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**“BLASPHEMY AND OTHER LIMITATIONS TO THE  
FREEDOM OF EXPRESSION”**

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**“Freedom of expression in the recent case law of the Slovenian  
Constitutional Court”**

**REPORT BY**

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## “Freedom of expression in the recent case law of the Slovenian Constitutional Court”

Visual presentation that may be accessed at:

[http://prezi.com/ykkfpiqzqr78/?utm\\_campaign=share&utm\\_medium=copy](http://prezi.com/ykkfpiqzqr78/?utm_campaign=share&utm_medium=copy)

### ***Some introductory words***

Article 39 of the Constitution of the Republic of Slovenia proclaims that freedom of expression of thought, freedom of speech and public appearance, freedom of the press, and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive, and disseminate information and opinions. The Constitution does not provide any special provision on the limitations of the freedom of expression. In accordance with the third paragraph of Article 15 of the Constitution, however, human rights may be limited in order to guarantee the protection of the rights of others. Thus, freedom of conscience enshrined in Article 41 of the Constitution could be applied to limit freedom of expression. However, none of the cases hitherto resolved by the Constitutional Court included a conflict between the freedom of conscience or religion and the freedom of expression.

In addition, blasphemy as such is not incriminated in Slovenia. There are a number of criminal offences that at least indirectly protect the freedom of religion. These are, for example, Violation of the Right to Equality (Article 131), Disrupting Religious Ceremonies (Article 311), Disrupting Funerals and Desecration of Graves (Article 312), and Public Incitement of Hate, Violence, and Intolerance (Article 297 of the Criminal Code) based *inter alia* on religion.

This is a photo of the cover of the album *Bitchcraft* by the Slovene group *Strelnikoff*. It depicts Virgin Mary holding a rat instead of Jesus as she does in the original painting at the church in Brezje, an important pilgrimage site in Slovenia. This could have been the closest we came to a case of “blasphemy”. As the cover allegedly severely offended and humiliated Slovene Christians, the members of the band were charged with the qualified form of the criminal offence of Violent Conduct.<sup>1</sup> The band claimed that the entire album was a critical response to statements that the Archbishop had made against the reproductive rights as they are proclaimed by the Constitution, in particular the right to freely decide on the bearing of children.<sup>2</sup> The criminal charges were eventually rejected, and the case did not reach the Constitutional Court, so (un)fortunately, I have no blasphemy case law that I could share with you.

In fact, in the majority of the Constitutional Court cases regarding freedom of expression, the right to personal dignity (Article 34 of the Constitution) and the right to privacy and personality rights (Article 35 of the Constitution) were invoked to justify limitations of freedom of expression. These were either cases that originated in criminal proceedings for criminal offences against

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<sup>1</sup> Article 299 of the Criminal Code then in force read as follows:

"Violent Conduct

(1) Whoever insults another, or treats him in an ugly manner or violently or endangers his security, thereby provoking endangerment, indignation or fright in public or in family, shall be punished by imprisonment of up to two years.

(2) If the offence under the above paragraph has been committed by at least two or more persons, or has entailed the serious humiliation of several persons or light bodily harm, the perpetrator shall be punished by imprisonment of up to three years."

<sup>2</sup> Article 55 of the Constitution lays down the Freedom of Choice in Childbearing and reads as follows:

"Everyone shall be free to decide whether to bear children.

The state shall guarantee the opportunities for exercising this freedom and shall create such conditions as will enable parents to decide to bear children."

honour and reputation<sup>3</sup> or cases that originated in civil law suits for the payment of compensation. Today, I would like to outline two cases from this last line of case law.

### **Presentation of the case law**

#### **Constitutional Court Decision No. Up-1391/07 of 10 September 2009 (Codices: SLO-2009-3-009)<sup>4</sup>**

The case originated in a civil law suit. There was a conflict between the right to protection of the honour and reputation of a deputy of the National Assembly (the lower house of the Slovene Parliament), on one side, and the freedom of expression of the weekly magazine *Mladina* and its journalists, on the other. The regular courts found that the magazine published an article that was objectively offensive and entailed a negative value judgment of the deputy's personality. They favoured the deputy's right to protection of his honour and reputation over the freedom of expression of the magazine and its journalists. The magazine was ordered to pay about 3,000 euros compensation for the deputy's mental suffering and it had to publish the operative provisions of the judgment.

The article in question was a presentation of a parliamentary debate that took place during the procedure for the adoption of a draft law on same-sex civil partnerships. In the debate, the deputy who was a member of the Slovene National Party vigorously opposed the adoption of the draft law and expressed both by words and gestures a very negative opinion regarding homosexuals. In the article at issue the journalist wrote that such behaviour "really turned out to be just in the normal range of a cerebral bankrupt who is lucky to be living in a country with such limited human resources that a person with his characteristics can even end up in the parliament when in any normal country worthy of respect he could not even be a janitor in an average urban primary school."

