

SVK-2019-1-001

a) Slovakia / b) [Constitutional Court](#) / c) Plenum / d) 09-01-2019 / e) PL. ÚS 5/2017 / f) / g) / h) CODICES ([Slovak](#)).

Keywords of the systematic thesaurus:

- [01.03.04.10.01](#) Constitutional Justice - Jurisdiction - Types of litigation - Litigation in respect of the constitutionality of enactments - **Limits of the legislative competence.**
- [01.03.04.11](#) Constitutional Justice - Jurisdiction - Types of litigation - **Litigation in respect of constitutional revision.**
- [01.03.05.03](#) Constitutional Justice - Jurisdiction - The subject of review - **Constitution.**
- [03.04](#) General Principles - **Separation of powers.**
- [03.12](#) General Principles - **Clarity and precision of legal provisions.**

Keywords of the alphabetical index:

[Abstract review](#) / [Freedom of speech](#), [restriction](#), [justification](#) / [Hate speech](#), [protected categories of people](#), [exhaustivity](#) / [Extremist crimes](#), [incitement](#) / [Constitution](#), [amendment](#), [substantive limitation](#) / [Constitutional amendment](#), [review](#).

Headnotes:

Criminal law is the measure of last resort by which a government may enforce its laws. The legislator must therefore exercise self-restraint in introducing new types of crimes or extending the definitions of existing types of crimes. Alternatives to encourage law obedience are preferable, where possible.

Criminal law provisions defining hate speech crimes are especially sensitive in this regard, as they interfere with freedom of expression. The categories of people protected by these provisions should be defined exhaustively and those categories should not include political opinions.

Summary:

I. The case concerns an abstract review of constitutionality initiated by a group of opposition MPs regarding several provisions of the Criminal Code relating to hate speech crimes, introduced by the so-called 2016 anti-extremist amendment.

The applicants contest the fact that the amended provisions criminalise not only hate speech directed against people of a different race, ethnicity, nationality or religion, but also against "another group of persons". They argue that this last phrase is too vague and that constitutes a violation of the *nullum crimen sine lege* principle and the freedom of expression. The applicants further contest the introduction of "political opinions" among the categories protected against hate speech in two of the contested provisions, claiming a violation of the freedom of expression.

The four contested provisions read as follows:

Section 421.1: Whoever establishes, supports or promotes a group, movement or ideology which is directed at the suppression of fundamental rights and freedoms of persons or which propagates racial, ethnic, national or religious hatred or hatred against another group of persons, or whoever promotes a group, movement or ideology that was directed at the suppression of fundamental rights and freedoms of persons in the past shall be punished by a prison sentence of one to five years.

Section 422.1: Whoever, publicly or in a publicly accessible place, particularly by using flags, badges, uniforms or slogans, expresses sympathy for a group, movement or ideology which is directed or was directed in the past at the suppression of fundamental rights and freedoms of persons, or which propagates racial, ethnic, national or religious hatred, or hatred against another group of persons, shall be punished by a prison sentence of six months to three years.

Section 423.1: Whoever publicly defames (a) any nation, its language, any race or ethnic group, or (b) a group of persons or an individual because of their actual or deemed belonging to a race, nation, nationality or ethnicity, because of their actual or deemed origin, skin colour, political opinions, religion, or because they have no religion, shall be punished by a prison sentence of one to three years.

Section 424.1: Whoever publicly incites violence or hatred against a group of persons or an individual because of their actual or deemed belonging to a race, nation, nationality or ethnicity, because of their actual or deemed origin, skin colour, sexual orientation, political opinions, religion, or because they have no religion, or whoever publicly incites restriction of their rights and freedoms, shall be punished by a prison sentence of up to three years.

II. The Court first observed that the government may only intervene in freedom of speech if the speech is harmful to others, and thus the intervention is necessary for their protection. The purpose of limiting free speech is not supposed to be educational.

The Court then considered the historical development of hate speech laws at the national and international levels, as well as the previous wordings of the contested provisions contained in the 2005 Criminal Code.

That development can be divided into three stages. Between 2005 and 2009, the contested provisions contained the classic hate-speech discrimination criteria in Sections 423 and 424 (race, ethnicity, nationality, religion) and violence as a constitutive element in Sections 421 and 422 (movements directed at suppressing fundamental rights by the use of violence, threat of violence or other serious harm), without any discriminatory criteria.

