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Art and Law between Entertaining and Offending the Audience

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Equality before the law is one of the basic elements of the state governed by the rule of law. Following this principle, we all have an inalienable right to equal and non-discriminatory legal protection, including the basic rights and freedoms, which are guaranteed by the constitution. However, regardless of this basic principle of the state governed by the rule of law, contemporary legal systems grant special rights to certain social or professional groups, and the latter enjoy these rights because of a broader social interest which they supposedly pursue in their actions and activities. A classic example of this situation is, for instance, parliamentary (or deputy) immunity of members of the parliament, whose role in the political system of parliamentary democracy is to represent the "voice of the people" in the legislative part of the authorities. An early example of specially protected representatives of the people's will in representative bodies were the people's tribunes (tribuni plebis) in ancient Rome, who were considered untouchable (sacrosancti). Parliamentary immunity in today's sense, however, is related particularly to the development of this legal institution in the history of British parliamentarism, which was the site of rivalry between the Crown and the parliament. Namely, from the 14th century onwards, it was no longer a matter of course that a member of the parliament should end up in prison if he said something in the parliament that did not appeal to the current king. Nowadays, when one no longer needs to be a king to put someone in prison (one does, however, need a substantial amount of money to hire a good lawyer), the function and form of parliamentary immunity have also changed somewhat; yet, parliamentary immunity still serves its basic purpose: the people's tribune should not fear punishment, for instance, for uncompromisingly criticising the executive power, even if it later turns out that this critique was misjudged, that it was not based on solid facts, etc. Judges of the Slovenian Constitutional Court have also observed this fact when they wrote the following in their explanation of the important decision No. U-I-226/95: "The demands concerning the adducing of proof that the asserted facts are indeed true, which are difficult to meet, can not only jeopardise an open public debate but can actually paralyse and limit it. Not taking into account the difficulties entailed in the verification of facts would have the same consequences. The fear that a statement could not be authenticated not only prevents the disclosure of false facts but also entails a reluctance to disseminate the facts that are true. Because of this kind of self-imposed censorship the control over the actions of the actors of political decision making could only be bogus." In this case, the Constitutional Court considers the stylistic questions of, for example, the (in)appropriateness of the chosen words or the (lack of) sophistication of the speaker or the writer completely irrelevant: "If a debate is to be truly free, the right of the individual to express his or her own opinion must be protected as a matter of principle, regardless of whether the statement is rude or neutral, rational or emotionally charged, calm or aggressive, useful or harmful, accurate or inaccurate."

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Immunity is a form of a special, specially protected, and thus privileged status, which can be understood as an exception or a particular kind of suspension of a general and commonly valid rule, such as the principle of equality before the law (at least this is so within the system of the state governed by the rule of law). Yet, even in this case, differentiation is acceptable if the legislators have complied with certain rules, such as those mentioned in the explanation of the abovementioned decision of the Constitutional Court: "The principle of equality before the law does not forbid the legislators to manage the positions of legal subjects differently; it does, however, prevent them from doing so arbitrarily, without a rational and objective reason. This means that differentiation must serve a constitutionally acceptable purpose, that this purpose must be reasonably related to the subject of the regulation, and that the introduced differentiation must be an appropriate means of accomplishing this goal."

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Differentiation, then, is acceptable because it is precisely these special guarantees that ensure the implementation of the basic constitutional

provisions (and thus values) of a given society. In addition to the members of the parliament and the judges, whose immunity grants them special legal protection in performing their functions, some other professional groups (for instance, journalists, scientists and artists) as well as certain social groups (such as minorities, who need special protection because of their originally unequal position in the society – this is called positive discrimination) also enjoy constitutionally recognised special rights. Immunity is a legal notion, whose meaning is determined within the legal system; however, in a somewhat broader or metaphorical sense, we can also apply it in the field of art. The constitution and the penal code thus guarantee a certain (functional) immunity to the artists or rather, if we are utterly precise, to all those people who "are creative" or who "express themselves" in the field of art. The Constitution of the Republic of Slovenia (Article 59) thus guarantees the freedom of "artistic creativity", while the Penal Code of the Republic of Slovenia (Article 169) states that "whoever expresses words offensive to another in a scientific, literary or artistic work" will not be punished (however, with an important addition, "provided that the manner of expressing such words or the other circumstances of the case indicate that this expression was not meant to be derogatory").

