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FREEDOM OF EXPRESSION AND ITS RESTRICTIONS IN EUROPE – ON THE APPLICABILITY OF ARTICLE 17 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS TO DISINFORMATION (FAKE NEWS)

Davor DERENČINOVIĆ[1]

ABSTRACT

Freedom of expression is not an absolute right and has limitations set up by international human rights treaties. The general clause of its limitation falls within the scope of the 'rights of others' as provided, for instance, in the European Convention of Human Rights. The role of the courts is to balance freedom of expression and the rights of others, performing a three-step test of legality, necessity, and proportionality of any restriction. However, according to the well-established case law of the European Court of Human Rights, some forms of expression do not enjoy protection under free speech clauses. Therefore, the European Court of Human Rights dismisses claims as manifestly inadmissible under Article 17. This 'abuse' clause is invoked when a particular claim is based on undermining the democratic values of a liberal state. The purpose of the abuse clause is to preserve the self-sustainability of the Convention. This paper aims to analyze whether fake news and disinformation campaigns fall under the scope of Article 17.

KEYWORDS

freedom of expression
proportionality test
fake news
disinformation
free speech clause
exclusion clause
abuse clause

1. Introduction

Freedom of expression is one of the most fundamental values of a democratic and liberal state governed by the rule of law.[2] Various international legal documents, both

1 | Professor, Faculty of Law, University of Zagreb, Croatia, davor.derencinovic@pravo.hr.

2 | According to the European Court of Human Rights 'freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man,' *Handyside v. the United Kingdom*, §49.

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legally binding and non-binding, guarantee the freedom of expression and the right to manifest beliefs and opinions. This is a *condicio sine qua non* for exercising democratic plurality as a cornerstone of modern societies. The Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter Convention)[3] in Art. 10 ensures that 'everyone has the right to freedom of expression...this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'[4] The European Court of Human Rights (Court) further developed a substance and the scope of this right.[5] This article applies not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock, or disturb.[6]

The freedom of expression is not an absolute right. This could be restricted to certain conditions. The exclusion clause of Art. 10 stipulates that the exercise of free speech carries duties and responsibilities and therefore may be subject to such formalities, conditions, restrictions, or penalties as prescribed by law and are necessary in a democratic society.[7] Other values whose protection could be used as grounds for restricting free speech are interests of national security, territorial disorder or crime, health or morals, reputation or rights of others, confidential information and authority, and impartiality of the judiciary. Following the text of the exclusion clause, the Court established through its rich case law that any restriction on the freedom of expression must be prescribed by law, must be necessary for a democratic society, and proportionate to the nature of the restriction.[8]

However, there are certain forms of expression that are not protected under Art. 10 of the Convention. Using Art. 17 of the Convention, the Court can *prima facie* exclude some forms of expression from the protective reach of Art. 10. Art. 17 of the Convention, by some commentators described as a 'guillotine' provision[9], serves the purpose of preventing applicants from claiming that the same Convention protects their speech that undermines the very foundations of the Convention.[10] In cases where the Court establishes

3 | The Convention for the Protecion of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on November 4, 1950 and came into force on September 3, 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. Available at https://www.echr.coe.int/pages/home.aspx?p=basictexts, Accessed August 27, 2021.
4 | *Ibid*. Art. 10., Accessed August 27, 2021.
5 | For comprehensive overview see Guide on Article 10 of the European Convention on Human Rights, European Court of Human Rights, December 2020, available at https://www.echr.coe.int/documents/guide_art_10_eng.pdf, Accessed August 27, 2021.
6 | *Observer and Guardian v. the United Kingdom*, §59. For different understanding and legal evaluation of free speech see the US Supreme Court judgement in *Brandenburg v. Ohio*: '...the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action' Brandenburg v Ohio, at. 447-448.
7 | *Supra note* 2, article 10, §2, Accessed August 27, 2021.
8 | In literature it is also known as a 'three tests' concept: the first is the test of the lawfulness of the interference, the second is legitimacy of the aim pursued by the interference test and the third is necessity of the interference in a democratic society test. *Supra note* 4, p. 20. See also *Observer and Guardian v. the United Kingdom*; *Prager and Oberschlick v. Austria*.
9 | Tulkens, 2012.
10 | *Ibid.*

grounds for applying Art. 17, the three-step test enshrined in Art. 10 would not apply. This short-track mechanism for rejecting claims of alleged free speech violations has been used to exclude hate speech from the protective function of Art. 10 of the Convention. In the Court's jurisprudence, it has been determined that, for instance, hate speech has not been protected under the free speech clause of Art. 10.[11] Moreover, this kind of negative speech runs contrary to the text and spirit of the Convention and undermines the most fundamental values protected therein.[12] Expressions excluded from the protective function of Art. 10 are also those related to the revision of well-established historical facts concerning Holocaust[13], collective labeling, and negative stereotyping of certain ethnic and religious groups. Through its rich case law, the Court established that the free speech clause could not be used to protect expressions that are racist, anti-Semitic, or Islamophobic.[14] In this regard, the Court 'has consistently held that sweeping statements attacking or casting in a negative light entire ethnic, religious, or other groups deserve no or very limited protection under Art. 10 of the Convention, read in the light of Art. 17.'[15] The same position was taken with respect to the statements portraying non-European immigrant communities as criminally minded.[16]

The fake news phenomenon has been described in the literature as 'spreading outrageous distorted information to discredit opposition or create divisiveness between

11 | Guide on Article 17 of the European Convention on Human Rights, European Court of Human Rights, August 2020.

12 | See *Gündüz v. Turkey*, §41. The applicant in this case was a member of the religious Islamic sect who in directly broadcasted TV show openly advocated Sharia law and criticizing the concept of democracy. He was convicted by domestic courts for incitement to hatred and violence, but the Strasbourg Court found violation of article 10 because the impugned statements could not have been qualified as it was done by the authorities, nor they represented call to religious intolerance. Available at https://globalfreedomofexpression.columbia.edu/cases/gunduz-v-turkey/, Accessed 27 August 2021.

13 | *Garaudy v. France*, see infra under 2. This was the case about the applicant, author of the book 'The Founding Myths of Modern Israel' in which he disputed the crimes committed during the Holocaust. After being sued and fined under the Freedom of the Press Act in 1998 before domestic courts, he turned to the Court claiming his rights under article 10 have been violated because, according to him, the relevant passages in the book were dealing with Israeli politics rather than exposing anti-Semitism and Holocaust denial. The Court found that the applicant advocated revisionist theories. According to the Court, '...there could be no doubt that disputing the existence of clearly established historical events, such as the Holocaust, did not constitute historical research akin to a quest for the truth. The real purpose of such a work was to rehabilitate the National-Socialist regime and, as a consequence, to accuse the victims of the Holocaust of falsifying history.' The article 17 was applied declaring the application inadmissible. *Garaudy v. France*, Inadmissibility decision, Press release issued by the Registrar, 2003.

14 | In *Norwood v. the UK*, the Court in its decision delivered in 2004 found that Islamophobic and anti-Muslim statements (Islam out of Britain—Protect British People) do not enjoy protection under article 10. The case concerned a member of radical political party who put a poster on his apartment window with message that all Muslims must be removed from the country. The Court found that implying in general Muslims as terrorists run contrary to the very foundations of the Convention and gives rise to the application of Art. 17.

15 | *Perinçek v. Switzerland,* Grand Chamber, §206.

16 | *Feret v. Belgium*, Press release issued by the Registrar, 2009. Reiterating the importance of combating racial discrimination, the Court in *Budinova and Chaprazov v. Bulgaria* delivered in 2021 repeated that 'the fact that the author of the statements is a politician or speaks in his or her capacity as a member of parliament does not alter that.' *Budinova and Chaprazov v. Bulgaria*, § 94.

opposing groups.'[17] According to another definition, fake news is 'false, often sensational, information disseminated under the guise of news reporting.'[18] The European Union defines disinformation as 'verifiable false or misleading information that is created, presented, and disseminated for economic gain or to intentionally deceive the public, and may cause public

harm.'[19] For some commentators, the term is defined through its consequences as the destabilization of the category of truth in a democracy for geopolitical gain.[20] According to some consequentialists, the fake news phenomenon creates an environment where 'emotion triumphs over reason, computational propaganda over common sense, or sheer power over knowledge.'[21] The phenomenon or concept of fake news (disinformation) was elaborated in my earlier paper on this topic written under this project (Social media, the freedom of expression and legal regulation of fake news in Croatia – not yet published at the moment of sending this paper for publication). Instead of being repetitive, I refer to the discussion on this issue. What is important, though, in the context of this paper, is the Council of Europe's position on this phenomenon in terms of its conceptual and substantive features. The first (and only) time when the Court applied the term 'fake news' was in the case of *Brzeziński v. Poland* in 2019.[22] The case concerned a Polish candidate in the local elections. He harshly criticized local executives in his electoral booklet. This was referred to the domestic court that in a very short time (24 hours), according to special electoral legislation, found a violation of disseminating false information in the context of elections and banned its further distribution. Mr. Brzeziński turned to the Court in Strasbourg, claiming that his rights under Art. 10 were violated. The Court unanimously decided (under the simplified procedure provided in Art. 28 of the Convention) that the applicant's rights of free speech were violated by the authorities. This case was very interesting because, *inter alia*, the Court, for the first time, used the term 'fake news' in the decision[23], even though neither the applicant nor the government did not mention it in their submissions. The Court was criticized for using this term, which was earlier found as inadequate and misleading.[24] The group of experts appointed by the European Union also took a negative stance on this term.[25]

17 | Nielsen, 2020 cited by Dalkir and Katz, 2020, pp. 238–257.
18 | https://www.collinsdictionary.com/dictionary/english/fake-news, Accessed August 27, 2021.
19 | Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions tackling online disinformation: a European approach. com/2018/236 final. https://eur-lex.europa.eu/legal-content/en/txt/?uri=celex%3a52018dc0236, Accessed August 27, 2021.
20 | Mueller, 2019.
21 | Peters et al. (eds.), 2018.
22 | See Fathaigh, 2019.
23 | Shattock, 2021.
24 | 'In this report, we refrain from using the term "fake news," for two reasons. First, it is woefully inadequate to describe the complex phenomena of information pollution. The term has also begun to be appropriated by politicians around the world to describe news organizations whose coverage they find disagreeable. In this way, it's becoming a mechanism by which the powerful can clamp down upon, restrict, undermine and circumvent the free press.' Information Disorder: Toward an interdisciplinary framework for research and policy making, Council of Europe, 2017, p. 5.
25 | In this report, the HLEG deliberately avoid the term 'fake news.' The HLEG do this for two reasons. Firstly, the term is inadequate to capture the complex problem of disinformation, which involves content that is not actually or completely 'fake' but fabricated information blended with facts, and practices that go well beyond anything resembling 'news' to include some forms of

Further, in the text follows an attempt to analyze how to treat, in the context of Art. 17, fake news (disinformation) as a phenomenon that is often at the intersection with hate speech, revisionism of mass crimes, negative stereotyping of minorities, and other forms of speech that are *prima facie* excluded from the protective function of Art. 10 Convention.[26]

2. Article 17 of the Convention

Art. 17 of the Convention is a provision on prohibition of the abuse of rights. It reads as follows:

> "Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."[27]

This provision is also known as the 'abuse' clause. In the context of Art. 17 as well as Art. 35 § 3 (a) the abuse means the 'harmful exercise of a right by its holder in a manner that is manifestly inconsistent with or contrary to the purpose for which such right is granted/designed.'[28] This provision, which was taken from the Universal Declaration of Human Rights (Art. 30),[29] aims to protect the foundations of democratic society from anti-liberal and totalitarian ideologies. The reasons for adhering to this protective clause are obvious. In adopting the text of the Convention, European governments were determined to prevent 'darkest pages of European history…by providing means that could rewrite them.'[30] In other words, the founding fathers of the Convention could not let room for the

automated accounts used for astroturfing, networks of fake followers, fabricated or manipulated videos, targeted advertising, organized trolling, visual memes, and much more. It can also involve a whole array of digital behavior that is more about circulation of disinformation than about production of disinformation, spanning from posting, commenting, sharing, tweeting and re-tweeting etc. Secondly, the term 'fake news' is not only inadequate, but also misleading, because it has been appropriated by some politicians and their supporters, who use the term to dismiss coverage that they find disagreeable, and has thus become a weapon with which powerful actors can interfere in circulation of information and attack and undermine independent news media. Research has shown that citizens often associate the term 'fake news' with partisan political debate and poor journalism broadly, rather than more pernicious and precisely defined forms of disinformation.' A multi-dimensional approach to disinformation, Report of the independent High level group on fake news and online disinformation, European Union, 2018, p. 10.

26 | *Supra note* 22.

27 | *Supra note* 2.

28 | *Miroļubovs and Others v. Latvia*, §§ 62 and 65; *S.A.S. v. France*, Grand Chamber, § 66. In *supra note* 10: 'In order to establish whether a particular conduct amounts to an abuse of rights, the Court scrutinises the aims which an applicant pursues when relying on the Convention and their compatibility with this instrument.', p. 8.

29 | Comp. Article 5 of the International Covenant on Civil and Political Rights; Art. 29 of the American Convention on Human Rights and article 54 of the Charter of Fundamental Rights of the European Union.

30 | Drooghenbroeck S. V., L'article 17 de la Convention européenne des droits de l'homme: incertain et inutile? In H. Dumont et al. Pas de liberté pour les ennemis de la liberté? Brussels, 2000, p. 141.

abuse of the Convention by those who claim their right to free speech that is incompatible with the very foundations of the Convention.[31] The first case before the Court, where Art. 17 was applied, was *the Communist Party of Germany (KPD) v. Germany*. By using Art. 17 of the Convention, the European Commission in 1957 rejected the claim of the applicant that their rights guaranteed under Art. 10 were violated and upheld the decision of the German Federal Constitutional Court to ban the party on the grounds that its program and activities aimed at the abolition of the democratic and liberal order of the state.[32]

The abuse clause applies to states, groups, and individuals,[33] and the threshold for its application is very high.[34] As clarified by the Court, its application is reserved only for the most serious forms of expressions that undermine the very foundations of the Convention. This was confirmed in the Court judgment *Lilliendahl v. Iceland* where the Court underlined that 'hate-speech' comprised two categories: one being its gravest form, which falls under Art. 17 of the Convention; another, which the Court considers 'less grave', but nevertheless possible for the Contracting States to sanction under the requirements set by Art. 10 of the Convention. According to the Court's case law, this category includes not only explicit calls for violence or other criminal acts but also insulting, holding up to ridicule or slandering of specific groups of the population subjected to prejudice.[35] Obviously, the facts of this case fall into the second category. The case concerned a private citizen who made online homophobic comments against the LGBTQ population. He referred to homosexuals as 'disgusting and deviant people indoctrinating children.' After being convicted and fined before the domestic court of the second instance, Mr. Lilliendahl claimed that his rights of free expression were violated by the authorities. The Court first found that, unlike in other hate speech cases, Art. 17 cannot be applied in this case because 'the applicant's comments were not immediately and clearly aimed at inciting to violence and hatred or destroying the rights and freedoms of others protected by the Convention.'[36] It also reiterated that the abuse clause applies only exceptionally and in extreme cases, this particular case not being one of them.[37]

The abuse clause has an accessory function as a ground for dismissing claims of those whose speech was restricted by the authorities. In other words, Art. 17 has been

31 | It cannot be ruled out that a person or a group of persons will rely on the rights enshrined in the Convention or its Protocols in order to attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention; any such destruction would put an end to democracy. It was precisely this concern which led the authors of the Convention to introduce Article 17, *Ždanoka v. Latvia*, §99. See also (see *Collected Edition of the "Travaux Préparatoires": Official Report of the Consultative Assembly*, 1949, pp. 1235-39).
32 | *German Communist Party (KPD) v. Germany*. The Commission quoted article 21 §2 of the Basic Law of the Federal Republic of Germany: 'Parties which, according to their aims and the behaviour of their members, seek to impair or abolish the free and democratic basic order or to jeopardise the existence of the Federal Republic of Germany, shall be anti-constitutional. The Federal Constitutional Court shall decide on the question of anti-constitutionality.' Upon the conclusion that the applicant's major political goal to establish 'a social-communist system by means of a proletarian revolution and the dictatorship of the proletariat' contravenes the fundamental values and guarantees enshrined in the Convention, the Commission applied article 17 and declared the application inadmissible.
33 | *Supra note* 10.
34 | *Lilliendahl v. Iceland*, §26.
35 | *Ibid*. §36.
36 | *Ibid*. §26.
37 | *Ibid*.

used in cases of 'speakers' when they appear as applicants, and not in cases of victims who apply to the Court for being targeted by either hate speech, negative stereotyping, and discrimination by the 'speakers.' A good example of this is a series of cases concerning the negative stereotyping of national minorities. In *Budinova and Chaprazov v. Bulgaria*, the Court concluded that statements of the well-known journalist and politician, all of which appear to have been deliberately couched in inflammatory terms, visibly sought to portray Roma in Bulgaria as exceptionally prone to crime and depravity…the statements were systematic and characterized by their extreme virulence (for instance expressions such as 'Gypsy terror over Bulgarian,' 'gigantic genocide of the Bulgarian nation')… the essence of his statements was that the Roma were immoral social parasites who abused their rights, lived off the back of the Bulgarian majority, subjected that majority to systematic violence and crime without hindrance, and aimed to take over the country… It is beyond doubt that this amounted to extreme negative stereotyping meant to vilify Roma in Bulgaria and to stir up prejudice and hatred towards them.'[38] The same person was concerned in the case *Behar and Gutman v. Bulgaria*. That is why both judgments are strikingly similar in the explanation of reasons. The only distinction was that the targets of the impugned statements given in the book were not Roma but Jews:

> "These statements were meant to vilify Jews and stir up prejudice and hatred towards them… they all rehearsed timeworn anti-Semitic and Holocaust-denial narratives. …this becomes evident from their very wording, regardless of the broader context of the two books in which they featured."[39]

In both cases, the Court found that domestic courts failed to protect community members' private lives that amounted to a violation of Articles 8 and 14 of the Convention. Although the issue of freedom of expression under Art. 10 was touched by the Court as an obiter dictum[40], there was no reference to Art. 17 or *a priori* exclusion of that kind of negative stereotyping of a national minority from the application of the free speech clause. Some commentators found this problematic, arguing that failure to invoke the abuse clause in cases of evident hate speech towards the national minorities could undermine the victims' rights under the Convention.[41] This is, no doubt, another angle that fuels the ongoing debate about the controversies in applying the abuse clause.

38 | *Budinova and Chaprazov v. Bulgaria*, §65.
39 | *Behar and Gutman v. Bulgaria,* §104.
40 | *Supra note* 37, § 94.
41 | 'Is the Court (still) resisting the entitlement of community vilification victims when they seek, by litigating before it, empowerment directly—and through them, minorities—to the detriment of States? Is the Court prepared to go further than States upholding minority identity at the level of Language (the Symbolic)? Inconsistency, as evidenced by the asymmetries discussed above, tends to disadvantage disenfranchised people. Victims of minority othering possibly meet less judicial perceptiveness as case protagonists taking on a State partly due to an absence of corresponding perspectives on the inside of an institution. Are minority/ victimized perspectives adequately integrated via representation on the Court? Or is the compassion of the privileged (to be relied on as) sufficient? Ilieva M.S., *Behar and Budinova v. Bulgaria*: The Rights of Others in Cases of Othering—Anti-victim bias in ECHR hate speech law, 2021, available at https://strasbourgobservers.com/2021/04/15/behar-and-budinova-v-bulgaria-the-rights-of-others-in-cases-of-othering-anti-victim-bias-in-echr-hate-speech-law/, Accessed August 27, 2021.

In addition to the uncertainties about the threshold for application of the abuse clause, there has also been a debate among the commentators about the inconsistencies in interpreting well-established historical facts in the context of genocide and other mass crimes. This debate highlighted the criteria adopted by the Court in genocide revisionist cases. As a standard, the Court established in *Garaudy v. France*[42]that 'disputing the existence of clearly established historical events such as the Holocaust did not constitute historical research but was rather an effort to rehabilitate the Nazi regime and accuse Holocaust victims of falsifying history.'[43]

While denial and revision of the Holocaust undoubtedly fall outside the scope of protected speech (case), according to the Court, the same does not apply to the Armenian genocide. In case of *Perinçek v. Switzerland*, the Court conducted a three-step test to determine whether the penalty that was imposed on the applicant for denial of the Armenian genocide (he said during his visit to Switzerland it is 'an international lie') in the course of criminal proceedings in Switzerland violated Art. 10 of Convention. The Court concluded that his rights under Art. 10 were violated because the necessity test indicates that the penalty imposed in criminal proceedings was not proportional to the legitimate aim of protecting the 'rights of others' (in this case Armenian community). In arriving at that conclusion, the Court took several elements into account, including the following: Mr. Perinçek's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance; there was no international law obligation for Switzerland to criminalize such statements; the interference with Mr. Perinçek's right to freedom of expression had taken the serious form of a criminal conviction.[44]

What is interesting, however, is that in this case, the Court did not find it necessary to apply Art. 17 and to address the issue of whether denial of genocide in the Armenian case *prima facie* excludes protection under Art. 10 of the Convention. However, out of seven judges who dissented to the majority, four stressed that the Court failed by not applying the abuse clause.[45] Concluding that the Court's approach to article 17 'in relation to genocide denial and other forms of hate speech has not been uniform'[46] these judges reminded about four different cases in which Art. 17 has been applied by the Court. The first is the direct application, with the effect of dismissing the application as inadmissible. For example, *Glimmerveen and Hagenbeek v. the Netherlands*, where the Commission found strongly racist views in contrast to the text and spirit of the Convention and dismissed the application.[47] In addition, there was an indirect application (combined approach). First, the Court subject the case to the standard three-step test under Art. 10 and then resorts to the abuse clause at the necessity stage to determine whether the application is manifestly ill-founded.[48] In the third group of cases (for instance, Leroy v. France), Art. 17 might have

42 | The applicant was found guilty of disputing the existence of the Holocaust in his book 'The Founding Myths of Modern Israel.' He received suspended sentences of imprisonment, the longest being for six months and fines in excess of 25,900 Euros and compensation of more than 33,500 Euro for the civil parties.
43 | https://futurefreespeech.com/garaudy-v-france/, Accessed August 27, 2021.
44 | https://globalfreedomofexpression.columbia.edu/cases/ecthr-perincek-v-switzerland-no-2751008–2013/, Accessed 27 August 2021.
45 | *Perinçek v. Switzerland*, Additional dissenting opinion of judge Silvis, joined by judges Casadevall, Berro and Kūris, pp. 125–127.
46 | *Ibid*. §2.
47 | *Ibid*. §3.
48 | *Ibid*. §4.

been applied but it was not.[49] Finally, in some cases (fourth group), the Court first examines the merits and then addresses the issue of the potential application of Art. 17.[50]

These uncertainties concerning the threshold and context for applying Art. 17 raise the question of appropriateness to apply this provision in fake news cases. This issue is addressed in the last section of this paper.

3. Discussion and conclusion

There are many intersections between Art. 17 of the Convention and the concept of disinformation (fake news). First, Art. 17 applies in cases where alleged expressions are contrary to the text and spirit of the Convention. The drafters of the Convention aimed to prevent the abuse of rights by those who propagated totalitarian ideologies, relativized mass crimes (particularly genocide), and systematically discriminated against members of national minorities. In such cases, the Court does not need to determine whether a particular restriction on the applicants' rights was in accordance with the standards under the Convention and its jurisprudence. Thus, it could be said that Art. 17 relieves the Court from the need to assess the legality and necessity of any individual restriction of the applicant's rights (free speech) by the national authorities by allowing the application to be dismissed as manifestly unfounded. This is understandable and justified because such abuses of rights could jeopardize the viability of the Convention and the unique human rights protection system it establishes.

At first glance, it could be said that the same logic applies to the concept of disinformation (fake news). In its radical sense, this concept is *per se* contrary to all values that the Convention promotes and protects. It is, first and foremost, the protection of human rights within the system of the rule of law of democratic states. These are the fundamental principles on which the regional organization of the Council of Europe, which recently marked its 70th anniversary, was created and further developed. Likewise, the abuse clause applies to states, groups, and individuals that correspond to the nature of the fake news that could be generated and disseminated by either of these subjects.

However, it should be noted that not all forms of fake news are the same, nor all of them reach the threshold for invoking Art. 17. Indeed, not all fake news is a threat to democracy. It goes only for those massive campaigns aimed at destabilizing the system, causing panic, creating confusion, and fueling social polarization. Likewise, in general, negligent and innocent fake news dissemination does not justify the application of criminal sanctions. Finally, fake news (disinformation) could raise the issue of the responsible subject, given that artificial intelligence often generates them.

Another relevant aspect is distinguishing fake news as untrue statements from other similar expressions, such as defamatory statements. The Court has emphasized that a careful distinction is to be made between factual statements on the one hand and value judgments on the other. While facts can be demonstrated, the truth of value judgments is not susceptible to proof. However, shifting the burden of proof about the truthfulness of the statement to the applicant could sometimes face him with an unreasonable, if not

49 | *Ibid*. §6.
50 | *Ibid*. §7.

impossible, task. Since the measures taken by states in response to defamatory statements are not a priori excluded from exercising a three-step test under Art. 10, there are no convincing arguments why fake news (disinformation) should be treated differently.

There is also a concern that *a priori* exclusion of disinformation from careful juridical balancing under Art. 10 of the Convention could undermine the role of court, that is, to provide interpretation in terms of legitimate aim as well as the necessity and proportionality of the restriction in any given case (clarification role). Lifting this role by simply invoking Art. 17 of the Convention in fake news cases might question the simplistic approach to the issue and bring even more uncertainty in this field.

This is particularly important, having in mind not always consistent standards applied in cases that trigger the abuse clause. In other words, the threshold for using Art. 17 has not been apparent even in cases that are considered a *prima facie* denial of freedom of expression as the ones concerning hate speech, genocide denial, negative stereotyping of minorities, etc. The nuances of the clarification role of the Court in this regard were explained above in this paper while comparing different approaches to various types of hate speech (*Norwood vis a vis Lilliendahl*) and various types of mass crimes (*Garaudy vis a vis Perincek*). With these uncertainties in mind, it seems that bringing a relatively new and not quite clearly conceptualized phenomenon and subjecting it to this control mechanism may not be a good idea given the imperatives of legal certainty and substantive justice.

In conclusion, notwithstanding the anti-democratic and anti-liberal dimensions of some forms of fake news (particularly those integrated into large-scale disinformation campaigns) that, no doubt, runs contrary to the text and spirit of the Convention, many valid arguments justify the caution when it comes to the blanket lifting of free speech protection mechanism provided in Art. 10 of the Convention. Therefore, applying the abuse clause in the context of disinformation should be decided on a case-by-case basis, considering all the relevant arguments discussed in this paper.

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NIHIL EST TAM INAEQUALE QUAM AEQUITAS IPSA: THE ISSUE OF CONFESSIONAL COMMUNITIES IN SERBIA

Dalibor ĐUKIĆ[1]

ABSTRACT

This study analyses the positions of churches and religious communities in the Serbian legal system. The 2006 Law on Churches and Religious Communities introduced the so-called 'multi-tier system', under which there are multiple legal categories of religious organisations. This study analyses the legal position of religious communities that have acquired a legal personality in accordance with socialist legislation, which defines 'confessional communities'. Some refuse to undergo registration under the new regulations for fear of losing their acquired rights. Special attention was paid to the legal solutions that have attempted to regulate their status more closely, as well as the reasons behind the decision not to allow their automatic registration ex officio.

KEYWORDS

freedom of religion
freedom of association
confessional community
registration of religious organization
registration requirement
Serbia
Law on Churches and Religious Communities

1. Introduction

Freedom of religion is one of the fundamental principles of modern Serbian statehood. Since 1827, it has been prescribed that foreigners living in Serbia have the right to their priests and chapels.[2] Freedom of religion is guaranteed to foreigners only due to the religious and national homogeneity of the first Serbian state. The first Constitution of the Principality of Serbia established in 1835 guaranteed freedom of worship to all religions.[3] From the middle of the 19th century, Serbia protected freedom of religion for

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2 | Petrović, 1827, p. 428.
3 | The Constitution of the Principality of Serbia, 1835, Art. 97.

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members of Christian non-Orthodox confessions.[4] The 1860 Criminal Code criminalized offences directed against all religions. 'Manners and rites of worshiping God' and 'all the things dedicated to God's service' enjoyed special criminal justice protection.[5] Several constitutional projects were initiated during the drafting of the new constitution under Prince Mihailo. Of these, the 1868 Constitutional Project provided Serbia's first protection of freedom of conscience.[6] However, this provision was not included in the final text of the Constitution, which was adopted in 1869. The 1888 Constitution contained a rather advanced solution in this area, decreeing that 'Freedom of conscience is unlimited'.[7] All subsequent Serbian constitutions have contained identical provisions. Although the constitution guaranteed the freedom to perform religious rites, it lacked detailed provisions on the right to profess religious beliefs.

The situation changed after the formation of the Kingdom of Serbs, Croats, and Slovenes. The new state was ethnically and religiously heterogeneous. The 1921 Constitution guaranteed freedom of conscience and religion, as well as the right to the public confession of religion, which was limited to members of adopted religions.[8] The 1931 Constitution contained the same provisions.[9] The public expression of religious belief was regulated by a special law on inter-confessional relations.

The draft of the 1925 Basic Law on Religions and Interreligious Relations contains several regulations that protect the public expression of religious belief.[10] These include Arts. 34 and 36, which prohibited the performance of activities that interfere with liturgical services or ceremonial processions and stipulated that no religious community (either recognised or not) could be forced to stop 'bell ringing, playing or singing' in situations when the regulations of other religions would ban it. The authors of this legal project strove to regulate inter-religious relations in an ethnically and religiously heterogeneous state in a way that was advanced for the time. Unfortunately, none of their projects were given legislative power.

The protection of freedom of religion and state–Church relations changed significantly after the Second World War. The new ideology sought to eliminate all religious organisations and religion in general from public spaces and to confine them to the private sphere. The 1946 Constitution of the Federal People's Republic of Yugoslavia officially implemented a system of separation of church (i.e. religious communities) and state.[11] Freedom of conscience and religion was formally guaranteed, but not the freedom of public expression of religious beliefs (Article 25 of the Constitution). The later Yugoslav constitutions also seek to confine religion to the private sphere. Article 46 of the 1963 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY) stipulates that religion may be freely practiced and that it represents a 'private matter of person'.[12] Article 174 of the 1974 Constitution of the

4 | The Collection of Laws and Regulations and Regulatory Decrees Promulgated in the Principality of Serbia from the Beginning until the End of 1853, pp. 78-79.
5 | The Criminal Code for the Principality of Serbia, Art. 207.
6 | Pržić, 1925, p. 212.
7 | The Constitution of the Kingdom of Serbia, 1888, Art. 18.
8 | The adopted religions in accordance with this Constitution were those which, on the basis of the regulations of previous states, gained legal recognition in any part of the state territory. The Constitution of the Kingdom of Serbs, Croats and Slovenes, Art. 12.
9 | The Constitution of the Kingdom of Yugoslavia, Art. 11.
10 | The Draft Basic Law on Religions and Interreligious Relations, Arts. 33-34.
11 | The Constitution of the Federal People's Republic of Yugoslavia, Art. 25.
12 | The Constitution of the Socialist Federative Republic of Yugoslavia (1963), Art. 46.

SFRY contains the same provisions.[13] During communist rule in Yugoslavia, there was a clear tendency to confine freedom of religion exclusively to the private sphere.

In the Kingdom of Yugoslavia, regulations governing the positions of religious organisations were prepared from 1918 to 1941; ironically, the first one came into force during communist rule. The Special Law Regulating the Position of All Religious Communities was passed in 1953.[14] Unfortunately, the 1946–1953 period was characterised by the open persecution of clergy, discrimination against believers, and militant atheist propaganda. The 1953 Law formally prohibited such actions, but the reality for churches and religious communities changed very slowly. The law stipulated that citizens could not be prevented from participating 'in religious rites and other expressions of religious feelings'. However, the performance of religious rites was limited to areas designated by religious communities, and the practice of rituals outside those areas required a permit from competent authorities (Article 13). This law was amended in 1965 due to its coordination with the 1963 Constitution of the Socialist Federative Republic of Yugoslavia.[15] The amendments mainly prescribed sanctions for violating the provisions of that law and specifying the character and elements of illegal acts.

After the constitution was changed in 1974, the regulation on the legal position of religious communities was transferred to the jurisdiction of the federal republics. The Law on the Legal Status of Religious Organisations for the Territory of the Socialist Republic of Serbia was passed at the end of 1977.[16] It guaranteed freedom to religious communities, while citizens were guaranteed the freedom to participate in religious rites and other forms of expression of religious belief. The legal performance of religious rites in accordance with Article 13 was confined to premises designated by religious organisations for that purpose, as well as to public spaces connected to religious buildings. Religious organisations were obliged to report such premises to competent municipal administrative bodies and submit evidence of fulfilment of the legally prescribed conditions for their use as public premises. Any performance of religious rites outside such premises was to be reported to the competent administrative body, except for rites concerning family celebrations, baptisms, and funerals (Article 14). The 1977 law on the Legal Status of Religious Communities further restricted freedom of expression of religious belief. It was intended to limit religiosity to the private sphere as well as to premises belonging to religious organisations and intended exclusively for religious activities.

2. Restrictions on freedom of religion

The 2006 Constitution of the Republic of Serbia stipulates that any restriction on freedom of religion must be prescribed by law, as is necessary in a democratic society, and must strive to achieve one of the legitimate aims mentioned in the Constitution.[17] In this respect, the Serbian Constitution does not deviate from international regulations governing restrictions on basic human rights. Moreover, the Constitutional Court of

13 | The Constitution of the Socialist Federal Republic of Yugoslavia (1974), Art. 174.
14 | Law on the Legal Status of Religious Communities (1953).
15 | Law on the Legal Status Of Religious Communities Amendments.
16 | Law on the Legal Status of Religious Communities (1977).
17 | Constitution of the Republic of Serbia, Art. 43.

the Republic of Serbia applies the methodology of the European Court of Human Rights when considering whether a right has been violated; thus, the rules restricting religious freedom in Serbian law are the same as those in European human rights law.

Criteria for restrictions on freedom of religion must be established by law in order to prevent arbitrariness in state bodies' assessment of their legitimacy.[18] Accessibility and foreseeability are the two conditions that a general legal act must meet in order to establish limitations on freedom.[19] This means that the limitation must be publicly available, published in the official gazette, and prescribe precise binding rules, as well as the consequences of their violation. This preserves the principle of legal certainty.

In a democratic society, the principle of 'necessity' implies that interference in a right is a 'pressing social need', that it is 'proportionate to the legitimate aim pursued', and that there is 'no other means of achieving the same end that would interfere less seriously with the fundamental right concerned'.[20] According to the European Court, a democratic society has two characteristics: pluralism, tolerance, and broadmindedness;[21] and the rule of law.[22] The European Court has developed the 'margin of appreciation' doctrine[23] in view of the inevitable differences between supranational human rights law and specific national legal orders.[24] Under this doctrine, state bodies have a certain degree of discretion,[25] subject to the supervision of the European Court: 'Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court'.[26] The margin of appreciation narrowed after the former communist states acceded to the Council of Europe,[27] although it still provides significant elbow room that has helped the state fulfil the obligation of neutrality and impartiality in religious issues.[28] In any case,

18 | The case law of the ECHR shows that the establishment of discretionary powers does not have to violate this rule if 'the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference'; Case of Refah Partisi (the Welfare Party) and others v. Turkey, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 57.

19 | 'In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable'; Case of the Sunday Times v. The United Kingdom, Application no. 6538/74, 49.

20 | Case of Wingrove v. The United Kingdom, Application no. 17419/90, 53. Case of Glor v. Switzerland, Application no. 13444/04, 95, Case of Association Rhino and Others v. Switzerland, Application no. 48848/07, 65, Case of Biblical Centre of the Chuvash Republic v. Russia, Application no. 33203/08, 58.

21 | To, 49.

22 | Case of the Sunday Times v. The United Kingdom, Application no. 6538/74, 8.

23 | Torron, 2005, p. 599.

24 | 'By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'; Case of Handyside v. The United Kingdom, Application no. 5493/72, 48.

25 | Harris, OBoyle, Wabrick, 2011, p. 11.

26 | Case of Handyside v. The United Kingdom, Application no. 5493/72, 49.

27 | Torron, 2005, pp. 601-602.

28 | Marković, 2019, p. 323.

the right of state bodies to decide on the rights guaranteed by the European Convention is not unlimited and is subject to review by the European Court.

As mentioned, the legitimate aims for which the right to freedom of religion may be restricted, as stated in Serbia's constitution, do not differ significantly from the legitimate aims contained in Article 9, para. 2 of the European Convention. It is not difficult for most respondent states to prove the existence of a legitimate aim, and the European Court generally accepts that any interference with rights protected by the Convention has a legitimate aim.[29] Thus, each legitimate aim need not be addressed in detail.

It has been argued that the wording 'public morality' used by the European Convention is more appropriate than the constitutional formulation 'morality of a democratic society'.[30] However, the European Court stated very early on that

> ...it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject.[31]

The Serbian constitution includes the prevention of incitement to religious, national, and racial hatred among the legitimate reasons to restrict the freedom of expression of religion or belief. A similar regulation is contained in the International Covenant on Civil and Political Rights.[32] The constitutional provision guaranteeing the right of parents to provide their children with religious education in accordance with their beliefs was taken over from the same Covenant.[33] This indicates that the Serbian constitution has accepted various international regulations concerning the protection of freedom of religion in order to regulate it as comprehensively as possible. The registration requirements stipulated by Serbia's Law for Confessional Communities constitute a restriction on the right to religious freedom, particularly its communal aspect. Below, this study examines whether these restrictions violate the Serbian Constitution and the European Convention on Human Rights.

3. The 2006 Law on Churches and Religious Communities

The drafting of Serbian legislation on the legal status of churches and religious communities began after the political changes that occurred in 2000. Finally, a new political system was established, and the principles of the market economy; rule of law; and the protection of political, civil, and human rights and freedoms were acknowledged. In

29 | Murdoch, 2012, p. 35.
30 | Đurđević, 2008, p. 215.
31 | Case of Handyside v. The United Kingdom, Application no. 5493/72, 48.
32 | International Covenant on Civil and Political Rights, 16 December 1966, art. 18: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.
33 | Constitution of the Republic of Serbia, Art. 43. International Covenant on Civil and Political Rights, 16 December 1966, art. 18: 'The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.

these new circumstances, churches and religious communities became significant social factors. In fact, a partnership was established between the state and traditional churches and religious communities. This relationship was given an appropriate legal form. A new law on religious freedom was drafted in 2001 to fill the gap created in 1993 and to correct the rift in the relations between the state and religious organisations that occurred after the Second World War.[34]

Amid Serbia's democratisation, its society changed ideologically and culturally, following the example of modern European democracies. The most significant change is the remarkable social expansion of traditional churches and religious communities.[35] In Serbia's 2002 census, only 0.53% of the population declared themselves atheists. In addition, the vast majority of those who professed to be believers belonged to one of Serbia's seven traditional churches and religious communities.[36] In the 2011 census, over 99% of those who declared themselves believers also expressed an affiliation with traditional churches and religious communities.[37] Another important characteristic of the religious landscape of the Republic of Serbia is the connection between ethnic and religious affiliation.[38] The extent of this intertwining of religious and ethnic identity is seen in the names of churches that contain an ethnic determinant (e.g. the 'Serbian Orthodox Church', the 'Slovak Evangelical Church'). Although religious affiliation may be a factor in ethnic identity, it cannot be identified.[39] In any case, this connection between ethnic and religious identity is an aggravating factor affecting the drafting of legislation on the legal status of churches and religious communities.

