

PROTESTS - PART OF FUNDAMENTAL HUMAN FREEDOMS

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Abstract: The corona virus has lately been responsible for the worldwide social turmoil. In Slovenia, the change of political authorities has further inflamed passions, which have recently led to regular peaceful Friday protests where the population expresses its disagreement with the current political option. Warnings that the authorities refuse to hear. Whether it is the legal protection of freedom of expression, the concepts of hate speech and offensive speech, the difference between hate speech, offensive and abusive speech, the field of press freedom, legal dimension of investigative journalism, and public interest in public radio and television, etc. Unfortunately, the European Court of Human Rights, with its case law, reduces the constitutional protection of freedom of expression to the level of minimum standards. In that regard, ordinary Slovenian courts also pose a major problem as the latter obstacle is rather hard for them to overcome.

Keywords: protests, freedom of speech/expression, fundamental human freedoms, European Court of Human Rights, judiciary

INTRODUCTION

In the 15th century, the invention of the press in Europe was in the hands of the existing social elite (Mills, 1964). The state and / or the church had control over the exchange of opinions and information in all areas of social life: political, religious, cultural and scientific. At that time, the press was primarily a means of enforcing and strengthening the power, ideology and legitimacy of the dominant or absolutist elites. In order to exercise control over public communication, the current government has used means such as censorship or previous restrictions, the granting of monopolistic permits to printers, and designation (Teršak, 2005). Until the 19th century, the policies of the ruling regimes used tools of concealment, secrecy and censorship in relation to the public. Censorship existed at the beginning of written history, or even before more sophisticated forms of directing and restricting communication emerged. The government's response to the invention of the press was the introduction of strict

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censorship in order to prevent any criticism of the government. In the 17th century, new intellectual elites began to emerge, and in response to the abuses of the church, new reform movements were formed, and at the same time, new printing technology emerged. This also changed the strategy of the church, which began to use smarter and more effective propaganda instead of extremely restrictive control over the formation and dissemination of knowledge. In the 19th and 20th centuries, the ruling regimes began to realize the importance and value of popular support for their political activities. They began by trying to influence public opinion. Propaganda, communication with the public, and massive subsidizing of information actually became a more effective strategy for appeasing and gaining the support of public opinion than censorship (Splichal, 1997). Influenced by new political theories and philosophy of the Enlightenment, however, arguments emerged in the late 17th and early 18th centuries in support of the belief that freedom of the press was a necessary instrument in the fight against potential despotic government and its oppression of the people (Teršek, 2005). At the end of the 18th century, as a result of the political and social struggle against despotic power, freedom of expression and freedom of the press were legally recognized as fundamental rights in a democratic society, which applies to both Europe and the United States (Voorhoof, 1995). Freedom of the press is really essential as far as the nature of a free state is concerned; it is based on the absence of prior restrictions on publication and not on freedom from censorship for criminal reasons after publication. Every human has the undoubted right to expose to the public whatever opinion one wishes and banning this would mean destroying freedom of the press. However, if one publishes something that is indecent, evil, or illegal, one must accept the consequences of one's audacity (Teršek, 2018; 2005).

CURRENT TIME AND NEW FORMS OF CENSORSHIP

Democratic societies, as described above, have nevertheless eliminated direct censorship of the expression of opinions through mass communication media - not in absolute terms, but rather successfully from one country to another. Subsequent censorship also occurs in countries whose authorities claim to be democratic. It is mainly through punitive measures against the authors of expressed (unpopular) opinions and ideas, also with the help of civil compensation institutes. Subsequent censorship also occurs in the form of measures against publishers and editors in historical periods and at present more or less worrying in different countries. Above all, mass communication faces subordination to the principles of political and economic spheres. This subordination occurs through various forms of indirect control exercised by the state and private corporations, mainly through indirect censorship and propaganda, all the way to advertising and political marketing (Teršek, 2018; Splichal, 1997). In professional literature, freedom of expression is defined as an essential component for the functioning of democracy (Harris, O'Boyle, Warbrick, 1995). Throughout human history, the struggle for communication rights and freedoms was at the core of the political struggle for freedom and democracy in general (Splichal, 1992). Some theorists believe that freedom of expression establishes a kind of market for ideas, and in it, in the face of many and often conflicting opinions and ideas, the process of seeking the truth takes place (Teršek, 2005). Representatives of one of the relevant currents of mindsets believe that freedom of expression enables personal development and self-realization of the individual. Ronald Dworkin, for example, believes that freedom of expression should be derived from the right to human dignity and the right of every individual to be an object of equal protection and respect (Teršek, 2020; 2005). The most convincing thesis seems to be that freedom of expression guarantees the individual the right to participate in the democratic process (Clayton and Tomlinson, 2001). It should be emphasized that actual democratization means that not only the number of active