In its constitutional complaint the magazine emphasised that the journalist merely responded to the deputy's own statements and conduct which were extremely insulting for a particularly vulnerable social group and that the journalist only expressed an opinion regarding the deputy's statements and conduct, not his personality. The complainant also pointed out that the article was a political satire and highlighted the important role of freedom of the press for a democratic society.

In its review, the Constitutional Court recalled the relevant constitutional case law. The body of constitutional case law on freedom of expression is quite extensive and, as a general rule, the Constitutional Court affords strong protection to freedom of expression. Thus in cases regarding the interferences of freedom of expression, or even artistic freedom, with the rights of private individuals to the protection of their personality rights stemming from Articles 34 and 35 of the Constitution, the Constitutional Court often decided in favour of freedom of expression.<sup>5</sup> The Constitutional Court also recalled the relevant case law of the European Court of Human Rights (hereinafter referred to as the ECtHR). It underlined the importance of freedom of expression, and in particular of freedom of the press, as one of the foundations of modern

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<sup>3</sup> See e.g. the recent Constitutional Court Decision No. Up-1128/12, dated 14 May 2015, that originated in criminal proceedings against a former deputy of the National Assembly for defamatory statements he made against a state prosecutor. The Constitutional Court found that the regular courts failed to take into account all constitutionally relevant circumstances of the case and strike a fair balance between the deputy's freedom of expression and the right of the state prosecutor to protection of his honour and reputation. It abrogated the challenged court decisions and remanded the case for new adjudication.

<sup>4</sup> The decision has been translated into English and may be found in CODICES or at: <http://odlocitve.us-rs.si/en/odlocitev/AN03281?q=Up-1391%2F07>.

<sup>5</sup> See e.g. Constitutional Court Decisions No. Up-50/99, dated 14 December 2000, SLO-2000-S-002, accessible at: <http://odlocitve.us-rs.si/en/odlocitev/AN02274>, No. Up-406/05, dated 6 July 2006, abstract accessible at: <http://odlocitve.us-rs.si/en/odlocitev/AN02997>, and No. Up-444/09, dated 12 April 2012, abstract accessible at: <http://odlocitve.us-rs.si/en/odlocitev/AN03614>.

democratic societies. However, the Constitutional Court then recalled that freedom of expression is not unlimited as it may have to be restricted in order to guarantee the rights of others. In this regard it stressed that journalists carry a particular responsibility regarding the information they convey.

The Constitutional Court confirmed that the deputy was a public figure and thus had to accept a higher degree of criticism than other persons. It also agreed that the deputy's conduct may have been inappropriate and therefore increased the threshold of acceptable criticism, recalling that also critical, even insulting opinions may be protected by freedom of expression if they entail a response to provocative statements. Nevertheless, the Constitutional Court then found that the regular courts did not excessively limit the complainant's freedom of expression. It explained that an average reader would have understood the article as the journalist's assessment of the deputy's low intelligence, incapacity, and poor personal characteristics. It rejected the complainant's argument that the article constituted political satire and found that it was intended to inform the public about a parliamentary debate. The Constitutional Court further held that there was no substantial connection between the deputy's conduct and the journalist's reaction. In the opinion of the Constitutional Court, the article did not contribute to people being informed or encourage a socially important and sensitive public discussion on the position of homosexuals. The journalist had thus overstepped the boundaries of his freedom of expression and inadmissibly interfered with the rights of the deputy.

The Constitutional Court concluded that the regular courts have struck an appropriate balance between the competing rights and rejected the constitutional complaint as unfounded.

#### **ECtHR: Mladina D.D. Ljubljana v. Slovenia (17 April 2014)<sup>6</sup>**

However, the story did not end with the Constitutional Court Decision, as the magazine complained to the ECtHR.

It was interesting to read the ECtHR Judgment as the Court initially highlighted the same aspects of freedom of expression and its limits and referred to some of the same case law as the Constitutional Court had done in its decision in the case at issue. The ECtHR found that the limitation of the right to freedom of expression had been lawful – the right to compensation is determined in the Code of Obligations. It further pursued a legitimate aim, i.e. the protection of the rights of another. However, while the reasons that the Slovene courts put forward to justify the limitation were relevant, the ECtHR concluded that they were not sufficient to justify the limitation of the freedom of expression in the case at issue.