The 1953 Law on the Legal Status of Religious Communities does not require the registration of religious organisations, although their legal personality under civil law has been recognised.[40] The 1977 Law on the Legal Status of Religious Communities was valid only in the Socialist Republic of Serbia. This law required citizens who established a religious organisation to report it to the municipal body in charge of internal affairs.[41] During the period when both laws were in force, there were no special conditions that religious communities had to meet in order to be registered, nor were there any procedures which needed to be carried out by state bodies. Some authors have therefore concluded that the application had a recording character instead of a constitutive one,[42] and that it was only a declaration of existence.[43] In accordance with this interpretation, religious communities have acquired legal personality through their very establishment.[44] Without entering into a theoretical discussion about the nature of the application that the founders of religious communities were obliged to submit before the locally competent police authority, the fact remains that such applications served as proof of possession of legal personality. The 1977 Law on the Legal Status of Religious Communities ceased to be valid pursuant to the

34 | Avramović, 2007, p. 15.
35 | Radulović, 2014, p. 94.
36 | *Population: census, households and dwellings in 2002: Religion, mother tongue and nationality or ethnicity by age and gender: data by municipalities*, 2003, p. 12.
37 | *Religion, mother tongue and ethnicity, Data by municipalities and cities*, 2013, p. 38.
38 | Radulović, 2014, p. 95.
39 | Radulović, 2014, p. 96; Đurić, 2014, p. 62.
40 | Law on legal status of religious communities, Art. 8.
41 | Law on legal status of religious communities, Art. 7.
42 | Đurđević, 2008, p. 185.
43 | Božić, 2019, p. 52.
44 | Đurđević, 2008, p. 185.

provisions of the 1993 Law on the Repeal of Certain Laws and Other Regulations.[45] Between 1993 and 2006, there were no regulations governing the registration and legal status of churches and religious communities. Their legal personality was not disputed, although it was not regulated. New religious organisations could opt to register and acquire the status of a legal entity in accordance with the regulations on citizens' associations.[46]

4. Classification of religious organizations

The 2006 Law on Churches and Religious Communities regulates the legal position of religious organisations in the Republic of Serbia and the procedures and conditions by which they are recognised (i.e. registered), while their freedom of action is guaranteed. Serbian legislators have implemented one of the variations of the multi-tier system, by dividing all religious organisations into three distinct categories: traditional churches and religious communities, confessional communities, and 'other religious organizations'.[47] This division was controversial and was one of the main reasons why the constitutionality of the Law on Churches and Religious was challenged. Several key factors need to be discussed before such a *prima facie* discriminatory differentiation between religious organisations, contrary to constitutional and international rules asserting their equality, can be rejected. The first is the question of the freedom of unregistered religious organisations to act; the second concerns the criteria and legal principles on which the division between religious organisations is based; and the third concerns the objective circumstances of the system applied in socialist Yugoslavia.

Regarding unregistered religious organisations, it should first be pointed out that their existence and activities are not prohibited by the Law on Churches and Religious Communities. The intention of the law was to enable as many religious organisations as possible to be registered under the Register of Churches and Religious Communities, but no legal obligation to register was introduced. Freedom of religion is not subject to any restrictions for anyone, regardless of the legal status of their organisation. However, as in other European countries,[48] unregistered religious organisations face difficulties in exercising certain rights. Since such organisations cannot be identified in legal transactions, they cannot own their own property or bank accounts, and may be a party to court proceedings only in exceptional cases.[49] Regarding the rights and obligations of religious organisations that are not registered, Serbian legislation is fully harmonised with international standards, which do not allow the prohibition or sanctioning of the activities of unregistered religious entities.[50] This is supported by the Rules on the Contents and Manner of Keeping the Register of Churches and Religious Communities, which stipulates that a religious organisation that does not want to undergo registration can still enjoy the religious freedoms guaranteed under the Constitution of the Republic of

45 | Law on the Repeal of Certain Laws and Other Regulations, Art. 1.
46 | Avramović, 2007, 14.
47 | Law on Churches and Religious Communities, Art. 4.
48 | Guidelines on the Legal Personality of Religious or Belief Communities, p. 24.
49 | Đurđević, 2008, p. 184.
50 | Đurđević, 2008, p. 13.

Serbia and international conventions on human rights.[51] Thus, a religious organisation may independently decide whether to submit a request for entry into the Register; the decision not to register produces certain consequences, which are known in advance.

Churches and religious communities categorised as 'traditional' receive the most favourable legal treatment in the Republic of Serbia.[52] These churches and religious communities meet two conditions: First, they enjoy centuries-old historical continuity; second, they acquired legal personality on the basis of special laws.[53] A wide range of evidence can be used to demonstrate the centuries-old historical continuity of traditional churches and religious communities, including regulations concerning their activities.[54] Their legal position was regulated by special laws in the period before World War II. Five churches and two religious communities are listed under the Law on Churches and Religious Communities, together with legal acts on the basis of which they acquired legal personality.[55] The circle of traditional churches and religious communities is closed because it is not possible for religious organisations currently outside it to meet both criteria and join it. Thus, the distinction between traditional and other religious organisations is based on objective criteria, which prevents state bodies from arbitrarily deciding on whom should receive the most favourable status provided by the legal system.[56] These criteria are derived from one general legal principle. During communist rule, traditional churches and religious communities were violently and illegally deprived of the numerous rights that they had acquired on the basis of previous laws. Just as legislators were obliged to order the return of forcibly and unlawfully confiscated property following the end of World War II,[57] there is also an obligation to regulate the restitution of rights and privileges that have been unlawfully taken away. The recognition of their legal personality *ex lege* represents a kind of *restitutio in the integrum*.[58]

When the Law on Churches and Religious Communities was adopted, some religious organisations acquired legal personalities on the basis of the liberal regulations created after 1953, in addition to the religious organisations that had acquired legal personalities before World War II. These religious organisations were legally declared 'confessional communities'.[59] Their legal personality is not recognised *ex lege*; however, the law required that they be registered under the new conditions if they wanted to retain it.[60] A particularly sensitive issue arising from such a legal solution is that of the continuity of legal personality. If continuity is interrupted, the confessional community could lose its acquired rights.

The Law on Churches and Religious Communities does not stipulate that the legal personality of confessional communities acquired in accordance with Yugoslav legislation

51 | Rules on the Content and Manner of Keeping of the Register of Churches and Religious Communities, Art. 7.
52 | Serbia implemented one variation of the multi-tiered registration systems; Coleman, 2020, p. 125.
53 | Law on Churches and Religious Communities, Art. 10.
54 | Collection of Laws, Decrees and Orders of the Ministry of Education and Religious Affairs, pp. 67-69, 116-118.
55 | Law on Churches and Religious Communities, Arts. 11-16.
56 | Guidelines on the Legal Personality of Religious or Belief Communities, p. 11.
57 | Law on Restitution of Property to Churches and Religious Communities.
58 | Avramović, 2011, p. 289
59 | Law on Churches and Religious Communities, Art. 16.
60 | Đurđević, 2008, p. 187.

will be recognised following their registration. This issue is regulated by the Rules on the Content and Manner of Keeping the Register of Churches and Religious Communities. These Rules stipulate that 'the date of first application [submitted by the religious community] shall be entered into both the Register and the decision on the registration of a religious organization according to previously valid laws and regulations'.[61] This means that the date on which an application by a religious organisation is submitted in accordance with Yugoslav legislation is taken as the date of establishment from which the continuity of legal personality runs, rather than the date of its entry into the Register in accordance with the applicable Serbian legislation. This guarantees that the continuity of legal personality will not be interrupted, and that the confessional communities that do undergo registration will not lose their acquired rights.

Since confessional communities and traditional churches and religious communities possessed the same legal personality when the new law was adopted, it can be argued that confessional communities have been subjected to discrimination due to the differences in their legal treatment.[62] All churches and religious communities are equal under the Constitution of the Republic of Serbia.[63] However, their equality does not mean that they are identical.[64] There are objective differences between traditional and confessional churches and religious communities; this leads to differences in legal treatment, which do not constitute discrimination. Equality implies different treatment for different groups.[65] Discrimination can coexist with equal treatment among groups. This attitude is best expressed by Pliny's legal proverb *Nihil est tam inaequale, quam aequitas ipsa*.[66] Most European countries recognise several different categories of religious organisation, which have different rights and privileges.

Objective circumstances also arise from the system of registration applied in the former Yugoslavia, which imposed different legal treatments across confessional communities. Yugoslav legislation lacked any notion of a central register of religious communities. The intention to introduce such a central register was the main reason why a special category of confessional community was established. Once a central register is created, entry into it is conducted under certain conditions (i.e. only when certain facts entered into the register are known to the competent authority). Confessional communities applied to local police authorities throughout the former Yugoslavia, but no central records on their applications were kept. The state authorities of the Republic of Serbia have no information on or records of these applications. In fact, state bodies are not able to determine which religious organisations actually belong to confessional communities. Registering them in the Register of Churches and Religious Communities requires that they submit the data about them that the state does not possess.[67] By contrast, data on traditional churches and religious communities are available to state authorities. This is the main legal difference between the confessional and traditional churches and religious communities, and forms the basis of the differences in the registration procedures used for them.

61 | Rules on the Content and Manner of Keeping of the Register of Churches and Religious Communities, Art. 7.
62 | IUz- 455/2011.
63 | Constitution of the Republic of Serbia, Art. 44.
64 | Avramović, 2011, p. 286.
65 | Religionsgemeinschaft der Zeugen Jehovans and others v. Austria, Application no. 40825/98.
66 | Avramović, 2015, p. 636.
67 | IUz- 455/2011.

5. Conclusions

Most Central European states have enacted new legislation pertaining to the legal status of churches and religious communities. These legislative improvements were necessary in order to replace the anachronistic, outdated, and (in some fields) hyper-liberal laws inherited from former communist regimes. Several significant obstacles and legal challenges remain that make the enactment of new legislation difficult.

One of them involves the de-registration and re-registration of religious organisations recognised by the state on the basis of the liberal provisions of outdated laws. The Act on Churches and Religious Communities of the Republic of Serbia (2006) introduces three categories of religious organisation: 'traditional churches and religious communities', 'confessional communities', and 'other religious organisations'. Confessional communities comprise those churches and religious communities whose legal position was regulated according to the laws of Yugoslavia and the Socialist Republic of Serbia. Confessional communities obtain 'legal person' status by being entered into the register, under the same conditions that apply to new religious organisations; by contrast, traditional churches and religious communities are registered *ex officio*, and the state recognises the continuity of their legal status. The basis of this differentiation is the mere fact that state authorities do not possess the information necessary for their registration.

Distinguishing between different categories of religious organisation is a controversial issue concerning the protection of the freedom of religion. In principle, their distinction does not have to be contrary to international standards for the protection of freedom of conscience and religion. Religious organisations are equal, but equality does not imply identical legal positions, or rights and privileges. Religious communities should have identical rights to the extent to which the communities are identical. If there is a legal difference between them, identification in terms of rights would constitute discrimination. On the other hand, distinguishing between religious organisations that are equal must not present grounds for discrimination against certain categories of religious organisation. Any distinction should be based on objective criteria derived from general legal principles. Judicial review of the justification of such decisions must apply the proportionality test used by the European Court of Human Rights in its case law.

The Serbian Law on Churches and Religious Communities bases the distinction between traditional and confessional religious organisations on their objective legal differences. On the one hand, the state possesses all the information on traditional churches and religious communities necessary for their entry into the Register; on the other hand, it lacks the information required for confessional communities, since some of them were registered outside the state's current borders. It is important to emphasise that the bylaw stipulates that the legal personality of (re)registered confessional communities shall be recognised from the moment an application is submitted in accordance with the previous legislation. In this way, the continuity of the legal personality, legal security, and exercise of the acquired rights of all confessional communities are guaranteed.

This study analyses one of the variations in multi-tier systems, whereby religious groups can belong to different categories of legal entity in stratified systems of church–state relations. Since these systems exist in a number of European countries, it would be desirable to analyse the positive practices that have emerged from them. Positive examples could be used to improve church–state relations and multi-tier systems throughout Europe.

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A TYPOLOGY OF SOCIAL MEDIA REGULATIONS IN EUROPE AND THEIR POSSIBLE FUTURE DEVELOPMENT

András KOLTAY[1]

ABSTRACT

Social media, search engines, and application platforms are the most important online gatekeepers from the perspective of freedom of expression. These routinely make 'editorial' decisions to make certain content inaccessible or to delete or remove it (either to comply with a legal obligation, to respect certain sensitivities, to protect their business interests or at their own discretion). Through such decisions, they directly influence the flow of information. The regulation of gatekeepers also determines the extent to which they are able or obliged to intervene in the process of publishing user content. The number and scope of regulations continue to grow, and the nature of these regulations is diversifying, even more so for online gatekeepers than for traditional media, and this imposes a wide range of rights and obligations on them. The paper reviews the regulations governing social media platforms in Europe, as gatekeepers, which have the greatest impact on the public sphere, typifying the regulations and considering possible directions for their future development.

KEYWORDS

internet regulation
social media
freedom of expression
self-regulation
co-regulation

1. The role of gatekeepers in online communication

Although the Internet seemingly promised direct and unconditional access to anyone possessing the right to free speech who wishes to participate in public discourse, in practice, it is not possible to publish an opinion without gatekeepers, even online. Gatekeepers refer to anyone whose activities are necessary for others' opinions to be expressed publicly. These include Internet service providers, blog providers, social media platforms, search engine providers, application vendors, web stores, news portals, news

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aggregating sites, or content providers of websites that decide on users' comments on posts. Some gatekeepers wield greater influence, may significantly impact public communication and may be unavoidable. In contrast, others have a minor impact, and the smaller ones are invisible to the public. A common feature of gatekeepers is that they can influence the public sphere even as a non-state actor, in most cases much more effectively than the government itself.[2] As private actors, gatekeepers are generally not bound by the constitutional protection of freedom of expression; they may set their standards of freedom of expression within their field of operations.

Social media, search engines, and application platforms are the most important online gatekeepers from the perspective of freedom of expression. These routinely make 'editorial' decisions to make certain content inaccessible or to delete or remove it (either to comply with a legal obligation, to respect certain sensitivities, to protect their business interests or at their own discretion). Through such decisions, they directly influence the flow of information. The activities of these gatekeepers may also aim to arrange how content is presented, changing the emphases between them (the 'findability' of the content), and creating a personalized offer for the user. Thus, as Uta Kohl notes, the most important questions concerning the principle of Internet gatekeepers concern the active or passive nature of their role in the communication process, the nature of their 'editorial' activity, and the similarity of this activity to the actual editing.[3] The role of gatekeepers is not passive; they have become key players in the democratic public sphere, are actively involved in the communication process, and can thus make decisions on what their users can access and what they cannot, or what can be accessed only with substantial difficulties.

The regulation of gatekeepers also determines the extent to which they are able or obliged to intervene in the process of publishing user content. The number and scope of regulations continue to grow, and the nature of these regulations is diversifying, even more so for online gatekeepers than for traditional media, and this imposes a wide range of rights and obligations on them. This paper will review the regulations governing social media platforms in Europe, as gatekeepers, which have the greatest impact on the public sphere, typifying the regulations and considering possible directions for their future development.

2. Legal regulation of social media

2.1. Regulations affecting the internet

Attempts to regulate the World Wide Web in the European Union (EU) have so far fallen into two categories: the regulation aimed specifically at certain Internet services and regulation that is generic in scope but also applies to Internet services. In addition to the areas harmonized by EU law, individual states may adopt specific rules as long as they do not present an unjustified obstacle to the free movement of services within the EU.

2 | Laidlaw, 2015, p. 39.
3 | Kohl, 2016, pp. 85–87.

The 2007 amendment to the AVMS Directive regulated audiovisual on-demand media services (also) available on the Internet,[4] and the material scope of the Directive was extended to video-sharing platforms in the 2018 amendment.[5] The main purpose of the Directive is to facilitate the free, cross-border flow of media services and, in some cases, to establish specific rules on the content of services, covering television (i.e., the 'traditional' subject of media regulation) and on-demand and other similar audiovisual services. However, it is not comprehensive and detailed but instead reflects a broad European consensus in this field regarding the protection of minors, the suppression of hate speech, and the definition of a framework for commercial communication.

The regulation of the information society and e-commerce services in Europe was based on a Directive adopted in 2000.[6] The material scope of this Directive extends to information society services, that is, a 'service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.' This also applies to intermediary services, which are categorized by the Directive into the simple transmission, caching, and hosting. In addition, the scope of the Directive may extend to any other service falling under broadly defined concepts, such as web stores, search engines, and even social media sites. The Directive also aims to create a single European market in the regulated field and, above all, to establish common rules of a consumer protection nature (thus not containing a provision on the content of regulated services). In addition, the obligations imposed on intermediary service providers in relation to infringing content are of paramount importance.[7]

Regulations affecting freedom of expression have also been adopted in the fields of copyright,[8] advertising law,[9] and data protection. Although not specifically designed for internet services, they also bind to them.[10] The platforms are also partly covered by the scope of contracts, consumer law,[11] and competition law.[12]

According to the case-law of individual states and the European Court of Human Rights, speech restrictions in the offline world may generally be applied in an online environment. The validity of the rules established in the traditional media world and the scope of the relevant legislation (mainly civil and criminal codes) generally cover factual communication

4 | Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) ['AVMS Directive'], art. 1.

5 | AVMS Directive, as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 ('new AVMS Directive').

6 | Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce', E-Commerce Directive), art. 2(a), with reference to art. 1(2) of Directive 98/34/EC.

7 | E-commerce Directive, arts. 12–14.

8 | Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

9 | See, e.g., Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

10 | Regulation (EU) 2016/679, General Data Protection Regulation.

11 | Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive).

12 | Arts. 101 and 102 of the Treaty on the Functioning of the European Union.

via the Internet (defamation, invasion of privacy, hate speech, etc.).[13] According to the former, this may have consequences not only for the speaker but also for the service provider involved in the publication of the infringing content. Although the real responsibility for the infringing content lies primarily with the publisher of the content (in some cases primarily upon failure to remove the infringing content[14]), their indirect liability may be established. As such, these speech restrictions necessarily apply to several activities.

2.2. Regulation of social media

Under EU law, social media platforms are considered to be hosting service providers, as the users of such services store, sort, and make their own content available in and through the system. This means that, pursuant to the E-Commerce Directive, the platforms are required to remove any violating content after they become aware of its infringing nature,[15] but they may not be subject to any general monitoring and control obligation.[16] It is open to question whether a platform may be required, under Art. 14 of the Directive, to remove not only a specifically identified piece of content but also all other identical or 'similar' content that might be made available in the future. The strict ban on the general monitoring obligation appears to have been questioned by the judgment of the Court of Justice of the European Union in *Glawischnig-Piesczek v. Facebook*,[17] in which the Court ruled that it was not contrary to EU law to oblige a platform provider such as Facebook to delete entries identical to, or, under certain conditions, with the same or similar content as a previously defamatory entry. According to the judgment,

> Directive 2000/31, in particular Article 15(1), must be interpreted as meaning that it does not preclude a court of a Member State from:
> - ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information;
> - ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content, or
> - ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law.[18]

13 | Infringements on the internet, e.g., limitation of obscene opinions: *Perrin v. the United Kingdom*, no 5446/03, decision of 18 October 2005; for violation of good reputation, see *Times Newspapers Ltd. v. the United Kingdom* (*Nos. 1* and *2*), no 3002/03 and 23676/03, judgment of 10 March 2009; *Mosley v. the United Kingdom*, no 48009/08, judgment of 10 May 2011; in terms of protection of copyrights, see *Ashby Donald and Others v. France,* no 36769/08, judgment of 10 January 2013.
14 | E-commerce Directive, arts. 12–14.
15 | Ibid., art. 14.
16 | Ibid., art. 15.
17 | Judgment of 3 October 2019 in case no C-18/18 *Eva Glawischnig-Piesczek v. Facebook Ireland Ltd*.
18 | Ibid, para. 53.

In addition to the E-Commerce Directive, more general pieces of legislation also apply to communications via social media platforms, including legislation on data protection, copyright, protection of personality rights, public order, and criminal law. Such legal provisions may also introduce obligations for hosting service providers in the context of removing violating content.

The offline restrictions of speech are also applicable to communications made through social media platforms.[19] Common violating behaviors in social media can be fitted into a more traditional criminal category (i.e., one that was adopted in the context of the offline world) almost without exception, which makes the introduction of new prohibitions unnecessary.[20] However, this duality gives rise to numerous difficulties, as, on the one hand, such limitations are defined as part of the national legislation of every country (and the law of free speech is also far from being fully harmonized among EU member states) and, on the other hand, social media are a global phenomenon by nature, meaning that they transcend national borders. For instance, an opinion that is protected by freedom of speech in Europe might constitute a punishable blasphemy in an Islamic country.

Since harmful content can be made available worldwide and shared on a social media platform quickly, the absence of a uniform standard can lead to tension and violence.[21] It seems that there is no ideal solution, as neither the limitation of freedom of speech nor the forcing of one's norms onto others appears acceptable. Robert Kahn uses the Holocaust as an example to demonstrate that the limitation of free speech can only be enforced with limited effect (in part due to the lack of consolidated standards), meaning that any offensive content can easily find its way into countries that ban such expressions. In the era of Facebook and YouTube, it is unlikely that such problems could be addressed (Geoblocking could offer some kind of solution, but it is also ill-equipped to counter unique and quickly spreading pieces of content).[22] Kahn believes that stricter restrictions would not solve the problem, arguing that the distinctive features of communication through social media should be accepted, as it should also be acknowledged that such problems and challenges arising from social media platforms cannot be solved perfectly from a legal perspective.

Based on the amendment adopted in 2018, the material scope of the AVMS Directive has been extended to include video-sharing platform services.

> 'Video-sharing platform service' means a 'service as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union; the principal purpose of the service or a dissociable section thereof is devoted to providing programmes or user-created content to the public in order to inform, entertain or educate, via electronic telecommunications networks within the meaning of Article 2(a) of Directive 2002/21/EC, for which the video-sharing platform provider does not have editorial responsibility and the organisation of the stored content is determined by the provider of the service, including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing.'[23]

19 | Rowbottom, 2012, pp. 357–366.
20 | Social Media and Criminal Offences, House of Lords (2014), https://publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3702.htm.
21 | Kohl, 2017.
22 | Kahn, 2019.
23 | New AVMS Directive, art. 1(1)(aa) (the precise identification of the provisions takes place in relation to the 2010 AVMS Directive, indicating the numbering of the Directive amending the Directive).

Although the original proposal would not have extended the scope of the Directive to social media platforms in general (as far as the audiovisual content uploaded to the site is concerned), it became clear during the legislative process that they could not be exempted from the Directive by focusing on portals used to share videos only (such as YouTube).[24] The amended recital to the Directive states

> Video-sharing platform services provide audiovisual content which is increasingly accessed by the general public, in particular by young people. This is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. Those social media services need to be included in the scope of Directive 2010/13/EU because they compete for the same audiences and revenues as audiovisual media services. Furthermore, they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users. Therefore, in order to protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism, those services should be covered by Directive 2010/13/EU to the extent that they meet the definition of a video-sharing platform service.[25]

This means that, despite its somewhat misleading name, a video-sharing platform also includes audiovisual content published on social media. An important aspect of the newly defined term is that service providers do not bear any editorial responsibility for such content. In contrast, service providers do sort, display, label, and organize such content as part of their activities; they do not become media service providers themselves.

Arts. 28b(1)–(2) of the amended directive provides that Arts. 12 to 15 of the E-Commerce Directive (in particular, the provisions on hosting service providers and the prohibition of introducing a general monitoring obligation) remain applicable. The Member States must ensure that video-sharing platform providers operating within their respective jurisdictions take appropriate measures to ensure:

- the protection of minors from programs, user-generated videos, and commercial audiovisual communications that may impair their physical, mental, or moral development;
- the protection of the public against programs, user-generated videos, and commercial audiovisual communications that incite violence or hatred against a group of persons or a member of a group;
- Protection of the public against programs, user videos, and commercial audiovisual communications containing content that constitutes a criminal offense under EU law, such as public provocation to commit a terrorist offense as set out in Art. 5 of Directive (EU) 2017/541, offenses concerning child pornography as set out in Art. 5(4) of Directive 2011/93/EU of the European Parliament and of the Council, and offenses concerning racism and xenophobia as set out in Art. 1 of Framework Decision 2008/913/JHA.
- compliance with the requirements of Art. 9(1) of the AVMS Directive (general restrictions on commercial communications and others related to the protection of minors)

24 | Robinson, 2017.
25 | New AVMS Directive, recital, para. (4).

with respect to the commercial audiovisual communications they market, sell or arrange.

What constitutes an 'appropriate measure' shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected, and considering the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users who created, transmitted, and uploaded the content as well as the general public interest.[26]

According to the Directive, such measures should extend to the following (among others):

- defining and applying in the terms and conditions of the video-sharing platform providers the above-mentioned requirements,
- establishing and operating transparent and user-friendly mechanisms for users of video-sharing platforms to report or flag up to the video-sharing platform provider concerned the content objected to,
- with a view to protecting children, establishing and operating age verification systems for users of video-sharing platforms with respect to content that may impair the physical, mental, or moral development of minors,
- providing parental control systems with respect to content that may be harmful to minors,
- providing users with easy-to-use controls to identify violating content,
- establishing and operating transparent, easy-to-use, and efficient procedures to manage and settle disputes between video-sharing platform providers and users,
- providing information and explanations by service providers regarding the protective measures,
- implementing measures and controls aimed at media awareness and providing users with information regarding such measures and controls.[27]

While the new provisions of the Directive appear rather verbose and detailed, the major platform providers have already begun making efforts to comply with the requirements that have now become mandatory. The regulations only apply to a narrow range of content (i.e., audiovisual content), and the government is granted control over the operation of platform providers only with regard to a handful of content-related issues (child protection, hate speech, support for terrorism, child pornography, or denial of genocide). The content of this type is commonly banned or removed upon notice by the platforms under their own policies. However, not all content prohibited in Europe is banned by such policies. Once the provisions of the Directive are transposed into the national law of EU member states, platform providers will be required to take action under both the E-Commerce Directive and the AVMS Directive. These two pieces of legislation act mostly in parallel, as the former requires infringing content to be removed in general, while the latter defines certain specific types of the infringing content and lays down detailed rules for their removal. Beyond this, the new AVMS Directive lays down numerous provisions that both facilitate the application of the rules and work as procedural safeguards.

26 | New AVMS Directive, art. 28b(3).
27 | Ibid.

Art. 28a(2) seeks to settle jurisdiction-related matters concerning the principle of establishment, a general principle of EU media regulation, and provides the following:

> A video-sharing platform provider which is not established on the territory of a Member State pursuant to paragraph 1 shall be deemed to be established on the territory of a Member State for the purposes of this Directive if that video-sharing platform provider:
> (a) has a parent undertaking or a subsidiary undertaking that is established on the territory of that Member State; or
> (b) is part of a group and another undertaking of that group is established on the territory of that Member State.

It remains to be seen how the Member States will apply the rules resulting from the new AVMS Directive after its implementation, how the national provisions can be harmonized regarding the detailed rules, and how the major platform providers can be forced to cooperate (which is a regulatory requirement for each member state).

The legal situation is much less complex in the United States, as the Section 230 Communications Decency Act protects social media platforms against government interference. If a platform only provides the framework needed to upload content, it cannot be held responsible for the possibly infringing nature of that content, even if it encourages users to speak and if it sorts user content.[28] However, providers are required to remove criminal material qualified as a federal crime, as well as any material that breaches the law on intellectual property. If a platform controls, generates, actively edits, or modifies users' content, then it loses its immunity.[29] The scope of exceptions from this rule can also be extended, as happened in 2018, since when the law permits taking action against websites, including hosting service providers, which promote trafficking in human beings for sexual exploitation.[30]

2.3. Self-regulation

Legislation is the primary, but not the only, means of regulating the conduct of legal entities. Self-regulation may be more effective in achieving the goals underlying the regulation of platforms. There is no clear definition of self-regulation; instead, it serves as a collective category for alternative (extra-legal) regulatory approaches. By self-regulation, here I mean a system of rules created and supervised by bodies set up by market and industry actors, but formally operating independently of them.

Self-regulation is a bottom-up construction, the essence of which is that each sector develops its own rules of conduct and ethics, which each recognizes as binding upon itself, and those who violate these rules are threatened with sanctions. The main feature of self-regulation is its voluntary nature: the industry players concerned are free to decide whether they want to participate in self-regulation or submit themselves to the self-regulatory mechanism. They may have not only moral reasons for this – in the free market; these reasons have little influence anyway, but also a well-conceived interest in participating: they may wish to present the image of a socially responsible company or hope that effective self-regulation can act to pre-empt stricter and mandatory state

28 | Tushnet, 2008, p. 1009.
29 | Jackman and O'Connell, 2017.
30 | Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA). See Jackman, 2018.

measures or legislation. Such considerations also drive Facebook, which has not brought about industry self-regulation, but created a self-regulatory mechanism that oversees its own operation only; it set up a supervisory body independent of the platform and of the state and other industry players.[31] Facebook's new self-regulatory body, set up in the spring of 2020, is the Oversight Board, previously referred to by Mark Zuckerberg as the 'Supreme Court of Facebook,' which is not intended to serve as an appeal forum for individual cases but as a body that sets general benchmarks for freedom of expression.[32] An essential element of self-regulation is the separable nature of the regulated and the regulator: The Oversight Board (the regulator) will therefore be considered self-regulatory if Facebook (the regulated) submits itself to its decisions.

The advantages of self-regulation over codified law are its flexibility and ability to adapt more rapidly, while its clear disadvantages are its lack of credibility (it is created with the participation of industry actors and is not completely independent of them) and uncertain effectiveness, since it lacks actual binding force and participation in it, and its submission to decisions made as a result of supervision is left to stakeholders. I also consider self-regulation supported by codified legal regulation as a form of self-regulation, where legal rules prescribe the framework, but self-regulatory organizations are entrusted with both the creation of norms (codes) and supervision, and the state cannot control their operation (an example of this is the English press's statutory self-regulatory system[33]).

2.4. Co-regulation

Co-regulation is a joint effort by the state and industry, which combines a system of codified law and self-regulation. Co-regulation is also an umbrella term because there are many possible forms and shades of cooperation between the state and the industry concerned. In practice, it is also characterized by being voluntary; that is, individual market participants are not obliged to participate. In principle, mandatory co-regulation could be envisaged, where the state requires market players to participate, but there are no examples of this in the media and content industry across Europe, at least not in general terms. At the same time, the rule implementing specific co-regulation in the E-commerce Directive provides for action against infringing user content on social media (see next section). Parallels can be drawn with various professional chambers, such as the bar or the chamber of notaries, where membership is compulsory for members of the profession and rules may be set by the state and also by the regulatory body authorized by it.

Co-regulation may facilitate the enforcement of legal obligations and the supervision of their observance, or it may completely replace legal regulation, provided that the parties also develop the norms to be complied with within the framework of co-regulation. In the latter case, it is also conceivable that the state only imposes an obligation on a branch of industry to operate such a system, which establishes a norm setting and compliance body or organization (ideally also independent of each other), with the state checking its legality and the adequacy of its operation.

31 | Kelly, 2020.
32 | Klonick, 2020, p. 2432.
33 | The Royal Charter on Self-Regulation of the Press (2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean__Final_.pdf (2020.03.28.).

The AVMS Directive also recognizes the significance of self- and co-regulation and requires member states to promote and incentivize the establishment of such systems. In this context, this highlights that measures aimed at attaining public interest objectives in the media service sectors are more effective if they are taken with the active support of service providers.[34]

2.5. Mandatory co-regulation on judging user behavior

Participation in co-regulatory schemes is generally voluntary for service providers, but, on a single important issue, regulations still subject them to specific co-regulation at the European level. This implementation of co-regulation obliges platforms to participate in monitoring the legality of user behavior. The regulation is binding on the platform, but aims to take action against infringements committed by users. The platform's liability is not for publishing infringing content but for failing to take action against it.

Art. 14 of the E-commerce Directive provides for a broad exemption for platforms so that if they made infringing content available, it was not their own content. They were not originally aware of the infringing nature of that content; they will not be held liable as long as they take action to remove or terminate access to it immediately after becoming aware of the infringing nature. However, in the event of failure to do so, they may be held liable for their own conduct. In this way, codified legal regulation forces the platforms into a decision-making role concerning user content, expecting them to decide on the illegality of the content, conditional upon their awareness of it. The consequence of this procedure may be the removal of content.

The assessment of what constitutes an 'infringing' nature raises a very important issue. The removal obligation is independent of any judicial or other official procedure to establish the infringement, and the hosting provider must act before such a decision is made, if any legal proceedings are instituted. It is therefore up to it to decide on the infringement itself, and this decision will be free from the guarantees of the rule of law (while it may also affect the freedom of expression). It may encourage the provider to decide against retaining content in any case of a concern to cover itself. This co-regulation, enforced by legal regulation, may be seen as a specific form in which the enforcement of codified legal norms (restrictions on freedom of expression) is monitored by a private party (the platform), which simultaneously enforces sanctions (deletion of content).

2.6. Private regulation

For social media, private regulation is how the platforms themselves create rules and oversee them in a process that they also create themselves. These rules do not, of course, oblige the platform itself, but its users. Private regulation is thus an additional extra-legal regulation of user behavior, which may overlap with codified legal regulation, but which is not a necessary feature. Platforms may enforce the private regulation of their users through their contract with them, so these rules have a legally binding force between the parties. Furthermore, because it primarily concerns content published and shared by users, it directly affects the freedom of expression. For example, the 'Oversight Board' established by Facebook may be considered private regulation, as its activities affect the freedom of expression of platform users. If Facebook also submits to its decisions, the Board's operation towards the platform may be considered self-regulation (see section

34 | AVMS Directive, art. 4a.

2.3), the rules of operation of the Board are established by Facebook, its members are appointed by Facebook, and its competence extends exclusively to the Facebook platform. The establishment of the Oversight Board is another step towards constructing a 'pseudo' legal system that is developing in parallel with the state legal system.

Platforms have the right to create these rules, which stems from their right to property and the right to freedom of the enterprise. There are relatively few restrictions on private regulation of this kind, although platforms are also required to comply with restrictions on freedom of expression (e.g., with regard to the advertisements they may accept) or to comply with the requirements of equal treatment of their users. In addition to their rights, private regulations may impose restrictions on the opinions published on the platform. Jack Balkin calls this phenomenon private governance,[35] while others prefer to use the less euphemistic term private censorship.[36] As Balkin has warned, it seems unreasonable to attempt to discuss compliance with government regulations separately from private regulations, considering that the threat of government regulation incentivizes platform providers to introduce private regulations, because the providers are interested in avoiding any troublesome interference by the government.[37]

Platform providers also have other motives for adopting private regulations. Of course, the most important of these is the economic nature. Platform providers are interested in ensuring that their users feel safe while using their platform, and are not confronted with insulting, upsetting, or disturbing content. The moderation and removal of such content do not take place in line with the normal limitations on free speech, meaning that a piece of content may be removed by this logic even if it would otherwise be permitted by law. In contrast, another piece of content may remain available even if it violates the limitations of free speech. A major problem with private regulation is that it may be both stricter and more lenient than government regulation, and as a result, the way it regulates content is unpredictable. Another major issue is that no adequate decision-making procedure is in place regarding the removal of pieces of content, meaning that the constitutional safeguards commonly available in legal proceedings are absent (for instance, the appropriate notification of the users concerned, the opportunity to appeal, public proceedings, transparency about the identity of the decision-maker, the requirement that decisions be made in writing and can be read, etc.). Over time, due to pressure from various sources, platforms are taking steps towards transparency, but they still have a long way to go in this regard.

The removal of undesirable content for the platform concerned is not the only means of implementing private regulations. A far more powerful means of implementing it is the editing and sorting of the content presented to individual users, as well as the promotion and suppression of certain pieces of content, the impact of which is not limited to individual pieces of content but to the entire flow of content on the platform (in the case of Facebook, it happens in their news feeds). This is not 'regulation' or 'censorship,' because it does not require a normative decision on the 'adequacy' of the content (examined in the light of the private regulation code), but it fundamentally affects the chances of each item of content to reach the public and so it may be considered as a kind of editing that generally has a greater overall impact on the fate of each piece of content than private regulation itself. All of this is done for the purpose of providing personalized services

35 | Balkin, 2018, p. 1182.
36 | Heins, 2014, p. 325.
37 | Balkin *supra note* 34, 1193.

and serving individual user needs (as guessed by the platform), relying on information collected about each user, their previous online presence, and their platform-generated profile. Thus, each user, unknowingly and, indeed, without explicit consent, influences the content of the service they receive, while the platform actively exerts influence over the user's intent and is capable of influencing the user, while at the same time having an impact on content producers, measurable in terms of money and opinion-forming power. The resulting consequences have an impact on the decisions that users make as consumers and also on the discussion of public affairs, access to information, and the diversity of opinion – in other words, the quality of the democratic public sphere.

3. Possible future regulatory models

Although the future of social media regulation is uncertain, certainly possible optional regulatory models are emerging within the framework of our current knowledge. In the following section, I outline models for the possible future regulation of social media. These may be further cross-bred with each other, that is, many other variations are conceivable, just as a new, previously unknown regulatory solution may emerge in the distant future.

3.1. 'Pure' legislation

'Pure' legislation means when the commanding norm is set by the state legislator and the related liability system is operated entirely by the state, through the courts and investigating authorities, without the participation of social media platforms. These include the rules contained in major codes of law and the systems of their oversight (civil and criminal codes), as well as, for example, the data protection regime. On their own, however, these rules are not suitable as a full, prompt, and effective remedy for violations committed through social media. The three possible legal, regulatory models are outlined below:

3.1.1. The European media authority model

It is conceivable to use a European model of a media authority, in which the norm is set by the legislator and the authority can react faster than the judicial system, with the authorities applying a system of sanctions for infringements and monitoring the operation of media service providers, whose decisions may be reviewed and possibly overturned by a court. However, applying a traditional media regulation model of this kind to social media is not realistic, as it assumes a kind of control over content that makes the mere publication (making available on the platform, that is, uploading by a user) of illegal content punishable in and of itself, as is the case in the context of broadcasting content by radio or television. This approach is unsustainable for social media platforms. In their present form of operation, it is not the platform that decides on publishing a given piece of content. For this reason, any sanction triggered by the act of publication might compel social media platforms to implement preliminary (pre-publication) monitoring to prevent and eliminate any possible violations in time. This would raise concerns, not only because it would bring about fundamental changes in the functioning of the platforms, but also because the overall implementation of such preliminary monitoring seems impossible

for the more popular platforms at this point, owing to the substantial volume and diversity of user-generated content, even with the use of various algorithms. At the same time, the monitoring of behaviors that are prosecuted under criminal law is very much present on the platforms, for example, content showing child pornography and support for terrorism is pre-screened. If, over time, it becomes technically possible to control all data traffic, the decision on issues that are difficult to judge (restrictions on political opinions, protection of personal rights, etc.) should not be left to artificial intelligence. The flood of content and the potential problems alone preclude using the traditional authority model, which is time-consuming – even if it is faster than court proceedings – compared to the dynamics of online communication.

3.1.2. Adopting the US model to the European landscape

A regulation similar to Section 230 of the CDA in the US does not seem conceivable in Europe. This rule provides a general exemption for social media platforms, except for certain high-profile violations specified in the law: they are not generally obliged to remove infringing content even if they are noticed. As Marcelo Thompson points out, American regulations are based on the assumption that a platform does not interfere with communication between users (unless it is required to remove illegal content and apart from important situations determined by law), because it has no incentive to do so.[38]

Under US law, the issues related to government censorship are handled reassuringly for the most part, since platform operators are not incentivized to comply with the government's attempts to influence their users, either through the promise of benefits if they play along with such attempts, or the threat of sanctions if they refuse to do so. At the same time, however, it does not allow the damage caused by the exercise of freedom of expression to be dealt with through statutory law, at least with regard to the liability of platforms, but allows private regulation to be exercised, without providing legal guarantees for the activities of gatekeepers. The European legal approach is incompatible with the application of this model.

