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State liability for health damage caused by excessive air pollution:
Constitutional and Private Law aspects***

Abstract

Air pollution severely damages human health and causes premature deaths. In order to fight against it, the European Commission initiated a revision of the Ambient Air Quality Directives aiming to improve the quality of outdoor air and to reach the Zero Pollution goal. However, the CJEU is already facing requests for a preliminary ruling dealing with state liability for health damage caused by excessive air pollution. The old common law maxim “The King does no wrong” according to which a citizen may not seek redress from the government for wrongs committed by the latter has long been surpassed. The institution of state liability is thus a widely recognised concept. The paper analyses the main features of state liability for health damage caused by polluted air and its boundaries. It focuses on the recent development of EU law in this regard and the established case law of the ECtHR. Since the right to a healthy living environment is recognised by several constitutions across the world, including Slovenia, the paper deals also with the Slovenian case law on state liability for damages caused by air and noise pollution from road and rail transport.

Keywords: environment, state liability, nuisance, air pollution, EU law, right to a healthy environment, sustainability, health, air quality, human rights

1. Introduction

Air pollution is one of the greatest environmental risks to human health worldwide. According to the World Health Organization (WHO), 6.7 million people die annually from air pollution.¹ The most problematic aspect is ambient (i.e., outdoor) air pollution,² the major sources of which are fossil fuel burning in industries and automobile emissions.³

Although, in principle, everyone is responsible for taking care of their own health, the state can be held liable for health damage caused by excessive air pollution. The right to a healthy environment is recognized as a human right by several constitutions across

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¹ WHO 2022.

² Ibid.

³ Chi-Hsien & Yue 2019, 210.



the world, which brings with it the positive and negative obligations of states. Moreover, to improve air quality, states are bound by several international environmental agreements, regional laws, and other agreements. With the aim of achieving cleaner ambient air by 2030 and zero pollution by 2050, the European Commission (hereinafter, the Commission) recently proposed stronger rules on ambient air, as contained in the proposed revision of the Ambient Air Quality Directives.⁴

This study aims to provide insights into the various approaches to the concept of state liability for health damage caused by excessive air pollution. Traditionally (under Roman law), an individual was protected against excessive emissions (caused by another) through the mechanisms of private law. However, the concept of human rights has brought about another dimension of law, including the liability of the state for violating such rights. Nevertheless, it can be seen (at least in Slovenian law) that certain concepts and institutions of tort law (including nuisance) can be (with certain modifications) applied to the vertical relationship between an individual and the state.

This paper aims to provide an overview of the legal framework on air quality in European Union (EU) law and current developments concerning the liability of EU Member States for the damage suffered by individuals due to excessive air pollution (Section 2). In doing so, the paper focuses on the recent ruling of the *Court of Justice of the European Union* (CJEU) in case C-61/21 and the proposed revision of secondary legislation on the matter. In addition, this study takes a closer look at the causality thereof, which is a prerequisite for state liability, which is, at least in environmental matters, usually considered *probatio diabolica*. Section 3 analyzes relevant European Court of Human Rights (ECHR) case law on the matter. Although there is no explicit right to a healthy living environment in the European Convention on Human Rights (hereafter, the Convention), the ECHR established its protection under the umbrella of Article 8 of the Convention (the right to respect for private and family life) and other provisions, and carved out the main features of state liability in such cases. Section 4 provides insight into Slovenian law – more precisely, into Slovenian case law dealing with massive claims of individuals against the state for damages caused by air and noise pollution from road and rail transport. Recently, the Supreme Court of the Republic of Slovenia changed its legal assessment of state liability in such cases, moving from a private law-oriented approach towards a more public law-oriented approach.

2. Air quality and eu law: the liability of member states for an infringement of eu law on ambient air quality

The legal basis for the EU to take measures regarding air quality lies in Articles 191 and 192 of the Treaty on the Functioning of the European Union⁵ regarding the environment. These articles empower the EU to preserve, protect, and improve the quality of the environment, protect human health, and promote actions at the international level to address regional or global environmental problems. As this is an

⁴ European Commission 2022a.

⁵ Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

area of shared competence between the EU and the Member States, EU measures must respect the principle of subsidiarity.⁶

The rules for the protection of ambient air quality are based on the EU's environmental competence and, therefore, necessarily aim at a high level of protection with regard to human health.⁷ Awareness of the harmful effects of air pollution has led to the adoption of specific restrictions.⁸ The limit values for some pollutants were established in 1980 and were gradually supplemented with new harmful substances.⁹ Currently, the main legislations are the Ambient Air Quality Directives 2004/107/EC¹⁰ and 2008/50/EC.¹¹

Air quality in the EU has improved over the last three decades,¹² but this has not been sufficient. Air pollution continues to be the number one environmental cause of early death in the EU.¹³ In November 2019, the Commission published a fitness check for the Ambient Air Quality Directives. It was concluded that the directives have been partially effective in improving air quality and achieving air quality standards; however, not all their objectives have been met thus far.¹⁴ The Commission also presented the European Green Deal. The Commission is committed to drawing on the lessons learned from the evaluation of current air quality legislation and proposing a revision of air quality standards to align them more closely with the WHO recommendations.¹⁵

The Ambient Air Quality Directives are part of a comprehensive clean air policy framework based on three main pillars. The first consists of Ambient Air Quality Directives that set quality standards for the concentration levels of 12 ambient air

⁶ European Commission 2022b. See Chapter 1.2. Legal basis.

⁷ Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 87.

⁸ See Misonne 2021, 35.

⁹ Council Directive 80/779/EEC of July 15, 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, OJ L 229, 30.8.1980; Council Directive 82/884/EEC of December 3, 1982 on a limit value for lead in the air, OJ L 378, 31.12.1982; Council Directive 85/203/EEC of March 7, 1985 on air quality standards for nitrogen dioxide, OJ L 87, 27.3.1985; Council Directive 92/72/EEC of September 21, 1992 on air pollution by ozone, OJ L 297, 13.10.1992. For more, see: Misonne 2021, 35.

