

JUDGMENT NO. 440 YEAR 1995

The Court heard a referral order reopening the issue of the constitutionality of the crime of blasphemy found in Article 724 of the Criminal Code. The Court first held that the secularity of the contemporary Italian State did not result in making the crime of blasphemy void for vagueness, and that sufficient clarity existed to conclude without doubt that the use of the expression “religion of the State” continued to indicate the Catholic religion. The Court reviewed its past reconsiderations of the crime of blasphemy in light of new constitutional principles of the secularity of the State, and the freedom and equality of citizens, which had gradually come to interpret the provision to offer a protection against invectives and offensive language that extended to believers in all religious faiths, and had called upon the legislator to update the language concerning the religion of the State. Reviewing the crime again seven years after the last decision had called for a legislative review, the Court concluded that the preeminence of the equality principle demanded a declaration of unconstitutionality for those parts of the provision that effectively violated the principle. The Court then divided the blasphemy provision into two parts: the first outlawing invectives and offensive language against a generic Divinity, not ascribed to any particular religion, the contents of which could be filled in by the religion of any believer, and the second outlawing invectives and offensive language against the Symbols and Persons venerated in the religion of the State. The Court struck down only the latter part of the provision, limiting its declaration to the words “Symbols, or Persons venerated in the religion of the State.”

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 724 of the Criminal Code initiated by the Tribunal of Milan with a referral order of 14 November 1991 in the criminal case of Onesti Fabio, registered as no. 457 of the Register of Referral Orders 1995 and published in the Official Journal of the Republic no. 36, first special series of 1995;

Having heard from Judge rapporteur Gustavo Zagrebelsky at the public hearing of 3 October 1995.

[omitted]

Conclusions on points of law

1. – The referral order from the Tribunal of Milan reopens the issue of the constitutionality of the crime of blasphemy found in the first paragraph of Article 724 of the Criminal Code, on the dual grounds that it violates the principle of legal certainty of crimes (Article 25, second paragraph, of the Constitution) and that it violates the principle of equality of religions (Articles 3 and 8, first paragraph, of the Constitution).

2.1. - Article 724, first paragraph, of the Criminal Code makes it a crime to [...] “blaspheme in public, with invectives or offensive language, against the Divinity, Symbols, or Persons venerated in the Religion of the State.” The first framing of the issue focuses on the consequences that – in the opinion of the referring Tribunal – derive from the elimination of the notion of “religion of the State.” This notion was formulated in Article 1 of the Albertine Statute and reiterated in Article 1 of the 1929 Lateran Treaty between Italy and the Holy See, and is widely used in the current Criminal Code, but is incompatible with the fundamental constitutional principle of secularity of the State (Judgment no. 203 of 1989 and 149 of 1995). The additional Protocol added to the modification agreement to the Lateran Treaty, enacted as part of Italian law with the passage of Law no. 121 of 25 March 1985, noted (at point 1) that it had become obsolete: “The principle that the Catholic religion is the only religion of the Italian State, originally stated by the Lateran Pacts, is considered to no longer have any effect.”

According to the referring Tribunal, this expiration gives rise to legal uncertainty concerning the crime described by Article 724, first paragraph, of the Criminal Code, therefore violating Article 25, second paragraph, of the Constitution, in that the religion that is the object of the invectives or offensive language that make up the substantive element of the crime of blasphemy can no longer be identified, making the provision void for vagueness.

The question, framed in this way, has already been reviewed and rejected by this Court in Judgment no. 925 of 1988.

The formula in Article 724, first paragraph, of the Criminal Code, after the elimination from the legal order of the notion of “religion of the State,” does not provide for any generic notion, and therefore does not support a challenge based on vagueness. What is created is merely the choice between two possibilities, both of them specific: either to hold that the elimination of the notion of “religion of the State” also diminished the crime under Article 724, first paragraph, of the Criminal Code, depriving it of any legal import, or else to hold that said expression is simply the linguistic means of indicating the Catholic religion, today as in times past. This is an interpretive choice that depends on the position one takes toward the motive underlying the will of the legislature that is expressed in Article 724 (the Catholic religion inasmuch as it is the religion of the State, or the religion of the State inasmuch as it is the Catholic religion). Criminal case law has at times followed the first and at times the second of these approaches, and ultimately the latter has prevailed with the endorsement of this Court, which has stated that the “undeniable depletion of the original meaning of the expression ‘religion of the State’ does not rule out that, in the context of Article 724 of the Criminal Code, it may have acquired one that is different, but still sufficiently clear

..: that is, that it means ‘Catholic religion,’ inasmuch as it is already the religion of the State” (Judgment no. 925 of 1988 and Order no. 52 of 1989).

2.2. – Having thus reaffirmed the constitutionality of the criminalization of blasphemy as far as the expression “religion of the State” is concerned – a formula to be understood, within the limits described below, and with no room for doubt or variation, as the Catholic religion, we now consider the question of the constitutionality of Article 724, first paragraph, of the Criminal Code with regard to the other constitutional parameters invoked.

