zaštita

U zaštiti prava na život u zdravoj životnoj sredini poseže se za dvije zaštićene vrijednosti/prava iz čl. 8. Konvencije, pravom na (poštovanje) privatnog i obiteljskog života i pravom na (poštovanje) doma. Ovo znači da se vrijednost/pravo na život u zdravoj životnoj sredini sadržajno prepoznaje i štiti u okvirima prava koja su identificirana u čl. 8. Konvencije i njime zaštićena (to nisu jedina zaštićena prava iz čl. 8. Konvencije). Preciznije, kroz pojedine pojavne oblike povreda ovih prava prepoznaje se povreda prava na život u zdravoj životnoj sredini. Tako se može pročitati da Europski sud povrede prava na privatan i obiteljski život nalazi u povredama njegovih potkategorija

[43] V.: *Mutatis mutandis*, *Botta protiv Italije*, zahtjev br. 21439/93, presuda od 24. veljače 1998, para. 34.

[44] V.: *Ivan Atanasov protiv Bugarske*, zahtjev br. 12853/03, presuda od 2. prosinca 2010. para. 66.

[45] Vidjeti će se *infra* da se pravo na život u zdravoj životnoj sredini može štititi i kroz zaštitu nekih drugih konvencijskih prava, no, najčešće će se raditi o čl. 8. Konvencije. U ranijim istraživanjima detaljnije je prikazan koncept prava na život u zdravoj životnoj sredini koji je izgrađen primjenom načela tumačenja Konvencije. V.: Mihelčić, G., Marochini Zrinski, M. (2018). Utjecaj konvencijskih načela tumačenja na pojedine građanskopravne institute (odabrana pitanja). *Zbornik radova Pravnog fakulteta u Nišu*, vol. 78, br. 1, 127–148. Mihelčić, G., Marochini Zrinski, M., *Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini*. Marochini Zrinski, M. (2021). Principles in the Service of Conception and Protection of the Right to Live in a Healthy Environment: (In)Consistency of the European Court's Case-Law. *Property law: Challenges of the 21 century's: Proceedings: International Scientific Conference,* Simić, J., Radonjić, A. (ur.). Beograd: Univerzitet Union Beograd, 263–288.

– tjelesnog, psihičkog i moralnog integriteta vezanim uz okoliš.[46] Sličan se pristup vidi i kod prava na poštovanje doma.

Dovedemo li ovo u vezu s našom negatorijskom zaštitom od imisija sve je još složenije. Krenimo korak po korak.

Razlikovanje objekata zaštite

U usporedbi s negatorijskom zaštitom odnosno zaštitom od imisija, konvencijska zaštita prava na život u zdravoj životnoj sredini odstupa od koncepta jednoznačnosti svog objekta (zaštićene vrijednosti).[47] Istina je da jedna skupina predmeta u kojima je pružena konvencijska zaštita pokazuje sličnost sa zaštitom nalik onoj zbog nedopuštenih (izravnih/prekomjernih neizravnih) imisija (čl. 110. ZV, npr. dim, neugodni mirisi, čađa, otpadne vode, potres, buka i sl.) i njezinim zaštićenim objektom. Primjer je poznati predmet *Oluić protiv Hrvatske*[48] u kojem je zaštićeno pravo na dom i kazano da to pravo

> „...uključuje, ne samo pravo na konkretan fizički prostor, već i na tiho uživanje toga prostora". „Tiho uživanje nije ograničeno na fizičke povrede (npr. neovlašteni ulazak)." „Ono uključuju i zaštitu od buke, emisije, mirisa ili drugih oblika miješanja."[49]

Smetnje i utjecaji promatraju se u širem smislu, gotovo, sukladno čl. 4, st. 1, t. 7. ZZO, kao što je slučaj u predmetu *Fadeyeva protiv Rusije* kada je zašita pružena zbog smetnji i utjecaja iz „čeličane koja je ispuštala štetne tvari u vrijednostima višim od onih dopuštenih zakonom"[50].

Autonomno koncipiranje konvencijskih pojmova

Specifičnosti konvencijske zaštite dolaze do izražaja i u drugim aspektima. Štiteći pravo na život u zdravoj životnoj sredini kroz zaštitu pruženu pravu na poštovanje doma, zaštićuje se „prostor" definiran autonomnim

[46] Vodič kroz čl. 8. Europske konvencije o ljudskim pravima, Pravo na poštovanje privatnog i obiteljskog života, doma i dopisivanja, Vijeće Europe, 2020, https://uredzastupnika.gov.hr/UserDocsImages/ dokumenti/Edukacija /Vodi %C4 %8D %20 kroz %20 %C4 %8Dlanak %208. %20Konvencije.pdf., pristupljeno: 28. lipnja 2022, 33–34.

[47] Ova zaštita ne slijedi nacionalne pravce zaštite (npr. građanskopravne, upravnopravne, i sl.).

[48] Zahtjev br. 61260/08, presuda od 20. svibnja 2010.

[49] Odnosno „povreda može dovesti do povrede prava (…) ako [pojedinca] sprječava u uživanju u udobnosti njegovog doma." *Oluić protiv Hrvatske*, para. 44. V. također i *Udovičić protiv Hrvatske,* zahtjev br. 27310/09, presuda od 24. travnja 2014. Slični se navodi u većini presuda u kojima se Sud bavio tim pitanjem. Osobito v. *Hatton i drugi protiv Ujedinjenog Kraljevstva,* zahtjev br. 36022/97, [VV] presuda od 7. ožujka 2003, para. 96.

[50] *Fadeyeva protiv Rusije,* para. 116.

tumačenjem pojma doma,[51] značajno različit od stvarnopravnog pojma nekretnine (u smislu ZV), pa i kada se štiti od imisija.[52] Na djelu je poznati kriterij: dostatna faktično-funkcionalna veza pojedinca s nekim prostorom što omogućuje pravu na život u zdravoj životnoj sredini pružiti znatno širu zaštitu.

Pravo na život u zdravoj životnoj sredini – integralni dio prava na poštovanje privatnog života i prava na poštovanje doma?

Zaštita kroz pravo na poštovanje privatnog života

Iako veliki broj predmeta i razvijena praksa Suda dopušta, barem dijelom, predmete vezane uz pravo na život u zdravoj životnoj sredini podijeliti na one koji se odnose na pravo na poštovanje privatnog života i na pravo na poštovanje doma, zapravo, nije ozbiljno ne kazati da se često isprepliću i da nije jednostavno odvojiti uživanje privatnog života od uživanja u domu. Unatoč tome, postoje predmeti koji se isključivo odnose na pitanje poštovanja privatnog života.[53]

U predmetu *Cordella i drugi protiv Italije*[54] još su studije iz 1970-ih pokazale onečišćujuće učinke emisija iz čeličane Ilva u Tarantu na okoliš i javno zdravlje, a naknadne studije utvrdile i postojanje uzročno-posljedične veze između izloženosti takvim tvarima (okolišu u kojima ih je moguće udahnuti) i razvoja određenih tumora/kardio-krvožilnih patologija (povećanje smrtnosti od prirodnih uzroka, tumora, te bubrežnih i kardiovaskularnih bolesti među osobama koje žive u zahvaćenim područjima). Sud je smatrao da država nije uspjela uspostaviti pravednu ravnotežu između konkurentnih industrijskih i pojedinačnih interesa i donijeti mjere potrebne za osiguranje učinkovite zaštite prava na privatni život i ovim povrijedila čl. 8. Konvencije. Vrlo zanimljivo razmišljanje dano je u predmetu *Hudorovič i drugi protiv Slovenije.*[55] Sud u njemu nije izrijekom rekao da je čl. 8. Konvencije primjenjiv već je stvorio određenu hipotezu da „i pod pretpostavkom da je čl. 8. Konvencije primjenjiv u predmetu *Hudorovič i drugi protiv Slovenije* ne bi bio / nije povrijeđen". Raspravljano je pitanje pristupa pitkoj i sigurnoj vodi za piće i naglašeno da

[51] V. Mihelčić, G., Marochini, M. (2014). Koneksitet ostvarenja vindikacijskog zahtjeva na nekretnini i tzv. prava na poštivanje doma. *Zbornik PFR*-a, vol. 35, br. 1, 163–192, 168 et seq.

[52] Usp. predmet *Öneryıldız protiv Turske*, zahtjev br. 48939/99, presuda od 30. studenog 2004.

[53] V. *Brincat i drugi protiv Malte*, zahtjevi br. 60908/11, 62110/11, 62129/11, 62312/11, i 62338/11, presuda od 24. srpnja 2014; *Taskin i drugi protiv Turske*, zahtjev br. 46117/99, presuda od 10. studenog 2004.

[54] Zahtjevi br. 54414/13. i 54264/15, presuda od 24. siječnja 2019.

[55] Zahtjevi br. 24816/14. i 25140/14, presuda od 10. ožujka 2020.

„...pristup sigurnoj vodi za piće nije pravo zaštićeno čl. 8. Konvencije. Međutim, bez vode čovjek ne može opstati. Stalna i dugotrajna nemogućnost pristupa sigurnoj vodi za piće može imati štetne posljedice po zdravlje i ljudsko dostojanstvo i narušiti jezgru privatnog života i uživanje u domu u smislu čl. 8. Konvencije. Stoga, Sud ne može isključiti postojanje pozitivne obveze države prema ovoj odredbi. Postojanje takve pozitivne obveze i njezin sadržaj nužno su određeni posebnim okolnostima oštećenika, ali i pravnim okvirom, kao i ekonomskom i socijalnom situacijom države ugovornice. Sud smatra da je pitanje jesu li ispunjene pozitivne obveze te njihov opseg temeljno pitanje povezano s meritumom i u tijesnoj vezi s posebnim okolnostima slučaja i njihovom razinom ozbiljnosti. Stoga, postoji snažna veza između pitanja primjenjivosti i merituma u ocjeni je li riječ o pitanju privatnog života ili ne."

Sud je nadalje naglasio široku slobodu procjene države u području prostornog planiranja gdje samo posebno uvjerljivi razlozi poput ozbiljnog rizika po zdravlje mogu opravdati nametanje tereta državi da poduzme određene korake imajući u vidu specifične situacije podnositelja zahtjeva. Zaključio je da je država uzela u obzir ranjiv položaj podnositelja zahtjeva i usvojila odgovarajuće mjere kako bi im osigurala pristup pitkoj vodi i kanalizaciji čime je udovoljila zahtjevima iz čl. 8. Konvencije.

Zaštita u okviru oba zaštićena prava
iz čl. 8, st. 1. Konvencije

S druge strane, jedan noviji predmet pokazuje koliko je teško odvojiti pojam privatnog života od pojma doma. Riječ je o predmetu *Di Sarno protiv Italije,*[56] gdje je u regiji Kampanja (Campania) od veljače 1994. do prosinca 2009. proglašeno izvanredno stanje uvjetovano problemima u prikupljanju, obradi i odlaganju otpada. Osamnaest podnositelja koji su živjeli i/ili radili u ovoj regiji obratilo se Sudu i on je njihov problem razmotrio sa stajališta pozitivnih obveza države prema čl. 8. Konvencije. Zanimljivo je da se pozvao i na pozitivne obveze i na polje slobodne procjene koje države uživaju u odabiru sredstava za ispunjavanje tih obveza. Zanimljivo je, također, da se tužitelji nisu žalili ni na kakve zdravstvene probleme i, unatoč tome što je utvrdio da životi i zdravlje podnositelja nisu bili ugroženi, Sud je našao povredu prava na dom i privatni život iz čl. 8. Konvencije.

U praksi Suda postoji još niz predmeta,[57] no ovdje su prikazani neki od aktualnijih koji pokazuju kako je u okolišnim predmetima teško odvojiti

[56] Zahtjev br. 30765/08, presuda od 10. siječnja 2012.

[57] *Lopez Ostra protiv Španjolske,* zahtjev br. 16798/90, presuda od 9. prosinca 1994*; Fadeyeva protiv Rusije; Ledyayeva i drugi protiv Rusije*, zahtjevi br. 53157/99, 53247/99, 53695/00. i 56850/00, presuda od 26. listopada 2006, *Giacomelli protiv Italije*, br. 59909/00,

zaštićena dobra (privatni život od doma). Nastavno, ovo činimo i govorimo o predmetima koji se tiču prava na poštovanje doma i koji su, zapravo, brojniji od predmeta koji se odnose isključivo na poštovanje privatnog života.

