Case No.:
Up-1391/07

Date:
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The Dissenting Opinion of Judge Dr Ciril Ribičič in Case No. Up-1391/07, Joined by Judge Mag. Marija Krisper Kramberger

"I understand Hegel's consideration from the point of view that freedom, which is neither juridically conferred, nor a freedom given by essence (T. Hribar), nor forced upon one (as Rousseau and Weber would paradoxically define it), must be discovered again and again." Dr Bogomir Novak (www.geocities.com)

1. The owl of Minerva as an allegory of wisdom is often justifiably mentioned with reference to the fact that a judge, especially at such judicial instances as constitutional courts and the European Court of Human Rights (hereinafter referred to as the ECHR), is similar to an owl who begins its flight over the terrain and observes it only when dusk has already fallen.[1] A Slovenian judge does not need to worry about the desired lapse of time from the commission of an act to the adjudication thereof; time lags have existed [in the Slovenian judicial system] for many years now. The case at issue, for instance, took place in June 2005. There is no risk that Constitutional Court decisions interfere in events prematurely and too profoundly also because of the reserve of the Constitutional Court, which very rarely decides a right, it rather, also rarely, but less so, establishes flaws in the adjudication of regular courts and remands the case for new adjudication (the ECHR cannot do this and compensates for not being able to do that by awarding just financial satisfaction). The metaphor with the owl of Minerva is, in my opinion, even more relevant for the case at issue and other cases which concern freedom (of expression) from the following point of view: the owl must fly over the terrain, it must rise above it in order to see it and get to know it in its completeness, it cannot observe and examine the events only from the viewpoint of the plaintiff and of what speaks in his favour. From this point of view adjudicating is not compatible with fear of flying in instances in which a comprehensive review of a case requires a comprehensive review from a distance. Extremely precise weighing and resorting to various tests of proportionality does not at all help if already at the outset everything, and a bit more than it should be, is on one side of the scale (for instance with reference to the National Assembly deputy being offended and hurt) and the other side is *a priori* doomed to failure due to the unconvincing standpoint that the assessment of the deputy's speech is irrelevant in the weighing.

2. However, this is demonstrated only when we examine the operative provisions of the Constitutional Court decision in the case at issue. I can indeed agree with a number of starting points of the decision at issue. I cannot, however, agree with the result, that is to say, with the application of these starting points in the case at issue and with the message which this decision conveys. And particularly not with the assessment of the conduct of the regular courts which sentenced the constitutional complainant, the magazine Mladina, because of the article of journalist Jure Aleksič that it published, to pay compensation to the plaintiff for damages, i.e. to National Assembly deputy Srečko Prijatelj, and to publish the operative provisions of the judgment.

3. I can agree with the following starting points in particular:
- the case at issue concerns a collision of human rights, namely between the honour and reputation of the National Assembly deputy that was allegedly interfered with by the Mladina journalist and the right to the freedom of expression and freedom of the press of this magazine;
- the task of the court is to carry out value-weighing which should demonstrate whether in light of all the circumstances of the case at issue, the exercise of one right excessively limited the exercise of the other;
- the Constitutional Court has to review whether by the challenged judgments the regular courts in fact excessively protected the plaintiff's right to the protection of personality rights, while they did not attach the appropriate significance to the constitutional complainant's right to freedom of expression;
- freedom of expression is a fundamental constitutive element of a free democratic society; within its framework, freedom of the press has a particularly important role;
- freedom of the press and the freedom to express opinions help to establish and create an impartially informed public;
- freedom of expression has particular significance within the framework of the journalistic profession, as the broad boundaries of freedom of the press are one of the foundations of modern democratic societies;
- the significance of freedom of expression and freedom of the press is strongly emphasized by the ECHR, which underlines that the press plays a vital role in the society as “a public watchdog”;
- freedom of speech also applies with regard to information and ideas that offend, shock, or disturb, whereas restrictions of this freedom must be construed narrowly and restrictively;
- according to the ECHR, there is especially little scope for restrictions on freedom of speech in cases of political speech or debate on questions of public interest;
- in cases of value judgments expressed by journalists, it is not possible, as is the case regarding facts, that they are susceptible of proof; according to the ECHR, value judgments must have a sufficient factual basis;

- a National Assembly deputy as a public person and a bearer of an authoritative office must endure more criticism on this account than a person who does not hold such office;
- the Constitutional Court must, when reviewing whether the criticism is acceptable, particularly review the social role of the person at whom such criticism is directed;
- public persons must to a greater degree be prepared for possible critical and unpleasant assessments, especially if they concern their office;
- whether journalists act within the framework of performing their mission depends on all the circumstances in each individual case;
- the freedom of expression also protects opinions which are critical, even offensive, especially if they are a response to provocative statements of the affected person;
- it is especially important to review whether criticism is a response which has a factual basis in the conduct of the person at whom such criticism is directed.