The ECtHR drew attention to the fact that the domestic courts did not sufficiently consider the context and style of the article. Contrary to the Constitutional Court which mainly concentrated on the article, the ECtHR also focused on the deputy's conduct and statements and stressed that the deputy's own statements and conduct provided a sufficient basis for the journalist's response. The ECtHR explained that his imitation of homosexuals during the debate was a form of ridicule that promoted negative stereotypes. It held that the article should be interpreted as a strong disagreement or even as contempt for the deputy's position on the issue of same-sex partnerships rather than a factual assessment of his intellectual abilities. In the opinion of the ECtHR, in the article the journalist simply matched the deputy's provocative statements and adopted a satiric style to match the manner in which the deputy had chosen to express himself. The domestic courts thus did not correctly balance the rights in conflict.

The ECtHR concluded that the interference was not necessary in a democratic society within the meaning of the second paragraph of Article 10 of the European Convention for the Protection of Fundamental Rights and Freedoms (hereinafter referred to as the ECHR) and that

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<sup>6</sup> The decision is accessible at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-142424>.

there had been a violation of Article 10 of the Convention.

This case was decided by the fifth section of the ECtHR and even before it became final the Constitutional Court decided another somewhat similar case in which it referred to the Judgment in *Mladina D.D. Ljubljana v. Slovenia*.

### **Constitutional Court Decision No. Up-584/12 of 22 May 2014<sup>7</sup>**

This was Decision No. Up-584/12 of 22 May 2014. A closer look at the Decision shows that the Slovene Constitutional Court considered the arguments put forward by the ECtHR in its Judgment in *Mladina D.D. Ljubljana v. Slovenia* to be convincing. Case No. Up-584/12 again concerned a conflict between freedom of expression and personality rights. The complainant was the host of the satirical television show *Hri-bar*. He was ordered to pay damages to the director of entertainment programming on TV Slovenia due to defamatory statements he had made regarding his person. The complainant emphasised that his statements were a critical response to the censorship of satirical observations, which is incompatible with democratic values. The regular courts, however, found that the statements made by the complainant in various interviews were not made within the scope of satire and that they were offensive. He was ordered to pay about 2,000 EUR compensation.

In its review the Constitutional Court stressed the particular importance of freedom of expression. It explained that in a conflict between human rights, freedom of expression must be given considerable weight. However, due to the inviolability of the core of the rights determined by Articles 34 and 35 of the Constitution, a limit must also be drawn as regards expressions of harsh value judgments. This limit is reached, where the intent of the speaker is no longer to influence the debate on matters of public concern, but only to insult someone.

The Constitutional Court emphasised that when weighing the competing rights the circumstances of the case must be considered as a whole. The Constitutional Court established that the regular courts did not take into account that in the interest of preserving a free and unrestricted debate on matters of general interest, the sharpness, roughness, and exaggeration of certain expressed opinions or a certain degree of exaggeration and provocation must be tolerated. The courts also failed to establish the factual basis for the contested statements. In their review, they did not include the context in which the statements at issue were expressed. When weighing the competing rights, they especially failed to evaluate the allegation that by the statements at issue the complainant was responding to the prior conduct of the plaintiff as an executive at the public television network, i.e. to the censorship of the complainant's satirical show on the national television network. They also did not take into account the fact that, in the framework of the right to freedom of expression, not only the content, but the style of the statements (as a form of expression) is also protected. These were all constitutionally relevant circumstances that the regular courts should not have overlooked when carrying out the weighing.

The Constitutional Court therefore abrogated the challenged court decisions and remanded the case to the first instance court for new adjudication. It instructed the court to reweigh all the constitutionally relevant circumstances of the case at issue and on this basis decide whether the right of the plaintiff to the protection of his honour and reputation, or the right of the complainant to freedom of expression must be given priority in this case.

In the meantime, in the new proceedings the complainant was again ordered to pay compensation by the first instance court. He appealed the decision and the Higher Court has not yet decided on the appeal. The case might thus even return to the Constitutional Court.

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<sup>7</sup> The Decision is accessible in Slovene at: <http://odlocitve.us-rs.si/sl/odlocitev/US30419>; the abstract in English is accessible at: <http://odlocitve.us-rs.si/en/odlocitev/AN03699>.

***Concluding remarks***

I hope you enjoyed this glimpse into the case law of the Slovene Constitutional Court with regard to the limits of freedom of expression. Before I conclude, I would only like to add that I believe that the previous presentations and the debate have clearly shown that the question of the limits of freedom of expression cannot be resolved at an abstract level or by means of a general rule. Instead, in each case the competing rights have to be carefully weighed against each other and their relative importance must be duly assessed in the light of all of the circumstances of the individual case. Only by such consideration can we namely ensure that a fair balance between freedom of expression and other rights will be struck.

Thank you for your attention.