Zaštita kroz pravo na poštovanje doma

Među novijim predmetima koji se tiču prava na poštovanje doma u kontekstu zdrave životne sredine valja istaknuti predmete *Kapa i drugi protiv Poljske,*[58] *Yevgeniy Dmitriyev protiv Rusije*[59] i *Solyanik protiv Rusije.*[60]

U predmetu *Kapa i drugi protiv Poljske* Sud je ponovio svoje riječi iz predmeta *Hatton i drugi protiv Ujedinjenog Kraljevstva*:

> „Dom će uobičajeno biti mjesto, fizički definiran prostor, gdje se odvija privatni i obiteljski život. Pojedinac ima pravo na poštovanje doma, što znači ne samo pravo na stvarni fizički prostor, već i na tiho uživanje tog prostora. Povrede prava na poštovanje doma nisu ograničene na konkretne ili fizičke povrede, kao što su neovlašteni ulazak u dom osobe, već uključuje i one kao što su buka, emisije, mirisi ili drugi oblici miješanja. Teška povreda može dovesti do povrede prava na poštovanje doma, ako je podnositelj spriječen uživati u sadržajima svog doma. Također, ponovljena su ostala načela utvrđena u predmetima koji se odnose na pravo na život u zdravoj životnoj sredini.“[61]

Odluka koja je uslijedila bila je drukčija. Primjenom poučka iz predmeta *Hatton i drugi protiv Ujedinjenog Kraljevstva* u predmetu *Kapa i drugi protiv Poljske*, ponajprije, je utvrđeno da je ispunjen minimalan stupanj ozbiljnosti jer je razina buke s autoceste bila viša od one dopuštene domaćim propisima. Nadalje, utvrđeno je i da su nadležna tijela, koja su bila upoznata s problemom još od 1996. godine, isti svjesno ignorirala i nastavila razvijati projekt autoceste ne poštujući dobrobiti stanovnika Strikova (Strykówa) (među njima i podnositelja). Sud je prihvatio navode Vlade o problemima ekonomske i financijske naravi, no, izrazio i „ozbiljnu sumnju u postojanje ravnoteže“. Ispitano je i jesu li nadležna tijela reagirala adekvatno na problem koji je nastupio uslijed gustoće prometa koji je dodatno utjecao na stanovnike Strikova nakon otvaranja dionice autoceste 26. srpnja 2006. godine, te utvrdio da nisu.

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presuda od 2. studenog 2006; *Tatar protiv Rumunjske*, 67021/01, presuda od 27. siječnja 2009; *Hatton i drugi protiv Ujedinjenog Kraljevstva,* zahtjev br. 36022/97, [VV] presuda od 7. ožujka 2003; *Cuenca Zarzoso protiv Španjolske,* zahtjev br. 23383/12, presuda od 16. siječnja 2018, i brojni drugi.

[58] Zahtjevi br. 75031/13, 75282/13, 75286/13. i 75292/13, presuda od 14. listopada 2021.

[59] Zahtjev br. 17840/06, presuda od 1. prosinca 2020.

[60] Zahtjev br. 47987/15, presuda od 10. svibnja 2022.

[61] *Hatton i drugi protiv Ujedinjenog Kraljevstva, Op. cit.*, paras. 148–152.

U predmetu *Dmitriyev protiv Rusije* podnositelj zahtjeva posebno se žalio da su mu buka i druge smetnje uzrokovane svakodnevnim aktivnostima policijske postaje i postojanjem „privremenog" pritvorskog objekta u podrumu njegove stambene zgrade povrijedili pravo na poštovanje privatnog života i doma, kršeći čl. 8. Konvencije. Utvrđujući postojanje povrede Sud je smatrao da su svakodnevne aktivnosti policijske postaje predstavljale izravno miješanje u prava podnositelja zajamčena čl. 8. Konvencije, slijedom čega uplitanje mora biti opravdano u smislu st. 2. iste odredbe. Iako državna tijela uživaju široko polje slobodne procjene u određivanju „koraka" ka rješenju problema, nužno je postići ravnotežu između sukobljenih interesa. Mjere koje su naložila domaća tijela, po mišljenju Suda, nisu bile dovoljne, jer „nisu pravodobno primijenjene, nisu bile učinkovite, ili uopće nisu bile poduzete".

Konačno, treba spomenuti jednu od najnovijih presuda čije izvršenje je upitno s obzirom da je donesena u svibnju 2022, a utvrđena je povreda čl. 8. Konvencije od strane Rusije koja je u tom trenutku već istupila iz članstva u Vijeću Europe. Radi se o predmetu *Solyanik protiv Rusije* u kojem se podnositelj žalio na „zagađenja" koja su dolazila s groblja smještenog neposredno uz njegovu kuću i zemljište. Utvrđeno je

> „...da se groblje postupno širilo prema podnositeljevoj nekretnini i da postoje forenzički izvještaji o kontaminaciji tla i voda na nekretnini."

Sud je smatrao da je u konkretnom slučaju čl. 8. Konvencije primjenjiv iako nije bilo dokaza o šteti koja je nastupila za zdravlje podnositelja zahtjeva. Zaključeno je da „groblje" krši domaće propise, sve to unatoč opomenama (intervencijama) tijela za zaštitu potrošača i postojanja sudskog naloga kojim je određena sanitarna zona (promjera cca 500 m) i određene mjere zdravstvene zaštite (slično je zaključeno i u predmetu *Fadeyeva protiv Rusije).*

„Izlazak" iz zaštite članka 8. Konvencije

Zbog jasnijeg shvaćanja specifične konvencijske uzročne veze koja se traži kako bi bila pružena zaštita pravu na život u zdravoj životnoj sredini, treba spomenuti da je zaštita ovom pravu pružana i u okviru nekih drugih konvencijskih prava. Štiteći pravo iz čl. 2. Konvencije u predmetu *L. C. B. protiv Ujedinjenog Kraljevstva*[62] Sud kaže da „nije dokazana uzročna veza između oboljenja podnositeljice od leukemije i izloženosti njezina oca zračenju"[63]. Uzročna veza i povreda čl. 2. Konvencije postojali su u predmetu *Öneryıldız protiv Turske,* u kojem je država povrijedila svoju pozitivnu obvezu zaštititi

[62] Zahtjev br. 23413/94, presuda od 9. lipnja 1998.

[63] *Ibid.,* para. 39.

živote podnositelja – postoji uzročna veza između stradavanja devet osoba i eksplozije metana na odlagalištu otpada.[64]

„Priča“ o pozitivnim i negativnim obvezama država

Već u prvom predmetu u kojem se bavio (štetnim) utjecajem buke iz zračne luke Hitrou (Heathrow) (predmet *Powell i Rayner protiv Ujedinjenog Kraljevstva*[65]) naglašeno je da države uživaju široko polje slobodne procjene u ostvarenju ravnoteže javnih i pojedinačnih interesa. S ovim se u vezi javljaju pozitivne i negativne obveze država. Kada govorimo o razlici između pozitivnih i negativnih obveza, u pitanjima prava na zdravu životnu sredinu, uočljivo je da Sud, u načelu, ne inzistira na tom razlikovanju (negativne obveze države da se suzdrži od određenih činjenja i pozitivne obveze da poduzme određene mjere). Već je u predmetu *Powell i Rayner protiv Ujedinjenog Kraljevstva* istaknuto:

> „Hoće li se ovaj slučaj analizirati u smislu pozitivne obveze države na poduzimanje razumnih i primjerenih mjera za osiguranje prava podnositelja zahtjeva iz st. 1, čl. 8. ili u smislu 'miješanja javnog tijela' koje treba opravdati u skladu s pravičnom ravnotežom koja se mora postići između suprotstavljenih interesa pojedinca i zajednice u cjelini; a u oba konteksta država uživa određenu slobodu procjene pri određivanju koraka koje treba poduzeti kako bi se osigurala usklađenost s Konvencijom. Nadalje, čak i u odnosu na pozitivne obveze koje proizlaze iz st. 1, čl. 8, u uspostavljanju [potrebne] ravnoteže ciljevi navedeni u st. 2. mogu biti od određene važnosti.“[66]

Jednostavnije rečeno, zaključak o naravi „prijestupa“ nije presudan, odlučno je da je zbog njega (uz postojanje drugih konvencijskih pretpostavki) došlo do povrede zaštićenog prava. Ovakav način razmišljanja javlja se već u prvom *okolišnom* predmetu u kojem je zahtjev prihvaćen – *Lopez Ostra protiv Španjolske*, kao i u predmetu *Hatton i drugi protiv Ujedinjenog Kraljevstva*.

Ipak, u nekim predmetima Sud je smatrao bitnim razlikovati pozitivne i negativne obveze države. Takav primjer imamo u predmetu *Cuenca Zarzoso protiv Španjolske,* gdje je utvrđeno kako tužena država nije ispunila svoju pozitivnu obvezu.[67]

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[64] V. predmet i za povredu prava na mirno uživanje imovine/vlasništva.

[65] Zahtjev br. 310/81, presuda od 21. veljače 1990, para. 40.

[66] *Powell i Rayner protiv Ujedinjenog Kraljevstva*, para. 41.

[67] V. također predmete *Tatar protiv Rumunjske,* para. 107. i *Di Sarno i drugi protiv Italije,* para. 110; Marochini Zrinski, M. (2021). *Principles in the Service of Conception and Protection of the Right to Live in a Healthy Environment: (In)Consistency of the European Court's Case-Law, Property law: Challenges of the 21 century's: Proceedings: International Scientific Conference,* Simić, J., Radonjić, A. (ur.). Beograd: Univerzitet Union Beograd, 269–270.

Načelno govoreći o obvezi države zadržalo se na ocjeni o teškoćama u razgraničenju radi li se o pozitivnoj obvezi države da omogući uživanje zaštićenog prava, ili o negativnoj obvezi da se u njega ne miješa, ali se i naglašavalo (kako je rečeno *supra*) da su „primjenjiva načela vrlo slična“[68]. Vidjeli smo u predmetu *Fadeyeva protiv Rusije* da je povreda čl. 8. Konvencije nađena u propuštanju država da poduzme (pozitivne) mjere zbog smanjenja utjecaja na okoliš (npr. provođenjem pozitivnih propisa ili mogućom ponudom preseljenja), pa je, neovisno o širokom polju slobodne procjene koje uživa, država propustila postići pravičnu ravnotežu javnog i pojedinačnog interesa.[69] U predmetu *Roche protiv Ujedinjenog kraljevstva*, povreda je nastupila jer država podnositelju nije omogućila pristup informacijama s ciljem informiranog pristanka za nuklearno testiranje.[70] U kontekstu pozitivnih obveza države može se spomenuti predmet *Budayeva i drugi protiv Rusije*[71] gdje nadležna tijela nisu poduzela mjere kako bi se zaštitilo živote podnositelja od posljedica učestalog klizanja tla. Indikativan je primjer pozitivnih obveza iz predmeta *Taskin i drugi protiv Turske* kada nije izvršena odluka Visokog upravnog suda (Supreme Administrative Court) o povredi prava na život i zdrav okoliš protiv tvrtke koja je u okviru dopuštenja za iskorištavanje rudnika zlata koristila otrovne procese.[72]

Ova analiza ne bi bila potpuna ne kaže li se više o dvije odluke (novijeg datuma) u kojima su zahtjevi podnositelja proglašeni nedopuštenima: *Tolić i drugi protiv Hrvatske*[73] i *Mastelica i drugi protiv Srbije*.

U predmetu *Tolić i drugi protiv Hrvatske* podnositelji su prigovarali da domaće vlasti nisu na odgovarajući način i učinkovito odgovorile na navode o višegodišnjoj izloženosti podnositelja ozbiljnoj zdravstvenoj ugrozi zbog onečišćenja vode u zgradi u kojoj stanuju. S druge strane, Sud je zaključio kako je

> „...tužena država poduzela sve razumne mjere kako bi osigurala zaštitu prava podnositelja zahtjeva. Stoga je prigovor podnositelja zahtjeva očigledno neosnovan i mora se odbaciti u skladu sa čl. 35. st. 3. (a) i st. 4. Konvencije.“

[68] Spomenuti predmet *Powell i Rayner protiv Ujedinjenog Kraljevstva,* para. 41, v. i *Lopez Ostra protiv Španjolske,* para. 51.

[69] Slične činjenice slučaja i odluka Suda mogu se vidjeti i u predmetu *Ledyayeva i drugi protiv Rusije,* zahtjevi br. 53157/99, 53247/99, 53695/00. i 56850/00, presuda od 26. listopada 2006.

[70] Zahtjev br. 32555/96, presuda od 19. listopada 2005. V. i *Vilnes i drugi protiv Norveške,* zahtjevi br. 52806/09, 22703/10, presuda od 5. prosinca 2013.

