Case number:
Up-515/14

ECLI:
ECLI:SI:USRS:2017:Up.515.14

Challenged act:
Constitutional complaint against Judgment of Ljubljana Higher Court No. II Cp 621/2013, dated 4 December 2013, in conjunction with the second indent of Point I (1) of the operative provisions of Judgment of Ljubljana District Court No. P 3162/2008 – III, dated 12 November 2012

Operative provisions:
Judgment of Ljubljana Higher Court No. II Cp 621/2013, dated 4 December 2013, the second indent of Point I (1) of the operative provisions of Judgment of Ljubljana District Court No. P 3162/2008 – III, dated 12 November 2012, and part of Point II of the operative provisions of Judgment of Ljubljana District Court No. P 3162/2008 – III, dated 12 November 2012, which refers to the second indent of Point I (1) of the operative provisions of the same Judgment, are abrogated insofar as they refer to the allegations concerning the bankruptcy proceedings against Elan, and in this scope the case is remanded to Ljubljana District Court for new adjudication.

In the remaining part, the constitutional complaint is dismissed.

Abstract:
Due to the important contribution of political parties to political discourse in a free democratic society, the right thereof to freedom of expression determined by the first paragraph of Article 39 of the Constitution enjoys a high level of protection.

A court violates the constitutional right to freedom of expression if by inappropriately assessing the meaning that the disputed statement has for an average reader it conceives the starting point for the balancing of the colliding rights (i.e. the constitutional right to freedom of expression, on the one hand, and the human right to one's honour and reputation, on the other) to the detriment of the right to freedom of expression.

When assessing the meaning of a statement made within the framework of political discourse in the public interest, courts must diligently assess whether, for an average reader, such statement perhaps also contains a message that is broader than its literal meaning. In the event the meaning of the disputed statement assessed in such a manner is a mixture of a statement and an opinion, i.e. a value-laden statement of fact, then a more lenient approach towards the person making it and his or her freedom of expression is required than in the event the statement only refers to facts. In the case of a value-laden statement of fact, as is the case with value judgments, an adequate factual

basis suffices in order for an interference with the right to one's honour and reputation of the affected individual to be proportionate.

SUMMARY
Freedom of Expression and the Right to Honour and Reputation

In Case No. **Up-515/14** (Decision dated 12 October 2017), the Constitutional Court decided on the constitutional complaint of a political party against a judgment granting the lawsuit of the plaintiff (i.e. a former advisor to the President of the Republic) demanding that the complainant retract statements published on its website and that the operative provisions of the judgment be published. According to the *ratio decidendi* of the courts, although certain statements were defamatory and entailed an unlawful interference with the plaintiff's honour and reputation, the complainant failed to demonstrate that they are true or that it had reasonable grounds to believe that they are true. In its constitutional complaint, the complainant alleged, *inter alia*, that the courts violated its right to freedom of expression, which is guaranteed by the first paragraph of Article 39 of the Constitution, as they did not strike a fair balance with the plaintiff's right to the protection of honour and reputation, which is guaranteed by Article 35 of the Constitution. The complainant alleged that the right to freedom of expression was of particular importance in the case at issue as it concerned its expression as a political party regarding political events. Therefore, the statements in question allegedly entailed justified political criticism.

The Constitutional Court emphasised that, as a general rule, due to their important contribution to political debate in a free democratic society, the right of political parties to freedom of expression must enjoy a high level of protection. It found that when weighing the right of the political party to freedom of expression, on the one hand, and the plaintiff's right to the protection of honour and reputation, on the other, the courts took into account the decisive circumstances from the perspective of constitutional law and the criteria that the Constitutional Court and the European Court of Human Rights have formulated for instances of such collisions. The Constitutional Court further had to establish whether the courts adequately considered these criteria with regard to the importance and aim of the conflicting rights.

In its assessment, with regard to the statement concerning the implication of the plaintiff in the so-called "big bang" and Depala Vas affairs, when considering the kind of statements the plaintiff had to endure due to his role in society, the Higher Court partly proceeded from a too narrowly conceived starting point from the perspective of the complainant's right to freedom of expression. In the assessment of the Constitutional Court, given his role in society, the plaintiff must also endure defamatory statements interfering with his reputation that claim that he did something illegal or immoral. The limits of admissible criticism contained in such statements are only surpassed if the statements are untrue or if they are made in bad faith. Precisely due to the fact that the complainant failed to prove that the statement at issue had any kind of basis in fact, in the assessment of the Constitutional Court, the obligation to retract these statements and the publication of the operative provisions of the judgment are not unacceptable from the perspective of the complainant's right to freedom of expression. Not only journalists but also other persons who participate in public debate must namely act in good faith, i.e. they must have a sufficient basis to believe that the facts that they publish are true.

However, in the assessment of the Constitutional Court, the courts fundamentally underestimated the significance the statement had for the average reasonable reader when considering the statement regarding the plaintiff's management of Elan and consequently the courts formulated the starting

point of the weighing of the conflicting rights in such a manner that it resulted in harm to the complainant's right to freedom of expression. Therefore, the Constitutional Court abrogated the challenged judgments in this part and remanded the case to the court of first instance for new adjudication.

Thesaurus:
1.5.51.2.10 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - In constitutional-complaint proceedings - Annulment/annulment ab initio of a challenged act and remanding to new adjudication.
5.3.20 - Fundamental Rights - Civil and political rights - Freedom of expression.
2.1.3.2.1 - Sources of Constitutional Law - Categories - Case-law - International case-law - European Court of Human Rights.
5.3.29 - Fundamental Rights - Civil and political rights - Right to respect for one's honour and reputation.
5.3.13.17 - Fundamental Rights - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Reasoning.
1.5.5.2 - Constitutional Justice - Decisions - Individual opinions of members - Dissenting opinions.

Legal basis:
Arts. 22, 34, 35, 39, Constitution [CRS]
Art. 59.1, Constitutional Court Act [CCA]

Cases joined:

PDF Format:
Up-515-14 - Decision.pdf
Up-515-14 - Partly Dissenting Opinion Šorli.pdf
Up-515-14 - Summary.pdf

Full text:
Up-515/14
12 October 2017

DECISION

At a session held on 12 October 2017 in proceedings to decide upon the constitutional complaint of Slovenska demokratska stranka [Slovenian Democratic Party], Ljubljana, represented by the law firm Odvetniška družba Matoz, o. p., d. o. o., Koper, the Constitutional Court

decided as follows:

1. Judgment of Ljubljana Higher Court No. II Cp 621/2013, dated 4 December 2013, the second indent of Point I (1) of the operative provisions of Judgment of Ljubljana District Court No. P 3162/2008 – III, dated 12 November 2012, and part of Point II of the operative provisions of Judgment of Ljubljana District

Court No. P 3162/2008 – III, dated 12 November 2012, which refers to the second indent of Point I (1) of the operative provisions of the same Judgment, are abrogated insofar as they refer to the allegations concerning the bankruptcy proceedings against Elan, and in this scope the case is remanded to Ljubljana District Court for new adjudication.

