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THE PROCEDURAL POSITION OF THE WASTE DISPOSAL COSTS OF BANKRUPT COMPANIES: EUROPEAN CONVENTION ON HUMAN RIGHTS STANDARDS AND CROATIAN REALITY

Abstract

Practice has shown that bankruptcies can lead to problems of contaminated land for which no one takes responsibility. Generally speaking, this sets off avoidance and shifting of responsibility from the Government of the Republic of Croatia to regional and local self-government bodies and vice versa. Recently, the legislature has amended bankruptcy regulations several times, as well as a series of laws regulating environmental protection. The authors' intention is to highlight the necessity for more serious consideration of waste management regulations for bankrupt companies.

Keywords

bankruptcy law; environmental law; European legal standards

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Framework for Discussion

The emergence of more serious knowledge, interest, and the need for environmental protection, as represented in multilateral documents, began in the 1970s, following the Stockholm Conference on the Human Environment.[1] In Croatian law, the first legal provisions on environmental protection appeared in the mid-1970s.[2] Upon analysing European environmental regulations, we have come across only one EU directive on the prevention and compensation of environmental damage[3] that modestly addresses the issue of bankruptcy. Article 14 of the directive states that Member States shall take measures to encourage the development of financial insurance instruments and markets through appropriate economic and financial operators, including financial mechanisms for bankruptcy cases, aimed at enabling these operators to use financial guarantees to cover their liability arising from this directive. The reason for such regulation is certainly the fact that environmental protection policy is classified by the Treaty on the Functioning of the European Union as an area of shared competence between the Union and the Member States. Here, the so-called "principle of subsidiarity" sets the rule for choosing the optimal level for regulation of a particular issue. In other words, the logic is that environmental problems are best addressed where they occur.[4] The focus of the authors in this paper is not EU law, but this directive is important for the issue in question because it deals with environmental damage which is also a product of bank-

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[1] J. Omejec, "Uvodna i osnovna pitanja prava zaštite okoliša", in O. Lončarić-Horvat (ed.), *Pravo okoliša*, Zagreb: Organizator, 1993, p. 30.

[2] The Law on Associated Labour (Official Gazette of the SFRY, No. 53/76) contained a provision on the protection and improvement of the human environment (Art. 579).

[3] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. Amended by Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC - Statement by the European Parliament, the Council, and the Commission.

[4] D. Bodul et al., "Položaj ekoloških tražbina u stečajnom postupku – normativna dihotomija koja se pretpostavlja, ali se ne uvjetuje", *Zbornik radova*: *Trinaesto međunarodno savjetovanje Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, 2015, Pravni fakultet Sveučilišta u Mostaru: Mostar.

rupt companies. So, in the cases that emerge from the described situations it must be applied in the Croatian legal system.

I. Legal Sources of the Issue in Question

Today, in positive legal regulation, environmental protection has its constitutional,[5] convention-based,[6] and statutory justification.[7] For hazardous substances and activities, the legislature has not left the qualification of danger to the judiciary, but objective liability is prescribed by special laws. Therefore, companies engaged in activities posing a risk to the environment and human health are liable for damage according to the rules of objective liability.[8] Defined as such, liability for business that potentially poses a risk to the environment and human health, along with the proclaimed principles of environmental protection (the principles of precaution, causality, cooperation, and general compensation) and the principles of promoting sustainable development (the principles of integration, precaution, renewability, and preventive action) represent one of the key elements of the concept of socially responsible management.

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[5] Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10 and 5/14., Art. 3., 50., 69., ph. 2. and 3. and Art. 134.

[6] In the absence of an appropriate provision of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette-International Treaties, No. 18/97, 6/99, 8/99, 14/02, 1/06, and 13/17 – ECHR) directly relating to the human right to a healthy life and a healthy environment, the European Court of Human Rights (ECtHR) has generally classified violations of this kind under the infringement of the right to respect for private and family life according to Article 8, Right to respect for private and family life. The Convention on Civil Lability for Damage resulting from Activities Dangerous to the Environment is worth mentioning here even though it has not entered into force in Croatia. Its objectives are set out to ensure adequate compensation for damage resulting from activities dangerous to the environment and provide for means of prevention and reinstatement. Council of Europe, European Treaty Series, 1993, No. 150.

[7] Ministry of Environment and Spatial Planning, available at: https://mingor.gov.hr/o-ministarstvu-1065/djelokrug-4925/okolis/propisi-i-medjunarodni-ugovori-1428/propisi-i-medjunarodni-ugovori-iz-zastite-okolisa/1430 [last accessed 12.1.2024].

[8] Environmental Protection Act (EPA), Official Gazette, No. 80/13, 153/13, 78/15, 12/18, 118/18, Art 150, ph. 1, and Art. 151, ph. 1.