[71] *Budayeva i drugi protiv Rusije*, zahtjevi br. 15339/02, 11673/02, 15343/02, 20058/02, 21166/02, presuda od 20. ožujka 2008.

[72] V. predmet *Lemke protiv Turske,* zahtjev br. 17381/02, presuda od 5. lipnja 2007. Još v. predmet *Dzemyuk protiv Ukrajine,* zahtjev br. 42488/02, presuda od 4. rujna 2014.

[73] Zahtjev br. 13482/15, presuda od 4. lipnja 2019.

Konkretno,

> a) „prigovor podnositelja zahtjeva zbog uporabne dozvole i nepostojanja učinkovitog domaćeg pravnog sredstva u tom pogledu očigledno je neosnovan i mora se odbaciti u skladu s čl. 35. st. 3. t. (a) i st. 4. Konvencije jer podnositelji nisu ustrajali u svom zahtjevu u skladu s uvjetima utvrđenim u Zakonu o općem upravnom postupku i Zakonu o upravnim sporovima“;
> b) „Iako u Konvenciji nije navedeno izričito pravo na čisto i mirno okruženje, u slučaju kada na pojedinca izravno i ozbiljno utječe buka ili drugo onečišćenje, može se otvoriti pitanje na temelju čl. 8. Konvencije.[74] Teško onečišćenje okoliša može utjecati na dobrobit pojedinaca i spriječiti im uživanje u njihovim domovima na način da negativno utječe na njihov privatni i obiteljski život, a da pritom ne dolazi do ozbiljnog ugrožavanja njihovog zdravlja.“

U konkretnom predmetu brojni su razlozi doveli Sud do zaključka o neosnovanosti zahtjeva poput: podnositelji su kupili stanove i uselili se prije izdavanja uporabne dozvole; priznali su da se onečišćenje vode nije moglo otkriti kad su se uselili; nakon što su počeli prigovarati kvaliteti vode, država je poduzela niz mjera, uključujući

> „(a) krajem 2006. godine odlučila je snositi troškove otkrivanje uzroka onečišćenja vode i račune za vodu (iako iz spisa predmeta nije jasno je li račune podmirila država ili društvo; (b) osnovala je krizni stožer stručnjaka radi utvrđivanja uzroka onečišćenja vode; (c) zatražila je analizu na stotine uzoraka vode od strane raznih zavoda i u zemlji i u inozemstvu; (d) podnositeljima zahtjeva osigurala je vodu za piće; i (e) vodovodne cijevi u više su navrata hiperklorirane u pokušaju uklanjanja onečišćenja.“[75]

Do sličnih zaključaka Sud je došao i u predmetu *Mastelica i drugi protiv Srbije* gdje su se podnositelji žalili na „posebno štetne utjecaje“ dalekovoda (izgrađenog sukladno detaljnom urbanističkom planu) na zdravlje njih i njihovih obitelji, kao i da nisu mogli sudjelovati u postupcima u kojim je odobrena njegova izgradnja. Zahtjev je smatran

> „...očito neosnovanim s obzirom da su relevantni domaći propisi predviđali za širu javnost i frekvencije od 50 Hz relevantne granice izloženosti 2 kV/m, odnosno 40 μT za električna i magnetna polja, dok su relevantna međunarodna ograničenja bila 5 kV/m, odnosno 200 μT dok su, prema informacijama iz spisa predmeta, najviši zabilježeni nivoi u ovom slučaju bili znatno ispod gore spomenutih međunarodnih standarda.“

Nadalje, utvrđeno je

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[74] *Hatton i drugi protiv Ujedinjenog Kraljevstva*, para. 96.

[75] V.: a) G. *Tolić i drugi protiv Hrvatske*, paras. 11–12; c) *Tolić i drugi protiv Hrvatske*, para. 29; d) *Tolić i drugi protiv Hrvatske*, para. 18. in fine.

„...da nije dokazano da su vrijednosti elektromagnetnih polja generirana navedenim visokonaponskim dalekovodom imale štetan utjecaj na podnositelje ili njihove obitelji. Puka bojazan od dugoročnih negativnih posljedica ne može dovesti do primjene čl. 8. Konvencije i zbog toga Sud smatra da nije postignut minimalni stupanj ozbiljnosti potreban za utvrđivanje povrede čl. 8. Konvencije."

Infra će se kazati i nekoliko riječi o sličnom predmetu *Jakšić i drugi protiv Hrvatske*[76] u kojem je, po ugledu na predmete *Oluić protiv Hrvatske* i *Udovičić protiv Hrvatske,* tražena zaštita prava na poštovanje privatnog života i doma, ali je Sud kao „očigledno neosnovane odbacio zahtjeve podnositelja"[77].

Nekoliko riječi o specifičnoj konvencijskoj uzročnoj vezi

Autorice su u ranijim istraživanjima detaljnije pisale o problematici uzročne veze.[78] Ukratko, utjecaji i smetnje vezani uz okoliš konvencijski su relevantni ako su doveli do povrede konvencijskog prava koje uključuje minimalan stupanj ozbiljnosti (v. *supra* predmet *Mastelica i drugi protiv Srbije*). Dovoljna je sama povreda prava i ne traži se nastup štete (v. *supra* predmet *DiSarno*). Za uzročnu vezu ključna je usmjerenost na odgovornost države.

Minimalan stupanj ozbiljnosti i je li postojao u predmetu *Hatton i drugi protiv Ujedinjenog Kraljevstva*?

Kada je riječ o pravima iz čl. 8. Konvencije i njihovoj zaštiti mora se raditi o slučajevima koji uključuju minimalan stupanj ozbiljnosti da će pravo biti povrijeđeno (predmeti *Hatton i drugi protiv Ujedinjenog Kraljevstva, Powell i Rayner protiv Ujedinjenog Kraljevstva, Lopez Ostra protiv Španjolske, Guerra protiv Španjolske,*[79] *Moreno Gomez protiv Španjolske,*[80] *Cuenca Zarzoso protiv Španjolske, Oluić protiv Hrvatske).* Predmet *Mastelica i drugi protiv Srbije* primjer je kada

[76] Zahtjev br. 30320/13, odluka od 7. srpnja 2020.

[77] Cit. prema: https://uredzastupnika.gov.hr/UserDocsImages//dokumenti/Analize%20presuda%20i%20 odluka //Jak%C5%A1i%C4%87%20-%20analiza%20odluke.pdf, pristup 26. lipnja 2022.

[78] Bukovac Puvača, M., Mihelčić, G., Marochini Zrinski, M. (2019). Uzročna veza kao pretpostavka odgovornosti za štetu u europskim nacionalnim pravnim sustavima, praksi Suda Europske unije i Europskog suda za ljudska prava. *Godišnjak Akademije pravnih znanosti Hrvatske, Yearbook Croatian Academy of Legal Sciences*, *vol*. 10, br. 1, 25–49; Mihelčić, G., Marochini Zrinski, M. (2018). Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini. *Zbornik PFR*-a, vol. 39, br. 1, 241–268.

[79] Zahtjev br. 14967/89, [VV] presuda od 19. veljače 1998.

[80] Zahtjev br. 4143/02, presuda od 16. studenog 2004.

„...puka bojazan od dugoročnih negativnih posljedica ne može dovesti do primjene čl. 8. Konvencije“ (v. i *Leon i Angieszka Kania protiv Poljske*[81]).

Minimalan stupanj ozbiljnosti procjenjuje se od slučaja do slučaja primjenom kriterija: intenziteta smetnji ili utjecaja, trajanja, posljedica za pojedinca, te tzv. generalnog (općeg) konteksta (engl. general environmental context).[82] Sve ovo nije nađeno tj.

„...podnositelji nisu podnijeli dokaz u prilog 'stupnju nelagode' koji su pretrpjeli, a Vlada je 'priznala' kako je u osjetljivost na buku uključen i subjektivni element zbog čega se određeni (manji) broj ljudi češće budi zbog buke ili na drugi način osjeća poremećaj sna.“

Naravno, riječ je o predmetu *Hatton i drugi protiv Ujedinjenog Kraljevstva* kao stalnom ishodištu u traženju odgovora je li „što drugo“ prevagnulo nad zaštitom prava na život u zdravoj životnoj sredini.

Zaključci Ureda zastupnice iz predmeta *Jakšić i drugi protiv Hrvatske*

Za kraj smo ostavili analizu koju je povodom odluke u predmetu *Jakšić i drugi protiv Hrvatske* proveo Ured zastupnice Republike Hrvatske pred Europskim sudom dana 8. srpnja 2021. Prvi naglasak iz analize jest:

„Iako pravo na čist i tih okoliš nije izričito priznato Konvencijom, čl. 8. štiti se pravo pojedinca na poštovanje privatnog života i doma kada je pojedinac izravno i ozbiljno pogođen bukom ili nekim drugim oblikom onečišćenja.“

Sljedeći jest:

„Da bi se moglo otvoriti pitanje na temelju čl. 8. Konvencije, šetni učinci moraju doseći određenu minimalnu razinu ozbiljnosti kako bi se aktivirala pozitivna obveza države.“

U nastavku se kaže da Europski sud ispituje:

„...Je li miješanje u prava podnositelja bilo dovoljno ozbiljno da bi država morala reagirati sukladno svojoj pozitivnoj obvezi iz čl. 8. Konvencije?“

Odnosno

„...ako je bilo dovoljno ozbiljno, je li postupanje domaćih vlasti bilo takvo da je ispunilo navedenu pozitivnu obvezu?“

[81] Zahtjev br. 12605/03, presuda od 21. listopada 2009, para. 104.

[82] Manual on Human Rights and the Environment. (2006). Principles Emerging from the case-law of the European Convention on Human Rights. Strasbourg: CoE Publishing, 14. V. za složenost pretpostavki: Josipović, T., *Građanskopravna zaštita od štetnih imisija*, 59. et seq.

U predmetu *Jakšić i drugi protiv Hrvatske*, niti su štetni učinci na podnositeljev dom i privatni život dosegli određenu minimalnu razinu ozbiljnosti – što je već dovoljno za zaključak da nije nastupila povreda zaštićenog prava,[83] niti je država povrijedila svoje pozitivne obveze. Dapače, istaknut je navod Suda o tome da

> „...čak i pod pretpostavkom da je uznemiravanje bilo potrebnog intenziteta, postupanje domaćih tijela po prijavama podnositelja bilo je brzo i učinkovito."[84]

ZAKLJUČAK

U predmetu *Jakšić i drugi protiv Hrvatske* (zapravo kao i u predmetu *Tolić i drugi protiv Hrvatske*) Europski sud je utvrdio da je država ugovornica (Hrvatska) ispunila svoje pozitivne obveze. Dapače u predmetu *Jakšić i drugi protiv Hrvatske* valoriziran je napredak u ponašanju države nakon predmeta *Oluić protiv Hrvatske* i *Udovičić protiv Hrvatske* (*Jakšić i drugi protiv Hrvatske,* para. 86). Je li Sud uveo neke nove odrednice za zaključak o izmjeni ili dopuni zaštite koju pruža pravu na život u zdravoj životnoj sredini? Zapravo, i ne. Kao što smo u svojim ranijim istraživanjima vidjeli: riječ je o pravu izgrađenom u praksi (primjenom načela živućeg instrumenta, evolutivnog i

[83] Navedeno je da: „Ozbiljnost uznemiravanja u ovakvim predmetima ovisi o svim činjenicama predmeta poput: intenziteta i trajanja uznemiravanja te fizičkih i psihičkih posljedica koje je uznemiravanje ostavilo na podnositeljima. S obzirom da je razina buke u razdoblju od 2009. do 2013. samo tijekom dva mjerenja nadilazila dopuštenu te da je bila nižeg intenziteta i brzo sanirana, Europski sud nije smatrao da su takve sporadične epizode dosegle minimalnu razinu ozbiljnosti potrebnu za aktiviranje pozitivne obveze domaćih tijela na temelju čl. 8. Konvencije."

[84] „Sanitarne inspekcije provedene su bez odgode svaki puta na zahtjev podnositelja. Podnositelji zahtjeva prisustvovali su većem broju inspekcija i mjerenjima razine buke. U upravnim postupcima, u skladu s nacionalnim pravom, dodijeljen im je status stranke kad god su ga zatražili te su tijekom postupka na raspolaganju imali sva pravna sredstva za zaštitu svojih prava."