2. In the remaining part, the constitutional complaint is dismissed.

REASONING

A

1. The challenged Judgments granted the claim of the plaintiff (i.e. a former advisor to the President of the Republic) demanding that the complainant (i.e. a political party) retract certain statements published on its website and that the operative provisions of the judgment be published. The disputed statements, which the courts assessed unlawfully interfere with the plaintiff's honour and good reputation, are the following: "in any event, there has never been any doubt as to the active involvement of his co-worker Franci Perčič in the Big Bang. Last but not least, he has already actively participated in the Depala Vas scandal, and he also conducted bankruptcy proceedings against Elan for so long that the depositors of Les Bank gradually forgot who had actually stolen their money."[1] According to the *ratio decidendi* of the courts, although these statements were defamatory, the complainant failed to demonstrate that they were true or that it had reasonable grounds to believe that they were true. The alleged involvement in the Big Bang allegedly signifies participation in the corruption and bribery scandal regarding the purchase of military equipment in the Patria case, which attracted significant media coverage, which to an average reader is an act that is either morally despicable or illegal. According to the courts, the complainant failed to prove that it had reasonable grounds to believe in the veracity of this written statement; namely, it merely referred to "generally known facts and reasonable grounds." The claim regarding actively providing advice in the Depala Vas scandal allegedly entails an allegation of secret, conspiratorial, and immoral conduct, and the complainant allegedly merely claimed that it believed the information that the plaintiff participated therein, without providing any evidence therefor. According to the courts, to an average reader the written statement concerning the bankruptcy proceedings against Elan insinuates that the plaintiff (who for a certain period of time was the official receiver of Elan, and whom the bankruptcy panel discharged for fault, while bankruptcy proceedings lasted for an excessive amount of time) intentionally conducted bankruptcy proceedings for so long that the depositors of Les Bank would forget who had stolen their money, which leads to the conclusion that the plaintiff knowingly concealed the thief who appropriated the money of the injured parties. This written statement allegedly contains the allegation that the plaintiff as the official receiver acted inadmissibly, not only the information that the bankruptcy proceedings were lengthy and that damage was inflicted on the creditors. The courts

substantiated that by referring to newspaper articles that addressed the alleged irregularities in the bankruptcy proceedings against Elan the complainant did not prove that it had reasonable grounds to believe in the veracity of the statements published [on its website]. The Higher Court wrote, *inter alia*, that alleging immoral and unlawful actions is defamatory and that, in this context, the threshold for the plaintiff as a relatively public figure whose actions are justifiably subject to public criticism and whose (also past) social and political activities are a subject of public interest cannot be lower.

2. The complainant alleges that by the challenged decision the courts violated Articles 2, 14, 25, and 39 of the Constitution. It stresses that the article published [on its website] entailed exercise of the right to freedom of expression. In the case at issue, the right to freedom of expression was allegedly of particular importance as it was an expression by the complainant as a political party regarding political affairs. Allegedly, in the fore of its article was criticism of the list of people invited to a solemn dinner during a governmental visit. The complainant allegedly depicted inappropriate and politically incorrect conduct by the President of the state, which entails political criticism. The complainant alleges that it did not write anything concerning the plaintiff that it did not justifiably believe to be true, and it also proved that. Its intention in this respect was not to disparage the plaintiff, as the complainant allegedly expressed its opinion in the form of criticism with the intention of informing the public of the President's closest colleagues at work. The article allegedly referred to the plaintiff as a high-ranking official and politician, and also his previous activities characterised him as such a person. Allegedly, politicians should also be able to withstand criticism that is broader and encompasses their advisors. In the opinion of the complainant, the courts did not explain why the complainant acted unlawfully by stating that the plaintiff was involved in the Big Bang, in the Depala Vas scandal, and that he acted unlawfully with respect to the bankruptcy of Elan. Since in the article the complainant only mentioned "active participation in the Big Bang," and did not accuse the plaintiff of having acted unlawfully or adopt a position as to his concrete role in the Big Bang, it is convinced that the court should certainly explain why this is defamatory. In its opinion, the same applies to the written statement regarding Depala Vas. Namely, in connection therewith the two courts allegedly stated that this entails a claim that there was secret and conspiratorial conduct, although the complainant allegedly wrote that the plaintiff "actively participated" and did not accuse the plaintiff of that which the courts understood him to have done. Furthermore, the statutory representative of the complainant explained why he justifiably believed what was written. Therefore, the Higher Court allegedly should have explained why such written statement of the complainant is defamatory and why it did not deem proven the allegation of the complainant that it justifiably believed the written statement to be true. Thereby, in addition to Article 39, also Article 25 of the Constitution and equality before the law were allegedly violated.

3. On 20 December 2016, by Order No. Up-515/14 a panel of the Constitutional Court accepted the constitutional complaint for consideration. Therefore, in accordance with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, No.

64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), the Constitutional Court notified the Ljubljana Higher Court thereof, and in accordance with the second paragraph of the same Article sent the constitutional complaint to the opposing party in the civil procedure (i.e. the plaintiff) for a reply thereto.

4. The plaintiff is opposed to the constitutional complaint being accepted for consideration. In his opinion, the complainant misled the Constitutional Court by claiming that it had exhausted all legal remedies, as it had not filed a motion to file an appeal before the Supreme Court. Therefore, the plaintiff proposes that the Constitutional Court punish it in conformity with Article 34a of the CCA. In view of such allegations of the plaintiff, the Constitutional Court informed him of the order of the Supreme Court rejecting the complainant's motion to file an appeal before the Supreme Court. The plaintiff maintains that the complainant did not exhaust all legal remedies: (i) because it did not claim violations of human rights or fundamental freedoms already before the courts but only claimed violations of substantive and procedural law; (ii) because in the motion to file an appeal before the Supreme Court it did not state any important legal issue, and in particular not from the viewpoint of the right to freedom of expression; (iii) because it did not appropriately justify the alleged departure from the established and uniform case law; and (iv) because substantively it did not claim a violation of the right to a legal remedy. Furthermore, the complainant allegedly did not file a motion to file an appeal before the Supreme Court against the part of the Judgment of the court of first instance that was upheld by Judgment of the Higher Court No. II Cp 1666/2014, dated 5 November 2014; therefore, allegedly, in this part it did not even formally exhaust all legal remedies. Thus, the plaintiff maintains that the complainant's constitutional complaint should be rejected (reference to Order of the Constitutional Court No. Up-373/14, dated 11 June 2014, Official Gazette RS, No. 47/14).

5. The plaintiff substantiates why even substantively the constitutional complaint does not stand a chance of succeeding. He concurs with the assessment of the courts that the complainant's allegation that it justifiably believed in the veracity of the disputed written statements is unproven. Since it failed to prove it, it allegedly published untruths and thus inadmissibly interfered with the plaintiff's personality rights. Or, because it allegedly failed to verify the veracity of its statements, the complainant allegedly acted at least inexcusably negligently by publishing the disputed written statements. The plaintiff stresses that when balancing the rights in collision the courts took into consideration his social role, and hence considered him to be a relatively public figure (which in fact is something he does not concur with and stresses that he was employed in the Cabinet of the President as a civil servant). Nevertheless, the courts allegedly correctly concluded that also public figures do not have to withstand untruths, but only justified criticisms. The disputed statements allegedly did not entail a justified criticism as they did not contribute to discourse in the public interest; above all, they were allegedly published on an illegal website. The plaintiff attached a minor offence decision dating from 2012 from which it follows that the complainant did not submit a proposal to enter the website in the register of media at the competent ministry. In view of the above, the plaintiff

proposes that the Constitutional Court – provided that it does not reject the constitutional complaint – dismiss it. In the plaintiff's opinion, in the event the constitutional complaint is granted, his rights to judicial protection and to legal remedies would be inadmissibly interfered with.

6. The complainant rejects the plaintiff's positions stated in the reply to the constitutional complaint.

B – I

On the fulfilment of the Procedural Requirements

7. In accordance with the first paragraph of Article 51 of the CCA, a constitutional complaint may be lodged only after all legal remedies have been exhausted. The complainant filed a motion to file an appeal before the Supreme Court against the challenged part of the final Judgment, a motion that was dismissed by Supreme Court Order No. II DoR 29/2014, dated 9 April 2014. Thereby, it formally exhausted all legal remedies. The plaintiff's position that all legal remedies were not exhausted because in the motion to file an appeal before the Supreme Court the complainant allegedly did not submit any important legal question is erroneous. In order to issue an order on the exhaustion of legal remedies it suffices that – according to the assessment of the Supreme Court – the complainant fulfilled the requirement determined by the fourth paragraph of Article 367b of the Civil Procedure Act (Official Gazette RS, No. 73/07 – official consolidated text, 45/08, and 10/17), namely that it concretely state the disputed legal question – so that the complainant's motion to file an appeal before the Supreme Court was dismissed and not rejected for being incomplete.[2] The plaintiff's allegation that the complainant failed to formally exhaust all legal remedies against the part of the decision of the court of first instance that was upheld by Judgment of Ljubljana Higher Court No. II Cp 1666/2014, dated 5 November 2014, is not relevant, as the mentioned decision is not the subject of the constitutional complaint proceedings at issue.