3.1.3. The general prohibition of private regulation

Another possible paradigm, the elimination of the independent decision-making powers of social media platforms over content might bring about a regulatory scheme that is simpler and more predictable than any form of co-regulation. While limiting the liability of platforms, the US approach does not preclude platforms from making their own decisions to delete user content. Relieving such liability only reinforced the decision-making power of platforms, and they, in fact, had plenty of incentives to interfere with user communications (e.g., by trying to create a safe space for users or in pursuit of a political agenda, etc.). As a result, the limits of debates and public discourse on a platform are defined through private regulation, as opposed to government regulation, unless the power of social media platforms is restricted in some form.

A possible solution to this problem would be to consider platforms as public utilities or public forums to which the service provider is obliged to guarantee equal access. In such a situation, a social media platform would not be permitted to restrict the freedom of communication, just as a phone service provider is prohibited from restricting the content of conversations conducted through its network. The idea of prohibiting private regulation

38 | Thompson, 2015/16, p. 785.

might seem attractive at first. It is not unprecedented even in the world of online gatekeepers, as the concept of network neutrality in the context of Internet access providers serves quite similar purposes.

If it were banned by law, what would happen to the platforms' obligations in Europe to remove infringing content from their systems? Requiring platforms to judge the illegal nature of a given piece of content would mean that they are subject to an obligation that is not easy to perform and for which private regulation (i.e., extensive removal of the content) is encouraged. Under this model, it would be reasonable to relieve platforms from any liability for illegal content in general (similar to the US approach), or to require platforms not to remove any content unless it is ruled to be illegal by a court (or other authority).[39] Unlike the elimination of private regulation, a regulatory change in this direction would probably be welcomed by social media platforms. Generally, the platforms argue that intermediary service providers should not be expected to examine and judge content and that they should be required to send notifications to a competent body, 'ideally a court or other independent and impartial body qualified and with legitimacy to make these kinds of decisions.'[40]

The elimination of private regulation from two directions (both on the side of platforms and the side of reporting users) would probably be beneficial for free speech. However, it would also jeopardize the success of taking action against dangerous and harmful content since it would eliminate the possibility of taking prompt and decisive action against it, which is currently quite an attractive possibility for injured parties. This issue could be solved by permitting platforms to take action upon receipt of user reports (i.e., removing a piece of challenged content if it appears illegal *prima facie*), but doing so could also compromise the model and open the door to private censorship. Another possible solution would be to accelerate legal procedures aimed at determining whether a given piece of content is illegal. However, this does not seem feasible under the existing framework of courts and media authorities, meaning that the establishment of new and rapidly responsive bodies would need to be feasible, which would be uncertain.

3.2. Co-regulation

The operation of social media in Europe is currently governed by a specific system of co-regulation. The norms setting the prohibitions are made by individual states and EU legislative bodies, based on the E-commerce Directive, the removal of content that may be considered infringing under the Directive is the responsibility of the platforms if they receive a notice. This system can be considered co-regulation because it is entirely up to the platforms to assess the infringing nature of the content. If the request for deletion is rejected, but the content, following a decision by an authority, is still considered infringing, the platform is liable if it is not deleted. It is not only the Member State regulation implementing the E-commerce Directive based on this system of liability but also laws adopted independently by member states tightening the obligations of platforms,[41] such

39 | Chandler, 2006-07, p. 1117.
40 | Internet Service Providers' Association (UK), 2018.
41 | Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz –- NetzDG) Artikel 1 G. v. 01.09.2017 BGBl. I S. 3352 (Nr. 61), https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html.

as the German and French acts.[42] However, the co-regulatory system can be further refined and detailed.

3.2.1. Details and clarification of the current liability regime

According to the EU's approach to regulating platforms, the notice-and-takedown rule of the E-commerce Directive continues to be the basis for regulation. The recommendations and communications issued by the EU, as well as the 2018 amendment to the AVMS Directive, aim to establish a suitable legal and regulatory framework for the decision-making powers and, occasionally, an obligation of platforms under the supervision of government authorities, as a means of tackling the challenges that may arise.

The 2018 Recommendation of the Committee of Ministers of the Council of Europe raises the issue of regulating platforms,[43] encouraging them to respect the freedom of speech, ensuring that there is a clear (legal or ethical) basis for their interference with content,[44] and guaranteeing transparency and accountability[45] with special regard to the application of their content-related policies so that they also comply with the principle of non-discrimination.[46] It is also recommended that every user be guaranteed the right to an effective remedy and dispute resolution (regardless of whether or not the users are concerned about protecting their freedom of speech or the possible violation of their rights by the free speech of others).[47] It has even been suggested in the EU Commission that the deadline for removing illegal content could be shortened; there could be a requirement for pieces of especially dangerous content, such as speech-promoting terrorism, to be removed within one hour after receipt of a notice.[48]

These proposals of the EU, the recommendation of the Council of Europe, and the voluntary undertakings of the market actors concerned would, however, leave the notice-and-takedown procedure established by the EU's E-Commerce Directive essentially unchanged. Even in most EU documents, it is recommended that platforms voluntarily use means beyond state law. Jacob Rowbottom argues that this strategy aims to handle the problem by implementing a regulatory framework in which the regulatory body does not define its content-related expectations accurately or enforces such expectations consistently. Instead, platforms may develop their own rules and procedures related to the content, while the regulator oversees and controls these internal procedures to ensure adequate standards.[49]

Procedural strengthening of the notice-and-takedown procedure and stronger state oversight is, therefore, the simplest and most obvious regulatory approaches. The government (like any other user) may request the removal of illegal content only. However, the

42 | Loi visant à lutter contre les contenus haineux sur internet. Assemblée nationale, www.assemblee-nationale.fr/15/pdf/ta/ta0310.pdf. The French law was declared unconstitutional by the Conseil constitutionnel in June 2020, cf. Décision n° 2020-801 DC du 18 juin 2020.
43 | Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries. Council of Europe, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14.
44 | Ibid., s. 2.1.3.
45 | Ibid., s. 2.2.
46 | Ibid., s. 2.3.
47 | Ibid., s. 2.5.
48 | Google, Facebook, Twitter Face EU Fines over Extremist Posts. *BBC*, https://www.bbc.com/news/technology-45495544
49 | Rowbottom, 2018.

illegal nature of a piece of content needs to be assessed based on constitutional standards for free speech, and this requirement may make platforms face difficult issues in interpreting the law. Nonetheless, formal procedural guarantees and increased transparency in the decision-making processes of social media platforms would be welcome development. In cases determined by government legislation, platforms may still take action to manage any harm or damage caused by free speech by removing illegal content and platforms may also introduce additional restrictions and hence may also remove lawful content that is inconsistent with their internal policies by using the means of private regulation.

3.2.2. Further possibilities for strengthening co-regulation

The European Commission submitted its legislative proposal titled the Digital Services Act (DSA), on December 15, 2020.[50] The proposal is not aimed at altering the liability regime of platforms, as set out in the E-commerce directive. Nevertheless, the DSA stipulates new obligations on the platforms. The obligations are:

- providing information to authorities based on orders,
- designating points of contact and legal representatives,
- indicating restrictions in terms,
- publishing annual transparency reports,
- managing notices on illegal contents,
- providing reasoning for decisions,
- maintaining a complaint management system,
- the right to turn to an out-of-court body (out-of-court dispute settlement)
- processing the notices on illegal content submitted by trusted flaggers with priority,
- suspending the services to recipients that frequently provide manifestly illegal content,
- reporting suspicions of criminal offenses,
- the publication of more detailed transparency reports,
- user-facing transparency of online advertising.

The DSA also contains the special obligations for 'very large online platforms' for managing systemic risks. The proposal can be considered as another step forward in strengthening the co-regulatory system established by the E-commerce directive.

Other co-regulatory models are also conceivable. Setting the general standards and procedural frameworks may remain the state's duty, but the development of detailed rules and the oversight of the operation of the platforms may be outsourced to an industry co-regulatory body. This approach also combines the advantages and disadvantages of the state and self-regulatory systems. According to the refined version of this model, the setting of the detailed rules beyond the legal framework may remain with the platform (as with the notice and takedown procedure), but its decision may be appealed to a public authority, whether or not the complainant claims damages for the violation of personal or other rights.

In September 2018, leading broadcasters and internet access providers in the United Kingdom requested that the government establish independent regulatory oversight of

50 | Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. Brussels, 15.12.2020, COM(2020) 825 final, 2020/0361(COD).

social media.[51] Traditional media outlets may find it difficult to accept that social media platforms, their indirect market competitors, can operate in a significantly more lenient legal environment. Strong co-regulation based on enhanced cooperation between private and government actors may cover numerous aspects of the operation of social media platforms. Such aspects include enhanced government control over private regulations implemented by platforms, introducing various requirements for promoting diversity on the platforms, and introducing government oversight of decisions made by platforms regarding user-generated content.

This model can also be extended to platform decisions taken within the framework of private regulation. Thus, in principle, it would not be only decisions taken to abide by the E-commerce Directive, and acting in proceedings for infringement of restrictive legal norms, but also the application of the platforms' own codes and directives, which may be subject to review by a public authority. The downside of this, in addition to the effect of the strengthening state intervention, is the necessarily slower reaction time in official proceedings.

If the legal system was to move towards broader state intervention or co-regulation with a stronger state role, the scope for private regulation would correspondingly narrow because the state would be able to impose obligations on platforms that would affect the constitutional implementation of freedom of expression. The method of handling the damages caused by free speech would be changed uniquely by increasing government involvement. On the one hand, reducing the gap between private regulation performed by platforms and government regulation would safeguard against remedying the damages in an excessive manner that could jeopardize free speech. On the other hand, making the procedures by platforms more similar to other formal proceedings would sacrifice the advantages of such procedures (i.e., speed and efficiency) for the sake of free speech.

3.3 Self-regulation

Although social media platforms are not currently subject to self-regulation, larger platforms are increasingly accepting the need to introduce such a regulatory system, primarily to avoid stricter state regulations. One possible model of self-regulation would be to keep standard-setting and compliance monitoring as the platform's task, while an independent self-regulatory body could be approached to appeal against the platform's decisions. This is similar to the concept of Facebook's Oversight Board, with the addition that the latter is a body that reviews only the decisions of a single platform.[52]

In the current regulatory environment, requiring an external, independent review of the content decisions taken by platforms would be the most realistic, and still a very significant step, even if it was not performed by a state body (authority or court). This model is somewhat similar to the self-regulation of the press, which, it may be noted, remains inadequate across Europe, despite some shining examples. Industry actors could work together to set up an independent decision-making and sanctioning body of independent experts,[53] but its authenticity, effectiveness, speed, and power are all open questions.

Press self-regulation in its purest form differs from the previously mentioned approaches in that both standard setting and its oversight are in the hands of an industry self-regulatory body. Publishers of press products submit to content regulatory codes and

51 | Lomas, 2018.
52 | Gilbert, 2020.
53 | Laidlaw, 2008, pp. 142/143.

board decisions. For example, the UK's Press Complaints Commission worked. The *News of the World* scandal of 2011 and the subsequent overhaul of the self-regulatory system suggest that this system was not sufficiently effective. The foundations of the system that replaced it is laid down in statutory law (Royal Charter), but participation in the charter remains voluntary and does not bring benefits that would offset any disadvantages for publishers.[54] (In addition, the Independent Press Standards Organisation, a self-regulatory body set up independently by major publishers, is not covered by the Charter.) In the absence of binding nature and a strong, enforceable system of sanctions, the new system is subject to a number of criticisms.[55]

The self-regulatory model, while participation in it remains non-mandatory, with possible benefits at least is capable of making it worthwhile participating in, and may also be applied to platforms once the weaknesses identified above have been addressed.

4. Conclusions

The legal relationship between gatekeepers and their users (which is not affected by the constitutional doctrines of free speech) is governed by law through the contract concluded by and between the parties. However, it does not seem possible to enforce the principles and doctrines of free speech in the online world with the same fervor as possible offline. Even so, this should not necessarily be considered a bad thing. The law is always changing; the constitutional recognition of free speech itself is a fairly new and modern development, and with the emergence of the Internet, the law of free speech is entering a new era of its development, the exact stages of which are not clear at this point.

Government decision-makers and shapers of public policy need to adopt a systematic approach that takes into account the distinctive features of and changes to gatekeepers' activities, providing an accurate definition of what gatekeepers are expected to do and what they might expect from the law, as well as precisely setting the duties and scope of liability of gatekeepers.[56] The impact of gatekeepers on the public sphere and the strengthening of private regulations necessitate the use of new, creative, and innovative regulatory methods and institutions, the invention of new ways of setting and enforcing rules,[57] and the degree of cooperation between public and private actors, which is unprecedented in this field.

54 | House of Lords, 2015.
55 | Cohen-Almagor, 2014.
56 | Bunting, 2018, p. 185.
57 | Ibid., p. 186. Cf. Hadfield, 2017, p. 9.

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SOME REMARKS ON THE 'SHECHITA CASE' OF THE ECJ

György MARINKÁS[1]

ABSTRACT

This study strives to answer why the European Court of Justice's (ECJ) 'Centraal Israëlitisch Consistorie van België' judgment, delivered on 17 December 2020, triggered heated reactions. Similarly, sharp criticisms were articulated regarding the recent decision of the Belgian Constitutional Court (Grondwettelijk Hof), where the Court upheld the national legislation on the ban of slaughter without prior stunning per the aforementioned ECJ judgment. This study examines the historic, theological, and scientific background of shechita and halal slaughter with reference to the aforementioned framework. Furthermore, the study strives to introduce the pros and cons of the issue to help the reader decide whether the ritual slaughter — the slaughter of animals without prior stunning but following certain rules aimed at sparing animals from useless suffering — is as humane as the modern non-religious method, where the slaughter is conducted with prior stunning. This study also examines the different theological interpretations on the acceptability of stunning animals before slaughter. In the second part, the study briefly introduces the freedom of religion-related case law of the European Court of Human Rights, and thoroughly analyses its Cha'are Shalom ve Tsedek decision. Moreover, it examines the ECJ's two ritual slaughter cases, namely the Liga van Moskeeën and Œuvre d'assistance cases, which preceded the Centraal Israëlitisch Consistorie van België case. As a brief excursus into the jurisprudence of the national constitutional courts, this study also introduces two cases brought by the constitutional courts of Germany and Poland. Finally, the third part thoroughly analyses the Advocate General's opinion and the judgment delivered in the Centraal Israëlitisch Consistorie van België case of the ECJ to highlight the reasons for the different interpretations of the very same EU law.

KEYWORDS

religious discrimination
shechita
halal
ritual slaughter
prior stunning
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Introduction

The European Court of Justice (ECJ) delivered its judgment[2] on 17 December 2020, and adjudged that '[the law of the European Union] must be interpreted as not precluding legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death.' This judgment sparked a vivid political debate. Similarly, sharp criticisms[3] were articulated regarding the recent decision[4] of the *Grondwettelijk Hof,* the Belgian Constitutional Court, where the Court upheld the national legislation on the ban of slaughter without prior stunning per the aforementioned ECJ judgment.

This ECJ judgment is of interest to experts in European Union (EU) law, because, as highlighted by Advocate General Gerard Hogan in his opinion[5], it was the first case where the ECJ analysed Article 26 (2/1) point 'c' of Regulation No. 1099/2009/EC of the Council[6] (hereafter: Regulation) and decided on its validity. First, it should be noted that according to Article 4 (1) of the Regulation, the legislature of the European Union considers slaughter with prior stunning as a rule and only allows ritual slaughter as an exemption based on Article 4 (4). Contrarily, Article 26 (2/1) point 'c' of the Regulation allows the Member States,

> '[to] adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in this Regulation in relation to the following fields [...] the slaughtering and related operations of animals in accordance with Article 4 (4).'

These rules, aimed at promoting animal welfare, typically impose severe restrictions on the exemption granted by Article 4 (4) of the Regulation. Due to this contradiction between the two paragraphs, the question arise, where the 'scale-beam' finds its point of equilibrium when the considerations of animal welfare and the right to religious freedom are placed on this 'theoretical scale.'

However, there is nothing new under the sun. Debates focused on the conformity of shechita and 'European values' have been ongoing since the end of the 19th century. Although some who advocated against shechita were truly driven by animal welfare

2 | C-336/19. sz. Centraal Israëlitisch Consistorie van België and Others case, Judgment of the Grand Chamber, 17 December 2020, para. 96

3 | 'Ruling brings Belgium into line with countries whose bans on Shechita date from the Nazi era,' says president of Conference of European Rabbis.' See: Jeremy Sharon, Belgian court upholds ban on religious slaughter. The Jerusalem Post (30 September 2021) [Online]. Available at: https://www.jpost.com/diaspora/belgian-court-upholds-ban-on-religious-slaughter-680733 (Accessed: 1 October 2021).

4 | Grondwettelijk hof, arrêt n° 117/2021 du 30 september 2021; Grondwettelijk hof, arrêt n° 118/2021 du 30 september 2021; See furthermore: Stephanie Romands, Brussels minister voor Dierenwelzijn legt verbod onverdoofd slachten op tafel. De Tijd (30 September 2021) [Online]. Available at: https://www.tijd.be/politiek-economie/belgie-brussel/Brussels-minister-voor-Dierenwelzijn-legt-verbod-onverdoofd-slachten-op-tafel/10335743 (Accessed: 1 October 2021).

5 | C-336/19, Centraal Israëlitisch Consistorie van België and Others case, opinion of Advocate General Gerard Hogan, 10 September 2020, para. 13.

6 | Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ L 303, 18.11.2009, pp. 1-30).

concerns, sadly enough, anti-Semitic overtones were audible from the very beginning. Owing to the anti-Semitism that peaked and resulted in an inconceivable tragedy during the second quarter of the 20th century, shechita was banned in most European countries. Dark eras of history still cast their shadows on debates about shechita, and more recently on debates about halal slaughter. It is up to the legislature to find the proper balance between the right to religious freedom and animal welfare considerations, which is backed by ever-growing societal support. Consequently, the latter one too, can be considered as public interest. While the religious groups claim the primacy of shechita and halal slaughter as core elements of their religion, there is increasing pressure from the other side to consider animal protection and welfare concerns as far as possible. All of these are expected to be achieved in an era when anti-Semitism, and generally xenophobia, are on the rise. The latter induces the 'same old fears' in the Jewish community for obvious reasons.

To find the abovementioned equilibrium, the legislature needs to be acquainted with the religious freedom-related case-law of the European Court of Human Rights (ECtHR) and the ECJ alongside the two religious slaughter-related decisions delivered by the German and Polish constitutional courts respectively. Despite the ECtHR's long-established case law in protecting human rights, it was not until the last quarter of a century that the Court had elaborated on the issue, and provided an extended and precise case law. This study presents a brief overview of the ECtHR's case law and analyses only the most relevant judgment in detail. Contrary to the ECtHR, the ECJ did not deliver a single judgment on the freedom of religion from 2009 — when the *Charter of Fundamental Rights of the European Union*[7] *(EU Charter)* was vested with binding legal power — until 2017. However, the ECJ remedied this omission and delivered several decisions related to religious freedom; three of them concerned religious slaughter. Two of these three judgments delivered by the ECJ on religious slaughter[8] are introduced in section two, while the third one is introduced in section three. This was decided because of the judgment's novelty, and the significant difference in the interpretation of EU law by the Advocate General and the Court. Therefore, the author believes that the said case deserves a more thorough examination and a separate section.

Lastly, the author introduces the research findings, including the scientific and religious arguments, introduced in the first section — pro and con. When doing so, the author wishes to indicate that he will dispense with expressing any personal views on the topic for two reasons: first, he does not possess thorough knowledge in either the field of theological or veterinary sciences. Second, neither Islamic scholars nor veterinary professionals can reach a consensus within their own circles, even if some tendencies may be observed in the case of scientific opinions. Thus, the summarizing part evaluates only the proper or improper nature of evaluating EU law by the Advocate General and court.

7 | Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391-407).
8 | 12 October 2021.

1. Historic, Theological and Scientific Background of Shechita and Halal Slaughter

1.1. An insight into the historic background

It is important to understand the historical side of the issue to reveal the possible historic reasons that made some part of the believers of Judaism react in such a heated manner to the Flemish legal regulation and the ECJ judgment of December 2021, in which the Court stated the national regulation's conformity with EU law.

The aforementioned reasons shall be pursued in the emancipation progress of the Jews, which mostly took part in the 19th century, and in the culmination of the antisemitism in the second quarter of the 20th century. As Salo Wittmayer Baron[9] noted, there is another interpretation of emancipation, which contradicts the well-established view that the emancipation of the Jews was the gift of the then-governments — mostly liberal and enlightened — to a group that 'existed outside society'. Contrary to the teachings of European history books,[10] Baron argues[11] that it was the modern egalitarian state that could not bear the differences in the legal status of society's different groups. Thus, the Jews had no option but to accept the deal, namely that they had to give up their autonomy related to their internal affairs in return for the rights and duties of a citizen.[12] Consequently, the Jewish traditions and laws, which were regarded as obsolete and contradicting the principles and aims of enlightenment[13], became discredited. Politicians and philosophers of the era firmly believed that Jews should assimilate into mainstream society and adopt their Christian values to the greatest extent possible. To achieve this, Jews were made to accept the stigmatization of their laws and customs, and their prevalence was restricted or banned. These laws and customs included: (i) Jewish matrimonial law, (ii) circumcision, (iii) Jewish burial customs, and (iv) the use of the *mikvah*, the place to take the ritual bath. *Immanuel Kant* named this process of assimilation as the 'euthanasia of Judaism' — well before the actual emancipation — and in his view, it was 'desirable'.[14]

Between the second half of the 19th century and the first half of the 20th century, the ban on *shechita* was in the centre of heated public and political debates in the German states (*Länder*), in Poland, and the Scandinavian countries. These debates formally addressed concerns regarding animal protection. In reality, they were tainted by anti-Semitism, however. In the then German Empire, the issue was called '*Rituelfragen*', that is, the question of Jewish rituals. The Alliance for Animal Protection of the German Empire (*Verband der Tierschutzvereine des Deutschen Reiches*), established in 1881, launched a successful campaign against *shechita*. Subsequently, 'barbaric' and

9 | The late professor of the Columbia University — regarded as the 'greatest Jewish historian of the 20th century' by many.

10 | This view is shared by Chapter 15 of the current Hungarian history book applicable according to the national curricula. See: Borhegyi, no date

11 | Baron, 1938, pp. 59–60.

12 | It is worth mentioning that acts on personal status of the Middle Eastern countries still distinguish between the citizens based on their religious affiliation. For a detailed analysis, please see: Marinkás, 2021b, p. 74.

13 | See: Lucci, 2008, p. 178.

14 | Kant, 1992, p. 217.

'ruthless' practices were banned in several states of the German Empire. The federal ban on shechita was imposed in April 1933,[15] shortly after Adolf Hitler emerged to power. The ban was incorporated into the law[16] in November of the same year.[17] In accordance with the mainstream tendencies, the Polish legislature (*Sejm*) enacted a law[18] in 1936 that as a rule required the prior stunning of animals. However, Article 5 (1) of the law provided that the Minister for Agriculture may issue a regulation[19] establishing particular rules for the ritual slaughter that serves the purposes of particular groups, whose religion requires special treatment. An amendment, which was adopted in the spring of 1939, completely banned religious slaughter. However, the outbreak of World War II prevented its ratification by the Senate. This 1936 law was formally repealed in 1997.[20] The Scandinavian countries also imposed their own bans on slaughter without prior stunning: Finland in 1902 by decree, Norway and Sweden by statute in 1929 and 1937, respectively. Denmark brought a similar law; however, *shechita* was exempted from the general ban. Based on records of the parliamentary debates on the Norwegian and Swedish laws, parliamentary speeches[21] of the time were commonly saturated by anti-Semitic arguments.[22]

15 | Delahunty, 2015, pp. 364–365.
16 | Das Deutsche Reichs Tierschutzgesetz vom 24. November 1933
17 | The animal protection law of the Third Reich, adopted on 24 November 1933, was the first animal protection law in Germany. Unfortunately, the act is saturated with Nazi ideology and anti-Semitism. See: Jütte, 2002, p. 183.
18 | Journal of Laws (Dz. U.) no. 29, item 237.
19 | Rozporządzenie Ministra Rolnictwa i Reform Rolnych z dnia 26 sierpnia 1936 r. wydanego w porozumieniu z Ministrem Wyznań Religijnych i Oświecenia Publicznego oraz Ministrem Spraw Wewnętrznych o sposobach i warunkach uboju rytualnego zwierząt gospodarskich, Journal of Laws (Dz. U.) No. 70, item 504.
20 | Skóra, 2019, pp. 288–290.
21 | Delahunty, 2015, pp. 366.
22 | There is an argument in the scientific literature — namely the article of Michael F. Metcalf — which suggests that anti-Semitic motivation of the above mentioned Scandinavian legislative procedures — the Norwegian and the Swedish respectively —, is proven by the fact that traditional hunting methods of the Sámi people were exempted from the prohibition of slaughtering animals without prior stunning. First of all, the author of the current article notes that Metcalf in his 1989 article referred to the Sámi people as Lapps, which — however was commonly used to name them in the past — is an offensive exonym used by the majority population of their respective countries. Secondly, while the author agrees with Metcalf that the Scandinavian ban on *shechita* in the past century was motivated by anti-Semitism, the author rejects Metcalf's argument that the exemption granted to the Sámi people is a proof of anti-Semitism. As the author of the current writing points out in his PhD dissertation — and his monographic writing based on his dissertation — these exemptions, which are still in force in Finland and Sweden — and also constitute part of the two country's EU accession treaties —, are necessary for the mere existence of the otherwise vulnerable indigenous groups. See: Metcalf, 1989, pp. 47–48.; See also: Marinkás, 2018, pp. 45, 234, 293; Marinkás, 2016, pp. 45, 205 and 244; for an analysis of the protection of indigenous peoples' traditional way of life through the spectacles of the religious freedom, see: Krajnyák, 2020, p. 100.

Summarising the above historic introduction, and having regarded the fact that anti-Semitism is on the rise again[23] the author is not surprised that a group of believers in the Jewish faith felt they were hit hard by the Flemish ban on *shechita,* the ECJ decision, and the recent judgment of the *Grondwettelijk Hof.* This is especially the case if one regards the fact that it restricts a religious custom, which was left intact during the emancipation and constitutes one of the core elements of their faith.

1.2. Theological background of the shechita and halal slaughter

It is worth examining the importance of *shechita* in Jewish religion and its scientific background. It should be noted that this custom dating back to thousands of years serves hygienic purposes, aiming at enhancing the preservability of meat, and is driven by the intention to reduce the suffering of animals during slaughter. Therefore, this study examines whether these strict religious instructions demand unconditional prevalence based on religious doctrines, considering that today's modern slaughter techniques can provide the prevalence of animal welfare considerations and religious prescriptions at the same time.

First, we should examine the meaning of *shechita*. What are the religious grounds of *shechita,* and what are the practical implications that verify religious prescriptions? How do *shechita* and halal slaughter compare to each other?[24] Since the two methods are very similar and share two cardinal prescriptions, they shall be examined together. The *first* cardinal requirement is that the animal's neck should be cut with a sharp knife and the edge should not have chips. This enables the kosher butcher, the *shochet*,[25] to slit the gullet, trachea, cervical artery, and vein of the animal with one determined move. The cervical vertebrae should remain intact during this process. While the *shechita* shall be performed only by the *shochet*, halal slaughter can be conducted by any grown person with true faith in Islam. Moreover, when such a person is unavailable, the slaughter may be conducted by a Christian or Jewish butcher, provided that they follow the prescriptions of Islam during slaughter. The *second* cardinal requirement is that the animal should die of bleeding, and the blood has to be drained out from the animal's corpse to the greatest extent possible.

Regarding the first, it shall be examined what the Jewish and Islamic scriptures say about the slaughter of animals. The Fifth Book of Moses *(Elleh Haddebarim)* only says that

23 | The scientific literature is divided on the possible causes of this growth, while some research indicate that the growth in the proportion of Muslim population — which is induced among others by immigration — clearly plays a role, other researches deny the existence of such nexus. However, it is a fact that during the research carried out by the European Union's Fundamental Rights Agency (FRA) in 2019, the members of the Jewish community reported the clear rise of anti-Semitism, and that they perceive the continuous growth of the Muslim community as a threat. It has to be noted regarding the latter that the victims of anti-Semitic attacks described their attackers as 'someone with a Muslim extremist view.' See: FRA, Young Jewish Europeans: perceptions and experiences of antisemitism (04 July 2019) [Online]. Available at: https://fra.europa.eu/en/publication/2019/young-jewish-europeans-perceptions-and-experiences-antisemitism#TabPubKeyfindings1 (Accessed: 24 September 2021); See also: Stremmelaar and Lucassen, 2018, pp. 7–11; Siegel, 2018, pp. 432–433.
24 | Bartosiewicz, Csiky and Gyarmati, 2008, p. 133.
25 | Raj Tamás: A Sachjet. [Online]. Available at: http://www.zsido.hu/ujelet/archiv/u990311.html (Accessed: 24 September 2021).

'you may slaughter any of your herd or flock he has given you, as I have commanded you.'[26] The Torah is silent about the details. However the Book of Education *(Sefer ha-Chinuch)* — which explains the Torah's text — suggests that the *shechita* aims to reduce the time of the animal's agony and to minimize its suffering. This is achieved by cutting the animal's neck 'ear-to-ear'.[27] Unlike its Jewish counterpart, the Islamic prescription on slaughter contains *expressis verbis* provision on the clemency towards animals during slaughter. *Hadith* 17 tells every Muslim that 'if you kill, kill well; and if you slaughter, slaughter well. Let each one of you sharpen his blade and let him spare suffering to the animal he slaughters.'[28] This is supplemented by a *Hadith* of Prophet Muhammad:

> 'A good deed done to an animal is as meritorious as a good deed done to a human being, while an act of cruelty to an animal is as bad as an act of cruelty to a human being.'[29]

However, it is not all about the mercy of animals. There is also the human side of ritual slaughter, namely that considering slaughtering as a sacred ritual reduces feelings of guilt when killing an animal. [30]

1.3. The science beyond the theological prescriptions

Those who argue for the humanity of *shechita* and halal slaughter claim that both methods fulfil the criteria on mercy, provided that the *shechita* and halal slaughter are conducted with a proper tool and in a proper way, then the animal shall lose consciousness within seconds. The 2001 guidelines[31] of the Food and Agriculture Organization of the United Nations (UNFAO) support this opinion. As the document states, both shechita and halal slaughter are acceptable from an animal welfare perspective, provided that certain 'appropriate' rules are obeyed. The results of scientific research also support these findings.[32] Stuart D. Rosen argues that *shechita* is a 'painless and effective method'.[33] The study[34] by Lerner and Rabello, and the 2003 study[35] of the Italian National Committee of Bioethics (*Comitato Nazionale per la Bioetica,* CNB) also argue in favour of *shechita*, claiming that it is a humane way of slaughter. The CNB holds that there is no way to determine which method — namely, slaughter with prior stunning or ritual slaughter without prior stunning — causes less suffering to animals. Grandin and Regenstein[36] — in their study

26 | Deuteronomy 12:20-22 (Christian Standard Bible version from the website Bible Gateway) [Online]. Available at: https://www.biblegateway.com/passage/?search=Deuteronomy%20 12:20-22&version=CSB (Accessed: 24 September 2021).
27 | Rabbi Chanoch Kesselman from the Union of Orthodox Hebrew Congregations (London): 'The rules of Shechita for performing a proper cut during kosher slaughter.' [Online]. Available at: https://www.grandin.com/ritual/rules.shechita.proper.cut.html (Accessed: 24 September 2021).
28 | The Forty Hadith of Imam Nawawi, Hadith 17 [Online]. Available at: https://40hadithnawawi.com/hadith/17-prescription-of-ihsan-perfection/ (Accessed: 24 September 2021).
29 | Rahman and Phillips, 2017, p. 10.
30 | Salamano and Cenci-Goga, 2015, p. 9.
31 | Heinz and Srisuvan, 2001, p. 91.
32 | One has to note however, that other studies have proven the opposite as well.
33 | Rosen, 2004, pp. 764–765.
34 | Lerner and Rabello, pp. 60–62.
35 | CNB, Ritual slaughtering and animal suffering. Approved in the Plenary session of the 19th of September 2003. [Online]. Available at: http://bioetica.governo.it/media/3340/p57_2003_ritual-slaughtering_en.pdf (Accessed: 24 September 2021).
36 | Grandin and Regenstein, 1994, pp. 120–123.

written in 1994 — compared *shechita* and modern large-scale slaughter methods based on three aspects: (i) the stress caused by the tools used to restrict the animals before slaughter; (ii) the pain felt by the animals during slaughter, which can be deducted from the moves and the sounds made by the animal during its agony, and (iii) the average duration of time between the administration of the cut and the loss of consciousness. Grandin and Regenstein concluded, regarding their first criteria, that the 'bottleneck' of large-scale *shechita* slaughter is the method of restricting the animal, namely, the average duration of time between the restriction of the animal and the cut is administered. Therefore, large-scale *shechita* slaughter and large-scale non-religious slaughter share the same weaknesses.

The animal is restricted in its movement and strives to escape, driven by its natural instincts. Due to these fruitless efforts, the animal is exposed to severe stress. In the case of traditional or small-scale slaughter, this time is shorter. However, when the slaughter is performed on a large scale, there is more time-lapse, which does not conform to animal protection and welfare considerations. Here, it is worth mentioning that in the case of slaughter with prior stunning, the animal is not exposed to this stress, provided that the stunning was successful. Regarding the second and third criteria, Grandin and Regenstein concluded that the animals' experience of pain was minimal, and the loss of consciousness occurred in seconds. The latter shows great variety, however. Grandin and Regenstein admit that, in cases of certain species, the period may be significantly longer. Particularly, this could take 20 seconds for sheep, 25 seconds for pigs, and up to 2 minutes for cattle, according to the 2004 scientific report by the European Food Safety Authority (EFSA).[37] Thus, considering their findings and animal welfare considerations, they make two recommendations, namely: (i) slaughter houses that perform large-scale *shechita* slaughter should revise and evaluate their methods to eliminate any unnecessary factors that induce stress among animals; (ii) the cut should be administered only by properly trained persons, and tools should be maintained in a proper condition according to the religious prescriptions.[38] Obeying these religious prescriptions together with the secular institutional rules is the key to humane slaughter in Kaminski's view.[39] He analyses the US regulation — namely, the Humane Methods of Slaughter Act (HMSA)[40] — and argues that the 'obsessive focus on stunning as the *sine qua non* of animal welfare' blinds those advocating for animal rights. Thus, they neglect other tools suitable to ensure that slaughter is administered humanely. Kaminski identifies another problem, which is a phenomenon that he calls as the 'ritual bubble'. In his view, the ritual bubble is created by § 1906 of the act that exempts religious slaughter from the rules and the supervision of the authority. Disobedience of rules has also been identified as an issue in other sources. The *Animal Aid* in a 2009 study — called the 'The humane slaughter myth'[41] — supports these findings by revealing systemic problems at slaughterhouses in the United Kingdom. It also supports the findings of Grandin and Regenstein, namely that the animals are exposed to severe

37 | EFSA, 2004, pp. 27–29.
38 | Grandin and Regenstein, 1994, pp. 120–123.
39 | Kaminski, 2019, pp. 51–53.
40 | Humane Methods of Livestock Slaughter Act (P.L. 85-765; 7 U.S.C. 1901 et seq.) Approved: August 27, 1958.
41 | Animal Aid: The humane slaughter myth. An Animal Aid Investigation into UK Slaughterhouses (2009) Researched and written by Kate Fowler. p. 32. [Online]. Available at: https://www.animalaid.org.uk/wp-content/uploads/2016/10/slaughterreport.pdf (Accessed: 24 September 2021).

stress, even if they are slaughtered with prior stunning. Additionally, animals usually witness how their fellows are stunned and then hung by their legs. Furthermore, Animal Aid's 2009 study reveals that the unsuccessful stunning — consequently, the hanging and slaughtering of conscious animals — is a more widespread phenomenon than the public would imagine.[42] The proportion of unsuccessful stuns can range from 2 % to 19 % depending on the species of the animal, the capacity of the slaughterhouse,[43] and the training of professionals who administer the stunning.[44] Contrarily, those arguing in favour of *shechita* and halal slaughter claim that the animals should not be slaughtered in front of each other, and the animal should not witness the sharpening of the knife as per religious prescription. These prescriptions are aimed at reducing animal stress.[45] They also argue that these requirements are difficult to fulfil in modern large-scale slaughterhouses.

Finally, to understand the so-called 'starting at home principle' advocated by Iddo Porat in his article,[46] it is worth citing Will Kymlicka and Sue Donaldson:

> 'Dominant groups typically ignore the ways in which they are complicit in the abuse of billions of captive and enslaved domesticated animals, while complaining about the hunting practices of rural communities and indigenous peoples, or the ritual use of animals by religious minorities, even though these latter practices represent only a tiny fraction of abused animals overall.'[47]

Porat argues that most Western societies accept many inhumane practices, such as branding and castrating animals without any anesthesia, and early separation of young calves from their mothers, which causes trauma and anxiety to both the mother and the calves. Furthermore, he provides statistical data and examples to prove that those inhumane practices accepted by the majority affect more animals than those slaughtered ritually by some minorities. Based on certain surveys, 18%–27 % of animals are slaughtered outside licensed slaughterhouses, within the territory of the EU. These animals are slaughtered using inhumane methods without obeying the EU rules. Furthermore, Porat argues that several hunting techniques, especially hunting by traps cause prolonged suffering in animals. Moreover, the amount of pain experienced and its duration were significantly greater than in the case of *shechita* and halal. Even in the case of a gunshot, no one can take it for granted that the animal dies shortly after the hit.[48]

After examining the pros of the argument, one should examine its cons. Advocates of ritual slaughter argue that *shechita* and halal slaughter require the butchers to obey rules aimed at reducing the suffering of the animals during slaughter, which is difficult

42 | Ibid. pp. 7-14.; See furthermore: the expert opinion of the Academic Services of the German Parliament, expert opinion, Wissenschaftliche Dienste des Bundestages, "Videoaufzeichnungen in Schlachth6fen" WD 5 -
3000 – 042/18) (27 March 2018).
43 | Greater capacity comes with a greater proportion of unsuccessful stunning.
44 | Vecerek et al., 2020, p. 6; von Wenzlawowicz et al., 2012, pp. 59–60.
45 | Bartosiewicz, 2014, pp. 80–81.
46 | Porat, 2020, p. 3.
47 | Kymlicka and Donaldson, 2014, p. 122; For a detailed analysis of the protection of indigenous cultural heritage— including traditional hunting techniques —, please see: Marinkás, 2017, pp. 35–38.
48 | These arguments also emerged in the C-336/19 Centraal Israëlitisch Consistorie van België case, where the ECJ thoroughly elaborated on the matter and refuted these arguments.

to fulfill in modern large-scale slaughterhouses. This is a convincing argument, but it fails when the large-scale slaughter is conducted in a temporary slaughterhouse to meet the extra demand for halal meat before a religious festival[49]. In such instances, it is simply impossible to obey the aforementioned prescriptions — for example, that animals shall not be slaughtered before each other —; thus, the preparatory acts of slaughter became ruthless as those in the case of large-scale non-religious slaughter.[50] Anne Peters notes[51] that those who refer to idealized religious practices to criticize non-religious slaughter practices as they happen in the real world are comparing apples with pears as religious practices are rarely followed to the letter.

