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.