Up-407/14
9 January 2017

Dissenting Opinion of Judge Dr Dunja Jadek Pensa,
Joined by Judge Dr Jadranka Sovdat

"If liberty means anything at all, it means the right to tell people what they do not want to hear."[1]

1. The framework of the juridical limits of the freedom of expression is not given in advance, once and forever. In fact, when freedom of expression (for instance) collides with the right to one's honour and reputation, the dispute cannot be resolved, as a general rule, without seeking the right balance between the legally protected values in collision. The problem is that the outcome of the judicial dispute is uncertain, regardless of the numerous thus far formed and recognised objective criteria, which should overcome the judge's subjective feeling for, *inter alia*, proportionality. This is the subject of an often expressed criticism. This criticism is substantiated by the reproach that the uncertainty of judicial outcomes leads to self-censure. I take this reproach seriously. Self-censure curtails the essence of freedom of expression. I believe that the uncertainty of a judicial outcome deepens if the weight of the affectedness of an individual's honour is in the end further increased by hitherto unknown elements of the right to one's honour and reputation that enlarge the scope of the protection of this right. Furthermore, if the parties have not been given the opportunity to give a statement on the newly-formed legally protected interest that broadens the field of the protection of the right to one's honour and reputation, I doubt that the assessment can be based on all of the circumstances of the expression at issue that are relevant for the decision-making. I find it in particular disputable that the party that is burdened by such widening and that loses the dispute for such reason was not able to present, through the prism of the circumstances of the concrete case and in light of the newly formed interest, the party's viewpoint as regards the opposing party's position *in concreto.* In this context, it is clear that, without the whole, the concept of the parts is meaningless and that the importance of what is expressed is (co)defined by the wider context. The short-sighted eyes of a judge can easily overlook all that falls into such wider context. These are essentially the reasons that I disagree with the majority decision and with the reason, which I believe is the key one, why the plaintiff – a politician in the role of the father of a family – must be recognised judicial protection from unjustified interferences with the reputation of his family, namely that also his children and wife are in the photograph. Let me add that my disagreement does not mean that I accept the publication of the images of the politician's children and spouse in a cutting political satire that is intended to be criticism of the politician's actions. An assessment from the viewpoint of their personality rights was namely not the subject of the case at issue.

I

2. In the challenged judgments, the compensatory sanction determined by Article 178 of the Code of Obligations (Official Gazette RS, No. 97/07 – official consolidated text) was passed due to a violation of the plaintiff's right to one's honour and reputation. The plaintiff thus obtained satisfaction for (his) non-material damage.[2] In the proceedings before the Constitutional Court the following two elements were disputable: (i) the collision between the right to freedom of expression and the right to one's honour and reputation,[3] which is protected within the framework of the right determined by Article 35 of the Constitution, and (ii) the necessity, in a democratic society, of the imposed sanction, which is determined by *statutory* law for instances of violations of an individual's right to one's honour and reputation.

3. In the case at issue, the expression that has a detrimental effect on the reputation [of the plaintiff and his family] is the publication of two family photographs. There are captions in small letters on the photographs that state "Dr Goebbels with his family" and "Dr Grims with his family," respectively. The photographs were published on the penultimate page of the weekly Mladina in a satirical section, and there was also accompanying bold text consisting of five lines. This text was the following: "Our former colleague Sena Driskić compared Dr Grims to Dr Goebbels on his facebook (*sic*). The editorial board of Mladinamit joins the protest. Perhaps it appears that Dr G. is inspired by his role model, but he is still far from being like him, currently he is not even half as good. A lot of practice in manipulation is still needed. Sieg!"[4] The Supreme Court underlined that every reader could clearly see that this was a satirical section.

4. The disputed publication [i.e. the published photographs and article] exceeds the informative importance of the two photographs. The excess is twofold, I believe. Firstly, the context and the manner of the publication of the photographs suggest that they should be compared to each other and provoke the reader's to look for equivalences, similarities, and differences in the content thus compared. Secondly, what is suggested is, *inter alia,* a comparison with the person who is named in the photograph and who was a politician and the Minister of Propaganda in Nazi Germany. I understand that the mentioned instance of exceeding the informative meaning hints at the expression of a negative opinion. And I completely agree with the majority that this is a sharply negative value judgment. However, I believe that, due to the form in which it is expressed, the suggested comparison hints at the negative value judgment such that it puts the reader in a position to form such judgment for him- or herself, and such that the satirical context of the publication is obvious to the reader.

