

# The Constitutional Court of Hungary on the Borderlines of Blasphemy

## A Note on Two Recent Cases

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### Abstract

*Blasphemy used to be a criminal offence in traditional legal systems. Although offending the transcendent is not criminalized in most Western legal systems, free speech must respect the dignity of others. Religious conviction constitutes an inherent part of dignity. The protection against hate speech offending the dignity of members i.e. of religious communities may include criminal sanctions in extreme cases. The new Civil Code of Hungary (2013) enables the bringing of a civil lawsuit for hate speech. After years of litigation the first two cases where litigants claimed their dignity violated by offensive images have reached the Constitutional Court. The Constitutional Court guaranteed protection of religious identity on the one hand, on the other hand, it upheld the freedom of political speech even when using a religious symbol. Degrading religion offends all members of the religious community, criticism of the religiosity of public actors, however, is protected by the freedom of speech.*

**Keywords:** blasphemy, freedom of speech, protection of dignity, protection of religion, Hungary.

### 1. The Prohibition of Blasphemy

Once upon a time even swearwords were more elaborate. When it comes to abusive language people related differently to blasphemy and to the uncouth or sometimes obscene speech targeted at God, the saints, and all things holy. Traditional legal systems used to criminalize blasphemy and, even if they did not always exercise the right of punishment, it was considered a capital offence, one of the most serious of crimes. The law was rooted in the Bible, as the Ten Commandments clearly state: “Thou shalt not take the name of the Lord thy God in vain; for the Lord will not hold him guiltless that taketh his name in vain.” (Exodus 20:7)

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Prior to the communist takeover (1948) blasphemy was a criminal offence in Hungary. As the first Criminal Code (Act V of 1878, the so-called *Csemegi Code*) stated in its Section 190:

“Any person who, in the manner specified in Section 171, causes a public scandal by way of abusive words aimed at God or who forcefully prevents or disturbs a religious ceremony acknowledged by the State shall be considered to have committed a misdemeanor and will be punished by imprisonment for up to one year and the imposition of a fine up to one thousand forints. Attempts thereat are also punishable.”

Although causing a public scandal is a provable fact, *i.e.* blasphemy in itself was not a crime, the object of the protection in the Criminal Code was, in line with the traditional approach to blasphemy, supernatural: God Himself. The title of the chapter also indicates that the legislator wishes to protect not only the freedom to practice religion, but also the religion itself (“Crimes and misdemeanors against religion and the free practice thereof”).

Blasphemy was not reinserted into the Hungarian Criminal Code following the collapse of the communist regime and it has been decriminalized in most Western legal systems, *e.g.* in 2008 in the United Kingdom, in 2017 in Denmark, in 2019 in Greece, *etc.* Decriminalization of blasphemy has made the carefully balanced jurisprudence of the ECtHR on margin of appreciation concerning offensive expression somewhat obsolete.<sup>1</sup>

## 2. The Protection of Religious Sensitivity and Sacred Objects

### 2.1. Criminal Law and Religious Conviction

Most contemporary legal systems do not offer God any protection. However, they do protect human dignity, which, for someone who believes in God, is inseparable from faith.<sup>2</sup> *Profanity and blasphemy are forms of verbal abuse* against believers and as regards its effects, it is considered similar to the desecration of an object with spiritual reverence. The question is whether the freedom of religion and the protection of the dignity/religious feelings of others can be a legal basis to restrict the freedom of others to voice their opinions, and what tools the State has at its disposal for promoting peace in society. The 2015 terrorist attack on the headquarters of the satirical weekly *Charlie Hebdo* in Paris has shown that

1 András Koltay, ‘Az Emberi Jogok Európai Bírósága és a blaszfémia mint a szólásszabadság korlátja’, *Iustum Aequum Salutare*, Vol. 13, Issue 1, 2017, pp. 175-189.

2 Bernát Török, ‘Can Religions or Religious People be Protected against Blasphemy?’, in András Koltay (ed.), *Media Freedom Regulation in the New Media World*, CompLex Wolters Kluwer, Budapest, 2014, pp. 509-531.

finding the right balance between the protection of competing rights is an ongoing challenge.<sup>3</sup>

Today, criminal law approaches the problem not from the aspect of God, but from the personal side: by criminalizing any conduct that hinders the freedom of practicing religion through violence or threats (Section 215 of Act C of 2012), it protects not religion, but the freedom of worship; by making hate speech illegal, it protects human dignity. The law on misdemeanors also protects the objects of religious devotion and those used for religious rites, and criminalizes any public scandals caused in places for worship (Section 188 of Act II of 2012). Contemporary legislation treats the issue not through the concept of blasphemy, but rather the protection of religious feelings and sensitivities: the object of protection is not the transcendent, but a particularly sensitive part of human dignity. Although the freedom of expression occupies a prominent place amongst fundamental rights, it may be justified to impose certain restrictions to ensure the protection of human dignity. In this case, it is not freedom of religion, but human dignity that is concurring with the freedom of speech (abuse and contempt in themselves do not restrict the freedom of the persons involved to practice their religion). Human dignity is seriously violated if religious beliefs are subjected to verbal or pictorial aggression. Dignity is also violated if the aggression is aimed not at the person, but at the person's religion or an object that the person holds sacred.