8. In accordance with the established constitutional case law, the requirement that all legal remedies must be exhausted entails not only the requirement of formal exhaustion in the form a legal remedy being filed, but also the requirement of substantive exhaustion, i.e. substantively claiming violations of constitutional rights already in the filed legal remedies.[3] However, the plaintiff's thesis that the complainant would only have substantively exhausted the stated constitutional claims had it already in proceedings before the courts expressly claimed a violation of constitutional rights or fundamental freedoms is erroneous. In order to ensure a constitutional review of a judicial decision from the viewpoint of a violation of individual constitutional provisions, it suffices that in court proceedings the complainant substantively claims the same circumstances or arguments that he or she subsequently claims in a constitutional complaint with a view to substantiating the claim that constitutional rights or

fundamental freedoms were violated.[4] The complainant satisfied this requirement. In proceedings before the courts it namely claimed the same procedural violations by which it now substantiates a violation of the constitutional procedural guarantee of a reasoned judicial decision, i.e. the duty of the Higher Court to adopt a position. The fact that these claims (insofar as they refer to the decision of the Higher Court) can only be important from the viewpoint of Article 22 and not from the viewpoint of Article 25 of the Constitution[5] does not affect the review of whether they are substantively exhausted. The complainant expressly claimed a violation of the right to freedom of expression already in court proceedings. Namely, both in the motion to file an appeal before the Supreme Court and in the appeal the complainant referred to the guarantees determined by Article 39 of the Constitution. Hence, since the complainant substantively exhausted all the claims that it states in the constitutional complaint, the plaintiff's proposal that the Constitutional Court reject the constitutional complaint is unfounded.[6] The complainant does not state in the constitutional complaint that there was an arbitrary departure from the established case law; therefore, it is irrelevant whether this claim has been exhausted.

B – II

The Starting Point of the Review

9. The complainant alleges, *inter alia*, that the courts violated its right to freedom of expression as guaranteed by the first paragraph of Article 39 of the Constitution, as they failed to strike a fair balance between this right and the plaintiff's right to the protection of one's honour and reputation. In the case at issue, the right to freedom of expression was of particular importance as it concerned the complainant's expression of its opinions as a political party regarding political events. In the disputed article, the complainant allegedly expressed its opinion in the form of criticism with the intention of informing the public of the President's closest work colleagues, who were invited to a solemn dinner during a state visit. The article allegedly referred to the plaintiff as a high-ranking official and politician, and also his previous actions allegedly characterised him as such a person. Therefore, the statements in question allegedly entailed justified political criticism.

10. In accordance with the established case law of the Constitutional Court, the right to personal dignity determined by Article 34 of the Constitution and the guarantee of the inviolability of personality rights determined by Article 35 of the Constitution jointly protect the right of individuals that they be recognised the value they have as humans, and the value they have gained through the legitimate development of their personality (in the eyes of society), i.e. the right to one's honour and reputation.[7] Freedom of expression is (in general) protected within the framework of the first paragraph of Article 39 of the Constitution. The Constitutional Court consistently attributes great importance to the freedom of journalistic expression, i.e. the press, and stresses the high level of

admissibility of writing on political issues and matters of public interest.[8] The Constitutional Court has not yet adopted a substantive position as to the level of protection ensured by this constitutional provision to the freedom of expression of political parties.

11. In accordance with the first paragraph of Article 39 of the Constitution, everyone may freely collect, receive, and disseminate information and opinions. In accordance with the established constitutional case law, legal entities enjoy certain constitutional rights, provided that the specific rights can also refer thereto in view of their content and nature,[9] with regard to which the scope of this protection is adapted to the nature of individual types of legal entities.[10] The Constitutional Court recognises a high level of protection to the freedom of expression of legal entities that work professionally in the field of informing the public, namely due to their key role in a democratic society as regards disseminating information in the public interest.[11] The Constitutional Court recognises legal entities of a pronounced commercial nature a lower level of protection of freedom of expression, as such nature is manifested, as a general rule, in the form of advertising.[12]

12. A political party is an organised association of individuals that realises its political goals through the democratic formation of the political will of individuals and by nominating candidates to stand in democratic elections.[13] The key means of its functioning is to convince the public to entrust it with the formation of its political will. Therefore, freedom of expression is of essential importance for the normal functioning of political parties. A political party is not only a collective platform for invoking the rights of individuals to freedom of expression; it also has an important role in ensuring that those who might vote for it are informed as regards important political topics. Thereby, it significantly contributes to free political discussion, which is a fundamental characteristic of a democratic pluralistic society. Due to such role of political parties in a free democratic society, respect for free democratic elections, the general and equal right to vote (the first paragraph of Article 43 of the Constitution), and the principle of parliamentary democracy (Article 3 of the Constitution), the right of political parties to freedom of expression with regard to political issues in the broader sense, i.e. also questions of general importance, must be ensured a high level of protection.[14]

13. Also according to the European Court of Human Rights (hereinafter referred to as the ECtHR), statements of opinion of politicians in the framework of the general freedom of expression guaranteed by the first paragraph of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR) are distinct.[15] In this respect, the ECtHR understands the term *politician* and *political speech* broadly. Not only does this concern the statements of elected representatives, but contributions to political discourse on polemical topics are also of key importance.[16] When political speech or a debate on issues in the public interest are at issue, there is little space for the limitations determined by the second paragraph of Article 10 of the ECHR.[17] Interferences with

such statements are subject to the same requirements as to proportionality as interferences with the freedom of the press or of the media.[18]

14. The ECtHR recognises that political parties play a key part in encouraging pluralism and in ensuring the appropriate functioning of democracy. As long as their functioning can be understood as a part of the collective exercise of the right to freedom of expression, political parties enjoy special protection of the rights enshrined in Article 10 of the ECHR.[19] Political parties enjoy extensive freedom of expression not only during an election campaign,[20] but also following elections, as an elected representative represents those who voted for it and protects their interests.[21] Limitations of the freedom of expression of elected representatives of the people are thus subject to the closest scrutiny.[22] Political parties have the right to defend their positions in public, even if they insult, shock, or disturb a part of the population.[23] The expression of a politician's opinions may contain serious accusations, as long as they do not contain defamatory statements *ad personam*.[24] The position of a politician is not, however, an attenuating circumstance when what is at issue is a speech that incites hatred for reason of religious, ethnic, or cultural prejudice and which is a threat to social peace and political stability in democratic states.[25] For politicians who appear in public it is very important that they avoid comments that incite intolerance. Their duty is to protect democracy and its principles, as their ultimate goal is to govern.[26] If a political party incites violence or promotes a policy that is hostile towards democratic principles it is not entitled to protection on the basis of Article 10 of the ECHR.[27]

Balancing the Constitutional Right to Freedom of Expression and the Human Right to Honour and Reputation

15. Hence, in the case at issue there is a collision of two constitutional rights: the right of a political party to freedom of expression determined by the first paragraph of Article 39 of the Constitution, on the one hand, and the right of the plaintiff to the protection of one's honour and reputation determined by Articles 34 and 35 of the Constitution, on the other. None of these rights is absolute and limitless. Each of them is limited by the rights and freedoms of others (the third paragraph of Article 15 of the Constitution). In accordance with the established constitutional case law, in the event of a collision of two constitutional rights, courts must decide what their coexistence should be like, with due consideration of the concrete circumstances of the case at hand.[28] In the case at issue, courts must balance between the weight by which the disputed statements reduce the honour and reputation of the plaintiff and the restriction of the freedom of expression of a political party created by the duty to retract the disputed statements and to publish the operative provisions of the judgment on its website. In this balancing, courts must assess the importance and objective of each right in collision. The constitutional case law and the case law of the ECtHR have already formed numerous criteria that courts must take into account in such balancing and adopt a position thereon.