II

5. In a collision between freedom of expression and the right to one's honour and reputation, the subject of a court's assessment is always some form of expression that

is detrimental to the other person's reputation. However, individuals' understanding of a publication is an expression of assessment and thereby subject to numerous different subjective assessments. Meanings arise and become clear only when the circumstances and facts that affect the understanding are taken into consideration, and they are, understandably, very different for each individual. Therefore, it is not surprising that individuals have different ideas, opinions, value judgments, and beliefs regarding the same publication. But which of the possible meanings of a concrete publication should be the subject of a court's assessment in the search for a balance between freedom of expression and the right to one's honour and reputation?

6. It follows from the constitutional case law that the court must consider the meaning of the publication that is the subject of assessment from the viewpoint of an average reader[5] and that the subjective feeling of the plaintiff as to how offensive a certain concrete publication is does not represent the correct starting point.[6] I am sure that, from the viewpoint of freedom of expression, it is also not irrelevant, when searching for the balance in a collision with the right to one's honour and reputation, whether the freedom of expression is burdened by all hypothetically possible meanings of the publication, whereby the assessment of the court then focuses on the meaning that is the most damaging for the honour and reputation [of the plaintiff], without any justification for such.[7] [8] The Constitutional Court has already adopted the position that defining the meaning of a disputable statement by applying overly strict criteria is incompatible with freedom of expression. One namely needs to ensure that by applying overly strict assessment criteria (which are then key to the imposition of a limitation of freedom of expression), the protection of the right to freedom of expression is not depreciated, as it should ensure the free exchange of opinions.[9] It follows from Judgment of the Supreme Court No. II Ips 509/2004, dated 13 July 2005, that an approach that burdens the writer or speaker merely due to one possible interpretation of the message of the text is incompatible with freedom of expression.

7. The justification of a limitation of freedom of expression due to a violation of the right to one's honour and reputation presupposes an objective understanding of the publication. Otherwise, it is not even possible to assess such limitation from the viewpoint of numerous factors. Therefore, in disputes such as the dispute at issue it is of decisive importance to define the meaning of the disputed text article and/or image. It is the *court* that should define what the message of the article is and what content will be the subject of its assessment. Until the court provides an answer to this fundamental dilemma, the subject of assessment is not even defined. Furthermore, the criteria that are important for the assessment of conflicting interests in the search for a fair balance between the two rights in collision are, understandably, always focused on the concrete meaning of the instance of expression at issue, and are applied so that a fair balance is taken into consideration. There is no other way. How can one otherwise assess the weight of an interference with an individual's honour and reputation if it has not been defined beforehand what "expression that is detrimental to one's reputation" means. The content of what was expressed is thus at the centre of the balancing

between the opposing conflicting interests *in concreto* and hence at the centre of the (for an outside observer mysterious, I believe) search for a balance between the freedom of expression and the right to one's honour and reputation.[10] Defining the meaning of the publication is therefore one of the key phases of the assessment. And there are special rules that apply thereto. They must be respected primarily because they prevent a fusion of the court's view with the view of the individual who feels offended, which is wrong already at first sight,[11] and also because they prevent us from seeing what we want to see and not that which is. Therefore, I completely concur with the position of the majority that the comprehensive, most commonly understood, and central meaning of the message that the disputed publication conveys from the viewpoint of an average reader must be taken into consideration.[12] I am sure that in instances where, objectively speaking, there are many such meanings, it is also necessary to justify in the judgment why a certain meaning that the court selected was placed on the scales.[13] The absence of reasons regarding such presupposes that the meanings are no longer bound by what was said, which in my opinion enables *ex post* assessment in a manner that is incompatible with the freedom of expression because it too severely limits freedom of expression due to the *ex ante* threat of sanctions. This inevitably leads to self-censure.