U analizi je objašnjeno da su: „...u razdoblju od 2009. do 2013. godine domaće vlasti provele ukupno deset inspekcija rada kafića (devet sanitarnih inspekcija i jedna inspekcija Državnog inspektorata, od čega 5 na zahtjev podnositelja); iako podnositeljima nije bilo omogućeno prisustvovati provođenju sanitarne inspekcije, imali su status stranke u upravnim postupcima izdavanja dozvole za rad kafića; mjerodavna tijela u istom razdoblju izvršila su i višestruka mjerenja razine buke od kojih je nekolicina provedena i u stanu podnositelja; u samo dva slučaja je utvrđeno da je buka iznad dopuštene i to tek u neznatnoj količini u odnosu na maksimalne dopuštene razine predviđene zakonom; u oba slučaja nedostaci su brzo otklonjeni i nova mjerenja koja su provedena nakon radova utvrdila su razinu buke u dopuštenim granicama."

autonomnog tumačenja pojmova, primjenom polja slobodne procjene države i načelom učinkovitosti) – legislativni napori europskog zakonodavca još nisu oživotvoreni; najčešće se ocjenjuje kroz povrede prava na poštovanje privatnog života i doma; utjecaji i smetnje povrjeđuju konvencijsko pravo postoji li uzročna veza; traži se da su najmanje minimalnog stupnja ozbiljnosti; on se procjenjuje u svakom predmetu s obzirom na intenzitet, trajanje, posljedice za pojedinca (opći kontekst) i, konačno, traži se da država s obzirom na postojanje (konvencijski relevantnih utjecaja i smetnji) nije poduzela ili nije propustila poduzeti ono što je trebalo (pozitivne i negativne obveze) u ostvarenju pravične ravnoteže između javnog i pojedinačnog interesa.

Što se tiče negatorijske, pa i imisijske zaštite, jednako kao i u europskom ni u nacionalnom sustavu nema normativnih novina. Kao što su pokazala prethodna istraživanja: pojam imisija definira se negativno; zaštita je orijentirana na zaštitu vlasništva od uznemiravanja, ustraje se na zahtjevu prekomjernosti kod posrednih imisija i odgovarajuće sužava zaštita kod dopuštenih prekomjernih posrednih imisija.

Pravo na život u zdravoj životnoj sredini zaštićuje (ima za objekt) značajno šire shvaćeno zaštićeno dobro – subjektivno pravo pojedinca *sui generis* (specifičnog sadržaja). U odlučivanju o njegovoj zaštiti Sud nije opterećen razlikovanjem granice prekomjernosti i posljedične nedopuštenosti prekomjernih posrednih imisija na kojem počiva nacionalni sustav. Ovo ne znači da u primjeni Konvencije Europski sud sudi arbitrarno i zaštitu pruža nekritično. Brane mu takvo što, ponajprije, zahtjevi minimalnog stupnja ozbiljnosti i udovoljavanja pozitivnim odnosno negativnim obvezama od strane država ugovornica.

Minimalan stupanj ozbiljnosti utjecaja i smetnji (iako se provjerava u svakom slučaju) na određeni je način moguće objektivizirati što se u praksi Suda i čini (npr. kada se u predmetu *Mastelica i drugi protiv Srbije* kaže da su „najviši zabilježeni nivoi bili znatno ispod međunarodnih standarda," v. i predmet *Jakšić i drugi protiv Hrvatske*). Takav pristup može podsjetiti na procjenjivanje prekomjernosti posrednih imisija (na nacionalnoj razini sudovanja), ali ovdje Sud slijedi jedan širi koncept. S druge strane, ocjena da nije narušena pravična ravnoteže interesa, a ovo znači da je pozitivno odgovoreno na sva pitanja vezana uz obveze države ugovornice, može značiti i da se zaštita otklanja kada bi za naše prekomjerne posredne imisije bila dopuštena. Je li ovo primjer da je pojedinačnom zaštitom tj. zaštitom subjektivnog imovinskog prava pojedinca moguće ostvariti (u ovom segmentu) snažniju zaštitu od one prema konvencijskom pravu? U najmanju ruku, može se reći da postoji razlog imati neprestano „na oku" oba pravca zaštite.

Prednost negatorijske zaštite jest što ju je moguće tražiti unaprijed (konvencijsku, načelno, ne) i nije nužno da je nastupila šteta (što se ne traži niti

za konvencijsku zaštitu). Dva su joj osnovna nedostatka (i ona nam se čine najproblematičnijima): složen način utvrđivanja relevantnih pretpostavki i to što u nekim varijantama, stvarnopravnoj zaštiti od imisija prethodi zaštita po posebnim propisima. Ona postupak njezina ostvarenja može učiniti dugotrajnijim i složenijim. U ovom pravcu i na ovom mjestu može pomoći zaštita kako se ostvaruje primjenom Konvencije.

Treba imati na umu da izravna primjena konvencijskih pravila i prakse traži dobro poznavanje konvencijskog prava. Kod prava na život u zdravoj životnoj sredini to je posebno složeno jer je riječ o „levijantnom" pravu. S jedne strane, ono samo je u neprestanom procesu – jer je nastalo i razvija se kao plod tumačenja Konvencije pomoću načela tumačenja kojima se trajno oblikuje, pa to, s druge strane, onemogućuje izrijekom odrediti kada će sve nastupiti njegova povreda, premda se čini da se praksa stabilizira (pokazuje barem tendenciju).

Znakovito je da je u predmetu *Jakšić i drugi protiv Hrvatske* Sud uočio i pomak u pružanju zaštite pravu na život u zdravoj životnoj sredini od strane države ugovornice, što pokazuje put dobre prakse kojim se krenulo. Napredak je ocjenjen s obzirom na postupanja koja je država pokazala u ranijim slučajevima (predmetima *Oluić protiv Hrvatske* i *Udovičić protiv Hrvatske*).

Možda bi neka nova redakcija stvarnopravnih pravila omogućila pojedine korisne akcente iz konvencijske prakse uvesti u i nacionalni sustav. Jasno, precizno i u službi učinkovitosti uređenja i nikako na način koji bi vodio fragmentarnim rješenjima. Dakle, podržavajući i osnažujući koncepciju pojedinačne zaštite subjektivnog imovinskog prava primjerima dobre konvencijske prakse.

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SHOULD NEGATORY ACTION AGAINST IMMISSIONS BE REFORMED IN THE LIGHT OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE RIGHT TO LIVE IN A HEALTHY ENVIRONMENT?***

ABSTRACT: In this paper, the authors rely on the results of scientific research based on which they concluded that although there are notable differences between the Croatian national regulation of immission protection and the one provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and taking into account the role of the Convention (the principle of subsidiarity), it is not inconceivable that protecting this right (which all states are obligated to protect) strengthens the position of the authorized national representative for negatory protection (e.g., the possibility of determining the basis relevant for negatory action in a

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less complex way; removing discrepancies, such as, for example, the requirement that proprietary legal protection of ownership and other proprietary rights against immissions is preceded by protections pursuant to special regulations, etc.). In this light, the authors analyse recent Convention case-law and compare the regulation of negatory action (protection of property from harassment) with the protection of a specific right established by the Convention – the right to live in a healthy environment based on Article 8 of the Convention– the right to respect for private and family life, home and correspondence. Exhaustively analysing the right to live in a healthy environment, they explain the interpretative methods and principles used by the European Court in detail, continuing their research concerning this issue. The main focus is on exploring the features of previously postulated rights: the requirement that the human rights protected by the Convention are violated by adverse environmental factors (that is, the existence of a specific Convention causal link); the category of a minimum level of severity; oscillation of this "quantum" of the minimum level of severity within Convention "fluctuations" and the scope (and type) of protection of the right to live in a healthy environment through the paradigm of the positive/negative obligations of the contracting states; naturally, bearing in mind the more recent cases brought before the Court. In conclusion, the authors answer the question postulated in the title of the paper.

Keywords: the right to live in a healthy environment, negatory action, immissions, European Court of Human Rights

INTRODUCTION[1]

In jurisprudence,[2] aspects of environmental protection and the role of negatory action, especially immission-related, have been analysed for a long

[1] See research results published in: Mihelčić, G., Marochini Zrinski, M., (2018). Coexistence of actio negatoria and the right to live in a healthy environment. *Collected papers of the Law Faculty of the University of Rijeka*, vol. 39, no. 1, 241–268.

[2] In Croatian legal theory, v. Gliha, I., Josipović, T., Civil environmental protection, in: Lončarić-Horvat, O., Cvitanović, L., Gliha, I., Josipović, T., Medvedović, D., Omejec, J., Seršić, M., (2003). *Environmental Rights*, 3rd edition. Zagreb: Organizator, hereinafter: Lončarić-Horvat, et al., 187. et seq*;* Proso, M., (2015). Civil liability in the field of environmental protection. *Collected papers of the Law Faculty in Split*, vol. 52, no. 3, 705–719, 712. et. seq. Maganić, A., Procedural legal aspects of civil environmental protection, in: *Civil environmental protection: round table held on June 7, 2017, in the Academy Palace in Zagreb* / edited by Barbić, J. Zagreb: HAZU, 22; Omejec, J., (2015). Environmental protection in the practice of the European Court of Human Rights. In: *Administrative and legal environmental protection – Where where we and where are we now?.* Round table held on October 23, 2014 in the palace of the Academy in Zagreb / edited by Barbić, J., Zagreb: HAZU, 71–99; Šago, D., (2013). Environmental lawsuit as an instrument of civil environmental protection. *Collected papers of the Faculty of Law in Split*, vol. 50, no. 4,

time from the civil law perspective. The environment is an object of enhanced protection that the right or requirement to a healthy environment is integrated into. As such, the environment is increasingly becoming the common denominator for a type of protection different from that in the traditional civil law sense, i.e., the protection of subjective property rights of the individual and the holder of those rights.[3]

In a paper published in 2018[4], we cited the conclusion presented by Cvetić on the relationship between collective and individual protection. The following statement by Cvetić brings us a relevant thesis:

> "…by protecting one's own interest ... an individual contributes to the realization of the general interest ... and, therefore ... one should not underestimate the interest of private subjects in the reaction that achieves protection of the natural environment, through the protection of private interests."[5]

The results of this research should shed some light on whether any potential advantages related to environmental protection could be achieved by protecting the subjective property rights of the individual from violations and disturbances of this right, such as immissions. This will require a detailed analysis of the scope of civil law protection *de lege lata*, starting from the fact that the principle of subsidiarity of European law and the direct application of the Convention for the Protection of Human Rights and Fundamental

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895–915, 901. *et seq*; Kačer, H. (1996). Environmental lawsuit – Article 156 of the Law on Obligatory Relations. Yearbook 3. *Current Affairs of Croatian Legislation and Legal Practice*. XI. traditional counseling. Opatija: Organizator, 285; Czoboly, G., Poretti, P. (2013). Procedural legal aspects of environmental protection in the Croatian and Hungarian legal systems. In: *Law – regions – development* (Župan, M., Vinković, M. editors). Faculty of Law, University of Peč and Faculty of Law, University of Osijek, Pečuh, Osijek, 360.

[3] Gajinov, T., (2016). Civil liability for immissions (doctoral thesis), Novi Sad: Faculty of Law, University of Novi Sad, Serbia, 11–16. GAJINOV, T., Civil liability for immissions and environmental protection, Belgrade, 2016., 13. et seq., https://www.researchgate.net/publication/342364863_Tamara_Gajinov_-_Gradjanskopravna_odgovornost_za_imisije/link/5ef0fc01a6fdcc73be94baca/download (May 30, 2022) Medić, D., Proprietary rights protection in the law of Republika Srpska, Yearbook of the Faculty of Legal Sciences, 2014., vol. 4., no. 4., 2014., 17–38. Cvetić, M. R., The significance of the negatory action for environmental protection, Collected papers of the Faculty of Law in Novi Sad, Novi Sad, 2015., vol. XLIX, no. 4., 1583–1595. Cvetić, R., Sustainable development and ecological damage, Collected papers of the Faculty of Law in Niš, 2014, vol. 53, no. 68, 291–302. Rašović, Z., (2006). Negatory action. *Legal and Social Sciences Archives*, no. 1–2, 964; Cited according to Medić, D. Proprietary rights protection in the law of Republika Srpska, 32. Lazarević, D., (2011). *Official duties and neighbouring law*, First edition. Belgrade, 468. Cit. according to: Medić, D., Proprietary rights protection in the law of the Republic of Srpska, 31.

[4] Mihelčić, G., Marochini Zrinski, M., *Coexistence of actio negatoria and the right to live in a healthy environment*, 247, note 29.

[5] Cvetić, M. R., The significance of the negatory action for environmental protection.

Freedoms (hereinafter: the Convention or the ECHR)[6] in the national legal system brought on a special supranational protection of a mixed nature.

