

**REPUBLIC OF SLOVENIA
CONSTITUTIONAL COURT****Number:** Up-309/05-25**Date:** 15 May 2008**DECISION**

The Constitutional Court, in deciding on the constitutional complaint of Dr. Peter Čeferin, Grosuplje, represented by the law firm Čeferin, o. p., d. n. o., Grosuplje, at its session on May 15, 2008

decided

The constitutional complaint against the decision of the Higher Court in Ljubljana No. I Kp 1010/2004 of 3 February 2005 in connection with the decision of the District Court in Ljubljana No. III K 49/2003 of 19 March 2004 is rejected.

Explanation**A.**

1. With the contested decision, the District Court, pursuant to the first paragraph of Article 78 of the Criminal Procedure Act (Official Gazette of the Republic of Slovenia, No. 63/94 et seq. – hereinafter referred to as ZKP), the appellant, as a defense counsel in criminal proceedings, was fined SIT 150,000 for insulting experts. At the main hearing, the appellant described the work of the court experts who had given expert opinions with the following expressions: "unreasonable ramblings," "expert fabrications," "professional weakness of experts," "the psychiatrist used psychological methods that he absolutely does not understand," "a psychologist with outdated psychological methods from the Stone Age of psychology and unscientific psychodynamic concepts." The court of first instance assessed that these were offensive value judgments of the experts and a negative value judgment of the experts' professionalism in performing their expert functions. The court believes that the professional knowledge of the psychiatrist and psychologist, who are registered in the list of experts at the Ministry of Justice, cannot be doubted. In the opinion of the court of first instance, the complainant's attitude towards the work of the experts is disparaging and allegedly insults their human dignity.

2. The High Court dismissed the appellant's appeal as unfounded in the contested decision. It assessed that the expressions used by the lawyer constituted an offensive value judgment and thus an attack on the honor and reputation of the experts, because they expressed contempt and disdain and a lack of respect for the human dignity of others and were unworthy of the profession of a lawyer. Therefore, it did not accept the complainant's arguments that he only wanted to draw attention to the unsustainability and frivolity of giving opinions, because the lawyer "could have done so in countless other acceptable ways." In the opinion of the Higher Court, the first-instance decision does not have an intimidating effect.

significance and does not constitute a gross interference with the constitutional right to freedom of expression and the right to defense, because in criminal proceedings the court is obliged to protect its authority, as well as the personal dignity of other participants in the proceedings, on the basis of the first paragraph of Article 78 of the Criminal Procedure Act.

3. The appellant claims that the courts, by their contested decisions, interfered with his right to freedom of expression under Article 39 of the Constitution, which is also protected by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of the Republic of Slovenia, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). The appellant merely expressed his justified and reasoned opinion on the professional competence of the experts. The opinion was given at the main hearing with the aim of ensuring the most effective defense possible, which must be guaranteed to the party in accordance with Article 29 of the Constitution and Article 6 of the ECHR. Since the right of the accused to a defense is one of the most important rights guaranteed by the Constitution and the ECHR, the expression of such an opinion should be particularly protected. The appellant considers that the courts interfered with his right to freedom of expression without such interference being necessary in a democratic society. He refers to the judgment in *Nikula v. Finland*,⁽¹⁾ in which the European Court of Human Rights (hereinafter ECtHR) took the view that Article 10 of the ECHR protects not only the content of ideas but also the form in which they are expressed, and that the right to freedom of expression is an essential part of the right to a defense, without which there can be no fair trial. The appellant considers that the contested court decisions, referring to the difference pointed out by the ECtHR in the aforementioned judgment concerning the prosecutor and the judge in the proceedings, are also unconstitutional because the appellant only criticized the inappropriate and unprofessional work of the experts, but did not insult the court, which would justify a more serious interference with his right to freedom of expression. The experts could have protected their honor and reputation by filing a private lawsuit against the appellant under Article 169 of the Criminal Code (Official Gazette of the Republic of Slovenia, No. 63/94 et seq. – hereinafter referred to as the CC), which would be a less severe interference with his right to freedom of expression. He believes that this was not the task of the court hearing the case.

4. The appellant also points out that, in the case of a criminal offense under Article 169 of the Criminal Code, the expert witness should have proven all the elements of this criminal offense, whereas, according to the third paragraph of Article 169 of the Criminal Code, unlawfulness is excluded for acts that otherwise have all the objective elements of defamation if they are in defense of a right or the protection of legitimate interests in any proceedings or dispute. Since, in these proceedings, the defense counsel was merely ensuring the protection of the legitimate interests of his client, who was charged with the criminal offense of murder, for which the penalty is thirty years' imprisonment, the intent to defame (*dolus coloratus*) should have been present for the offense to be criminal in order for the offense of defamation to be established. However, the appellant, as a defense counsel, did not have such intent. He proposes that the Constitutional Court repeal the contested decisions and return the case for a new decision.