III

8. The majority decision confirms the complainant's claim that from the viewpoint of an average reader the disputed publication cannot have the meaning of a side-by-side comparison with the Goebbels couple as regards the horrifying historical fact concerning the death of their children.[14] I completely agree with this assessment of the majority. Let me express clearly that I would also agree with the assessment of the Supreme Court that the limits of acceptable journalism were exceeded, even manifestly so, if I were able to state that the message of the disputed publication for an average reader was that, in view of this horrifying historical fact, there is a similarity or even an equivalence between the plaintiff and Goebbels. I would add two considerations in this respect. Firstly, the Supreme Court did not explain why it focused its assessment precisely on this meaning. Secondly, I can see from the judgment of the court of first instance that such was the plaintiff's understanding of the meaning of the disputed message; the court of first instance dismissed it, taking into account the criterion of an average reader.[15] In light of these starting points, I believed that the judgment of the Supreme Court was based on a position that is incompatible with the right to freedom of expression and that, therefore, there was a violation of the complainant's right to freedom of expression.

9. The majority decision justifies that the content of the text articles was exceeded by its position as to the "open nature of the content" of the comparison of photographs.[16] However, I believe that the position regarding the open nature of the content does not in any way contribute to the definition of the comprehensive, most commonly understood, and central meaning of the message that the disputed publication conveys

from the viewpoint of an average reader, i.e. to the starting point, with which I concur, and which also in the opinion of the majority is key for the phase of defining the meaning of the statement.[17] Perhaps by this position the majority decision concurs with the reasons of the Higher Court that “the photograph or the comparison of the photographs triggers an avalanche of associations in the observer” and that this comparison is open to interpretation in terms of content. However, the assessment of the Higher Court of the necessity to impose a compensatory civil sanction is not at all based on such a generalised definition of the meaning of the suggested comparison. The Higher Court completely clearly and without doubt explained that the “comparison with the other photograph, which depicts a commonly known symbol of evil, who […] has gained, on the basis of historical facts, a metaphorical dimension of bestiality,” has a different communication effect than *serious* text articles. The key element for the finding against the complainant in the proceedings before the Higher Court was not “an avalanche of triggered associations” but the specific communication effect of the comparison as defined by the Higher Court. The Higher Court did not question itself as to the perception of the average reader of the most commonly understood and central meaning of the message, or the applications addressed to courts when, objectively speaking, it is possible to recognise many meanings in a disputed publication. The Higher Court, which obviously attributed a lower degree of protection to satire, was precisely for this reason not able to correctly assess the satirical context of the disputed publication. This completely clearly follows from the majority decision.[18] I was therefore of the opinion that also the judgment of the Higher Court is based on positions that are incompatible with freedom of expression, and thus there is a violation of the complainant’s right to freedom of expression.

10. *To conclude.* In a democratic society, the necessity to impose a civil compensatory sanction in the challenged judgments was not justified by the fact that there was a comparison of two family photographs. Of key importance was the clearly defined *concrete* meaning of the message that the courts attributed to the suggested comparison. What is essential as regards this meaning is that the courts deemed that the suggested comparison irrefutably hints at a similarity or even the equivalence of the plaintiff and characteristics that entail complete dehumanisation. Or, in other words, the courts deemed that the most horrifying images of human behaviour, freed from the photographs, arise from the suggested comparison of family photographs and that all these horrifying images are projected upon the plaintiff. Unfortunately, the Constitutional Court missed the opportunity to devote attention to the importance of the disputed publication and to upgrade its hitherto positions regarding defining the objective meaning of what was expressed from the viewpoint of the requirements of the right to freedom of expression in this delicate case. In such manner it would have contributed to the creation of the predictability of judicial decision-making. Due to the reasons I substantiated at the beginning of my opinion, I find this particularly important for cases such as the case at issue.

IV

11. In the opinion of the majority, the Higher Court did not correctly assess the disputed publication, namely due to the incorrect assessment of satire.[19] Let me mention that the decisive element for the Supreme Court was the side-by-side comparison of the plaintiff with the horrifying fact of the murder of children, because the complainant thereby interfered with the inviolability of the core of the rights determined by Articles 34 and 35 of the Constitution, and hence with the plaintiff's right to one's honour and reputation.[20] The majority decision negates the correctness of such meaning of the disputed publication.