In Croatian law, immission-related negatory action is governed by proprietary legal protection rules protecting the owner from harassment[7] and also governed by neighbouring rights.[8] It can be immediately noticed that these rules (as well as those of a mandatory legal nature) have not been amended by legislators since our last research (even longer, in fact). Protection from immissions has a broader scope than the protection of property owners from any disturbance. These, as well as other neighbouring rights within Croatian law, give the property owner the right to, in exercising his right of ownership for the sake of a mutually considerate exercise of rights, demand from the owner of another property to endure a sufferance, miss out on something or act in regard to the property in his interest (art. 100. p. 1. of the Act on Ownership and other Real Propety Rights, hereinafter: AORPR).[9] Or, in this case, that they do not expose ones property to (illicit levels of) immissions. The uniqueness of immission protection lies in the fact that it is realized through mandatory legal rules, i.e., the request to eliminate the risk of damage (art. 1047., Civil Obligations Act[10]), as well as by the appropriate application of the non-contractual damage liability rules.

Immissions are defined in another legislation as well (Article 4, Paragraph 1, Point 7 of the Environmental Protection Act),[11] as "the concentration of harmful substances in a certain place and at a certain time in the environment". This legal protection system, however, has a different object of protection (the environment), different content and different appointed judicial authorities.[12] However, even though this research is solely limited to the civil

[6] Official Gazette, hereinafter: OG, International agreements, hereinafter: IA, no. 18/97, 6/99 – *corrigendum*., 8/99, 14/02, 13/03, 9/05, 1/06 i 2/10.

[7] Chapter 5, art. 167 of the Act on Ownership and other Real Property Rights, OG, no. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15 – consolidated text and 94/17, hereinafter: AORPR.

[8] Neighbouring rights are governed by Articles 100–113 of OPRA. Imissions are governed by Article 110 of the AORPR.

[9] Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (2007). *Proprietary law*, vol. 1, second amended and supplemented ed., OG, Zagreb, hereinafter: Gavella, et al., 645. et seq. Gliha, I. (2003). The new arrangement of neighbourly relations in light of the harmonization of Croatian civil law with the European one. In: *Das Budapester Symposium, Beiträge zur Reform des Sachenrechts in den Staaten Südosteeuropas, Budapest Symposium, Contribution to Real Law Reforms in Southeast European Countries*. Bremen: Editio Temmen, 48. *et seq*.

[10] OG, no. 35/05, 41/08, 125/11, 78/15, 29/18 i 126/21, hereinafter: COA.

[11] OG, no. 80/13, 153/13, 78/15, 12/18 i 118/18, hereinafter: EPA.

[12] For the administrative legal framework, Medvedović, D., Development of administrative and legal environmental protection in Croatia, in: Administrative and legal envi-

law concept of immission,[13] the fact that the fluidity of the border between these two systems is increasingly emphasized in civil legal theory and that the European approach almost suppresses it, cannot be ignored.[14]

Namely, the Convention *acquis* brought significant innovations into the national positive legal framework, i.e., the application of the Convention and the European Court of Human Rights' case-low (hereinafter: the European Court or the Court). Its impact rests on three fundamental assumptions: the assumption that the Convention protects the right to live in a healthy environment; the assumption that this right was created by interpreting the Convention through interpretation principles (the evolutive interpretation (the living instrument doctrine), the principle of autonomous interpretation, the margin of appreciation doctrine, and the principle of effectiveness); and the assumption that the right to live in a healthy environment is protected if there is a clear Convention causal link, if the violation is at least minimally severe or the result of a violation of the fair balance principle.

THE PRINCIPLE OF SUBSIDIARITY AND THE DIRECT APPLICATION OF THE CONVENTION – THE BACKBONE OF THE HARMONIZATION OF THE PROTECTION PROVIDED BY THE CONVENTION AND NEGATORY ACTION, I.E. PROTECTION AGAINST IMMISSIONS

Referring to the effect of the Convention and its practice on national law in the case of *Habulinec and Filipović v. Croatia,*[15] the European Court considers the Convention to be an integral part of the Croatian legal system[16],

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ronmental protection – Where were we and where are we now?: round table held on October 23, 2014, in the palace of the Academy in Zagreb / edited by Barbić, J., (special print), Zagreb: HAZU, 2015., 41. et seq.

[13] Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (2007). *Proprietary law*, vol. 1, second amended and supplemented ed., OG, Zagreb, 662.

[14] *Ibid*. Also article 5, items 4 and 5 of the EPA on the application of mandatory rules.

[15] Application No. 51166/10, judgment of June 4, 2013.

[16] Proceeding from the provisions of "Article 14, Article 35 and Article 140 of the Constitution of the Republic of Croatia (OG, No. 56/90, 135/97, 8/1998 – revised text, 113/00, 124/00 – revised text, 28 /01 and 41/01 – revised text, 55/01 – corrigendum and 76/10, hereinafter: Constitution/10), Article 62 of the Constitutional Law on the Constitutional Court (OG, No. 29/02, hereinafter: CLCC/02) and Article 5 of the Law on Courts (OG, No. 3/94, 100/96, 131/97, 129/00, 17/04 and 141/04, hereinafter: LC/04)" and "constitutional judicial practice from decisions of the U-I-892/1994 of November 14, 1994 (OG; No. 83/1994) and U-I-130/1995 of February 20, 1995 (OG, No. 112/1995) in which

emphasizing that its practice is an integral part of the Convention system. Therefore, both the Convention and the practice of the Court are integrated into the Croatian legal system.[17] Based on the principle of subsidiarity, they are to be applied when the necessary conditions exist[18], guided by the fact that subsidiarity implies that the mechanism for the protection of human rights and fundamental freedoms established by the Convention is subsidiary to the national systems safeguarding human rights. In other words, it implies that the contracting states are primarily responsible for the effective implementation of the Convention, thus, the Court only acts as a "final safeguard" for eliminating any violations that have not been amended at the national level, once all domestic remedies have been exhausted.

In some instances, the Convention and related practices of the Court will have to be applied directly, like when a national regulation does not coincide with the Convention, so the direct application of the Convention amends the shortcomings of the national regulation and eliminates the threat of violating the rights protected by the Convention. Therefore, it should be borne in mind that

> "…the Convention does not impose a pre-determined practice for ensuring effective implementation of the Convention within the national law of the Contracting States ... the task of choosing the most appropriate means to do so is, in principle, up to the domestic (state) authorities (due to direct insights and better knowledge of the national regulations)."[19]

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the Constitutional Court ruled that 'all rights guaranteed by the Convention and its Protocols should be considered as constitutional rights that have the same level of power as the provisions of the Constitution,' (*Mastelica and others v. Serbia*, §§ 10–11)", the Court says: "The Convention is an integral part of the Croatian legal system, in which it has priority over any contrary legal provision (Article 140 of the Constitution/10...) and is directly applicable (Article 5 ZS/04)." *Habulinec and Filipović v. Croatia*, § 30.

[17] *Habulinec and Filipović v. Croatia*, § 30

[18] The Court states that "the principle of subsidiarity is one of the fundamental principles on which the Convention system is founded ... which means that the system of protection of fundamental human rights established by the Convention is subordinated to national systems that protect human rights." *Habulinec and Filipović v. Croatia*, §§ 26–32.

[19] Important: "According to Article 35, Paragraph 1 of the Convention, the Court can resolve a matter only after all domestic legal remedies have been exhausted. The purpose of Article 35 of the Convention is to give all Contracting States the opportunity to prevent or correct violations before allegations of violations are submitted to the Court." See also: *Habulinec and Filipović v. Croatia*, §§ 26–32. For example, in the case of *Mastelica and others v. Serbia,* judgment of December 10, 2020, App. No. 14901/15, the Court emphasizes that "it is not necessary to discuss the government's objection regarding the exhaustion of domestic legal remedies, because the applicant's requests are, either way, unacceptable," *Mastelica and others v. Serbia*, § 47.

One of the first issues that arose in Croatian legal cases was the application of the *ratione temporis* criteria of the Convention. As of November 5, 1997, the Convention binds the Republic of Croatia[20] and, according to the statements of the Court,

> "...taking into account the facts that constitute interference,[21] (…) since providing legal protection presupposes that the interference was determined illegal based on the law that was in force when the interference happened (*tempus regit actum*)."[22]

Therefore, assuming the application of the *ratione tempore* criteria of the Convention and the existence of a causal link between the State's interference with the right to live in a healthy environment leading to the conclusion of unjustified interference, it can be concluded that by directly applying the Convention, the national court can provide the same level of protection that the European Court provides for the right to live in a healthy environment in its practice.

IMMISSION REGULATION IN CROATIAN LAW

A proprietary legal protection right from Art. 110, para. 1. of AORPR prohibits the use of real estate property in such a way that immissions, smoke, unpleasant odours, soot, waste water, earthquakes, noise, etc. reach another person's (real estate) property. Immissions are prohibited when excessive, not without exception though, but with regard to the purpose appropriate for a specific property. In other words, the prohibition of immissions depends on whether they cause significant damage or are prohibited according to another specific regulation. It regards the, so-called, "excessive indirect immissions".

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[20] See the case of *Blečić v. Croatia*, judgment (VV) of March 8, 2006, App. No. 59532/00. It was pointed out that "in accordance with the general rules of international law (...) the provisions of the Convention do not bind the state party in relation to (...) an act or fact that occurred or (...) a situation that ceased to exist before the entry into force of the Convention in relation to that party." Furthermore, it was pointed out that "in its statements made on the basis of former Articles 25 and 46 of the Convention (...) Croatia recognized the competence of the Convention's bodies to act on individual requests based on facts that occurred after the Convention and its Protocols entered into force in relation to Croatia. These statements remain valid for determining the jurisdiction of the Court ... on the basis of the current Article 34 of the Convention and on the basis of Article 6 of Protocol no. 11." *Blečić v. Croatia,* §§ 70–71.

[21] *Blečić v. Croatia*, § 77.

[22] *Blečić v. Croatia*, §§ 80–81.

When such instances occur, that is, when disturbance/harassment of a more permanent nature is in question, the owner (alleged owner [23]/ possessor [24]) has the right to demand that the disturbance/harassment cease (Art. 167. para. 1. related to para. 4. of AORPR).[25] The range of authorized individuals who may request protection against immissions is wider than the range of authorized individuals who derive their authority for protection on the basis of negatory action. On the active side, the authority belongs to all individuals who own real estate (property), based on the right derived from the owner's proprietary rights.[26] The same is true for the passive side.[27]

Immission protection also differs in terms of content. It includes protection against direct immissions (which are always prohibited) and excessive indirect immissions. The rights available to those who suffer from immissions are: to demand the removal of the cause of immissions, to demand compensation for the damage caused, as well as to demand that refraining from the action that has caused the immissions in the future until all measures necessary to disable it are taken. An exception can be made when excessive indirect emissions originate from an activity for which there is legal permission from a competent authority. As long as this permission lasts, it is not possible to demand adjournment of performing such activities. However, demanding compensation for damages and requesting that appropriate measures are taken to prevent excessive immissions in the future, that is, to prevent the damage from occurring or reduce it, is allowed. The key difference in the context of negatory action exists in regard to the authority provided for instances of a foreseeable danger posing a threat to one's (real estate) property due to direct or excessive indirect immissions. In that case, a request to determine and implement purposeful measures to prevent immissions can be made.[28]

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[23] See Art. 167, para. 4. of AORPR.

[24] See Art. 20 para. 2 in connection with Art. 21 para. 1 of AORPR.

[25] Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (2007). *Proprietary law*, vol. 1, second amended and supplemented ed., OG, Zagreb, 625. et seq.

[26] See Art. 100. para. 2. of AORPR.

[27] See Art. 100. para. 4. of AORPR

Co-owners whose co-owned parts of the property have established ownership of a separate part of the real estate are also subject to the rules on neighbour rights. Gavella, et al., *Op. cit.*, 625. *Ibid.,* 649. Golub, A., Protection of proprietary rights through a lawsuit for the cessation of harassment (a negatory action), Croatian Law Review, 2012., vol. 11., 2–3. See also within ordinary negatory action, Gavella referring to Art. 37, para. 6 of AORPR. Gavella, et al., *Op. cit.*, 690., Golub referring to Art. 46, para. 1 of the AORPR. Golub, A., Protection of proprietary rights through a lawsuit for the cessation of harassment (a negatory action), 2–3.

[28] See Art. 110, para. 5 of AORPR. In theory, it is problematic whether this expansion of the claim calls the negatory nature of the action into question. Gavella, et. al., *Op. cit.*, 664.