5. The Constitutional Court accepted the constitutional complaint for consideration on October 23, 2007.

B. – I.

6. The complainant asserts that his right to freedom of expression while performing his duties as the defendant's counsel in criminal proceedings was violated by his punishment for insulting experts.

7. In its decision No. U-I-145/03 of 23 June 2005 (Official Gazette of the Republic of Slovenia, No. 69/05 and OdlUS XIV, 62), the Constitutional Court assessed the constitutionality of Article 109 of the Civil Procedure Act (Official Gazette

¹ *Nikula v. Finland*, judgment of 21 March 2002.

RS, No. 26/99 et seq. – hereinafter referred to as ZPP),² which regulates punishment for insults in civil proceedings. It assessed that the contested regulation, which is intended to protect trust in the judiciary, is not inconsistent with the Constitution. It emphasized that the exercise of freedom of speech (both in oral statements and in written submissions) in the position of a party (or its representative or agent) before the court serves the function of effective enforcement of constitutional procedural guarantees. Therefore, it assessed the allegation of inconsistency of the contested regulation with the first paragraph of Article 39 of the Constitution in the context of assessing the consistency of the legal regulation with Article 22 of the Constitution. It took the position that, in the case of statements made by a lawyer when representing a party in a specific case before a court, this prohibition constitutes a means of exercising⁽³⁾ the right under Article 22 of the Constitution and not a restriction thereof. However, it also stated that a court deciding to apply the provision on punishment for insult must carefully consider whether critical and perhaps harsh statements constitute permissible exercise of the right to freedom of expression, because if the court does not take these aspects sufficiently into account in a specific case, this may constitute a restriction of the right to freedom of expression. "On the one hand, it must be taken into account that the fact that the statement was made in the context of defending rights before a court argues in favor of greater tolerance. On the other hand, however, the special importance of trust in the judiciary and respect for the authority of the courts for the judicial branch to perform its tasks must be taken into account."⁽⁴⁾

8. After adopting a decision on the constitutionality of Article 109 of the Civil Procedure Act, the Constitutional Court, by Decision No. Up-150/03 of 12 October 2005 (Official Gazette of the Republic of Slovenia, No. 101/05 and OdlUS XIV, 100) assessed the court's decision to punish a lawyer who had insulted the court in her appeal. It referred to its views in Decision No. U-I-145/03 and assessed the interference with the appellant's right to freedom of expression under the first paragraph of Article 39 of the Constitution within the framework of the right under Article 22 of the Constitution. Having found that the court had taken into account the principles set out in the cited decision and had properly assessed whether the appellant's statements were necessary from the point of view of the effective defense of rights before the court and whether this therefore constituted a justified exercise of the right to defense before the court, it assessed that the decision on the inadmissibility of offensive statements did not excessively interfere with the complainant's right under the first paragraph of Article 39 of the Constitution.

9. In this case, as in the case referred to in Decision No. Up-150/03, the legal provision allowing for the punishment of lawyers for offensive submissions applies.⁵ In any event it is necessary to

² Article 109 of the Civil Procedure Act, as interpreted by the Constitutional Court, reads as follows:

"The civil court shall punish, in accordance with the provisions of the third to seventh paragraphs of Article 11 of this Act, anyone who insults the court, a party, or another participant in the proceedings in a submission." With the cited decision, the Constitutional Court repealed the fifth to seventh paragraphs of Article 11 of the ZPP and part of the third paragraph of that article, while assessing that Article 109 of the ZPP was not inconsistent with the Constitution.

³ Second paragraph of Article 15 of the Constitution.

⁴ Point 13 of the reasoning of the cited decision.

⁵ Article 78 of the Criminal Procedure Act reads as follows:

"(1) The court shall impose a fine on a defense counsel, attorney, legal representative, injured party, private prosecutor, or injured party acting as a prosecutor if they insult the court or anyone participating in the proceedings in a motion or speech. The fine shall amount to at least one fifth of the last officially published average monthly net salary in the Republic of Slovenia per employed person, and at most three times that amount. The decision on punishment shall be issued by the investigating judge or the panel before which the offensive statement was made, or, if the offense is recorded in the application, by the court that is to decide on it. An appeal may be lodged against this decision. If the public prosecutor or his representative insults someone, the competent public prosecutor shall be notified thereof. The Bar Association shall be notified of the punishment of a lawyer or trainee lawyer.