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The legal systems of contemporary parliamentary democracies thus incorporate certain mechanisms or institutions that guarantee special protection to those individuals who are involved in certain activities that are considered particularly important from the perspective of constitutional law. These guarantees are meant to balance the collisions of rights, which can be anticipated and which are in fact frequent in these professions and activities. In court practice, there are numerous examples of collision between, say, the right to privacy, honour and reputation and the right to artistic creativity and expression. In these cases, the court must decide how far the latter can extend without excessively jeopardising the other constitutional right. As the constitutional judge Dragica Wedam Lukić says (the article was published in 2009 in the collection Pravna država), "it issues from the decisions of the Constitutional Court that the specificities of artistic creativity must be taken into account when searching for an answer to the question of how far artistic freedom (as a special instance of the right to freedom of expression) can extend or the question of where the boundary is located that separates this constitutional right from

the constitutionally protected personal rights of others, which include protection of honour and reputation". As demonstrated by some important examples of constitutional judgement in the past few years (for instance, the Pikalo case and the book Modri e, or the Smolnikar case and the book Ko se tam gori olistajo breze), court practice habitually attaches considerable weight precisely to the "specificities of artistic creativity" and it is less favourably disposed towards the absolute protection of personal rights, with which these specificities are often at odds.

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Yet, things are not as simple as it might seem. As long as artistic activities are specially protected and deemed an exception to the rule (as mentioned before in relation to Article 169 of the Penal Code), the judges are able to tip the scales in favour of the right to "creativity" and "expression", when this right collides with a certain personal right. However, more difficult to solve are the cases in which artists with their work find themselves at odds with a certain regulation that does not explicitly mention art as a possible exception to the rule. In these cases, the judges and their scales are put to a new and important test.

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It is a slightly easier task for the judge if an artist has done something in his or her work that raises suspicions that this might be a minor or even a criminal offence, yet, this act as such has not been properly sanctioned by a special law yet. This could be called a legal void or, a bit more metaphorically, wilderness, that is, that sphere of human activities that has not been – at least not entirely – regulated by positive legislation. As far as artistic activities are concerned, this area of legal wilderness resembles Hakim Bey's "temporary autonomous zone" in the early days of the Internet. With the accumulation of new regulations and the ever increasing legal standardisation of a certain social field, there is less and less room for manoeuvre left to the artist who is entering into some sort of interaction with this social field. This somewhat abstract presentation of the problem can be illustrated with the example of the original and the reconstructed performance Pupilija, papa Pupilo pa Pupilčki.

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As we know, there is a notorious scene in this show that involves the slaughtering of chicken. This was one of the reasons why in 1970 the Police Station Ljubljana Center brought charges against the mem-

bers of the (original) theatre group with the municipal misdemeanours judge. The judge moderately fined seven members of the group, while the rest of its members – who were said to "have played an inferior role in the incident", as the rule about the misdemeanour stated – were acquitted. It is important to note, however, that the judge pronounced the sentence only in relation to that part of the charge that concerned violation of Article 8 of the then valid law on misdemeanours against public order and peace, because the group gave no previous notice about the theatrical event to the appropriate body. The judge dismissed all other elements of the police charge – including the accusations that "their shows were a brutal insult to the public morals" and that "they tortured animals" (in both cases, the police quoted the law on misdemeanours against public order and peace) – and explained that "the actions of the accused show no signs of misdemeanour".

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Since, at the time, there was no law equivalent to the current Animal Protection Act and the then valid law on misdemeanours against public order and peace named no such misdemeanours, the judge deemed that the disputed acts showed no signs of misdemeanour. The judge thus acted in accordance with the principle of legality, which means that someone can be punished only if there exists a corresponding legal rule. Whatever one's opinion about the courts during the period of Yugoslavian socialism may be, we could not argue that, in the just mentioned case of "Pupilčki" and the alleged misdemeanour, the judge did not act in accordance with the law.