participants in communication processes increases, but so does the social base of communication (Splichal, 1992). First, any forcibly silenced opinion can, at least as far as we can know with certainty, be true. To deny such a possibility is to assume that we ourselves are infallible. Second, although a silenced opinion is erroneous, it can - and very often does - contain some part of the truth (Teršek, 2018; 2006). However, since a general or dominant opinion on any matter is seldom or never the whole truth about it, a conflict between different opinions is the only way to supplement it with the rest of the truth. Thirdly, even if the prevailing opinion on a matter is not only true, but at the same time the whole truth about it, most people will accept it only in the form of prejudice, without understanding and feeling for its reasonable foundations, if we do not call it into question firmly and committedly enough. Furthermore, the very meaning of the doctrine will (fourthly) threaten to either be in vain or become weaker and lose its decisive influence on character and behavior. Dogma, on the other hand, becomes merely a formal vow that only hinders and prevents any real and sincere beliefs coming from reason or personal experience, because dogma is capable of doing anything else. Thus, truth presupposes that freedom of expression is not an end in itself, nor is it a complete whole in itself, but represents a means of identifying and accepting certain opinions and ideas as truths (Teršek, 2006, 2005).

AND WHAT IS HAPPENING IN SLOVENIA?

At the beginning of 2020, mostly peaceful protests began in several Slovenian cities against the new Government led by the Slovenian Democratic Party (SDS) and Janez Janša. The new Government was formed with the support of the center-right party Nova Slovenija (NSi), center-left DeSUS parties and the Modern Center Party (SMC) after the resignation of the then Prime Minister Marjan Šarec. The protesters accused the Government of breaking pre-election promises of coalition parties, controversial previous actions of the party and the SDS government, and several new controversial moves by the Government. During the coronavirus epidemic in Slovenia, the implementation of protests was hampered by decrees aimed at limiting the spread of the epidemic. The third Janša Government took power during the outbreak of the new coronavirus disease epidemic in Slovenia. The period between and after the takeover was marked by a large number of controversial actions by the new government. The Government has set the highest possible salaries for ministers and state secretaries. Immediately after taking power, the Government replaced the leadership of the police, army and intelligence services. The new government politicized the National Institute of Public Health and in a short period of time replaced two acting directors during the epidemic (the second soon after he described some of the government's measures to contain the epidemic as unjustified). The Foreign Ministry sent a letter to the Council of Europe, claiming that most of the Slovenian media space is controlled by the media coming from the former communist regime, while the Minister of the Interior wrote on Twitter that he had also informed the Interior Ministers about the media struggle and left-wing political pole against the government that is successfully curbing the epidemic. Mr Janša, Government politicians and people close to the Government, publicly discredited and attacked a large number of journalists and journalistic organizations, which led to several warnings from Slovenian and international journalistic organizations. What is more, the official Twitter account of the Government crisis headquarters, which was supposed to inform the public about the epidemic, published an insulting comment that insulted the journalist and civil society government critics and led to a lawsuit by the institution of the offended. Police later refuted the official explanation for the insulting announcement that an unknown person had hacked into the account. A number of disclosures showed that government-related politicians tried to influence the procurement process by promoting certain suppliers in the procurement process (sometimes offering less suitable or more expensive products or delivering products with long



delays). Family or personal acquaintances between politicians and suppliers promoted by politicians were also found. The revelations triggered police investigation. Shortly afterwards, the director of the National Bureau of Investigation, who was in charge of criminal investigation of procurement irregularities, was dismissed. The dismissal was, according to some estimates, a breach of jurisdiction. Due to the dismissal, the employees of the National Bureau of Investigation published a public letter for the first time in history, in which they expressed their opposition to the dismissal. The Government also fired the head of the Office for the Prevention of Money Laundering who, in addition to the National Bureau of Investigation, was investigating suspicions of illegal financing of SDS-related media (I.M.; Tavčar, B., Š. J. Mirt Bezlaj; G. C., G. K.; Delo).