Activities that would result in the violation of these principles would entail criminal liability or constitute what is known as environmental crime.[9]

The provisions of Article 1047 of the Civil Obligations Act,[10] regarding the request for the elimination of risks of danger, are of particular importance for environmental protection. The primary role of environmental litigation is to take preventive action against activities harmful to the environment. Environmental litigation can prevent the commencement of activities that could harm the environment before damage occurs.[11]

From a comparative legal perspective, the question that certainly arises is whether and under what conditions a debtor, or later a bankruptcy trustee, can abandon a contaminated property that he is obligated to remediate.[12] From the perspective of positive law, based on

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[9] Environmental crime refers to all actions that violate environmental regulations and cause significant damage or endanger the environment and human health. In Croatia, all criminal offences against the environment are systematized in the Criminal Code (Official Gazette, No. 25/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, and 114/23, in Chapter XX "Criminal Offenses Against the Environment"). The Convention on the Protection of the Environment through Criminal Law has not entered into force yet, but it is relevant for the issue in question because its objective is to ensure adequate compensation for damage resulting from activities dangerous to the environment and to provide for means of prevention and reinstatement. Council of Europe, European Treaty Series, 1998, No. 172.

[10] Civil Obligations Act, Official Gazette No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23.

[11] The provisions of the mentioned article grant every individual the right to file a request (known *as actio popularis)* aimed at protecting oneself or a specific number of people from a source of danger that poses significant harm or from of activities causing disturbance or risk of danger. When it applies to cases where there is a threat to the environment, it is also referred to as an environmental lawsuit. However, unlike comparative law, our current judicial practice does not yet have judgments awarding non-material damages for mental anguish suffered owing to the negative impact of harmful emissions, regardless of the fact that the right to a healthy environment is one of the fundamental constitutional rights. In more detail, refer to Šago, D., "Environmental Lawsuit as an Instrument of Civil Law Environmental Protection", *Proceedings of the Faculty of Law in Split*, 2013, Issue 50, p. 895-915.

[12] Act on Ownership and Other real Rights (Official Gazette 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. and 94/17), Art. 133. Of Abandoned Real Property in Particular: (1) A piece of real property belongs to no one only when the right of ownership is deleted in the land register

the provisions of the Law on Ownership and Other Real Rights, abandoned property becomes the property of the Republic of Croatia if otherwise is not specified by law (Article 133, paragraph 2). The legislature has equated the abandonment of property with a unilateral legal act – renunciation of ownership rights. However, on the basis of the aforementioned provisions of the EPA and the Waste Management Act,[13] we believe that the principle of polluter and his legal successor liability establishes responsibility for every legal or natural person who, through his/her unlawful or improper activities, causes environmental pollution. The polluter or his/her legal successor remains liable for environmental pollution even in the event of the bankruptcy of a company or other legal entities. Therefore, they are obliged to remedy the cause of pollution and the consequences of direct or indirect environmental pollution.

Here, the authors will focus on the relationship between bankruptcy legislation and environmental regulations. We believe that the aim of new bankruptcy legislation[14] is to create a mechanism through which bankruptcy creditors are provided with the opportunity to recognize and choose the best strategy for recovering the amounts owed to them. The traditional model, unfortunately also prevalent in Croatian bankruptcy reality, is conducting bankruptcy proceedings through the sale of assets of the bankrupt company (liquidation bankruptcy). From the Croatian perspective, the bankruptcy process is uncertain and extremely challenging for creditors. One of the proclaimed goals of the bankruptcy process is to satisfy creditors, but it depends on the debtor's assets which enter the bankruptcy estate. Therefore, the basic material prerequisite for conducting bankruptcy proceedings is the existence of sufficient assets of the bankrupt debtor, or such a bankruptcy estate, whose sale would generate funds to satisfy the debtor's creditors.

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based on a waiver of ownership in the form of a document suitable for land registry entry. (2) An abandoned piece of real property becomes the property of the Republic of Croatia by the operation of law, unless provided otherwise by law. (3) Special regulations regulate when it is deemed that land which is completely uncultivated or buildings that are dilapidated because they have not been repaired for a long time are abandoned and when the Republic of Croatia is to assume ownership of them.

[13] Waste Management Act, Official Gazette No. 84/21, 142/23.

[14] Bankruptcy Act (BA), Official Gazette No. 71/15, 104/17, 36/22.

In case the assets are insufficient for satisfaction, the secondary goal of the bankruptcy process, and the most common in Croatian bankruptcy practice, is the deletion of the entity from the court register – the debtor who cannot fulfil its obligations.