Furthermore, it is not contested that the rules of *shechita* and halal slaughter — with their prescriptions aimed at the forbearance of animals — were ahead of their times.[52] However, it is hard to negate the scientific facts proving that slaughter with prior stunning is the most humane way, even if the risk of potential suffering for the animal cannot be excluded with 100% accuracy. The current EU legislation on the matter — namely Council Regulation 1099/2009/EC — in its preamble cites such scientific documents — including the 2004[53] and 2006[54] opinions of the EFSA — prove that slaughter with prior stunning is more humane than slaughter without prior stunning. The scientific works[55] cited in the ECJ judgments and the consensus among veterinarians also verify this argument. The opinions of the EFSA emphasize that from an animal welfare perspective, only slaughter with prior stunning is acceptable.[56] The Federation of Veterinarians of Europe in its 2002 position paper[57] also shares this view. According to the position paper, a state of unconsciousness may occur only minutes after the cut is administered. This fact is admitted even by Grandin and Regenstein, the advocates of *shechita* slaughter. Furthermore, as Holleben and her fellow co-authors argue in their study,[58] the animal may return to a state of consciousness before death occurs. These periods expose animals to stress and unnecessary suffering. Furthermore, if slaughter is carried out without prior stunning and proper restriction of the animal, including stretching of the neck in a way that enables the bleeding out in the shortest possible way, makes the whole process more circumstantial, which further increases the stress level of the animal.[59] Based on this study, the new scientific research proves that Grandin and Regenstein were wrong and animals do feel pain when their necks are cut without prior stunning, with special regard

49 | See the ECJ's judgment delivered in the C-426/16, Liga van Moskeeën case, where the court had to decide on the conformity of a domestic law which regulates the creation of temporary slaughterhouses aimed at satisfying the temporary increase in the demand for halal meat before *Eid al-Adha*, the Muslim Feast of the Sacrifice. The said judgment is introduced in the second section of the article.
50 | Bartosiewicz, Csiky and Gyarmati, 2008, p. 145.
51 | Peters, 2019, pp. 296–298.
52 | The scriptures of Christianity do not contain a ban on eating blood since Christianity does not attribute soul to animals.
53 | EFSA, 2004, pp. 27–29.
54 | EFSA, 2006, pp. 17–18.
55 | von Holleben et. al., 2010, pp. 55–60.
56 | See: EFSA, 2020, pp. 59–60.; EFSA, 2014a, pp. 6–8; EFSA, 2013, p. 17.
57 | FVE, Slaughter of Animals Without Prior Stunning. *FVE Position Paper* (FVE/02/104 – Final) [Online]. Available at: https://fve.org/cms/wp-content/uploads/fve_02_104_slaughter_prior_stunning.pdf (Accessed: 24 September 2021)
58 | von Holleben et. al., 2010, pp. 55–56.
59 | ibid., pp. 55–56.

to the fact that the neck is rich in terminal nerves. This statement is solid even if the cut is administered by a well-trained person who uses a properly sharpened knife.[60] Thus, as aforementioned, the animal is exposed to needless suffering if the loss of consciousness accidentally occurs only later.

Importantly, the scientific articles, studies, and reports that advocate in favour of *shechita* and halal slaughter — claiming that it is as humane as the slaughter with prior stunning — typically date back 15–20 years or earlier.[61] For example, the abovementioned article of Grandin and Regenstein dates back to 1994, while all those writings argue in favour of slaughter with prior stunning are newer. Although this argument does not necessarily convince everyone, it reveals the current dominant tendency in scientific arguments. This tendency can be summarized as follows: while every technique of slaughter may possibly endanger the welfare of the animal — for example, in case the prior stunning is unsuccessful, the animal is exposed to unnecessary pain —, these risks are lowest when the slaughter is conducted with prior stunning.

The other commonly shared cardinal requirement of *shechita* and halal slaughter, namely the requirement for bleeding out, may be found in other religions and folk customs. Among others, it plays an important role in the Hungarian practice of pig slaughter, even though Christian religious prescriptions do not impose a ban on consuming blood. This ban in Jewish and Islamic religions is based on the belief that the blood contains the soul of the animal: these two exit the body of the animal together. This is how the soul returns to its creator.[62] If one peels the religious/ideological shell of the prescription of bleeding out and examines these prescriptions from a sanitary viewpoint, it is clear that these requirements once served practical considerations: the residual blood in the corpse of the animal makes the meat less conservable.[63] In other words, if one — living as a nomad in a desert environment, [64] lacking any advanced preserving methods — aims to preserve the quality and edibility of the meat, it is essential to drain out the blood to the greatest extent possible.[65] The latter is facilitated by the animal's own heart and blood circulation system, both of which function for a while after the cut is administered. However, the total drain-out is impossible from a scientific standpoint as a certain amount of blood always remains in the animal's corpse.[66] The practice of koshering — rinsing the meat with water and soaking it entirely submerged in water than dry salting — aims at completely draining out the remaining blood from the animal's corpse.

Subsequently, it is worth examining whether the second cardinal element — namely that the animal has to die from bleeding — allows the stunning of the animal before slaughter. First, certain stunning techniques cause irreversible harm to the animal, that is, the animal's death is not caused by the bleeding out alone. Second, prior stunning may

60 | ibid., pp. 53–55.
61 | September 2021.
62 | 'But don't eat the blood, since the blood is the life, and you must not eat the life with the meat. Do not eat blood; pour it on the ground like water.' Deuteronomy 12, 23-24 (Christian Standard Bible version from the website Bible Gateway) [Online]. Available at: https://www.biblegateway.com/passage/?search=Deuteronomy+12%3A23-24&version=CSB (Accessed: 24 September 2021].
63 | The scientific explanation is the following: the contagious blood from the dead animal's intestines flows back to the muscular tissues and spoils them.
64 | The fact that the custom of *shechita* dates back to the time of the 'Wandering in the Desert' supports the argument that bleeding out once served practical considerations.
65 | Kaminski, 2019, p. 34.
66 | Berényi, 2014, p. 63.

have a detrimental effect on the effectiveness of the bleeding out; namely, less blood may be drained out. The significant difference between the regulations on *shechita* and halal must be noted here. While in the case of *shechita*, any stunning technique is forbidden. Muslim scholars are divided on this issue.[67] The lack of consensus is attributable to two factors: (i) the less centralized nature of Islamic denominations,[68] and (ii) the lack of an *expressis verbis* ban on prior stunning in Islamic scriptures. Therefore, while some Muslim scholars maintain that prior stunning is not allowed, as there is a doubt that the animal's death is not caused by the bleeding out alone. Others argue that *Hadith 17* requires that followers of the Islamic faith strive to reduce the suffering of the animal, provided that the most important rule, namely that the animal dies of bleeding out, and the blood drains out from its corpse to the greatest extent possible.[69] This view is supported by the 1986 recommendation of the Muslim World League (*Rabitat al-Alam-al-Islam*) adopted jointly with the World Health Organization (WHO).[70] There are two things worth mentioning regarding the requirement of bleeding out. First, prior stunning does not affect the effectiveness of bleeding out, that is, it does not decrease the quantity of the blood drained out. Moreover, some research[71] suggests that the *electronarcosis*[72] — which is required by the Flemish law in the ECJ's C-336/19 case — increases the effectiveness of bleeding to a small extent. Second, the concept of completely bleeding out the animal is a mere fiction from a scientific standpoint as some blood always remains in the dead animal. That the residual blood needs to be removed from the animal's body by koshering to achieve the kosher quality is not coincidental.

2. Freedom of Religion in the case law of the ECtHR, the pre-2020 case law of the ECJ, and a short excursus to the jurisprudence of two selected national constitutional courts

2.1. Grounding thoughts on the case law of the ECtHR and the ECJ on the freedom of religion

Balázs Schanda and Annamária Csiziné Schlosser argue[73] that the jurisprudence of the European Human Rights Mechanism on Article 9 of the European Convention on Human Rights (hereafter: European Convention) is very modest compared to other

67 | Farouk et al., 2014, pp. 518–519; Cuccurese et al., 2013, pp. 443–445.
68 | See: Benyusz, Pék and Marinkás, 2020, p. 161.
69 | The *Halal Food Authority* (HFA) also supports slaughter with prior stunning, provided that animal dies of the bleeding out. See: http://www.halalrc.org/ (Accessed: 24 September 2021)
70 | WHO, Joint meeting of the League of Muslim World (LMW) and the World Health Organization (WHO) on Islamic rules governing foods of animal origin (held on 5-7 December 1985), WHO Doc WHO-EM/FOS/1-E (January 1986) at p. 8. [Online]. Available at: https://apps.who.int/iris/handle/10665/116451 (Accessed: 2021 September 24).
71 | Anil et. al., 2010, p. 2. Religious rules and requirements – Halal slaughter. Dialrel Reports (2010) [Online]. Available at: https://www.dialrel.net/dialrel/images/halal-rules.pdf (Accessed: 24 September 2021).
72 | For more information on the method see: Humane Slaughter Association, Electrical Stunning of Red Meat Animals Electronarcosis [Online]. Available at: https://www.hsa.org.uk/electrical-stunning/electronarcosis (Accessed: 24 September 2021); See also: Végh, 2016, p. 68.
73 | Schanda and Csiziné Schlosser, 2009, pp. 67–69.

articles of the said document. The European Commission on Human Rights (ECHR) — which has been wound up[74] since then — declared submissions related to the freedom of religion as applicable only in small numbers. Moreover, the ECtHR delivered its first judgment to state the violation of Article 9 only in the nineties of the last century. Some argue that this is because there are no severe problems with the prevalence of religious freedom in Europe. As Schanda and Csiziné Schlosser argue, other explanations exist. The ECtHR has 'remedied the omission,' and has delivered several judgments related to Article 9 in the meantime. Similar to the ECtHR, the ECJ also remained silent on the issue of religious freedom for a long time. This silence lasted from 2009, when the EU Charter was vested with binding legal power, till 2017, when the ECJ delivered its first religious freedom related decision.[75] However, the ECJ remedied this 'omission' and delivered several decisions related to religious freedom. John Witte Jr. and Andrea Pin even call the ECJ the 'new boss of religious freedom.' Although this may seem to be an exaggerated expression first, they argue that the ECJ already showed a strong preference for 'state neutrality,' and provided a more nuanced analysis of religious freedom and enhanced protection for the said freedom. They argue that the ECJ performs better in this field than the ECtHR, which grants an ample 'margin of appreciation' for state parties, when it comes to '*laïcité*' and secularization. Two phenomena, which Witte and Pin claims to be an 'aggressive [and harmful][76] policy trend' in some EU Member States.[77]

What can explain this enhanced activity in the case of both courts? The author hereby reminds the reader that in the second part of the current series of articles, he already stated that religiousness is on the rise in the 21st century, which is an increasingly important determinant.[78] However, the phenomenon, named 'desecularization,' by Peter Berger[79] started earlier, at the end of the last century.[80] Those who explore religious beliefs[81] are most likely to pick one of the fundamentalist branches.[82] It is obvious that fundamentalist branches of religions are hard to be concealed with the expectations of

74 | Protocol No. 11 to the European Convention on Human Rights
75 | Witte Jr. and Pin, 2021, pp. 660–661.
76 | Interpreting addition by the author.
77 | Pin and Witte Jr., 2020, pp. 223–224.
78 | Marinkás, 2021b, p. 53.
79 | Berger, 1999, p. 8; See furthermore: Rosta, 2019, pp. 792–793.
80 | Berger's ideas are supported by the *fact that the number of believers in Islamic religion is on a dynamic rise and this growth seems set to continue in the years to come according to forecasts*. Although there is a rise in Christian religiousness, the rise in Islamic religiousness is more apparent. This phenomenon is more obvious in case of the Western European youngsters with a migratory background, who in most instances are more religious than their parents. See: EPRS (European Parliamentary Research Service): *'Religion and the EU's external policies – Increasing engagement',* In-depth Analysis, February, 2020; Lipka and Hackett, 2017; Harriet Sherwood: Religion: why faith is becoming more and more popular. *The Guardian* (27 August 2018) [Online]. Available at: https://www.theguardian.com/news/2018/aug/27/religion-why-is-faith-growing-and-what-happens-next (Accessed: 24 September 2021).
81 | Reiss, 2000, p. 47.
82 | The picture is more complex, however. The majority of the MENA region's population is clearly refused the ideologies of the ISIS/DAESH and those political actors who cooperated with the extremists. See: Arab Barometer (April 6, 2020) Is the MENA Region Becoming Less Religious? An Interview with Michael Robbins [Online]. Available at: https://www.arabbarometer.org/2020/04/is-the-mena-region-becoming-less-religious-an-interview-with-michael-robbins/ (Accessed: 24 September 2021).

the mainstream society and the idea of secularization. This was proven by the *Cha'are Shalom ve Tsedek vs. France case*[83] of the ECtHR. The rise in religiousness is illustrated by the fact that the nexus between state and church, and also the nexus between politics and religion is once again at the centre of societal and political debates in certain European states.[84] The ECtHR — maybe because of the 'desecularization trend'—delivered a relatively rich case law on religious freedom in the last 20-25 years. Shanda and Csiziné Schlosser argue that regarding the precedent nature of these judgments, certain conclusions can be drawn based on this case law. The current study introduces only those arguments that are relevant in this article: (i) the religious communities should have the right to obtain legal personality;[85] (ii) a democratic state does not have the right to intervene in the domestic affairs of religious communities;[86] and (iii) expression of religious faith may be restricted, but these restrictions cannot be disproportionate.[87]

2.2. Freedom of Religion in the case-law of the ECtHR and the Cha'are Shalom ve Tsedek case

The *Cha'are Shalom ve Tsedek* is worth highlighting and analysing for several reasons, amongst others, for its similarities with the C-336/19 *Centraal Israëlitisch Consistorie van België* case of the ECJ. The case that is the focus of this study.

The facts of the case before the national court can be summarized as follows: based on a French decree of 1980,[88] ritual slaughter may be conducted only in licensed slaughterhouses that obey the rules. Religious communities may obtain a license from the state department responsible for agriculture based on the recommendation of the state department responsible for justice affairs.[89] However, *shechita* was granted an exemption and the license was issued by the *Association Consistoriale Israelite de Paris* (ACIP), an umbrella organization of Jewish religious communities. In the case where there is no registered Jewish religious community in a given county, the license is issued by the prefect of the county. The association *Cha'are Shalom ve Tsedek* was aimed at cultural and educational purposes. In addition to its main activities, it endeavored to procure and deliver the '*glatt*' (pure/smooth) meat to its members. The *glatt* meat is made per the prescriptions of the '*Shulchán Aruch'* known as 'Set Table' or the 'Code of Jewish Law' written by Rabbi Joseph Karo during the 16th century. It is one of the most orthodox branches of Judaism. The *Cha'are Shalom ve Tsedek* claimed that it can procure such meat only in Belgium, as the meat produced by the ACIP does not meet the requirement of *glatt* quality.

83 | ECtHR, Cha'are Shalom ve Tsedek v. France case, Judgment (27 June 2000). For the analysis of the case see: Békefi Judit: Vallásszabadság jogi szemszögből. Szombat (2016.07.09.) [Online]. Available at : https://www.szombat.org/politika/vallasszabadsag-jogi-szemszogbol (Accessed: 24 September 2021).
84 | Lásd: Benyusz, Pék and Marinkás, 2020, p. 173.
85 | ECtHR, Canea Catholic Church v. Greece, Judgment, 16 December 1997.
86 | ECtHR, Serif v. Greece, Judgment 14. December 1999; ECtHR, Hasan and Chaush v. Bulgaria, Judgment, 26 October 2000; ECtHR, The Metropolitan Church of Bessarabia and others v. Moldavia, Judgment, 13 December 2001; ECtHR, Agga v. Greece, Judgment 17 October 2002.
87 | ECtHR, Kokkinakis v. Greece, Judgment, 25 May 1993; ECtHR, Valsamis v. Greece, Judgement 18 December 1996; ECtHR, Kalaç v. Turkey, Judgment 1 July 1997; ECtHR, Larissis and others v. Greece, Judgment, 24 February 1988; ECtHR, Buscarini and others v. San Marino, Judgment, 18 February 1999
88 | Décret n°80-791 du 1 octobre 1980 pris pour l'application de l'article 276 du code rural.
89 | ECtHR, Cha'are Shalom case, para. 48.

Therefore, the *Cha'are Shalom ve Tsedek* submitted a claim for a license to produce *glatt* meat domestically. The ACIP rejected this application.[90]

Having regarded the traditionally secular attitude of the state (*laïcité*), which includes the separation of church and state, the French judicial system was unable to resolve the issue, where religious arguments conflicted with secular ones. After these unsuccessful attempts before domestic courts, the applicant submitted an application to the ECHR, which referred to the case before the ECtHR on 6 March 1999.[91]

Although the Grand Chamber held[92] that there was 'no violation of Article 9 of the Convention taken alone [or] taken in conjunction with Article 14', the decision was far from unanimous. The judges decided on the first and second questions with a 12:5 and 10:7 ratio, respectively. Seven judges — who disagreed with the other ten regarding the second question in their joint dissenting opinion[93] — argued that the majority opinion is not the only proper interpretation of the case. The ECtHR case law was elaborated on in the aforementioned article of Schanda and Csiziné Schlosser, which supports the opinion of the dissenting judges, instead of the majority opinion.

Accordingly, the *Cha'are Shalom ve Tsedek* and the French State dissented on three issues. First, the French state argued that the *Cha'are Shalom ve Tsedek*, which was registered as a cultural association, was not allowed to conduct any religious activities.[94] The majority of judges approved this argument.[95] However, the dissenting judges favoured the applicant and argued that the *Cha'are Shalom ve Tsedek* should be regarded as a religious association according to the 1905 Act on the separation of church and state.[96] Their argument is supported by the fact that the aforementioned Decree of 1980 did not define 'religious organizations' and the criteria for being recognized as such an organization.[97] Second, in conjunction with the preceding, it could be argued that the state's decision to grant exclusive rights to ACIP on decisions regarding the license constitutes the violation of Article 14 of the European Convention. While most judges accepted the French state's reasoning, namely, that the special status of the ACIP as an umbrella organization of the Jewish religious associations is necessary and proportional, the dissenting judges argued that respecting pluralism is the task of the state and not its elimination. As the dissenting judges argued that the notion of discrimination ordinarily includes cases where states treat persons or groups in analogous situations differently, without providing an objective and reasonable justification.[98] Although they acknowledge that

> '[...] the fact that the State wishes to avoid dealing with an excessive number of negotiating partners so as not to dissipate its efforts and in order to reach concrete results more easily,

90 | ECtHR, Cha'are Shalom case, paras. 22-44.
91 | ECtHR, Cha'are Shalom case, paras. 1-2.
92 | ECtHR, Cha'are Shalom case, para. 88.
93 | ECtHR, Cha'are Shalom case, Joint Dissenting Opinion of judges Sir Nicolas, Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Panțîru, Levits and Traja, para. 2.
94 | ECtHR, Cha'are Shalom case, paras. 69-70.
95 | ECtHR, Cha'are Shalom case, paras. 62, 67-69.
96 | La loi concernant la séparation des Églises et de l'État (1905).
97 | ECtHR, Cha'are Shalom case, Joint Dissenting Opinion, para. 2.
98 | ECtHR, Cha'are Shalom case, Joint Dissenting Opinion, para. 2.

> whether in its relations with trade unions, political parties or religious denominations, is not illegitimate in itself, or disproportionate.'[99]

However, this may not result in differentiated treatment, without providing an objective and reasonable justification. According to them, in the case at hand, neither the alleged insufficient representativeness of the *Cha'are Shalom ve Tsedek*, nor the French state's other allegation — namely, the necessity to protect public order and public health — stands fast. The latter argument is especially weak, having regarded the fact that the French state is particularly gracious when it comes to licensing halal slaughterhouses,[100] even though Muslim religious associations are much smaller in their membership and lack strict hierarchy.[101] Thus, they do not possess such representativeness compared to the Jewish religious groups. Third, The *Cha'are Shalom ve Tsedek* argued the fact that it can procure *glatt* meat — the sole acceptable quality for its customers — only from foreign sources, constitutes the violation of Article 9 of the European Convention. The majority concluded that 'the right to freedom of religion guaranteed by Article 9 of the Convention cannot extend to the right to take part in person in the performance of ritual slaughter [...].'[102] The majority opinion further emphasizes that the applicant, contrary to its allegations, is able to procure meat from both domestic and foreign sources. Thus, there were no violations of Article 9.[103] Contrarily, the dissenting judges argued that '[...] the fact that the applicant association is able to import 'glatt' meat from Belgium does not justify in this case the conclusion that there was no interference with the right to the freedom to practice one's religion through performance of the rite of ritual slaughter [...]' Thus, the state's regulation that excludes participation in such ceremonies infringes on the right of religious freedom. This is supported by the fact that the Decree of 1980 *expressis verbis* grants the right to participate in religious slaughter. Anne Peters noted that the reliance on imported meat — which is often reasoned with animal welfare concerns — is only an 'outsourcing' of animal cruelty.[104]

In conclusion, the main reason for such a difference between the outcome of the majority and the dissenting opinion is that the preceding is based on the premise that the *Cha'are Shalom ve Tsedek* was not a religious organisation according to French law However, considered from two standpoints, namely that the *Cha'are Shalom ve Tsedek* was a religious organization. The first premise has two logical consequences. First, the state could not infringe on Article 9 of the European Convention granting religious freedom, since the restriction — in the interpretation of the state's representative — was related to economic activity. Second, the *Cha'are Shalom ve Tsedek* — as a non-religious association — was not in an analogous situation with the ACIP or with the Muslim religious associations that are cited in the case. Thus, infringement of Article 14 could not have occurred.

99 | ECtHR, Swedish Engine Driver's Union v. Sweden, Judgment of 6 February 1976 Series A, para. 46.
100 | ECtHR, Cha'are Shalom case, Joint Dissenting Opinion, para. 2.
101 | Benyusz, Pék and Marinkás, 2020, p. 161.
102 | ECtHR, Cha'are Shalom case, paras. 82.
103 | ECtHR, Cha'are Shalom case, paras. 80-82.
104 | Peters, 2019, p. 291.

2.3. The pre-2020 case law of the ECJ on religious slaughter

Before interpreting the case law of the ECJ, two points should be emphasized. First, the EU legislature — based on the scientific arguments introduced in section 1.3 — decided that, as a rule, slaughter shall be conducted only with prior stunning. Thus, ritual slaughter without prior stunning constitutes an exemption based on the regulation. Second, animal welfare is not a general principle of EU law,[105] but an accepted value and public interest to be promoted and fostered based on the case law of the ECJ.[106] The Court firmly stuck to this interpretation even after Article 13 of the Treaty on the Functioning of the European Union (TFEU)[107] was introduced.[108] Therefore, Micaela Lottini and Michele Giannino argue that, despite the introduction of Article 13 into the TFEU under EU law, animals seem to be attributed a dual status: on the one hand, they are qualified as 'sentient beings' and, accordingly, they are awarded a (limited) legal protection. On the other hand, animals are considered as 'products' or more precisely goods, because they can be valued in money and capable of forming the subject of commercial transactions.[109] — It is worth comparing this with the Hungarian dogmatic theory on animals.[110]

In the C-426/16 *Liga van Moskeeën*[111] case, the ECJ interpreted the freedom of religion by analysing Article 10 of the EU Charter on religious freedom, and the provisions of Article 13 of the TFEU on animal welfare requirements, particularly, to religious rites — more precisely, the so-called *Eid al-Adha*, the Muslim Feast of Sacrifice — related to Article 4 of the Regulation.

The domestic court raised the following question:

> 'Is Article 4(4) of [Regulation No 1099/2009], read in conjunction with Article 2(k) thereof, invalid due to the infringement of Article 9 of [the ECHR], Article 10 of the [Charter] and/or Article 13 [TFEU], in that it provides that animals may be slaughtered in accordance with special methods required by religious rites without being stunned only if such slaughter takes place in a slaughterhouse falling within the scope of [Regulation No 853/2004], whereas there is insufficient capacity in the Vlaams Gewest (Flemish Region) to meet the annual demand for the ritual slaughter of unstunned animals on the occasion of the … Feast of Sacrifice, and the costs of converting temporary slaughter establishments, approved and monitored by the authorities, into slaughterhouses falling within the scope of [Regulation No 853/2004], do not appear relevant to achieving the objectives pursued of animal welfare and public health and do not appear proportionate thereto?'[112]

105 | C-189/01, Jippes case, Judgment of the Court, 12 July 2001
106 | C-592/14, European Federation for Cosmetic Ingredients v. Secretary of State for Business, Innovation and Skills. Opinion of Advocate General Michal Bobek, 17 March 2016, paras. 20-21; C - 355/11, G. Brouwer case, Judgment of the Court (Sixth Chamber) of 14 June 2012
107 | Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47- 390)
108 | Lottini and Giannino, 2019, pp. 502–511
109 | Sowery, 2018, pp. 58–59; See also: Geiger, Khan and Kotzur, 2015, p. 225.
110 | Based on 5:14 (3) of the Hungarian Civil Code (Act V of 2013) the animals are things from a legal perspective. 'The provisions pertaining to things shall apply to animals in accordance with the statutory provisions laying down derogations consistent with their natural characteristics.' The theoretical background is elaborated on in: Szilágyi, 2018, pp. 129–130.
111 | C-426/16, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest, Judgment of the Grand Chamber, 29 May 2018.
112 | Ibid, para. 26.

Advocate General Nils Wahl's opinion[113] and the ECJ's judgment echoed the view that '[...] the concept of 'religious rite' [...] is defined in Article 2(g) of the Regulation as a series of acts related to the slaughter of animals and prescribed by a religion.'[114] Thus 'it falls within the scope of Article 10 (1) of the Charter.'[115] However, as the Advocate General stated that I do not think it desirable for the Court to address the question of whether the ritual slaughter must, from a theological standpoint, necessarily be carried out'. The ECJ approved the opinion of the Advocate General.[116] Considering the abovementioned arguments, the ECJ placed the case in an economic context. Furthermore, the determining argument of the Advocate General was that the reluctance of the applicants of the base case to assume the sunk costs of creating temporary slaughterhouses that meet public health requirements to meet the temporary increase in demand is not capable of affecting the validity of Article 4 (4) of the Regulation.[117] Thus, the ECJ concluded as follows:

> '[the] examination of the question did not disclose any issues capable of affecting the validity of Article 4(4) of Council Regulation (EC) No 1099/2009 of September 24, 2009, on the protection of animals at the time of killing, read together with Article 2(k) thereof, with regard to Article 10 of the Charter of Fundamental Rights of the European Union and Article 13 TFEU.'[118]

Anne Peters examined the *Liga van Moskeeën* decision of the ECJ and provided a thorough analysis.[119] While she agrees with the outcome of the judgment, she criticises the ECJ for failing to consider the rights of religious minorities more broadly — including a more thorough analysis of the theological necessity of the ritual slaughter during the Feast of Sacrifice — and for not addressing the animal welfare point sufficiently. As she highlights, contrary to the ECJ's firm standpoint in this regard, even if the member state's regulation is neutral, it might deploy a disproportionate negative impact on particular religious groups.[120] However, as a result of her examinations, she dismisses every argument that proves the existence of indirect discrimination. *First of all* she argues that — despite the differing context[121] —, the ECtHR's remarks in the *Cha'are Shalom ve Tsedek* may be applied in the present case, namely that the right to freedom of religion 'cannot extend to the right to take part in person in the performance of ritual slaughter [...].' Then Peters examines some of the key allegations of the Advocate General and the Court respectively. The Advocate General argued that the requirement of using only approved slaughterhouses

113 | C-426/16, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest, opinion of Advocate General Nils Wahl, 30 November 2017, para. 141.
114 | C-426/16, Liga van Moskeeën case, judgment, para. 47.
115 | Ibid, para. 49.
116 | C-426/16, Liga van Moskeeën case, judgment, paras. 45., 50-51.
117 | C-426/16, Liga van Moskeeën case, opinion of the advocate general, paras. 135-140.
118 | C-426/16, Liga van Moskeeën case, judgment, paras. 85.
119 | Peters, 2019, 269.; See furthermore: Peters, 2018
120 | Namely, the ECJ stated that '[...] the obligation to use an approved slaughterhouse, in accordance with the technical specifications required by Regulation No 853/2004, applies in a general and neutral manner to any party that organises slaughtering of animals and applies irrespective of any connection with a particular religion and thereby concerns in a non-discriminatory manner all producers of meat in the European Union.' – C-426/16, Liga van Moskeeën case, judgment, para. 61.
121 | The issue in Cha'are Shalom was rather the need for the ultraorthodox group to rely on slaughter performed by other licensed slaughterers for them according to their rites, without being able to examine in person whether their stricter rites had been duly observed. – Peters, 2019, p. 291.

would not be proportionate to reach the objective of animal welfare; and therefore, would have to be qualified as an unjustified limitation and violation of the freedom of religion.[122] Peters disagrees with this statement. One must reiterate that the Islamic religion lacks the dogmatic unity that characterise some other religions, such as the Catholic Church. As Peters states, religious opinion diverges whether slaughter is compulsory during the Feast of Sacrifice or not. Moreover, as a novel trend, young Muslims started to substitute the slaughter of animals with monetary donations. Similarly, there is disagreement among Muslim scholars regarding whether stunning animals is allowed or banned by the Muslim religion. Consequently, not every believer of the Islamic faith is concerned with the rules, and the restrictions imposed on their religion are bearable. She concludes that based on the aforementioned arguments the regulation of the member state is neither discriminative nor unproportioned.[123] Even if Peters acknowledges that, as the Advocate General stated in his opinion:

> '[...] some of the rules laid down in Annex III to Regulation No 853/2004, such as [...] the refrigerated storage of meat, may, [...] prove superfluous [...] inasmuch as [...] the meat from them will, in principle, be given directly to the final consumer.'[124]

In the C-497/17 *Œuvre d'assistance aux bêtes d'abattoirs* case, the ECJ had to answer whether '[it is allowed for the national legislature to prohibit] the use of the European 'organic farming' label in relation to products derived from animals which have been slaughtered in accordance with religious rites without first being stunned [...]?'[125] Special attention must be paid to the fact that these practices '[do not] respect high animal welfare standards'[126] Advocate General Nils Wahl in his opinion[127] reiterated that, while Council Regulation on Organic Production and Labelling[128] expressly bans certain practices, it does not require prior stunning. In other words, there is no outright ban on issuing organic labels on products from animals subjected to ritual slaughter. The Advocate General further argues that pre-stunning may prove unnecessary for satisfying the principle of protecting animal welfare: 'I do not think that the principle of prior stunning laid down in Regulation No 1099/2009 leads to the conclusion that the requirement of 'high animal welfare standards' necessarily means that slaughter is to take place with prior stunning.'[129] The ECJ took the opposite view. The Court argued[130] that EU law grants the right to conduct ritual slaughter without prior stunning, provided that certain legal requirements are obeyed. This constitutes sufficient protection to the right to religious

122 | C-426/16, Liga van Moskeeën case, opinion of the advocate general, paras 98-128., 91., 97., 133.
123 | Peters, 2019, pp. 292-294.
124 | C-426/16, Liga van Moskeeën case, opinion of the advocate general, para. 127.
125 | C-497/17, Œuvre d'assistance aux bêtes d'abattoirs case, Judgment of the Grand Chamber, 26 Februar 2019, paras. 33.
126 | C-497/17, Œuvre d'assistance aux bêtes d'abattoirs case, judgment, para. 36.
127 | C-497/17, Œuvre d'assistance aux bêtes d'abattoirs case, opinion of advocate general Nils Wahl, 20 September 2018
128 | Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ L 189, 20.7.2007, pp. 1-23)
129 | C-497/17 sz. Œuvre d'assistance case, opinion of the advocate general, para. 83.
130 | C-497/17 sz. Œuvre d'assistance case, judgment, paras. 36., 45., 48., 49., 52.

freedom. The latter right cannot serve as grounds for claims to use organic labels on meat products that do not meet animal welfare considerations.[131] As the ECJ argued that:

> '[…] scientific studies have shown that pre-stunning is a technique that compromises animal welfare the least at the time of killing […] the particular methods of slaughter prescribed by religious rites that are carried out without pre-stunning and that are permitted by [the Regulation] are not tantamount, in terms of ensuring a high level of animal welfare at the time of killing, to slaughter with pre-stunning […]'.[132]

Micaela Lottini and Michele Giannino argue that the Advocate General took a more flexible and business-friendly position than the Court. While they praise the willingness of the ECJ to emphasize animal welfare concerns, they argue that the decision may adversely impact producers of halal or kosher food.[133]

2.4. A short excursus to the jurisprudence of some selected national constitutional courts

First, this section makes an excursus to the so-called *Schächten-case* of the German Federal Constitutional Court (*Bundesverfassungsgericht, BverfG*), the constitutional court that can be regarded as *quasi-primus inter pares*[134] among European constitutional courts — which in the aforementioned judgment from 2002[135] stressed — per its well-established case law[136]— the importance of balancing the concurring rights and interests, in this particular case, the individual's right to religious freedom and personal development versus the interest of the public. As elaborated in section 1, during the last decades of the 19th century and the first part of the 20th century, several states of Germany imposed a ban on *shechita*. An ideologically motivated federal ban was imposed after the Nazis rose to power. After WWII, ritual slaughter was tacitly permitted until 1986, [137] when the legislature ruled that warm-blooded animals should not be slaughtered without prior stunning. As an exemption, ritual slaughter was allowed, provided that the competent authority granted a license. The *BverfG* in its aforementioned judgment analysed the provisions of the 1986 act on animal protection and the license through the spectacles of Articles 4 (1) (2) and 2 (1) of the Basic Law of Germany *(Grundgesetz, GG)*,[138] granting the right to freedom of religion and conscience, and the right to personal development, respectively.[139] As the

131 | It is worth mentioning that a petition was submitted to the European Parliament's Committee on Petitions with the aim of repealing Article 4 (4). The petition was rejected since — as the Committee argued — the Regulation together with other sources of law of the Union strikes a fair balance between human welfare considerations and the right to religious freedom. See: Petition 1063/2014 by Marta Poschlod on the ban on ritual slaughter
132 | C-497/17, Œuvre d'assistance case, judgment, paras. 47., 50.
133 | Lottini – Giannino, 2019, pp. 502-511.
134 | Editorial Comments, 2020, pp. 965–978; See furthermore the concurring opinion of Juhász Imre to decision No. 22/2016 (XII.5.) of the Hungarian Constitutional Court
135 | BVerfG, Urteil des Ersten Senats vom 15. Januar 2002 – 1 BvR 1783/99 -, Rn. 1-61, More on the case: Silver, 2011, pp. 671–672.
136 | See: Bomhoff, 2013, p. 280.
137 | Tierschutzgesetzes vom 12. August 1986 (BGBl I S. 1309)
138 | Grundgesetz für die Bundesrepublik Deutschland (1949)
139 | It has to be noted that the applicant also claimed that his right to choose his profession freely (GG Article 12 (1)) was also violated. The BVerfG dismissed this claim since, the applicant was not a German citizen – 1 BvR 1783/99, para. 3.

BverfG stated, the prevalence of the rights of animals and their welfare considerations can be regarded as public interest, which enjoys the support of society's majority. The licensing procedure aims to ensure that ritual slaughter, which is conducted without prior stunning, remains exceptional and well-inspected.[140] The latter are served by regular examinations of the facilities and personnel working there. As the *BVerfG* noted, the rules on licensing cannot be considered unconstitutional because the examination conducted by the authority focuses on the prevalence of the requirements laid down in law, and does not entail any evaluation of the religious prescriptions. Nevertheless, when it comes to the case at hand, both the authority — which denied granting the license — and the courts deciding on the appeal, failed to properly interpret the provisions of the GG and the law. In its decision,[141] the Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG*) used arguments that were based on the examination and evaluation of certain religious practices, and their necessity from a theological standpoint, that is, whether there is a ban in the Islamic religious scriptures on consuming meat of pre-stunned animals, and whether it is compulsory to consume meat at all. As the *BVerwG* noted regarding the latter: 'The adherents of such a religion can change over to food of vegetable origin or to fish [...] doing without meat, however, does, according to the Court, not constitute an unreasonable restriction of the freedom to develop one's personality.'[142] The *BVerfG* dismissed this argument and — just like the ECJ/ECtHR in the aforementioned cases —, dismissed the concept that a non-religious court may have any jurisdiction to decide on religious issues and referred the case back to the administrative court. [143]

The second excursus is made to the ritual slaughter case of the Polish Constitutional Court (*Trybunał Konstytucyjny*). As mentioned previously, *shechita* was banned in Poland in 1939, even if the 1939 amendment of the 1936 Act never came into force due to a procedural error. The 1936 act was formally repealed in 1997[144] by the 1997 Act on Animal Protection (*Ustawa o ochronie zwierząt*),[145] which again allowed exceptions for slaughter manners of specific religious groups, until 2002, when the amendment of the act cancelled the exception for ritual slaughter. However, just like in the case of the 1936 Act, ritual slaughter was allowed based on a directive issued in 2004 by the Minister of Agriculture and Rural Development. On 27 November 2012 — proceeding on the motion of the Public General-Prosecutor (*Prokurator Generalny*), supported by animal rights organizations —, the Polish Constitutional Court quashed the directive because the ordinance was issued without due statutory authorization. Consequently, a full-fledged prohibition of religious slaughter without stunning took effect in Poland.[146]

In August 2013 the Association of Jewish Religious Communities[147] (*Związku Gmin Wyznaniowych Żydowskich w Rzeczypospolitej Polskiej*) filed an application to the Constitutional Tribunal of Poland to examine the compliance of the provisions of the Animal Protection Act with the Constitution of the Republic of Poland *(Konstytucja*

140 | 1 BvR 1783/99, paras. 40-41., 45-46., 57-58.
141 | BVerwG, 15.06.1995 – 3 C 31.93
142 | 1 BvR 1783/99, para. 10.
143 | 1 BvR 1783/99, para. 60.
144 | Journal of Laws (Dz. U.) no. 60 item 369 with amendment
145 | The Animal Protection Act, Journal of Laws (Dz. U.) consolidated text from 2019 item 122.
146 | Skóra, 2019, pp. 289–290.
147 | The President of the Muslim Religious Union in Poland (Muzułmański Związek Religijny), Tomasz Miśkiewicz, was also present at the Court as an observer.