¹⁰ Directive 2004/107/EC of the European Parliament and of the Council of December 15, 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, OJ L 23, 26.1.2005.

¹¹ Directive 2008/50/EC of the European Parliament and of the Council of May 21, 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, as amended by Commission Directive (EU) 2015/1480 of August 28, 2015 amending several annexes to Directives 2004/107/EC and 2008/50/EC of the European Parliament and of the Council laying down the rules concerning reference methods, data validation and location of sampling points for the assessment of ambient air quality, OJ L 226, 29.8.2015.

¹² European Commission 2022b. See Chapter 1. Context of the Proposal.

¹³ Ibid.

¹⁴ European Commission 2019a, 38.

¹⁵ European Commission 2019b, 14.

pollutants. The second is the NEC Directive,¹⁶ which establishes Member States' obligations to reduce emissions of key ambient air pollutants and their precursors and works within the EU to collectively reduce transboundary pollution. The third pillar comprises legislation¹⁷ that sets emission standards for key sources of air pollution, such as road transport vehicles, domestic heating appliances, and industrial plants.¹⁸

In October 2022, the Commission proposed a revision of the Ambient Air Quality Directives (hereinafter, the Proposal for a Directive on Ambient Air Quality and Cleaner Air for Europe, or the Proposal).¹⁹ Article 28 of the Proposal for a Directive on Ambient Air Quality and Cleaner Air for Europe introduces the right to compensation for damage caused to human health.²⁰ The Proposal states that “*Article 28 aims to establish an effective*

¹⁶ Directive (EU) 2016/2284 of the European Parliament and of the Council of December 14, 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, OJ L 344, 17.12.2016.

¹⁷ Directive 2010/75/EU of the European Parliament and of the Council of November 24, 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010; Directive (EU) 2015/2193 of the European Parliament and of the Council of November 25, 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants, OJ L 313, 28.11.2015; Directive 98/70/EC of the European Parliament and of the Council of October 13, 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, OJ L 350, 28.12.1998; etc.

¹⁸ Full para. summarised from: European Commission 2022b. See Chapter 1. Context of the Proposal.

¹⁹ European Commission 2022b.

²⁰ Ibid. Proposal for Art. 28 (entitled Compensation for damage to human health) shall read as follows:

“1. Member States shall ensure that natural persons who suffer damage to human health caused by a violation of Articles 19(1) to 19(4), 20(1) and 20(2), 21(1) second sub-paragraph and 21(3) of this Directive by the competent authorities are entitled to compensation in accordance with this article.

2. Member States shall ensure that non-governmental organisations promoting the protection of human health or the environment and meeting any requirements under national law are allowed to represent natural persons referred to in paragraph 1 and bring collective actions for compensation. The requirements set out in Article 10 and Article 12(1) of Directive (EU) 2020/1828 shall mutatis mutandis apply to such collective actions.

3. Member States shall ensure that a claim for compensation for a violation can be pursued only once by a natural person referred to in paragraph 1 and by the non-governmental organisations representing the person referred to in paragraph 2. Member States shall lay down rules to ensure that the individuals affected do not receive compensation more than once for the same cause of action against the same competent authority.

4. Where a claim for compensation is supported by evidence showing that the violation referred to in paragraph 1 is the most plausible explanation for the occurrence of the damage of that person, the causal link between the violation and the occurrence of the damage shall be presumed.

The respondent public authority shall be able to rebut this presumption. In particular, the respondent shall have the right to challenge the relevance of the evidence relied on by the natural person and the plausibility of the explanation put forward.

5. Member States shall ensure that national rules and procedures relating to claims for compensation, including as concerns the burden of proof, are designed and applied in such a way that they do not render impossible or excessively difficult the exercise of the right to compensation for damage pursuant to paragraph 1.

6. Member States shall ensure that the limitation periods for bringing actions for compensation as referred to in paragraph 1 are not less than 5 years. Such periods shall not begin to run before the violation has ceased and the

*right for people to be compensated where damage to their health has occurred wholly or partially as a result of a violation of rules prescribed on limit values, air quality plans, short-term action plans, or in relation to transboundary pollution. People affected have the right to claim and obtain compensation for that damage. This includes the possibility for collective actions.*²¹ The right to compensation is invoked when damage to human health is caused by a violation of Articles 19(1)–19(4), 20(1), 20(2), 21(1), or 21(3) by competent authorities. The proposals in these articles demand the establishment of air quality plans, short-term action plans, and activities for transboundary air pollution. Therefore, this Proposal assumes an effective right to compensation in the event of limited violations. It is up to Member States to decide how to meet the requirements foreseen.

If such amendments are adopted, certain issues may be resolved, at least theoretically. These provisions have raised several theoretical and practical questions. However, air pollution is of an older date, and the damage to health is the result of years of exposure. Accordingly, the CJEU already had to answer whether individuals are able to demand compensation for health damage resulting from an infringement of the current directives.

In its air quality-related case, *Deutsche Umwelthilfe*, the CJEU, underlined that the full effectiveness of EU law and the effective protection of the rights of individuals may, where appropriate, be ensured by the principle of state liability.²² Case C-61/21 was the first to reach the CJEU to test this statement. As highlighted by Advocate General Kokott, the case was intended to clarify the extent to which an infringement of the limit values for the protection of ambient air quality under EU law can *in fact* give rise to an entitlement to compensation.²³ On December 22, 2022, the CJEU delivered its judgement. The answer is decisive because it could open the door to many potential lawsuits.

2.1. The request for a preliminary ruling in Case C-61/21

The case originated from a dispute initiated by a French resident on the French State's breach of EU air quality rules. The applicant in the main proceedings claimed that he had suffered damage to his health as a result of the deterioration of ambient air in the Paris geographical area where he lives.²⁴ He submitted that he had been suffering from health problems since 2003 and that his problems had worsened over time.²⁵ The limit values for ambient air quality have been exceeded in the relevant Paris agglomeration,

person claiming the compensation knows, or can reasonably be expected to know, that he or she suffered damage from a violation as referred to in paragraph 1."