(2) Punishment under the previous paragraph shall not affect the prosecution and sentencing for the criminal offense committed by the insult.

take into account that the freedom of expression of a lawyer acting as a defense counsel in criminal proceedings is a function of the defendant's right to defense. In criminal proceedings, the right to make statements under Article 22 of the Constitution is specifically guaranteed as a special human right in Article 29 of the Constitution, which regulates legal guarantees in criminal proceedings. The latter human rights belong to the party to the proceedings and not to its lawyer, and only the party, and not its lawyer on its behalf, may claim a violation of these human rights. In this constitutional complaint, however, the complainant is a lawyer who does not claim that the decision of the courts violated the rights of his party, but that his human right, which he exercised in the function of defending his party, was violated. This right can be none other than the lawyer's right to freedom of expression under the first paragraph of Article 39 of the Constitution, which is exercised in a special way in the context of court proceedings. That being the case, the specific nature of this situation requires that the exercise of a lawyer's role in exercising his client's right under Article 22 or Article 29 cannot result in his right to freedom of expression being violated only when a violation of Article 22 or Article 29 of the Constitution can also be established in advance. Therefore, the Constitutional Court changes its position from Decision No. Up-150/03, according to which a possible violation of a lawyer's right to freedom of expression can only be assessed in the context of respect for the rights under Articles 22 and 29 of the Constitution. The fact that a lawyer exercises his right to freedom of expression in court proceedings solely because he represents a party is extremely important in assessing the admissibility of interference with a lawyer's right under the first paragraph of Article 39 of the Constitution, but it cannot mean that the Constitutional Court would not assess whether the courts' decisions to punish the lawyer violated his right to freedom of expression.

10. The first paragraph of Article 39 of the Constitution guarantees freedom of thought, speech, and public appearance, press, and other forms of public communication and expression. The ECHR protects freedom of expression in the first paragraph of Article 10 and defines it as the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The second paragraph of this article stipulates that the exercise of these freedoms carries with it duties and responsibilities, and may therefore be subject to formalities, restrictions or penalties prescribed by law and necessary in a democratic society, inter alia, to protect the reputation or rights of others and to protect the authority and impartiality of the judiciary. Since constitutional protection of the right to freedom of expression and the possibility of its restriction also includes the protection provided by Article 10 of the ECHR, the Constitutional Court examined the complainant's allegations from the perspective of the first paragraph of Article 39 of the Constitution.

11. The right to defense, particularly its aspect from the first and second indents of Article 29 of the Constitution, is fundamental to the effective defense of the accused. Criminal proceedings are also judicial proceedings, which by their very nature require that the manner or form of procedural acts, including statements before the court, be regulated and subject to certain formal and procedural requirements.⁶ In this regard, the fact that the defendant has access to a qualified defense counsel who has the knowledge and skills to participate in court proceedings⁷ in which the defendant will be guaranteed

⁶ This was already stated by the Constitutional Court in its decision No. U-I-145/03, point 6 of the explanation.

⁷ The ECtHR also explicitly emphasized the importance of lawyers' participation in court proceedings in its judgment in *Nikula v. Finland*: "The Court reiterates that, by virtue of their special position, lawyers play a central role in the functioning of the judicial system as intermediaries between the public and the courts. This position explains the usual restrictions imposed on the conduct of members of the Bar. Furthermore, courts – the guardians of justice, which play a fundamental role in a state governed by the rule of law – must enjoy the confidence of the public. Given the crucial role played by lawyers in

a fair trial. Therefore, the court may not interfere with the defendant's right to defense by punishing the lawyer. Such interference would be inadmissible due to its incompatibility with the legal guarantees of Article 29 of the Constitution. The court must keep this in mind at all times when applying the first paragraph of Article 78 of the ZKP.

