CASE STUDY

SLAPP IN SLOVENIA

PATFox

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1. INTRODUCTION

Influential individuals initiating legal action in order to silence and intimidate unwanted opposition and prevent topics of general interest from being discussed publicly is nothing new. However, we have become more keenly aware of the negative effects of such litigation on both the defendant and democracy. We can identify it earlier and more easily and have been finding ways to mitigate its fallout. This type of litigation has been termed Strategic Lawsuits Against Public Participation (SLAPP).

According to the Coalition Against SLAPPs in Europe (CASE), 41 SLAPPs were filed in **Slovenia** in 2010, putting the country in the second place in terms of SLAPPs per capita among the 31 countries for which CASE keeps the record.[1] This report presents one such lawsuit in which a political party took on a member of the civil society: **Slovenian Democratic Party (SDS) v. university professor Rudolf Rizman**.

[1] Samo Demšar, ostro.si, Slovenija med državami z največ SLAPP tožbami na prebivalca, https://www.ostro.si/si/novice/slovenija-med-drzavami-z-najvec-slapp-tozbami-na-prebivalca.

2. Slovenian Democratic Party (SDS) v. Rudolf Rizman

2.1 Facts of the Case

Mr Rizman appeared as a guest on *Odmevi*, a news programme on the **national television** (RTVSLO), on 18 February 2020, a day after endorsing, as the first in a group of 150 academics, followed by many others, an **open letter** calling for democracy in Slovenia to be protected from an authoritarian government. The letter was penned at the time when SDS was in the process of forming a government and negotiating with its potential coalition partners. Although some political parties had refused cooperation with SDS after a previous election, they were now happy to negotiate their place in the coalition.

Mr Rizman made the following contentious **observation** on the news programme: *"[...] that the government would be led by a party or its leader, that advocates authoritarian ideas, is financed by a foreign party, or a foreign regime – I'm referring to Hungary, of course – and is in a way promoting xenophobic political rhetoric in order to exclude and oppose the rule of law. [...] This is a horrifying fact. The fact a political party is being funded from abroad."*

A few days later SDS announced that it had formed a **coalition**, after which its president, Janez Janša, was sworn in as the prime minister.

The party then issued a warning to Mr Rizman requesting that he **withdraw** his statement. Since Mr Rizman refused to comply, SDS filed a lawsuit (ref. No P 17/2020) against him with the Kamnik Local Court. The **Slovenian Democratic Party (SDS)** demanded, in accordance with Article 178 of the Code of Obligations, that Mr Rizman withdraw part of his statement made in the news programme on 18 February 2020, and sought, in accordance with Article 183 of the Code, that he pays €8,000 in damages for hurting the party's reputation.

2.2 Main arguments

The defendant received the summons on 5 June 2020. As the plaintiff had previously filed a similar **lawsuit** against Marjan Šarec (former PM), the wording of the summons contained several errors (e.g. Mr Rizman was referred to as Marjan Šarec), which the plaintiff later corrected.

In his reply to the lawsuit, the defendant stressed that when a constitutional right to protect reputation is juxtaposed with the constitutional right to freedom of expression, a court must weigh up the two rights. The **court's assessment** ought to be based on the following criteria:

- The position of the defendant;

- The position of the plaintiff;

- The subject matter discussed by the defendant in the TV programme, and

- The nature of the defendant's statements.[2]

In his reply, the **defendant** stated that if the above criteria were to be taken into consideration, it would be patently clear from the onset that in a standoff between the largest political party in the country and a scholar criticising that party's actions – which in itself makes for a political debate *par excellence* and is therefore deserving of the highest level of protection under the right to freedom of expression – the scales ought to be tipped heavily in favour of freedom of expression. A position to the contrary would wrongfully interfere with the defendant's right to freedom of expression, which is protected both under Article 39 of the Slovenian Constitution and Article 10 of the European Convention on Human Rights.