Rzeczypospolitej Polskie)[148] and the EU Charter. The Court delivered its decision on the 10th December 2014.[149] However, in the case of religious freedom, there were other things at stake: in 2012, the Polish meat industry exported an estimated 200,000 tons of kosher and halal meat, amounting to approximately 329 million USD. Some authors argue that the economic interests tainted the majority decision, and the constitutional principles had to 'yield' before the economic interests of the country. This, of course, was not written by the majority. According to Judge *S*ławomira Wronkowska-Jaśkiewicz,[150] the Constitutional Court wrongly went beyond the applicants' claim and extended the protection of religious freedom as granted by Article 53 of the Polish Constitution for those carrying out merely economic activity. Her argument is supported by the dissenting opinions[151] of judges Teresa Liszcz, Piotr Tuleja, and Wojciech Hermeliński — and certain authors[152]— who sharply criticised the majority judgment for going beyond the claimants' demands to meet the economic interests. Judge Hermeliński in his dissenting opinion[153] even provided a draft text that, in his view, the Court should have adopted to narrow the exemption to those affected — namely, those who live in Poland[154]— to serve the prevalence of religious freedom. His suggestion reads as follows:

> '[the Polish law] — insofar as it does not permit subjecting animals to particular methods of slaughter prescribed by Judaism (the so-called *shechita*) to meet the needs of the followers of that religion in Poland[155]— is inconsistent with [the Constitution].'[156]

The decision of the Polish Constitutional Court received further criticism from the dissenting judges — Teresa Liszcz and Mirosław Wojciech Granat[157] — and scholars for the way the majority decision of the court elaborated on the moral standards.[158] Aleksandra Gliszczytiska-Grabias and Wojciech Sadurski criticised the Constitutional Court [159] for

148 | Ratified: 2 April 1997.
149 | Polish Constitutional Court, Judgment of 10 December 2014 Ref. No. K 52/13 (/s/k-5213). – Official English translation. [Online]. Available at: https://trybunal.gov.pl/en/hearings/judgments/art/7276-uboj-rytualny/ (Accessed: 24 September 2021).
150 | Dissenting Opinion of Judge Sławomira Wronkowska-Jaśkiewicz to the judgment of the Constitutional Tribunal of 10 December 2014, ref. no. K 52/13.
151 | Dissenting Opinion of Judge Teresa Liszcz to the judgment of the Constitutional Tribunal of 10 December 2014, ref. no. K 52/13; Dissenting Opinion of Judge Piotr Tuleja to the judgment of the Constitutional Tribunal of 10 December 2014, ref. no. K 52/13.
152 | Gliszczytiska-Grabias and Sadurski, 2015, pp. 604-605., 608.; See also: Skóra i.m. p. 294.
153 | Dissenting Opinion of Judge Wojciech Hermeliński to the judgment of the Constitutional Tribunal of 10 December 2014, Ref. No. K 52/13.
154 | Based on official statistics some 100000 Jews live in Poland, however most of them are not conscious of his/her origin or does not hold religious laws. See: Yardena SCHWARTZ, 40 Miles from Auschwitz, Poland's Jewish Community is Beginning to Thrive. Time, February 27, 2019. [Online]. Available: https://time.com/5534494/poland-jews-rebirth-anti-semitism/ (Accessed : 24 September 2021).
155 | Italicising added by the author.
156 | Dissenting Opinion of Judge Wojciech Hermeliński to the judgment of the Constitutional Tribunal of 10 December 2014, Ref. No. K 52/13 .
157 | Dissenting Opinion of Judge Mirosław Granat to the judgment of the Constitutional Tribunal of 10 December 2014, ref. no. K 52/13.
158 | Polish Constitutional Court, Judgment of 10 December 2014, paras. 7.2., 8.2.2.
159 | Gliszczytiska-Grabias and Sadurski, 2015, pp. 607–608.

building the notion of public morality exclusively on the [Christian][160] morality of the majority.[161] In their view, it would result in the 'double counting' of religious freedom: first, as an independent constitutional principle, and second, as an ingredient of 'public morals.'[162] Instead, as Anna Śledzińska-Simon argues, 'morality' should be a set of rules, norms, values, views, and models of conduct, which are generally acceptable in a democratic society. She concludes that public morality may justify only such limitations of constitutional rights and freedoms that would be considered as generally harmful, rather than harmful, in the perception of the majority.[163] Criticisms against the Constitutional Court's decision were also articulated to deny the constitutional status of animal welfare.[164]

3. The newest case of the ECJ related to freedom of religion: The C-336/19 *Centraal Israëlitisch Consistorie van België* case

The importance of the case — as it was emphasized by Advocate General Hogan[165]— lies in the fact that (i) it was the first precedent to analyse Article 26 (2/1) point 'c' of the Regulation and decides on its validity. Furthermore, (ii) the Court had to answer whether the abovementioned Article of the Regulation permits Member States to adopt rules that restrict religious slaughter without prior stunning 'with a view to promoting animal welfare', contrary to Article 4 (4).

The base case originated from the constitutional review of the Decree (hereafter: contested decree) on the modification of the Act 1986 'On the Protection and Welfare of Animals, Regarding Permitted Methods of Slaughtering Animals'[166] (Flemish Animal Protection Act) by the *Grondwettelijk Hof*, the Belgian Constitutional Court. The decree was enacted on 7 July 2017 and entered into force on 1 January 2019.

160 | Interpreting addition by the author.
161 | It is worth keeping in mind that some 86 % of the Polish population is Roman Catholic. This proportion is higher than in Italy (67 %). See: Rocznik Statystyczny – Rzeczypospolitej Polskiej (Statistical Yearbook of the Republic of Poland) https://stat.gov.pl/en/topics/statistical-yearbooks/statistical-yearbooks/statistical-yearbook-of-the-republic-of-poland-2019,2,21.html [2021. 08. 22.]; See also: US Department of State, 2019 Report on International Religious Freedom: Italy. [Online]. Available at: https://www.state.gov/reports/2019-report-on-international-religious-freedom/italy/ (Accessed: 24 September 2021).
162 | In their view this is also the result of the Polish Constitutional Court's consistent failure to protect the secularity of the state.
163 | Śledzińska-Simon, 2015.
164 | It is worth mentioning that the *Austrian Constitutional Court (Verfassungsgerichtshof)* in its 1998 decision also denied the constitutional status of animal protection. The Court emphasized that: 'it does not overlook the fact that a change in values has taken place in recent decades [...] animal protection embodies a widely recognised and significant public interest. However, animal protection [...] does not yet have a decisive weight compared to the right to freedom of religion.' – See: Verfassungsgerichtshof (B3028/97) 17.12.1998 – (ECLI:AT:VFGH:1998:B3028.1997), para. 2.7.1.
165 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 13.
166 | Wet betreffende de bescherming en het welzijn der dierennek (Belgisch Staatsblad, 3 December 1986. p. 16382)

Before the modifications entered into force, Article 16 (1) of the Flemish Animal Protection Act required prior stunning of the animal, except for the case of *vis-maior*, when the animal was permitted to be killed by causing less pain. Paragraph (2) of the Article granted an exemption for slaughter that was conducted for religious purposes. The abovementioned modification reduces this exemption. According to Article 15 (2) of the modified act, if the animals are slaughtered according to special methods required for religious rites, the stunning must be reversible and the animal's death must not be caused by stunning. '[167]

The aims of the legislature shall be examined based on the preparatory materials of the Flemish regulation. These documents make it clear that the reform was aimed at ensuring animal welfare considerations and the prevalence of religious freedom at the same time. Having considered the scientific facts and religious prescriptions, the legislature chose *electronarcosis* as the statutory method for stunning, since it does not cause irreversible harm to the animal. Contrarily, its effect is completely reversible, the animal regains consciousness if the cut is not administered. If the cut is still performed, the animal dies of bleeding, the effectiveness of which is not decreased by the *electronarcosis*.

The arguments of the applicants of the base case before the *Grondwettelijk Hof* is introduced in five points by the Advocate General.[168]

> First, 'Infringement of [the Regulation] read in conjunction with the principle of equality and non-discrimination, in that Jewish and Muslim believers are being deprived of the guarantee contained in Article 4(4) of [the Regulation] to the effect that ritual slaughter cannot be made subject to the requirement of prior stunning, and in that the contested decree, contrary to Article 26(2) of the aforementioned regulation, was allegedly not notified to the European Commission in time.'[169]
>
> Second, 'Infringement of freedom of religion, by making it impossible for Jewish and Muslim believers, on the one hand, to slaughter animals in accordance with the rules of their religion and, on the other hand, to obtain meat from animals slaughtered in accordance with those religious rules.'[170]
>
> Third, 'Infringement of the principle of separation of Church and State, because the provisions of the contested decree allegedly prescribe the manner in which a religious rite is to be carried out.'[171]
>
> Fourth, 'Infringement of the right to work and to the free choice of occupation, freedom to conduct a business and the free movement of goods and services, because it is impossible for religious butchers to practise their occupation [...] and because it distorts competition between slaughterhouses [under the jurisdiction of the domestic law] or in another Member State of the European Union where the slaughter of animals without stunning is permitted.'[172]
>
> Fifth, 'Jewish and Muslim believers are treated, without reasonable justification, in the same way as people who are not subject to the specific dietary laws of a religion; the people who kill

167 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, paras. 11-12.
168 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 34
169 | Ibid, para. 34.
170 | Ibid, para. 34.
171 | Ibid, para. 34.
172 | Ibid, para. 34.

> animals while hunting or fishing or controlling harmful organisms, on the one hand, and the people who kill animals according to special slaughter methods prescribed by the customs of religious worship,[173] on the other hand, are treated differently without reasonable justification, and Jewish believers, on the one hand, and Muslim believers, on the other hand, are treated in the same way without reasonable justification.'[174]

The *Flemish* and the *Walloon* governments took an opposite view, where they argued that Article 26 (2/1) point 'c' of the Regulation expressly permits Member States to adopt rules that restrict religious slaughter without prior stunning, and 'with a view to promoting animal welfare,' contrary to Article 4 (4).

'In those circumstances the *Grondwettelijk Hof* [...] decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:'[175]

> (1) Should point (c) of the first subparagraph of Article 26(2) of [Regulation No 1099/2009] be interpreted as meaning that member states are permitted, by way of derogation from [...] Article 4(4) of that regulation and with a view to promoting animal welfare, to adopt rules such as those contained in the decree [at issue in the main proceedings], rules which provide, on the one hand, for a prohibition on the slaughter of animals without stunning that also applies to the slaughter carried out in the context of a religious rite and, on the other hand, for an alternative stunning procedure for the slaughter carried out in the context of a religious rite, based on reversible stunning and on the requirement that the stunning should not result in the death of the animal?[176]
> (2) If the first question referred for a preliminary ruling is to be answered in the affirmative, does point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009, in the interpretation referred to in the first question, infringe Article 10(1) of the [Charter]?[177]
> (3) If the first question referred for a preliminary ruling is to be answered in the affirmative, does point (c) of the first subparagraph of Article 26(2) read in conjunction with Article 4(4) of Regulation No 1099/2009, in the interpretation referred to in the first question, infringe Articles 20, 21 and 22 of the [Charter], since, in the case of the killing of animals by particular methods prescribed by religious rites, provision is only made for a conditional exception to the obligation to stun the animal (Article 4(4), read in conjunction with Article 26(2) [of that regulation]), whereas in the case of the killing of animals during hunting and fishing and during sporting and cultural events, for the reasons stated in the recitals of the regulation, the relevant provisions stipulate that those activities do not fall within the scope of the regulation, or are not subject to the obligation to stun the animal when it is killed (Article 1(1), second subparagraph, and Article 1(3) [of that regulation])?'[178]

In his opinion, the Advocate General analysed the first two questions and dispensed the third one by analysing it, per the Court's request. Having regarded the organic

173 | As it was already introduced in the first structural part of the current article, a similar reasoning emerged related to the exemption granted for the Sámi people by the Scandinavian countries.
174 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 34
175 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 32.
176 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 32.
177 | Ibid, para. 32.
178 | Ibid, para. 32.

connection between the two, the Advocate General decided that he would answer the two questions together.[179]

In his preliminary remarks, the Advocate General made two important statements: (i) he refuted the applicants' allegations that the European Commission was not notified in due time. Furthermore, (ii) He reiterated his own opinion as Advocate General in the C-243/19 *A. vs Veselibas Ministrija* case[180] and the case-law of the ECtHR,[181] and concluded that 'a secular court cannot choose in relation to the matters of religious orthodoxy.'[182] He argued that:

> '[It is] sufficient to say that there is a significant body of adherents to both the Muslim and Jewish faiths for whom the slaughter of animals without such stunning is regarded by them as an essential aspect of a necessary religious rite.'[183]

The Advocate General first analysed Articles 4 (1) and (4) of the Regulation. Furthermore, he cited the case law of the ECJ.[184] Reiterating the statements of the ECJ in the *Liga van Moskeeën* case, the Advocate General argues that according to the Court's case-law:

> 'It must be observed that the Charter uses the word 'religion' in a broad sense, covering both the *forum internum* that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.'[185]

Consequently, in the cited case, the ECJ concluded that the scope of Article 10 (1) of the EU Charter covers the special slaughter methods, which are described in Article 4 (4) and should be interpreted as the manifestation of religious faith. However, the Court stated that having regarded Article 4 (1) of the Regulation, slaughter which falls under the scope of Article 4 (4) may be the subject of '[...] technical conditions or specifications that seek to minimize the suffering of animals at the time of killing and ensure the health of all consumers of meat which are neutral and non-discriminatory in their application [...].'[186] That is to say: '[...] restrictions on the religious freedom may be imposed on the freedom to carry out slaughter without prior stunning for religious purposes to organise and manage that slaughter.'[187] The decision of the court delivered in the *Œuvre d' assistance* case conforms to the above-cited opinion of the Advocate General. Moreover, the Court stated that

179 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, paras. 43., 45.
180 | C-243/19, A v Veselības ministrija, opinion of Advocate General Gerard Hogan, 30 April 2020, para. 5.
181 | '[...] the Court has held that the State's duty of neutrality and impartiality, as defined in its case-law [...] is incompatible with any power on the State's part to assess the legitimacy of religious beliefs' See: ECtHR, Vartic v. Romania, Judgment, 17 March 2014, para. 34.
182 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 47.
183 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 47.
184 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, paras. 50-59. and the ECJ case-law cited there.
185 | Please find a detailed analysis on the difference between *forum internum* and *externum* in: Morini, 2010, pp. 628–630.
186 | C-426/16, Liga van Moskeeën case, opinion of the advocate general para. 58.
187 | C-426/16, Liga van Moskeeën case, opinion of the advocate general para. 58.

'the derogation provided for by Article 4 (4) of Regulation No. 1099/2009 does not extend beyond what is strictly necessary to ensure observance of the freedom of religion.'[188] A significant part[189] of the opinion, which is worth highlighting, is that the Advocate General draws attention to the issues of interpreting the law because of the tension between the wording of Paragraphs (1) and (4) of Article 4 of the Regulation. While the former applies 'strict terms', the latter uses the expression '[...] animals subject to particular methods of slaughter prescribed by religious rites.'[190] As the Advocate General argues, this is in contrast with the lack of any concrete or specific limits to the derogation contained in Article 4(4), other than the requirement that the slaughter in question be prescribed by religious rites and take place in a slaughterhouse.'[191] In the course of examining the merits of the case, the second thoroughly analysed part was Article 26 (2/1) point 'c' of the Regulation, which permits Member States to adopt rules that restrict religious slaughter without prior stunning 'with a view to promoting animal welfare' contrary to Article 4 (4). As the Advocate General reiterated: 'The general words of Article 26(2) cannot be read in such a manner as would take from the specific provisions of Article 4(4).'[192] The Advocate General highlighted that a stricter national regulation maybe adopted, 'provided that the 'core' of the religious practice in question, namely ritual slaughter, is not encroached upon.'[193] Furthermore, he brings examples to the possible restrictions that conform to EU law, namely: (i) the requirement of the presence of a qualified veterinarian at all times during the ritual slaughter; (ii) requirement of the proper training of the person conducting that particular form of slaughter; and (iii) rules on the nature, size, and sharpness of the knife used, and the requirement of keeping a second knife at hand if the first one becomes damaged during slaughter. According to the Advocate General, the requirement of prior stunning should not be regarded as conforming to the Regulation. The logic of the opinion, which is clear and coherent until this point, seems to break down here. The Advocate General fails to provide reasoning behind his consideration of the domestic law, which prohibits the slaughter of animals without prior stunning, to be in contradiction with the EU law.[194] Instead, the reader has to be satisfied with the Advocate General's opinion in paragraph 76: 'I do not consider it fruitful to speculate on which type of measures could lawfully be adopted by Member States [...]' and that 'It is not the role of the Court to give advisory opinions on the matter.'[195] The latter projected the statement

188 | C-497/17, opinion of the advocate general, para. 59.
189 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, paras. 60-65.
190 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 53.
191 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 61.
192 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 67.
193 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 72.
194 | On the other hand, he provides the Court with a rather detailed analysis regarding why the possibility of procuring meat without restriction is an insufficient guarantee of the right to religious freedom regardless what the majority of judges held in the ECtHR's Cha'are Shalom case. – See: C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, paras. 82-87.
195 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 76.

of the Advocate General in paragraph 47 of his opinion, namely 'a secular court cannot choose in relation to the matters of religious orthodoxy.' Summarising his thoughts, the Advocate General states in paragraph 76 of the opinion that: 'It is simply sufficient to say that this power does not extend as far as prohibiting ritual slaughter without stunning in the manner contemplated in the present proceedings by the Flemish legislature.'[196]

The author of the current article argues that the Advocate General simply swept away any scientific reasoning, introduced in the first section of the article which supports that slaughter with prior and reversible stunning is the best possible solution. What is worse, the Advocate General arbitrarily picked and arbitrarily evaluated the EU law. As the Eurogroup for Animals argues in its *amicus curiae* brief,[197] the Advocate General failed to consider that the EU legislature intentionally executed only a partial harmonization regarding the rules on slaughtering animals. This is supported by Article 13 of the TFEU:

> '[...] the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions, and regional heritage.'[198]

Furthermore, recital (18) of the Regulation provides that a certain level of subsidiarity remains among the Member States regarding the rules on slaughtering of animals. According to Article 26 (2/1) point 'c' of the Regulation:

> 'Member States may adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in this Regulation in relation to the following fields [...] the slaughtering and related operations of animals in accordance with Article 4 (4).' [199]

Within the meaning of Article 2 point 'b' of the Regulation 'related operations' are '[...] means operations such as handling, lairaging, restraining, stunning and bleeding of animals taking place in the context and at the location where they are to be killed; [...]' [200]

These shortcomings are particularly sore spots with special regard to the fact that, as the author already mentioned above, the opinion of the Advocate General otherwise contains valuable statements such as those on the inconsistencies of the Regulation's wording that have a detrimental effect on animal welfare considerations. Furthermore, as a positive aspect, the Advocate General realizes the provisions on the rights and duties of states arising from Article 13 of the TFEU. As the Advocate General wrote:

> 'In my view, Article 4 (1) of Regulation No. 1099/2009 is the cornerstone of that regulation and reflects and gives concrete expression to the clear obligation[201] imposed by the first part of

196 | Ibid.
197 | Eurogroup for Animals, pp. 4–5.
198 | TFEU Article 13.
199 | Regulation No. 1099/2009, Article 4 (4).
200 | Regulation No. 1099/2009, Article 2 point 'b'.
201 | Italicising added by the author.

> Article 13 TFEU on both the Union and the Member States to pay full regard to the welfare requirements of animals, which are sentient beings […].'[202]

Sadly, he drew false conclusions. He proposed that the first and second questions shall be answered as follows:

> 'Point (c) of the first subparagraph of Article 26(2) of Council Regulation (EC) No 1099/2009 of 24 September 2009, on the protection of animals at the time of killing, read together with Article 4(1) and 4(4) thereof, and having regard to Article 10 of the Charter of Fundamental Rights of the European Union and Article 13 TFEU, must be interpreted as meaning that Member States are not permitted to adopt rules which provide, on the one hand, for a prohibition of the slaughter of animals without stunning that also applies to the slaughter carried out in the context of a religious rite and, on the other hand, for an alternative stunning procedure for the slaughter carried out in the context of a religious rite, based on reversible stunning and on condition that the stunning should not result in the death of the animal.'[203]

The ECJ came to the opposite conclusion. Namely, the Court stated that:

'Point (c) of the first subparagraph of Article 26 (2) of Council Regulation (EC) No 1099/2009 of 24 September 2009, on the protection of animals at the time of killing, read in the light of Article 13 TFEU and Article 10 (1) of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding legislation of a member state that requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death.'[204]

Having regarded that this difference arise from the differing evaluation of the very same facts and legal provisions, the author only elaborates on the differences in the evaluation.

One of the differences is that the ECJ put greater emphasis on the prevalence of Article 52 (1) and (3) of the EU Charter read in conjunction with Article 13 of the TFEU. The ECJ applied the *Gebhard-test*[205]. As the Court pointed out:

(i) '[…] the limitation on the exercise of the right to the freedom to manifest religion identified in paragraph 55 above is provided for by law, within the meaning of Article 52 (1) of the Charter'; (ii) '[…] national legislation which lays down the obligation to stun the animal beforehand during ritual slaughter, while stipulating that that stunning should be reversible and not cause the animal's death, respects the essence of Article 10 of the Charter, since, according to the information in the documents before the Court, set out in paragraph 54 above, the interference resulting from such legislation is limited to one aspect of the specific ritual act of slaughter, and that act of slaughter is not, by contrast, prohibited as such.' (iii) The ECJ took the view that 'it is apparent […] that the Flemish legislature intended to promote animal welfare [and to] to eliminate all avoidable animal

202 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 52.
203 | C-336/19, Centraal Israëlitisch Consistorie van België case, opinion of the advocate general, para. 88.
204 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgement, para. 96.
205 | C-55/94, Gebhard-case, judgment, 30 November 1995, para. 37.

suffering.' [...] 'It is clear both from the case-law of the Court[206] [...] and from Article 13 TFEU that the protection of animal welfare is an objective of general interest recognised by the European Union'.[207] (iv) '[...] it should be borne in mind that [...] the corresponding rights of the ECHR [must be taken into account] for the purpose of interpreting the Charter, as the minimum threshold of protection [...]'[208]

As the ECJ pointed out, based on the case-law of the ECtHR[209] the state — as a rule — has a wide margin of appreciation when it acts within the scope of Article 9 of the ECtHR. The width of the margin of appreciation on the EU level *also stems from the fact that there is no consensus on the subject matter covered by the Regulation.* The EU legislature intentionally stated in recital (18) that Member States shall keep a 'certain level of subsidiarity.' Similarly, both the difference between Paragraph (1) and (4) — which was expressly highlighted by the Advocate General — and the wording of Article 26 (2/1) point 'c' that permits Member States to adopt differentiated rules serves the handling of these differences.[210] (iv/b) '[...] like the ECHR, the Charter is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today [...] with the result that regard must be had to changes in values and ideas, both in terms of society and legislation, in the Member States. Animal welfare, as a value to which contemporary democratic societies have attached increasing importance for several years.[211] Of course, different societies evaluate human rights protection considerations and religious customs differently. As the ECJ noted, however, '[...] the Flemish legislature was entitled to adopt, following a wide-ranging debate organized at the level of the Flemish Region, the decree at issue in the main proceedings' [...].[212] Based on the current stand of sciences: A scientific consensus has emerged that prior stunning is the optimal means of reducing the animal's suffering at the time of killing'.[213] The latter statement is supported by the scientific opinions of the EFSA cited in recital (6) of the Regulation.[214] As the Court pointed out, the Flemish legislature weighted the animal protection considerations and the requirement of religious freedom's prevalence in a proper manner, when it prescribed a method of stunning that is first of all totally reversible — namely, it does not cause the death of the animal, and second, it does not have a detrimental effect on the draining-out process. The Flemish decree — per Article 26 (4) of the Regulation —'[...] neither prohibits nor impedes the putting into circulation, within the territory in which it applies, of products of animal origin derived from animals which have undergone ritual slaughter, without prior stunning, in another Member State.'[215] The ECJ — contrary to the opinion of the Advocate General — hereby dispenses with making a reference to the ECtHR's *Cha'are Shalom* case, where judges came — though not a unanimous — conclusion that 'the right to freedom of religion guaranteed by Article 9 of the Convention cannot

206 | See the cases cited at para. 63 of the judgment delivered in the C-336/19, Centraal Israëlitisch Consistorie van België case.
207 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgement, paras. 62-63.
208 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgement, para. 56.
209 | See: ECtHR, SAS v. France, Judgment, 1 July 2014
210 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, paras. 64-71.
211 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 77.
212 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 79.
213 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 72.
214 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, paras. 72-76.
215 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 78.

extend to the right to take part in person in the performance of ritual slaughter […].'[216] Thus, as far as the believers of a certain faith do not deny the possibility of procuring and consuming meat of animals slaughtered according to their religious beliefs, there is no violation of Article 9 of the European Convention. In the author's view, the fact that the Court — contrary to the opinion of the Advocate General[217]— did not pay attention to the possible halts in the supply chains can serve as grounds to criticize the ECJ's judgment. Possible halts may include either proposed or actually imposed export bans on kosher meat products[218] or *vis-maior* events with unforeseen consequences, such as the *COVID-19* pandemic.[219] By its third question — which was not analysed by the Advocate General upon request of the court — the referring court 'in essence raises the validity of point (c) of the first subparagraph of Article 26 (2) [the Regulation] in light of the principles of equality, non-discrimination, and cultural, religious, and linguistic diversity, as guaranteed by Articles 20, 21, and 22 of the [EU] Charter, respectively.'[220] The applicants of the base case provided a reasoning,[221] namely, 'the applicants observe that the above decree, adopted pursuant to that regulation, treats differently, without any reasonable justification, those who kill animals while hunting or fishing, or in the context of pest control and those who kill animals in accordance with particular methods of slaughter prescribed by a religious rite'.[222]

The ECJ, citing its case-law reiterated that 'the prohibition on discrimination is merely a specific expression of the general principle of equality which is one of the fundamental principles of EU law, and that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.'[223] The Court examined Article 1 (3) of the Regulation, which provides that 'This Regulation shall not apply […] where animals are killed: during hunting or recreational fishing activities; during cultural or sporting events […]'[224]

The ECJ made four statements about this. The author only introduces the first two because they are relevant and can be regarded as 'clinchers'. The first statement of the

216 | ECtHR, Cha'are Shalom case, judgment, paras. 82.
217 | See paras 82-87 of the Advocate General's opinion in the C-336/19 Centraal Israëlitisch Consistorie van België case.
218 | Kayleigh Lewis: Netherlands bans export of kosher and halal meat to 'minimise' negative effects on animal welfare Martijn van Dam, Netherlands' junior minister for economic affairs, hopes new measures minimising 'ritual slaughter' will reduce animal suffering. *Independent* (18 February 2016) [Online]. Available at: https://www.independent.co.uk/news/world/europe/netherlands-bans-export-kosher-and-halal-meat-minimise-negative-effects-animal-welfare-a6881406.html (Accessed: 24 September 2021); Aaron Reich: Poland postpones kosher meat export ban till 2025. *The Jerusalem Post* (14 October 2020) [Online]. Available at: https://www.jpost.com/diaspora/poland-postpones-kosher-meat-export-ban-till-2025–645717 (Accessed: 24 September 2021).
219 | Marinkás 2021a, pp. 5-6.; See furthermore: Ungvári and Hojnyák, 2020, pp. 122-138.; The effects of the COVID-19 on the prevalence of freedom of religion is elaborated on in: Ungvári, 2021
220 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 82.
221 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 31.
222 | As it was already introduced in the first structural part of the current article, a similar reasoning emerged related to the exemption granted for the Sámi people by the Scandinavian countries.
223 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 85.; See furthermore the C-117/76 and 16/77, Ruckdeschel and others case, Judgment, 19 October 1977, para. 7 and the C-127/07, Arcelor Atlantique et Lorraine and others case, Judgment 16 December 2008, para. 23
224 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 86.

Court was that Article 2 point 'h' defines 'cultural or sporting events' as 'events which are essentially and predominantly related to long-established cultural traditions or sporting activities, including racing or other forms of competitions, where there is no production of meat or other animal products or where that production is marginal compared to the event as such and not economically significant.'[225] In this regard, the Court reiterated recital (16) of the Regulation, which states that 'Provided that those activities do not affect the market of products of animal origin and are not motivated by production purposes, it is appropriate to exclude the killing of animals taking place during those events from the scope of this Regulation'.

Thus — in the ECJ's interpretation — *first*, the 'cultural or sporting events' cannot be regarded as activities aimed at 'production of food' in the sense of Article 1 (1). *Second*, as the Court reiterated recital (14) of the Regulation, which states that hunting or recreational fishing activities take place in a context where conditions of killing are very different from those used for farmed animals.' As a consequence, 'if the concepts of 'hunting' and 'recreational fishing' are not to be rendered meaningless, it cannot be argued that those activities are capable of being carried out in respect of animals which have been stunned beforehand.'[226]

Regarding the above considerations, the ECJ stated that: 'It follows that the examination of the third question referred for a preliminary ruling has disclosed nothing capable of affecting the validity of point (c) of the first subparagraph of Article 26 (2) of Regulation No. 1099/2009'.

Summarizing thoughts

In section 1, the author introduced the historical, theological and scientific background of the *shechita* and halal slaughter. Based on his findings, the author drew two conclusions. First, in the author's view, it is not surprising that any restriction or ban on *shechita* is a cut to the quick for the followers of the Jewish faith, since *shechita* is the last foundation stone of their religious belief that was left intact during the forced assimilation and by the anti-Semitic movements of the 19th and 20th centuries. The author's second comment is related to the question that needs to be answered by every court which proceeds in cases about ritual slaughter, namely: 'Where is the equilibrium between the two concurring interests, that is, the freedom of religion and animal welfare considerations?' Considering that the developments in science provided us with methods that are suitable for stun and slaughter the animal in the most humane way, while religious prescriptions are also observed — that is to say, these methods are suitable for providing the prevalence of both the religious and the animal welfare requirements — where are the boundaries of the right to religious freedom and where shall it give ground to animal protection concerns? One may raise the question reversed, namely, where the boundaries of the 'rights of the animals'[227] to their welfare are and where is the point where the 'rights of the animals' shall give ground to the right religious freedom. The author is in a quite lucky

225 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 87.
226 | C-336/19, Centraal Israëlitisch Consistorie van België case, judgment, para. 91.
227 | By using the quotation marks, the author wishes to emphasize that based on 5:14 (3) of the Hungarian Civil Code (Act V of 2013) the animals are things from a legal perspective.

situation, since, unlike the judges of the ECtHR, the ECJ and the constitutional courts — he does not have to take sides. He is well aware of the fact that the reconciliation of animal welfare measures and religious prescriptions is not an easy task, as clearly shown by the high proportion of dissenting judges in the ECtHR's *Cha'are Shalom ve Tsedek* case and in the Polish Constitutional Court's religious slaughter case. As Advocate General Gerard Hogan wrote: 'a secular court cannot choose in relation to the matters of religious orthodoxy'. In accordance with these thoughts, the *ECJ* — just like the German Constitutional Court and unlike the Polish Constitutional Court, which elaborated on the 'morals' in a non-neutral way — strives to asses religious arguments from the outside, as a sociological question instead of examining it theologically and does well in this aspect, as some scholars argue.[228] This article's author agrees with this opinion. Even if it is not for secular courts to decide in theological issues, once the case is brought before them, they have to make a decision and the 'outsider approach' is the only acceptable solution in a modern democratic society.

On the other hand, the author of the current article also argues that the issue needs to be settled through social and political debate. That is the way to find the equilibrium,[229] regarding the fact that the scope of ECJ jurisdiction only covers the interpretation of EU law and decides on its validity. Following this, the author dispenses remarks on theological questions. Instead, he compares the opinion of the Advocate General and the ECJ judgment from an EU law perspective and draws his conclusions, namely that the latter is more coherent and more in conformity with EU law. That is, the author opines that the ECJ stated it correctly that member states have a margin of appreciation when it comes to weighting animal welfare considerations and the right to religious freedom. The Court provided more coherent reasoning than the Advocate General did. Furthermore, the author argues that the ECJ applied a more appropriate weighting of the relevant EU laws and principles. The two most apparent differences are that the ECJ put greater emphasis on evaluating Article 13 of the TFEU and that the ECJ applied the Gebhard-test when it came to the evaluation of the Member State's measures from the aspect of proportionality. The author contends that the lack of the latter in the Advocate General's opinion is rather apparent, and it contributed greatly to the fact that the ECJ provided a better interpretation. The author maintains his statements even if the ECJ judgment exhibits shortcomings as well — as it was introduced above — and holds that the Court failed to acknowledge the problems of interpretation attributable to the wording of the Regulation, something that the Advocate General did in his opinion.

228 | Pin and Witte, 2020, p. 255.

229 | This equilibrium may shift to either side as the attitude of society's evaluation on animal protection changes. These shifts are induced by societal changes — including the changes in the ethnic or religious composition of the society and the proportion of religious members of society.

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LEGAL REGULATION OF RELIGIOUS CLOTHING IN THE PUBLIC SPHERE IN THE CZECH REPUBLIC IN LIGHT OF THE CASE OF A MUSLIM STUDENT VERSUS A SECONDARY SCHOOL

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ABSTRACT

This study examines the issue of religious clothing in public spaces in the Czech Republic. It describes the legal regulation/restriction of this exercise of religious freedom in three areas: photographs on personal documents, face coverings at public assemblies, and religious clothes worn in schools. Regarding the third area, it examines in detail a Muslim student's case against a medical secondary school. This case shows that the wearing of religious clothing is very loosely regulated in the Czech Republic and is restricted to a few specific areas.

KEYWORDS

basic human rights
freedom of religion
freedom of assembly
school
religious clothing

Introduction

Part of the freedom of religion is in its external expression, including the use of religious clothing in public. This study aims to describe and evaluate the legal regulation of the use of religious clothing in public in the Czech Republic based on national legislation and case law. It aims to lay the foundation for further elaborations of this topic, especially through comparisons with both the legal regulations of other states and the judicial decisions of the European Union. This rather narrow treatment is chosen in order to provide a useful elaboration of this topic across a relatively wide historical breadth, starting with the establishment of the Czechoslovak Republic in 1918, and to maintain a tolerable scope.

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In the first chapter, we describe the general historical background of legal regulation in the territory occupied by the Czech Republic since the inception of Czechoslovakia in 1918. The second chapter presents the constitutional basis of the right to express one's religion by wearing religious clothing. In the next two chapters, we discuss the regulation/ restriction of the exercise of this right in the field of personal documents and the rights of participants in public assemblies, which are regulated by law.[2] In the last chapter, we address the wearing of religious clothing in schools, and discuss the case of a lawsuit launched by a Muslim student against a medical secondary school. In addition to describing legal regulations regarding the public wearing of religious clothing, we also evaluate them and discuss their prospects in terms of *de lege ferenda*.

1. General historical background of legal regulation

After its inception, the Czechoslovak Republic embarked on a path of legal continuity. The Austrian legal order continued to apply in Czech lands (the territory occupied by the present Czech Republic), while the Hungarian legal system applied in Slovakia (the territory of the present Slovak Republic) and, with modifications, in Carpathian Ruthenia, which was ceded to the Soviet Union in June 1945. Both legal systems contained a large number of regulations in the area of religious law, which continued to apply in Czechoslovakia.

The establishment of the communist regime in Czechoslovakia in February 1948 led to a redefinition of church–political relations and, thus, of religious law. After the end of the negotiation phase (especially with the Roman Catholic Church) in 1949, the regime unilaterally introduced substantial legal changes. The adoption of the Act on the Economic Indemnity of Churches and Religious Societies in October 1949 was of fundamental importance, as it established a path of legal discontinuity. The repealing provision in § 14 briefly stipulates: 'All regulations governing the legal relations of churches and religious communities are repealed'.

This established a legal vacuum in several areas, which was filled by administrative will, which was often arbitrary, aimed at building a socialist society as set out in the introductory sentence of the Declaration at the very beginning of the Czechoslovak Constitution of May 1948:[3] 'We, the Czechoslovak people, declare that we are firmly intent to build our liberated state as a people's democracy that will ensure a peaceful path to socialism'.

The path to socialism under the leadership of the Communist Party of Czechoslovakia, confirmed by the Czechoslovak Constitution of 1960,[4] became the starting point not only for administrative practice, but also for new 'socialist' legislation. The Education Act (also called the 'Act on Unified School') is particularly important in terms of religious symbols and clothing, as it completely nationalised education in Czechoslovakia and pushed the religious element out of it, except for a severely limited teaching of religion.[5] However, the

2 | We deliberately avoid the issue of ordered uniforms (e.g. in the army, police, fire brigades).
3 | Constitutional act no. 150/1948 Sb., Constitution of the Czechoslovak Republic.
4 | Constitutional act no. 100/1960 Sb., Constitution of the Czechoslovak Socialist Republic.
5 | Act no. 95/1948 Sb., on the basic regulation of unified education (School Act).

regime also violated its own laws, as the Communist Party's instructions superseded the legal order. This was acknowledged retrospectively by the parliament of the independent Czech Republic.[6] Religious life was also pushed out of the public sphere from 1948 to 1989. Its public expression was minimally tolerated and was restricted without necessarily being regulated by law.

After the overthrow of the Communist Party of Czechoslovakia in 1989/1990, the state was democratised. This was manifested by both new guarantees of human and civil rights and efforts to minimise interference with these rights by laws and bylaws. The consequence was a tempering or even absence of legal regulation, which was reflected in the issue of religious clothing in the public sphere.

2. Constitutional basis of the expression of freedom of religion

Czechoslovakia's constitutional basis was laid by the 1991 Charter of Fundamental Rights and Freedoms.[7] Article 15 of the Charter enshrines the guarantee of freedom of thought and conscience, scientific research, and the creation of art (*forum internum*):

> (1) Freedom of thought, conscience, and religious convictions are guaranteed. Everyone has the right to change their religion or faith, or be non-denominational.
> (2) Freedom of scholarly research and artistic creation is guaranteed.
> (3) No one may be compelled to perform military service if this is contrary to their conscience or religious convictions; detailed provisions are laid down in law.

Article 16 strongly guarantees both individual and corporate expressions of religious convictions (*forum externum*):

> (1) Everyone has the right to freely manifest their religion or faith, either alone or in community with others, in private or public, through worship, teaching, practice, and observance.
> (2) Churches and religious societies govern their own affairs; in particular, they establish their own bodies and appoint their clergy, as well as found religious orders and other church institutions, independent of state authorities.
> (3) The conditions under which religious instruction may be provided at state schools should be set by law.
> (4) The exercise of these rights may be limited by law in the case of measures necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others.

The right to assemble is guaranteed in the same way:

> (1) The right to a peaceful assembly is guaranteed.

6 | Act no. 198/1993 Sb., on the illegality of the communist regime and on resistance against it.
7 | Constitutional act no. 23/1991 Sb., which introduces the Charter of Fundamental Rights and Freedoms as a constitutional law of the Federal Assembly of the Czech and Slovak Federal Republic.

> (2) The exercise of this right may be limited by law in the case of assemblies held in public places if it concerns measures that are necessary in a democratic society for the protection of the rights and freedoms of others, public order, health, morals, property, or the security of the state. However, an assembly shall not be made to depend on a grant of permission by a public administrative authority.

The 1991 Charter continued to play a very important role in the case law of the Constitutional Court. The Czech Republic's constitution does not regulate human and civil rights, but refers to the Charter,[8] re-adopted as part of the constitutional order of the Czech Republic.[9]

A representative commentary on the Charter states that, in light of the case law of the European Court of Human Rights, it is concluded that the wearing of religious symbols and clothing is understood as a limitable expression of religious beliefs rather than as part of an individual's religious freedom. At the same time, it is not only the formal aspect that is decisive, but also the intention. For example, a headscarf is not a religious symbol as such, but it becomes a manifestation of religious belief if a Muslim woman wears it specifically in a stable form. In the same way, religious symbols can consist of a specific arrangement of an exterior (e.g. religious or clerical clothing, clerical collar, hijab, niqab, burkas, beard, yarmulke, uncut hair, kirpan). However, the specific limits of the application of this fundamental right must be understood in the light of the cultural and social context of a given state. In the Czech Republic, the context is that of a cooperative model of the relationship between the state and churches/religious communities ('CRC' hereafter).[10]

A special act on CRCs was adopted in 1991.[11] The law was rather short and favourable to CRC activities. The 2002 Act on Churches and Religious Communities[12] excluded the public activities of CRCs from its scope, thus leaving it competent to deal only with purely internal religious activities. However, the intervention of the Constitutional Court in November 2002 renewed the legal recognition of the broad activities of CRCs.[13]

Neither of these laws specifically regulates the expression of religious belief through the regulation of religious clothing. Therefore, because of their development, both laws maintain a guarantee of the freedom of expression of religious belief in accordance with the Charter of Fundamental Rights and Freedoms.

8 | Constitutional act no. 1/1993 Sb., Constitution of the Czech Republic.
9 | Resolution of the Presidency of the Czech National Council no. 2/1993 Sb., on the promulgation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic.
10 | Jäger, 2012a, p. 380; Jäger, 2012b, pp. 397–398, 416.
11 | Act no. 308/1991 Sb., Act on Churches and Religious Communities.
12 | Act no. 3/2002 Sb., Act on Churches and Religious Communities.
13 | Judgment of the Constitutional Court of 27 November 2002 no. 4/2003 Sb. in the matter of a proposal to repeal act no. 3/2002 Sb., on freedom of religion and the status of Churches and religious Communities and to amend certain acts (Act on Churches and Religious Communities), or to repeal certain provisions of this Act.