3.1. – An analysis of the constitutionality of the crime of blasphemy found at Article 724, first paragraph, of the Criminal Code, with reference to the principle of the non-discriminatory equality of religion (Article 3 of the Constitution) and the principle of the equal freedom of all religious denominations before the law (Article 8, first paragraph, of the Constitution) calls for a reconstruction of the legal interest protected by the provision at issue, starting with the original idea behind the 1930 criminal legislation.

The first element of this reconstruction is found in the reference to the religion of the State/the Catholic religion. The reference is made generally in the descriptions of crimes pertaining to religion (Articles 402-404: disrespect of various kinds, and 724: blasphemy) and is explained by the fact that, according to the political views of the time, collective, Catholic, religious sentiment was considered to be an element of the nation’s moral unity. The State, as the expression and guarantor of said unity, understandably had “its” religion as well as an interest in fostering and defending it. The second element – which must be taken together with the first, and does not eliminate it – is represented by the configuration of the crime of blasphemy together with offensive manifestations toward the dead and by its placement under the wide-ranging “title” of “violations concerning la regulation of public morality,” a placement that justifies taking the most reductive definition of the crime of blasphemy (like for gambling, acts against public decency, profanity, etc.) as an act of public immorality.

3.2. - Following the adoption of the new constitutional principles of the freedom and equality of citizens and the secularity of the State, the crime of blasphemy has been subject to reconsideration, the fundamental points of which are found in various pronouncements of this Court. Judgment no. 79 of 1958 effected the first shift in the legal interest to be protected. In its interpretation, the Catholic religion was no longer the religion of the State as a political organization, but rather that of the State as society: it held that the special protection afforded to the “religion of the State” was justified by “the relevance the Catholic religion has had and continues to have for the ancient and uninterrupted tradition of the Italian people, nearly the entirety of which consistently subscribes to it. .. The law at Article 724 of the Criminal Code, like others found in the same Code .., refers to the ‘religion of the State’ giving importance not to a formal qualification of the Catholic religion, but rather to the circumstance that, in the Italian State, it is professed by nearly the entirety of its citizens and, as such, is deserving of special criminal protection, due to the extent and intensity of the social reactions naturally aroused by offences directed at it.”

Later, with Judgment no. 14 of 1973, the case law of this Court went further, and held that the object of legal protection was no longer Catholicism as the religion of “nearly the entirety” of Italians, but rather “religious sentiment,” a basic element of religious freedom, which the Constitution recognizes as common to all people. Thus, by reference to the concept of religious sentiment, the Court opened a perspective that impacts the position of the government toward all religions and their respective adherents, and, therefore, extends beyond the Catholic religion alone. Nevertheless, in that judgment the Court retained the legislative provision’s express limitation to offences exclusively against the Catholic religion, once again on the grounds of “the extent of social reactions .. of the majority of the Italian population.” However, the Court noted that, “for complete fulfillment of the constitutional principle of religious freedom, the legislator should revise the provision, for purposes of extending the criminal protection against violations of religious sentiment to individuals who adhere to faiths other than Catholicism.”

Finally, Judgment no. 925 of 1988, which represents the point of departure for the review of the question now brought once again before the Constitutional Court, declared constitutional challenges to the applicable blasphemy law to be unfounded, but on the basis of different principles, setting aside the numerical majority argument, which had theretofore supplied its reason for denying that the provision violated the equality principle: “limiting the legislative provisions to offences against the Catholic religion’ can no longer be justified by the adherence of “nearly the entirety” of Italian citizens to Catholicism .. nor by the need to protect the religious sentiment of the ‘majority of the Italian population’ .. : this is not so much for statistical reasons (in any case Catholicism remains the most popular religion in Italy), but rather legal ones. The fact that point 1 of the Protocol of 1984 moves past any distinction between the Catholic religion, ‘only religion of the State,’ and other ‘permitted’ denominations indeed renders any form of discrimination on the mere basis of the numerical majority or minority of believers in the various religious faiths unacceptable.” The Court’s abandonment of the quantitative criterion means that, where religion is concerned, since numbers are irrelevant, the same protection of the conscience of any person who identifies as part of a religious faith applies, regardless of the religion to which that person subscribes. In this way the first paragraph of Article 8 of the Constitution finds its full validation.

The recognition in Judgment no. 925 of 1988 of the disparity of regulation deriving from the “enduring limitation inherent in the provision of Article 724,” is, therefore, unavoidable, but it goes on to say that the provision “may still find some foundation in the sociologically relevant observation that the kind of behavior forbidden by the questioned provision concerns a public immorality phenomenon that has, for a long time now, become a bad habit for many people,” adding, moreover, that, “the obligation to arrive at a revision of the crime” was a duty that fell to the legislator. In this way the Constitutional Court newly defined the interests protected by the Criminal Code’s rule (one interest pertaining to religion and the other to public morality) and held, for the time being and in expectation of intervention by the legislature, that the second interest’s need for protection prevented a declaration that the rule was unconstitutional, despite its flaws in protecting the first interest, by reason of the equality imperative.