[2] Cf. point 33 of Karman v. Russia (ECHR)

The defendant outlined its **position**: Mr Rizman is a full professor holding respective PhDs in sociology and political sciences and has been a lecturer on general and specialised sociology fields at the Sociology Department of the Faculty of Arts of the University of Ljubljana since 1979. He is also a visiting professor at a number of foreign universities, such as Harvard, MIT, the Woodrow Wilson Center, LSE, the Free University of Berlin, the Universities of Bologna and Sarajevo, the Charles University in Prague and the Vienna Institute for Advanced Studies, and professor emeritus at the University of Ljubljana. In addition, Mr Rizman is one of Slovenia's many intellectuals who keep a watchful eye on Slovenian politics and make themselves heard whenever they find that fundamental rights and freedoms have been threatened or even breached.

The defendant proceeded to outline the position of the plaintiff: With over 30,000 members, SDS is the largest political party in Slovenia. At the time of the litigation, SDS was the largest government party and its leader, Janez Janša, the Prime Minister (with several past terms behind him). Referring to decisions by the Constitutional Court of Slovenia and the ECHR, the defendant pointed out that the political party was inherently a **public person**.

The defendant also stressed that where the largest government party finds itself confronted by a scholar criticising it, the share of power and influence is decidedly in favour of the former, and therefore exceptional attention should be paid to protecting the defendant's right to freedom of expression as opposed to the plaintiff's reputation. Affording more weight to the freedom of expression of the defendant not only protects government critics from repercussions but also empowers both the defendant and others to publicly criticise the authorities, which is a cornerstone of any democracy and an open and free debate on socio-political issues. The absence of such bias would see the defendant, but even more so the public, get the shorter end of the stick. The right to freedom of expression is not merely the right of the defendant to share his views on the (prospective) government, but also the **right of the public** to learn about the opinions of those who do not see eye to eye with the governing political party.

The defendant also highlighted the public significance of this issue. A discussion of the way a political party is financed is no doubt a political debate and one that is very much in the public interest. It is therefore important to recall that while both the Constitutional Court and the ECHR allow for the right to freedom of expression to be curtailed, albeit only exceptionally, the present case clearly does not fall into this category. Invoking ECHR judgment in **Kasabova v. Bulgaria**, the Constitutional Court stated in case Up-366/16 that uncovering wrongful or corruptive practices, e.g. in public bodies and political parties, is without a doubt an issue of public concern.

The defendant then elaborated on the nature of his **statement**. According to the plaintiff, the defendant saying that a political party receiving foreign funding was horrifying was not a value judgment but rather a demonstration of a fact that ought to be substantiated. This is not true, however. The defendant's comment was a value judgment based on facts, in other words, a value-laden statement of facts (cf. points 69-70 of Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal) where a minimum factual basis is sufficient. The defendant, therefore, did not set out to prove in court that his statements were true since there is no evidence to substantiate this, but rather that he had a sufficient factual basis (rooted in numerous media articles on the funding of SDS) for making the value judgment on the plaintiff's practices and funding. The defendant invoked the ECHR case-law.

2.3 Summary of the proceedings

The plaintiff filed a lawsuit, a corrigendum and six preparatory submissions at first instance. The defendant filed a reply and four preparatory submissions.

The court at first instance accepted all the **arguments** put forward by the defendant, dismissing the plaintiff's claim in its entirety with a judgment of 21 May 2021. The court ordered the plaintiff to pay the defendant's court costs at first instance amounting to €2,008.80.

The plaintiff appealed, but the higher court dismissed the **appeal** on almost all counts on 13 April 2022 (only reducing the defendant's court costs at first instance to €1,860.04). The court also ordered the plaintiff to pay the costs (€410.65) incurred by the defendant before the appellate court.

Almost two years elapsed between the day the defendant was served the summons (5 June 2020) and the day the court issued a final judgment in his favour (13 April 2022). This was partly due to the **COVID-19 pandemic** but also to the requests by the plaintiff to reschedule hearings whenever the plaintiff's representative, who was serving as prime minister at the time, was not available. Although the dates of the hearings and the agenda of the plaintiff's representative had mostly been known for weeks (even months) in advance, the requests to postpone the hearings were often submitted at the last moment. A total of two hearings were held.

At the **initial hearing** on 13 November 2020, the court sought to hear both the plaintiff's representative and the defendant; however, it was unable to do so as the plaintiff's representative was absent for work according to his attorney. The court accepted the justification but warned the plaintiff's attorney that their client, who was representing the party that had brought the proceedings, was to make sure to attend the court hearings despite his work obligations or else they would jeopardise the defendant's right to a trial without undue delay.