## 2.2. Civil Law and Religious Conviction

In Hungary, the effective law aims at the protection of the religious feelings of citizens, to safeguard their dignity. Considering that the criminal persecution of hate speech crimes has proven to be ineffective and recognizing that criminal sanctions should be reserved to the most outrageous cases,<sup>4</sup> the new Civil Code of Hungary (Act V of 2013) opened the possibility of bringing a civil lawsuit for violations of dignity:

“Any member of the community may enforce his personality rights within a thirty-day term of preclusion from the occurrence of a legal injury that was committed with great publicity in relation to some essential trait of his personality, his belonging to the Hungarian nation or some national, ethnic, racial or religious community, and is grossly offensive to the community or unduly insulting in its manner of expression. With the exception of relinquishing the material gain obtained through the violation of rights, any member of the community may enforce any sanctions of the violation of personality rights.”<sup>5</sup>

3 Jeroen Temperman & András Koltay (eds.), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge University Press, Cambridge, 2017.

4 Following Decision No. 30/1992. (V. 26.) AB, the Constitutional Court adopted a liberal approach to the freedom of speech limiting the possibility of criminal sanctions for hate speech to the most excessive cases.

5 Section 2:54(5) of the Civil Code.

Civil litigation is possible if someone (a member of a certain group) is seriously offended. Although freedom of expression occupies a prominent place amongst fundamental rights, it may be justified to impose certain restrictions for the protection of human dignity. In this case, it is not freedom of religion, but *human dignity that is competing with the freedom of speech*. Freedom of religion is in fact not curtailed by being offended, but human dignity suffers a serious violation if religious beliefs of an individual are subjected to verbal or pictorial aggression. The same holds true when aggression is not aimed at the person, but at the person's religion or an object that the person holds sacred.

It must be noted that the Fundamental Law itself in its section guaranteeing free speech provides for the protection of dignity *against* free speech on a constitutional level (through criminal law or civil law provisions):

“The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act.”<sup>6</sup>

### 3. Recent Decisions of the Constitutional Court of Hungary on Offending Religion Sentiment

Early 2021 the Constitutional Court decided two remarkable cases. The cases had in common that litigants saw their dignity violated by offensive images and filing a civil lawsuit relying on the above mentioned new instrument of the Civil Code. In both cases, the petitioners were Catholic individuals who started litigating before the lower courts and continued litigation until the third instance. Since they did not receive remedy at the Curia of Hungary, they filed constitutional complaints.

#### 3.1. Provoking Performance

The reason for one of the lawsuits was a performance held in front of the embassy of Poland in Budapest. An activist dressed as a Catholic bishop distributed abortion pills as the communion.<sup>7</sup> The petitioners claimed to be offended by the performance mocking the most holy sacrament of their belief. The demonstrators protested against the tightening of the Polish abortion law and its support by the Catholic Church. During the demonstration the performance imitated the Eucharist that was placed by an activist on the tongue of the other two participants, uttering the words “Body of Christ”. The white pill was held in a bag labelled ‘abortion pill’. The performance was later published on the internet for the general public to view. In their action, the plaintiffs asked the

6 Article IX(5) of the Fundamental Law of Hungary.

7 Decision No. 7/2021. (II. 19.) AB, Reasoning [34]. Images from the performance can be seen at <https://images.app.goo.gl/yiv6yqfDRwuBPsY69>.

court to declare that through their actions, the defendants violated their human dignity and their right to practice their religion freely, owing to the plaintiffs affiliation with the Catholic religious community, which is an essential feature of their personality. The Budapest-Capital Regional Court acting on first instance dismissed the action, the second instance regional court quashed the first instance judgment. Finally, the Curia of Hungary, in its judgment closing the review proceedings, upheld the judgment of first instance and quashed the regional courts' decision. The plaintiffs then turned to the Constitutional Court. In their petition, they asked that it annul and declare the judgment of the Curia of Hungary contrary to the Fundamental Law, as they considered the first instance court's and the Curia of Hungary's judgments to be contrary to the provisions of the Fundamental Law stating that the exercise of the freedom of expression should not be aimed at offending the dignity of others or a religious community. The Constitutional Court found that the judgments delivered by the Curia of Hungary and the Budapest-Capital Regional Court in the subject-matter of offending the Catholic community were in conflict with the Fundamental Law and, therefore, annulled them.