16. In constitutional complaint proceedings, the Constitutional Court assesses whether

during adjudication courts carried out a balancing of the colliding rights, i.e. whether they perhaps overlooked one of the constitutional rights at issue. If they have carried out such balancing, the Constitutional Court will assess whether in doing so they took into account the constitutionally decisive circumstances and criteria formulated in the case law of the Constitutional Court and the ECtHR (i.e. the public's interest in learning of the information; the social role of the person to which the publication refers, the context of the statement, whether the statement is a response to the prior conduct of the addressee thereof, etc.).[29] Provided that the courts did not overlook such criteria or constitutionally significant circumstances during their decision-making, the Constitutional Court also assesses whether in view of the significance and objective of the relevant constitutional rights they appropriately assessed these criteria or constitutionally significant circumstances.[30]

17. From the challenged judgments it follows that the courts were aware of the coexistence and collision of the complainant's right to freedom of expression, on the one hand, and the plaintiff's right to honour and reputation, on the other. The courts also took into account the constitutionally significant circumstances and criteria that the Constitutional Court and the ECtHR formulated to this end, namely: (i) that the disputed written statements were published on the website of a political party as media of a specific nature, due to which its freedom of expression must be recognised particular weight;[31] (ii) that the plaintiff as the addressee of the disputed statements is, in view of his social role (an advisor to the President of the state), a public person whose acts are subject to public criticism;[32] (iii) that in this context there also exists a public interest in information regarding the past social and political activities of the plaintiff;[33] (iv) that the complainant had to have a justified reason to believe in the veracity of what it stated regarding the plaintiff, otherwise it is civilly liable for a defamatory accusation.[34] The Constitutional Court must assess whether the courts also appropriately assessed these criteria in view of the significance and objective of the rights in collision, and in view of the context of the case as a whole.

18. Criticism of a member of the Cabinet of the President of the state published on the website of a parliamentary party undoubtedly entails a written statement in a political context. The current and past activities of a high-ranking employee of the head of state directed towards the public is clearly a subject of public discourse in a democratic society.[35] Therefore, especially weighty reasons must exist to limit the complainant's freedom of expression in the case at issue (see Paragraphs 12–14 of the reasoning of the present Decision). In this respect, it is irrelevant that the case concerned a publication on the internet (and whether the website of the complainant was officially listed in the register of media or not). What is key is that it concerned political discourse in the public interest. Therefore, such a written statement enjoys the same level of protection as if it were published in some other manner.[36] In this respect, the Constitutional Court concludes that, from the viewpoint of Article 39 of the Constitution, in the challenged judgment the Higher Court recognised political expression an appropriate degree of protection by stating that the situation at issue is in fact similar to reporting by

journalists, yet nevertheless it is somewhat special, as it concerns the website of a political party as a medium of a specific nature, which has to be taken into account when balancing the rights in a collision.

19. In accordance with the starting points of the Constitutional Court and the ECtHR, it is also the position of the courts [in the case at issue] that, in view of the plaintiff's social role, the weight of his right to honour and reputation that is in collision with the right of a political party to express itself as to his conduct in society is appropriately small. The plaintiff is indeed not a politician in the true sense of the word, however the courts correctly deemed him – as a high-ranking employee of the head of state who already by occupying such a position (irrespective of his recognisability otherwise) entered into the political arena – to be a public person who in comparison to average individuals must be able to withstand broader limits of admissible criticism concerning his actions directed towards the public.[37]

20. Civil servants (in a broader sense than this term is used by the ECtHR) do not expose themselves on purpose to the oversight of the public and politicians. Nevertheless, in the circumstances of a specific case, the wider limits of acceptable criticism relating to their competences can also apply thereto.[38] The limits of acceptable criticism are a bit narrower with respect to those civil servants who must be protected from defamatory and malicious verbal attacks that might affect the performance of their duties and that reduce the trust of the public in the institution they pertain to (such as state prosecutors, police officers, and judges).[39] But also in such instances, the interest to be protected must be balanced against the freedom of the press and the freedom to discuss matters significant to the public.[40] Such special protection does not apply to all persons employed by the state or companies in state ownership. The ECtHR has already adopted the position that due to the great significance of public discourse on a certain question, the following persons must demonstrate a higher level of tolerance to criticism relating to their work: (i) a member of the management of an airport in state ownership (the Judgment in *Busuioc v. Moldavia*, Paragraph 64 of the reasoning), (ii) the former CEO of the [French] national Central Service for Protection against Ionising Radiation (the Judgment in *Mamère v. France,* dated 7 November 2006, Paragraphs 27–30 of the reasoning), (iii) the CEO of a company who provided the public service of water supply and which was subsidised by the state (the Judgment in *Tănăsoaica v. Romania*, dated 19 June 2012, Paragraph 46 of the reasoning), etc. The Constitutional Court adopted a similar position as regards the head of entertainment programming at the national television corporation (see Paragraph 11 of Decision No. Up-584/12, dated 22 May 2014, Official Gazette RS, No. 42/14, and OdlUS XX, 34). This, of course, does not entail that broader limits of acceptable criticism necessarily apply to all persons employed by the state occupying any position or in any service.[41] However, in the case at issue, in view of the plaintiff's position as an advisor to the President of the state in the relevant period and in view of the political context in which the disputed written statements were published, it is obvious that the plaintiff is obliged to withstand wider limits of acceptable criticism relating to his professional or social conduct – in particular if such conduct is

allegedly unlawful or immoral.[42] Namely, it is even more justified if public discussion on such topics is in the public interest. Therefore, from the viewpoint of the complainant's right to freedom of expression, the position of the Higher Court that when alleging immoral and unlawful actions – because such allegations are defamatory irrespective of whether they are true or not – the threshold for the plaintiff cannot be lower, is disputable. In view of his role in society, the plaintiff must also be able to withstand defamatory statements interfering with his reputation that claim that he did something illegal or immoral. The limits of acceptable criticism of such allegations made within the context of political discussion are only exceeded if they are false or made in bad faith. Therefore, below the Constitutional Court reviewed the positions of the courts relating to this constitutionally significant question.

21. In assessing whether what is at issue is criticism that is still acceptable or an unjustified personal attack that inadmissibly interferes with the plaintiff's right to honour and reputation, differentiating between statements regarding facts and value judgments is of key importance.[43] Namely, the existence of facts can be proven, whereas the veracity of value judgments cannot be proven.[44] Therefore, being required to prove the veracity of these [value judgments] entails a violation of freedom of opinion, which is a part of the right to freedom of expression.[45] With regard to value judgments, a sufficient factual basis is enough to ensure the proportionality of an interference. Value judgments are only excessive if they have no basis in fact that would support them.[46] Hence, those making a statement must be sufficiently careful when stating facts, as well as when making value judgments.[47] Therefore, classifying a statement as one or the other is of key importance. The Constitutional Court is thus obliged to review this classification made by the courts.

On the Assessment of the Written Statement Concerning Involvement in the Big Bang and in the Depala Vas scandal.

22. According to the courts, the disputed written statements entail statements of fact. There is no doubt that the statements on the involvement of the plaintiff in the Big Bang and in the Depala Vas scandal entail statements of fact and not value judgments. At the same time, according to the courts, the complainant failed to state any circumstances demonstrating that it had reasonable grounds to believe in the veracity of its allegations. Namely, merely referring to "commonly known facts" and to the fact that "it simply believed the information that the plaintiff participated" does not suffice to discharge itself of responsibility, according to the courts. In the constitutional complaint, the complainant alleges that in the proceedings it proved that it justifiably believed in the veracity of what it published regarding the plaintiff. It thereby polemicises with the evaluation of evidence made by courts, which in and of itself cannot be verified by the Constitutional Court. In this context, the complainant only concretely alleges that during the hearing its statutory representative explained why he justifiably believed that which had been written in relation to the Depala Vas scandal. According to the complainant, this fact imposes on the Higher Court the duty to adopt a more detailed position as to its

allegations in the appeal. The Constitutional Court consulted the case file and established that this allegation is also in this part manifestly unfounded. From the minutes of the hearing of the statutory representative of the complainant it namely follows that, with respect to the disputed written statement, the statutory representative merely testified to that which the court of first instance had already established, namely that this is "a generally known fact" and that also during the hearing in the lawsuit the plaintiff confirmed that the actors in the Depala Vas scandal were "in fact employed in the same corridor of the same company" and that "it would be completely absurd to expect that they did not talk about it at all." It is obvious that by referring to such testimony of its statutory representative the complainant did not prove that it had any grounds to believe in the veracity of what had been written. Consequently, there was no duty of the Higher Court determined by Article 22 of the Constitution to substantiate in more detail its position in conformity with the position of the court of first instance that the provision of evidence by the complainant was insufficient. In accordance with the established case law of the Constitutional Court, it is not a constitutional requirement that the Higher Court exhaustively reiterate the grounds for the decision in the event it concurs with the substantiation of the court of first instance and the complainant does not state new legal arguments in the appeal.[48]

