Offence Intended - Virgin Mary With a Rainbow Halo as Freedom of Expression

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14.05.2019 doi: 10.17176/20190517-143914-0

The news that a 51-year-old activist, Ms Elżbieta Podleśna, was detained and interrogated by Polish authorities shocked the public in Poland. She was interrogated for five hours, had her car and home searched, and was charged with offending religious feelings. Police are said to have seized her laptop, mobile phone, and memory cards during the search and reportedly asked for CCTV camera footage from her building. The incriminating pieces of evidence would be posters and badges bearing the image of the Virgin Mary with her halo painted in the colours of the rainbow flag which appeared in the streets in the city of Płock. It is worth noting that the posters were, according to other activists, a response to a provocative Easter decoration in the church of St. Dominic in Płock. The decoration of the tomb of Jesus in this church contained cardboard blocks, each of them naming one sin, including "LGBT" and "Gender". This latest example of Polish authorities prosecuting cases of religious insults illustrates the incompatibility of Poland's "blasphemy law" with European human rights guarantees, in particular the freedom of expression.

According to Art. 196 of the Polish penal code, offending the religious feelings of others is a crime and carries a maximum prison sentence of two years. Over the years, this article has been regularly used to punish artists who refer to religious symbols in their art. One of such cases reached the Polish Constitutional Court in 2015 (case file SK 54/13), and the Court determined that Art. 196 of the penal code is in line with the Constitution, particularly with the freedom of expression guarantees.

Maintaining Art. 196 (commonly known as "blasphemy law") in the Polish penal code remains problematic in the light of international and European human rights law, because of the discriminatory impact that it has on the freedom of expression rights of atheists, believers of minority religions or beliefs, and dissenters within religion or beliefs. A number of soft law guidelines were issued by the OSCE, PACE and the Venice Commission recommending to abolish blasphemy laws and to permit an open debate on matters relating to religion and religious beliefs. Some Council of Europe Member States – Denmark, the United Kingdom, Iceland, Norway, and Malta – have repealed the criminal prohibitions on blasphemy based on those recommendations. Poland is not willing to follow that path; on the contrary, in recent months, a number of cases have been opened against journalists, publishers and artists based on the law.

The case of Virgin Mary with a rainbow halo is also at odds with the European Court of Human Rights case law. Although traditionally in cases of blasphemy, particularly in the art sphere (the "big three" cases: *Müller v. Switzerland*, *Otto Preminger-Institut v. Austria*, and *Wingrove v. United Kingdom*), the Court was giving a wider margin of appreciation to national authorities, this approach seems to evolve and reverse, when the use of a religious symbol is "used" in the context of protest or public debate.

The Polish prosecution authorities, however, seem to ignore a number of recent ECtHR standards, when they decided to open the Virgin Mary with a rainbow halo case and criminally charge a number of activists. The ECtHR has repeatedly asserted that speech that "offends, shocks or disturbs" is protected. As judges Ganna Yudkivska, Iulia Motoc and Péter Paczolay have noted in one of their dissenting opinions "[i]n a fast-moving world, it is not surprising that those who wish to highlight a particular cause or voice an opinion would have recourse to those symbolic acts and demonstrations which are likely to gather a greater

degree of attention and trigger a wider debate than might have been achievable with more conventional and established forms of protest" (*Sinkova v. Ukraine*). The *Alekhina and others v. Russia* and *Mătăsaru v. Moldova*cases opened the door for symbolic speech protection under the Convention. The first case concerned the conviction for religious hatred and enmity of members of the Pussy Riot group. The members of the band performed the song "Punk Prayer – Virgin Mary, Drive Putin Away" from the altar of Moscow's Christ the Saviour Cathedral in protest against the political situation in Russia and comments that had been made by the Russian Orthodox Church following widespread protests over the presidential elections in December 2011. In the second case the applicant was convicted for an "obscene" demonstration, involving one person with two statues (of a penis and vulva) representing alternately politicians and prosecutors. Based on the conclusions of the above mentioned cases, it can be assumed that the same principles apply to speech that uses religious symbols in an unconventional manner, in order to express criticism towards state policies and the interference of the Church with the state. Those two cases paved the way for the recognition of protected symbolic speech by the ECtHR, similar to the protection granted to such speech by the US Supreme Court.

Moreover, back in 1996, the Commission (predecessor of the Court), already had a chance to adjudicate on the "use" of the Częstochowa Virgin Mary image in the inadmissibility decision regarding *Skup and Dubowska v. Poland*. One of the Polish weeklies used the holy image on its front page, with the face of the Virgin Mary partly covered by a gas-mask. The art related to an article on air pollution in the region of Częstochowa. The applicants in the case were trying to initiate, to no avail, criminal proceedings against the publisher based on the religious insult law. The Commission recalled that members of a religious community must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. The right to freedom of belief (guaranteed in Art. 9 of the European Convention of Human Rights) does not necessarily and in all circumstances imply a right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals. The Commission agreed with the Polish authorities, which refused to open the investigation, giving priority to the freedom of expression.

The ECtHR constantly recalls that criminal sanctions should only be used as a measure of last resort, considering the principles of necessity and proportionality. Moreover, the availability of numerous non-coercive measures outside of criminal law should be considered, in particular as less restrictive means may indeed be more effective in countering intolerance and discrimination. The UN Special Rapporteur on freedom of religion endorsed the ECtHR approach in the Rabat Plan of Action, stating that violence and discrimination, as well as the advocacy of hatred constituting incitement to these acts, is best prevented through open dialogue rather than through censorship.

The use of the religious symbol in this case was an element of a public debate on LGBT rights. Freedom of speech in public interest and within the public debate framework has been protected by the ECtHR. In recent months, sexual minorities rights in Poland have been under constant attacks by the parliamentarian majority and the ruling party. The posters constituted a response in a heated political debate.

It seems that the ECtHR draws a line to religious criticism in the case of *Norwood v. UK*. The Court refused to give protection to an expression urging all those who might read the message that followers of the Islamic religion should be removed from Britain and warning that their presence in the UK was a threat or a danger to the British people. As explained by the Polish activists, the posters of Virgin Mary were not triggered by religious hatred, but constituted a reply to a provocative activity of the local priest. The posters did not contain any slogans or insults, but were simply a reproduction of the Holy picture, with a rainbow halo added to it. The action of the activists should be also viewed in a larger perspective, where LGBT minorities have under continuous political attack for months by the governing majority, accompanied by the clergy. In

that sense, the modification of the painting, constituted a "voice" in a public debate.

If the Polish authorities (politicians and prosecution) were to take into consideration those ECtHR standards another grave violation of human rights could be avoided. Moreover, the detention and interrogation of Ms Podleśna fuelled further demonstrations and clashes among protesters. This illustrates that such controversial actions by the authorities escalate the divisions in the Polish society. Though intolerance on the grounds of religion or belief is a challenge to any democratic society, especially a pluralistic one, it does not follow that it is necessary to resort to restrictions on all intolerant speech in order to promote tolerance. Creating space for an inclusive dialogue seems to be the most effective way to counter hatred, including on the basis of religion or belief, which may be expressed through religious insult.

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SUGGESTED CITATION

Bychawska-Siniarska, Dominika: Offence Intended – Virgin Mary With a Rainbow Halo as Freedom of Expression, Verfassungsblog, 14.05.2019, doi: 10.17176/20190517-143914-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20190517-143914-0.