Article 1047 of the COA authorizes removing the risk of damage or refraining from a certain activity[29], as well as taking the necessary measures to prevent the damage or harassment from occurring, i.e. removing the source of the danger/threat.[30] This exception is similar to the one covered by proprietary legal rules – in the case of excessive damage that occurred as a result of performing a generally useful activity, for which adequate approval has been obtained, demanding compensation for damage is possible if it exceeds the usual limits.[31] Taking socially justifiable measures to prevent the damage from occurring or reduce the damage may also be requested.[32]

The rules governing non-contractual damage liability are very important for immission protection. According to Article 167, paragraph 3 of the AORPR, if the harassment caused damage, the owner has the right to demand compensation according to the general rules on damage compensation. The damage in question does not necessarily have to be related to real estate or be pecuniary. A request for compensation can be made together with a negatory action claim for the cessation of harassment/disturbance or as an independent request in a separate claim for damage compensation. In contrast to the negatory claim, which is not barred by the statute of limitation (another point in favour of this kind of protection),[33] the claim for damage compensation expires according to the general rules on statute of limitations (from the COA).[34]

PROTECTION OF THE RIGHT TO LIVE IN A HEALTHY ENVIRONMENT WITHIN THE FRAMEWORK OF THE CONVENTION

The right to live in a healthy environment is not a right guaranteed under the Convention. Namely, Article 8 of the Convention (or any other article, in fact), does not guatantee the right to a healthy environment or the right to live in a helthy environment. This right is not mentioned in the Convention, nor

[29] See Article 1047, para. 1 of COA.

[30] See Article 1047, para. 2 of COA.

[31] See Article 1047, para. 3 of COA.

[32] See Article 1047, paragraph 4 of COA. For court practice: Kontrec, D. (2017). Civil law environmental protection in judicial practice, in: Civil law environmental protection: round table held on June 7, 2017, in the Academy Palace in Zagreb (edited by Barbić, J.). Zagreb: HAZU, 85. et seq.

[33] For more on this matter, as well as a more detailed analysis, see Josipović, T., Civil law protection from harmful immissions, in: *ibid.,* 56.

[34] Medić, D., Proprietary rights protection in the law of Republika Srpska. *Yearbook of the Faculty of Legal Sciences*, 34.

in the additional Protocols. This is the first of several relevant points that the European Court highlights in a series of cases,[35] emphasizing the vital importance of environmental issues in today's society.[36]

This is also one of the reasons why the Council of Europe has been trying to pass the Protocol on the Right to a Healthy Environment[37] since 2009 (hereinafter: the Protocol), but without any success. The idea of the Protocol was presented in 2009, when the Parliamentary Assembly of the Council of Europe (hereinafter: the Assembly) made a recommendation for its adoption, but the Committee of Ministers of the Council of Europe (hereinafter: the Committee) failed to take the necessary measures. It wasn't until September 2021 that the Assembly's Committee for Social Affairs presented a draft proposal of the Protocol,[38] while the Assembly itself adopted Resolution no. 2396 (2021)[39] in October 2021 (again), by which the Committee calls for the adoption of an additional protocol to the Convention, which would establish an affirmative "right to a safe, clean, healthy and sustainable environment." The Resolution recommends to the Member States to develop and establish a legislative framework, both at the domestic (national) and European level, in order to protect the right to a healthy environment. Furthermore, they are encouraged to support multilateral initiatives aimed at the explicit recognition and protection of this right. Establishing a special legal framework for strengthening corporate responsibility for the environment is also proposed by the Resolution. The Resolution also states that the adoption of a legally binding and reassuring instrument, such as the additional protocol,

> "...would finally give the European Court an indisputable basis for making decisions concerning the violations (and protection) of human rights that occur due to the harmful environment-related effects on human health, dignity, and life."[40]

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[35] See: *Fredin v. Sweden* (No. 1), Application No. 12033/86, judgment of February 18, 1991, § 48, *Turgut and others v. Turkey*, Application No. 1411/03, judgment of July 8, 2008, § 90; *Rimer and others v. Turkey*, Application No. 18257/04, judgment of March 10, 2009., § 38.

[36] *Ibid*.

[37] Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17777&lang=en, accessed on June 28, 2022.

[38] Anchoring the right to a healthy environment: the need for enhanced action by the Council of Europe, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=29409&lang=en, accessed on June 28, 2022.

[39] Resolution 2396 (2021), Text adopted by the Assembly on 29 September 2021 (27th sitting), https://pace.coe.int/en/files/29499/html, accessed on June 28, 2022.

[40] It was noted that "although almost half of the world's countries recognize the right to a healthy environment, Europe is the only region in the world without an agreement guaranteeing such a right."

The decision on whether to draft a new protocol to amend the Convention or not is now up to the Committee. If the new protocol gets adopted, it remains to be seen how many countries will ratify it and when. What is indicative is the fact – that the European Convention on the Protection of the Environment through Criminal Law (ETS No. 172)[41] from 1998 still hasn't managed to collect a sufficient number of ratifications to enter into force.[42]

It will certainly take a long time before the new protocol enters into force and gets ratified by a sufficient number of Member States. Until then, the European Court (as well as national courts) will examine the vast majority of claims related to violations of the right to live in a healthy environment within the framework of Article 8 of the Convention. How does the protection provided to applicants on the basis of this article work? The first and foremost assumption is the existence of a corresponding causal link between the violation of the right and the corresponding basis of its violation (the damage claimed and the violation alleged).[43] A great peculiarity is reflected in the fact that the basis for the violation in the context of the Convention is a specific harmful *sui generis* action – an action or an oversight of the state that led to the violation of this right. Whether positive or negative, it is the state's obligation[44] not to interfere with an individual's right that is not in accordance with the Convention. The state is also not allowed to widen its margin of appreciation which would potentially lead to the violation of, first of all, Article 8 of the Convention.[45]

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[41] Convention on the Protection of the Environment through Criminal Law (ETS No. 172), https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=172, accessed on June 28, 2022.

[42] The issue in question requires the ratifications by only three member states.

[43] See: *mutatis mutandis*, *Botta v. Italy*, Application No. 21439/93, judgment of February 24, 1998., § 34.

[44] See: *Ivan Atanasov v. Bulgaria*, Application No. 12853/03, judgment of December 2, 2010., § 66.

[45] It will be assessed *infra* if the right to live in a healthy environment can be protected through the protection of some other rights of the Convention, but most often it will be protected by Article 8 of the Convention.

In earlier research, the concept of the right to live in a healthy environment was presented in more detail, based on applying the principles of interpretation of the Convention. V. Mihelčić, G., Marochini Zrinski, M. (2018). The influence of the principles of interpretation of the Convention on individual civil law institutions (selected issues). *Collected papers of the Faculty of Law in Niš*, vol. 78., no. 1., 127–148; Mihelčić, G., Marochini Zrinski, M. *Coexistence of actio negatoria and the right to live in a healthy environment*; Marochini Zrinski, M. (2021). Principles in the Service of Conception and Protection of the Right to Live in a Healthy Environment: (In)Consistency of the European Court's Case Law. *Property law: Challenges of the 21 Century's Proceedings: International Scientific Conference* (Simić, J., Radonjić, A., ed.). Belgrade: Union University in Belgrade, 263–288.

Negatory action-based immission protection *versus* Convention-based protection

Within the scope of protection of the right to live in a healthy environment, two values/rights protected by Article 8 of the Convention are relevant: the right to (respect for) private and family life and the right to (respect for) one's home. This means that the value of/right to live in a healthy environment is substantively recognized and protected within the framework of the rights identified in Article 8 of the Convention (amongst other rights). More precisely, the violation of the right to live in a healthy environment is also recognized in certain forms of violations of these rights. Thus, the European Court identifies violations of the right to private and family life within violations of its subcategories, e.g., the right to physical, psychological, and moral integrity related to the environment.[46] A similar approach is also reflected in the right to (respect for) one's home.

Upon attempting to connect this fact with the context of our negatory action/immission protection, things get even more complex. Let's break it down step by step.

Differentiating the objects of protection

In comparison with negatory action, i.e., protection against immissions, the Convention's protection of the right to live in a healthy environment deviates from the concept of the uniqueness of its object of protection (protected values).[47] One group of cases where protection was provided by the Convention shows a high level of similarity with protection from unlawful (direct/excessive indirect) immissions (Article 110 of the AORPR, e.g., smoke, unpleasant odours, soot, wastewater, earthquakes, noise, etc.) and their object of protection. A good example is the well-known case of *Oluić v. Croatia,*[48] where the right to one's home was protected under the explanation that this right

> "...includes not only the right to a specific physical area but also the right to a quiet enjoyment of that area." "Quiet enjoyment is not limited to physical

[46] Guide to Article 8 of the European Convention on Human Rights, Right to respect for private and family life, home and correspondence, Council of Europe, 2020. https://uredzastupnika.gov.hr/UserDocsImages/dokumenti/Edukacija/Vodi %C4 %8D %20 kroz %20 %C4 %8Dlanak %208. %20Konvencije.pdf., accessed June 28, 2022., 33–34.

[47] This protection does not follow national protection guidelines (e.g., civil law, administrative law, etc.).

[48] Application No. 61260/08, judgment of May 20, 2010.

violations (e.g., trespassing)." "It also involves protection against noise, emissions, odours, or other forms of disturbance/interference."[49]

Disturbances and harmful effects are observed in a broader sense, almost in complete accordance with Article 4, paragraph 1, point 7 of the EPA, as was the case in *Fadeyeva v. Russia*, where protection was provided on the basis of disturbances and effects of "a steel plant that emitted harmful substances in values higher than those allowed by law."[50]

Autonomous conceptualization of Convention-related terms

The specifics of the protection provided by the Convention come to the fore in other aspects as well. By protecting the right to live in a healthy environment through protecting the right to respect for home, the "area" defined by the autonomous interpretation of the concept of home[51] is also protected, even from immissions.[52] Such a concept of area significantly differs from the proprietary legal concept of property/real estate in the AORPR, even regarding protection from immissions. Here, the well-known, previously explained criterion is at work: a sufficient factual-functional connection of an individual with a certain area, which, based on the right to live in a healthy environment, enables providing a significantly wider scope of protection.

The right to live in a healthy environment – an integral part of the right to respect for private life and the right to respect for home?

Protection based on the right to respect for private life

A large number of cases and the developed case-low of the Court at least partially allow for the cases related to the right to live in a healthy environment to be divided into those related to the right to respect for private life and the right to respect for one's home. On the other hand, the fact that needs to be acknowledged is that they are often intertwined and that separating the notion

[49] That is, "any physical violation may lead to a violation of rights ... if it prevents (the individual) from enjoying the comforts of his home." *Oluić v. Croatia*, § 44. See also: *Udovičić v. Croatia,* Application No. 27310/09, judgment of April 24, 2014.

Similar statements are made in most of the judgments where the Court had dealt with this issue, especially in the *Hatton and others of the United Kingdom* case, § 96.

[50] *Fadeyeva v. Russia,* § 116.

[51] See Mihelčić, G., Marochini, M., (2014). The connection between the realization of the vindication claim on the real estate and the so-called right to respect for home. *Collected Papers of the Faculty of Law University of Rijeka*, vol. 35, no. 1, 163–192, 168 et seq.

[52] Ct. case of *Öneryıldız v. Turkey*, Application No. 48939/99, judgment of November 30, 2004.

of private life from the notion of home is not always easy. However, there are certain cases that exclusively relate to the issue of respect for private life.[53]

In the case of *Cordella and others v. Italy*,[54] studies dating back as far as the 1970s showed the polluting effects of emissions from the Ilva steel plant in Taranto on the environment and public health. Subsequent studies also established the existence of a cause-and-effect relationship between exposure to such substances (inhalable environments) and the development of certain tumours/cardiovascular pathologies (increased mortality from natural causes, and cases of tumours, and kidney/cardiovascular diseases among people living in the affected areas). The Court held that the state failed to establish a fair balance between the competing industrial and individual interests and adopt the necessary measures to ensure effective protection of the right to private life, thereby violating Article 8 of the Convention. A very interesting point of view was presented in the case of *Hudorovič and others v. Slovenia.*[55] In its ruling, the Court did not state that Article 8 of the Convention was applicable, but rather created a certain hypothesis that "even under the assumption that Article 8 of the Convention is applicable in the *Hudorovič and others v. Slovenia* case, it would not have been/was not violated." The issue of access to potable and safe drinking water was also discussed and it was emphasized that "access to safe drinking water is not a right protected by Article 8 of the Convention.