23. In view of the above, in the assessment of the Constitutional Court the case at issue undoubtedly also does not entail a situation in which a court imposed on the complainant too strict criteria to prove good faith from the viewpoint of freedom of expression. Similarly as applies to journalists, also other persons who participate in public discourse must namely act in good faith, i.e. they must have a sufficient basis to believe that the facts that they publish are true.[49] Not even a politician when expressing criticism of a political opponent in political discourse, which entails political speech *par excellence*, is exonerated from this duty.[50] According to the Constitutional Court, in the case at issue, taking into account both the effect the disputed statements had on the reputation of the plaintiff and the fact that the complainant failed to prove that it had any factual basis for making the disputed statements, the complainant undoubtedly violated this required diligence.[51] Since the complainant failed to prove that it justifiably believed in the veracity of its statements, namely that the plaintiff was involved in the Big Bang and in the Depala Vas scandal, which in accordance with the assessment of the courts are defamatory due to the negative connotation thereof, the duty imposed on the complainant by the challenged judgment, namely to retract these statements and to publish the judgment, are, in the assessment of the Constitutional Court, not unacceptable from the viewpoint of its right to freedom of expression determined by the first paragraph of Article 39 of the Constitution.[52] It thus becomes apparent that the excessively limiting starting point of the Higher Court – from the viewpoint of the complainant's right to freedom of expression – as to what kind of statements the plaintiff should be able to withstand in light of his social role did not, in this part, inadmissibly affect the result of the balancing of the rights in collision.

On the Substantiation of the Defamatory Effect of the Statements

24. The complainant also alleges that the two courts failed to sufficiently explain their position as to the disputed statements being defamatory. In accordance with the established case law of the Constitutional Court, the procedural guarantee of a reasoned judicial decision entails an independent element of the right to a fair trial, which at all levels of adjudication is ensured by the equal protection of rights determined by Article 22 of the Constitution.[53] Therefore, the Constitutional Court also carried out a review of the challenged judgments in the parts that refer to the allegations concerning the involvement [of the plaintiff] in the Big Bang and in the Depala Vas scandal from the viewpoint of this constitutional procedural guarantee.

25. The two courts substantiated that the statement [that the plaintiff] was involved in the Big Bang entails [that he] was involved in the Patria scandal, which for an average reader raises no doubt as to the fact that this act is either morally despicable or illegal. Furthermore, they substantiated that the statement that [the plaintiff] actively provided advice in the Depala Vas scandal without a doubt entails an allegation that [his] act was secret, conspiratorial, and immoral. According to the courts, the allegations that [he] was involved in an immoral and illegal act are defamatory. In neither the lawsuit nor in the constitutional complaint did the complainant present its perspective – opposing that of the plaintiff – on the content of the term "active participation in the Depala Vas scandal" and "involvement in the Big Bang." Hence, the complainant failed to offer a different interpretation of the disputed written statements, one that would perhaps justify the conclusion that they entail value-neutral statements, i.e. statements that are irrelevant and do not at all affect the public image of the plaintiff. It only defended by general statements that the written statements are not defamatory and subsequently (in the appeal and in the motion to file an appeal before the Supreme Court) that the court failed to substantiate this. Taking this into consideration, namely that the complainant did not elicit, by its defence, a request for a more detailed substantiation, it becomes apparent that the otherwise sparse reasoning of the courts as to the defamatory character of the disputed written statements is constitutionally sufficient. Therefore, the Constitutional Court dismissed as unfounded the complainant's allegation that these positions were insufficiently substantiated.

26. Since the complainant's right to freedom of expression determined by the first paragraph of Article 39 of the Constitution in the part that refers to the duty to publish the judgment and to retract the statement that the plaintiff was involved in the Big Bang and the Depala Vas scandals was not inadmissibly limited, and also since its claim that the constitutional procedural guarantees determined by Article 22 of the Constitution (while the complainant did not specifically substantiate the claim that Article 14 of the Constitution was violated) were violated is manifestly unfounded, the Constitutional Court dismissed the constitutional complaint in this part (Point 2 of the operative provisions).

On the Assessment of the Written Statement regarding Conducting the Bankruptcy

Proceedings against Elan

27. According to the courts, the written statement that the plaintiff "conducted bankruptcy proceedings against Elan for so long that the depositors of Les Bank gradually forgot who had actually stolen their money" is also a statement of fact. The court of first instance assessed that this entails an insinuation that the plaintiff intentionally conducted bankruptcy proceedings against Elan for so long that the creditors of Les Bank gradually forgot who had actually stolen their money, i.e. that he knowingly concealed the thief. Apparently, also the Higher Court concurred with this meaning – at least it did not depart therefrom. However, this is obviously not the only meaning conveyed to an average reader – who is the benchmark for assessing the content and meaning of statements[54] – by the written statement at issue, taking into account also the fact that, in the case at issue, in view of the type of "media" involved, such reader is, as a general rule, someone who votes for or sympathises with the complainant. Namely, the written statement (also) has the obvious meaning in that it draws attention to the slow conduct of the bankruptcy proceedings without the plaintiff's intention to effect a loss of memory, which is illustrated as a consequence of the distance in time between the creation of the debt due for payment and the conclusion of payment: that [the depositors of the bank] forgot about the reason and the person [who stole their money]. The usage of the word *forgot* entails an opinion, whereas *theft* must be understood symbolically, i.e. as the inherently unfair deprivation of the creditors(in lay terms: theft). Hence, this is a so-called value-laden statement, i.e. a value-based statement of fact or a mixed opinion.[55] In accordance with the established case law of the ECtHR, such a statement requires a more lenient approach towards the person making it and his or her freedom of expression than in the event the statement refers only to facts.[56]

28. On the basis of their starting point that the statement at issue concerns a statement of fact that includes the aggravated dimension of an intentional act, the courts assessed whether the complainant had grounds to believe in the veracity of such meaning, and not whether it had a sufficient basis in the facts (a sufficient legal basis) for a so-called mixed opinion without an aggravated dimension, namely that due to the (real) length of the bankruptcy proceedings against Elan, whose official receiver was (indeed) the plaintiff, "the depositors of Les Bank gradually forgot who had actually stolen their money." Because the meaning of the disputed statement was significantly too narrowly ascertained, the courts hence formulated the starting point of the balancing of the rights in collision in a manner that had a detrimental effect on the complainant's right to freedom of expression.[57] Thereby, they violated the first paragraph of Article 39 of the Constitution. Therefore, the Constitutional Court abrogated the challenged judgments in the part that refers to the written statement concerning the plaintiff's conduct of bankruptcy proceedings against Elan and in this part remanded the case to the court of first instance for new adjudication (Point 1 of the operative provisions).

29. In the new proceedings, the court of first instance will have to assess whether the

complainant had a sufficient basis in the facts for the statement – such as it manifestly is, in the assessment of the Constitutional Court – and which contains elements of an opinion (drawing attention to the slow conduct of bankruptcy proceedings against Elan and in relation therewith the opinion that the creditors of Les Bank forgot who had actually caused damage to them). From the reasoning of the first instance judgment, it seems, as of now, that there is no connection between the depositors of Les Bank and the bankruptcy proceedings against Elan. What kind of connection there was and whether it was sufficient [to entail the above-mentioned unfair deprivation], however, is something that the court of first instance will still need to assess in the new proceedings. Namely, thus far it only limited its assessment to the other meaning (i.e. *knowingly*, *intentionally*, and *theft* understood literally).