The contested provisions were first amended in 2009 as part of a larger-scale 2009 anti-extremist amendment, which implemented the EU Council Framework Decision 2008/913/JHA and the Additional Protocol to the Convention on Cybercrime. Sections 421.1 and 422.1 underwent only minimal changes; family origin was added to the discrimination criteria in Sections 423.1 and 424.1, as well as religion in Section 424.1. Section 424.1 no longer required that the act be committed publicly, the reason for which was to include online hate speech in the definition of this crime.

The 2016 amendment introduced all the contested changes to the four provisions. The element of violence was completely removed from Sections 421.1 and 422.1 and instead a list of

discriminatory criteria was added, which included the contested "another group of persons" formulation, and the discriminatory criteria in Sections 423.1 and 424.1 were extended to include "political opinions".

The Court proceeded to review the constitutionality of the contested provisions. It affirmed that the actions criminalised by the challenged provisions fell within the scope of freedom of speech and that these provisions interfered with that principle.

The next step was to examine the legality of the contested provisions. [Article 26.1 of the Constitution](#) guarantees freedom of speech, which pursuant to [Article 26.4 of the Constitution](#) may only be limited by law if such measures are necessary in a democratic society to protect the rights of others, public order, national security, public health and morality. According to [Article 49 of the Constitution](#), only a law may lay down which actions are criminal and what punishments may be imposed for those crimes.

In order to satisfy the *nullum crimen sine lege* principle, it is insufficient that the definitions of crimes be included in a law passed by the parliament, as the principle also implies certain standards with regard to the quality of the legal definitions.

With regard to the "another group of persons" formulation contained in Sections 421.1 and 422.1, the applicants object that it is overly vague and that a fifth characteristic cannot be induced from the four preceding ones (race, ethnicity, nationality and religion). The Government opposes that the characteristics of people protected against hate speech can be inferred from anti-discrimination legislation.

The Court first stated that the "another group of persons" formulation could theoretically be constitutionally sustainable, provided that courts and other state authorities active in criminal proceedings could be expected to interpret it in conformity with the Constitution. However, given the present state of affairs with regard to the interpretation methods used by those bodies, the Court concluded that, for the time being, the contested formulation could not be maintained. The Court argued that it could not disregard the way the law is interpreted in practice, stating that prosecution authorities needed clear rules regarding these types of crimes. In addition, it is the duty of the legislative and executive branches to monitor pressing social issues. They should take responsibility for regulating explicitly the characteristics of protected groups and for making sure that the definitions of different types of hate speech crimes are consistent with one another, as well as with the protection guaranteed by and definitions contained in the Minor Offences Act. If one of the legislator's main intentions in criminalising these types of conduct is to condemn hatred against different groups of people, then these groups are certainly worthy of being explicitly mentioned in the definition of the crimes in question. Furthermore, comparative law shows that hate speech crime definitions tend to contain the disturbance of public order and violence as constitutive elements. Since these elements are absent from Sections 421.1 and 422.1, the contested clauses must be interpreted all the more restrictively.

Freedom of speech cannot be restricted so vaguely, the definitions of the corresponding crimes cannot be so open, the government must have proper constitutional justification for restricting free speech, and citizens' duties must be clearly defined. It follows, therefore, that the contested clauses of Sections 421.1 and 422.1 violate the constitutional requirement of legality (the *nullum crimen sine lege* principle), freedom of speech and the rule of law.

With regard to the "political opinions" criterion, the Court stressed that an individual's political opinions are normally protected from persecution by the government or entities affiliated with it. The Court warned that it could be precisely the government or its affiliated entities which might be tempted to use these Criminal Code provisions against the opposition, especially since there appear to be still tendencies that encourage and exploit social conflicts.

Furthermore, the provisions in question do not require the disturbance of public order as a constitutive element and Section 424.1 does not even contain any element of violence in its definition. Therefore, even non-violent and non-disturbing political debate could face the risk of criminalisation. The contested formulations could thus discourage political discussion.

The Court finally added that the entire 2016 amendment was incoherent and it was difficult to find a unifying purpose in it. For these reasons, it was concluded that the contested provisions failed to meet the legality requirement.

Since all four contested provisions failed the legality test, it seemed unnecessary to examine them as to their proportionality.

Cross-references:

Constitutional Court:

- no. PL. ÚS 7/2017, 31.05.2017, *Bulletin* 2017/2 [[SVK-2017-2-002](#)];

- no. PL. ÚS 17/2008, 20.05.2009.