3. Requirements for photographs on ID cards and passports

3.1. Overview of legal regulation regarding identity cards

The legal regulation of identity cards began in the interwar period (the period of the First Czechoslovak Republic). The first Czechoslovak legal norm was a government decree of August 8, 1919, which introduced general citizenship cards for citizens of the Czechoslovak Republic. This regulation followed Imperial Regulation no. 31/1857 RGBl, on the introduction of a new passport system,[14] and its execution instruction no. 32/1857 RGBl.[15] The general citizenship card took the form of a small-format workbook (of approximately A6 size), the data of which were entered manually. The card included a verbal description of the citizen's appearance because it did not contain a photograph. However, the card was not a compulsory identity document, but was specified as optional in national communication.[16] This decree left the determination of the date of effectiveness in the territories of Czechoslovakia up to the Minister of the Interior. The Minister set the effectiveness date for Bohemia, Moravia, and Silesia (i.e. for the territory of the present-day Czech Republic) as May 1, 1920.[17] Therefore, none of these decrees contained regulations for taking photographs for general citizenship cards.

After Czechoslovakia was occupied by the Nazi regime (on March 15, 1939), a decree of the Reich Protector Konstantin von Neurath of March 17, 1939, introduced a mandatory general citizenship card for citizens of the Protectorate of Bohemia and Moravia following the German model, the so-called *Kennkarte*, which included a photograph for the first time.[18] A decree of President of the Republic Edvard Beneš, issued in exile in London in 1944, laid down the rule of legal discontinuity for protectorate legal acts,[19] so this regulation expired on May 5, 1945.[20]

Two fundamental changes occurred in 1948, during the communist regime: The current general citizenship card was renamed the 'identity card', but it was introduced on January 1, 1949, and made compulsory only for persons in the border zone.[21] This act was repealed by a government decree on identity cards of 1953, which stipulated the obligation to have an identity card for all citizens over the age of 15.[22] Decree no. 2384/1948 Ú.l. I

14 | Kaiserliche Verordnung Nr. 31/1857 RGBl., wirksam für alle Kronländer, über die Einführung eines neuen Paßsystemes.
15 | Verordnung der Ministerien des Äußern des Innern und des Handels Nr. 32/1857 RGBl., der obersten Polizeibehörde und des Armee-Ober-Commando, wirksam für alle Kronländer, womit neue paßpolizeiliche Vorschriften erlassen werden.
16 | Regulation of the Government of the Czechoslovak Republic no. 481/1919 Sb. z. a n., which introduces general citizenship cards.
17 | Decree of the Minister of the Interior no. 338/1920 Sb. z. a n., on when the Order of the Government of the Czechoslovak Republic of 8 August 1919, no. 481 Sb. z. a n., on general civil identification cards, comes into force.
18 | Všeobecné občanské legitimace [General citizenship cards]. Available at: http://www.scanzen.cz/dobove-dokumenty/prukazy/vseobecna-obcanska-legitimace.
19 | Constitutional Decree of the President of the Republic no. 11/1944 Úř. věst. čsl., on the restoration of legal order.
20 | Government regulation no. 31/1945 Sb. z. a n., which stipulates the end of the unfree period for the field of regulations on the restoration of the legal order.
21 | Act no. 198/1948 Sb., on identity cards.
22 | Government regulation no. 61/1953 Sb. on identity cards.

of the Ministry of the Interior implemented regulations for the Act. It prescribes as follows with regard to photography:[23] two photos measuring 5.5 x 6.5 cm, showing the applicant's head (uncovered) in a half-profile measuring at least 2 x 3 cm.

The requirements for the photograph were changed slightly by a 1953 decree of the Ministry of National Security,[24] which prescribes as follows: two non-retouched 5.5 cm x 6.5 cm photos, with a 1.5 cm wide white border.

Minor changes, especially regarding identity cards' period of validity, were introduced by the Identity Cards Act in 1957.[25] The 1958 Implementing Decree did not make any changes to the design of the photograph.

The Identity Card Act of 1957 was in force until the end of 1999, although it was amended several times. Two decrees were issued to implement this act by the end of 1989, in 1978[26] and in 1984.[27] The requirements they set for making a photograph are almost identical. We quote from § 2 (2) para. (b) of the 1984 Decree:

> two sharp, non-retouched photographs taken from the same negative on a smooth, glossy half-cardboard or taken by a multi-lens instrument, measuring 3.5 x 4.5 cm, showing the citizen in a three-quarter profile, in civic clothing, without headgear and spectacles with dark glasses, the height of the facial part of the head (from the eyes to the chin) at least 13 mm.

After the change in political conditions and the disintegration of Czechoslovakia (on January 1, 1993), another decree was issued in 1993 for the same 1957 act.[28] Identity cards were now laminated, so the scope of the information they contain has radically decreased. Photo requirements have been slightly modified. They are as follows: two sharp, unretouched, non-toned, black and white photographs measuring 5.5 x 6.5 cm, with a 1.5 cm wide white border depicting the citizen in a three-quarter profile, in civilian clothing and without headgear (head size approximately 3 cm), and without spectacles with dark lenses, paper surface smooth, matte.

The first 'post-November' law on identity cards was issued in 1999, made effective from July 1, 2000.[29] This introduced many changes. It transfers responsibility for identity cards from the Police of the Czech Republic to district authorities.[30] It introduces the registration of identity cards via computer technology connected with the basic inhabitants register and other components of the information system covering the registration of

23 | Decree of the Ministry of the Interior no. 2384/1948 Ú. l. I, which sets out the details for identity cards.
24 | Decree of the Ministry of National Security no. 240/1953 Ú. l., which issues more detailed regulations on identity cards.
25 | Act no. 75/1957 Sb. on identity cards.
26 | Decree of the Federal Ministry of the Interior no. 135/1978 Sb., which issues more detailed regulations on identity cards.
27 | Decree of the Federal Ministry of the Interior no. 119/1984 Sb., which issues more detailed regulations on identity cards.
28 | Decree of the Ministry of the Interior no. 128/1993 Sb., which implements the act on identity cards.
29 | Act no. 328/1999 Sb. on identity cards.
30 | As of January 1, 2003, with the entry into force of act no. 320/2002 Sb., on the amendment and repeal of certain acts in connection with the termination of district offices, this agenda passed from the extinct district offices to the municipal offices of municipalities with extended powers; cf. Říha, 2013, p. 21.

inhabitants, making it possible to use ID cards as travel documents (instead of passports). Therefore, it aims to unify the legal regulation of identity cards with legislation governing the registration of inhabitants, travel documents, and registries. Concerning the exercise of religious freedom in the context of the Charter of Fundamental Rights and Freedoms, the act lays down restrictions on the use of religious clothing, especially headgear, by the requirement to submit the following: one photograph measuring 35 × 45 mm, corresponding to the current fashion of the citizen, shown in front view with the height of the facial part of the head from the eyes to the chin of at least 13 mm, in civilian clothes, without dark glasses (except for the blind), and without headgear, unless its use is justified on religious or medical grounds; in such a case, the headgear must not cover the facial area in a way that makes it impossible to identify the citizen ('photograph' hereafter). The requirements for the technical design of the photograph are set out in a decree of the Ministry of the Interior.

The explanatory report for the law comments on this change as follows:

> Contrary to the current legislation, an exception concerning head covering is included in the provision on the presentation of a photograph on the identity card. In cases where this is usual, that is, for religious and health reasons, the citizen is allowed to have a head covering in the photograph.

An implementing decree of the Ministry of the Interior was issued in 2000.[31] In § 6, it provides detailed requirements for the design of the photograph, such as the possibility of using black and white or colour photography, the exact dimensions of the photograph, and the design of its background. These requirements are repeated in the 2004 Decree,[32] which also discusses the possible digital processing of photography. In addition, it distinguishes between two versions of the identity card – with and without machine-readable data. A new decree from 2011[33] envisages the acquisition of a digital photograph directly at the office where the application for an identity card was submitted, although it leaves open the possibility of sending a digital photograph from the photographer. It orders that a digital photograph be entered into the Ministry of the Interior database and envisages placing an electronic chip on the back of the card.

The latest legal regulation, the Identity Card Act, was issued in 2021[34] This act requires that the identity card include machine-readable biometric data – facial images and handprints taken under Regulation (EU) 2019/1157 of the European Parliament and of the Council – and therefore eliminates the possibility of issuing an identity card without machine-readable data (while introducing a temporary identity card instead). It also enables the issuance of an identity card to persons under the age of 15 (eventually without fingerprinting) and liberalises the administration of issuing identity cards. The administrative office was newly determined as the sole venue for acquiring a digital photograph. The appearance of the person to whom the identity card is issued is described on the

31 | Decree of the Ministry of Interior no. 177/2000 Sb., implementing the act on identity cards and the act on travel documents.
32 | Decree of the Ministry of Interior no. 642/2004 Sb., implementing the act on identity cards and the act on travel documents.
33 | Decree of the Ministry of Interior no. 400/2011 Sb., implementing the act on identity cards and the act on travel documents.
34 | Act no. 269/2021 Sb. on identity cards.

card in two ways: directly on the data page (the photo on the identity card) and stored in a data carrier containing biometric data. The execution of the photograph is specified in detail by a decree of the Ministry of the Interior issued in the same year,[35] in which § 20 (3) stipulates the possibility of an exception:

> The person to whom an identity card is issued may take the form of a head covering, which may not cover the face in such a way as to make it impossible to identify the person if it is wearing it for medical or religious reasons.

3.2. Overview of legal regulation regarding passports

The legal regulation of passports also began in the interwar period (during the First Czechoslovak Republic). Czechoslovakia began regulating the use and issuance of passports soon after its inception, first via provisional government regulations from 1918[36] and 1919,[37] and subsequently by the Passport Act of 1928.[38] These norms also followed Imperial Regulation No. 31/1857 RGBl on the introduction of a new passport system,[39] and its implementation instruction No. 32/1857 RGBl. To cross the Czechoslovak border, every citizen had to have a Czechoslovak passport, and every foreigner had to have a passport corresponding to the requirements set out in this act. The act did not address the execution of the photograph.

Further regulation occurred during the communist regime. The Passport Act was issued in 1949,[40] with implementing regulations for it passed in 1951,[41] 1953,[42] and 1959.[43] Another law on travel documents was issued in 1965[44] along with an implementing decree,[45] and the next decree was passed in 1970.[46] In addition to a passport, an exit permit is often needed, which effectively limits the use of passports.[47] None of these norms specified detailed regulations for the photograph; in practice, the regulations for identity cards were used for passports, which is why photographs made this way were called 'documentary photographs'.

35 | Decree of the Ministry of the Interior no. 281/2021 Sb. on the implementation of the Act on Identity Cards and certain provisions of the Act on Travel Documents and the Act on Basic Registers.
36 | Government regulation no. 87/1918 Sb. z. a n. on the issuance of passports.
37 | Order of the Minister of Finance in agreement with the Minister of the Interior, the Minister of Industry, Trade and Trades, and the Minister of Foreign Affairs no. 46/1919 Sb. z. a n., for the implementation of the Decree of 22 December 1918, no. 87 Sb. z. a n., on the issuance of passports.
38 | Act no. 55/1928 Sb. z. a n., on passports.
39 | Kaiserliche Verordnung Nr. 31/1857 RBl., wirksam für alle Kronländer, über die Einführung eines neuen Paßsystemes.
40 | Act no. 53/1949 Sb. z. a n., on passports.
41 | Decree of the Ministry of Foreign Affairs No. 2/1952 Ú.l., which issues more detailed regulations on the Passport Act.
42 | Decree of the Ministry of Foreign Affairs no. 69/1953 Ú.l., on the exchange of passports and their registration.
43 | Decree of the Ministry of Foreign Affairs no. 100/1959 Ú.l., on the issuance of passports.
44 | Act no. 63/1965 Sb., on travel documents.
45 | Decree of the Ministry of the Interior and the Ministry of Foreign Affairs no. 64/1965 Sb., which issues implementing regulations for the Act on Travel Documents.
46 | Decree of the Ministry of the Interior and the Ministry of Foreign Affairs no. 44/1970 Sb., which issues implementing regulations for the Act on Travel Documents.
47 | Dealing with the travel clause would be too burdensome for this article.

The Travel Document Act, which respects the right to travel abroad freely and to return home,[48] was issued during the post-communist Czechoslovak Federation in 1991, along with its implementing decree.[49] Another significant amendment was the Travel Document Act of 1999,[50] issued together with the Act on Identity Cards and containing identical principles. This act also stipulates an exception to the requirement for an uncovered head:

> For religious or medical reasons, a head covering photograph may be submitted with the application for a travel document; this cover must not cover the facial part in a way which would make identification impossible.

Since the issuance of this act, more detailed instructions have been laid down in decrees regulating both identity cards and travel documents, including the latest Decree no. 281/2021 Sb.

3.3. Evaluation of requirements for photographs in personal documents in terms of the use of religious clothing

There were no problems with wearing a head covering for religious reasons in identity document photos in the first decades after the establishment of Czechoslovakia in 1948. This was mainly due to the Austrian tradition, where religion was a common part of public life.

This gradually changed after the Communist Party of Czechoslovakia took power in February 1948. By no means was there a sudden turning point on the issue of personal documents because the communist regime sought an agreement with churches, especially the Roman Catholic Church, at least until mid-1949.[51]

After 1949, the regime sought to push visible manifestations of religion, including clothing, out of public life. At the same time, the religious situation was simplified. The Jewish population had been liquidated almost entirely during World War II. There were very few Muslims in Czech lands, and the legal status of Muslims in Czechoslovakia was problematic after World War II.[52] Catholic priests increasingly wore civilian clothing (usually a suit with a clerical colar) instead of a clerical garb. When they lost state approval to perform clerical work, the state called them 'former priests'. They had to work in civilian jobs, and many were drafted into military service or imprisoned. Men in religious orders were expelled from their monasteries from April to May 1950, were interned, or were drafted into military service for several years. Upon their return, they usually worked in civilian occupations and wore civilian clothes. Therefore, their photographs on identity

48 | Act no. 216/1991 Sb. on travel documents and travelling abroad.
49 | Government regulation no. 512/1991 Sb. implementing the Act no. 216/1991 Sb. on travel documents and travelling abroad.
50 | Act no. 329/1999 Sb. on travel documents and on the amendment of Act no. 283/1991 Sb. on the Police of the Czech Republic (Act on Travel Documents).
51 | I add a personal memory to illustrate. My mother remembered that, in 1946 – before the first parliamentary elections after World War II – communist Jiří Pelikán performed in their village under the slogan 'Jesus Christ, the first communist'.
52 | After World War II, Brikcius, the leading representative of Czechoslovak (or rather Czech) Muslims, was arrested and sentenced to a long prison term for anti-Jewish activities during World War II; See Němec and Hesová, 2021, p. 35.

cards and travel documents (if they received them at all) were taken with them wearing civilian clothes.

At that time, head covering for religious reasons was an issue only for Christian women. Although Christians were under strong pressure, including via the closing of most monasteries in the autumn of 1950 and subsequent internment, the vast majority of them did not put aside their religious clothing, even when in difficult working conditions in factories.

The exchange of identity cards for newer ones also took place over a period of years. It is therefore not surprising that religious women continued to use photographs of themselves in religious attire, including veils, in personal documents. Although the veils were often very distinctive in shape, they never covered their faces or made it impossible to identify them.

The use of photographs taken in religious clothing for personal documents has persisted even though it has been explicitly ordered since 1978 that photographs should be taken in civilian clothing and without a head covering. This can be attributed to several reasons.

First, the requirement for civilian clothing is ambiguous. The Czech legal system lacks a definition of 'civilian clothing'. The term is therefore understood to refer to clothing used in ordinary social relations, in contrast to domestic, work, or sport clothing. For religious women, religious clothing is the usual clothing they use in daily social relations.

Second, the degree of social sustainability is an important issue. The will of religious women could not be broken in the 1950s, when the regime used very harsh coercive means, and it was no longer socially acceptable in the 1970s to force nuns to take the photographs used in personal documents without wearing a religious veil. The condition was, however, that these women had to have been officially religious before the regime was founded (i.e. had to have entered their orders or congregations before 1950 or during the period of partial liberation of 1968–1970). Secretly received religious women wore civilian clothes and were photographed in them for personal documents.

Moreover, using photographs of women wearing religious attire in personal documents had certain advantages for the totalitarian regime. It made it easy to identify them during police checks if they operated outside the convent in civilian attire, which was done for conspiratorial reasons, especially when working with young people. The totalitarian regime was a police state, and arguments made by the police, both public and (above all) secret, carried very great weight with it. Paradoxically, it was precisely for these conspiratorial reasons that religious women were sometimes photographed in civilian clothes for their personal documents in the 1980s.[53]

Since the fall of the communist regime in 1990, photographs taken in religious clothing have been used in personal documents for religious women, and sometimes for men (usually without a head covering, with the exception of Orthodox monks). With the easing of religious oppression and increased population migration in the Czech Republic, other religions have emerged that emphasise religious clothing, including Islam, which traditionally requires headdress for women. Under the Charter of Fundamental Rights and Freedoms, respect for this practice is reflected in the laws on identity cards and travel

53 | Thus, the sisters of the Congregation of the Sisters of Mercy of St. Charles Borromeo recall that their then-revered General Superior, the Venerable Vojtěcha Hasmandová, ordered some sisters (usually younger, admitted between 1968 and 1970) to have a photograph taken in civilian clothes for their personal documents.

documents enacted in 1999, which remained after the legal regulation of 2021. These laws apply to all religious groups, not just state-registered churches and religious communities, which can lead to bizarre consequences.[54]

3.4. Reflections and suggestions de lege ferenda

Although the current legislation largely guarantees the exercise of religious freedom, several questions remain. It is clear that respect for public expressions of religious freedom applies to all religions, not just those registered by the state as churches and religious communities according to Act no. 3/2002 Sb.

Because official photographs for personal documents can be acquired only from officials at municipal or city offices, a conflict may occur between the view of an official and that of a resident. A visual model for correct identification photographs is provided by the Ministry of the Interior, but it is not legally binding; it merely explains the legal provisions. Therefore, it is an official interpretation, but has no legal force. Thus, a binding legal document (i.e. a by-law) should be issued. Such a regulation should probably be issued via a decree of the Ministry of the Interior, published in the Collection of Laws and Regulations (and therefore easily accessible to the public), rather than merely a methodological instruction published in the Ministry of the Interior Bulletin.

4. Regulation regarding the right of assembly

4.1. Overview of legal regulation regarding the right of assembly

The right to associate was enshrined in the Czechoslovak constitutions of 1920, 1948, and 1960, but not absolutely. The Czechoslovak Constitution of 1920 provided in § 113 (3) the possibility of restricting this freedom by law and defined the objectives of the restriction through a demonstrative list. The first communist constitution from year no. 150/1948 Sb. contains in § 23 (1) the following restrictions: 'provided that this does not endanger the people's democratic establishment or public peace and order'. In addition, the communist constitution no. 100/1960 Sb., Article 28 guarantees this right 'in accordance with the interests of the working people'. The current constitutional enshrinement is contained in the 1991 Charter of Fundamental Rights and Freedoms.[55]

The implementation of this right is regulated by laws and by-laws. After the establishment of Czechoslovakia, the 1867 Austrian law on the right of assembly continued to be applied.[56] This law did not regulate the clothing worn by participants in assemblies. The law was not replaced until 1951,[57] with § 6 (1) effectively restricting the exercise of the right of assembly:

54 | For example, pastafarians could ask to be photographed with a colander on their heads, and, legally, they would have a good chance of success.
55 | Cf. above chapter 2.
56 | Gesetz Nr. 135/1867 RGBl., über das Versammlungsrecht.
57 | Act no. 68/1951 Sb. on voluntary organisations and assemblies.

> In accordance with the interests of the working people, citizens are guaranteed the exercise of the right of assembly, provided that it does not menace the people's democratic establishment or public peace and order.

The implementing decree issued in the same year[58] contains no regulations regarding the attire of participants in an assembly.

The most recent regulation is given by the 1990 Act on the Right of Assembly, which is very liberal. Later amendments were made mainly because of the need to respond to the abuse of this right, especially through acts of violence, and to remedy the significant shortcomings of the law. Therefore, it was first amended in 2002,[59] adding to § 7 a new paragraph 4:

> The participants of the assembly may not have their faces covered in a way that makes it difficult or impossible to identify them, if the intervention of the Police of the Czech Republic is carried out against the assembly.

The provision of paragraph 4 was tightened in 2008[60] to read as follows:

> The participants of the assembly may not have their faces covered in a way that makes it difficult or impossible to identify them.

The latest amendment, introduced by the 2021 Pandemic Act,[61] added this paragraph:

> The participants of the assembly may not have their faces covered in a way that makes it difficult or impossible to identify them, if the authority or the Police of the Czech Republic issues such an instruction, if the peaceful course of the assembly is disrupted or endangered.

The latest amendment was not included in the government bill, and is thus not commented on in the explanatory report for the law. It appeared in a comprehensive amendment (actually, a new wording of the bill) submitted by Minister of the Interior Jan Hamáček as a deputy on the basis of an agreement brokered with difficulty among the representatives of all political parties in the Czech Republic's Chamber of Deputies (its lower house of parliament). This proposal was presented as a sign of goodwill on behalf of the governing coalition. This amendment was based on the case law of the Supreme Administrative Court, which had ruled that the requirement to leave the face uncovered (including in traditional masquerades and similar parades) was adequate.

58 | Decree of the Minister of the Interior no. 320/1951 Ú.l. on voluntary organizations and assemblies
59 | Act no. 259/2002 Sb., amending Act no. 84/1990 Sb., on the right of assembly, as amended by Act no. 175/1990 Sb., and certain other acts.
60 | Act no. 274/2008 Sb. amending certain acts in connection with the adoption of the Act on the Police of the Czech Republic.
61 | Act no. 94/2021 Sb. on emergency measures in the event of an epidemic of COVID-19 and amending some related acts. This law makes it possible to take certain epidemiological measures without declaring a state of emergency.

The Ministry of the Interior issued an explanatory opinion regarding masking during an assembly on its website,[62] summarising the reasons for the legal regulation and the rules for its application. However, as is common for ministries, it is not dated, and it lacks a reference number and the name of the person who signed it. In addition, it cites the wording of the law before the last amendment, which is not only a material error but also reduces the credibility of this opinion (and of the ministry itself).

4.2. Evaluation of requirements regarding religious clothing for assembly participants

The regulation given by the Act on the Right of Assembly no. 84/1990 Sb. in its original version imposes no restriction on the use of religious clothing. After the law's tightening, which was criticised by the Supreme Administrative Court, the last amendment to the Act in 2021 forbids participants in an assembly to cover their faces in a way that makes it difficult or impossible to identify them, but only during an interaction with Czech police. The 2021 amendment clarifies this ban by stating that it applies only to cases in which the peaceful conduct of the assembly is being disrupted.

It can therefore be stated that the regulation of the right of assembly in the Czech Republic interferes with the right to express one's religious beliefs by wearing religious clothing to only a minimal extent – marginally, in fact.

4.3. Reflections and suggestions de lege ferenda

The current restriction on facial masking during a public meeting, which is the result of judicial review, imposes a very narrowly defined obligation on meeting participants, and is also subject to a clear definition of the authority of Czech Republic police. It seems unnecessary to lay down any further legal or by-law definition.

5. Regulation of wearing religious clothes in schools

5.1. Legal basis for wearing religious clothes in schools

The wearing of religious clothing in schools has never been regulated by law in the Czech Republic. The traditional tools for regulating individual schools are schools' internal regulations, which fall under the Education Act.[63] According to § 30 of the act, these regulations are issued by the school director. The school rules regulate the following:

> a) details on the exercise of the rights and obligations of children, pupils, students, and their legal representatives in the school or school facility and details on the rules of mutual relations with staff in the school or school facility
> b) working and internal regime of the school or school facility,

62 | Approach of the Ministry of the Interior on the issue of masking during the assembly; available at: https://www.mvcr.cz/clanek/stanovisko-ministerstva-vnitra-k-problematice-maskovani-behem-shromazdeni.aspx (Accessed 25.08.2021).
63 | Act no. 561/2004 Sb., on pre-school, primary, secondary, higher vocational and other education (School Act).

> c) conditions for ensuring the safety and health protection of children, pupils, or students and their protection against socially pathological phenomena and against manifestations of discrimination, hostility, or violence
> d) conditions for the treatment of school or school property by children, pupils, and students

At the same time, under § 29 of the act, the school is obliged to ensure the safety and health protection of children, pupils, and students. School rules can in certain circumstances be interpreted as a rule of law, as required by Article 16 (4) of the Charter of Fundamental Rights and Freedoms. However, this applies only in situations where the school rules restrict freedom of the expression of religion to fulfil obligations imposed on the school by the Education Act. It is therefore primarily a matter of ensuring the safety, protection, and health of pupils. Thus, the school may apply such restrictions to pupils' clothing at school, which will prevent threats to their health and safety.[64]

In addition to the constitutionally guaranteed rights and freedoms set out in the Charter of Fundamental Rights and Freedoms, the Anti-discrimination Act has important provisions.[65] In § 2 (3), direct discrimination is defined as follows:

> (3) Direct discrimination means such conduct, including the omission of one person being treated less favourably than another, has been or would be treated in a comparable situation, on grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief, or worldview, as well as in legal relations in which the directly applicable regulation of the European Union in the field of free movement of workers applies, also on the grounds of nationality.

In § 3 (1) it defines indirect discrimination as follows:

> (1) Indirect discrimination means such an act or omission where, based on a seemingly neutral provision, criterion, or practice, a person is disadvantaged compared to others for one of the reasons stated in § 2 (3). It is not indirect discrimination if that provision, criterion, or practice is objectively justified by a legitimate aim, and the means of achieving it are proportionate and necessary.

On the other hand, the law stipulates that there may be no discrimination but merely a difference in treatment between individuals. The area of freedom of conscience is covered by the provisions in § 6 (3):

> (3) Discrimination is not a difference in treatment in matters of the right to employment, access to employment or occupation, in matters of employment, service or other dependent activity, if there is a factual reason to do so due to the nature of the work or activity and the requirements applied. Discrimination on grounds of sex does not consist in a difference in treatment as regards access to or training for employment or occupation, provided that the factual reason for doing so is the nature of the work or activity performed and the requirements applied are proportionate to that nature.

64 | Kohl (2021), p. 30.
65 | Act no. 198/2009 Sb. on equal treatment and legal means of protection against discrimination and on amendments to certain acts (Anti-Discrimination Act).

5.2. Secondary medical school student versus the school: the wearing of hijab

The regulations governing the wearing of religious symbols are strongly affected by a court case brought by a secondary medical school student against the school.

In September 2013, two girls – both of whom had received asylum in the Czech Republic – wanted to attend a secondary medical school in Prague 10. Both girls were Muslim, one came from Somalia and the other from Afghanistan. Attempts to study ended in conflict. The Somali girl signed a declaration that she was dropping out of school on her first day after a conflict with the schoolmistress, and the Afghan girl left after two months of classes. Both argued that their religious rights had been violated because, according to the school rules, they were not allowed to cover their heads with a hijab during class, including classes on theoretical subjects, which the schoolmistress required. It should be noted that both students should have agreed to take off their hijab during practical classes in healthcare facilities.

In November 2013, the Somali girl lodged a complaint with the ombudswoman, who in July 2014 issued an opinion stating that the school's conduct was discriminatory.[66] The same girl filed a lawsuit against the school in February 2016, in which she demanded an apology for the allegedly discriminatory conduct and payment of 60,000 Czech crowns (approximately 2,400 euros) in non-pecuniary damages.

In response to the Somali student's case, the Ministry of Education issued a communication in 2014 urging school directors to be very careful when setting dress codes, especially as regards head covering, in light of the right to freely express a religion or belief.[67] The wording of this communication is general and recommends that directors be empowered to grant exemptions to school guidelines, primarily for religious reasons. The content of the communication could thus be summed up in the popular saying 'less often means more'.

In January 2017, the court of the first instance – the district court for Prague 10 – accepted the opinion of the schoolmistress that there was no discrimination against the student. The student did not deliver the legally required documents – a permit to stay in the Czech Republic and a hand-signed enrolment form for the school – on the day she started school. The schoolmistress therefore claimed that the applicant had not become a student at the school at all and that, consequently, refusing her entry was not discriminatory. Therefore, the court did not address the question of whether the school rules showed signs of direct or indirect discrimination.[68]

The applicant appealed to the court of the second instance, the Municipal Court in Prague. On September 19, 2017, the Court of Appeal upheld the decision of the lower court, dismissing the action. It also addressed the potential indirect discrimination against the applicant by the school, based on school rules. The court stated that there was no discrimination because the provisions of the school rules are uniform for all students and fully correspond to the secular nature of public education in the Czech Republic. The court described the Ombudswoman's report as contradictory and erroneous in the context of

66 | Public Defender of Rights. Inquiry report on the ban on wearing headgear in a secondary medical school, file number 173/2013/DIS/EN, of 2 July 2014.

67 | Ministry of Education. Communication, 'The right to freely express one's religion or belief in the context of the rules of theoretical and practical teaching in schools and school facilities', File no. ČŠIG-3601/14-G21, of October 6, 2014; it should be noted that this document has a date and a reference number, although it is not known who signed it.

68 | Judgment of the District Court for Prague 10, file number 17 C 61/2016-172, of 27 January 2017.

other facts. At the same time, however, it also stated that there is no unanimous view on the wearing of religious symbols, especially in the European Union.[69]

The plaintiff then lodged an extraordinary appeal: an appeal for cassation to the Supreme Court of the Czech Republic. In its judgment of November 27, 2019, the Supreme Court reversed the prior rulings. Unlike previous courts, it declared it irrelevant whether the plaintiff had been a student or not. It addressed the possibility of discrimination by the school and concluded that the school had indirectly discriminated against the applicant because the school rules prevented the legitimate expression of religious freedom (i.e. the wearing of the hijab for Muslim women). It thus agreed with the 2014 opinion of the Ombudswoman. It therefore overturned both previous judgments and returned the case to the court of first instance; lower courts are bound by the legal opinion of the Supreme Court.[70]

However, the District Court for Prague 10 did not begin to hear the merits of the case because the applicant withdrew the action on April 24, 2020. She argued that almost seven years had elapsed since the events in question and, in view of the years of litigation ahead of her, no apology or symbolic compensation would provide satisfaction; thus, she considered the Supreme Court's decision satisfactory. As a consequence of this action, the applicant was exposed to further trouble (e.g. threats, disgraceful claims in the media, difficulty finding housing and employment), and she wanted to find peace of mind at work and a normal life without having to deal with a seven-year-old event. Therefore, the court decided to stop the proceedings.[71]

However, the school did not agree with the withdrawal and demanded that a decision be made on the merits of the case. It therefore lodged an appeal because the school had a serious moral interest in the decision (given its impact on the school's reputation and on the personal rights of the schoolmistress). The school announced as follows: '[it] absolutely does not agree with the judgment of the Supreme Court, it considers it to be factually and legally incorrect and argumentatively erroneous'. The Municipal Court upheld the appeal and finally stopped the proceedings on January 27, 2021. An appeal to the Supreme Court can be made as an extraordinary remedy only if the procedure of the court of appeal was contrary to legal norms.[72] The school wants to continue proceedings with the student over the hijab. It therefore appealed to the Supreme Court in April 2021,[73] but the outcome of the proceedings is uncertain.

5.3. Evaluation of the case in terms of the use of religious clothing

The case law of Czech courts on discrimination against Muslim women seeking to wear the hijab in theoretical classes is clearly inconsistent. The only legally binding case law is the decision of the Supreme Court, which is, however, still a unique case that stands

69 | Judgment of the Municipal Court in Prague, file number 12 Co 130/2017 – 228, of 19 September 2017.

70 | Judgment of the Supreme Court of the Czech Republic, file number 25 Cdo 348/2019-311, of 27 November 2019.

71 | Judgment of the District Court for Prague 10, file number 17 C 61/2016-350, of 20 July 2020.

72 | Judgment of the Municipal Court in Prague, file number 12 Co 304/2020 – 375, of 27 January 2021.

73 | *Škola chce pokračovat v soudním sporu se studentkou o hidžáb. Obrátila se na Nejvyšší soud* [*The school wants to continue a lawsuit with a student over the hijab. It turned to the Supreme Court*]. Available at: https://ct24.ceskatelevize.cz/domaci/3298073-skola-chce-pokracovat-v-soudnim-sporu-se-studentkou-o-hidzab-obratila-se-na-nejvyssi (Accessed 26.08.2021).

in clear contradiction with the decisions of lower general courts. The school may have opposed the withdrawal of proceedings in order to obtain a different opinion from the Supreme Court, or to present the case before the Constitutional Court of the Czech Republic, which is competent to rule on intrastate constitutionality, including on human rights. The matter may yet be submitted to the European Court of Human Rights.

In addition, the issue was strongly politicised. First, the case attracted very significant media coverage. Second, all court proceedings were accompanied by petitions and demonstrations, mostly in support of the position taken by the school and schoolmistress. Third, the President of the Czech Republic, Miloš Zeman, inserted himself into the case by awarding the schoolmistress the Medal for Merit of the First Degree and calling her 'a brave woman in the fight against an intolerant ideology' in October 2018.[74] This was inappropriate given the ongoing proceedings before the Supreme Court, which finally ruled against the legality of the conduct of the school and its schoolmistress. Fourth, the schoolmistress also politicised the case by running for the Senate of the Czech Republic (its upper chamber) in 2021. Her campaign emphasised a consistent position on immigrants – that they must adapt to the legal and cultural customs of the host country. However, the schoolmistress finished ninth out of 11 candidates in the first round of the election, winning only 3.64% of the vote.[75] This case also led to controversy and debate in the media, especially on social networks.

5.4. Reflections and suggestions regarding de lege ferenda

The legal situation in the Czech Republic is somewhat unusual. On the one hand, the concrete case law of the Supreme Court is legally binding only in a concrete case, but no binding case law has emerged. On the other hand, this case law can be invoked by any lower ordinary court.

The Ministry of Education responded to this situation even before the Supreme Court rendered its decision via its communication on the right to freedom of expression in schools. However, this communication does not have the nature of a generally binding regulation. Therefore, the Ministry should issue a generally binding regulation based on an evaluation of national legislation and case law and of the case law of judicial institutions of the European Union (European Court of Human Rights and European Court of Justice), preferably through a ministerial decree. Such a decree should regulate the wearing of religious symbols and clothing, particularly headgear, in classes dealing with theory.

Conclusion

The constitutional right to express one's religion via religious clothing is widely guaranteed by the Charter of Fundamental Rights and Freedoms, which is part of the Czech Republic's constitutional order. The Charter requires that restrictions on the exercise of these rights be provided for by law – namely, in cases where they are necessary in a

74 | Pražský hrad, Prezident ČR. *Prezident republiky udělil státní vyznamenání, 28. října 2018*. Available at: https://www.hrad.cz/cs/pro-media/tiskove-zpravy/aktualni-tiskove-zpravy/prezident-republiky-udelil-statni-vyznamenani-8-14366 (Accessed 25.05.2021).
75 | volby.cz. *Volby do Senátu Parlamentu ČR konané dne 2.10. – 3.10.2020*. Available at: https://www.czso.cz/csu/czso/volby-do-senatu-parlamentu-cr-2020 (Accessed 25.05.2021).

democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others.

Regarding personal documents, a key question is the legal requirements that apply to the form of the holder (the photograph). Although the legal regulation of identity documents is very extensive and has its roots in the Austro-Hungarian period, the requirements for photography were legally defined only after the communist regime took power in 1948. Although it was ordered that citizens must be depicted without a head covering, religious veils continued to be tolerated. Since 1999, the use of headgear has been expressly permitted for religious or medical reasons.

The wearing of religious clothing by participants in public assemblies has not been legally limited. A ban on face coverings has existed since 2002. Since 2021, this ban has been very narrow, and has applied only in cases where the Czech police are investigating a possible violation of a peaceful assembly.

Wearing religious clothing in schools was practically banned throughout the communist period (1948–1989) without a legal basis. The only exception applied to clergy involved in religious education, but they usually wore civilian clothing. Even after 1989, there was no legal regulation, and it was left up to school directors to outline details via school regulations. This issue was strongly affected by a Muslim student's lawsuit against a medical secondary school in 2013. Although a final court decision has not yet been reached, the Supreme Court ruled that the general ban on wearing headdress during classes of theoretical instruction constituted indirect discrimination. In April 2021, the school appealed the suspension of court proceedings to the Supreme Court, while the Ministry of Education had announced in 2014 that school regulations should allow for the exceptional wearing of a head covering for religious or health reasons.

It is therefore clear that the wearing of religious clothing is regulated very loosely in the Czech Republic and is restricted to a very few specific areas. Current legal regulations should be clarified, particularly regarding the competence of official bodies concerning photographs used in personal documents and the right of schools to regulate the wearing of headgear in class, especially in theoretical classes.

Biography

Born in 1960 in Boskovice (Czech Republic, Moravia), maternal tongue Czech.

Dominican since 1986, ordained priests in 1991, 1998–2002 provincial of the Czech Dominican Province.

Professor at the Palacký University of Olomouc, teaching canon law and religion law at the Faculty of Theology, and at the Faculty of Philosophy. Research worker at the Faculty of Law at the University of Trnava (Slovak Republic).

Translator of several official documents of the Catholic Church in Czech. Translator of liturgical texts of the Catholic Church into the Czech Republic.

Member of the *Canon Law Society* (Prague) and its *Institute of Religion Law*. Member of *Consociatio Internationalis Studio Iuris Canonici Promovendo* (Roma), *Société International de Droit Canonique et de Législations Religieuses Comparées* (Paris), *International Consortium for Law and Religion Studies (ICLARS)* (Milano), and *the European Society for History of Law* (Brno).

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FREEDOM OF CONSCIENCE AND RELIGION IN PRIVATE SCHOOLS

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ABSTRACT

This study examines freedom of conscience and religion in private schools, which seems to lie outside the mainstream of discussions on the presence of religious symbols or, more broadly, religious acts in public spaces. First, the study explores the parallel historical formation of freedom of conscience/religion and the right to education. Then, the study sketches an outline of the sources of law guaranteeing these freedoms, focusing on the aspects common to European legal culture. Then, the subject and object of this freedom are discussed in the context of private schools. Selected case law is then examined to provide illustration. Finally, the study offers key general and de lege ferenda conclusions.

KEYWORDS

religious freedom
freedom of conscience
private school
curriculum
worldview
pluralism

1. Introduction

Freedom of conscience and religion is a fundamental human right. It can be enjoyed in various ways and at different stages of life. Education, in both public and private schools, is also basic in nature. The presence of religious symbols in public schools was an issue in the well-known case *S. Lautsi vs. Italy* tried before the European Court of Human Rights (ECHR); private schools were left on the margins of this dispute.[2] However, can this issue be limited to public schools? Are private schools *extraterritorial*? Compelling and practical

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2 | At the same time, the Italian government indicated that, when a person refuses to accept crosses in a public school, he or she may send the child to a private school; cf. Lautsi v. Italy, 3 November 2009, no 30814/06, § 37. In the context of ECHR jurisprudence, the doctrine is focused on public schools; cf. Abramowicz, 2015, p.11 and passim; Romanko, 2013, p.207 and passim; Stanisz, 2016, p. 155 and passim; Szubtarski, 2016, p. 185 and passim; Torfs, 2016, p. 11 and passim.

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issues arise concerning the freedom of conscience and religion in private schools in the broad sense. What are the limits of restrictions on this freedom in private schools? This issue can also be approached from the institutional side, by considering what a restriction on the freedom of private education looks like when freedom of conscience and religion is being abridged.