30. Since the Constitutional Court abrogated the challenged Judgment in the disputed part already due to the established violation of the complainant's right to freedom of expression determined by the first paragraph of Article 39, in this part it did not review the other alleged violations of constitutional rights.

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31. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr Etelka Korpič – Horvat, Vice President, and Judges Dr Matej Accetto, Dr Rajko Knez, Dr Špelca Mežnar, Dr Marijan Pavčnik, and Marko Šorli. Point 1 of the operative provisions was adopted unanimously. Point 2 of the operative provisions was adopted by five votes against one. Judge Šorli voted against and submitted a dissenting opinion.

Dr Etelka Korpič – Horvat
Vice President

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[1] The court of first instance furthermore granted the claims for the retraction of the statements and for the publication of the Judgment, the statements that referred to the complainant's allegations regarding the plaintiff's connection with the State Security Service and partly to the claim for the payment of monetary damages for non-material damage that the plaintiff allegedly sustained on account of all of the disputed statements; however, the Higher Court abrogated the Judgment in this part and remanded the case for new adjudication. Hence, this content is not challenged in the constitutional complaint at issue.
[2] *Cf.* Para. 6 of the reasoning of Order of the Constitutional Court No. Up-678/09, dated 20 October 2009 (Official Gazette RS, No. 88/09, and OdlUS XVIII, 92).

[3] *Cf.* Para. 18 of the reasoning of Order of the Constitutional Court No. Up-39/95, dated 16 January 1997 (OdlUS VI, 71).
[4] *Cf.* Para. 8 of the reasoning of Order of the Constitutional Court No. Up-106/02, dated 25 April 2002 (OdlUS XI, 128).
[5] *Cf.* Paras. 6 and 8 of the reasoning of Decision of the Constitutional Court No. Up-399/05, dated 15 May 2008 (Official Gazette RS, No. 55/08, and OdlUS XVII, 32).
[6] Case No. Up-373/14 is not comparable with the case at issue. In that case, the complainant proposed that the Constitutional Court consider the constitutional complaint prior to the exhaustion of the [available] extraordinary legal remedy; however, according to the Constitutional Court, the conditions for exceptional consideration on the basis of the second paragraph of Article 51 of the CCA were not fulfilled.
[7] *Cf.* Para. 10 of the reasoning of Decision No. U-I-226/95, dated 8 July 1999 (Official Gazette RS, No. 60/99, and OdlUS VIII, 174), and Para. 11 of the reasoning of Decision No. Up-407/14, dated 14 December 2016 (Official Gazette RS, No. 2/17).
[8] *Cf.* Para. 12 of the reasoning of Decision No. Up-407/14, and Paras. 7 and 15 of the reasoning of Decision No. Up-530/14, dated 2 March 2017 (Official Gazette RS, No. 17/17).
[9] *Cf.* Para. 3 of the reasoning of Order No. Up-10/93, dated 20 June 1995 (OdlUS IV, 164), and Para. 18 of the reasoning of Decision No. U-I-40/12, dated 11 April 2013 (Official Gazette RS, No. 39/13, and OdlUS XX, 5).
[10] *Cf.* Para. 9 of the reasoning of Decision No. Up-530/14.
[11] *Cf.* Para. 34 of the reasoning of Decision No. Up-20/93, dated 19 June 1997 (OdlUS VI, 181), and Para. 5 of the reasoning of Decision No. Up-570/09, dated 2 February 2012 (Official Gazette RS, No. 18/12, and OdlUS XIX, 40). See also Decision No. U-I-106/01, dated 5 February 2004 (Official Gazette RS, No. 16/04, and OdlUS XIII, 7), in which the Constitutional Court granted equal protection to the public institution RTV Slovenija (See Paras. 6 and 7 of the reasoning).
[12] See Paras. 19 and 21 of the reasoning of Decision No. U-I-141/97, dated 22 November 2001 (Official Gazette RS, No. 104/01, and OdlUS X, 193).
[13] See Article 1 of the Political Parties Act (Official Gazette RS, No. 100/05 – official consolidated text *et seq.*).
[14] The Constitutional Court stated similar in Paras. 6 and 7 of the reasoning of Decision Up-462/02, dated 13 October 2004 (Official Gazette RS, No. 120/04, and OdlUS XIII, 86) with respect to the freedom of expression of an opposition deputy on political issues. See also K. Jaklič in L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 417.
[15] See C. Grabenwarter, European Convention on Human Rights: Commentary, V. C. H. Beck, Munich 2014, p. 269.
[16] *Ibidem*. See also Para. 42 of the reasoning of the ECtHR Judgment in *Bowman v. United Kingdom*, dated 19 February 1998, and Para. 41 of the reasoning of the ECtHR Judgment in *Unabhängige Initiative Informationsvielfalt v. Austria*, dated 26 February 2002.

[17] *Cf.*, for instance, the ECtHR Judgments in *Thorgeir Thorgeirson v. Iceland*, dated 25 June 1992, Para. 64 of the reasoning, and *Dupuis and others v. France*, dated 7 June 2007, Para. 40 of the reasoning.
[18] In *Steel and Morris v. United Kingdom* the ECtHR dismissed the objection of the British government that the statement of the complainants, who were activists in a non-governmental organisation, enjoys a lower degree of protection than if it were a statement made by journalists (Para. 89 of the reasoning). See also C. Grabenwarter, *op. cit.*, p. 267.
[19] *Cf.* Paras. 88 and 89 of the reasoning of the ECtHR Judgment in *Refah Partisi and others v. Turkey*, dated 13 February 2003.
[20] *Cf.* Para. 76 of the reasoning of the ECtHR Judgment in *Féret v. Belgium*, dated 16 July 2009.
[21] *Cf.* the ECtHR Judgments in *Jerusalem v. Austria*, dated 27 February 2001, Para. 36 of the reasoning, *Castells v. Spain*, dated 23 April 1992, Para. 42 of the reasoning, and *Kubaszewski v. Poland*, dated 2 February 2010, Para. 42 of the reasoning.
[22] *Cf.*, for instance, the ECtHR Judgments in *Kubaszewski v. Poland* and *Lombardo and others v. Malta*, dated 24 April 2007, Para. 53 of the reasoning.
[23] *Cf.* Para 77. of the reasoning of the ECtHR Judgment in *Féret v. Belgium*.
[24] *Cf.* Para 44. of the reasoning of the ECtHR Judgment in *Kubaszewski v. Poland*.
[25] *Cf.* Para 75. of the reasoning of the ECtHR Judgment in *Féret v. Belgium*.
[26] *Ibidem.*
[27] This is stated by the ECtHR in *Refah Partisi and others v. Turkey*, Para. 98 of the reasoning.
[28] This is stated by the Constitutional Court, *inter alia*, in Para. 13 of the reasoning of Decision No. Up-530/14.
[29] In Para. 16 of the reasoning of Decision No. Up-407/14, the Constitutional Court wrote in detail on the criteria of the ECtHR.
[30] *Cf.* Paras.14 and 20–22 of the reasoning of Decision No. Up-530/14.
[31] *Cf.* Paras. 63 and 77 of the reasoning of the ECtHR Judgment in *Féret v. Belgium*.
[32] *Cf.* the ECtHR Judgment in *Dupuis and others v. France*, Para. 40 of the reasoning, in which the disputed written statements referred to one of the closest co-workers of President Mitterrand.
[33] *Cf.*, e.g., Paras. 67 and 68 of the reasoning of the ECtHR Judgment in *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal*, dated 17 January 2017.
[34] *Cf.*, e.g., Paras. 67–72 of the reasoning of the ECtHR Judgment in *Busuioc v. Moldavia*, dated 21 December 2004.
[35] The additional argument voiced by the District Court in favour of the position that the criticism directed against the plaintiff was unjustified, namely an attempt to distinguish between criticism directed against the staffing policy of the President of the state and criticism directed against the actions of a public servant of the President of the state, is thus not acceptable.
[36] See, e.g., the ECtHR Judgment in *Renaud v. France,* dated 25 February 2010, in which the ECtHR recognised a high level of protection to critical statements made by the

founder of a local association, which were published on the website of the association, directed against the mayor and related to planned construction projects. See also the European Court of Human Rights, Internet: case-law of the European Court of Human Rights, Council of Europe, 2015, p. 32.