12. If the key reason for the challenged judgment is undermined in the majority decision – i.e. the meaning of the message that is attributed in this judgment – its reasons cannot be appropriate and sufficient. *Non sequitur.* The same applies *mutatis mutandis* if the publication in a satirical context is viewed from a manifestly incorrect position regarding the level of protection of satire. I can deduce therefrom that the necessity of the imposed civil sanction is not appropriately and sufficiently reasoned in either the judgment of the Supreme Court or the judgment of the Higher Court. I could not agree with the different opinion of the majority.[21]

13. In contrast to the majority, I was of the opinion that the reasons of the majority decision with which I entirely concur undermined the decisive two reasons on which the judgments of the Supreme Court and of the Higher Court were based. If the disputed publication does not have the concrete message that the Supreme Court attributed to it and if the satirical context in the challenged judgment [of the Supreme Court] was incorrectly assessed from the viewpoint of the freedom of expression, I must ask myself what it is, then, that substantiates the violation of the plaintiff's right to one's honour and reputation and what justifies the necessity, in a democratic society, to impose the compensatory civil sanction. If I understand things correctly, it is the position of the majority decision that the plaintiff must be recognised "legal protection from unjustified interferences with the reputation of his family" due to the fact that also the plaintiff's wife and children, to whom the satirical criticism does not refer, are in the photo.[22]

14. It does not follow from the challenged judgments that the plaintiff referred to the entitlement that he as a father can protect, in his name and on his behalf, the (collective) reputation of his family by pursuing civil compensatory sanctions. He submitted a claim, on behalf of his children, that the complainant apologise to them, however he was unsuccessful with this part of the claim.[23] Therefore, I am not surprised that in the challenged judgments the courts did not adopt a position on the protection of *an individual's* right to one's honour and reputation from the viewpoint of the (collective) reputation of a family that was assessed in the case at issue. The challenged judgments thus lack answers to numerous questions that are raised, given today's level of development, regarding the (collective) reputation of a family in the sociological and legal sense. Of particular importance to the case at issue would

be an answer to the question of the legal protection of the (collective) reputation of a family on the basis of the claim of an individual (the father) that is provided by statutory law (of obligations) in order to protect the individual's right to one's honour and reputation in the form of compensation for non-material damage that is awarded to the holder of this right.[24] In short, I cannot read from the data in the file that the (plaintiff's) interest in protecting the (collective) reputation of the family is positioned at the site where (I assume) the opposing views of the parties to the dispute are confronted with one another, that such is placed on the judicial scales, and that it substantiates the imposition of a compensatory sanction and thus the necessity, in a democratic society, to limit freedom of expression.

15. The plaintiff's interest in protecting the (collective) reputation of his family was thus not the subject of the initial judicial dispute. The mere fact that the Supreme court explained that in the photograph the plaintiff is in the role of "the father of a family" does not mean – in my opinion – in and of itself, that the assessment can be reduced to this factor. This would be too great a simplification. Let me repeat, neither the judgment of the Higher Court nor the judgment of the Supreme Court are based on this factor. Given that this was my starting point, I could not rid myself of the feeling that the complainant was not given the possibility, either in the initial judicial dispute or in the proceedings before the Constitutional Court, to make a statement on the (collective) reputation of the family. Equally, it was not able to present its possible arguments against the position that, under national statutory law (due to the requirements of the Constitution), the (collective) reputation of the family is protected within the framework of the right to one's honour and reputation, and that such protection is ensured by the claim of the holder of the right to compensation for non-material damage. The same applies to the complainant's possible reasons that, due to the circumstances of the case at issue, exclude the possibility of such protection of the plaintiff's honour and reputation *in concreto.*

16. *Conclusion.* The majority decision did not convince me; as I understand it, it concurs with the appellate arguments and challenges the decisive reasons of the challenged judgments, on the one hand, and rejects the substantiation of the same appellate arguments with the position that the reasons stated in the challenged judgments are appropriate and sufficient, on the other. Furthermore, the decision adds to the judicial scales, namely, what is added to the side favouring the right to one's honour and reputation is the (collective) honour of one's family, regarding which the complainant had no possibility to adopt a position. Unfortunately, I could not vote for the majority decision, which I believe, due to the mentioned reasons, does not contribute to fostering the predictability of decision-making.