We are concerned with individual rights and their possible gradation: on the one hand, freedom of conscience and religion at the individual and institutional levels; on the other, the right to education. In European legal culture, freedom of conscience and religion and the right to education are both highly valued and protected.[3] One can hypothesise that, although freedom of conscience and religion is not absolute and can be properly limited,[4] any limitation thereof in private schools should be interpreted narrowly because of the gradation of values within the axiology recognised in European legal culture.

This study seeks to contribute to discussions concerning possible restrictions on freedom of conscience and religion in private schools. The analysis is confined to the European legal context (using the Polish legal order as an illustrative example) because of the limited framework of the article.

2. Historical outline of education and freedom of conscience and religion in Europe

The issue of freedom of conscience and religion in private schools is not new. Freedom of conscience and religion and the right to education are issues that have been shaped for centuries, and with very similar subjective and objective scopes. Thus, discussing them from a historical perspective is important.

Education is inseparable from the history of humans, who, as rational beings, pass knowledge on to others in order to survive and develop. The first organised form of education appeared in antiquity; interestingly, it was usually private (e.g. Plato's Academy).[5] The idea of religious freedom, legally sanctioned via the Edict of Milan (313 CE), developed thereafter. After the fall of the Roman Empire, Christians created an organised system of education in Europe, which became unified (the requirement to use Latin and teach specific subjects facilitated scientific exchange and progress).

The first universities appeared in the Middle Ages, within the framework of functioning denominational states. They were the most highly organised educational element of a system subordinate to the Catholic Church. Over the years, lower-level schools were founded that were accessible to the wider public (e.g. parish schools). Education developed

3 | It must be remembered that their basis is the dignity which is the source of human rights, widely recognized in international and constitutional law, particularly in Europe; cf. Introduction to the Universal Declaration of Human Rights adopted in New York on December 10, 1948; introduction to the International Covenant on Civil and Political Rights opened for signature in New York on December 19, 1966; Introduction to the International Covenant on Economic, Social and Cultural Rights opened for signature in New York on December 19, 1966; preamble to the Convention on the Rights of the Child, adopted in New York on November 20, 1989.

4 | Schanda, 2015, p. 207.

5 | Cf. Orczyk, 2008.

not only in Europe but also on other continents, such as Asia (e.g. China). However, what is characteristic of Europe is the organised nature of education since the Middle Ages and the significant contribution made by religious communities to its development and functioning.[6] The freedom of conscience and religion of believers attending schools run by their religious community was generally unlimited. Many of the schools founded by religious associations in centuries past were open to persons of other faiths (e.g. *Gymnasium Bonarum Artium* founded in Raków, Poland, by the Arians in 1602). The notion of a universal education system developed during the Enlightenment. The school system created by the Church was being abolished at that time; for example, many Catholic orders that had provided education were being dissolved. The secular school was part of the new model of a secular state, as was limited freedom of conscience and religion, at least institutionally. The desire to reduce, or even eliminate, private education appeared at a later stage in history. During the communist period, the functioning of private schools in Central and Eastern Europe was contrary to the political assumptions of the time. Communist states were secular and were hostile to religion.[7]

After communist regimes fell, a general process of legal normalisation took place in the countries of Central and Eastern Europe (as they adopted the standards of states with the rule of law), during which freedom of conscience and religion was restored and guaranteed in a broad sense, including the right to establish and run schools. The centuries-old achievements of religious communities in shaping Europe's education system were newly appreciated. The Catholic Church concluded many concordats guaranteeing the right to run schools (including universities).[8] Interestingly, the Holy See

6 | As judge Bonello pointed out in a dissenting opinion to the judgment of the ECHR of March 18, 2011, no. 30814/06. in the famous case of S. Lautsi, the debate on the cross in public schools should begin by seeing its presence in Italian schools in its righteous perspective, since the Church provided the only education in Italy for many centuries. According to this judge's opinion, many, if not most, schools, colleges, universities, and other educational institutes in that country were founded, financed, or run by the Church or its members or branches; dissenting opinion of the judge G. Bonello to the judgment of the European Court of Human Rights Lautsi [Grand Chamber] v. Italy of 18 March 2011, no. 30814/06.

7 | Interestingly, there were a few exceptions, such as the Catholic University of Lublin in Poland; cf. Přibyl, Kříž, 2015, p. 139.

8 | For example, in accordance with Art. 14 sec. 1-2 of the concordat with Poland of July 28, 1993:

> 1. The Catholic Church has the right to establish and run educational and upbringing institutions, including kindergartens and schools of all kinds, in accordance with the provisions of canon law and in accordance with the principles specified by relevant laws. 2. These schools are governed by Polish law in carrying out the minimum curriculum for compulsory subjects and in issuing official forms. In carrying out the curriculum of other subjects, these schools follow the Church regulations. The public nature of these schools and institutions is determined by Polish law.

However, according to Art. 15 sec. 1-2 of the concordat:

> 1. The Republic of Poland guarantees the Catholic Church the right to freely establish and run higher education institutions, including universities, separate faculties and higher seminaries, as well as research institutes. 2. The legal status of the universities referred to in paragraph 1, as well as the procedure and scope of recognition by the State of ecclesiastical degrees and titles, and the legal status of Catholic theology faculties at state universities are regulated by agreements between the Government of the Republic of Poland and the Polish Episcopal Conference authorized by the Holy See.

Cf. also art. 10 of the concordat with Slovenia of May 24, 2004. AAS 98 (2006) p. 142 and passim. As noted by Warchałowski, contemporary concordats recognize the Church's right to establish and run schools at various levels (from kindergarten to university); cf. Warchałowski, 1998, p. 216.

even concluded a partial concordat with China on education and the right to run schools autonomously.[9]

Thus, the provenance of education is clearly private, and private education should be given space in a pluralistic education system, with due respect for the autonomy and independence of religious communities running such institutions, and for the freedom of conscience and religion of individuals. Religious associations have had a significant influence on the development of the education system. Freedom of conscience and religion and the right to education have very similar histories.[10] The constitutions of modern European countries often refer in their preambles to their Christian heritage and tradition, which is important, *inter alia*, for the historical and functional interpretation of their regulations.[11]

3. Outline of the sources of law protecting freedom of conscience and religion in the context of private schools

Freedom of conscience and religion is recognised in many normative acts.[12] The right to education is guaranteed at similar levels in the hierarchy of sources. In states with the rule of law, however, the law is preceded by an axiology recognised by society,[13] consisting of values that are related and have an observable gradation. The value of freedom of conscience and religion ranks high in the hierarchy of values. For believers, eternal life is often more important than mortal life.[14]

9 | Pursuant to Art. 2 (A) of the concordat with China of December 2, 2011:

> The Parties agree that both authorities, responsible for their own Higher Education System and for the Higher Education Institutions established or approved by the same authorities or otherwise considered as belonging to their systems, shall be independent and autonomous each within their field and adhering to the said principles shall closely cooperate among them. (AAS 105 (2013) 93-104)

This confirms the view emerging in the literature about the universal nature of the concordat, which can be considered when quantitative factors are of lesser importance (e.g. the number of followers in a given country); cf. Medina, 2020, p. 33.

10 | For example, according to judge Bonello, education and Christianity have almost become interchangeable concepts in Italy, and it is the absence of a crucifix in school that should be surprising, not its presence; cf. Dissenting opinion of the judge G. Bonello to the judgment of the European Court of Human Rights Lautsi [Grand Chamber] v. Italy of 18 March 2011, no. 30814/06.

11 | Cf. preamble to the Slovak constitution of September 1, 1992, preamble to the Polish constitution of April 2, 1997.

12 | Cf. Moravčíková, 2015, p. 37 and passim.

13 | As the Polish Constitutional Tribunal rightly noted in its judgment of 16 November 2011

> [The] protection of fundamental rights has a high rank in the law of the European Union. [...] The consequence of the axiology of legal systems common to all Member States is that the EU law does not arise in a European space, that is abstract and free from the influence of the Member States and their communities. It is not created arbitrarily by the European institutions but is the result of joint actions by the Member States. (Judgment of the Polish Constitutional Tribunal of November 16, 2011, file ref. no. SK 45/09, Journal of Laws No. of 2011, No. 254, item 1530, OTK ZU 9A/2011/97)

14 | As pointed out by the ECHR in the judgment of May 25, 1993, Kokkinakis v. Greece, no. 14307/88, according to which freedom of religion is, in its religious dimension, one of the most important elements forming the identity of believers and their concept of life. According to the ECHR, pluralism, an inherent feature of a democratic society that has been fought for over centuries, depends on it.

As confirmed by the ECHR, freedom of thought, conscience, and religion is also a value for atheists, agnostics, sceptics, and people indifferent to faith.[15] Education is also highly valued in Europe. It is quite typical for parents to strive to provide the best possible education for their children, while respecting the freedom of conscience and religion of other parents and their children. The constitution-maker should take this into account when creating a framework for public education, but also enable the proper functioning of private schools, giving parents and other adults the right to determine their educational path.[16]

It should therefore not be surprising that constitutional law includes universal guarantees of freedom of conscience and religion. There is also a guarantee of the right to education, which includes the right to run private schools and to study at such institutions.[17] The right to education is universal in Europe. However, certain differences may appear when this law is compared with the freedom of conscience and religion and the specific model of the state–church relationship adopted in a country. For example,

15 | Kokkinakis v. Greece, May 25, 1993, no. 14307/88.

16 | Cf. Misztal, 2000.

17 | Interestingly, such guarantees can be found in various systems of church–state relations. For example, in Poland, pursuant to Art. 53 of the Constitution of April 2, 1997, religious freedom is protected on an individual basis; cf. also art. 6.1 of the Constitution of Holand of March 28, 1814; art. 19 of the Constitution of Belgium of February 7, 1831; art. 99 of the Constitution of Latvia of February 15, 1922; art. 44.2 1° of the Constitution of Ireland of July 1, 1937; art. 19 of the Constitution of Italy of December 27, 1947; art. 4 (1) of the Constitution of Germany of May 23, 1949; art. 18 of the Constitution of Cyprus of August 16, 1960; art. 40.1 of the Constitution of Malta of September 21, 1964; art. 41.1 of the Constitution of Portugal of April 2, 1976; art. 16.1 of the Constitution of Spain of December 27, 1978; art. 37 (1) of the Constitution of Bulgaria of July 12, 1991; art. 29 (1) of the Constitution of Romania of November 21, 1991; art. 41 of the Constitution of Slovenia of December 23, 1991; § 40 of the Constitution of Estonia of June 28, 1992; art. 24.1 of the Constitution of Slovakia of September 1, 1992; art. 26 of the Constitution of Lithuania of October 25, 1992; art. VII of the Constitution of Hungary of April 25, 2011. Moreover, in a religious state such as Greece, religious freedom is protected in accordance with Art. 13 of the Constitution of June 9, 1975. At the same time, with regard to establishing and running private schools, it is worth pointing out that, pursuant to Art. 70 paragraph. 3 of the Polish Constitution of April 2, 1997:

> Parents have the freedom to choose schools other than public ones for their children. Citizens and institutions have the right to establish primary, secondary and tertiary schools as well as educational establishments. The conditions for the establishment and operation of non-public schools and the participation of public authorities in their financing, as well as the principles of pedagogical supervision over schools and educational establishments, are set out in the Act.

A state in which cooperation with religious communities is undertaken for the common good can be classified as secular; cf. also art. 24 § 1 of the Constitution of Belgium of February 7, 1831; art. 42.3 1° of the Constitution of Ireland July 1, 1937; art. 7 (5) of the Constitution of Germany of May 23, 1949; art. 20.1 of the Constitution of Cyprus of August 16, 1960; art. 27.3 of the Constitution of Spain of December 27, 1978; art. 26 of the Constitution of Lithuania of October 25, 1992. For comparison, in accordance with Art. 16 sec. 1 of the Greek Constitution:

> Parents are free to choose schools other than public ones for their children. Citizens and institutions have the right to establish primary, secondary and tertiary schools as well as educational establishments. The conditions for the establishment and operation of non-public schools and the participation of public authorities in their financing, as well as the principles of pedagogical supervision over schools and educational establishments, are set out in the Act.

The above list shows that religious freedom and the right to education in Europe are so universal that they are guaranteed in selected secular and religious states. The dissimilarity between states manifests in Europe in terms of the pluralism of relations between states and churches.

placing religious symbols on the facade of a private school building is not prohibited in Croatia, Poland, or Hungary, unlike in France (the rule for school interiors is different).[18]

Freedom of conscience and religion is also widely protected by international law, both universal and European. International law includes the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Beliefs; and the Convention on the Rights of the Child. Among European laws, the European Convention for the Protection of Human Rights and Fundamental Freedoms has gained particular significance for European legal culture, as the ECHR relies on it to resolve specific cases and ensure the effectiveness of its judgments. Moreover, the Convention is an element of universal binding law in European countries.[19] The right to education is also protected under international law, including the abovementioned acts. Thus, there is a clear relationship between these rights. The ECHR referred to the relation between Article 9 of the Convention guaranteeing freedom of conscience and religion and Article 2 of Protocol No. 1 to the Convention guaranteeing the right to education, implying that a systemic interpretation of both standards is necessary.[20] The starting point is Article 9 of the Convention. In the jurisprudence of the Court, guaranteeing educational pluralism is important; pluralism is guaranteed in terms of beliefs. This includes a pluralism of models of church–state relations in individual states.

Regarding international agreements, freedom of conscience and religion is expressly guaranteed in contemporary concordats concluded by the Holy See with many countries with different models of church–state relations. The same international agreements often explicitly guarantee the right to establish schools, including universities.[21]

Individual states also determine issues related to religious freedom from sub-constitutional legal sources. Poland initiated the systemic transformation of post-communist countries and therefore seems to be a good example of the fight not only for religious freedom but also for educational pluralism. In Poland, churches and other religious

18 | Cf. Tawil, 2015, p. 66; Valutytė, Gailiūtė, 2013, p. 58.

19 | As the Polish Constitutional Tribunal rightly pointed out in its judgment of December 2, 2009 (file ref. no. U 10/07; Journal of Laws 2009 No. 210, item 1629):

> The judgements of the European Tribunal establish common normative content of fundamental rights and freedoms, the legal regulations of which (including constitutional ones) sometimes differ significantly in individual states. This also applies to the freedom of conscience and religion, one of the fundamental freedoms enshrined in the Convention. The legal regulation of the freedom of conscience and religion in individual European countries differs, but the European Court established the normative content of the principle of freedom of conscience and religion common to European democratic states, interpreting the provisions of the Convention, in particular its Art. 9, defining the freedom of conscience and religion.

20 | Cf. Lautsi, § 47; cf. also Folgerø, § 84.

21 | Cf. Art. 14-15 of the concordat with Poland of July 28, 1993. It is worth mentioning that, under Community law (which no longer has a pan-European scope), the European Union respects the solutions of individual Member States in the field of relations between state and church. In the field of education, the free movement of people and capital is an important factor. Therefore, the general principles of the fundamental rights guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms and rights resulting from the constitutional traditions common to the Member States acquire particular importance for the assessment of the relationship between freedom of conscience and religion and the right to education; Art. 6 sec. 3 of the Treaty on European Union.

associations have the general right to establish and run schools in accordance with the Act of May 17, 1989, on the guarantees of freedom of conscience and religion.[22] This act is of a general nature and protects religious freedom.[23] Acts that individually relate to a dozen or so religious associations are also characteristic of the Polish legal system. These laws guarantee religious freedom as well as the right to establish schools and universities, regardless of whether a given religious community is Christian.[24] Thus, the rights of religious associations in conducting educational activities are generally recognised.

It can thus be concluded that freedom of conscience and religion on individual and institutional levels is broadly guaranteed by normative acts in European legal culture, starting from the constitution and proceeding through multilateral and bilateral international agreements and sub-constitutional acts. This freedom may be limited by strictly defined conditions. The right to education is protected by similar normative acts. There is a parallelism here similar to that observed in the historical discussion in the previous chapter, which proves that freedom of conscience and religion and of the right to education enjoy similar levels of importance in European legal systems. Moreover, this freedom is included as part of basic human rights, which is important for its interpretation in relation to the right to education. Therefore, the relationship between freedom of conscience and religion and the right to education appears simultaneously at a different level of the hierarchy of sources of universally binding law. Thus, they must be construed using systemic and functional interpretations.

4. Subjects of freedom of conscience and religion in the context of private school activities

The subjective aspect of freedom of conscience and religion in the context of private schools can be considered at various levels by considering the sources of the law guaranteeing this freedom. First, this freedom is granted to individuals, since humans have a conscience and are capable of religious acts. This freedom can thus be compared with the rights of an entity running a private school and of its students. The believer can exercise his or her freedom of conscience and religion at a school (individual aspects). Moreover, people have the right to organise themselves into groups and to express their faith collectively and to create religious communities. Thus, this freedom is granted essentially to

22 | Cf. Art. 21, 22. Consolidated text: Journal of Laws of 2017, item 1153, as amended.
23 | Cf. Art. 1.
24 | For example, cf. Art. 33 of the Act of April 21, 1936 on the State's relationship to the Muslim Religious Union in the Republic of Poland (Journal of Laws No. 30, item 240); Art. 12, 20, 23; Act of May 17, 1989 on the State's Relationship to the Catholic Church in the Republic of Poland (consolidated text: Journal of Laws of 2019, item 1347); Art. 9, 16-19 of the Act of 4 July 1991 on the State's Relationship to the Polish Autocephalous Orthodox Church (consolidated text: Journal of Laws of 2014, item 1726); Art. 11, 16-19 of the Act of May 13, 1994 on the relationship of the State to the Evangelical-Augsburg Church in the Republic of Poland (uniform text: Journal of Laws of 2015, item 43); Art. 9, 14-16 of the Act of June 30, 1995 on the relationship of the State to the Evangelical-Methodist Church in the Republic of Poland (uniform text: Journal of Laws of 2014, item 1712); Art. 13 of the Act of February 20, 1997 on the State's Relationship to Jewish Religious Communities in the Republic of Poland (consolidated text: Journal of Laws of 2014, item 1798).

individuals but also to institutions. Freedom is then concerned with, *inter alia*, a religious community's right to establish a private school and run it. Moreover, this freedom is enjoyed by non-believers and legal persons, who also have the right to establish private schools.

It can thus be concluded that religious freedom, which is vested in many subjective entities, may on both individual and institutional levels refer to the activities of private schools.

5. Objects of freedom of conscience and religion in the context of private school activities

The objective aspect of freedom of conscience and religion in the context of private schools seems to be more complex than the subjective aspect. This freedom may have different configurations. There may be *secular* and *denominational* private schools depending on the entity running them and on the profile of the establishment (e.g. foreign-language schools, high schools, higher seminaries). In the first case, exercising freedom of conscience and religion may consist of manifesting religious beliefs – for example, by praying before and after classes, wearing religious symbols or religious clothing,[25] and expressing a position consistent with your beliefs. A *secular* private school could take the position that such behaviour violates its internal norms and try to implement the worldview adopted in its internal acts. Moreover, it could be argued, that, since the choice of school is voluntary and other schools are available, any person in violation of the rules should change schools or adapt to the school's norms.

At this point, it is necessary to refer to the jurisprudence of the ECHR on the use of religious symbols in the workplace, which initially accepted such an argument by analogy (regarding employee relations).[26] However, current jurisprudence differs.[27] Other students or teachers could also invoke their individual freedom of conscience and religion. The matter is complicated by the possible conscientious objections of the pupils, issues related to discrimination, and the relevant model of church–state relations. Specific matters should be approached individually and examined in terms of whether the restriction of religious freedom was justified – for example, in light of another protected value.

25 | The growing ECHR case law on the wearing of religious clothes in public spaces is important in this regard; cf. Dahlab v. Switzerland, 15 February 2001, no 42393/98; Şahin v. Turkey [Grand Chamber], 10 November 2005, no 44774/98; Phull v. France [decision], 11 January 2005, no 35753/03; Köse and the Others v. Turkey [decision] 24 January 2006, no 26625/02; Kurtulmuş v. Turkey [decision] 24 January 2006, no 65500/01; El Morsli v. France [decision], 4 March 2008, no15585/06; Dogru v. France and Kervanci v. France, 4 December 2008 – no 27058/05 and no 31645/04; Ahmet Arslan and Others v. Turkey, 23 February 2010, no 41135/98; Belcacemi and Oussar v. Belgium, 11 July 2017, no 37798/13; Dakir v. Belgium, 11 July 2017, no 4619/12; Hamidovic v. Bosnia and Herzegovina, 5 December 2017, no 57792/15; Lachiri v. Belgium, 18 September 2018, no 3413/09. Regarding public schools, one important consideration in the ECHR decision is the functioning model of the state–church relationship. However, the question of private schools remains open.

26 | Eweida and Others v. the United Kingdom, January 15, no. 48420/10, § 59.

27 | Cf. ibid, § 83.

In the case of *denominational* private schools, additional issues of an institutional nature may arise, such as whether the curriculum is imposed by the state, how the school is financed, how learning outcomes are determined in the general education system, how religious symbols are handled, or whether admission depends on certain criteria (e.g. religious ones for a seminary). Therefore, a number of questions arise, such as how far the state can interfere in the curriculum by pointing to certain minimum criteria.

The state has the right to interfere in the education system in the context of freedom of conscience and religion, but it should do so only exceptionally as part of the framework limiting that freedom and while taking the autonomy of *denominational* private schools properly into account. State funding should not imply a refusal to recognise the autonomy of these schools.

The two groups of private schools have common features. For example, their funding is based to varying degrees on fees paid by pupils (i.e. parents). Therefore, it is important to consider the opinions of the parents and strive for compromise. Another common feature is that attendance is voluntary. This voluntariness would become illusory if no other schools were available.[28] Moreover, private schools generally enjoy more freedom in designing their curricula than public schools do.

Therefore, the subject of freedom of conscience and religion in the context of private schools is complex. The exercise of this freedom in full or even in part may be confronted by other rights, including the freedom of conscience and belief/religion of others. Therefore, one cannot formulate a single 'pan-European' answer in the form of a general prohibition against the expression of religious beliefs (e.g. wearing a traditional religious symbol) or the granting of unlimited religious freedom (e.g. engaging in frequent public prayers instead of attending class) at such schools. In European legal culture, issues related to religious freedom must often be settled by the judiciary on a case-by-case basis. The key to resolving such disputes is to, first, try to assess the gradation of individual values in a specific case (the principle of weighing the protected values) and then, following this order, to examine whether any potential restriction of freedom of conscience and religion would be proportionate (principle of proportionality of restrictions).

6. Selected case law

The judgments of the ECHR have the greatest range of impact given the number of states that have ratified the convention. The ECHR has issued many judgments within the scope of Article 9 of the Convention[29] guaranteeing freedom of conscience and

28 | Pursuant to Art. 2 letter c of the Convention to Combat Discrimination in the Field of Education, drawn up in Paris on December 15, 1960, the setting up or operation of private teaching establishments is not deemed to be discriminatory as long as they are not intended to exclude any group. Their aim should be to supplement the educational opportunities provided by the state.

29 | Cf. Kokkinakis v. Greece, 25 May 1993, no 14307/88, § 31; Otto-Preminger-Institut v. Austria, 20 September 1994, no 13470/87, §47; Şahin v. Turkey [Grand Chamber], 10 November 2005, no 44774/98, § 104; cf. also Valutytė, Gailiūtė, 2013.

religion as well as Article 2 of Protocol No. 1 to the Convention, which guarantees the right to education while respecting the rights of parents to raise their children as they see fit. Several judgments also refer to the relation between these articles. Article 2 of Protocol No. 1 does not distinguish between public and private education, although the educational pluralism necessary to protect democracy is safeguarded primarily by state education.[30] Thus, the ECHR has ruled that, to an appropriate extent, this objective should also be pursued in private schools. Although the protocol constitutes a *lex specialis* in relation to Art. 9, these provisions should be interpreted jointly, and one cannot rely solely on a simple 'conflict of laws' rule, as in the field of hermeneutics.[31] The interpretative burden concerning the relation of Article 9 of the Convention and Article 2 of Protocol No. 1 focuses on public schools run by a public authority. This is evidenced by the indication that ensuring pluralism requires the state to define curricula that convey information or knowledge in an objective, critical, and pluralistic manner.[32] However, such norms cannot be directly applied to private schools, such as seminaries. Moreover, the possibility that indoctrination will be alleged, for example, due to the placement of a cross in the classroom seems lower in a private school than in a public school, as private school is voluntary.

As has been mentioned, the decisions of the ECHR and general jurisprudence are often referred to by constitutional tribunals.[33] It can be concluded that such judgments are an example of the complex nature of issues concerning the relationship between freedom of conscience and religion and the right to education in private schools.[34] This issue requires multifaceted interpretations, an appropriate and individual hierarchy of recognised values and the rights protecting them, assessments of their mutual relationship, and a determination of the possibility of restricting freedom of conscience and religion. There are no definite answers for every case. However, the starting point should be a

30 | Lautsi, § 47.

31 | Cf. Lautsi [Grand Chamber] v. Italy, 18 March 2011, no 30814/06, § 60.

32 | Cf. ibid, § 62.

33 | Cf. Poniatowski, 2018. A judgment of the Polish Constitutional Tribunal can be mentioned as an example of the pursuit of pluralism and the resolution of the relationship between freedom of conscience and religion and the right to education. It dealt, *inter alia*, with the issue of financing Catholic private schools from the state budget. Three acts were at issue: 1) an act on financing the Pontifical Faculty of Theology in Warsaw from the state budget (Journal of Laws of 2006, No. 94, item 648); 2) an act on financing the Pontifical Faculty of Theology in Wrocław from the state budget (Journal of Laws of 2006, No. 94, item 649); 3) an act on financing the Higher Jesuit School of Philosophy and Education ('Ignatianum') in Krakow from the state budget (Journal of Laws of 2006, No. 94, item 650). According to the applicants, the authorities supported a given religious doctrine and the education of clergymen, as in a denominational state. However, in the opinion of the Tribunal, such funding is not contrary to the constitution and fulfills the constitutional right to education, which is of universal nature; cf. the judgment of the Polish Constitutional Tribunal of December 14, 2009 (file reference number K 55/07, published in Journal of Laws of 2009, No. 218, item 1702). As indicated by the Constitutional Tribunal, this is precisely how the state fulfils its obligation to ensure educational pluralism:

> From the perspective of a democratic, pluralist and open society, the existence – next to other universities – of religious universities is a value because it significantly extends the educational offer addressed to citizens, enriches public debate and is an important element of worldview pluralism.

Cf. ibid.

34 | This issue is universal; cf. also Chetty, Govindjee, 2014 (the article concerns the legal order of South Africa); Donlevy, 2008.

consideration of freedom of conscience and religion in light of the gradation of values. The jurisprudence of the ECHR emphasises the need to maintain a proper balance between individual rights.

7. Conclusions

National legal orders may differ, implicitly or explicitly, in how they approach freedom of conscience and religion in private schools. Nations should respect their constitutional law, based largely on European legal culture but also on international law, including the jurisprudence of the ECHR, which has competent jurisdiction in this regard and analyses specific cases in a way that often seeks a European consensus; in its absence, the court analyses the relationship between the law of a given state and the Convention.

Freedom of conscience and religion in private schools can be approached from the perspective of both the individual (the student's rights) and the institution (the rights of the entity running the school). There is no simple answer as to which is paramount in every case. Therefore, dispute resolution should be approached on an individual basis, and the values protected by law should be weighed in the context of the given dispute. The starting point is that freedom of conscience and religion should be understood broadly and applied to the entire operation of private schools (including the pupils and also those who establish and run the schools). Any restriction must be justified based on appropriate legal grounds resulting from constitutional and international standards.

In view of the gradation of values within the axiology recognised in European legal culture, the possibility of limiting the freedom of conscience and religion in private schools should be interpreted narrowly. The catalogue of possible restrictions on freedom of conscience and religion should follow the typical premises of such restrictions indicated in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is often referred to in constitutional law. Therefore, the task of the state is to regulate the law in such a way as to maintain the correct balance between freedom of conscience and religion and the pursuit of educational pluralism.

Europe has few laws or judgments relating to the use of religious symbols or religious instruction in public schools, as shown in the case of S. Lautsi before the ECHR. There are even fewer laws relevant to private schools. On a *de lege ferenda* basis, then, it might be advisable to include a specific norm in relevant statutes or even acts of a higher rank that would explicitly determine a generally formulated freedom of conscience and religion by guaranteeing it to everyone and every type of school, with limitations thereof possible only in cases specified in the act and requiring compliance with constitutional and international standards.

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ONLINE COMMENTS AND DEFAMATION: THE EUROPEAN PERSPECTIVE

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ABSTRACT

A defamatory statement is a false or untrue statement that harms the reputation of a living person. In the digital environment, defamatory content can be easily shared and may remain available online for a very long period. At first, anonymous Internet communication was predominantly seen as a value in itself – a mechanism that advances the public debate, protects political dissension, and furthers due process. However, the rapid growth of social networks and digital platforms has transformed the content and tone of online interactions. This paper analyzes online comments that may threaten the reputation of a person from a freedom of speech and within the auspices of European law. These comments typically appear as anonymous statements, signed only with a 'nickname' not allowing for identification of a poster. The European Union has adopted several pieces of legislation that set the legal status of defamatory online comments. The Directive on Electronic Commerce is of utmost importance given that it regulates the dissemination of online content. However, the European approach to defamation cannot be understood unless the European Union's system is combined with that of the European Convention on Human Rights. The European Court of Human Rights' approach towards defamatory online comments is best demonstrated in its decision on Delfi v. Estonia and MTE v. Hungary.

KEYWORDS

freedom of expression
speech
Internet
comments
hosting service operators
defamation

1. Introduction

The Internet supports the global ecosystem of social interaction. Since the end of the 20th century, modern lifestyles have revolved around networks, news feeds, online comments, reviews, and rankings. Initially, the online world was idealized as an unrestricted

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civic forum in which divergent views and conversations could coexist. Anonymous Internet communication was predominantly seen as a value in itself—a mechanism that advances the public debate, protects political dissension, and furthers due process. However, the rapid growth of social networks and digital platforms has transformed the content and tone of online interactions. People started increasingly using the protection afforded by online anonymity to attack others or engage in other kinds of misbehavior. Anonymity can encourage irresponsible writing—offensive or even violent language, as well as inaccurate, deceptive, or false information. Readers are interested in knowing the identity of writers to better assess their credibility.[2] This paper analyzes online comments that may threaten the reputation of a person from a freedom of speech perspective, and within the auspices of European law. These comments typically appear as anonymous statements, signed only with a 'nickname' not allowing for identification of a poster. Comments may be moderated or unmoderated. In the case of unmoderated comments, the platform provider is not aware that the comment has been posted, unless somebody informs it. In contrast, moderation of comments may be exercised either *ex ante* or *ex post*. Prior moderation consists of the approval of the comment before allowing it to be visible to other users, while *ex post* moderation consists of the removal of unsuitable comments that were already posted by the users.

The paper commences with a brief analysis of the European approach to freedom of expression protection (Section 2) and a presentation of the main principles of defamation law (Section 3). The European Union has adopted several pieces of legislation that set the legal status of defamatory online comments. The Directive on Electronic Commerce is of utmost importance given that it regulates the dissemination of online content. The Court of Justice of the European Union provided some useful interpretative guidance with respect to the safe harbor regime and the prohibition of general monitoring obligations on the side of the hosting providers (Section 4). However, the European approach to defamation cannot be understood unless the European Union's system is combined with that of the European Convention on Human Rights. The European Court of Human Rights's approach towards defamatory online comments is best demonstrated in *Delfi v. Estonia* and *MTE v. Hungary* (Section 5).

2. Freedom of expression in the European legal framework

The United States is commonly perceived as the 'cradle' of freedom of speech protection. In that jurisdiction, freedom of speech can be limited only when it represents a clear and immediate danger. With respect to defamation specifically, the US Supreme Court pointed out in the leading case *New York Times v. Sullivan* that statements made with actual malice or reckless disregard are beyond the protection of freedom of speech and can therefore trigger liability for the author of such statements.[3] Otherwise, where these criteria are not met, no limit can be imposed on the public debate. The First Amendment to the US Constitution, as well as the US court decisions, has established a broad scope of protection of freedom of speech, even when other fundamental rights are at stake. This broad protection of freedom of speech in the non-digital context has been transposed into the digital environment as well.

2 | Veliz, 2019, p. 646.
3 | US Supreme Court, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Although legal provisions declare freedom of expression as a human right (fundamental right)[4] in both the United States and Europe, there are some important differences between the two jurisdictions. In Europe, the exercise of freedom of expression must be balanced with protecting other fundamental rights (for example, national security). Owing to the complexity of the constitutional landscape, there is no European counterpart to the US First Amendment. In Europe, the protection of freedom of expression stems from a variety of sources, particularly from the European Convention on Human Rights (ECHR)[5], the EU Charter of Fundamental Rights[6], several national constitutions, and the case law of the European courts. Under Art. 10 of the ECHR, the freedom of expression includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as prescribed by law and are necessary for a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, to prevent the disclosure of information received in confidence, or to maintain the authority and impartiality of the judiciary. From the very structure of this provision, it emerges that Art. 10 of the ECHR, contrary to the US First Amendment, does not regard freedom of expression as an absolute. Therefore, the contracting parties may legitimately impose restrictions on freedom of expression, provided that the criteria set forth under Art. 10 of the ECHR are respected.

Before the coming into force of the Treaty of Lisbon in 2009, there was no explicit acknowledgment of freedom of expression as a fundamental right in EU law. It is through the incorporation of the EU Charter of Fundamental Rights into the EU primary law that freedom of expression has started to be regarded as a fundamental right in the European Union.[7] Under Art. 11 of the Charter, everyone has the right to freedom of expression and information. To comprehend the European approach to freedom of expression, it is of the utmost importance to analyze the interplay between the case law of the Court of Justice of the European Union (CJEU) and that of the European Court of Human Rights (ECtHR). As the European Union is primarily an economic community, the European Court of Human Rights, which is part of the Council of Europe structure, still plays a fundamental role in determining the scope of protection of freedom of expression in Europe.

3. Main principles of defamation law

A defamatory statement is a false or untrue statement that harms a living person's reputation.[8] The purpose of defamation laws is to protect the reputations of individuals

4 | Rights derived from international law are referred to as human rights, while rights derived from domestic constitutional law, as well as from European law, are referred to as fundamental rights.
5 | The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed in 1950 within the auspices of the Council of Europe. It entered into force in 1953.
6 | The Charter of Fundamental Rights of the European Union has become the primary source of fundamental rights in the EU under the Lisbon Treaty.
7 | Pollicino and Bassini, 2014, p. 521.
8 | In US law, the terms 'libel' and 'slander' are also employed. Libel is a written defamation; slander is a spoken defamation.

from injury. In the digital environment, defamatory content can be easily shared and may remain available online for a very long period. Remedies for defamation, including an award of damages, must be proportionate to the injury to reputation suffered. In *Tolstoy Miloslavsky v. the United Kingdom*, the ECtHR found that a disproportionately large award may violate the applicant's right to freedom of expression.[9] The availability of other civil remedies as alternatives to damages, such as apologies or correction orders, could provide a proportionate response to defamation. Any remedies that are already provided, such as voluntary or self-regulatory basis, should be taken into account when assessing court-awarded damages. To the extent that remedies already provided have mitigated the harm done, this should result in a decrease in any pecuniary damages. However, in the case of online comments, these instruments do not always represent an appropriate alternative.

Public officials are required to tolerate more criticism, in part because of public interest in open debate about public figures and institutions. In *Lingens v. Austria*, the very first defamation case heard before the ECtHR, the court emphasized that

> "the limits of acceptable criticism are (...) wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance".[10]

This principle is not limited to the criticism of politicians acting in their public capacity, but also covers matters of public interest relating to private or business interests. However, an important distinction must be made between what is of interest to the public and what interests the public. Insofar as the latter only concern the trivial and indelicate interests of the public, they are of less democratic value for the public as a whole.[11]

Under the ECtHR case law, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible to proof.[12] A requirement to prove the truth of a value judgment infringes on the right to freedom of opinion. Defamation laws typically include several defenses that safeguard the right to freedom of expressions, such as the truth or accuracy of a statement, the public interest in the topic treated, or the good faith in publishing a statement. Given that placing the burden of proof with the defendant can have a significant negative effect on the right to freedom of expression, the ECtHR held that, particularly where a journalist is reporting from reliable sources in accordance with professional standards, it would be unfair to require them to prove the truth of their statements. This is particularly the case in which the publication relates to a matter of public concern.[13]

The conduct of defamation proceedings can raise serious questions under Art. 6 of the ECHR, which guarantees fairness in both civil and criminal proceedings. This means that defamation defendants should be given adequate time to prepare their defense, that the proceedings should be conducted before an impartial tribunal established by law, that proceedings should be open to the public and that, in criminal cases, a defendant must be

9 | ECtHR, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, para. 49.
10 | ECtHR, *Lingens v. Austria*, 8 July 1986, para. 42.
11 | McGonagle, 2019, p. 14.
12 | See for example: ECtHR, *Lingens v. Austria,* para. 46.
13 | ECtHR, *Colombani v. France*, 25 June 2002, para. 65.

presumed innocent until proven guilty. Although the ECtHR has not ruled out criminal defamation, it recognizes that there may be serious problems. The Court has frequently reiterated the following statement:

> "The dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."[14]

4. Court of Justice of the European Union and defamatory online comments

The European Union has adopted several pieces of legislation that set the legal status of defamatory online comments. These are, *inter alia*, the Directive on Electronic Commerce[15], the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[16], and the EU Charter of Fundamental Rights[17]. Given the limited scope of this paper, we will focus on the Directive on Electronic Commerce, which sets the rules related to the dissemination of online content, including safe harbors for mere conduits, caching, and hosting.

Under the Directive, the intermediaries that serve as hosting providers would ordinarily benefit from an exemption for liability for illegal content, as long as they maintain a neutral or passive approach towards that content. A service provider that hosts third-party content may avail of this exemption on the condition that it does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, and that upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.[18] However, the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at the national level.[19] Although the EU rules were modeled on the US Digital Millennium Copyright Act (DMCA), they differ from the US safe harbor in two ways. First and most important, the Directive's hosting provision governs all claims related to user-generated content, not just copyright. These claims may be derived from private law, in the form of copyright infringement or defamation, and from criminal law, in the form of incitement to violence, or hate speech. Second, the notice-and-takedown mechanism is prescribed by a directive, which allowed for a certain flexibility of the national legislators and resulted in 27 harmonized, yet not identical, national

14 | See for example: ECtHR, *Castells v. Spain*, 23 April 1992, para 46.
15 | Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *Official Journal* L 178, 17.7.2000.
16 | Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *Official Journal* L351/1, 20.12.2012.
17 | Already analyzed in Section 2 of this paper.
18 | See arts. 12-14 of the Directive on electronic commerce.
19 | Recital 46, Preamble of the Directive on electronic commerce.

legal regimes in EU member states.[20] The Directive on Electronic Commerce additionally prohibits the imposition of general obligations on hosts that are protected by a safe harbor to monitor the information they transmit or store, or to actively seek out facts or circumstances indicating illegal activity.[21]

4.1. Eva Glawischnig-Piesczek case

In the *Eva Glawischnig-Piesczek* case, the Court of Justice of the European Union provided some useful interpretative guidance with respect to the safe harbor regime and the prohibition of general monitoring obligations.[22] The case arose in 2016 when an anonymous Facebook user in Austria shared an article and a defamatory comment against the applicant Eva Glawischnig–Piesczek, an Austrian politician. Ms. Glawischnig-Piesczek obtained an injunction from the Vienna Commercial Court to remove the infringing content as well as text with equivalent meaning, after which Facebook disabled access to the impugned content in Austria. The Vienna Higher Regional Court upheld this injunction but limited the blocking of equivalent content upon notice given by Ms. Glawischnig-Piesczek or a third party to Facebook. Both parties appealed to the Austrian Supreme Court, which referred to the CJEU the question of the scope of content to be removed as well as the territorial scope of the removal. The Court considered that while Art. 15(1) of the Directive on Electronic Commerce prohibits general monitoring of online content, which includes actively seeking facts or circumstances indicating illegal activity, recital 47 allows for monitoring in a specific case where content has been declared illegal. In the present case, Facebook Ireland had been notified of illegal content but failed to expeditiously remove or disable the impugned content. Recital 52 of the Directive states that the harm from the information flows on social media sites results from the rapidity and geographic extent to which it spreads to others through sharing and reproduction. In light of the above, the Court held that the Directive did not preclude a member state from ordering a hosting provider to remove information that has been held to be unlawful, as well as information that is identical or equivalent to such unlawful information posted by any user. Monitoring for identical content to that which was found to be illegal would fall within the allowance for monitoring in a 'specific case' and thus not violate the general monitoring prohibition. The Court reasoned that this allowance could extend to 'information with an equivalent meaning'[23], providing the host was not required to 'carry out an independent assessment of that content'[24] and employed automated search tools for the elements specified in the injunction[25].