4. As already stated above, I cannot agree with the result, namely with the dismissal of the constitutional complaint and with the argumentation in the statement of reasons of this dismissal. In particular, I cannot agree with how the regular courts assessed the conduct of the National Assembly deputy who had provoked the criticism voiced by the complainant's journalist Jure Aleksič. Especially the judgment of Ljubljana District Court, as the first instance court in the case at issue, in my opinion erroneously presents and assesses the journalist's text published in Mladina on 27 June 2005. The judgment is written in a decidedly biased manner. In the judgment a correct account of certain of the above-mentioned starting points can indeed be found, however, unfortunately mostly in the part in which the allegations of the constitutional complainant are summarized. It is obvious that the court applies double, distinctly different, standards when assessing the speech of deputy Srečko Prijatelj in the National Assembly and when assessing the article of the journalist who described, assessed, and criticized the deputy's speech.

5. The District Court was of the opinion that it can limit itself to the question of whether there exist the elements of the journalist’s liability for damages and with reference to such does not need to examine the broader circumstances of the case, especially those which concern the speech of the National Assembly deputy. This can be convincingly illustrated especially on the basis of the court's answer to the question of whether the article of the Mladina journalist was offensive to the National Assembly deputy and, on the other hand, the court's assessment whether the deputy's speech which provoked such article was in and of itself offensive and provoking. The court observed the following: “It is difficult to imagine that the defendant knows what kind of feelings the plaintiff experienced. The plaintiff knows this best…” The plaintiff explained that he understood the phrase “a cerebral bankrupt” in the article published in Mladina as criticism of his personality. Such criticism was allegedly written in a humiliating tone, and aimed at humiliating him. The article was shocking to him, offensive. He was personally

belittled, and others thought he deserved it. This was allegedly painful for him as a National Assembly deputy. Because of the article he became a subject of mockery, ridicule, etc.

6. With reference to the deputy's speech, the District Court adopted the standpoint that this speech “cannot be considered as promoting prejudice and inciting people against homosexuals”. Such statements can also not be deemed so extreme that the plaintiff had thereby provided the public with a reason for a critical description thereof and would therefore have to endure criticism of his conduct. The plaintiff merely expressed his opinion. If such is perhaps wrong, in the opinion of the [regular] courts, this alone does not entail promoting prejudice and inciting people against homosexuals.

7. In such a manner the court thus assessed the deputy's speech. And how do the affected persons assess it, i.e. the members of this vulnerable minority group of homosexuals, namely those who, also according to the District Court, are the only ones who can know and feel whether the statements and assessments were offensive and whether they incited intolerance and stigmatized the members of the homosexual community? Mitja Blažič, a gay activist, assessed the speech of the deputy as follows: he was used to “all kinds of vexation” from Slovenian nationalists, from their “expert opinions” that homosexual love is a disease which must be institutionally treated, that homosexuality is not natural, is not normal, to allegations that homosexuals are a disgrace to Slovenia, and he was also used to manipulations regarding discourse on child adoptions, which the law does not regulate at all. Nevertheless, Mitja Blažič was surprised by the speech of deputy Srečko Prijatelj in the procedure for adopting the Registration of a Same-Sex Civil Partnership Act: “I did not expect that deputy Srečko Prijatelj would stoop to such an infantile level of offensiveness. I certainly could not relate to what he showed and what is evidently his understanding of homosexuality. And I believe that no one would want to relate to such humiliation, offensiveness, and aping.” Blažič furthermore adds that it is sad that from their benches deputies can afford in this manner and similar to trample on the dignity of citizens, however, it is even sadder that they can do so without being punished.[2]

8. Naturally it is not that deputies in a debate on a certain law are not allowed to say what they think is right and to do so to the best of their conviction and conscience. Especially if they are opposition deputies. Freedom of expression and their special constitutional position, spiced up with the immunity rights of deputies, are the foundation of their free speech. And there is nothing wrong with this. In the case at issue, the assessment of the deputy's speech and its consequences are interesting only from a certain special point of view: whether and to what extent it influenced or even provoked the journalist's criticism, as a result of which the magazine that published the criticism was sentenced to pay compensation for damages?

