

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.