12. The task of the courts and the adjudicating court is to direct the proceedings in such a way as to ensure the proper conduct of the parties and the fairness of the proceedings – rather than to assess the appropriateness of the parties' statements in the previous proceedings in the subsequent proceedings.⁸ However, this does not mean that a lawyer's freedom of expression is completely unrestricted when acting as a defense counsel in criminal proceedings.⁹ Precisely because he is acting in court proceedings and his right to freedom of expression is intended to protect the rights of others, it is more restricted than the right to freedom of expression of any individual in a public place. Lawyers are restricted by the fact that they are acting in proceedings that are formalized and, as such, conducted on a rational level, and by their professional ethics.¹⁰ A lawyer may express strong and sharp criticism, but his arguments in protecting his client's interests must remain at the level of reasonable argumentation; there is no place for insults laden with emotional charge. It is understandable that the threshold of tolerance that a court may allow when defending a defendant charged with a serious criminal offense for which a severe penalty is threatened is higher than usual, but a lawyer must not exceed the extreme limits of this tolerance. If they do so, it is right for the court to protect other values,⁽¹¹⁾ namely trust in the judiciary and the reputation and authority of the judiciary, which ensures that the public respects the courts and trusts them to fulfill their role in a state governed by the rule of law. The protection of the authority of the court refers to the awareness that the courts are the forum for resolving disputes or deciding on guilt or innocence, whereby it is important that the judiciary enjoys a high degree of public trust that it is capable of fulfilling this function.¹² This is a constitutionally permissible reason for restricting a lawyer's right to freedom of expression. As the Constitutional Court has already emphasized in Decision No. U-I-145/03, the institution of punishment for offensive submissions is not a fundamental means of ensuring the reputation and authority of the judiciary, but rather an additional (and subordinate) tool that

in this area, it is reasonable to expect that they will contribute to the proper functioning of the judicial system, thereby maintaining public confidence in it." (paragraph 45)

⁸ See also ECtHR in *Nikula v. Finland*, paragraph 53.

⁹ See also ECtHR in *Nikula v. Finland*: "The Court does not exclude the possibility that, in certain circumstances, an interference with the lawyer's freedom of expression during the proceedings may raise an issue under Article 6 of the Convention concerning the accused's right to a fair trial. The 'equality of arms' and other factors of fairness therefore also militate in favor of a free and even vigorous exchange of arguments between the parties. However, the Court rejects the applicant's argument that the lawyer's freedom of expression should be unlimited." (paragraph 49)

¹⁰ The Constitutional Court has already emphasized in point 12 of the explanation of decision No. U-I-145/03 that professional ethics in the legal profession undoubtedly imply that a lawyer's freedom of speech is not unlimited and that, as part of the judiciary, a lawyer has a special role and responsibility in establishing trust in and respect for the judiciary. as the Constitutional Court has already emphasized in point 12 of the explanation of decision no. U-I-145/03.

¹¹ Compare with the ECtHR judgment in *Nikula v. Finland*: "While lawyers are certainly entitled to comment publicly on the functioning of the judicial system, their criticism must not exceed certain limits. In this regard, it is necessary to strike a fair balance between the various interests at stake, namely the public's right to information on issues arising from court decisions, the requirements of the proper functioning of the judicial system, and the dignity of the legal profession." (point 46)

¹² ECtHR judgment in the case of *Worm v. Austria* of 29 August 1997 (paragraph 40).

enables the defense of the reputation of courts when disparaging value judgments and generalized attacks on the work of the court, which are unnecessary from the point of view of defending rights in a specific case, undermine confidence in the work of the courts.

B. – II.

13. The appellant made the statements referred to in point 1 of the grounds for this decision in defense of the defendant, who was charged with the criminal offense of murder, for which the penalty is thirty years' imprisonment. The statements were value judgments about the experts who, as permanent sworn court experts, gave expert opinions in the criminal proceedings. On the basis of

Article 248 of the Criminal Procedure Act stipulates that expert evidence shall be ordered when it is necessary to obtain the findings and opinion of a person with the necessary expert knowledge in order to establish or assess any important fact. As the Constitutional Court has already emphasized in its decision No. U-I-132/95 of January 8, 1998 (Official Gazette of the Republic of Slovenia, No. 11/98 and OdlUS VII, 1), expert evidence is not only evidence, i.e. the source of knowledge of relevant facts, but the expert is also an assistant to the court in the performance of its functions. Hence the requirement for impartiality, as otherwise the parties to criminal proceedings would not be on an equal footing. Given the position of a court expert as an assistant to the court in the performance of its functions, his authority must be protected in the same way as the authority of the judiciary. This is a constitutionally permissible objective, on the basis of which it was possible to restrict the appellant's right to freedom of expression. Therefore, the complainant's arguments that the situation would be different if he made offensive statements against the court than if the statements were directed against a court expert cannot be accepted.⁽¹³⁾

14. The courts' assessment that the appellant made offensive value judgments about the court experts is well-reasoned and not unreasonable. It was not just a matter of harsh criticism of the expert opinions, but rather the offensive judgments amounted to a personal disqualification of the experts as professionals.¹⁴ The offensive remarks made go beyond reasonable argumentation with which the defense counsel could justify a motion to appoint new court experts. Therefore, it cannot be accepted that such assessments can be justified in terms of ensuring the defendant's right to defense under Article 29 of the Constitution. On the contrary, an offensive assessment of an expert as a person called upon to give a professional opinion could even jeopardize a fair trial in criminal proceedings.⁽¹⁵⁾ As