9. Immediately after the deputy's speech also his colleagues from the then present deputy groups critically assessed his speech. Roberto Battelli commented that it was an offence of human dignity and appealed to the President of the National Assembly to prevent such speeches in the National Assembly. It must be taken into consideration that the deputy's speech was directed against a draft version of the law on the registration of a same-sex civil partnership, which was not some kind of an extreme or radically liberal law, but a law which tried to ensure minimal standards acceptable to the right-central Government in power at that time. In the debate the deputies of the governing coalition parties namely pointed out that they were proud that a controversial and long-denied question was finally being appropriately regulated. They repeatedly emphasised that they were proud that, thanks to them, it would finally be possible to register same-sex civil partnerships. The deputies of the governing coalition parties (i.e. Anton Sok, Jože Tanko) deserve recognition because they explicitly distanced themselves from the inappropriate and offensive speech of deputy Srečko Prijatelj, even though by being present he decisively contributed to the quorum in the National Assembly in the procedure of adopting this act. Thereby they showed that they did not consent to an alliance with the deputies of the Slovenian National Party (hereinafter referred to as the SNP) holding these extreme positions, i.e. the party which several times has engaged in disputes with minorities regarding national, gender, ethical, and other questions. Deputy Srečko Prijatelj did not respond to the criticism of his deputy colleagues with any explanation, let alone an apology, but when explaining his vote before voting on the draft law, he went one step further in his opposition to such registration. He namely called upon the homosexual citizens of Slovenia to travel to Finland or Denmark, where it is the free choice of an individual whether they wish to marry a homosexual.[3] In the procedure for adopting the Registration of a Same-Sex Civil Partnership Act, deputy Srečko Prijatelj thus supported the most extreme positions of all those that were voiced in the National Assembly and he must have expected a sharp response from the public.

10. The deputy alleged before the District Court that he had been threatened that accounts with him would be settled. However, those who are in fact physically threatened and have been attacked several times are precisely the people whom the deputy offended and incited intolerance against. Among them, the already mentioned Mitja Blažič,[4] who in 2009 was the victim of a physical attack perpetrated by masked young men, who injured him and attempted to burn down the bar in which the organisers of the Gay Pride Parade were gathered. From this it can be concluded that inciting intolerance against and stigmatising homosexuals is perhaps not as innocent and harmless as may appear to the District Court. Furthermore, the question arises whether a speech such as the speech of deputy Srečko Prijatelj can be deemed to be a manner of performing the office of deputy of the opposition which should enjoy special protection against public criticism. Article 14 of the Constitution prohibits any discrimination on the grounds of any personal circumstance. Among the personal circumstances which may not be a basis for discrimination, the Charter of

Fundamental Rights of the European Union explicitly states also sexual orientation.[5] The deputy's speech, however, is particularly disputable from the viewpoint of Article 63 of the Constitution, which is not explicitly mentioned in the constitutional complaint. In this article the Constitution prohibits incitement to discrimination and intolerance, and emphasizes that any incitement to national, racial, religious, or other discrimination, and the inflaming of national, racial, religious or other hatred and intolerance are unconstitutional. Also from this perspective arises the question of whether the protection of the speech of a deputy, such as ventured by Srečko Prijatelj, deserves the same constitutional protection regarding honour and reputation as is the case regarding someone else who is not a politician or bearer of public office and who did not provoke offensive criticism with his or her public speech?

11. An important particularity of the case at issue is that the deputy directed his attacks against a vulnerable minority group of people. With reference to such, in his column Ervin Hladnik Milharčič points out: “The fact is that in Slovenia one can attack with all canons of slandering, fabrication, half-truths, prejudice, and hate speech every minority in society or group of people which is considered weaker and the world will not bat an eyelid. This is a field of normality. As regards minorities and the weak, Slovenia is a paradise of freedom of speech.”[6]

12. In Mladina, Jure Aleksič comprehensively and objectively reported on the parliamentary debate and the procedure for adopting the Registration of a Same-Sex Civil Partnership Act. He described the circumstances surrounding the drafting of the act, its limited scope, the discontent with such scope of those to which the act referred, he described criticism outside the parliament, etc. If we compare his reporting with a literal record, the journalist correctly summarised the debate of the deputies. He was very sharp only when assessing the speeches of the deputies of the SNP and especially deputy Srečko Prijatelj. He described his speech and especially sharply criticised the fact that the deputy called upon homosexuals to go get married abroad. The part of the speech he considered the most inappropriate was that in which the deputy tried to imitate a gay man who went to a kindergarten to pick up his child. He imitated him in a manner that ridiculed and mocked homosexuals. I carefully watched the video recording of the deputy's speech and established that it was an attempt to stigmatise homosexuals, to incite intolerance against them, and to ridicule them. The Mladina journalist very sharply assessed this part of the deputy's speech with the following words: “He accompanied his brilliant idea with a coffeehouse imitation which was probably supposed to clearly illustrate some orthodox understanding of a stereotypically feminised and phoney fagot, whereas it really turned out to be just in the normal range of a cerebral bankrupt who is lucky to be living in a country with such a limited pool of human resources that a person with his characteristics can even end up in the parliament, when in any normal country worthy of respect he could not even be a janitor in an average urban primary school.”