The legislator has implemented a provision in the EPA according to which the costs of remediation of polluted areas have a special status. Namely, within the bankruptcy proceedings, there are four categories of creditors: preferential, secured, bankruptcy creditors, and creditors of the bankruptcy estate, although they share the same interest, namely the protection of their rights to realize their claims. Each of these categories has a different legally determined manner of its realization, as well as a position from which it operates. Recognizing the problematic issue of the costs of remediating polluted areas, the legislator subsumes them as part of the costs of bankruptcy proceedings, or as the costs of the bankruptcy estate (Article 198 of the EPA). What is important is that the the costs of the bankruptcy proceedings and other due obligations of the bankruptcy estate are settled as a matter of priority. Indeed, the costs of bankruptcy proceedings are procedural expenses associated with conducting of bankruptcy without which no bankruptcy procedure can function. They are primarily and proportionally satisfied from the "free" bankruptcy estate (property not encumbered by the rights of other persons) and ahead of other obligations of the bankruptcy estate (Article 154 of the BA). Furthermore, EPA grants the state extensive discretionary powers and duties regarding environmental remediation actions, as well as significant authority over the assets of the bankrupt debtor if environmental remediation actions have already been undertaken. The state can ensure environmental remediation at sites heavily burdened with hazardous waste even when the polluter or producer is known, but has not remediated or refuses to do so. Moreover, the state is entitled to reimbursement for all costs incurred in environmental remediation. To secure payment for the completed remediation, the state, on the basis of the aforementioned laws, acquires a legal lien on the real estate and movable property where the remediation has been carried out, up to the amount of the remediation costs, thus obtaining the position of a preferential creditor. We will also clarify our positions in accordance with the content of preferential rights and in relation to the costs of bankruptcy proceedings. Creditors who have a lien or a right to satisfac-

tion on property or rights registered in the public registry have the right to separate satisfaction from that property or right, according to the provisions of Article 149 of the BL. Creditors who have a lien or a right to satisfaction on property or rights, and who are registered in the public registry, are preferential creditors. They have the right to separate satisfaction from the value of the pledge or the right to enforcement according to the provisions of Article 247 of the BL. Finally, the costs of remediation incurred during the bankruptcy proceedings are considered as part of the bankruptcy costs.

1. Convention Standards

In this chapter the authors will analyse the case law of the European Court of Human Rights related to waste issues, starting from the assumption that insights into this matter can be crucial for national courts and other bodies making decisions in cases concerning the quality of the individual's environment. It is important to emphasize that uncertain environmental conditions or conditions causing disturbances have a negative impact, not only on the well-being of the individual, but also on the community as a whole. Therefore, judgments of the ECtHR will be presented, which could guide national courts when solving problems related to the environment. Those judgments are particularly significant for the issue in question, where the environmental pollution, and therefore a danger for human health, is highlighted by the fact that the polluter is bankrupt and that therefore the issue of pollution cannot be simply resolved.

In *Lopez-Ostra v. Spain*[15] Mrs. López Ostra brought an action against Spain relating to environmental pollution from a nearby waste treatment plant. She lived near the factory, which was operating without a permit. One of the factory's units malfunctioned upon start-up, releasing gas emissions and unpleasant odours. This caused health problems and nuisance to the local population. The city council evacuated the local residents, including the applicant. Additionally, it partially shut

[15] *Lopez-Ostra v. Spain*, Application No. 16798/909, Judgment of 9.12.1994.

down one of the factory's production units, but allowed the continuation of other operations.

Mrs. López - Ostra submitted an application to the local courts, complaining that the authorities did not adequately respond to the health risks caused by the waste treatment plant. She requested a temporary or permanent shutdown of the factory. The court ruled against her, considering that the operation of the plant caused nuisance, but did not constitute a serious health risk, and that the local authorities were not liable because they responded to the risk posed by the plant. Mrs. López - Ostra then appealed to the Supreme and Constitutional Courts, which also ruled against her.

Mrs. López Ostra argued that the inaction of the local authorities resulted in a violation of her right to respect for her home under Article 8. Additionally, she claimed to be a victim of degrading treatment, contrary to Article 3. ECtHR notes that the family had to bear the nuisance caused by the plant for over three years before moving away. They moved only when it became apparent that the situation could continue indefinitely and when Mrs López Ostra's daughter's paediatrician recommended that they do so. Under these circumstances, the municipality's offer could not afford complete redress for the nuisance and inconveniences to which they had been subjected. Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the ECtHR considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life. All of the above led to a violation of the right to home and the right to private life under Article 8.

In the decision *Tolić and Others v. Croatia*,[16] the applicants purchased newly built apartments. In mid-2006, two water analyses were conducted before some of the applicants began moving into the apartments. One out of the four water samples showed contamination with mineral oils slightly above the maximum of acceptable level. During the last quarter of 2006, new samples taken showed an increase of mineral oils tens and then hundreds of times above the permitted maximum. Be-

[16] *Tolić and others v. Croatia*, Application No. 13482/15, Decision of 27.6.2019.

tween June and December 2006, the applicants moved into the apartments. In February 2007, an occupancy permit was issued for the building based on the two initial tests. Over time, the tap water developed an unpleasant odour and left greasy traces. New analyses were conducted in 2007 and 2008, showing abnormal and increasing levels of mineral oils. Authorities provided assistance and advised residents to use water exclusively for flushing toilets. In early September 2007, the City of Zagreb established a crisis management team, whose members included representatives from the Public Health Institute of the City of Zagreb (PHIZ), the Croatian Institute of Public Health, and the Croatian Institute of Toxicology.