PUBLIC OPINION ON PROTESTS

In a survey conducted by Ninamedia (700 respondents) between 12 and 13 May, 52.2% of respondents assessed the protests as justified and 44.1% as unfounded (. In the Valicon poll conducted between 12 and 14 May (529 respondents), 57% of respondents strongly agreed with the protesters' demands, 27% strongly disagreed and 16% were undecided / unaware of what was happening (among those who were at least partially aware of the protests, 33% of respondents fully agreed with them, mostly 28% of respondents, mostly 12% disagreed, not 17% of respondents at all, and 11% were undecided or insufficiently informed). 54% of respondents thought that protest cycling was a predominantly appropriate way of protesting (32% thought it was completely appropriate), 36% considered it inappropriate (21% considered it completely inappropriate), and 10% were undecided. 63% of respondents thought they were familiar with the content of the protests (25% very well informed, 38% mostly familiar). Freedom of expression is an inescapable right because it allows for an informed understanding of the possible actions and policies of the authorities (Teršek, 2020). In order to acquire civic competence, citizens must have the opportunity to show their perceptions, to learn from each other, to engage in debates and reflections, to read, hear and seek the opinion of experts, political candidates and those in whom judgments are trusted, and to learn about public life in other ways conditioned by freedom of expression. Finally, without freedom of expression, citizens would quickly lose the ability to influence the agenda of government decisions. Silent citizens may be perfect subjects of an authoritarian ruler, but they are a real disaster for democracy.

INDISPENSABLE ROLE OF PROTESTS

Protests are not as simple as all advocates and their opponents know. But the right to express an opinion is a simple and well-known one. The mass media have the function of establishing and articulating the public, the function of socialization, the function of public control, and the function of legitimization. The mass media form their own media discourse, but they also intervene in all areas where different discourse appears (Teršek, 2020; Vreg, 2000). Politicians use the media to establish contact with the public, to communicate their political image to the public, their political programs and views on individual topics that are the subject of election campaigns (Teršek, 2006). On the other hand, through the media, the public provides politicians with "feedback" on their political efforts, a response to their ideas and views, as well as the evaluation of individual political candidates and parties. In this context, the role of the media is predominantly passive, especially as regards the direct access of political candidates to the addressees of the message. The reason for this lies in the fact that the normative framework in this regard is determined by institutions other than the media. While editorial policy can influence



the choice of information to be passed on to the public, it is about ideas or views that are formed independently of the media, and at the same time the media must be guaranteed independence. A greater degree of democracy, and thus the legitimacy of the political process, would therefore also be achieved by increasing the ability of citizens to influence political processes, also from the point of view of informing citizens. Habermas, e.g. noted that "there were sufficient reasons that relatively well-informed people were more likely to engage in discussions, to tend to mutually confirm their findings, and to influence the hesitant and less engaged" (Habermas, 1969). As information on social and political events is also expected to mean greater transparency, the level of legitimacy is increased in this way. At the same time, we should not overlook the fact that with the development of information technologies, the possibility of immediate and unhindered access to information and thus providing opportunities for individual information, the level of information, behavior and knowledge of politicians potentially increases as well as the quality of political decision-making or political decisions taken (Teršek, 2020). At the same time, the concept of democracy is changing with IT and is no longer based on a submenu of closed geographical space (Teršek, 2006; Ridderstrale, Nordstrom, 2004).

CASE LAW OF EUROPEAN COURT OF HUMAN RIGHTS (HEREINAFTER ECtHR)

Freedom of expression occupies a central place in the constitutional hierarchy of values. It is associated with a democratic form of government and, on the other hand, also represents one of the preconditions for self-realization and autonomy in the decision-making of each individual. Article 10 of the European Convention for the Protection of Human Rights (hereinafter ECHR) (Council of Europe) sets out the right to freedom of expression and the conditions under which it may be restricted. Interference with justice must be very restrictive, especially when it comes to political debates and other matters of public interest. As the Convention itself does not answer the question of what the level of protection of an individual right is and what the right actually represents, the answer must be found primarily in the case law of the most important body of the Council of Europe, the European Court of Human Rights (ECtHR). The field of free assessment of the evidence of states in various cases is wide, where are the limits of the right and what criteria has been developed by the ECtHR through its practice in assessing the admissibility of interference with the right. Slovenia was also convicted before the ECtHR for violating the right to freedom of expression. Currently, this is the only case of a conviction of Slovenia for violating Article 10 of the ECHR (Council of Europe). The proceedings began with an appeal against the Republic of Slovenia lodged with the Court on 8 April 2010. The complainant emphasized that the Member of Parliament and that the article at issue had contributed to the debate in the public interest, and that the disputed allegations were a response to the Member's homophobic stereotypes. Next, the article was written in a satirical style. The domestic courts did not take into account the context nor the disputed conduct of the Member of Parliament. The government argued that domestic courts had already carefully considered both colliding rights. The article allegedly incompletely presented the speech of S.P. and contained insulting remarks about the deputy's personal and intellectual qualities, for which there was no real basis. The domestic courts also examined the speech of S.P. and assessed that it alone did not encourage prejudice against homosexual people. With regard to the satirical style, the Constitutional Court assessed that the article as a whole was intended to inform the public about the parliamentary debate and that it could not therefore be confirmed that it was a satire. The importance that the ECtHR gives to freedom of expression and freedom of the press for a modern, democratic society can be summarized in three basic points: a) freedom of expression is one of the foundations of a democratic society and one of the central conditions for the development