Dr Dunja Jadek Pensa

Judge

Dr Jadranka Sovdat
Judge

Notes:
[1] G. Orwell, The Freedom of the Press, written as a preface to Animal Farm, Mladinska knjiga, Ljubljana, 2016, p. 157.
[2] The publication of the judgment and the apology pursue a [non-monetary] compensatory purpose. *Cf*. Para. 19. of the reasoning of the judgment of the Higher Court.
[3] It follows from the judgments of the courts that, for the plaintiff, the publication of the photographs was also disputable from the viewpoint of the interference with the rights to privacy and to the free profession of one's religious beliefs; however, the courts adjudged that there was no violation of the rights to privacy or to the free profession of one's religious beliefs (*cf.* Para. 9 of the judgment of the Higher Court). The judgment of the court of first instance states: "From the conduct of the [plaintiff] it follows that he decided to expose his family to the public within the framework of his promotion as a politician." (*Cf.* Para. 60 of the judgment of the District Court.)
[4] These are some circumstances of the case that are summarised from the courts' findings of facts: the plaintiff is a politician, a notable member of a political party, an absolute public person; the plaintiff himself exposes his family to being photographed, he allows that the photographs of his children be published in the media and be even sold.
[5] *Cf*. decision of the Constitutional Court No. Up-406/05, dated 12 April 2007 (Official Gazette RS, No. 35/07, and OdlUS XVI, 51), Para. 10 of the reasoning.
[6] *Ibidem.*
[7] The following is stated in the judgment of the European Court of Human Rights (hereinafter referred to as the ECtHR) in *Wirtschafts-Trend Zeitschriften-Verlags GmbH (No. 3) v. Austria,* dated 13 December 2005, in which Austria was found liable due to a violation of the right determined by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, Nos. 33/94, MP, 7/94): The complainant was convicted in Austria because, after a connection was established between Mrs G. and "Bonnie", the court recognised therein an allegation that she was involved in a criminal offence, although it did not overlook that it was written in the article that there was no suspicion that Mrs G. had carried out a criminal offence. In the proceedings before the ECtHR, it was argued that the legendary pair "Bonnie and Clyde" is well-known in Austria and that the name "Bonnie" is primarily connected with a woman who carried out a series of criminal offences with her partner and then unsuccessfully tried to avoid criminal charges by fleeing with him. The ECtHR rejected such reasoning as unacceptable. It assessed that, from the viewpoint of an average reader, it is not probable that one would make such a conclusion, stemming from the content of the article and the ironic context. *Cf.* Para.

44 of the reasoning of the judgment of the ECtHR in *Wirtschafts-Trend Zeitschriften-Verlags GmbH (No. 3) v. Austria*, dated 13 December 2005.
[8] If there are multiple possible meanings, one must proceed from the meaning that least burdens the freedom of expression. Taken from H. D. Jarass and B. Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 11th Edition, Beck Verlag, Munich 2011, p. 209; the authors refers to the position of the German Federal Constitutional Court. *Cf*. I. von Münch and P. Kunig (Eds.), Grundgesetz-Kommentar, Vol. 1, Verlag C. H. Beck, Munich 2012, p. 499, and K. Wegner in: H.-P. Götting, C. Schertz, W. Seitz *et al.*, Handbuch des Persönlichkeitsrechts, C. H. Beck, Munich 2008, p. 498, which states, as regards the German legal area, that in a case where multiple interpretations of the expressed content are possible, courts may only adopt the meaning that is worthy of condemnation as the basis of the decision if the other meanings are eliminated for viable (*tragfähig*) reasons.
[9] *Cf*. Decision of the Constitutional Court No. Up-1128/12, dated 14 May 2015, Official Gazette RS, No. 37/15.
[10] Balancing presupposes an understanding of what is expressed. Taken from H. D. Jarass and B. Pieroth, *op. cit.*, p. 204; the authors refers to the position of the German Federal Constitutional Court.
[11] *Cf*., e.g., I. von Münch and P. Kunig (Eds.), *op. cit*., p. 498.
[12] *Cf*. Para. 20 of the reasoning of the majority decision.
[13] Freedom of expression is violated by judgments that impose a sanction by referring to a certain meaning of something expressed that has multiple meanings, without excluding the other possible meanings for reasonable grounds. Taken from I. von Münch and P. Kunig (Eds.), *op. cit.*, p. 499; the author refers to the position of the German Federal Constitutional Court.
[14] *Cf*. Para. 20 of the reasoning of the majority decision.
[15] It also follows from the judgment of the court of first instance that the court denied that the horrifying fact of the murder of the Goebbels children was commonly known. *Cf*. Para. 33 of the judgment of the District Court.
[16] *Cf*. Para. 22 of the reasoning of the majority decision.
[17] *Cf*. Para. 20 of the reasoning of the majority decision.
[18] *Cf*. Para. 29 of the reasoning of the majority decision, in which a different position regarding the criterion for assessing freedom of expression when satire is at issue is clearly expressed, compared to the position adopted by the Higher Court; *cf.* the operative provisions of the majority decision from which it follows that the judgment of the Higher Court was also the subject of independent assessment by the Constitutional Court.
[19] According to the data in the case file, the Supreme Court did not grant the motion to file an appeal before the Supreme Court as regards the position of the Higher Court concerning the lower level of protection of satirical publications, which was disputed by the applicant.
[20] *Cf*. Para. 19 of the reasoning of the Supreme Court judgment.
[21] *Cf.* Para. 31 of the reasoning of the majority decision.
[22] *Cf*. Para. 29 of the reasoning of the majority decision.