In their application to the ECtHR, the applicants stated that for several years they had been exposed to serious environmental hazards related to water pollution in their building owing to the lack of an adequate and effective response from the domestic authorities to their allegations. The ECtHR, concerning the ongoing criminal proceedings and the response of the defendant state, referred to relevant principles in this regard, for example, in the case of *Hatton and Others v. the United Kingdom*.[17] Although the ECHR does not explicitly state the right to a clean and quiet environment, in cases where an individual is directly and seriously affected by noise or pollution, the matter can be addressed ,on the basis of Article 8. Severe environmental pollution can affect individuals' well-being and can prevent them from enjoying their homes in such a way as to negatively impact their private and family life, without necessarily posing a serious threat to their health.[18] Article 8 can be applied in cases concerning environmental protection whenever the pollution is directly caused by the state or when the state's responsibility arises from its failure to properly regulate the activities of private industry. Regardless of whether the case is analysed in terms of the positive obligation of the state to take reasonable and appropriate measures to ensure the applicants' rights under Article 8 paragraph 1, or in terms of interference by public authorities, which must be justified under Article 8 paragraph 2, the applicable principles are quite similar. A fair balance needs to be struck between the competing interests of the individ-

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[17] *Hatton and others v. the United Kingdom*, Application No. 36022/97, 8.7.2022.

[18] *Guerra and others v. Italy*, Application No. 14967/89, Judgment of 19.2.1998.

ual and the community as a whole. The state enjoys a certain margin of appreciation in determining the steps necessary to ensure compliance with the ECHR. Furthermore, even concerning the positive obligations arising from the first paragraph of Article 8, in achieving the necessary balance, the objectives set out in the second paragraph may be of some importance. The State's positive obligations under Article 8, implying that the authorities have a duty to apply the criminal-law mechanisms of effective investigation and prosecution, concern allegations of serious acts of violence by private parties. Nevertheless, only significant flaws in the application of the relevant mechanisms amount to a breach of the State's positive obligations under Article 8. Accordingly, the ECtHR will not concern itself with allegations of errors or isolated omissions, since it cannot replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrators' criminal responsibility. Previous cases in which the ECHR found that Article 8 required an effective application of criminal-law mechanisms, were about serious crimes. The legal framework could also consist of civil-law remedies capable of affording sufficient protection.[19] The ECtHR notes that the allegations concern the State's failure to adequately and effectively respond to the applicants' allegations that they were exposed to serious environmental danger for several years related to water contamination in their flats. The ECtHR task in such a situation is to assess whether the State took all reasonable measures to secure the protection of the applicants' rights under Article 8. The ECtHR notes firstly that there is no dispute between the parties that the water contamination was caused by the private companies and not by the State. Secondly, the applicants had acquired the flats and moved in before the permit for use was issued. They conceded that the water contamination had not been detectable when they had moved in. At that time, two water analyses were conducted. While the applicants submitted that some analysis had been incomplete because they did not include testing for the presence of mineral oils, the ECtHR notes that at the time those analyses by default did not include testing for mineral oils. It was only later that the sanitary inspectorate issued an instruction that future analyses should include

[19] *Noveski v. the Former Yugoslav Republic of Macedonia*, Application No. 25163/08, 2681/10, 71872/13, Decision of 13.9.2016, para 61, and *Söderman v. Sweden* [GC], Application No. 5786/08, Judgment of 12.11.2013, para 85.

testing for mineral oils. It is also noted that the second analysis indicated a slightly increased quantity of mineral oils in only one flat out of four. It was on the basis of those analyses and the consent of the sanitary inspector, *inter alia*, that the permit for use was issued. It was also on the same grounds that the State Attorney decided that there were no grounds for prosecuting. Thirdly, once the applicants had started complaining about the water, the State undertook a serious set of measures, trying to solve the persisting problem in question. However it was not until June 2008 that it was indicated for the first time that the water was unfit for human consumption and posed a health risk. The respondent State had informed the applicants that the water was not safe to use, and that it should be used only for flushing toilets in 2007. It is noted in this respect that in October 2007 the water was still considered to pose no danger to health. Although the criminal proceedings were still ongoing, ECtHR observes that the acts alleged by the applicants do not consist of physical violence. Therefore, it considers that in the present case, as disagreeable as the water contamination must have been for the applicants, there was no obligation under Article 8 for the domestic authorities to effectively apply criminal-law mechanisms, and that civil proceedings sufficed. ECtHR also observed that the State Attorney issued an indictment against a number of persons, and that civil proceedings were conducted. Both the Municipal and the County Court ruled in favour of the applicants, finding the three defendant companies liable for the damage. While it is true that those proceedings were ongoing, pending a decision on an appeal on points of law, and that the exact amount of compensation has not been determined, ECtHR notes that the applicants stressed that they had not complained about the civil proceedings. In view of the above, the ECtHR considers that the respondent State has taken all reasonable measures to secure the protection of the applicants' rights. Accordingly, the applicants' complaint is manifestly ill-founded and must be rejected.