[37] *Cf.* Para. 37 of the reasoning of the ECtHR Judgment in *Krone Verlag GmbH & Co. KG v. Austria*, dated 26 February 2002.

[38] See the ECtHR Judgments in *Janowski v. Poland*, dated 21 January 1999, Para. 33 of the reasoning, and *Nikula v. Finland*, dated 21 March 2002, Para. 48 of the reasoning.

[39] *Ibidem*. See also Decision of the Constitutional Court No. Up-1128/12, dated 14 May 2015 (Official Gazette RS, No. 37/15), Para. 16 of the reasoning. The admissibility of the limitation of the freedom of expression in order to protect the authority and impartiality of the judiciary follows already from the second paragraph of Article 10 of the ECHR.

[40] This is stated by the ECtHR in*, inter alia, Busuioc v. Moldova*, Para. 64 of the reasoning. See also Decision of the Constitutional Court No. Up-1128/12.

[41] *Cf.* Para 27 of the reasoning of the Judgment in *Mamère v. France*. For instance, in *Nilsen and Johnsen v. Norway*, dated 25 November 1999, the ECtHR opined that a governmental expert (who was head of an investigative commission established within a ministry) cannot be compared to a politician, however in the concrete case he was obliged to withstand harsher criticism because he was involved in a public debate and the limits of acceptable criticism were thus broader (see Para. 52 of the reasoning).

[42] *Cf.* Para 40. of the reasoning of the ECtHR Judgment in *Dupuis and others v. France*.

[43] See C. Grabenwarter, *op. cit.*, p. 267. See also the ECtHR Judgments in *Jerusalem v. Austria*, Paras. 44 and 45 of the reasoning, and *Unabhängige Initiative Informationsvielfalt v. Austria,* Paras. 46–48 of the reasoning. Also in the German environment, the differentiation between facts and value judgments is key when assessing the admissibility of an interference with the reputation of an individual (*cf.* K. Wegner and C. Schmelz in: H.-P. Götting, C. Schertz, W. Seitz, *et al*., Handbuch des Persönlichkeitsrechts, Verlag C. H. Beck, Munich 2008, p. 492). In the Republic of Slovenia, already the Constitution differentiates between information and opinions, namely in the first paragraph of Article 39 thereof.

[44] See, e.g., the ECtHR Judgments in *Jerusalem v. Austria*, Para. 42 of the reasoning, and in *Steel and Morris v. the United Kingdom,* Para. 87 of the reasoning. See also Decision of the Constitutional Court No. Up-462/02, Para. 9 of the reasoning.

[45] This is stated by the ECtHR in*, inter alia, Jerusalem v. Austria*.

[46] See, e.g., the ECtHR Judgment in *Busuioc v. Moldova*, Para. 61 of the reasoning.

[47] See A. Van Rijn in: P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak (Eds.), Theory and Practice of the European Convention on Human Rights, 4th Edition, Intersentia, Antwerpen – Oxford 2006, pp. 794–795.

[48] See, e.g., Decision No. Up-590/05, dated 17 April 2008 (Official Gazette RS, No. 53/08, and OdlUS XVII, 30), Para. 9 of the reasoning.

[49] *Cf.* the ECtHR Judgment in *Steel and Morris v. the United Kingdom*, Para. 90 of the reasoning, in which the ECtHR adopted such a position with regard to activists who were members of a non-governmental organisation. An equivalent position was also adopted

in Germany (see E. Wanckel and C. Schmelz in: H.-P. Götting and others, *op. cit.*, pp. 373 and 484).
[50] C*f.* the ECtHR Judgment in *Keller v. Hungary*, dated 4 April 2006 (in the Parliament, an opposition deputy alleged that a minister had intentionally neglected his professional duties for personal reasons), and Decision of the Constitutional Court No. Up-462/02, Paras. 9 and 11 of the reasoning (at a session of the National Assembly, an opposition deputy alleged that a state undersecretary was corrupt).
[51] *Cf.* E. Wanckel and C. Schmelz in: H.-P. Götting and others, *op. cit.*, pp. 373 and 484–485.
[52] *Cf.* Paras. 67–72 of the reasoning of the ECtHR Judgment in *Busuioc v. Moldova.*
[53] See in particular Para. 11 of the reasoning of Decision No. Up-162/09, dated 16 December 2010 (Official Gazette RS, No. 3/11), and Paras. 6 and 8 of the reasoning of Decision No. Up-399/05.
[54] *Cf.* Para. 16 of the reasoning of Decision No. Up-530/14. See also K. Wegner and C. Schmelz in: H.-P. Götting and others, *op. cit.*, p. 497.
[55] *Cf.* Para. 33 of the reasoning of the ECtHR Judgment in *Karsai v. Hungary*, dated 1 December 2009, and Para. 68 of the reasoning of the ECtHR Judgment in *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal*. See also C. Grabenwarter, *op. cit.*, p. 267.
[56] Also in Germany it holds true that in the event a statement is a mixture of a statement of fact and a value judgment, it enjoys the protection of opinions enshrined in the first paragraph of Article 5 of the Basic Law (*Grundgesetz*) (K. Wegner and C. Schmelz in: H.-P. Götting and others, *op. cit.,* p. 494).
[57] In particular, in statements made within the framework of political discourse, it must be ascertained whether they cannot be attributed a meaning that is broader than the literal meaning (*cf.* the ECtHR Judgment in *Lombardo and others v. Malta*, Para. 59 of the reasoning).

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Up-515/14
3 November 2017

Partly Dissenting Opinion of Judge Marko Šorli

I voted in favour of Point 1 of the reasoning of the Decision, whose essence lies in the interpretation of the statement due to which the complainant was convicted. Since the meaning thereof established by the two regular courts was too narrow, this had a detrimental effect on the complainant's right to freedom of expression. In this part, the two judgments are abrogated.

However, I do not concur with Point 2 of the operative provisions of the Decision, by which the constitutional complaint was dismissed.

The Decision adopted by the majority [which supported] Point 2 is a glass house built on unsound foundations. What all the courts neglected or overlooked is what the complainant actually communicated by using the words "in any event, there has never been any doubt as to the active involvement of his[1] co-worker Franci Perčič in the Big Bang. Last but not least, he has already actively participated in the Depala Vas scandal […]."

The Broader Context of the Statement

The broader context of the statement are the scandals referred to as the Patria and Depala Vas scandals. In both scandals, judicial proceedings lasted for several years to the point where criminal prosecution became time-barred, both of them were the subject matter of political accusations, and both garnered extensive media coverage. The media published various conflicting interpretations as to what had actually happened. One of the interpretations as to the Patria scandal was that it was triggered by one political option against another, a hypothesis called "the Big Bang" by most people. Reportedly, also the Depala Vas scandal was the result of a dispute involving the opposing political sides and the intelligence services. In both scandals, one of the interpretations was that the actions (e.g. concerning the Big Bang in the Patria scandal) were positive actions that uncovered previous criminal offences of corruption perpetrated by the very same protagonists in these scandals. Subsequently, through the media each side portrayed its own role as positive and the opponent's role as negative. The two scandals, considering all their dimensions, the reasons therefor, and the actions of the individuals involved in one way or another therein, were never perceived uniformly or uniquely, and therefore also cannot be interpreted in one single manner as generally known facts. The perspective of the public as to these two scandals is divided, depending on, *inter alia*, one's political convictions and whom one sympathises with.