²¹ European Commission 2022b. See Chapter 5. Detailed explanation of the specific provisions of the Proposal.

²² Judgement of the CJEU of December 19, 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, para. 54. See Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 29.

²³ Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 29.

²⁴ Request for a preliminary ruling lodged on February 2, 2021, C-61/21, 5.

²⁵ Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 24.

namely the limit values for nitrogen dioxide (since 2010) and PM10 (from 2005 to 2019).²⁶ Therefore, he requested that the Prefect of the Département du Val-d'Oise take measures to comply with the limit values under EU secondary legislation. Additionally, he demanded compensation of EUR 21 million for the harm he attributed to air pollution; EUR 6 million for damage to his health; and EUR 15 million for emotional distress, anxiety, bodily injury, disfigurement, physical harm, and psychological damage.²⁷

Since his action was dismissed by the *Tribunal administratif de Cergy-Pontoise* (Eng.: Administrative Court, Cergy-Pontoise, France), he appealed to the *Cour administrative d'appel de Versailles* (Eng.: Administrative Court of Appeal, Versailles, France).²⁸ The Appellate Court in the main proceeding stated that the decision on the compensation claim requires clarification of the scope of Articles 13(1) and 23(1) of Directive 2008/50 with regard to the entitlement of individuals to compensation.²⁹ Therefore, the French National Court referred two preliminary questions to the CJEU. Through its first question, the national court was essentially asking whether individuals are able to demand compensation for damage to health resulting from an infringement of said provisions. Assuming that the provisions may indeed give rise to such entitlement, the national court asked what conditions entitlement was subject to.³⁰

2.2. State liability and the Francovich Doctrine

The key question in this case is whether individuals suffering from health problems caused by excessive air pollution can successfully follow the *Francovich*³¹ line of case law.³² Advocate General Kokott proposed that Member States could be held liable for air pollution-related health damages. However, the CJEU does not follow this opinion.

The principle of state liability for harm caused to individuals by breaches of EU law for which a Member State can be held responsible is inherent in the treaty system.³³ This was established by the CJEU in the *Francovich* case.³⁴ Since then, the conditions for

²⁶ *Ibid.*, para. 23. See endnotes Nos. 11–13: Judgement of the CJEU of October 24, 2019, *Commission v. France* (Exceedance of limit values for nitrogen dioxide), C-636/18, EU:C:2019:900; Judgement of the CJEU of April 28, 2022, *Commission v. France* (Limit values – PM10), C-286/21 (not published), EU:C:2022:319; Judgement of the Conseil d'État (Council of State) of August 4, 2021, *Association les Amis de la Terre France et Autres*, 428409, FR:CECHR:2021:428409.20210804, points 4 and 5.

²⁷ *Ibid.*, para. 24. See also the request for a preliminary ruling lodged on February 2, 2021, C-61/21, 2.

²⁸ *Ibid.*, para. 26. *Ibid.*

²⁹ Request for a preliminary ruling lodged on February 2, 2021, C-61/21, 5.

³⁰ Full questions, as referred to the *CJEU*: See Judgement of the CJEU of December 22, 2022, *JP v. Ministre de la Transition écologique, Premier ministre*, C-61/21, EU:C:2022:1015, para. 33.

³¹ Judgements of the CJEU of November 19, 1991, *Francovich and Others*, C-6/90 and C-48/93, EU:C:1991:428.

³² The principle of state liability for breaches of EU law made its first appearance in *Francovich*. Bobek 2020, 183.

³³ Judgements of the CJEU of November 19, 1991, *Francovich and Others*, C-6/90 and C-48/93, EU:C:1991:428, para. 35.

³⁴ See footnote No. 32.

state liability have been reformulated slightly.³⁵ An individual's right to compensate for the damage caused by a Member State for a breach of EU law is examined under three conditions. First, the rule of law infringed must be intended to confer rights on individuals. Second, a breach of this rule must be sufficiently serious. Third, there must be a direct causal link between the breach of obligation born by the Member State and the damage sustained by the injured parties.³⁶

The CJEU has stated that numerous air quality directives³⁷ establish quite clear and precise obligations regarding the results to be achieved by Member States.³⁸ However, these obligations serve the general objective of protecting human health and the environment.³⁹ The relevant provisions of Directive 2008/50 and its predecessors do not confer any explicit rights on individuals. The obligations laid down in those provisions, in the context of the general objective of protecting human health and the environment as a whole, do not allow individuals to be implicitly granted individual rights based on these obligations.⁴⁰ The first of the cumulatively required conditions is not met.⁴¹ This conclusion is not altered by the fact that when a Member State has failed to ensure compliance with the set limit values, individuals may require national authorities to take the measures required by these directives (if necessary, by bringing an action before the competent court).⁴² Similarly, natural or legal persons directly affected by an exceedance of the set limit values must be able to require national authorities to draw up an air quality plan (if necessary, by bringing an action before the competent court).⁴³ The CJEU emphasized that individuals must have the right to seek measures from the authorities. The CJEU explicitly stated that its conclusion does not oppose state liability

³⁵ Bobek 2020, 184.

³⁶ Judgements of the CJEU of March 5, 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, para. 51; of March 24, 2009, *Danske Slagterier*, C-445/06, EU:C:2009:178, para. 20; and of December 10, 2020, *Euromin Holdings (Cyprus)*, C-735/19, EU:C:2020:1014, para. 79. See also: Judgement of the CJEU of December 22, 2022, *JP v. Ministre de la Transition écologique, Premier ministre*, C-61/21, EU:C:2022:1015, paras. 43–44 and the cited case law.

³⁷ The CJEU pointed out that, in light of the period referred to in the national court's submissions, not only the provisions of the Directive 2008/50 are relevant, but also those of Directive 96/62 (Council Directive 96/62/EC of September 27, 1996 on ambient air quality assessment and management, OJ L 296, 21.11.1996), *Directive* 1999/30 (Council Directive 1999/30/EC of April 22, 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L 163, 29.6.1999), *Directive* 80/779 (see footnote No. 9) and *Directive* 85/203 (see footnote No. 9). See Judgement of the CJEU of December 22, 2022, *JP v. Ministre de la Transition écologique, Premier ministre*, C-61/21, EU:C:2022:1015, para. 41.