13. It must be admitted that such assessments of the deputy's speech are very sharp. However, also because they are in and of themselves so sharp, it is unnecessary to further exacerbate them in the manner carried out by the District Court. I have in mind that by repeating the quotation out of context a number of times the District Court presented the matter as if the journalist of Mladina, the constitutional complainant, had written that the deputy was a cerebral bankrupt, i.e. that he had lost his mind. He did not write it like that, but he did sharply criticise the deputy's speech and claimed that this statement “turned out to be just in the normal range of a cerebral bankrupt…” The journalist did not concern himself with an analysis of the deputy's personality but he decided to present to the public and to sharply criticise the content of the deputy's speech and the manner in which this speech was presented. The parts of the text which speak of “the range” and how the deputy's statement “turned out to be” prove that it did not entail insulting the deputy *ad personam*, but sharp criticism of his conduct *ad rem*.

14. The District Court is thus biased in presenting the journalist's article also by claiming that the journalist in this article characterised the deputy as a cerebral bankrupt. The Court should have noticed that within the framework of the criticism of the deputy's speech, the journalist said that the statements turned out to be as if expressed by a cerebral bankrupt, that the deputy's words were in such a range. Also I am of the opinion that such assessments of the deputy's speech are objectively offensive and an average reader of Mladina would understand them as such. However, it is still not acceptable in the judgment to quote in inverted commas the term “a cerebral bankrupt” countless times and consistently leave out the part of the text which speaks of how the deputy's statement turned out to be and the part of the text which speaks of the range of the deputy's speech in the National Assembly.

15. The Higher Court decided similarly when it held that it “did not have any second thoughts regarding the conclusion of the court of first instance that the article of the defendant that stated that the plaintiff is ‘a cerebral bankrupt’ does not entail stating facts or part of the criticism of the plaintiff's debate in the National Assembly, but it rather entails an offensive value judgment regarding the plaintiff's personality, which the plaintiff as a public person does not need to endure.” The courts even forced the constitutional complainant to publish out of context an incomplete quotation regarding ‘a cerebral bankrupt’ from the journalist's article. This already enforced sanction is perhaps even more painful for the complainant, and by all means more difficult to rectify than the fact that it paid compensation for damages.

16. In assessing and comparing the deputy's speech and the journalist's article, the Higher Court also did not react to the biased treatment and double standards of the District Court. The only thing that the Higher Court held with reference to such was that even if the assessment that the deputy offended all homosexuals

[*sic*.: is true], “namely the defendant's thesis that the plaintiff, as he himself interfered with the personality of homosexuals, agreed to the interference with his personality, cannot be accepted. If the plaintiff had violated anyone's rights with his speech in the National Assembly, the individuals whose rights were violated should have exercised appropriate judicial protection. In any event, the defendant was not called upon to answer the possible offensive speeches of deputies or other public persons by an offensive value judgment of the personality of such individuals in the press when reporting on important events in the country…”

17. Even though it can be said that by such assessment the Higher Court at least partially corrected the assessments of the District Court, the characteristic of the judgments of both regular courts is still that they apply decidedly different criteria for the assessment of the deputy's and journalist's presentations. If they considered the hitherto case-law of the regular courts, the Constitutional Court, and the ECHR, they should have treated the matter essentially differently, i.e. they should have more critically assessed the contribution of the deputy to the journalist's response and treat the journalist's response to the deputy's offensive speech with more understanding. Regarding such, the Supreme Court in its Decision No. I Ips 237/97, for instance, held: “In accordance with the second paragraph of Article 10 of this Convention, the exercise of freedom of expression may be subject to restrictions or penalties only if such are necessary in a democratic society for the protection of the reputation or rights of others. The European Court of Human Rights interprets the above-mentioned exception very restrictively, especially in instances of articles by journalists who offensively express themselves with regard to individual politicians who have given the journalists' reason for such articles by their own conduct.” And precisely the latter happened in the case at issue, due to which it would be more than appropriate to consider the above-cited standpoint of the Supreme Court, which is also supported by numerous judgments of the ECHR.[7]

18. The standpoint of the Higher Court that those that were offended by the deputy's speech should exercise appropriate legal remedies, remains at a very general level. It seems to me that the community or union of homosexuals or individual members of this community could not be successful if they in fact exercised their rights against the manifestly offensive speech of the National Assembly deputy. They could certainly try; perhaps they should even do so. I am afraid, however, that instances of effectively exercised legal remedies against the speeches of deputies in which minority groups have been attacked, even if especially vulnerable minority groups have been attacked and intolerance incited, which is explicitly prohibited by the Constitution, cannot be found in case-law. It follows more or less explicitly from the article of the Mladina journalist that he felt obliged to sharply critically asses the deputy's standpoints precisely because in the National Assembly and outside they were not met with the appropriate criticism. He, *inter alia*, wrote that at the session (also because of the legislative obstruction) there was “no one who would even impotently speak out against them”. And apparently he felt obliged to do this himself.

19. The Supreme Court of the United States, the German Federal Constitutional Court, the ECHR, and other respectable courts very often and with great emphasis review freedom of expression and freedom of the press, and extremely restrictively recognise the possible restrictions of this freedom, especially in cases involving journalists. Such approach has more or less a universal character and is, differently than reviewing other human rights and freedoms, subject to the smallest oscillations resulting from changes in the composition of the above-mentioned courts.