However, humans cannot survive without water. Permanent and long-term inability to access safe drinking water can have harmful consequences for human health and dignity and violates the core of the right to respect for private life and home within the Article 8 of the Convention. Therefore, according to this regulation, the Court cannot exclude the existence of a positive obligation of the state to address this matter. The existence of such a positive obligation is determined by the specific circumstances of the injured party, but also by the legal framework, as well as the economic and social situation of the contracting state. The Court considers that the question of whether the positive obligations have been fulfilled to their full extent is a fundamental question related to the merits and closely related to the specific circumstances surrounding a case, based on their severity level. Therefore, there is a strong connection between the question of applicability and the merits in assessing whether this is a matter of private life or not. The Court further emphasized the State's wide margin of appreciation regarding spatial planning, where only

[53] See *Brincat and others v. Malta*, Applications No. 60908/11, 62110/11, 62129/11, 62312/11, i 62338/11, judgment of July 24, 2014.; *Taskin and others v. Turkey*, Application No. 46117/99, judgment of November 10, 2004.

[54] Applications No. 54414/13 i 54264/15, judgment of January 24, 2019.

[55] Applications No. 24816/14 and 25140/14, judgment of March 10, 2020.

particularly compelling reasons such as serious health risks can justify imposing a burden on the state to take necessary action, bearing in mind the specific situation of the applicants.

Ultimately, the Court concluded that the state took the vulnerable position of the applicants into account and adopted appropriate measures to ensure they have access to drinking water and sewage, thus meeting the requirements of Article 8 of the Convention.

Protection within the scope of both rights protected by Article 8, paragraph 1 of the Convention

On the other hand, a more recent case is an example of how difficult it actually is to separate the concept of private life from the concept of home. In the case of *Di Sarno v. Italy,*[56] from February 1994 to December 2009, a state of emergency was in place in the Campania region, due to serious problems with solid urban waste collection, processing and disposal. Eighteen applicants who lived and/or worked in this region addressed the Court, which considered their problem from the perspective of the state's positive obligations under Article 8 of the Convention. It is interesting that the Court referred to both positive obligations and the wide margin of appreciation that enables contracting states to freely choose the means to fulfil those obligations. What is also interesting is that the applicants did not complain of any health problems, and despite finding that the lives and health of the applicants were not threatened, the Court identified a violation of the right to home and private life from Article 8 of the Convention. In the practice of the Court, there are a number of similar cases[57] but we have only described some of the more recent ones that showcase how difficult it actually is to differentiate and separate protected goods (private life from home) in environmental cases. We continue to do this below by bringing up cases concerned with the right to respect for one's home, which are actually more common than cases that exclusively refer to respect for private life.

[56] Application No. 30765/08, judgment of January 10, 2012.

[57] *Lopez Ostra v. Spain,* Application No. 16798/90, judgment of December 9, 1994; *Fadeyeva v. Russia; Ledyayeva and others v. Russia*, Applications No. 53157/99, 53247/99, 53695/00 and 56850/00, judgment of 26 October 2006, *Giacomelli v. Italy,* Application No. 59909/00, judgment of November 2, 2006, *Tatar v. Romania*, App. No. 67021/01, judgment of January 27, 2009; *Hatton and others of the United Kingdom; Cuenca Zarzoso v. Spain*, Application No. 23383/12, judgment of January 16, 2018, and many others.

Protection based on the right to respect for home

Among recent cases concerning the right to respect for one's home in the context of a healthy environment, it is worth highlighting the cases of *Kapa and others v. Poland,*[58] *Yevgeniy Dmitriyev v. Russia,*[59] and *Solyanik v. Russia.*[60]

In the *Kapa and others v. Poland* case, the Court repeated its statement from the *Hatton and others of the United Kingdom* case:

> "A home will usually be a place, a physically defined area, where private and family life goes on. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home. Other principles established in cases related to the right to live in a healthy environment were also reiterated."[61]

Yet, the following decision was different. By applying the lessons learned from the *Hatton and others of the United Kingdom* case in the *Kapa and others v. Poland* case, it was firstly determined that the minimum level of severity was met because the highway noise level was higher than that allowed by domestic regulations. Furthermore, it was established that the competent authorities, who were aware of the problem since 1996, knowingly ignored it and continued developing the highway project without respecting the welfare of the residents of Stryków (the applicant being one of them). The Court had accepted the government's claims about problems of economic and financial nature but also expressed "serious doubts about the existence of a balance." It was also examined whether the competent bodies reacted adequately to the problem that arose due to the density of traffic, which additionally affected the residents of Stryków after the opening of a highway section in July 26, 2006. The Court ultimately determined that they did not.

In the case of *Dmitriyev*, the applicant specifically complained that the noise and other disturbances caused by the daily activities of the police station

[58] Applications No. 75031/13, 75282/13, 75286/13 and 75292/13, judgment of October 14, 2021.

[59] Application No. 17840/06, judgment of December 1, 2020.

[60] Application No. 47987/15, judgment of May 10, 2022.

[61] *Hatton and others of the United Kingdom*, §§ 148–152

and the existence of a "temporary" detention facility in the basement of his residential building violated his right to respect for his private life and home, in violation of Article 8 of the Convention. Upon determining the existence of a violation, the Court considered that the daily activities of the police station directly interfered with the applicant's rights guaranteed by Article 8 of the Convention, and that, as a result, the interference must be justified in terms of Paragraph 2 of the same Article. Although state authorities enjoy a wide margin of appreciation when determining the "steps" that should be taken towards solving the problem, achieving a fair balance between conflicting interests is necessary. In the eyes of the Court, the measures ordered by the local authorities were not sufficient, because "they were not applied in a timely manner, were not effective, or were not taken at all."

Finally, one of the most recent Court rulings worth noting is the judgment in the *Solyanik v. Russia* case, the execution of which is questionable considering that it was passed in May 2022, establishing a violation of Article 8 of the Convention by Russia, which, at the time, had already withdrawn as a member of the Council of Europe. In the *Solyanik v. Russia* case, the applicant complained about "pollution" coming from a cemetery located directly next to his property, i.e., his house and land. It was established that

> "...the cemetery gradually expanded towards the applicant's property and that there were forensic reports on the contamination of the soil and water on the applicant's property."

The Court considered that, in this particular case, Article 8 of the Convention was applicable, even though there was no evidence of damage to the applicant's health. It was concluded that the "cemetery" violates the domestic regulations in place, despite the warnings (interventions) of the national consumer protection bodies and the existence of a court order specifying a sanitary zone (approx. 500m in diameter) and other public health protection measures that were undertaken (a conclusion similar to the one reached in the *Fadeyeva* case).

Reaching outside the protection of Article 8 of the Convention

For a better understanding of the specific Convention causal link, on the basis of which protection of the right to live in a healthy environment can be provided, it is worth noting that protection of this right was also provided within the framework of other rights established by the Convention. Protecting the right from Article 2 of the Convention in the case of *L.C.B. v. the*

United Kingdom,[62] the Court stated that "the causal link between the applicant's leukaemia and her father's exposure to radiation has not been proven."[63] Both a causal link and violation of Article 2 of the Convention existed in the *Öneryıldız* case, in which the state violated its positive obligation to protect the lives of the applicants – "there was a clear causal link between the death of nine people and the methane explosion at the landfill."[64]

Delving between positive and negative obligations of the states

In the very first case dealing with the (harmful) effects of noise from Heathrow Airport (the case of *Powell and Rayner v. the United Kingdom*[65]), it was emphasized once again that the contracting states have a wide margin of appreciation in balancing public and individual interests and adapting them to the requirements of the Convention. This is where the related positive and negative obligations of contracting states come into play. When talking about the difference between positive and negative obligations regarding the right to live in a healthy environment, it is noticeable that the Court generally does not insist on making this distinction (between the negative obligations of the state to refrain from certain actions and the positive obligations of the state to act/undertake certain measures). This was already pointed out in the *Powell and Rayner v. the United Kingdom* case:

> "Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 (art. 8–1) or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2 (art. 8–2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention … (art. 8–2). Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8 (art. 8–1), 'in striking [the required] balance the aims mentioned in the second paragraph (art. 8–2) may be of a certain relevance'."[66]

[62] Application No. 23413/94, judgment of June 9, 1998.

[63] *Ibid.,* § 39.

[64] See the subject for violation of the right to peaceful enjoyment of property/ownership, as well.

[65] Application No. 310/81, judgment of February 21, 1990, § 40.

[66] *Powell and Rayner v. United Kingdom*, Application No. 310/81, judgment of February 21, 1990, § 41.

In simpler terms, the conclusion on the nature of the "transgression" was not crucial, but it was decided that its very existence (in addition to the existence of other Convention-related assumptions) was the basis for a violation of the protected right. This point of view could have already been seen in the first environmental case in which the application was accepted – *Lopez Ostra v. Spain*, as well as in the *Hatton and others of the United Kingdom* case.

Nonetheless, in some cases, the Court considered that it was important to distinguish between the positive and negative obligations of the state. Such an example can be found in the case of *Cuenca Zarzoso v. Spain*, where it was established that the defendant state did not fulfil its positive obligation.[67]

When speaking about the state's obligation, it generally came down to the assessment of the difficulties in demarcating whether it is a positive obligation of the state to enable the enjoyment of a protected right or the State's negative obligation not to interfere with it, but it was emphasized (as stated above) that "the applicable principles are very similar."[68] In the *Fadeyeva v. Russia* case, we could see that the violation of Article 8 of the Convention was found in the state's failure to take (positive) measures to reduce the negative impact on the environment (e.g., by implementing positive regulations or a possible resettlement offer), so, regardless of the wide margin of discretion it enjoyed, the state failed to strike a fair balance between public and individual interests.[69] In the *Roche v. the United Kingdom* case, the violation occurred due to the state's failure to provide the applicant with access to information for the purpose of informed consent for nuclear testing.[70] In the context of the positive obligations of the state, we can mention the case of *Budayeva and others v. Russia,*[71] where the competent authorities did not take the necessary measures to protect the lives of the applicants from the consequences of frequent landslides. Another example indicative of positive obligations is

[67] See also the cases of *Tatar v. Romania,* Application No. 67021/01, judgment of January 27, 2009, § 107 and *Di Sarno and others v. Italy,* Application No. 30765/08, judgment of January 10, 2012, 110. Marochini Zrinski, M., Principles in the Service of Conception and Protection of the Right to Live in a Healthy Environment: (In)Consistency of the European Court's Case Law*,* 269–270.

[68] The cases in question: *Powell and Rayner v. United Kingdom,* Application No. 310/81, judgment of February 21, 1990 § 41, v. and *Lopez Ostra v. Spain,* Application No. 16798/90, judgment of December 9, 1994, § 51.

[69] Similar case facts and the decision of the Court can also be seen in the case of *Ledyayeva and others v. Russia*, Applications No. 53157/99, 53247/99, 53695/00 and 56850/00, judgment of October 26, 2006.

[70] Application No. 32555/96, judgment of October 19, 2005. See also *Vilnes and others v. Norway*, Applications No. 52806/09, 22703/10, judgment of December 5, 2013.

[71] *Budayeva and others v. Russia,* Applications No. 15339/02, 11673/02, 15343/02, 20058/02, 21166/02, judgment of March 20, 2008.

from the *Taskin and others v. Turkey* case, where the Supreme Administrative Court's decision on the violation of the right to life and a healthy environment against a company that used toxic processes as part of a gold mine exploitation permit was not implemented.[72]

Our analysis would not be complete if we missed to say something about two recent decisions reached by the Court where the applicants' claims were declared inadmissible: *Tolić and others v. Croatia*[73] and *Mastelica and others v. Serbia*.

In the *Tolić and others v. Croatia* case, the applicants complained about the local authorities not responding adequately and effectively to the allegations of the applicants' years-long exposure to a severe health hazard due to water pollution in the building where they lived. On the other hand, the Court concluded that

> "...the respondent State took all reasonable measures to ensure the protection of the applicant's rights. Therefore, the applicant's complaint is manifestly ill-founded and must be rejected in accordance with Article 35, paragraph 3 (a) and paragraph 4 of the Convention."

In particular,

> a) "...the applicant's objection regarding the use permit and the absence of an effective domestic remedy in this regard is manifestly ill-founded and must be rejected in accordance with Article 35, paragraph 3, point (a) and paragraph 4 of the Convention, because the applicants did not persist in their request in accordance with the conditions established by the Law on General Administrative Procedure and the Law on Administrative Disputes; b) Although the Convention does not explicitly state the right to a clean and peaceful environment, in the case where an individual is directly and severely affected by noise or other type of pollution, a question can be raised based on Article 8 of the Convention.[74] Severe environmental pollution can affect the well-being of individuals and prevent them from enjoying their homes in a way that negatively affects their private and family life, without seriously endangering their health."

In this particular case, numerous reasons led the Court to the conclusion that the request was ill-founded. For example, the fact that the applicants bought the apartments and moved in before the issuance of the occupancy permit; the fact that the applicants admitted that the water pollution could

[72] See also the cases of *Lemke v. Turkey,* Application No. 17381/02, judgment of June 5, 2007, and the case of *Dzemyuk v. Ukraine*, Application No. 42488/02, judgment of September 4, 2014.