³⁸ Judgement of the CJEU of December 22, 2022, *JP v. Ministre de la Transition écologique, Premier ministre*, C-61/21, EU:C:2022:1015, para. 54.

³⁹ *Ibid.*, para. 55.

⁴⁰ *Ibid.*, para. 56.

⁴¹ *Ibid.*, para. 57.

⁴² *Ibid.*, paras. 58–59. See also the cited case law.

⁴³ *Ibid.*, paras. 60. See also the cited case law.

under the national legal orders of Member States⁴⁴ or periodic penalty payment orders to ensure that Member States meet the requirements of these directives.⁴⁵

On the contrary, on May 5, 2022, Advocate General Kokott took the view that an infringement of the limit values set under Directive 2008/50/EC may give rise to entitlement to compensation from the state under the classic conditions for state liability. Even if the CJEU did not follow her Opinion and concluded its assessment on the first condition, the more ‘futuristic’ Opinion of Advocate General Kokott can serve as a guideline for domestic courts in the future. Therefore, her opinion is as follows:

Advocate General Kokott stated that the first condition is fulfilled. The limit values for pollutants in ambient air and the obligation to improve ambient air quality are intended to confer rights on individuals.⁴⁶ Articles 7 and 8 of Directive 96/62, read in conjunction with the limit values for nitrogen dioxide and PM10 in Directive 1999/30, establish a clear and unconditional obligation to comply with these limit values. The limit values have existed since January 1, 2005, with respect to PM 10 and from January 1, 2010, with respect of nitrogen dioxide. The Advocate General also noted that the Member States, in accordance with Article 7(3) of Directive 96/62, only had to take measures to reduce the duration of exceedance to a minimum. In doing so, they had to strike a balance between conflicting interests. The second obligation is sufficiently clear only in the aspect of exceeding the limits of the margin of discretion.⁴⁷ Furthermore, Article 13(1) of Directive 2008/50 establishes a precisely defined, directly effective obligation on the part of Member States to prevent the exceedance of the limit values for the air pollutants covered.⁴⁸ In addition, Article 23(1) imposes a clear and independent obligation to establish an air quality plan that must comply with certain requirements. This obligation is triggered by the infringement of the limit values.⁴⁹

The standard of liability is determined by the ‘sufficiently serious breach’ test.⁵⁰ Advocate General Kokott submitted that an exceedance of the limit values for ambient air quality without a corresponding plan to remedy the exceedance satisfies the second condition.⁵¹ Although the question of whether the exceedance of the limit values constitutes a serious infringement of EU law is unclear,⁵² a sufficiently serious breach is reached when the limit values are exceeded without the adoption of an adequate air quality improvement plan. In addition, according to case law, a breach of EU law is sufficiently serious if it persists despite a judgement finding the breach in question.⁵³

⁴⁴ Ibid., para. 63.

⁴⁵ Ibid., para. 64.

⁴⁶ Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, para. 103. For a detailed analysis, see paras. 22–103.

⁴⁷ Ibid., para. 54.

⁴⁸ Ibid., para. 68.

⁴⁹ Ibid., para. 69.

⁵⁰ Craig & de Búrca 2020, 296.

⁵¹ Opinion of Advocate General Kokott delivered on May 5, 2022, C-61/21, EU:C:2022:359, paras. 112 and 125. For a detailed analysis, see paras. 106–125.

⁵² Ibid., paras. 108–112.

⁵³ Ibid., para. 107. See endnote No. 85: Judgements of the CJEU of March 5, 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, para. 57; of December 12, 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, para. 214; of May 30, 2017,

Regarding the third and final condition, Advocate General Kokott warned that the real hurdle to a successful compensation claim is proving a direct causal link between the serious infringement of air quality rules and concrete damage to health.⁵⁴ Although the limit values are based on the assumption of significant damage to human health, they do not prove that the suffering of an individual is attributable to the exceedance of the limit values and an insufficient air quality plan in terms of legally relevant causation.⁵⁵ However, the fact that something is difficult to prove should not rule out a particular legal basis for the protection of individuals in advance.

2.3. Problems of causation

As previously mentioned, one of the key problems faced by an individual when it comes to claims for damage caused by pollution is the question of causation. In principle, national courts determine ways to prove causation and the standards of proof. Member States approach this issue differently by applying different theories of causation and standards of proof. However, when applying EU law, they must observe the principles of equivalence and effectiveness.⁵⁶ This means that the rules of causation should be applied without distinction, whether the infringement alleged is of EU law or national law (where the purpose and cause of the legal action are similar); conversely, the application of such rules should not make it virtually impossible or excessively difficult to obtain compensation for the damage suffered.

As stressed by Advocate General Kokott in her opinion in Case C-61/21, the injured party should prove: (i) that he or she has stayed for a sufficiently long time in an environment in which the limit values of ambient air quality have been seriously infringed; (ii) the existence of damage that can be linked to the relevant air pollution; and (iii) a direct causal link between the abovementioned stay and the damage claimed.⁵⁷ To ease the burden of proof, it was suggested applying a rebuttable presumption that a typical type of damage to health is attributable to a sufficiently long stay in an environment in which the limit value has been exceeded, similar to that of the ECHR in *Fadeyeva v. Russia* (see below). However, unfortunately, the CJEU did not give any further guidance on the issue of causation in case C-61/21, since it held that the first prerequisite for state liability was not fulfilled.

Causality brings many challenges to environmental matters, particularly in the case of climate-change litigation. Such cases require the claimant to prove not only that greenhouse gas emissions cause climate change (and that the defendant contributed to such emissions) but also that the claimant's damage is caused by climate change.⁵⁸ Moreover, because climate change is a consequence of various factors and stakeholders, it is particularly difficult to determine the proportion of defendants that contribute to the

Safa Nicu Sepahan v. Council, C-45/15 P, EU:C:2017:402, para. 31; and of January 18, 2022, Thelen Technopark Berlin, C-261/20, EU:C:2022:33, para. 47.