of society and self-improvement ; b) freedom of expression enables every individual to participate in the public exchange of cultural, political and social information and ideas of all kinds; c) freedom of the press is one of the means of identifying and forming opinions on the ideas and actions of political leaders (ECtHR *Handyside v. the United Kingdom*). Third, freedom of expression is the lifeblood of democracy. The free flow of information and ideas informs the political debate. It is a safety valve: people are more willing to take decisions directed against them if they can influence them in principle. As for the truth argument, it can be said to have less impact on the case law of the ECtHR than, for example, the constitutional case law of the Supreme Court US and Canadian courts (Teršek, 2005; 2007; European Court of Human Rights).

CURRENT CASE OF SLOVENIAN JUDICIARY

DECISION of the CC RS, no. Up-584/12 In the present case, the Constitutional Court assessed whether the regular courts had established a fair balance between the right to freedom of expression of a recognized satirist and the right to honor and good name of the plaintiff. The complainant, A. H., a well-known satirist and host of the satirical television show *Hri-bar*, allegedly insulted the plaintiff, the editor-in-chief of all entertainment programs on TV Slovenia, in three television shows. The editor censored the satirical show and the presenter responded by making statements in interviews with other media in which he stated about the editor that he was “turbo anus”, “homo erectus”, “a man without honor”, “without knowledge and ability”. The editor filed a claim for damages against the presenter and succeeded with it before the court of first instance. The court ruled that the presenter insulted the editor with his statements in a satirical show and in interviews. The presenter appealed against the first-instance judgment, and the High Court upheld the appeal against the illegality of very sharp, harsh and ruthless statements in the case of discussions of general or of public importance and statements constitute a critique of conduct or position and not an attack on personality. Unlawfulness, however, will not be ruled out when the statements are merely an insult to another. It is also important that the fear of punishment due to certain value judgments does not paralyze the public debate (i.e., the deterrent effect). The judgment of the Constitutional Court in question was adopted only a good month after the judgment of the ECtHR in the case of *Mladina d.d. against Slovenia*. In its judgment, the Constitutional Court refers for the first time to the case of *Mladina d.d.* and this time decides unanimously in favor of the right to freedom of expression. In the present case, the first-instance court in any case did not take into account the criteria established in the practice of the Constitutional Court and in the practice of the ECtHR. With regard to all the complainant statements, the court considered them to be objectively offensive and, already on the basis of this decision, considered that they inadmissibly infringed the right to honor and good name of the plaintiff. The Court did not take into account the context in which the statements were made, nor the style. The High Court partially corrected the judgment of the Court of First Instance by granting protection under the right to freedom of expression to statements made in the context of a satirical broadcast. With regard to the statements made in the interviews, the High Court also did not take into account all the circumstances of the case. Practically, all traditional European democracies have been condemned before the ECtHR for interpreting the restriction on freedom of expression too extensively (Teršek, 2005; 2007). Nevertheless, some countries persistently reiterate unacceptable encroachments on freedom of expression, which the ECtHR has just as persistently condemned as a violation of Article 10 of the ECHR (Council of Europe) and ruled in favor of the complainants. Therefore, the national court, whether regular or constitutional, must be careful not to infringe the ECHR, taking into account the views of the ECtHR. Judges must put themselves in the role of a European judge and ask themselves how that judge would decide.

CONCLUSION

Although social life is intertwined with many forums for public communication, the media and their simultaneous description and co-determination of social reality can be defined as that part of the public sphere that is of particular importance to society. With regard to the institutes of direct democracy and democratic self-government, where the institute of elections is central, the media are the most important means of transmitting information that raises the quality of public decision-making (enabling the so-called “informed choice”). At the same time, the media enable the formation of public opinion, as they offer a (conditionally) independent forum for public communication. In connection with the question of the legitimacy of the political management of society, the media enable the public to express their opinions and ideas and thus influence the functioning of state power. At the same time, they can develop their power to such an extent that they achieve a dominant influence on social life. The media are, in fact, the central means of exercising public control over the social environment and it seems the most important mechanism for controlling that segment of social reality which is predominantly or entirely of a political nature. The media are the main bearer of the function of determining the topics to be discussed in public discourse (i.e. the “agenda-setting function”), thus determining the framework of a legitimate public debate. Just as the media can directly influence the selection process among citizens, they can also have a positive impact on the learning process of citizens. Citizen participation in political processes, which would increase control over political elites, is one of the key goals of democratic societies. Active public participation is one of the foundations of democracy, as without public participation in political processes, democracy loses legitimacy. Therefore, the development of means of political participation is one of the key problems in theory based treatment of the public. Freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every human being, even in protests. This applies not only to information or ideas that are accepted with public approval or that are positively accepted as non-offensive or irrelevant, but also to those ideas and information that offend, shock or upset the country or any part of its population. These are the demands of pluralism, tolerance and openness of spirit, without which there is no democratic society.