¹³ Even with regard to the position of public servants, the ECtHR has ruled that they must enjoy public trust in the performance of their duties and that it may therefore be necessary to protect them from aggressive verbal attacks against them in the course of their duties. In *Janowski v. Poland*, judgment of 21 January 1999, the ECtHR stated: "Moreover, public servants must enjoy the confidence of the public without undue interference in order to be able to perform their duties effectively, and it may therefore be necessary to protect them from offensive and violent verbal attacks while performing their duties." (paragraph 33) The ECtHR assessed a case of insults against municipal police officers in the performance of their duties; the ECtHR also refers to this decision in its judgment in the case of *Nikula v. Finland*.

¹⁴ The case of *Nikula v. Finland*, however, was a different case, where the lawyer limited her inappropriate criticism solely to the prosecutor's conduct in the proceedings against her client and not to his professional or other qualities in general. It was precisely this circumstance that the ECtHR emphasized as decisive: "Although some of the expressions were inappropriate, her criticism was limited to T.'s performance of his duties as a prosecutor in the proceedings against the applicant's client and not to T.'s general professional or other qualities. In this context, T. had to tolerate very serious criticism from the applicant, who was acting as a defense lawyer." (paragraph 51)

¹⁵ An expert who is exposed to insults could even respond by favoring the lawyer's client in order to avoid future insults, which would make him biased; he could also react by becoming even more hostile towards the lawyer's client (which is even worse in criminal proceedings), thereby not only being biased but also effectively prejudicing the defendant's right to a defense.

The Constitutional Court has already emphasized in its decision No. U-I-145/03 that it is of exceptional importance when it comes to statements made by lawyers that the parties to the proceedings recognize that offensive sharpness in court is not evidence of high-quality representation by a lawyer. Similarly, a quality defense cannot be based on offensive value judgments that disparage the expert witness, rather than on reasoned and reasonable criticism of their opinion given in the specific proceedings. Therefore, the courts cannot be accused of having to tolerate insults within the limits of tolerance, which the courts have reasonably assessed as contemptuous of court experts as professional assistants to the court. Therefore, the interference with the appellant's right to freedom of expression, which the court did by imposing a fine on the lawyer for the insults he uttered, is not disproportionate.

15. The appellant considers that it was not the court's task to protect the honor and reputation of the experts, since the experts had the option of filing a private lawsuit for a criminal offense under Article 169 of the Criminal Code. At the same time, he explains why, even if such a lawsuit had been filed, his actions would not have been unlawful, because the act was committed in defense of the rights of the party and because he did not have any malicious intent. The Constitutional Court did not have to deal with the question of whether the complainant, by making the aforementioned statements, fulfilled the legal criteria for a criminal offense under Article 169 of the Criminal Code, as this was not the subject of the contested court decisions and therefore cannot be the subject of this constitutional complaint. The only arguments that could be relevant to this constitutional complaint would be that the courts should not have punished him because bringing a private prosecution for the aforementioned criminal offense would have been a less severe interference with his right to freedom of expression than punishing him for offensive statements. However, these arguments are unfounded. The Constitutional Court has already emphasized in its decision No. U-I-145/03 that the possibility of independent criminal law protection is not an adequate substitute and cannot serve the purpose for which the legislator has enacted the possibility of punishment for offensive submissions. Here, too, the Constitutional Court reiterates that the protection defined by the legislator in the first paragraph of Article 78 of the ZKP is not intended to protect specific experts, but rather to protect the reputation and authority of the judiciary as a whole. The reason why the reputation and authority of court experts as impartial assistants to the court are also an integral part of this protected asset has already been explained in point 13 of the reasoning of this decision.

16. It is clear from the above that the courts did not impermissibly and excessively interfere with the appellant's right under the first paragraph of Article 39 of the Constitution in the contested judicial decisions. Therefore, the constitutional complaint is unfounded and the Constitutional Court has rejected it.

C.

17. The Constitutional Court adopted this decision on the basis of the first paragraph of Article 59 of the Constitutional Court Act (Official Gazette of the Republic of Slovenia, No. 64/07 – official consolidated text – ZUstS) in the following composition: President Jože Tratnik and Judges Marta Klampfer, Marija Krisper Kramberger, Miroslav Mozetič, Jasna Pogačar, Dr. Ciril Ribičič, and Jan Zobec. Judge Dr. Mitja Deisinger was excluded from the decision in this case. The decision was adopted by

six votes to one. Judge Ribičič voted against and issued a dissenting opinion. Judge Zobec issued a concurring opinion.

Jože Tratnik President