The second hearing, scheduled for 26 March 2021, was cancelled by the plaintiff on a two days' notice due to the plaintiff representative's work obligations, despite the fact that the invitation for the hearing had been sent out several weeks before and that the work obligation (European Council summit) had been known over a month in advance. The defendant, duly invoking the relevant case-law, **criticised** the court for permitting the hearing to be rescheduled, claiming that by submitting late requests for postponement on account of his representative's unavailability the plaintiff was abusing the process right to justified absence.

A third hearing was penned in for 23 April 2021 but was rescheduled to 21 May 2021, as the plaintiff's attorney had to attend another hearing at a different court.

At a hearing on 21 May 2021, the court heard both parties and the witnesses and closed the proceedings.

The **first-instance judgmen**t was issued in writing and served on the defendant on 1 July 2021. The court at first instance accepted all the arguments put forward by the defendant, dismissing the plaintiff's claim in its entirety with a judgment of 21 May 2021. The court ordered the plaintiff to pay the defendant's court costs at first instance amounting to €2,008.80.

The plaintiff appealed the judgment, while the defendant submitted a reply. The judgment of the **Ljubljana Higher Cour**t was delivered on 13 April 2022 and served on the defendant on 3 June 2022. The higher court dismissed the plaintiff's appeal on almost all counts on 13 April 2022 (only reducing the defendant's court costs at first instance to €1,860.04). The court also ordered the plaintiff to pay the costs (€410.65) incurred by the defendant before the appellate court.

The plaintiff paid all the defendant's **court costs**.

2.4 Legal strategies

Drawing on the case-law of the Constitutional Court and above all the ECHR, and bearing in mind other court cases where the right to freedom of expression is pitted against the right to protect honour and reputation, we set out to base our reply on solid arguments, i.e. the position of the defendant, the position of the plaintiff, the subject matter discussed by the defendant in the TV programme, and the nature of his statements (value-laden statement of facts). We subsequently elaborated on the finer points of our arguments, reinforcing them through the **case-law** of the Supreme Court of Slovenia, the Constitutional Court of Slovenia and the ECHR. We made every effort to keep our submissions to a minimum as their number affects the costs of proceedings.

When producing evidence, we focused on proving that the defendant had sufficient facts at his disposal to make the **value judgment** about the plaintiff's practices that he expressed in the TV programme. We submitted 'a host of articles', to use the wording of the higher court, on the foreign funding of the plaintiff, pointing out that this practice had not only been the subject of an extensive public debate but that it was also being investigated by the Court of Audit of Slovenia and a parliamentary commission of the National Assembly.

We were not particularly worried about the **outcome** of the proceedings, since anyone who has any knowledge of the ECHR, Constitutional Court and Supreme Court case-law would have been able to conclude already at first glance that as long as the court relied on the extensive case-law covering the freedom of expression in relation to the right to honour and reputation, it would most probably not decide in the plaintiff's favour. The biggest challenge of the proceedings was their duration and the fact that although we had explained to our client that the arguments were on his side, we were unable to say for certain what the outcome would be. This uncertainty, coupled with the litigation itself and everything related to it, negatively affects the client by causing a chilling effect. The cost of legal representation is yet another burden for the client, despite the fact that they may ultimately see these costs reimbursed to them by the opposing party – if the latter has any money left once the proceedings are over. While plaintiff insolvency was not an issue in the

case at hand, and our client was duly reimbursed all the eligible costs, this is not always the case.

We believe that the following **two solutions** could help reduce the number of SLAPPs in Slovenia:

(1) The courts should summarily dismiss any proceedings that threaten public participation as manifestly unfounded;

(2) Where there are elements indicating the abusive nature of a lawsuit, security *pendente lite* should be imposed making it possible for the court to order the plaintiff to provide security for procedural costs and damages.

2.5 Extra-legal strategies

The **media coverage** of the case was extensive from the beginning of the process and there was a prevailing message among the mainstream media that this is a very important legal case not only because of the persons involved (big political party v. one of the most prominent Slovenian intellectuals) but also because of the importance of the freedom of expression as one of the essential foundations of a democratic society.