20. The Constitutional Court of the Republic of Slovenia can be, regarding its hitherto adopted standpoints, placed among the above-mentioned courts. In Decision No. Up-50/99, dated 14 December 2000 (Official Gazette RS, No. 1/01 and OdlUS IX, 310) it has, *inter alia*, held that a human being as a social being must be enabled to not only form their opinions but also to communicate (orally, in writing, or by means of conclusive acts) and modify them in contact with others. In this respect, individuals must have the right, giving consideration to the limitations concerning the description of an individual intimate life, to mention in their copyrighted work persons with whom they have had contact and the events they have experienced with them without needing their consent for such. They are entitled to this right in the framework of their freedom of expression or artistic endeavour and irrespective of the fact whether the matter concerns a public person or an "average" individual. In the second case (Decision No. Up- 422/02, dated 10 March 2005, Official Gazette RS, No. 29/05 and OdlUS XIV, 36), the Constitutional Court reviewed the standpoint that even in cases of literary works, the right of the author is withdrawn the moment someone recognises himself or herself in the text and feels affected by the description. The Constitutional Court held in the review that the courts excessively protected the plaintiff's right to honour and reputation and excluded the author's right to free artistic endeavour. Also in Decision No. Up-406/05, dated 12 April 2007 (Official Gazette RS, No. 35/07 and OdlUS XVI, 51), the Constitutional Court held that the interference of the courts with the complainant's right to free artistic endeavour was excessive and that the reasons which the courts stated did not suffice to justify such interference of the courts. Thereby, the Constitutional Court referred to the case-law of the ECHR, which in such cases looks at the alleged interference in the light of the case as a whole and determines whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient (*cf.*, the Case of Éditions Plon v. France, Judgment dated 18 May 2004, the Case of Association Ekin v. France, Judgment dated 17 July 2001, and the Case of Vereinigung Bildender Künstler v. Austria, Judgment dated 25 January 2007).

21. The standpoint of the ECHR, which has already been adopted by the Constitutional Court, that freedom of expression is applicable also to information or ideas that offend, shock, or disturb, is of key importance for the case at issue. This standpoint can be found in very numerous judgments of the ECHR,[8] in

which the ECHR found that various Member States of the Council of Europe had violated Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, IT, No. 7/94 – hereinafter referred to as the Convention; *inter alia*, in the Case of Prager and Oberschlick v. Austria, Judgment dated 26 April 1995). From the extensive case-law of the ECHR it follows that the objectively offensive nature of assessments, especially if they concern absolute public persons, does not suffice for the conviction of journalists. The most notorious case from this point of view is the use of the word “idiot” (*“Trottel”*) within the framework of journalistic reporting on the speech of a nationalistic Austrian leader and deputy. The ECHR held that the conviction of the journalist for defamation breached the right provided for in Article 10 of the Convention on freedom of expression (the Case of Oberschlick v. Austria, Judgment dated 1 July 1997). The disputable article and the offensive word *“Trottel”* may certainly be considered polemical, but they did not on that account constitute a gratuitous personal attack, as the journalist provided an objectively understandable explanation for them derived from the politician's speech, which was itself provocative. The ECHR held that as such they were part of the political discussion provoked by the politician's speech and amounted to an opinion, whose truth is not susceptible of proof. Such an opinion may, however, be excessive (in particular in the absence of any factual basis), but in light of the above considerations that was not so in this ECHR case. The ECHR has emphasized several times that freedom of expression is subject to exceptions, which must, however, be construed strictly; such restrictions are admissible only in instances in which journalists in fact overstep the boundaries of acceptable criticism. National courts must justify any such restriction with reasons that are relevant and sufficient.

22. When weighing between rights that are in collision, the court must look at the impugned interference with freedom of expression in light of the case as a whole and all its circumstances, including the content of the statement concerned, the context in which it was made, and also the particular circumstances of those involved (*cf*., the Case of Feldek v. Slovakia, Judgment dated 12 July 2001, the Case of Scharsach and News Verlagsgesellschaft mbH. v. Austria, Judgment dated 13 November 2003, and the Case of Perna v. Italy, Judgment dated 25 July 2001). The latter case concerned a defamatory article about the public prosecutor, who was known as a fighter against corruption and mafia-type organisations, however, the ECHR found sufficient basis in his past for allegations against him and held that there was a violation of Article 10 of the Convention. Due to the excessively extensive interpretation of the restrictions on the freedom of expression, the ECHR has found practically every traditional European democratic state to be in violation of the Convention. Nevertheless, certain states persistently repeat inadmissible interferences with freedom of expression, which the ECHR just as persistently finds to be in violation of Article 10 of the Convention and decides in favour of applicants. Therefore, the finding that the journalist in the case at issue voiced objectively offensive assessments is not a sufficient basis for the conviction of the constitutional complainant.