⁵⁴ Ibid., para. 126. For a detailed analysis, see paras. 126–142.

⁵⁵ Ibid., para. 130.

⁵⁶ Ibid., para. 128.

⁵⁷ Ibid., paras. 131–136.

⁵⁸ Sindico, Moise Mbengue & McKenzie 2021, 681.

specific damage caused by climate change. Causality is typically proven as a standard of certainty. However, numerous legal orders enable a reduction in the standard of proof, for example, to the preponderance of evidence.⁵⁹

Luciano Llinya v. RWE AG,⁶⁰ a prominent case of climate change litigation before German courts, perfectly illustrates the problems that arise in proving causation (although it does not deal with state liability but with the liability of a private entity). In this case, a Peruvian farmer filed declaratory judgement and damages against RWE, Germany's largest electricity producer, stating that RWE, having contributed to climate change by emitting substantial amounts of greenhouse gases, bore some measure of responsibility for the melting of mountain glaciers near Huaraz.⁶¹ The claimant demanded that the RWE pay 0.47% of the expected cost of erecting the flood protection. This percentage is the RWE's estimated contribution to global industrial greenhouse gas emissions since the beginning of industrialization. This case raises many issues regarding causation, the most contentious of which is the percentage contribution of the defendant. The district court dismissed the claimant's request for damage, also for the reason of causality (stating that no linear causal chain could be discerned amid the complex components of the causal relationship between particular greenhouse gas emissions and particular climate change impacts).⁶² In German private law, causation has two components: the first is the but-for test (the alleged behavior has to be the actual cause of the damage in the sense of a *condictio sine qua non*), and the second is the doctrine of adequate causation (the alleged behavior should lead to a serious increase in the risk of harm, and the harm claimed should be expected to flow from the defendant's wrongful act within the natural course of events).⁶³ The causality must be proven beyond reasonable doubt.⁶⁴ German scholars mostly agree with the district court's decision in this case and deny causality under both but-for causation and adequate causation.⁶⁵ It seems indeed problematic, if not impossible, to establish a causal link between a particular stakeholder and a particular regional climatic condition (let alone the percentage of the contribution).

Considering the above-mentioned (and several others) problems regarding proving causality, the EU legislature proposed a (rebuttable) presumption of a causal link in the recent Proposal for a Directive on ambient air quality and cleaner air for Europe that conferred the right to compensation for damage to human health, as mentioned above. The proposed rule reads as follows: "*Where a claim for compensation is supported by evidence showing that the violation referred to in paragraph 1 is the most plausible explanation for the occurrence of the damage of that person, the causal link between the violation and the occurrence of the damage shall be presumed. The respondent public authority shall be able to rebut this presumption. In particular, the respondent shall have the right to challenge the relevance of the evidence relied on by the*

⁵⁹ See Pöttker 2014, 141–161 (Germany) and 306–323 (USA).

⁶⁰ Judgement of Essen Regional Court (Germany) of December 15, 2016, No. 2 O 285/15 (on appeal).

⁶¹ See Climate Change Litigation Databases 2015.

⁶² *Ibid.*

⁶³ Wagner & Arntz 2021, 12.

⁶⁴ *Ibid.*, 13.

⁶⁵ *Ibid.*, 15.

*natural person and the plausibility of the explanation put forward.*⁶⁶ This solution seems reasonable because it aims to strike a fair balance between the individual's and the state's burden of proof and thus aims to establish an effective right for an individual to be compensated where damage to his or her health has occurred.

3. The right to a healthy environment and state liability: a human-rights approach

It is widely accepted that human rights and the environment are synergistic, even to the extent of suggesting that environmental rights belong to the `third generation of human rights.⁶⁷ The concept of an independent right to a healthy environment is not unproblematic.⁶⁸ Its recognition differs from state to state,⁶⁹ and the ECHR protects environmental rights in innovative ways.⁷⁰

The right to a healthy environment is constitutionally protected in over 100 states.⁷¹ At the national level, Portugal and Spain were the first countries to enshrine this right in their constitutions, in 1976 and 1978, respectively.⁷² Since then, the right to a healthy environment has spread to other constitutions, more rapidly than any other new human right.⁷³ Approximately two-thirds of all constitutional rights refer to healthy environment.⁷⁴ For example, Article 72 of the Slovenian Constitution, entitled "*The right to a healthy environment*," guarantees everyone the right to a healthy living environment in accordance with the law. To this end, the state establishes conditions for carrying out economic and other activities. The law sets out the conditions under which and to what extent a person causing damage to the living environment is liable to pay compensation. The same article grants animal protection against torture. An alternative phrasing of the specified object of protection includes the right to a clean, safe, favorable, wholesome, and ecologically balanced environment.⁷⁵ From the EU perspective, although environmental protection is not enshrined in constitutional texts in many Member States, it may be protected by other laws or case law.⁷⁶ Article 37 of the Charter of Fundamental

⁶⁶ Art. 28(4) of the Proposal for a Directive on ambient air quality and cleaner air for Europe. See European Commission 2022b.

⁶⁷ Council of Europe 2022, 9. An in-depth discussion of their historical development and legal recognition goes beyond the scope of this paper. For more, see, e.g.: Knox & Pejan 2018, Atapattu & Schapper 2019, Lavrysen 2012. See also: Mišćević & Dudás 2021, 55.

⁶⁸ In its landmark decision, the Human Rights Council unequivocally recognized for the first time that having a clean, healthy, and sustainable environment is a human right. See Human Rights Council 2021.

⁶⁹ Knox 2018, 11.

⁷⁰ The ECHR provided indirect protection concerning environmental matters by its interpretation of some Convention rights. Morgera & Marín Durán 2021, 1043.

⁷¹ Boyd 2019, 4. See also: Knox 2018, 11.

⁷² Knox 2018, 11. See also: Boyd 2012, 5.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Morgera & Marín Durán 2021, 1047–1048.