In *Cordella and others v. Italy*[20] the 180 applicants have lived in the municipality of Taranto. Ilva's Taranto plant is the largest industrial steelworks complex in Europe. The impact of plant emissions on the

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[20] *Cordella and others v. Italy*, Application No. 54414/13 and 54264/15, Judgment of 24.12.2019.

environment and on the health of the local population has given rise to several alarming scientific reports. On 30 November 1990 the Council of Ministers identified "high environmental risk" municipalities (including Taranto) and asked the Ministry of the Environment to draw up a decontamination plan for areas concerned. From the end of 2012 onwards, the Government adopted a number of texts, among them the so-called "Salva-Ilva" Legislative Decrees. In September 2017, the deadline for implementing the measures provided for in the environmental plan was extended to August 2023. The municipality of Taranto complained to the Administrative Court about the environmental and public-health consequences of the further extension of that deadline. Several sets of criminal proceedings were brought against Ilva's management. Some of these proceedings culminated in convictions in 2002, 2005, and 2007. Among other things, the Court of Cassation found that the management of the Ilva factory in Taranto was responsible for air pollution, the dumping of hazardous materials, and the emission of harmful particles. It noted that particle production had persisted despite numerous agreements with the local authorities in 2003 and 2004. In a judgment of 31 March 2011, the Court of Justice of the European Union held that Italy had failed to fulfil its obligations concerning integrated pollution prevention and control.

Relying on Articles 2 and 8 of ECHR, the applicants complained that the State had not adopted legal and statutory measures to protect their health and the environment, and that it had failed to provide them with information concerning the pollution and the attendant risks for their health. ECtHR decided to consider these complaints solely under Article 8. It noted that, since the 1970s, scientific studies had shown the polluting effects of the emissions from the Ilva factory on the environment and on public health. A report from 2012 confirmed the existence of a causal link between environmental exposure to inhalable carcinogenic substances produced by the company Ilva and the development of tumours in the lungs and pleura, and of cardio-circulatory pathologies in persons living in the affected areas. In addition, a 2016 study had demonstrated a causal link between exposure to industrial sources, arising from Ilva's production and increased mortality from natural causes, tumours, and kidney and cardiovascular disease in the population of Taranto. ECtHR noted that in spite of the national authorities'

attempts to achieve decontamination of the region in question, the projects put in place had not so far produced the desired results. The measures recommended from 2012 onwards in order to reduce the factory's environmental impact were ultimately not introduced. Furthermore, the deadline for implementing the environmental plan approved in 2014 had been postponed to August 2023. The procedure put in place to achieve the identified targets for cleaning up the region was thus extremely slow. In the meantime, the Government had intervened on numerous occasions through urgent measures in order to guarantee that the steelworks would continue production, despite the finding by the relevant judicial authorities, based on chemical and epidemiological expert reports, that there existed serious risks to health and to the environment. This situation was compounded by the uncertainty arising, on the one hand, from the company's state of financial failure and, on the other, from the option granted to the future buyer to postpone the clean-up operations.

For these reasons, ECtHR considered that the persistence of a situation of environmental pollution endangered the health of the applicants and, more generally, that of the entire population living in the areas at risk. The necessary fair balance had not been struck. It followed that there had been a breach of Article 8 of the Convention.

In *Brincat and others v. Malata*,[21] the applicants were employees (or relatives of employees) of a government-run ship repair yard from 1968 to 2003. They allege that they (or their relatives) were constantly and intensively exposed to asbestos particles during their employment repairing ship machinery insulated with asbestos. This resulted in damage to their health and in one case the death of one of the workers from asbestos related cancer.

The ECtHR reiterated that the State has a positive duty to take reasonable and appropriate measures to secure applicants' rights under Articles 2 and 8 of the ECHR. In the context of dangerous activities, the scope of the positive obligations under Articles 2 and 8 largely overlapped. The positive obligation under Article 8 required the national authorities to take the same practical measures as those expected of them

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[21] *Brincat and others v. Malata,* Application No. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, Judgment of 24.10.2014.

in the context of their positive obligation under Article 2. The ECtHR found that the Maltese Government had known or ought to have known of the dangers arising from exposure to asbestos at least from the early 1970s, given the domestic context as well as scientific and medical opinion accessible to the Government at the time. The applicants had been left without any adequate safeguards against the dangers of asbestos, either in the form of protection or information about risks, until the early 2000s by which time they had left employment at the ship repair yard. Legislation which had been passed in 1987 had not adequately regulated asbestos related activity or provided any practical measures to protect employees whose lives may have been endangered. Lastly, no adequate information was in fact provided or made accessible to the applicants during the relevant period of their careers at the shipyard.