23. Of the recent judgements of the ECHR by which this court established the violation of Article 10 of the Convention, the Case of Bodrožić v. Serbia, Judgment dated 23 June 2009, is especially relevant for the case at issue. The case concerns the reporting of the journalist in question on the statement of a historian, J. P., who with his appearance on national television stirred up the public with his controversial statement regarding the existence and history of national minorities in Vojvodina. He stated that "all Hungarians in Vojvodina were colonists" and that "there were no Croats in that region". The journalist sensed intolerance against national minorities in the historian's statements. The ECHR held that the fact that the journalist considered it his duty as a journalist to react to such statements publicly is understandable. The ECHR furthermore examined the position of the historian J. P.; it established that J. P. appears to have been a well-known public person, having published a book on a subject of wide public interest and having appeared on local television, he must have been aware that he might be exposed to harsh criticism by a large audience. Although the applicant used harsh words which may be considered offensive, his statements were made as a reaction to a provocative interview and in the context of a free debate. The ECHR thus established that the article entitled "The Floor is Given to the Fascist" ("*Reč ima fašista"*), which spoke of the affected person as an idiot and fascist, was a reaction to the provocative interview and in the context of a free debate which was of interest to the broad public. The same as in the case at issue, also the Case of Bodrožić concerns a public attack on minority rights which should be taken into consideration when assessing the offensive response of a journalist to such an attack. The difference is naturally in the fact that the Serbian case does not concern the speech of someone who, as a bearer of political office, must endure harsher criticism of his speeches.

24. When deciding, Slovenian courts must consider the above-mentioned minimal European standards as provided for in the Convention and in the case-law of the ECHR, which provide developmental and creative interpretation of the Convention as a living international instrument. The Convention is ratified in Slovenia and has the effect of national binding law that is superior to legislation. Although it is subordinate to the Constitution, it is in fact on the same level as the Constitution in all those elements which concern determining higher standards of the protection of rights than determined by the Constitution (the Constitution explicitly allows such in the fifth paragraph of Article 15). Therefore, a national court, be it regular or constitutional, must consider the standpoints of the ECHR in order not to violate the Convention. It must assume the role of a European judge and ask itself how such a judge would decide. The regular courts and the Constitutional Court did not do so. The ECHR judgments (*cf.,* the Case of Feldek v. Slovakia, Judgment dated 12 July 2001, and the Case of Dichand and Others v. Austria, Judgment dated 26 February 2002) give priority to freedom of expression before the protection of privacy, which is also the case in the hitherto established case-law of the Constitutional Court. Therefore, the adoption of the decision in the case at issue entails an inadmissible and unconvincing change in

the attitude of the Constitutional Court towards the significance of freedom of expression, which might lead to Slovenia being convicted for the violation of Article 10 of the Convention. Even more so than from the point of view of the Convention and the ECHR, which determine minimal standards of the protection of rights, the decision is disputable from the viewpoint of the violation of the Constitution.

25. What directly follows from the case-law of the ECHR is that the courts of the Member States of the Council of Europe must thoroughly address the question whether someone referring to freedom of expression has some factual basis for his or her assessments in reality (the Case of De Haes and Gijsels v. Belgium, Judgment dated 24 February 1997, the Case of Kuliś v. Poland, Judgment dated 18 March 2008, and the Case of Feldek v. Slovakia, Judgment dated 12 July 2001). If they do not do so, this naturally entails that they did not treat the case comprehensively, namely that they did not take into consideration all the relevant circumstances of the case. From the viewpoint of the case-law of the ECHR, it is thus not acceptable that the regular courts in the case at issue neglected the fact that the critical article of the Mladina journalist was provoked by the deputy's offensive and constitutionally disputable speech. For this reason alone, the judgments in the case at issue should be abrogated and the case remanded for a new trial. Personally, I am even of the opinion that there are quite some arguments also for a more decisive interference of the Constitutional Court, namely that the Constitutional Court itself decide the constitutional complainant's right, as it has done in a case involving a violation of freedom of artistic endeavour (Constitutional Court Decision No. Up-406/05), which was accepted by the public with the compliment “birches greened again”. Such decision would have had a basis in the assessment of the Constitutional Court that upon a comprehensive examination of all the circumstances of the case and a different assessment, and taking into consideration the deputy's speech, the result of the weighing could by no means be to the detriment of the complainant.