Rights of the EU (hereinafter: EU Charter)⁷⁷ on environmental protection⁷⁸ is a clear manifestation of a lack of consensus among the EU Member States as to a substantive human right to a healthy environment⁷⁹ since it only belongs to the category of principles.⁸⁰

We now turn to the protection offered to individuals against the state, as determined by the ECHR. Regarding the rights in question, the ECHR has frequently remarked that the Convention has no explicit right to a clean and quiet environment.⁸¹ However, its case law shows a growing awareness of the link between the protection of individuals' rights and the environment,⁸² which has led to a clear extension of the scope of Article 8 to cover environmental human rights.⁸³

The ECHR's assessment of interference is relative and depends on all circumstances, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life.⁸⁴ An arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in a significant impairment in the applicant's ability to enjoy his or her home, private, or family life.⁸⁵ However, no issue arises if the complaint of detriment is negligible in comparison to the environmental hazards inherent in life in every modern city.⁸⁶ Environment-related issues may also be addressed in the context of other provisions of the Convention, such as Articles 2, 3, and 10 and Article 1 of Protocol No. 1.⁸⁷

The following is a presentation of two ECHR judgements that often guide national courts in interpreting state liability for damages in alleged breaches of the right to environmental protection (as illustrated in Section 4). In some respects, parallels can be drawn in the case of C-61/21. However, the principles of the assessments are quite different.

⁷⁷ Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016.

⁷⁸ Art. 37 of the EU Charter reads: "*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.*"

⁷⁹ Morgera & Marín Durán 2021, 1048.

⁸⁰ Ibid., 1042, 1053–1055, and 1060–1063.

⁸¹ Lafferty 2018, 561.

⁸² Council of Europe 2022, 19.

⁸³ Lafferty 2018, 561 and the cited case law.

⁸⁴ The case of *Dubetska and others v. Ukraine*, ECHR judgement of February 10, 2011, para. 105 and the cited case law. See also: *Hatton and Others v. The United Kingdom*, ECHR judgement of July 8, 2003, para. 96; *Ioan Marchiș and Others v. Romania*, ECHR decision of June 28, 2011, para. 28 and the cited case law.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Morgera & Marín Durán 2021, 1043–1044. For more, see: ECHR 2022.

3.1. The case of Fadeyeva v. Russia

In the case of *Fadeyeva*,⁸⁸ the applicant alleged that the operation of the Severstal steel plant, the largest iron smelter in Russia, close to her home endangered her health and well-being. She relies on Article 8 of the Convention.⁸⁹

Like thousands of others, she and her family lived inside a zone that was supposed to separate the plant from the town's residential areas. The blocks of flats in the zone belonged to the plant and were mainly designated for the plant's workers and the applicant's husband among them.⁹⁰ The applicant, along with her family and various other residents, sought resettlement outside the zone.⁹¹ The applicant claimed that the concentrations of certain toxic substances in the air near her home constantly exceeded and continues to exceed the safe levels established by Russian legislation.⁹² She stated that this caused her poor medical condition because she suffers from various nervous system illnesses.⁹³

In *Fadeyeva*, the ECHR established that Severstal steel plant operations did not fully comply with the environmental and health standards established in Russian legislation.⁹⁴ The ECHR did not establish that the applicant's health had deteriorated solely because of her living in the zone. Even under the assumption that the pollution did not cause any quantifiable harm to her health, it inevitably made applicant more vulnerable to various illnesses. Moreover, there was no doubt that this adversely affected her quality of life at home. Therefore, the ECHR accepted that the actual detriment to the applicant's health and wellbeing had reached a level sufficient to bring it within the scope of Article 8 of the Convention.⁹⁵

In the aforementioned case, the ECHR considered two alternatives to solve the applicant's problem: resettlement of the applicant outside the zone and reduction of toxic emissions. First, the ECHR found that little, if anything, had been done to help applicants move to a safer area. Regarding the efforts of authorities aimed at reducing pollution, the ECHR noted that certain progress has been made since the 1980s. However, government programs and privately funded projects have not achieved the expected results. The ECHR accepted that given the complexity and scale of the environmental problems around the Severstal steel plant, such problems could not be resolved in a short period. However, the complexity and severity of the environmental problem did not mean that the authorities remained passive. On the contrary, they had to take "*reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8,*" as established in the case of *Hatton and Others v. the United Kingdom*,⁹⁶ with the shortest delay possible.

⁸⁸ Case of *Fadeyeva v. Russia*, ECHR judgement of June 9, 2005.

⁸⁹ *Ibid.*, para. 3.

⁹⁰ *Ibid.*, paras. 10–11.

⁹¹ *Ibid.*, paras. 20–28.

⁹² *Ibid.*, paras. 29–43.

⁹³ *Ibid.*, paras. 44–47.

⁹⁴ *Ibid.*, para. 102.

⁹⁵ *Ibid.*, para. 88.

⁹⁶ Case of *Hatton and Others v. the United Kingdom*, ECHR judgement of July 8, 2003, para. 98.

Given the seriousness of the situation, the *onus* was on the state to show how it dealt with environmental problems.⁹⁷

The ECHR concluded that despite the wide margin of appreciation left to the state, it failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect her home and private life. The ECHR found a violation of Article 8.⁹⁸ The ECHR reached a similar conclusion in the cases of *Ledyayeva and Others*,⁹⁹ referring to the *Fadeyeva* judgement.

3.1. The case of Pavlov and others v. Russia

The recent case of *Pavlov and Others*¹⁰⁰ raised the question of whether the state's failure to take adequate protective measures to minimize or eliminate the effects of industrial air pollution constitutes a violation of Article 8 of the Convention.