3.3. – Two essential points from the case law cited above must be considered fundamental for a reconsideration of the constitutionality of Article 724, first paragraph, of the Criminal Code: the irrelevance of the numerical criterion in making constitutional

evaluations in the name of religious equality and the placement of the provision against blasphemy within the category of crimes that pertain to religion.

In particular, this Court cannot share the tendency – found in some criminal court decisions judging both matters of law and matters of fact – which would place the rule found in Article 724 of the Criminal Code exclusively within the category of public immorality. Indeed, the rule’s distinguishing *raison d’être* – its relevance to protection of the religious sphere – would be lost if blasphemy were interpreted as being only a form of verbal incivility. The rule’s origins, its textual reference to the “religion of the State,” later transformed into a reference to the Catholic religion, and its systematic placement next to the provision that punishes generic profanity without added qualifications (Article 726, second paragraph, of the Criminal Code), all run counter to this. One may well say that blasphemy – according to our legislation, as well – is an act of incivility with regard to the life of society the impact of which goes beyond just believers, but one cannot disregard the fact that it is characterized by its having to do with religion. Religion and religious believers are another matter separate from good manners and well-mannered people.

For this reason, the cited constitutional parameters – equality before the law without religious discrimination (Article 3) and the equal freedom of all religious denominations (Article 8, first paragraph) – are relevant. They now necessitate a declaration that the provision criminalizing blasphemy is unconstitutional, to the extent that it discriminates by providing legal protection of an individual’s religious sentiment according to what faith that person professes. Judgment no. 925 of 1988 did not arrive at such a declaration for the time being, instead awaiting intervention by the legislator (which was called for as early as Judgment no. 14 of 1973), which could take action to cure the discrimination between adherents to different religious denominations. Seven years after the last judgment, the contents of which were reiterated in Order no. 52 of 1989, the legislator’s persistent inertia forbids this Court to prolong said discrimination any further, given the preeminence of the constitutional principle of religious equality over other interests, like that of public morality protected by Art. 724, the value of which, albeit significant, is not comparable.

3.4. – The declaration that Article 724, first paragraph, of the Criminal Code is unconstitutional must, nevertheless, be limited exclusively to the part in which it amounts to an effective violation of the equality principle. The crime found at Article 724, first paragraph, of the Criminal Code is divisible into two parts: the first concerns blasphemy against the Divinity, indicated by an abstract term and without further specifications, and including both the verbal expressions and the representative signs of the Divinity itself, the contents of which are left to be determined according to the views of the various religions. The second concerns blasphemy against the Symbols or the Persons venerated in the religion of the State. Blasphemy against the Divinity, as opposed to blasphemy against Symbols and Persons, as legal scholarship and case law have acknowledged, may be criminalized without ascribing the Divinity to any particular religion, thus avoiding unconstitutionality. Moreover, from a purely textual point of view, although the formula at Article 724 can lead to a unitary connection of the notions of Divinity, Symbols, and Persons in the criminal protection afforded exclusively to the “religion of the State,” it bears noting that, in the strict sense, the term “venerated,” used in Article 724, properly refers only to the Symbols and Persons. Therefore, necessarily assuming that the legislature made specific and conscious use of

the chosen expressions, the reference to the “religion of the State” may only apply to Symbols and Persons.

The questioned provision, therefore, lends itself to division into two parts. One part – excluding any value added by this judgment, which is prohibited per se by the exclusive reservation of matters pertaining to crime and punishment to the legislator – avoids unconstitutionality, concerning blasphemy against the Divinity in general and therefore already protecting all believers and all religious faiths from invectives and offensive expressions, without distinction or discrimination, naturally within the sphere of the constitutional concept of public morality (Articles 19 and 21, sixth paragraph, of the Constitution). The other part of the provision under Article 724, on the other hand, involves blasphemy against Symbols and Persons with exclusive reference to the Catholic religion, consequently violating the equality principle. For this part, of the two possibilities for overcoming the aforementioned flaw – the elimination of the unconstitutional rule for a lack of generality or the extension of the same to the excluded religious faiths – only the first is granted to the Constitutional Court, because of the aforementioned prohibition on additive decisions in criminal law.

The legislator’s choice to criminalize blasphemy, once cured of its reference to a single religious denomination, does not contradict constitutional principles in and of itself, since it provides non-discriminatory protection of an interest that is common to all the religions that today characterize our national community, in which a variety of different faiths, cultures, and traditions must coexist.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

Declares Article 724, first paragraph, of the Criminal Code, limited to the words: “Symbols, or Persons venerated in the religion of the State,” to be unconstitutional.

So decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 18 October 1995.