26. Those who equate the position of deputies as bearers of the legislative branch of power and absolute public persons with the position of journalists as bearers of the so-called fourth branch of power, overlook the fact that deputies are paid from the state budget and by their speeches in the National Assembly they fight for votes. In contrast to such, journalists and such magazines as is the constitutional complainant depend on the market, wherein readers vote on their existence virtually every day. In addition, by critically following political activities they perform an exceptionally important role in society with regard to the development of democracy and the protection of human and minority rights, being unfortunately named a “public watchdog”. Deputies and journalists can therefore not be treated as if their positions are on the same level; it is even less justified, however, to grant deputies a privileged position on the basis of the assessment that journalists' work has a great influence on public opinion. It seems that the condemnation of the complainant follows from the desire to inform the so-called yellow press that also in democratic societies there exist

some absolute limits on interferences with the honour and reputation of bearers of public office. The case at issue is completely wrongly suited for something like this. Not only because the journalist's article was not published in the so-called yellow press, but most of all because he dealt with a serious social matter and not “yellow” interferences with the private and intimate life of bearers of public office, which have nothing to do with performing their office.

27. Naturally it has to be admitted that the proceedings that had been conducted against the magazine, especially regarding liability for damages, do not entail such a drastic and extreme interference with freedom of the press as would be banning the magazine and/or criminal proceedings against the journalist. Nevertheless, being sentenced to compensate for damages and to publish the operative provisions of the judgment entail a very grave interference with freedom of the press which can have fatal consequences. I have in mind the so-called chilling effect that the ECHR often mentions and because of which journalist may be discouraged from conveying certain statements, opinions, and information to the public, because they fear that the expressed opinion might harm them “even if only because they would have to defend themselves because of their statement or because they would have to justify it”[9]. Naturally, the established liability for damages is much more. It is about forcing the editorial board of the convicted magazine and editorial boards of other magazines to warn journalists that they should be careful in polemics regarding bearers of public office as otherwise the financial basis for their functioning could be endangered. It furthermore discourages editorial boards and journalists from in the future resisting offensive attacks and the incitement of intolerance against any minority for which the support of public opinion is of key importance.

28. Dr Andraž Teršek particularly underlines that the boundaries of acceptable criticism “also depend on the identity of the one who they concern. The restriction of critical expression will be most strictly reviewed in instances in which the criticism concerns the work of politicians. In comparison with them, for instance, police officers are in the middle category, as they, contrary to politicians, do not consciously expose themselves to thorough scrutiny of their words and conduct.”[10] The author very sharply criticises a so-called mechanical analysis of regular courts who treat words that are merely “opinions”, “sharp criticism”, and in extreme instances “exaggerated opinions” or “very sharp value judgments” regarding the work of public officials as “an offensive statement of facts” or as “inadmissible claims of untruths”. As a consequence, critical journalists, columnists, or other writers are punished for writings which do not exceed the framework of constitutionality and which are a legitimate part of their role in the society. Thereby, freedom of expression is seriously endangered. It is endangered precisely by judicial institutions which should protect this freedom to the greatest extent possible. And so the opponents of freedom of expression turn into victims, advocates of freedom of expression into its attackers, and institutionalised defenders of this freedom into its threat… In the case at issue what is also important is the author's assessment that hate speech is most of all

“such speech which expresses hostility or discriminatory prejudice about personal circumstances, such as race, religion, ethnic affiliation, nationality, sexual orientation, and physical or mental disability. On one hand, this concerns groups of those individuals who are already at the outset and due to certain personal characteristics traditionally put in a less favourable position or a position in which they are threatened.”[11] From this point of view, it is immediately obvious that from an expert point of view the journalist's response to the hostile speech of the deputy cannot be claimed to be hate speech.

29. Let me return to the starting point expressed at the outset with a few questions about the obligation of a (Constitutional Court) judge to comprehensively review each individual case: Is it acceptable that when reviewing the case at issue a judge pretends that only an objectively offensive assessment, taken out of context from the journalist's article, is before him or her and that his or her duty is only to review whether it contains the elements of liability for damages? Can a judge behave as if he or she does not know the background which concerns the rights of homosexuals and that he or she does not know of the offensive speech of the deputy concerning them, the speech which provoked the critical response of the journalist? Can a judge be interested only in what is in compliance with procedural rules and correct and not what is right and fair? Can a judge be a slave to formalistic proceedings even though they evidently lead to a result which is unfair? I do not think so.

30. A judge, especially a Constitutional Court judge, cannot allow him- or herself to carry out an isolated review of two words taken from some journalistic article without an in-depth analysis of the politician's speech which provoked the journalistic criticism. A judge cannot shut his or her eyes to what is, comprehensively speaking, the final result of the case at issue. A case in which the regular court was satisfied with determining the elements of liability for damages even though this led to a situation in which the person who was soliciting votes with an offensive speech given from a position of authority and inciting intolerance and who provoked the response of the journalist was awarded with compensation for endured suffering, a case in which the magazine which published the criticism of his speech had to pay this award, while the vulnerable minority group of homosexuals, which the awarded person had offended and the condemned magazine defended, is a mere passive observer that no one cares about.