The participants lived in Lipetsk, an industrial city in Russia.¹⁰¹ They unsuccessfully brought proceedings against 14 federal and regional agencies. They claimed that the concentrations of harmful substances in the atmospheric air and drinking water in Lipetsk consistently exceeded the maximum permitted levels. The authorities failed to take meaningful measures, such as creating sanitary protection zones around the city's industrial undertakings. They requested that the court order defendants (federal and regional agencies) to take relevant measures. They also claimed EUR 10,500.00 for non-pecuniary damages.¹⁰² These lawsuits and all subsequent national legal remedies were unsuccessful.¹⁰³

Applicants turned to the ECHR and relied on Article 8 of the Convention. They complained that severe industrial pollution in Lipetsk endangered their health and impaired the quality of their lives for many years and that the state had failed to take effective protective measures.¹⁰⁴

The ECHR reiterated that in order to fall within the scope of Article 8 of the Convention, complaints relating to environmental nuisances have to show, first, that there was actual interference with the applicant's private sphere and, second, that a level of severity was attained. Assessment of the minimum level is relative. Health risks present a relevant factor. In the absence of medical evidence, it cannot be said that industrial air pollution necessarily caused damage to the applicants' health. Nevertheless, the ECHR considered that it had been established based on the extensive evidence submitted that living in an area where pollution exceeded the applicable safety standards posed an increased risk to applicants' health. The ECHR also reiterates that severe environmental pollution may affect individuals' well-being and adversely impact their right to private

⁹⁷ See the case of *Ledyayeva and Others v. Russia*, ECHR judgement of October 26, 2006, paras. 103–104.

⁹⁸ See the case of *Fadeyeva v. Russia*, ECHR judgement of June 9, 2005, para. 134. Regarding the State's omission in the present case, see the Concurring Opinion of Judge Kovler.

⁹⁹ Case of *Ledyayeva and Others v. Russia*, ECHR judgement of October 26, 2006.

¹⁰⁰ Case of *Pavlov and Others v. Russia*, ECHR judgement of October 11, 2022.

¹⁰¹ *Ibid.*, para. 5.

¹⁰² *Ibid.*, para. 8.

¹⁰³ *Ibid.*, paras. 11–13.

¹⁰⁴ *Ibid.*, para. 53.

and family life without seriously endangering their health. The applicants, as long-term residents of Lipetsk, were exposed to air pollution above the relevant norms. The ECHR, therefore, considered that the material in the case supported the applicants' allegations that the level of pollution they experienced in their daily lives for more than 20 years was not negligible and exceeded the environmental risks inherent in living in any modern city.¹⁰⁵

The ECHR further analyzed two main issues. First, the state has a positive duty to take reasonable and appropriate measures to secure applicants' rights under the first paragraph of Article 8 of the Convention. Second, whether the state, within its margin of appreciation, struck a fair balance between the competing interests of the applicants and the community as a whole, as required by paragraph 2 of Article 8 of the Convention. Official reports clearly indicate that industrial air pollution was the main factor contributing to the overall environmental deterioration of Lipetsk. The authorities issued operating permits for industrial undertakings in the city, regulated their activities, conducted environmental assessments, and conducted inspections. The environmental situation was not the result of a sudden or unexpected change in events. In contrast, it is long-standing and well known. Domestic authorities were aware of the continuing environmental problems and applied certain sanctions to improve them. The ECHR concluded that the authorities in the present case were in a position to evaluate the pollution hazards and take adequate measures to prevent or reduce them. After an extensive analysis of all the measures taken and an assessment of their actual effectiveness in light of the appellants' complaints, the ECHR concluded that there had been a violation of Article 8 of the Convention. Therefore, domestic authorities failed to strike a fair balance in carrying out their positive obligations to secure the applicants' right to respect their private lives.¹⁰⁶

4. State liability for emissions from road and rail traffic in national law: the slovenian experience

In the last two decades, Slovenian courts have faced massive claims for damages caused by air and noise pollution from road and rail transport. Individuals who lived along particularly busy roads and railroads (in the northeastern part of the country¹⁰⁷) filed claims against the state, requesting compensation for nonpecuniary damage. They claimed to have suffered from air pollution, noise, and vibrations that exceeded the 'normal limits.'¹⁰⁸ Consequently, they claimed to have several health issues, including headaches, problems with concentration, insomnia, etc. They asserted that the state violated their personal right to a healthy living environment.

Case law shows that most have succeeded in their claims against the state, and the latter had to pay damages in the amount of several tens of millions of euros. The courts

¹⁰⁵ Ibid., paras. 58–71.

¹⁰⁶ Ibid., paras. 77–93.

¹⁰⁷ Before the construction of the highway in Pomurje in 2008, all freight traffic with Hungary was carried out on regional roads that led through settlements.

¹⁰⁸ See, e.g., Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 254/2008 of May 8, 2008.

grounded the state's liability in Article 72 of the Slovenian Constitution (the right to a healthy living environment) and held that the state is obliged to ensure a healthy living environment. It follows from the case law that the state should have taken adequate measures in the field of transport so that individuals would not be exposed to excessive noise.¹⁰⁹ If such measures are not taken (even if due to a lack of resources) and the environment is polluted beyond permissible limits, the state shall be liable for damages due to a violation of the constitutional right to a healthy living environment.¹¹⁰ The courts have awarded damages on the basis of a nuisance, which is an institution of private law (Art. 133(3) of the Slovenian Obligations Code¹¹¹) and – in cases of generally beneficial activities (such as traffic) – allows compensation for damage that exceeds the 'normal limits'.¹¹²

The reasoning of the courts in the above-mentioned cases was highly disputed by Slovenian scholars.¹¹³ Možina argues that the concept of civil liability for damage due to an excessive nuisance between private individuals shall not be automatically (i.e. without any modifications) transferred to relationships between the state and private individuals.¹¹⁴ He agrees that the state should take every reasonably possible measure to ensure a healthy living environment for its citizens, but it can hardly guarantee a healthy environment in the sense of the strict liability of the state for nuisances exceeding the 'normal limits' (as held by the courts).¹¹⁵ Namely, as a result of the application of such strict liability, the state was liable regardless of fault for the entire damage of individuals suffering from nuisances above the 'normal limit.' The private law approach is based on the idea that whoever benefits from an activity that causes an excessive nuisance should also bear the costs of such an activity, including damage. However, this approach is not (entirely) applicable to the state, because the benefit from such traffic cannot be considered profitable in the abovementioned sense. Instead, courts should apply Article 26 of the Constitution, which establishes a legal framework for the liability of the state based on the principle of fault for the wrongful exercise of authority.¹¹⁶ A modified approach to liability for excessive nuisance should also enable courts to strike a proper balance between the public and private interests.¹¹⁷

¹⁰⁹ See, e.g., Decision of the Higher Court in Ljubljana (Republic of Slovenia), No. III Cp 2607/2014 of October 28, 2014.