In its decision, the Constitutional Court found that the challenged judgments acknowledged that the petitioners had been offended as a religious community. At the same time, they accepted the offensive communication as constitutionally protected speech, without examining the content of the opinion of the specific conduct actually complained of or its contribution to the discussion of public affairs. Consequently, the courts hearing the case could not have examined with due diligence whether or not the communication at issue was intended to offend the community concerned. With respect to the offensive communication, the courts stated that members of the religious community were offended by the provocation but had to tolerate this like public figures have to tolerate critique. The Curia of Hungary stated that the dignity of the petitioners' religious community was in fact undermined by the demonstrators' exercise of freedom of expression, but the members of the religious community have to endure this as a consequence of the public statements of the Church on abortion. The Constitutional Court found in its unanimous decision that the challenged court decisions were in conflict with the Fundamental Law and therefore annulled them. This opens up the possibility for a new court procedure that is to find a new balance between competing rights. Offending a community would not raise a constitutional issue but *offending the dignity of (the members of) a community can set limits to free speech*.<sup>8</sup>

### 3.2. Political Caricature – or Ridiculing the Nativity Scene?

The Constitutional Court also ruled on the case of the HVG weekly's cover page from Christmas 2014 that depicted a redesigned version of the painting 'Adoration of the Shepherds' by Gerard Von Honthorst.<sup>9</sup> The faces of the original characters were replaced by the faces of leading politicians, and the image of the

8 Id. in particular, Reasoning [29].

9 The original of the painting (1622) can be seen in the Wallraf Richartz Museum in Cologne.

infant Jesus was replaced by a pile of gold coins.<sup>10</sup> The petitioner claimed that the picture offended the Catholic community. After having lost at all court instances she filed a constitutional complaint arguing that her human dignity and freedom of religion were violated. She claimed that her fundamental right to have the symbols and liturgy of her religion respected, and to practice her religion in an undisturbed manner in the community space was violated because the Curia of Hungary and the proceeding courts have accepted without criticism the defendant's argument that the communication complained of was aimed at criticizing the politicians concerned and had no anti-religious purpose. The petitioner therefore turned to the Constitutional Court seeking that it declares the Curia of Hungary's judgment in conflict with the Fundamental Law. Although the figures pictured in the caricature are not portrayed in a degrading way, the cover page can still offend Christians. Yet this provocation remains limited. It can be noted that this type of caricature is only comes through as long as the Christian symbolism is understood.

According to the decision of the Constitutional Court, the courts acting in the main proceedings recognized correctly that the pivotal issue to be assessed was the purpose of the communication, as a question of primary importance. Examining the front page in question, the Curia of Hungary stated, on the one hand, that it was not aimed at offending Christians, and it did not convey a negative value judgment about believers. Figures in the picture were not displayed in a degrading manner. The Constitutional Court identified the specific political opinion conveyed by the authors. The *form of expression of this political opinion was not found to be arbitrary or unjustified* in relation to the content of the opinion.<sup>11</sup> The Christian symbolism in this case was a carrying agent of the message but the target was the attitude of the political elite. The Constitutional Court rejected the constitutional complaint with nine votes to five. Justices authoring dissenting opinions argued that the image amounted to an infringement of the dignity of believers, neglecting the commitment of the Fundamental Law to the Christian legacy.

Representatives of religious communities (e.g. bishops) when entering the public discourse have to bear criticism like all other parties to public debates. The central difference between the two cases is not that in one case politicians were targeted, whereas in the other it was (Polish) bishops. The central difference is much rather that mocking the Eucharist is much more offensive than the non-degrading portrayal of the figures of the nativity scene. Mocking the Eucharist offends also fellow believers, whereas the cover page primarily targeted politicians. The basic message of the cases is that freedom of expression deserves protection as long as it does not jeopardize the human dignity of others. A dignity

10 Decision No. 6/2021. (II. 19.) AB, Reasoning [26]. The controversial image can be found at <https://images.app.goo.gl/zHr7utGJMvLa67UR7>.

11 The case summaries in English (also used in the present note) are available at <https://hunconcourt.hu/kozlemany/the-expression-of-opinion-is-free-the-dividing-line-is-the-protection-of-human-dignity>.

of the community and the dignity of members of the community seem to be interlinked.

According to Article R(4) of the Fundamental Law of Hungary “[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.” The Fundamental Law does not commit the Hungarian State to Christian religion or even to Christian culture in general and provides for the freedom of religion and belief in respect of all faiths. This way the state is neutral with regard to religion, but it expressly orders the protection of the culture of Hungary as a Christian culture. The aim of the constitutional legislator was undoubtedly to afford the identity of the nation a stronger emphasis and protection. Furthermore, the Fundamental Law’s preamble refers to the ‘Christian heritage’ of the nation. Religions (the dignity of people of various faiths) deserve equal protection, in does not make a difference if the target of provocation belongs to a religious minority or a mainstream religion. The cultural tradition of the country enjoys constitutional protection, but paradoxically it is this cultural background that makes it possible that the public is able to understand the message of a provocation.

#### 4. Conclusion

The protection of the dignity of members of a faith community can be a legitimate reason to set limitations to free speech. Critical expression can also have or target religious content, in particular when discussing public affairs. On the one hand, the target of criticism must be scrutinized. If religion itself is the target, critical expression may also hit those who have not been party to the public discourse and beyond a certain limit the members of a faith community do not have to tolerate provocations. Offending them cannot be considered a legitimate collateral damage of public debate. On the other hand, public figures (including representatives of religious communities) have to bear criticism, even if criticism relates to their religious conviction.