The ECtHR concluded that, in view of the seriousness of the threat posed by asbestos, and despite the State's margin of appreciation as to the choice of means, the Government had failed to satisfy their positive obligations, to legislate, or to take other practical measures under Articles 2 and 8.

II. What Does All this Mean on an Empirical Level?

Environmental laws typically impose certain actions, omissions, or tolerances on subjects, often directly impacting the content of validly acquired, property rights, which inevitably leads to conflict. Consideration must be given to social and political circumstances, especially the relationship between ecology and economy, as well as differences at state, regional, and local levels. Therefore, the perception of some judicial decisions raises many controversial issues, indicating that the judiciary is becoming a factor of managed risk. As environmental law does not have a long tradition, conflicts will have to be resolved at the institutional level by courts. In this way, judicial practice will significantly contribute to shaping new perspectives on legal instruments for the protection of the environment. Therefore, here are very important conclusions and judgments of the ECtHR presented in the previous chapter, which should be guided by national courts.

Perhaps the best example is the bankruptcy proceedings of the bankrupt debtor Salonit d.d. in bankruptcy Vranjic (Salonit), in which the Environmental Protection and Energy Efficiency Fund (Fund)[22] is one of the most important participants. Firstly, it appears as an obligee to pay for the remediation of asbestos-cement waste in Vranjic,[23] and secondly, as an obligee to compensate a portion of the bankrupt debtor's

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[22] The longstanding inappropriate business practices of companies in the Republic of Croatia and the management of technological waste, which has become a threat to the natural environment and human health, led to the establishment of the (Fund). It was founded on the basis of provisions of Article 60, paragraph 5 of the EPA and Article 11 of the Energy Act (Official Gazette, No. 68/01). The Environmental Protection and Energy Efficiency Fund Act (EPEEFA) was published in the Official Gazette, No. 107/03, that came into force on 1.1.2004. According to the relevant provisions of the EPA, the Fund is established to secure additional funds for financing projects, programmes, and similar activities in the field of environmental conservation, sustainable use, protection, and improvement. According to the provisions of the Energy Act, the Fund is established with the aim of participating with its resources in financing national energy programmes with a view to achieving energy efficiency and the use of renewable energy sources. According to the provisions of EPEEFA, the Fund is established for financing the preparation, implementation, and development of programmes, projects, and similar activities in the field of environmental conservation, sustainable use, protection, and improvement, as well as in the field of energy efficiency and the use of renewable energy sources. The Fund is established as an extrabudgetary fund, as a legal entity with public authority determined by law. The public authorities of the Fund relate to issuing administrative acts concerning the payment of fees and special fees, maintaining a register of fee payers, prescribing conditions that beneficiaries of Fund resources must meet, and conditions for the allocation of funds. The operations of the Fund are governed, not only by the provisions of the EPEEFA, but also by the provisions of the Budget Act, the General Tax Act, and the General Administrative Procedure Act. The Government exercises the founding rights and duties on behalf of the Republic of Croatia. The Fund manages and disposes of funds for purposes and uses determined by the EPEEFA The Fund is liable for its obligations with all its assets. The Republic of Croatia is jointly and severally liable for the Fund's obligations. Interestingly, US legislation also recognizes the Environmental Protection Agency (EA). However, unlike in Croatia where there is much discussion, but relatively little research on the actual role of the Fund in addressing environmental issues, the American EA plays a specific role in bankruptcy cases (EA - Memorandum, Guidance on EA Participation in Bankruptcy Cases, 1997., 6-8). It is interesting to note that a similar fund with the same function does not exist in Croatia. Namely, the functions of Fund are defined by law. As can be observed, the Fund does not foresee the remediation or decontamination of environmental pollution sources in the event of bankruptcy proceedings, nor is bankruptcy explicitly mentioned anywhere in the EPEEFA.

[23] Conclusion of the Government of the Republic of Croatia, 10.11.2006.

employees who lost their jobs owing to the ban on asbestos use. However, a serious misunderstanding arose when the Fund requested reimbursement of the funds invested from the bankrupt debtor Salonit for large environmental remediation expenses. The lack of clear environmental protection regulations, as well as the case law, is certainly a contributing factor. As a result, the dispute resolution will have to be determined by the court in a lawsuit that has been ongoing for five years at the Commercial Court in Split.[24] Owing to the existence of the lawsuit, the bankruptcy proceedings have not yet been concluded.[25]