¹¹⁰ Ibid.

¹¹¹ Art. 133 (3) of the Obligations Code reads: "*If damage arises during the performance of generally beneficial activities for which permission has been given by the relevant authority it shall only be possible to demand the reimbursement [sic!] of damage that exceeds the normal limits.*" Similar provisions can also be found in other States of former Yugoslavia; for Serbian law (and its application in Serbian case law), see Mišćević & Dudás 2021, 65. For the practice in other countries see e.g.: Orosz F et al. 2021, 99–120.

¹¹² 'Normal limits' is a legal standard that is defined by the court, taking into consideration all legally relevant circumstances of the case and limits defined by administrative law.

¹¹³ See Možina 2018.

¹¹⁴ Možina 2018, 187 et seq.

¹¹⁵ Ibid., 186.

¹¹⁶ Ibid., 188.

¹¹⁷ Ibid.

These arguments contributed significantly to the turnabout in jurisprudence in 2020. In a set of decisions,¹¹⁸ the Supreme Court changed its legal reasoning and adopted a more restrictive approach towards state liability. Instead of applying strict liability for nuisances exceeding 'normal limits' as established in private law, it referred to Article 26 of the Constitution, which is the legal basis for state liability based on the principle of fault for the wrongful exercise of authority.¹¹⁹ The Supreme Court followed the line of argumentation suggested by Možina that the state does not profit from road and rail traffic in a way that would justify the use of strict liability. Conversely, such activity is in the public interest and not in the interest of the state. With reference to the concept of state liability as laid down in the Constitution, the Supreme Court held that it should be evaluated whether all conditions for such liability are met: (i) a damage event, (ii) the illegal conduct (or omission) of a state authority when exercising authority, (iii) legally relevant damage, and (iv) a causal link between conduct and damage. Regarding the second condition, illegal conduct, the Supreme Court stressed the importance of the state's actual and financial capabilities.¹²⁰ Conversely, to reduce or exclude state liability it should be taken into consideration to what extent the injured parties exercised their duty to mitigate – i.e. what they did to prevent or reduce damage.¹²¹ Decisions of the courts of lower instances (to which the cases were returned for retrial) are still awaited. However, it is expected that courts will follow the guidance of the Supreme Court and take a more restrictive approach towards state liability, which will probably result in rejecting claims for damages in such cases.

The analysis of the Slovenian legal framework on state liability for excessive nuisance is of great importance in the context of the recent decision of the CJEU in Case C-61/21. Expressly, after rejecting the possibility of establishing state liability according to the rules of EU law, the CJEU held that the decision does not preclude Member States from establishing state liability according to the (stricter) rules of their national laws.¹²² In Slovenian law, such liability would be evaluated according to the rules of Article 26 of the Constitution. As in the case of massive claims for damage caused by air and noise pollution from road and rail transport, the second prerequisite of the claim (i.e., the illegal conduct (or omission) of a state authority when exercising authority) seems the most difficult to establish. It can clearly be seen from the presented legal analysis that both theory and jurisprudence tend to interpret this condition rather strictly, thereby considering the actual and financial capabilities of the state.

¹¹⁸ Decision of the Supreme Court of the Republic of Slovenia, Nos. II Ips 126/2019, II Ips 129/2019, II Ips 130/2019 of May 29, 2020. See also: Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 44/2021 of September 1, 2021.

¹¹⁹ Decision of the Supreme Court of the Republic of Slovenia, Nos. II Ips 126/2019, II Ips 129/2019, II Ips 130/2019 of May 29, 2020, para. 24.

¹²⁰ *Ibid.*, para. 26.

¹²¹ Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 44/2021 of September 1, 2021, para. 19.

¹²² Judgement of the CJEU of December 22, 2022, *JP v. Ministre de la Transition écologique, Premier ministre*, C-61/21, EU:C:2022:1015, para. 63.

5. Conclusion

This analysis shows that the concept of state liability for health damage caused by excessive air pollution is relatively nascent, at least at the EU level. As shown above, the CJEU has recently rejected the possibility of establishing Member States' liability for a breach of EU secondary legislation on air quality, reasoning that it does not confer rights on individuals. However, this might change soon, since the Commission has already proposed the revision of the Ambient Air Quality Directives, giving the right to compensation for damage to human health. Until then, state liability for damage caused by excessive air pollution could be established according to the existing national laws of Member States.

However, several constitutions worldwide recognize the right to a healthy environment as a human right. Although not explicitly mentioned in the Convention, the ECHR found a strong connection between a healthy living environment and the right to respect for private and family life (Article 8) and some further provisions. An arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in a significant impairment of an individual's ability to enjoy his or her home, private, or family life. Health risks and problems are relevant factors in the overall assessment of interference. Severe environmental pollution may affect an individual's well-being by adversely affecting his or her private and family life, without seriously endangering health. As mentioned, a healthy living environment as such is not protected by the Convention, but only by the impact of pollution and health problems on an existing Convention right.

In Slovenia, the right to a healthy living environment is guaranteed by the constitution (Article 72). In the last two decades, massive claims have been filed before civil courts by individuals, requiring the state to pay damages caused by air and noise pollution from roads and rail transport. These claims were based on Article 72 of the Constitution and the institution of nuisance, as established in tort law. The 2020 turnabout in the jurisprudence of the Supreme Court is of great importance to this topic. The Supreme Court rejected the application of unmodified rules on nuisances, as established in private law, as they did not allow weighting between private and public interests. Instead, special rules on state liability should apply, as in Article 26 of the Constitution. In addition, under the influence of the relevant ECHR case law, the Slovenian Supreme Court (as suggested by academics) emphasized the importance of the actual and financial capabilities of the state and the contribution of the injured party when establishing the liability of the state in each individual case.

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