[23] In this part, his claim was dismissed. It does not follow from the case file that the plaintiff challenged this decision of the court.
[24] It does not follow from the majority decision that national courts and legal theorists have thus far already adopted a position regarding the legal protection of the (collective) protection of a family within the framework of sanctions that are regulated by statutory law due to the protection of an individual's honour and reputation. As regards the German legal area, *cf.* K. Wegner in H.-P. Götting, C. Schertz, W. Seitz, *et al.*, *op. cit.*, p. 629: in this part, a family is not considered to be a holder of personality rights, regardless of the special constitutional protection it enjoys; only exceptionally is it possible to take into consideration, in the assessment of a violation of the reputation of an individual family member, a violation of the honour and reputation of another family member, for which strict requirements apply.

Up-407/14
9 January 2017

Concurring Opinion of Judge Dr Špelca Mežnar

1. A full seven years ago, this court adopted a decision in case No. Up-1391/07 (hereinafter referred to as *Mladina I*). The complainant was the same, and so was the constitutional issue: in a conflict between the freedom of journalistic expression and the reputation of a deputy of the National Assembly, should it be the former or the latter that prevails? The Constitutional Court gave priority to the honour and reputation of the deputy, but the subsequent assessment in Strasbourg demonstrated that, in doing so, it did not appropriately assess the importance and the scope of a journalist's freedom of expression when he or she responds to the insulting positions of politicians.[1] Hence, the ECtHR concurred with the overruled minority (i.e. Judge Dr Ribičič, who submitted a dissenting opinion, Judge Mag. Krisper Kramberger, who joined him, and Judge Tratnik), which justly drew attention to the unconvincing substantiation of the majority decision.

2. Although similar at first sight, the cases *Mladina I* and *Mladina II*[2] differ in their key elements. The journalist who labelled the deputy's statements as falling within "the range of a cerebrally bankrupt person" insulted him; however, his value judgment was admissible in a democratic society considering the circumstances that provoked it (i.e. the primitive and insulting mockery of homosexuals during a parliamentary discussion on the draft act that was intended to regulate the position of homosexuals. In *Mladina II*, the complainant published, in the satirical section Mladinamit, one above the other, a photograph of the Goebbels family and a photograph of the Grims family. The Higher Court and the Supreme Court adopted the position that the juxtaposition of the Grims family with the Nazi Goebbels family is insulting towards the plaintiff. In accordance with the established position of the ECtHR, also insulting and provocative value judgments ("a cerebrally bankrupt person"[3], "a fascist"[4], "an idiot"[5]) can be admissible in a democratic society. Then why did the juxtaposition of the plaintiff – a politician – with Goebbels in *Mladina II* overstep the threshold of what is admissible, while the label "a cerebrally bankrupt person" in *Mladina I* did not?