Salonit began with operations in 1921, initially producing asbestos-cement products.[26] The factory was modernized in 1926, introducing the production of corrugated sheets. Manual production of pipes and sewage and chimney ducts started in 1930, and in 1939, a facility for the production of pressure and sewage pipes was installed. From then until the commencement of bankruptcy proceedings in 2004, all the efforts made in the reconstruction, modernization of production, and improvement in environmental and occupational safety did not eliminate the harmful impact of asbestos on human health. During the bankruptcy proceedings, a programme for alternative, asbestos-free production was developed, but not implemented, focusing on the production of polyethylene pipes and asbestos-free corrugated sheets (environmentally friendly programmes).[27] Finally, in the Republic of Croatia, after the bankruptcy and closure of the Salonit in 2005, there was no longer production of asbestos-cement products. However, scattered asbestos-cement waste remains within and around the factory premises, accumulated over years of production, a situation which needs to be appropriately remediated. The issue of asbestos technology was ad-

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[24] Actions related to environmental remediation were undoubtedly taken during the bankruptcy proceedings. Other issues will be discussed during the ongoing litigation, and therefore, we cannot prejudge the court's decision.

[25] Ministry of Justice of Republic of Croatia, Court registry, available at: https://sudreg.pravosudje.hr/registar/f?p=150: 28:0:: NO:28: P28_SBT_MBS: 060004497 [last accessed 1.2.2024].

[26] State Audit Office, Branch Office Split, Report on the conducted audit of the conversion and privatization of Salonit, Vranjic, 2002, p. 2.

[27] From the Report on the economic position of the bankruptcy debtor and the progress of the bankruptcy trustee Ivan Sunara from Split, submitted to the Commercial Court in Split on 16.1.2006.

dressed long ago by the International Labour Organization through Special Convention No. 162 on Safety in the Use of Asbestos, 1986.[28] In the secondary legislation of the EU, there are also regulations limiting the use and trade of products containing asbestos. By signing the Stabilization and Association Agreement with the European Union, January 1st 2002, the Republic of Croatia undertook the obligation to harmonize its legislation with that of the European Union, including regulations related to the production, trade, and use of products containing asbestos. Concrete actions took a full four years. On the basis of the Decision of the Government of the Republic of Croatia from November 10th 2006, the Ministry of Environmental Protection, Physical Planning and Construction was tasked with implementing Phase I of the disposal and remediation of asbestos-cement waste from the premises of the bankrupt Salonit, while the Fund was responsible for securing the financial resources needed for the implementation of this remediation. Between December 4th 2006, and September 26th 2007, a total of 8000 m3 of asbestos-cement waste was disposed of from the premises of the bankrupt Salonit. The value of the works for Phase I of the disposal and remediation of asbestos-cement waste from the premises of the bankrupt Salonit amounted to HRK 14,941,370.00. Works on Phase II of the remediation, located at the football field "Omladinac", were completed on 15.5.2009. The total value of the works amounted to approximately 43,620,000.00 kn. The final remediation of the bankrupt Salonit still requires the implementation of the decontamination project for the external and internal areas of the factory, estimated at a value of HRK 60,000,000.00, and the remediation of the Mravinac quarry, with estimated works valued at HRK 29,000,000.00. For the overall remediation of the bankrupt Salonit the remediation of the quarry hosting the "Omladinac" football field, and the remediation of the

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[28] Article 10 of Convention No. 162 reads: "When it is necessary to protect the health of workers and when technically feasible, national laws or other regulations shall prescribe one or more of the following measures: (a) substitution of asbestos or certain types of asbestos or asbestos-containing products with other materials or products or the use of alternative technologies scientifically assessed by the competent authority as safe or less hazardous, whenever possible; (b) complete or partial prohibition of the use of asbestos or certain types of asbestos or asbestos-containing products in some work processes.", Official Gazette -International Agreements no 11/03.

Mravinac quarry, the Fund has allocated financial resources totalling 20,000,000.00 euro.[29] At the time of writing this paper, the bankruptcy proceedings against Salonit are still ongoing!

In the second case of the High Commercial Court,[30] it is emphasized that:

> (...) this court takes the position that these costs do not directly burden the real estate. Namely, waste is an incidental product of the debtor's business operations and is not a product of the essence or existence of the real estate itself. Therefore, waste generated by the debtor's business operations should be borne by all bankruptcy creditors, not just the secured creditor. The waste did not arise from the essence of the real estate itself but from the operations of the debtor company or lessee (...).

For these reasons, direct costs totalling HRK 491,591.31 (overhead costs) and HRK 134,500.00 (waste disposal costs) should not burden the purchase price obtained from the sale of the property subject to the secured claim.