31. I am convinced that the above-mentioned arguments substantiate my position that in reviewing the judgments of regular courts in the case at issue the Constitutional Court should not be satisfied with repeating their positions that the deputy's speech was not offensive and neither was the tone of the expressed words, that his statements cannot be deemed so extreme that such provided the public with a reason for a critical article, or with repeating, following the Higher Court, that “even if the plaintiff's speech was offensive, this does not justify the offensive value judgment regarding his personality”. Furthermore, the position of

the Constitutional Court that there did not exist a substantive connection between the offensive nature of the deputy's speech and the journalist's critical assessment “but it simply entails an offence” (paragraph 18 of the reasoning of the Constitutional Court decision) is not convincing. The Constitutional Court should have abrogated the judgments of both courts and required that they in a new trial carry out an in-depth weighing of values regarding the importance of not only freedom of expression and freedom of the press, but also the right to honour and reputation, and thus in a manner such that they impartially take into consideration all the circumstances of the case at issue. Thereby the Constitutional Court should underline different criteria for assessing the deputy's speech and the journalist's article and require an in-depth review of their mutual connection. Due to the fact that the Constitutional Court did not act in such a manner and thereby departed from its hitherto practice of how it valued the significance of freedom of expression and furthermore did not consider to a sufficient extent the case-law of the ECHR, I was forced to vote against such decision. It namely also applies for the Constitutional Court that as it neglected the importance of the deputy's speech and denied the offensive and provocative nature of this speech, and most of all did not consider that it offended and stigmatised one of the most vulnerable minority groups, it therefore acted contrary to the starting-points of this decision mentioned at the outset and contrary to the hitherto established case-law regarding the significance of freedom of expression, which was more than exemplary. It namely attributed too much weight to the protection of the honour and reputation of a person who, at the expense of the dignity of a vulnerable minority group, was soliciting cheap votes, and too small a significance to the protection of freedom of expression and freedom of the press, regarding which the same decision states are “fundamental constitutive elements of a free democratic society”.

Dr Ciril Ribičič
Judge

Mag. Marija Krisper Kramberger
Judge

Notes:

[1] *Cf*., Dr Boštjan M. Zupančič, The Owl of Minerva, Eleven, Utrecht, 2008, p. XIV.

[2] Summarised after: Jure Trampuš, In the Opinion of the Court, Mladina Insulted SNP Deputy Srečko Prijatelj (*Po mnenju sodišča je Mladina žalila poslanca SNS Srečka Prijatelja*), Mladina No. 8/2007.

[3] The attitude of the Council of Europe towards this issue is clearly shown by the following statement of Maud de Boer-Buqicchio, Deputy Secretary General of the Council of Europe, given on 21 September 2009, which refers to the

cancellation of the Gay Pride Parade in Belgrade: “This was a sad day not only for the LGBT community, but for everyone in Serbia who believes in democracy, human dignity, and human rights. I encourage the Serbian authorities to analyse the circumstances which led to the cancellation and make sure that, in the future, violence, prejudice, and hate will not be allowed to prevent the exercise of rights guaranteed by the European Convention on Human Rights.” (www.coe.org.rs/eng/news)

[4] Some time ago the Constitutional Court voted in favour of the constitutional petition filed by Mitja Blažič (Constitutional Court Decision No. U-I-425/06, dated 2 July 2009, Official Gazette RS, No. 55/09) on the basis of which the Constitutional Court established the inconsistency of Article 22 of the Registration of a Same-Sex Civil Partnership Act, as with its regime of inheritance it interfered with the petitioners' right to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution) and with the manner of its implementation it determined that until the established inconsistency was remedied, the same rules apply for inheritance between partners in registered same-sex partnerships as apply for inheritance between spouses in accordance with the Inheritance Act.

[5] This is a document from 2002, which has already been ratified in Slovenia as a part of the Lisbon Treaty, however, it is not yet binding. Sexual orientation can more and more often be found as a personal circumstance included also in the national legislation of the Member States of the Council of Europe, for instance in the new anti-discrimination Swedish law which entered into force at the beginning of 2009 (*cf.,* European Anti-Discrimination Law Review, No. 8/2009, p. 67).

[6] Inglorious Bastards (*Neslavne barabe*), Dnevnik, 27 August 2009, p. 16.

[7] *Cf.,* ECHR in the Case Öllinger v. Austria, Judgment dated 29 June 2006, in which the ECHR underlined that an important element of weighing is also the assessment of the admissibility of the conduct of the person who provoked the reaction.

[8] Such diction, namely that freedom of expression also protects statements that offend, shock, and disturb, is stated by the ECHR in its judgments as many as 146 times.

[9] Andraž Teršek, Freedom of Expression (*Svoboda izražanja*), Informacijsko dokumentacijski center Sveta Evrope, Ljubljana 2007, p. 186.

[10] *Ibidem*, p. 190.

[11] *Ibidem*, p. 264.