How Courts Must Interpret Statements

When assessing whether a certain general statement of fact has a defamatory meaning and whether it has the capacity to harm the honour of the other person, the conceptual content of the statement has to be ascertained. The meaning thereof cannot be ascertained from the viewpoint of how the plaintiff understands it (the subjective meaning), but from the viewpoint of an average, reasonable addressee of the statement. The so-called addressee's horizon must be taken into consideration. The objective meaning cannot be established merely on the basis of the subjective interpretation of the plaintiff; on the contrary, the subjective side of the case can be established on the basis of the established objective meaning, taking all the other circumstances into account. If one took into consideration the subjective position (i.e. that of the plaintiff) when interpreting the content of the statement, one would also have to take into account his excessive sensitivity or even that which he ascribes to the defendant, or that which is guessed as to the unwritten value judgment that should be in the background of the

statements of fact. Establishing the meaning and the rationale of a statement is particularly important when a statement has multiple meanings and allows for multiple interpretations. In such an instance, the starting point must be the interpretation that only leads to a conviction when all the other interpretations that do not give rise to an offense are excluded for justified reasons.[2]

In the case at issue, the court of first instance simply ascribed the statement defamatory meaning and the intention to disparage [the plaintiff] without providing appropriate argumentation. In this respect, it is clear that if the interpretation that the alleged actions of the defendant entailed the uncovering of criminal offences of others (i.e. the other primary actors in the scandals) prevails, this cannot be defamatory. Nevertheless, irrespective of the context, the court stated that the scandals concerned events that are criminal in nature, which allegedly is generally known, and connecting the plaintiff thereto is defamatory. The court did not attempt to prove that the defendant had the intention to defame [the plaintiff], but again ascribed such intention thereto, and argued that it did not state facts regarding it having reasonable grounds to believe in its statements. Irrespective of such reasons (which in fact were merely conclusions), the appellate court only added the conclusion that the statement regarding [the plaintiff's] involvement in the Patria scandal, which received significant media coverage, raises no doubt as to the fact that this act is either morally despicable or illegal. Similarly, the [appellate] court interpreted the written statement that [the plaintiff] actively provided advice in the Depala Vas scandal in its own way as a claim that the plaintiff acted secretly, conspiratorially, and immorally. Understandably, the defendant was unable to appeal against the reasons and conclusions added by the appellate court.

These are the foundations on which the decision of the Constitutional Court to dismiss the constitutional complaint in the part that refers to this part of the judgments is based; these foundations are the mere unreasoned conclusions that the statements are defamatory, the ascribed intention to disparage [the plaintiff], and the interpretation added by the appellate court that the statements were defamatory. Such a position violates the level of protection provided by Article 10 of the ECHR to the freedom of expression in such a context. Namely, in such circumstances the freedom of expression enjoys the strictest level of protection. Free political discourse and free elections are the foundation of every democratic system. This is the generally accepted European standard. The nature of the speech is of key importance for the strictness of the assessment of the ECtHR in the field of expression. The ECtHR adopted the position that limitations of political discourse necessitate the strictest assessment. Therefore, in accordance with the doctrine of the ECtHR, the political expression of elected representatives or journalists has privileged status. This is so precisely due to their contributions to public discourse on matters of general interest.

The Decision in favour of which the majority voted concludes – but disregards – that it was precisely a political party that in the case at issue made the [disputed] statements. Political parties are entitled to a high level of protection, which is equal to that which

journalists are ensured on the basis of Article 10 of the ECHR. The element that counts in both cases of such subjects expressing themselves is their contribution to public discourse as regards matters of public interest.[3]

The strict assessment that refers to the expression of journalists (in order to enable democracy) and which for the same reasons also applies to deputies includes, *inter alia,* the principle that also exaggerations and provocations are protected.

In the case at issue, it is also impossible to overlook that the plaintiff first had the possibility to reply to the statements in the media that published them, whereas in the newspapers that reproduced these same statements he did not even try to do the same. This is also an important element of the strictest assessment, which, however, the courts did not take into account.[4]

The next circumstance that is relevant from the viewpoint of strict assessment and which the Constitutional Court in fact established – but failed to take into consideration – is that the plaintiff is a public person whose actions are subject to public criticism, and therefore the limits of acceptable criticism or provocation relating thereto that he must withstand must be wider. It is precisely at this point where the Constitutional Court based its assessment on the shaky foundations of the regular courts, which namely ruled that the complainant failed to prove that it had grounds to believe that what it had written was true. The complainant would only be obliged to do that once and if the plaintiff proved that the only possible interpretation is that the written statements were defamatory or if interpretations that would not lead to a conviction were excluded. This situation does not entail the application of the American doctrine in accordance with which the bar regarding state employees must be raised very high as regards proving that they were defamatorily accused.[5] This is a specific situation where a political party allegedly inflicted damage on a public person by making a statement that was not necessarily defamatory and for which it has not been proven that it was made with the intention to disparage [the plaintiff]. In such an instance, the plaintiff must at least prove the circumstances that exclude the interpretations that are different than the one he himself advocates. It is simply impossible to ascribe a defamatory character to a completely general statement, in particular if the broader context in which the statement was made also allows for interpretations according to which the statement is not defamatory. If the defendant was required to explain and substantiate all such meanings, that would signify that it also has to prove the non-existence of incriminating facts and to prove so-called negative facts.

One cannot concur that the two courts appropriately substantiated that the allegation concerning the “Big Bang” entails involvement in the Patria scandal, which is criminal in nature; this is merely the conclusion in the judgment. Furthermore, the court of first instance does not even mention an act that is either morally despicable or illegal. This is the conclusion of the appellate court. In the absence of reasons, the court of first instance made reference to the fact that it is generally known that both scandals are

criminal in nature, which is an allegation that both the appellate court and the Constitutional Court received, with regard to which it is clear that not every involvement necessarily entails participation in a criminal enterprise.

In my assessment, the courts of first and second instance did not interpret the disputed statements or attempt to establish their meaning in the broader context of the two scandals, but simply followed the plaintiff's (subjective) interpretation. The allegation that the complainant failed to offer a different interpretation of the disputed written statements – which without the ascribed meaning cannot harm the reputation of the plaintiff – cannot justify the lack of an appropriate interpretation and arguments. So, would the defendant then exonerate itself if it claimed (that it is generally known) that the Big Bang is merely a metaphor for the moment when the Patria scandal was justifiably uncovered, and if it stated that the phrase "actively provided advice" does not say anything about whom was advised and about what?

The conviction in the case at issue – concerning a political party that published statements regarding a controversial topic that for years was the subject of public discourse that never concluded – did not take into account that the statements were made in a political debate and that they were made by a political party in relation to an act of a public person, which would require the strictest assessment and that a milder interpretation be taken into account.

I believe that the two Judgments of the regular courts violated the complainant's right to freedom of expression determined by Article 39, the right to an effective appeal determined by Article 25, and the right determined by Article 22 of the Constitution. The Constitutional Court should have abrogated the Judgments also in this part.

Marko Šorli
Judge

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[1] "[H]is" in this context denotes the President of the state.
[2] Freedom of expression is violated by judgments that issue a sanction and in doing so rely on a certain meaning without excluding the other possible meanings by providing justified reasons. Taken from I. von Münch and P. Kunig, Grundgesetz-Kommentar, C. H. Beck, Munich 2012, p. 499; the author refers to the position of the German Federal Constitutional Court.
[3] D. J. Harris, M. O'Boyle, "Law on the European Convention on Human Rights," Oxford

University Press, p. 630. Here, the authors cite [the cases] *Castells v. Spain,* 1992, Para. 42; *Piemont v. France*, 1995, Para. 76; and *Ceylan v. Turkey*, 1999, Para. 34.
4. See P. Van Dijk *et al*., Theory and Practice of the European Convention on Human Rights, Hart Publishing, Oxford 2006, p. 799. The European Court [of Human Rights] also established the position that freedom of expression is particularly important for elected representatives of the people and that, therefore, "interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny on the part of the Court." Here, at the end of the quotation, the following cases are listed in the commentary: *Steel and Morris*, 2005, Para. 89; *Piemont*, 1995, Para. 76; *Jerusalem*, 2001, Para. 36; *Pakdemirli*, 2005, Para. 33.
[4] *Idem*, p. 431. The two authors draw attention to the Court's doctrine of "less restrictive alternatives," which concerns the application of milder interpretations.
[5] In *New York v. Sullivan*, the US Supreme Court ruled that in the cases in which there exists a public interest, the burden of proof is on the plaintiff.

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