In conclusion, we can say that the problem of a bankrupt society and environmental pollution is not only related to the responsibility for environmental protection and human health, but entails much deeper problems of a financial nature. However, to solve this problem, the case law of the ECtHR in relation to Article 8 should be relevant, as is emphasized in the judgments mentioned in this paper in cases concerning environmental protection whenever the pollution is directly caused by the state or when the state´s responsibility arises from its failure to properly regulate the activities of private industry. A fair balance needs to be struck between the competing interests of the individual and the community as a whole. We believe that the pressing problem presented here through the problem related to Salonit did not meet the standards set in the ECtHR's case law. These standards could and should be key to solving the problem as well as to all possible future situations in which companies in bankruptcy can harm the environment and human health itself. Also, it is evident that the above-mentioned problem of environ-

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[29] V. Mladineo, "Zbrinjavanje građevinskog otpada koji sadržava azbest u RH", *Arhiv za higijenu rada i toksikologiju*, 2009, vol. 60, No. Supplement, p. 11-13.

[30] High Commercial Court, Case No. Pž 1226/2023-2, 5.4.2023.

mental pollution due to the company's bankruptcy does not achieve the desired goal, so it is necessary to review the current regulations in the Republic of Croatia and harmonize them with the practice of the ECtHR. Conventions that are not yet in force in Croatia, but regulate the topic in question, as well as EU law itself, can be of great use here.

Conclusions

The past practice of conducting bankruptcy proceedings, including the case of Salonit, indicates that assets contributing to environmental pollution are often not sold in bankruptcy proceedings. In Croatia, after the bankruptcy and closure of Salonit there is no longer production of asbestos-cement products, but chemical hazardous waste generated during decades of production in the factory remains. Significant financial resources are required for the destruction or disposal of such waste, which are difficult to allocate, especially in liquidation bankruptcy proceedings or the implementation of a bankruptcy plan. It should be noted that the commencement of bankruptcy proceedings (the so-called "zero-hour rule") results in the material-legal consequence of the dismissal of the management of the company, the transfer of the debtor's rights to the bankruptcy trustee, and the termination of contracts of the majority of employees (Article 24 and 120 of BA), thereby stops being a viable option for preserving hazardous materials. Such actions result in chemical hazardous substances used by the legal entity for business purposes often being unable to be sold, remaining unsensitized and stored on the premises of the legal entity, complicating the bankruptcy proceedings and continuing to pollute the area where they are located. This type of assets can become extremely hazardous waste, which is often not treated as such and is neglected. However, despite the autonomy of legal disciplines in bankruptcy law and environmental protection law, in complex market economy conditions, according to the authors' opinions, these are actually mutually interdependent systems. It is justified to question whether and how the state will fulfil its constitutional obligation to protect the environment and human health, and whether funds for financing the costs of remediating the damage caused by these companies in the past will be secured in bankruptcy proceedings.

Namely, the Salonit case has shown that bankruptcy law, as the *ultima ratio* measure, must finally enable the respect of economic principles through market sustainability criteria. Furthermore, this bankruptcy proceeding demonstrates that the state has not in a timely fashion recognized the environmental protection issues. Moreover, existing practice shows deviations in terms of insufficient assurance of legality, legal certainty, predictability, transparency, publicity, and effectiveness in implementing waste management procedures in bankruptcy. Consideration should be given to ensuring that, in future, administrative, judicial, and ultimately legislative practices preserve good solutions and enact new regulations. It is also a question of whether and when the invested funds in environmental remediation will be recovered. On the other hand, owing to practical issues, there is a growing understanding that overcoming the environmental crisis cannot be achieved solely through specific "environmental" legislation. In Croatia, the Fund has recognized the connection between ecology, on the one hand, and bankruptcy, on the other, through the institution of statutory lien on debtor's real estate. Ultimately, the question of responsibility arises for the failure to fulfil the proclaimed constitutional obligations to protect the environment and human health, as well as other legal obligations related to environmental protection and the public interest and rights of citizens. The problem gains significance in the light of the growing number of collective lawsuits which have entered the legal systems of EU countries and Croatia from the Anglo-Saxon legal tradition in recent years.[31] It is probably only a matter of time before citizens who suffer damages from polluted areas where bankruptcy proceedings have been conducted, but environmental remediation has not been carried out, start initiating legal proceedings and seek compensation from the state for failure to fulfil obligations prescribed by positive regulations, especially considering that there is already case law in this regard. This standpoint is significant as the ECHR and case law of the ECtHR is directly applicable in the legal order of Croatia (Article 134 of the Constitution of the Republic of Croatia). The current general assessment of waste management in Croatia in terms of alignment with European leg-

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[31] The Civil Procedure Act, Official Gazette, No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/22, 114/22, 155/23. Articles 502.a-502.

islation shows that the legislative framework necessary for the functioning of waste regulation systems has been established as well as the institutions necessary for the its implementation. However, this does not mean that waste management procedures are fully aligned with all the requirements of the aforementioned ECtHR case law. The intention in the analysed cases was to clarify certain legal institutes, primarily those related to Article 8, which have arisen as a result of long-standing practice, and by examining their interrelation, to gain insights into the legal-logical mechanism of decision-making by the ECtHR and to determine if there is room for improvement in domestic legislation and case law.