The defendant also received public moral support from Slovene PEN Centre, The Faculty of Arts (University of Ljubljana) and from Forum for Democracy and also a lot of non-public support.

It needs to be stressed that media engagement and expressions of beforementioned **public support** were not part of the strategies as it was not instigated or planned by the defendant. The media coverage and the expressions of public support were consequences of the importance of the case for freedom of political expression in Slovenia. The media interest in the case was not material to the way the case progressed in court and this is a good sign that the courts had the legal arguments in the mind and were not susceptible to other factors such as media attention.

3. Impact of case reported

The case received a lot of media attention in Slovenia. The judgments of both courts serve as a **powerful message** to the defendant, but also to other individuals and the Slovenian civil society at large, that in a democracy it is perfectly acceptable to criticise the authorities and there is no room for fear of repercussions. It is equally important that this message be heard by those already in power as well as those seeking to come to power.

In regard to the experience of the SLAPP target himself we are presenting the statement written by Mr Rizman for the purposes of this case study:

"*This trial which lasted for two years consumed (too) much of my professional and intellectual time and energy. Not least it involved and burdened my family both psychologically and financially as I had to borrow a large amount of money for paying legal expenses. On the other hand, the political party SDS who was suing me was in a much better position to cover its legal costs.*

In addition, my relative lost his job due to his close relationship with me. This repressive act was executed by his superior person, a loyal and obedient supporter of autocratic leader Janez Janša and his party SDS, either by their request or 'independently'. This kind of 'revenge' by this authoritarian leader was often practised for almost three decades, both when he was in government or in opposition.

Besides, I was several times verbally attacked publicly by fanatical supporters of a mentioned autocrat, two times when I was walking with my wife in my hometown or in the media. In the first case somebody even spitted on me and in the other case when known editor and journalist (Jože Možina) employed on public TV twitted my accusations in an interview to the same media that the autocrat's party was illegally receiving money from Orban circle should not be trusted due to my 'supposed collaboration with the secret service (Udba)' in the former authoritarian regime.

It is quite a paradox that another loyal supporter and propagandist historian (Igor Omerza) of the autocratic party and its leader in his book on dissident poet Edward Kocbek documented to the contrary that I was followed, and my home searched by the same secret

service (Udba). This was obviously connected with my role as a public intellectual and my academic contacts and studies abroad (LSE-London School of Economics and Political Science, Harvard, and Bologna University), also with my membership in the International Russell Tribunal on war crimes (Vietnam, 1966 and Afghanistan, 1979, and others) and close collaboration with dissident historian Vladimir Dedijer, who only one year after Tito's death (1981) published first critical biography on him in this country.

I should also reveal that I have had an 'uneasy' relationship with the mentioned autocrat for almost three decades(!). In 1994 he, then in the role of Slovenian defence minister, commented on the same public TV the contents of my private letter, which was sent to my two academic colleagues at Freie University in Berlin and MIT, with his loyal journalist (Vida Petrovčič), who hold my private letter during TV talk in her hands(!). In it, I criticised the autocrat for arms trafficking and autocratic politics. Most probably the only unique case of a politician in democratic (and even autocratic!) Europe, is that some high-ranking politician discussed the contents of private correspondence!

Later several world-known academics, including Noam Chomsky, protested these grave violations of my rights. This case was also mentioned in the US State Department's yearly report for 1994 on the violation of human rights in the world, at the same time then President Bill Clinton sent me a letter of his support.

Kamnik, 12 December 2022"

4. Conclusion

It is clear that the **positive outcome** of the case SDS v. Rudolf Rizman is a good indicator that the judgement in favour of the freedom of political speech is a result of the workings of the independent judicial system in Slovenia, a system that knows and respects case law of the ECHR and Constitutional Court of Slovenia. It is also clear that SLAPPs can't be effectively addressed by existing legal tools and that is why the need for new approaches and legal solutions that would help to prevent the abuse of rights enshrined in the Slovene Constitution and in the ECHR is very strong. For the victims of SLAPPs and for democracy in general the solutions can't come fast enough.

Appendices

- Judgement of the Local court Kamnik of 21 May 2021 (in the Slovene language),
- Judgement of the Ljubljana Higher Court of 13 April 2022 (in the Slovene language).