3. The key difference is the conduct of the politician that provoked the journalist's response. The instances where the ECtHR allowed harsh and insulting comparisons in the name of freedom of expression concerned journalists' responses to disputable positions of a politician or some other public figure (e.g. anti-Semitic statements, homophobic statements in the parliament, publicly addressing issues regarding the rights of national minorities). In the case at issue, the comparison with the Goebbels family was provoked by the fact that the plaintiff attended a religious ritual – a mass in Brezje on the occasion of the Assumption of Mary holy day, where they were seated in the first row.[6] In my opinion, the participation of a religious family at a religious

ritual (a mass) cannot justify a comparison with the Goebbels family, regardless of the fact that the plaintiff on this occasion publicly exposed himself and his family.

4. In the case at issue, the Constitutional Court did not decide on the protection of the honour and reputation of the Grims family but on the honour and reputation of one of its members – the plaintiff. However, by protecting the honour and reputation of the plaintiff, the Constitutional Court also indirectly protected the reputation of the family that the plaintiff is a member of. When (as in the case at issue) an interference with honour and reputation stems from the publication of a family photograph in a certain context (in the case at issue, next to a photograph of the Goebbels family), an interference with the honour and reputation of family members entails, by the nature of the matter, also an interference with the reputation of the family and *vice versa*. I understand the reasoning in Paragraphs 21 through 29 of the adopted decision in this sense.

5. In the case at issue, the courts only decided on the plaintiff's claim. Hence, in this case, we did not assess whether there was (also) an interference with the honour and reputation of the plaintiff's wife and their children. In this respect, a question could be raised as to whether perhaps the plaintiff has to be willing to be subject to the disputed comparison of photographs, as opposed to his wife and children, who do not have to be willing to be subject thereto. Such a position could follow from the special position of the plaintiff, who as an absolute public person must be willing to be subject to significantly harsher value judgments than the other members of his family. I think that, in the case at issue, such a position is incorrect for two reasons. The first reason is of a formal nature: neither in proceedings before the regular courts nor in the constitutional complaint did the complainant challenge the plaintiff's entitlement (active standing) to demand an apology for the publication of the family photographs; the substantive position of the courts that he has such an entitlement is also not manifestly erroneous and thus arbitrary (Article 22 of the Constitution). The second reason is of a substantive nature. By choosing a family photograph, the complainant made a transition from discussion *ad rem* (i.e. a discussion on the plaintiff's and Goebbels's methods of political propaganda) to discussion *ad hominem* (*ad personam*). It drew a parallel between the personality of the father and husband Branko Grims with the personality of the father and husband Paul Joseph Goebbels. As already stated (in Paragraph 3), the fact that the plaintiff and his family attended a mass cannot justify such (objectively insulting) comparison *ad personam.*

6. All three courts carried out their task well. Not even the fact that the decision was different at the first instance can change this conclusion. Indeed, it is possible to find a few deficiencies in their reasons, however these deficiencies are not such as to require an interference by the Constitutional Court. To remand cases for new adjudication only because the reasoning is not ideal does not contribute, in my opinion, to strengthening the legal culture and respect for the judiciary.

Judge
Dr Špelca Mežnar

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[1] Judgment of the ECtHR in *Mladina d. d. Ljubljana v. Slovenia*, dated 17 April 2014.
[2] *Mladina II* is my designation for the case at issue, No. Up-407/14.
[3] Judgment of the ECtHR in *Mladina d. d. Ljubljana v. Slovenia*, dated 17 April 2014.
[4] Judgment of the ECtHR in *Bodrožić and Vujin v. Serbia*, dated 23 June 2009.
[5] Judgment of the ECtHR in *Oberschlick v. Austria*, dated 1 July 1997.
[6] The fact that the comparison with the Goebbels family was provoked by [the Grims family] attending a mass, and not by the prior conduct of the plaintiff can be seen from the fact that the complainant chose precisely the disputed photograph from Brezje. As the complainant itself underlined in the proceedings before the court of first instance, the plaintiff in the past publicly exposed his family also in different circumstances, for instance at the festival of his political party and in the magazines Nova (2006) and Obrazi (2007). Hence, the complainant also had the possibility to choose other photographs to illustrate its narrative.