[73] Application No. 13482/15, judgment of September 4, 2014.

[74] *Hatton and others of the United Kingdom*, § 96.

not have been detected when they first moved in; and the fact that, after the applicants began complaining about the quality of the water, the state had undertaken a number of measures, including the following:

> "(a) at the end of 2006, the state decided to bear the costs of identifying the underlying cause of water pollution and the water bills (although it is not clear from the case file whether the bills were settled by the state or the company G., (see *Tolić and others v. Croatia*, §§ 11–12); (b) the state established a crisis headquarters of experts to determine the cause of water pollution; (c) the state requested the analysis of hundreds of water samples by various institutes both in the country and abroad (see *Tolić and others v. Croatia*, § 29); (d) the state provided the applicants with safe drinking water (see *Tolić and others v. Croatia*, § 18. *in fine*); and (e) water pipes have been repeatedly hyperchlorinated in an attempt to remove any contamination."

The Court reached similar conclusions in the *Mastelica and others v. Serbia* case, where the applicants complained about the "particularly harmful effects" of a transmission line (built in accordance with a detailed urban plan) on their health and that of their families, as well as that they could not participate in the proceedings in which its construction was approved. The request was considered to be

> "...manifestly ill-founded considering that relevant domestic regulations provided for the general public had frequencies of 50 Hz and relevant exposure limits of 2 kV/m (i.e. 40 μT) set for electric and magnetic fields, while the relevant international limits were 5 kV/m, that is, 200 μT, and because, according to the information from the case file, the highest recorded levels in this case were significantly below the above-mentioned international standards."

Furthermore, it was determined that

> "...it was not proven that the values of the electromagnetic fields generated by the said high-voltage transmission line had a harmful effect on the applicants or their families. A mere fear of long-term negative consequences cannot lead to the application of Article 8 of the Convention, and therefore, the Court considers that the minimum degree of severity required to establish a violation of Article 8 of the Convention has not been reached."

A similar case, *Jakšić and others v. Croatia*, will be discussed below, where, based on the *Oluić* and *Udovčić* cases, protection of the right to respect for private life and one's home was requested, but the Court rejected the applicant's requests as "manifestly ill-founded".[75]

[75] Cit. according to: https://uredzastupnika.gov.hr/UserDocsImages//dokumenti/Analize %20presuda %20i %20odluka//Jak %C5 %A1i %C4 %87 %20- %20analiza %20odluke.pdf, accessed on June 26, 2022.

A few words about the specific Convention causal link

In earlier papers, the authors wrote about the issue of causality (the causal link) in more detail.[76] In short, effects and disturbances related to the environment are relevant to the Convention if they have led to a violation of a Convention right involving a minimum level of severity (see the *Mastelica and others v. Serbia* case, discussed above). The mere violation of a right is sufficient, thus, proving the occurrence of damage is not required (see the *Di Sarno and others v. Italy* case, discussed above). Focusing on the responsibility of the State is crucial for determining a causal link.

The minimum level of severity:
Did it exist in the Hatton case?

Regarding the rights guaranteed by Article 8 of the Convention and the protection of those rights, cases must contain a minimum level of severity for the right to be considered violated (the cases of *Hatton and others of the United Kingdom, Powell and Rayner v. United Kingdom, Lopez Ostra v. Spain, Guerra and others v. Italy*[77]*, Moreno Gomez v. Spain,*[78] *Cuenca Zarzoso v. Spain, Oluić v. Croatia).* The *Mastelica and others v. Serbia* case is an example of how

> "...a mere fear of long-term negative consequences cannot lead to the application of Article 8 of the Convention" (see also: *Leon and Angieszka Kania v. Poland* [79]).

The minimum level of severity is assessed for each individual case using the following criteria: the intensity and duration of a disturbance or effect, the resulting consequences for the individual, and the so-called general environmental context.[80] None of the criteria above was found in the *Hatton and others of the United Kingdom* case, i.e., it was found that

[76] Bukovac Puvača, M., Mihelčić, G., Marochini Zrinski, M., (2019). Causal link as a presumption of damage liability in European national legal systems, the practice of the Court of the European Union and the European Court of Human Rights. *Yearbook of the Croatian Academy of Legal Sciences*, vol. 10., no 1.; 25–49.; Mihelčić, G., Marochini Zrinski, M., Coexistence of actio negatoria and the right to live in a healthy environment.

[77] Application No. 14967/89, [VV], judgment of February 19, 1998.

[78] Application No. 4143/02, judgment of November 16, 2004.

[79] Application No. 12605/03, judgment of October 21, 2009, § 104.

[80] Manual on Human Rights and the Environment. *Principles Emerging from the case law of the European Convention on Human Rights*. Strasbourg: CoE Publishing, 2006, 14.

For the complexity of the assumptions, see Josipović, T. (2017). *Civil law environmental protection*: round table held on June 7, 2017, in the Academy Palace in Zagreb (edited by Barbić, J.). Zagreb: HAZU, 59. et seq.

> "...the applicants did not submit evidence in support of the 'degree of discomfort' they suffered, and the Government 'admitted' that sensitivity to noise also includes a subjective element, which is why a certain (smaller) number of people wake up more often due to noise or otherwise feels a sleep disturbance."

The *Hatton and others of the United Kingdom* case is a constant starting point in the search for an answer as to whether "something else" had prevailed over the protection of the right to live in a healthy environment.

Conclusions of the Representative's Office in the *Jakšić* case

We conclude this paper with the analysis conducted by the Office of the Representative of the Republic of Croatia before the European Court on July 8, 2021, in connection with the Court's decision in the case of *Jakšić and others*. The first notion emphasized in the analysis is that: "Although the right to a clean and quiet environment is not expressly recognized by the Convention, Article 8 protects the individual's right to respect for private life and home when the individual is directly and severely affected by noise or another type of pollution." The following emphasis is on the fact that: "In order to raise an issue under Article 8 of the Convention, the adverse effects must reach a certain minimum level of severity to trigger the positive obligation of the state." It goes on to say that the European Court examines the following: "Was the interference with the applicant's rights severe enough for the State to react in accordance with its positive obligation under Article 8 of the Convention?" And "if it was severe enough, have the actions of the domestic authorities fulfilled the specified positive obligation?" In the *Jakšić and others v. Croatia* case, neither did the adverse effects on the applicant's home and private life reach a certain minimum level of severity (which, in itself, is sufficient to conclude that there was no violation of the protected right;[81] nor did the state violate its positive obligations. Rather, the Court's statement that "even under the assumption that the disturbance was of necessary intensity, the domestic authorities' handling of the applicants' reports was quick and efficient" was highlighted.[82]

[81] It was stated that: "The severity of the disturbance/interference in such cases depends on all the facts regarding the case, such as: the intensity and duration of the interference and the physical and psychological consequences that the applicants suffered as a result." Given that the noise level in the period from 2009 to 2013 only exceeded the permitted level during two measurements and was of lower intensity and quickly remedied, the European Court did not consider that such sporadic episodes had reached the minimum level of severity required to activate the positive obligation of domestic authorities on the basis of Article 8 of the Convention.

[82] "Sanitary inspections were carried out at the applicant's request each time without any delay. The applicants attended a number of inspections and noise level measurements.

CONCLUSION

Not only has the European Court found that the contracting state (*Croatia*) had fulfilled its positive obligations in the *Jakšić and others v. Croatia* (as well as the *Tolić*) case, but in the *Jakšić and others v. Croatia* case, the behavioural progress of the state after the *Oluić* and *Udovičić* cases was even valorised (*Jakšić and others v. Croatia*, § 86). Has the Court introduced any new guidelines on amending or supplementing the protection provided by the right to live in a healthy environment? Not really. As we noted in our earlier research, it is an issue of law built in practice (by applying the living instrument principle, evolutionary and autonomous interpretation of concepts, the margin of appreciation doctrine and the principle of effectiveness), as the legislative efforts of the European legislator have not yet been revived. It is most often assessed through violations of the right to respect for private life and one's home. Effects and disturbances violate the rights guaranteed by the Convention if there is a causal link and if they are at least of a minimum level of severity; they are assessed for each individual case with regard to their intensity, duration, and consequences for the individual (general context); and finally, if the state, with regard to the existence of effects and disturbances relevant to the Convention, did not take or did not fail to take the measures that should have been taken (positive and negative obligations) to achieve a fair balance between public and individual interests.

As for negatory action and immission protection, there aren't any normative changes, not in the European or national (domestic) legal systems. As previous research has shown, the term "immissions" is defined negatively; the protection is oriented to the protection of property from harassment, it insists on the requirement of excess in regard to indirect immissions and correspondingly narrows the scope of protection in the case of permitted excessive indirect immissions.

In administrative proceedings, in accordance with national law, they were granted party status whenever they requested it and had all legal means to protect their rights at their disposal during the proceedings."

In the analysis, it was explained that: "In the period from 2009 to 2013, local authorities conducted a total of ten inspections of coffee shops (nine sanitary inspections and one inspection performed by the State Inspectorate, 5 of which were performed at the request of the applicant); although the applicants were not allowed to attend the sanitary inspection itself, they had the status of a party in the administrative procedures for issuing an operational license to the coffee shops; in the same period, the competent authorities had also carried out multiple measurements of the noise levels, some of which were also carried out in the applicant's apartment; it was determined that the noise was above the permitted level only in two instances, both times in an insignificant amount in relation to the maximum permitted levels stipulated by law; in both instances, the defects were quickly removed and new measurements subsequently carried out determined the noise level was within the permissible limits."

The scope of what the right to live in a healthy environment protects has (i.e. its object has) a significantly broader understanding of the protected good – the subjective *sui generis* right of an individual (with specific, unique content). In deciding on the protection of this right, the Court is not burdened with distinguishing the limit of excessiveness and the consequent inadmissibility of excessive indirect immissions on which the national system rests. This does not mean that, in applying the rules of the Convention, the European Court rules arbitrarily and provides protection uncritically. The Court is prevented from doing so, first of all, by the requirements of a minimum level of severity and the contracting states' compliance with positive and negative obligations.

The minimum level of severity of effect and disturbance (although examined for each individual case) can be objectified in a certain way, which is actually done in the practice of the Court (e.g., when it was stated that "the highest recorded levels were significantly below international standards" in the *Mastelica and others v. Serbia* case; see also the *Jakšić and others v. Croatia* case). Such an approach may remind one of assessing the excess levels of indirect immissions (at the national judicial level), but in this case, the Court follows a broader concept. On the other hand, assessing that the fair balance of interests has not been violated (which means that all questions related to the obligations of the contracting state have been answered positively), may imply that the protection could be withdrawn if the excessive indirect emissions do not violate the balance. Is this an example of the possibility that through individual protection (negatory action), i.e., the protection of the individual's subjective property right, stronger protection can be achieved (in this segment) than under the protection of the law of the Convention? At the very least, it can be said that there is a reason to constantly "keep an eye" on both lines of protection.

The advantage of negatory protection lies in the fact that it can be requested in advance (while Convention-based protection generally cannot) and that it is not necessary for the damage to have already occurred (which is not required even for Conventional protection). On the other hand, it has two basic drawbacks (which seem to be the most problematic): the fact that determining the relevant assumptions is complex and that, in some scenarios, proprietary legal protection from immissions is preceded by protection under special legal regulations, which can make the process of its realization longer and more complex. In regards to this issue, the protection provided by the Convention can be of help.

It should be kept in mind that the direct application of the rules and practices of the Convention requires a good knowledge of Convention law. In the case of the right to live in a healthy environment, this is particularly complex since it is a not a demarcated right. On one hand, it is in a continuous process

– because it was created and is developing as a result of the interpretation of the Convention by means of the principles of interpretation that permanently shape it and, on the other hand, this makes it impossible to explicitly determine whether it is violated or not, although it does seems that the Court's practice is starting to stabilize (or at least, shows a tendency to do so).

This is indicated by the fact that, in the *Jakšić* case, the Court observed progress in the protection of the right to live in a healthy environment by the contracting state, which demonstrates that a path of good practice that had been taken. The progress was evaluated with regard to the actions of the state demonstrated in earlier cases (the *Oluić* and *Udovičić* cases).

Perhaps, some new redaction of proprietary legal rules would enable certain useful highlights from the Convention's practice to be introduced into the national system. Clearly, precisely and in the service of the efficiency of the arrangement and by no means in a way that would lead to fragmentary solutions, thus supporting and strengthening the concept of individual protection of subjective proprietary rights with examples of good practice from the Convention.

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