REFERENCES

1. Constitutional Court decision no. Up-584/12. Accessed on 22 June 2019 on <https://www.us-rs.si/odlocba-ustavnega-sodisca-st-up-584-12-z-dne-22-5-2014/>.
2. Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms. Accessed on 31 October 2019 on http://www.varuh-rs.si/fileadmin/user_upload/word/Temeljni_dokumenti_VCP/Konvencijo_o_clovekovih_pravicah_in_temeljnih_svoboscinah.pdf
3. Delo (27. 4. 2020). V več krajih po državi shodi protivladnih protestnikov. Delo. Accessed on 30 April 2020 on <https://www.dnevnik.si/1042928066>
4. European Court of Human Rights, Case of Mladina d.d.d Ljubljana v. Slovenia, Application no. 20981/10. Accessed on 22 June 2019 on <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-142424%22%5D%7D>
5. G. C., G. K. (1. 5. 2020). Opoldne shodi, zvečer v Ljubljani kolesarilo 3500 protestnikov. RTV Slovenija. Accessed on 3 May 2020 on <https://www.rtvlo.si/slovenija/opoldne-shodi-zvecер-v-ljubljani-kolesarilo-3500-protestnikov/522420>



6. Habermas J. (1969). Javno mnenje. Kultura, Beograd.
7. Harris, D.J., O'Boyle M., Warbrick C. (1995). Law of the European Convention on Human Rights. Oxford University Press, Oxford New York.
8. Ninamedia, Current issues. Accessed on 10 July 2020 on <http://ninamedia.si/arhivi/700>.
9. I.M. (3. 7. 2020). Protesta za in proti vladi potekala mirno #foto #video. Siol net. Accessed on 4 July 2020 on <https://siol.net/novice/slovenija/pahor-sprejel-protestnike-ki-ne-predstavljajo-protestnikov-in-organizatorjev-protestov-529212>.
10. Mills, W. C. (1964). Elita vlasti. Kultura, Beograd.
11. Ridderstrale J., Nordstrom K.A. (2004). Karaoke kapitalizem. Vodenje za
12. Človeštvo. GV založba, Ljubljana.
13. Splichal S. (1992); Izgubljene utopije?: Paradoksi množičnih medijev in civilne družbe v postsocializmu. Znanstveno publicistično središče, Ljubljana
14. Tavčar, B., Š. J. Mirt Bezljaj (19. 6. 2020). Protestniki sporočajo: »Vztrajali bomo dokler bo treba«. Delo. Accessed on 21 June 2020 on <https://www.delo.si/novice/slovenija/pred-protestom-trg-republike-tokrat-v-celoti-zagrajen-322113.html>
15. Teršek, A. (2005). Svoboda javnega komuniciranja. Pravna fakulteta v Ljubljani, Zbirka Manet.
16. Teršek, A. (2006). The Human Rights Ombudsman of the Republic of Slovenia and Faculty of Law Ljubljana: *Besede so dejanja, govor jih poganja – diskriminatorni in sovražni govor, International conference organized by*, 27. september 2006, Ljubljana. Accessed on 15 May 2019 on https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Tersek_Svoboda_izrazanja.pdf
17. Teršek, A. (2007). Svoboda izražanja v sodni praksi Evropskega sodišča za človekove pravice in slovenski ustavnosodni praksi. Informacijsko dokumentacijski center Sveta Evrope pri NUK, Ljubljana.
18. Teršek, A. (2018). Svoboda izražanja, mediji in demokracija v postfaktični družbi : filozofske, teoretične in praktične refleksij. Lexpera, GV založba, Ljubljana.
19. Teršek, A. (2020). Svoboda izražanja : komentar 39. člena Ustave Republike Slovenia. Lexpera, GV založba, Ljubljana.
20. Valicon, Research Novanormalnost. Accessed on 10 July 2020 on <https://www.valicon.net/sl/novanormalnost/>