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The Universal Declaration of Animal Rights was solemnly proclaimed – in 1978 in Paris at the meeting of the International Society for Animal Rights – after the performance Pupilija, papa Pupilo pa Pupilčki. In the 1970s, a number of other conventions were adopted, which concern humane treatment of animals and preservation of their natural habitats. In Slovenia, the Animal Protection Act was adopted on the eve of the new millennium – on 18 November 1999. The difficulty facing contemporary "Pupilčki" group, who set about reconstructing the original show, was the fact that what lay between their attempt at putting on the show in 2006 and the original "Pupilčki", who staged theirs in 1969, were the Animal Protection Act, several regulations and a whole series of international conventions that have been ratified by the Republic of Slovenia as well. Since legal rules determine precisely when an animal may be put to death, by whom, how, where, for what purpose, etc. and since the legislators have not explicitly allowed the slaughtering or execution of animals for artistic purposes, it is very likely that the court, in case a report were made, would recognise this act as animal torture and penalise the performers and the producer with a draconian fine.

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As this case demonstrates, art shares the fate of other social activities whose destinies and (admissible) scope are determined and shaped by the legislation. Yet, the setting of the boundaries of acceptability should not be left to the discretion of the judges or, even less so, the lawyers. The state governed by the rule of law is meant to be the opposite of the police state; yet, the excessive power of the judicial part of the authorities can also make life completely unbearable. The story of the alleged neutrality of the state governed by the rule of law as regards politics and social values is the unattainable myth of liberal political theory. Dragica Wedam Lukić has pointed this out (in the abovementioned article): "We must consider the fact that constitutional judges are also only human, and their value judgements are sometimes more conservative and sometimes more liberal. And it is precisely in relation to the dilemmas concerning fundamental values that the question of the judges' self-restraint versus activism resurfaces time and again: to what extent should the judges pay heed to commonly held values and to what extent should they use their decisions to enforce new values?" We must locate the Pupilija case in the broader context of the legal systems of contemporary parliamentary democracies, in which many legal provisions concerning animal protection are, to put it mildly, imbued with hypocrisy and double standards. Despite the fact that these laws prohibit the slaughtering or execution of animals for artistic purposes, they still allow supervised execution of animals in traditional fighting events (such as bullfighting), in hunting, for religious purposes (the so-called ritual slaughter), for the purposes of natural science museums, in experiments and for the purposes of scientific research, for educational purposes, etc.

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In Slovenian legislation and in the European Union law, experiments involving animals and the use of animals for the purposes of scientific research are dealt with and standardised in great detail. The key guiding principle in this area is "the goal justifies the means", for Article 21 of the Slovenian Animal Protection Act allows the use of animals

(in this case, vertebrates) for the purposes of scientific research "if it is expected that the suffering of animals would be ethically acceptable compared to the anticipated result" and "if it is expected that the results would be of exceptional importance to people or animals or the solution of scientific problems". On the other hand, the Act completely ignores artistic practice and makes no exceptions in this regard, for it automatically considers any kind of execution of animals on stage a violation of the law. The problem here is probably the fact that the legislators understand artistic practice as an activity that is meant to provide to its consumers, first and foremost, entertainment and distraction. If we only consider the dominant forms of popular entertainment industry worldwide, it may be true that art is often precisely such an activity; however, this is not a good enough reason to lump all kinds of art together, including those productions that strive to create precisely the opposite effect. We can mention the Croatian Animal Protection Act as a telling example of a law that claims that all shows, in which animals appear together with other (human) actors, are necessarily intended to entertain the audience. Hermann Nitsch's shows and performances with their ritual animal sacrifice; Günter Brus's anxious performances, in which he mutilated and tortured his own body; the slaughtering of chicken in the engaged show Pupilija, papa Pupilo pa Pupilčki; the slaughtering of a rooster in Vlasta Delimar's socially critical performance; the slaughtering of a calf in Franc Purg's tormenting performance; and the list continues – is it really possible to claim that these events are primarily intended to "entertain the audience"? Are these performative events not meant to stir the viewers' critical thinking rather than provide entertainment? The point of these events is not to entertain but rather – to paraphrase the title of Handke's famous dramatic text – to "offend the audience". A viewer lulled by inane entertainment is probably not worth the life of any "serially fattened" chicken sacrificed on the theatre stage, but the audience that feels "slapped in the face" after seeing such a show and that leaves the theatre thinking that there is something wrong with the things that seem self-evident – such an audience is a matter of a broader social interest and this is why it is worth thinking through the limits of the right of the artist to probe social norms, which are crystallised in legal norms and the legal practice of a given society.