The Court further established that recital 41 of the Directive required a balance to be struck between the parties' interests when issuing an injunction, which in the present case consisted of protecting the claimant's reputation and honor without imposing an excessive burden on the host provider. On the territorial applicability of such an injunction, the Court observed that Art. 18(1) of the Directive[26] notably does not provide any

20 | Before Brexit – 28.
21 | Art. 15 of the Directive on electronic commerce.
22 | CJEU, case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, 3.10.2019.
23 | *Ibid,* para. 39.
24 | *Ibid,* para 45.
25 | *Ibid,* para 46.
26 | Art. 18.1 of the Directive on electronic commerce: '*Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.*'

territorial limitation for the effects of such injunctions.[27] Therefore, the Court held that it is up to the Member State to determine the geographic scope of the restriction, as long as it is within the framework of the relevant international law.[28]

5. European Court of Human Rights and defamatory online comments

The European approach to defamation cannot be understood unless the system of the European Union is combined with that of the European Convention on Human Rights, and the decisions of the respective courts are read in light of their reciprocal influence.[29] The Court of Justice of the European Union in case *Promusicae*[30] clarified that in transposing the directives and implementing the transposing measures "the Member States must (...) take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order".[31] This 'fair balance' doctrine was also accepted and further developed by the European Court of Human Rights, particularly in decisions *Delfi v. Estonia*[32] and *MTE v. Hungary*[33]. Both cases concerned the liability of online hosts for allegedly defamatory content posted by anonymous users in the comment sections below news articles published by the platforms.

5.1. Delfi v. Estonia case

In *Delfi v. Estonia,* the ECtHR decided on the liability of Delfi, a high-volume Estonian online news outlet, for defamation based on offensive comments posted by its readers below one of its online news articles. Delfi published a story concerning ice bridges that generated several responses. Some of these contained offensive material, including threats directed against an individual designated as L. A few weeks later, L requested that around 20 comments be deleted and damages were paid. Delfi removed the offensive comments on the same day but refused to pay damages. The matter then went to Court, and L was awarded damages. Delfi's claim to be a neutral intermediary and, therefore, immune from liability under the EU Directive on electronic commerce was rejected. The news organizations brought the matter to the ECtHR, which had found no violation of the right to freedom of expression in this case.[34] Delfi then requested a referral of the case to the Grand Chamber because of the concern that the First Section judgment would have serious adverse repercussions for freedom of expression and democratic openness in the

27 | CJEU, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, para. 49.
28 | *Ibid,* para. 52.
29 | Pollicino and Bassini, 2014, p. 521.
30 | CJEU, case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, 29.1.2008.
31 | *Ibid,* para 68.
32 | ECtHR, *Delfi v. Estonia*, 16 June 2015.
33 | ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (hereinafter: *MTE v. Hungary*), 2 February 2016.
34 | The First Section of the ECtHR rendered its judgment on 10 October 2013.

digital era. The judgment of the Grand Chamber confirmed, however, that the imposition of publisher liability on Delfi did not constitute a violation of Art. 10 of the ECHR.

The Estonian domestic courts had classified Delfi as a traditional publisher and not as an intermediary within the meaning of Art. 14 of the Directive on Electronic Commerce. Based on this classification, the Estonian domestic courts applied the Civil Code and the Obligations Act, rather than the Estonian Information Society Services Act. The classification resulted in denying Delfi the protection of the safe harbor foreseen in Art. 14 of the Directive on Electronic Commerce. The Estonian Supreme Court recognized a difference between traditional publishers and online media, underlying that it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for printed media publications. In line with the distinction made by the Estonian Supreme Court, the ECtHR Grand Chamber referred to the Council of Europe Recommendation on a new notion of media[35]. The Recommendation promotes a 'differentiated and graduated approach,' which requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form and the appropriate level of protection. Therefore, the Court considered that because of the particular nature of the Internet, the 'duties and responsibilities' that are to be conferred on an Internet news portal for the purposes of Art. 10 may differ to some degree from those of a traditional publisher as regards third-party content.[36]

Despite its support for a nuanced approach, the ECtHR declared that qualification of Delfi as a publisher was foreseeable: '*The Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences that these could entail (...)*'.[37] The Grand Chamber agreed with the definition of Delfi as a publisher, but deemed it crucial to delineate the scope of the judgment in light of the facts of the case.[38] In view of the Grand Chamber, the case only concerned the duties and responsibilities of online news portals when they provided a platform for user-generated comments on a commercial basis and when some users on this platform engage in clearly unlawful speech, which infringes on the personality rights of others and amounts to hate speech.[39] The ECtHR highlighted that the controversial comments in the present case were not disputed as being hate speech, thus manifestly unlawful. The Court concluded that hate speech does not enjoy the protection of Art. 10 of the ECHR.[40] In reaching its decision, the Court also took into account the nature of the Delfi news portal. Delfi actively called for comments that, after publication, could only be modified or deleted by Delfi, but not by the actual authors of the comments. Consequently, the Court found that the applicant company's involvement in making public comments on its news articles on the Delfi news portal went beyond that of a passive, purely technical service provider.[41] The Court highlighted that the Delfi case did not concern 'other fora on the Internet' where third-party comments can be disseminated, for example, an online discussion forum or a bulletin board where users can freely set out their ideas on any topics without the discussion being channeled by any

35 | Recommendation CM/Rec(2011)7, 21 September 2011.
36 | ECtHR, *Delfi v. Estonia*, para. 113.
37 | *Ibid,* para. 129.
38 | *Ibid,* para. 111.
39 | *Ibid,* para 115.
40 | *Ibid,* paras. 117-118.
41 | *Ibid,* para. 146.

input from the forum's manager. The Grand Chamber's finding is not applicable to a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby.[42]

In view of the foregoing, the Grand Chamber considered that the rights and interests of others and society as a whole may entitle contracting states to impose liability on Internet news portals if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.[43]

5.2. MTE v. Hungary case

In 2016, less than a year after its *Delfi v. Estonia* decision, the European Court of Human Rights delivered a judgement in case *MTE v. Hungary*. The case also concerns the liability of online intermediaries for user comments. The problem arose in 2010 when MTE, a self-regulatory body of Hungarian Internet content providers, published an opinion about two real estate management websites owned by the same company. In the opinion entitled "Another unethical commercial conduct on the net" MTE denounced the company's business strategies and customer treatment. Shortly after, a number of offensive pseudonymous comments were posted. The same type of comments appeared when the full text of the opinion was reproduced by the online portals *vg.hu* and *Index.hu*. The company operating the real estate management websites brought a civil action before the Budapest Regional Court, claiming that both the opinion and comments infringed its right to a good reputation. The Budapest Regional Court found that the comments went beyond the limits of freedom of expression. The Regional Court and later the Court of Appeal rejected the applicants' argument that they were mere passive intermediaries within the meaning of the EU Directive on Electronic Commerce and the Hungarian Electronic Commercial Services Act. The Hungarian Supreme Court shared the Court of Appeal's view in finding that the comments could harm the plaintiff's good reputation and that the applicants' liability consisted of having allowed their publication. MTE and *Index.hu* appealed to the ECtHR, arguing that by effectively requiring them to moderate the content of comments made by readers on their websites, the domestic courts unduly restricted their freedom of expression and thus the liberty of online commenting.

The European Court of Human Rights observed that there was interference with the applicant's freedom of expression in the present case. The interference at hand was prescribed by law and had the legitimate aim of protecting the rights of others.[44] The Court had to determine whether the interference was 'necessary in a democratic society', that is, to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the ECHR, which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Art. 10, and on the other, the right to respect for private life enshrined in Art. 8.[45] The Court has found that the rights guaranteed under Articles 8 and 10 ECHR deserve equal respect. The outcome of an application should not vary according to whether it has been lodged with the Court under Art. 10 ECHR by the publisher of an offending article or under Art. 8 ECHR by the person who has been the subject of that article.[46]

42 | *Ibid,* para. 116.
43 | *Ibid,* para. 159.
44 | ECtHR, *MTE v. Hungary,* para. 52.
45 | *Ibid,* para. 58.
46 | *Ibid,* para 59.

The ECtHR's judgment makes a direct comparison between this case and its judgment on *Delfi v. Estonia*. Although the Court explicitly stated that 'the present case is different'[47], it nevertheless deemed it appropriate to re-use the same criteria developed in the *Delfi v. Estonia* case to assess the interference in question. In *Delfi v. Estonia,* the ECtHR listed four specific factors to guide the balancing process: (1) the context of the comments; (2) the measures applied by the platform to prevent or remove the comments; (3) the liability of the actual authors of the comments as an alternative to the platform's liability; and (4) the consequences of the domestic proceedings for the platform.[48] In *MTE v. Hungary*, the Court added the fifth factor—the consequences of the comments for the victim.[49] When applying these factors to the two cases, ECtHR came to two opposite conclusions. In *Delfi v. Estonia*, the comments were qualified as hate speech and incitement of violence. Thus, the imposition of liability on the hosting provider struck a fair balance, and it did not entail a violation of the right to freedom of expression. However, in *MTE v. Hungary*, the Court characterized the comments as merely offensive and concluded that the liability imposed on the intermediaries for their dissemination violated the right to freedom of expression.

With respect to the first criterion, the context of the comments, the Court regarded the comments published under the MTE's statement as relating to a matter of public interest. The business conduct of online real estate companies has already generated numerous complaints to consumer protection groups. For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals—a consideration that reduces the impact attributed to those expressions.[50] Regarding the second criterion – measures applied by the platform, the Hungarian courts decided that by allowing unfiltered comments, the applicants should have expected that some of the comments would be unlawful. Both MTE and *index.hu* had a notice-and-take down system in place and both provided a disclaimer in terms and conditions that prohibited unlawful comments. Further, *index.hu* had a team of moderators in place. The domestic courts ruled that these measures were insufficient, but the ECtHR disagreed.[51] The ECtHR also observed that the injured company never requested the applicants to remove the comments but opted to seek justice directly in court.[52] With respect to the third criterion, the liability of the actual authors of the comments, the ECtHR noted that the Hungarian domestic courts did not examine the feasibility of identifying the actual authors of the comments, nor did they analyze the proportionality of the division of liability between the actual authors and the web portals.[53] With respect to the fourth criterion, the consequences of the domestic proceedings for the applicants, the ECtHR observed that the applicants were obliged to pay court fees, including the fee paid by the injured party for its legal representation, but no awards were made for non-pecuniary damage. However, the ECtHR was of the view that the decisive question when assessing the consequences for the applicants is not the absence of damages payable but how Internet portals can be held liable for third-party comments. Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example, by compelling it

47 | *Ibid,* para. 64.
48 | ECtHR, *Delfi v. Estonia*, para. 142.
49 | ECtHR, *MTE v. Hungary,* paras. 68-69.
50 | *Ibid,* para. 77.
51 | *Ibid,* para. 82.
52 | *Ibid,* para. 83.
53 | *Ibid*, paras. 78-79.

to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet.[54]

In *MTE v. Hungary,* the Court added the fifth criterion to assess the consequences of the comments for the victim. The Court observed that at the time of the publication of the article and the impugned comments, there were already ongoing inquiries into the plaintiff company's business conduct. For that reason, the Court was not convinced that the comments in question could make any additional and significant impact on the attitude of the consumers concerned.[55]

After applying these five criteria to the case at hand, the ECtHR concluded that the interference with the applicant's freedom of expression was a violation of Art. 10 ECHR, as the Hungarian domestic Court did not balance the interests of the online real estate company, on the one hand, and MTE and *index.hu*, on the other.[56] The Court found that the impugned comments did not constitute hate speech, as was the case in *Delfi v. Estonia*.[57] It seems that the Court used this opportunity to clarify that the *Delfi v. Estonia* judgment was limited in scope to 'manifestly unlawful' comments consisting of hate speech and incitement to violence. In the *MTE v. Hungary* case, where the comments were merely vulgar and offensive, implementing a notice-and-take down mechanism was considered sufficient to balance the rights and interests of the parties involved.

6. Concluding remarks

Defamatory online comments posted by users may generate significant problems for web portals and social networks. Although the EU Directive on electronic commerce provides for the limitation of liability for intermediaries, its provisions do not fully correspond to recent technical developments and the appearance of new forms of online communication. Twenty years ago, the Directive envisaged three categories of intermediaries: those that are mere conduits, those that offer caching, and those that host content. All three categories of intermediaries are seen as facilitators via technical services rather than contributors to the provision of specific content. However, the proper qualification of the third category, hosting sites, has become quite challenging in the last decade, given the development of a range of new online services. Under the Directive, the protection for hosting services is dependent on a lack of 'actual knowledge' of the offending content. Although the Directive prevents the Member States from imposing on Internet intermediaries a general obligation to monitor the information they transmit or store, or a general obligation to actively seek out facts and circumstances indicating illegal activities, the Directive does not prevent public authorities in the Member States from imposing a monitoring obligation in a specific, clearly defined individual case.[58] Furthermore, the Directive does not affect Member States' freedom to require hosting service providers to apply those duties of care that can reasonably be expected from them and which are specified by national law to detect and prevent certain types of illegal activities.[59] Given the above,

54 | *Ibid,* para. 86.
55 | *Ibid,* para. 85.
56 | *Ibid,* para. 88.
57 | *Ibid,* para. 91.
58 | See: Recital 47 of the Directive on electronic commerce.
59 | See: Recital 48 of the Directive on electronic commerce.

it would be incorrect to assert that ECtHR's decisions in *Delfi v. Estonia* and *MTE v. Hungary* are contrary to the wording and spirit of the Directive.[60]

The Court of Justice of the European Union also interpreted the scope of Articles 14 and 15 of the Directive on Electronic Commerce. In the most notable case, *SABAM v. Netlog*,[61] which concerned a social networking site that received a request from the Belgian copyright society to implement a general filtering system to prevent the unlawful use of musical and audio-visual work by the users of its site, the Court took a balanced stance on the issue of content filtering. The CJEU observed that the EU law precludes a national court to impose a general content monitoring obligation on a hosting service provider: (1) which requires it to install a system for filtering information that is stored on its servers by its service users, (2) which applies indiscriminately to all users, (3) exclusively at its expense, and (4) for an unlimited period. *A contrario,* a specific monitoring system that would be in place for a limited period and would not be entirely at the expense of the hosting operator, would not be *prima facie*, contrary to the Directive on electronic commerce. However, the Court noted that a filter might not distinguish between lawful and illegal content, thus affecting users' freedom of expression.

The Directive on Electronic Commerce does not harmonize the conditions for holding intermediaries liable, but only the conditions for exempting Internet intermediaries from liability.[62] A recent European Commission's proposal of the Digital Services Act (DSA)[63] attempts to rectify certain deficiencies of the existing content removal mechanism. The DSA proposal introduces the obligation for service providers to act when they receive orders in relation to a specific item of illegal content. 'Illegal content' is defined as any information that, in itself or by its reference to an activity, including the sale of products or provision of services, is not in compliance with European Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law.[64] The recitals give us more detail, specifically referring to illegal hate speech or terrorist content and unlawful discriminatory content, or the content that relates to illegal activities, such as the sharing of images depicting child sexual abuse, unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the non-authorized use of copyright-protected material, or activities involving infringements of consumer protection law.[65] Hosting providers, including online platforms, are subject to additional rules, such as the reporting mechanisms for illegal content or the provision of a statement of reasons in relation to a decision to remove or disable access to specific items of content.[66] Given that the DSA proposal refers to 'illegal content' that may be disabled or removed under certain conditions, it seems that all types of online comments will not be caught under the proposed mechanism. This brings us back again to the complex distinction made by the European Court of Human Rights between 'manifestly illegal comments' and 'merely offensive comments.'

60 | Although it is also true that ECtHR was not deciding on whether the claimant was a neutral intermediary or not, but was rather reviewing the impact of the national court's reasoning.
61 | CJEU, case C-360/10, *SABAM v. Netlog,* 16.1.2012.
62 | Stalla-Bourdillon, 2017, p. 292.
63 | Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.
64 | Art. 2(g) of the DSA.
65 | Recital 12 of the DSA.
66 | Art. 15 of the DSA.

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RELIGIOUS EDUCATION IN THE PUBLIC SPHERE IN SLOVENIA

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ABSTRACT

Slovenia is among the few European states that explicitly do not allow religious education in public schools. This rule is prescribed by the Organization and Financing of Upbringing and Education Act (Education Act), which explicitly prohibits all religious activities in public schools. It prohibits any other kind of denominational activity in public schools and kindergartens. Several Slovene authors have argued that the area of education runs a high risk of either remaining or becoming a battlefield for ideological disputes. This study analyses the Slovenian legal regulation of religious education in public schools. First, the Slovenian model of state–church relations is explained. Then, a brief overview of the historical regulation of religious education in Slovenia's public schools is provided in order to enable a clear understanding of current regulations.

KEYWORDS

religion
religious education
Slovenia
public school

1. Introduction[2]

One cannot overstress the importance of schools and education. Schools are one of the main mechanisms of socialisation. Schools exist in specific social and historical contexts, which mark them significantly. Educational programs are determined not only by the general results of the development of basic human knowledge but also by the tradition and culture of a particular society.[3] Most European countries provide religious

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2 | I am using parts of my paper "Religious Symbols in the Public Sphere in the Legal Order in Slovenia" (in print) in this paper.

3 | Marinović Bobinac, 2007, p. 426.

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education.[4] Religious educational content is conveyed in one of the following ways: as confessional religious education, as non-confessional religious education delivered as a separate subject, or as non-confessional religious education delivered as part of other subjects.[5] Religious education is sometimes a hotly disputed issue. As Ivanc states, the area of education runs a high risk of either remaining or becoming a battlefield for ideological disputes.[6] Slovenia is among the few European states that provide no official religious education in public schools. However, one elective (obligatory) course, Religion and Ethics (*Varstva in etika*), is taught in senior primary school. It is interesting to mention that the Organisation and Financing of Upbringing and Education Act (Education Act)[7] explicitly prohibits any religious activities in public schools. It also prohibits any other kind of denominational activity in public schools and kindergartens. This is why some scholars see an equation between Slovenia and France regarding religious education.[8] It is thus worthwhile analysing the legal regulation of religious education in Slovenian public schools (which differs from the regulation of private schools).

2. Historical development

Before the Second World War, religious instruction in Slovenia was not only obligatory in public school but it was also regarded as the basis and crowning glory of public education.[9] Historically, the Catholic Church and the Evangelical Church of the Augsburg Confession made important historical contributions to the development of the schooling

4 | It is the aim of confessional religious education to promote an obligation towards a particular religion. In most developed European countries, there is an awareness of the difference between religious education as part of education in schools and religious education in church. In accordance with this awareness, the confessional approach to religious education has shifted in many countries from pursuing catechetic (growing in faith), formative, pastoral, and evangelic aims towards educational and intercultural aims, to offer civic education and education for peace and tolerance. The aim of non-confessional religious education is to transfer information about religion/religions to develop social tolerance and provide students with a view of different religions and worldviews, allowing them to make a conscious choice and live in a pluralist society. Ideally, religions are discussed neutrally, objectively and harmoniously; ibid.

5 | Ibid. Most European countries provide confessional religious education in public schools (e.g. Belgium, Bosnia & Herzegovina, Germany, Finland, Croatia, Luxembourg, Latvia, Lithuania, Austria, Poland, Portugal, Serbia, Slovakia, Spain, Greece, Ireland, Italy, Malta, Romania). Some offer religious education outside of the public school system, but on public school premises (e.g. Moldavia, Chech Republic, Hungary). Some countries provide religious education in the form of religious culture (e.g. Denmark, Estonia, Island, Great Britain, Holland, Norway, some Swiss cantons, Sweden, Ukraine). Only three European countries do not provide religious education in any form: France (with the historically conditioned exceptions of Alsace and Mosele), Albania, and Slovenia; see Filipović, 2011, p. 140; Staničić, 2018, p. 402.

6 | Ivanc, 2015, p. 137.

7 | Uradni list RS, no. 16/07 (consolidated text), 36/08, 58/09, 64/09, 65/09, 20/11, 40/12, 57/12, 47/15, 46/16, 49/16, 25/17, 123/21.

8 | Education about religion at public schools in Slovenia is, from a legal point of view, similar to that in France and different from that in most European countries, where the laws guarantee religious instruction within the framework of the public school; Kodelja, 1999, p. 153.

9 | Ibid.

system in Slovenia.[10] In the Austro-Hungarian Empire and the subsequent Kingdom of Yugoslavia, religious communities had a strong influence on education. Religious education was an obligatory subject, and religious communities had the exclusive right to implement it.[11] The Catholic Church enjoyed a privileged position, especially in the Austro-Hungarian Empire.[12]

The political transformations that occurred at the end of the Second World War and the creation of a new socialist Yugoslavia within the new European *cuius regio, eius religio* determined at Yalta in February 1945 might be considered the realisation of the possibilities David Martin attributes to the Latin (and partly the Orthodox) pattern: Given suitable historical circumstances, polarisation can develop into a conflict of vicious dimensions. According to Martin, such a confrontation may result in either a strengthened rightist pro-Church authoritarian regime or a leftist anti-clerical authoritarian regime. Precipitated by the Second World War, the second option prevailed in Slovenia, and a conflict pattern of social secularisation was established.[13] In this system, the separation of church and state could not have been neutral.[14] Communist Yugoslavia introduced a strict separation of church and state, an atheistic and materialistic ideology based on Marxism, and a systematic and constant oppression of religion and believers.[15] Therefore, throughout the communist era, religious education was banned from public schools (as was religion from the public sphere).[16] After 1952, religious education was completely banned.[17]

After 1991, the democratic Republic of Slovenia enacted a new constitution, which marked a departure from the negative perception of religion and initiated a search for new foundations for the church–state relationship.[18] However, Slovenia took a path different from that of most of the former Yugoslav republics, which opted for a separation of church and state but with strong ties with whatever was the most numerous religious community (the Catholic Church in Croatia, the Serbian Orthodox Church in Serbia, Islam in Bosnia). Slovenia envisaged its own state–church relations model, which can be linked to the well-known French model of *laicite*, although it is not legally prescribed as such. The preamble of the 1991 Constitution of the Republic of Slovenia contains no reference to God or religion. Article 7 of the new democratic constitution defined the

10 | Ivanc, 2015, p. 137.
11 | Staničić, 2014, p. 230.
12 | Smrke, Rakar, 2006, p. 11.
13 | Črnić et al., 2013, p. 210.
14 | Ibid.
15 | Ivanc, 2015, p. 138.
16 | In 1945, the government prohibited the operation of any kind of private school, and many private schools that operated before this time were nationalised. Religious communities could establish religious schools only to educate priests, and diplomas from these religious schools were not publicly recognized. As a result, the atheism prescribed by Marxism was the privileged belief in Slovenia for almost half a century and was encouraged throughout the educational system (Šturm, 2004, p. 610). Today, Article 57 provides for freedom of education, which is closely related to the rights of peaceful assembly and the freedom of association. In guaranteeing freedom of education, Article 57 also prescribes compulsory elementary education financed from public funds. The 1991 Constitution provides for the autonomy of public universities and other public junior colleges; however, it leaves regulation over the manner of their financing up to statutes. Thus, while the 1991 Constitution does not explicitly provide for religious schools, the constitutional right to freedom of education seems to permit them; ibid., p. 615.
17 | Smrke, Rakar, 2006, p. 11.
18 | Ivanc, Šturm, 2015, p. 379.

role of churches and religious communities and their relation to the state. Article 7 sets forth the following basic principles: separation between the state and religious communities, equality among religious communities, and the free activity (autonomy) of churches and religious communities within the legal order.[19] When Slovenia declared independence from Yugoslavia in 1991, the new state initially decided not to regulate the relationship between public schools and religion (i.e. the Roman Catholic Church, with which the majority of Slovenes affiliate), especially since restrictive regulation could paradoxically provoke new problems.[20] Since 1991, the religious composition of Slovene society has gradually changed, becoming slightly more diverse, and the Ministry of Education has started receiving requests from school principals to advise them on how to act in concrete cases of (non-Christian) religious symbols entering school spaces. Meanwhile, the pressure exerted by the Catholic Church for a more visible presence in schools has not abated.[21] Recognising the need[22] to revise its initial decision to not regulate the field of religion in education, the Ministry of Education asked a handful of experts to give opinions and thus provide the basis for solving the dilemma systematically and in accord with the Slovenian constitution and its cultural traditions.[23] Subsequently, the Ministry of Education published the *White Book on Education* [*Bela knjiga o vzgoji in izobraževanju*] in 1995, which highlighted the 'starting point' concept and stressed the key goals of the school organisation and curriculum reforms.[24] New laws on education were later passed. Of course, various religious actors did not approve of the course established in the *White Book*. The result was the Education Act, which introduced 'the autonomy of the school space', with an explicit prohibition of religious (confessional) education.

19 | Ibid., Ivanc, 2015, p. 41.
20 | Črnič, Pogačnik, 2019, p. 120.
21 | The presence of religion in public schools was evident in the Church's demand to introduce Catholic confessional religious education 'from kindergarten to university'. At the beginning of the 1990s, this demand was made by Alojz Uran, who in 2004 succeeded Rode as archbishop; Smrke, Rakar, 2006, p. 14.
22 | The proposal of the Roman Catholic Church was that confessional religious education be introduced in public schools. It would not be a classical catechism; however, it would be under the competence of the Roman Catholic Church. One of the main arguments of the Church for introducing confessional religious education in public schools was the equation of religiosity with morality. The government proposal, on the other hand, was that, in accordance with the constitutional principle of state–church separation, the reasonable solution would be (1) to introduce knowledge about religions in the existing subjects; (2) to introduce private education, in which there is no obstacle to confessional subjects; and (3) to introduce a non-confessional subject about religions in public schools; ibid., pp. 21, 22.
23 | Črnič, Pogačnik, 2019, p. 120. The second expert group concluded that public schools are secular in Slovenia. Secular schools, which realise the constitutional separation of state and religious communities, have to be neutral in relation to worldviews. Such a worldview-neutral school is a school that does not force anyone to accept a particular worldview, while at the same time offering elements enabling everyone to build a worldview of their own choosing. Therefore, it is not the task of the public school to form Catholics, liberals, Protestants, or atheists. That can be done only by private schools, families, churches, and so on, not the public school, which has to be a space of unification based on shared fundamental values, providing cultural identity and social integrity to future generations and a space of learning about democratic behaviour, tolerance, and respect for those who think differently; ibid., p. 122.
24 | Kalin, Šteh, 2007, p. 157.

3. Educational system in Slovenia and its legal regulation

Slovenia's national education system is structured into several levels: early childhood education and care (kindergarten, or *vrtec'*), primary education (primary school, or *osnovna šola*), secondary general education (gymnasium, or *gimnazija*) or secondary vocational education (secondary vocational school, or *srednja poklična šola*), post-secondary non-tertiary education (*višja strukovna šola*), and tertiary education (higher school and university, or *visoka šola* and *univerza*).[25]

Preschool education is aimed at children aged 11 months to six years or until the children start compulsory primary education. It is not compulsory. Parents decide whether to enrol their children in a kindergarten. Preschool education is provided by both public and private kindergartens.[26] Children pursue preschool education in 1,165 administrative units. These are set up in 108 independent public kindergartens, 203 school-based kindergartens, and 96 private kindergartens. There are 5,313 classes in total. The vast majority of children (94.4 %) attend public kindergartens.[27]

Primary and lower secondary education is organised as a single-structure nine-year basic school attended by students aged six to 15 years. It is provided by public and private schools (fewer than 1% of Slovenian students attend private basic schools), as well as educational institutions for SEN children and adult education organisations. Basic school education is compulsory and state-funded as specified by the Constitution of the Republic of Slovenia. Basic schools are set up by local communities. A wide public network of basic schools provides all residents of Slovenia access to education. In the 2018/2019 school year, 187,854 students attended 772 basic schools and branches, as well as 58 specialised schools and special units of mainstream basic schools and institutions for SEN children. In total, over 19,000 teachers are employed in Slovenian basic education.[28]

After nine years of compulsory basic education (theoretically at the age of 15), students may continue on to two- to five-year non-compulsory upper secondary education. In the 2018/2019 school year, there were 111 public upper secondary schools (organised in single upper secondary schools or school centres), six private upper secondary schools, and six educational institutions for SEN children. The system of upper secondary education is centralised; decisions about their foundation and financing, as well as agreements on and the distribution of education programs, are adopted at the national level. However, schools and teachers enjoy autonomy in determining teaching content, choosing teaching methods, and staffing and managing employment relationships.[29]

Early childhood education and care are regulated by the Pre-School Institutions Act[30], elementary education is regulated by the Elementary School Act[31], secondary education

25 | Ivanc, 2015, p. 139.
26 | Taštanoska, 2019, p. 19.
27 | Ibid., p. 21.
28 | Ibid., p. 25.
29 | Ibid., p. 29, 30.
30 | *Zakon o vrticih,* Uradni list RS, no. 100/05 – officially consolidated text, 25/08, 98/09 – IUZGK, 36/10, 62/10 – ZUPJS, 94/10 – ZIU, 40/12 – ZUJF, 14/15 – ZUUJFO, 55/17, 18/21.
31 | *Zakon o osnovni šoli*, Uradni list no. 81/06 – officially consolidated text, 102/07, 107/10, 87/11, 40/12 – ZUJF, 63/13 in 46/16 – ZOFVI-L.

is regulated by the Gimnazije Act[32] and Vocational Education Act,[33] and higher education is regulated by the Higher Education Act.[34] Most important for this study's discussion is the Education Act, which explicitly bans religious education from public schools and kindergartens. The Education Act lists autonomy as one of the goals of child rearing and education. Under the Act, this concern for autonomy is manifest in extracurricular '"types and varieties of knowledge and persuasion", and by ensuring the optimal development of individuals irrespective of their religious belief'. Accordingly, the Act requires that schools be religiously neutral and autonomous in religious communities. Additionally, this principle of autonomy prohibits discrimination against religious beliefs and urges principled tolerance.[35]

4. Slovene state–church model

In theory (and practice), three general models of church–state relations have been identified: 1. the state or national church model; 2. the cooperative or concordant model; and 3. the strict church–state separation model (or separation model).[36]

Of course, these three models are not 'pure' models. They can be elaborated and combined into six models of church–state relations: 1. aggressive animosity between the church and state (e.g. communist regimes), 2. strict separation in theory and practice (e.g. France); 3. strict separation in theory but not in practice (e.g. United States), 4. separation and cooperation (e.g. France, Germany); 5. formal unity but with substantial divisions (e.g. United Kingdom, Denmark, Israel, Norway); and 6. formal and substantial unity (e.g. Iran, Saudi Arabia).[37]

The Slovenian model of relations between the state and church is established by Article 7 of the Constitution. In Slovenian legal theory, the equality of religious communities has been, at least until the end of the first half of 2000, understood by the state as an 'undiscriminating affirmation of the whole religious field'.[38] The meaning of this is that different religious communities are equal before the law. Some have said that the Slovene model of state–church relation can be called a 'model of separation with simultaneous cooperation' (*model ločitve ob hkratnem sodelovanju*).[39] Religious communities are not part of the system of the separation of powers under Article 3 of the Constitution or of state institutions *stricto sensu*. However, as believers are citizens with the right to vote, the limitations on religious communities are derived from Article 7: Religious communities are not allowed to organize themselves as political

32 | *Zakon o gimnazijah*, Uradni list no. 1/07 – officially consolidated text, 68/17, 6/18 – ZIO-1, 46/19.
33 | *Zakon o poklicnih in strokovnem izobraževanju*, Uradni list no. 79/06, 68/17, 46/19; regarding secondary education one should also mention the Matura Examination Act (*Zakon o maturi*), Uradni list no. 1/07 – officially consolidated text in 46/16 – ZOFVI-L.
34 | Zakon o visokem šolstvu, Uradni list no. 32/12 – officially consolidated text, 40/12 – ZUJF, 57/12 – ZPCP-2D, 109/12, 85/14, 75/16, 61/17 – ZUPŠ, 65/17, 175/20 – ZIUOPDVE, 57/21 – decision of the Constitutional Court.
35 | Šturm. 2004., p. 626.
36 | Sokol, Staničić, 2014, p. 44.
37 | Ibid., p. 44; Brugger, 2007, p. 31.
38 | Črnič, Lesjak, 2003, p. 362; Dragoš, 2001, p. 41.
39 | Avbelj, 2019, commentary on Article 7.

parties or act within state institutions.[40] On the other hand, some feel that Slovenia follows the French model of *laicite* and that the principle of separation establishes a secular[41] state. This means that the state must not be tied to any church and cannot privilege, discriminate against, or opt for religiosity or non-religiosity.[42] Kaučić wrote that, in Slovenian legal theory and practice, the principle of separation between state and religious communities is largely understood and interpreted in terms of consistent and strict separation modelled on states with a more pronounced separation of state and church. Such a position is not to be attributed to the constitutional order, but to legal and executive derivations of this constitutional principle, particularly the influence of the previous political system.[43]

Slovenian authors agree that Article 7 of the Constitution sets forth three principles that define the legal position of religious communities in Slovenia: separation, the free action of religious communities, and the equality of religious communities.[44] However, in accordance with Article 5 of the Constitution, the Religious Freedom Act regulates the duty of the state to respect the identity of religious communities and to maintain an open and continuous dialogue with them while developing forms of permanent cooperation. The principle of separation does not prevent religious communities from freely pursuing activities in their spheres. If the activities of the state and religious communities collide, their competence should be delimited according to the internal sovereignty of the state, which allows it to determine the proper limits but without preventing religious communities from pursuing social activities.[45] Stres concludes that the principle of separation requires, in the spirit of European political culture, only that authorities not use religion for their own purposes and that religious organisations not attempt to abuse the state to achieve its own objectives.[46]

In 2007, Slovenia's parliament passed the Religious Freedom Act,[47] by a majority of one (46 out of 90).[48] The impact of this law on the Slovenian model of state–church relations was huge, as it marked a sharp change in practice and legislation. Prior to its enactment, Slovenia had been rightly portrayed as a country that mirrored France's *laicite* model of state–church relations, which is based on state neutrality. The law was a huge change because it embraced a different model of state–church relations – a cooperation model in which state neutrality does not have the same significance it had in the earlier model. The Religious Freedom Act obliges the state to enter relations with various religious communities. However, the Slovenian state did this prior to the law (having signed three agreements in the early 2000s), which would suggest that the model of state–church relations in Slovenia was never really that of *laicite*.

40 | Ibid.
41 | Naglič uses the term *laičnost* or *laicite* in French; see Naglič, 2017, p. 16.
42 | Ibid.
43 | Kaučić, 2002, p. 404.
44 | Mihelič, 2015, p. 132; Naglič, 2010, 4, pp. 491-492; see also decision U-I-92/07.
45 | Ivanc, 2015, p. 47.
46 | Stres, 2010, p. 492.
47 | Uradni list, no. 14/07, 46/10, 40/12, 100/13.
48 | Lesjak and Lekić claim that the Act was passed due to the votes of Italian and Hungarian minorities; see Lesjak and Lekić, 2013, p. 158.

5. Religious education in public schools in Slovenia

No religious education is offered in Slovenian public schools, *stricto sensu*. As discussed above, the Slovenian model of state–church relations emphasised state neutrality and resembled the French *laicite* model. However (as mentioned), this model was modified extensively in 2007 via the Freedom of Religion Act, which introduced a cooperation model of state–church relations. The state signed various agreements with religious communities in the 2000s.[49] Slovenia had strongly emphasized state neutrality, especially in the 1990s, and thus opted for a very strict (Ivanc calls it 'ultra-strict') approach to religious education in public schools. Unlike other former Yugoslav republics, which all reintroduced religious (confessional) education after 1991, Slovenia went its own way after religious education was omitted from the school curriculum in 1951/1952.[50] According to Ivanc, Slovenian legislators not only embraced the French idea of the secular school (*l'école laïque*) as well as the American model, but surpassed them by introducing an ultra-strict model of the separation between religion and the state/school, which is quite different from that of most European countries, whose laws guarantee religious instruction within the framework of the public school system.[51]

The Education Act explicitly prohibits religious activities in public schools. It also prohibits any other kind of denominational activity in public schools and kindergartens. It was enacted in 1996 and established the 'autonomy of schools'. The state assumed an obligation to maintain neutrality and tolerance and conduct activities that are non-indoctrinating and non-proselytizing. The law forbids religious activities in public schools, which thus disallows 1. performing confessional religious education in the classroom; 2. having teaching content or teachers appointed by religious communities, and 3. organising religious services in school.[52]

This is all prescribed by Article 72 or the Education Act, as follows:

> Article 72[53]
>
> (Autonomous Use of School properties)
>
> Activities not related to education may be carried out in public preschool institutions or schools with the permission of principals.

49 | 1. Treaty on legal issues between the Republic of Slovenia and the Holy See, signed on 14 December 2001, ratified in 2004, Uradni list RS-MP, no. 4/04.
1. The Agreement between the Slovenian Bishop's Conference and the Government of the Republic of Slovenia on Spiritual Care for Military Persons in the Slovenian Army (signed 21 September 2000),
2. The Agreement between the Evangelical Church in the Republic of Slovenia and the Government of the Republic of Slovenia on Spiritual Care for Military Persons in the Slovenian Army (signed on 20 October 2000),
3. The Agreement on Legal Status of the Pentecostal Church in the Republic of Slovenia (signed on 17 March 2004), The Agreement on Legal Status of the Serbian Orthodox Church (signed on 9 July 2004),
4. The Agreement on Legal Status of the Islamic Community in the Republic of Slovenia (signed on July 9, 2007),
5. The Agreement on the Legal Status of the Buddhist Congregation Dharmaling (signed on July 4, 2008); see Ivanc, 2015, pp. 44, 45.
50 | Ibid., p. 147.
51 | Ivanc, 2011, p. 4.
52 | Marinović Bobinac, 2007, p. 435.
53 | Original text from 1996.

> Activities of political parties and their youth are prohibited in preschool institutions and schools.
> Religious activities shall not be permitted in public preschool institutions, schools, preschool institutions, and schools with concessions.
> Religious activities of the preceding paragraph of this Article shall include:
> • sectarian Bible study or religious education aimed at establishing religion;
> • instruction in cases where educational contents, textbooks, teacher training, and suitable characteristics of teachers are determined by religious communities;
> • Organised religious rituals
> Upon the proposal of a principal, the minister can exceptionally permit a Bible study or religious education to take place in a public preschool institution, school, preschool institution, or school with a concession outside class and after regular hours, if there are no other premises suitable for such activity in that local community.
> Authorised state officials – with the exception of inspectorates and the state auditing agency – need the principal's permission to perform their duty in a preschool institution or school.
> An official may enter the premises of a preschool institution or school without the principal's permission if so authorised by law or a court decree or if that is unavoidable in order to make an arrest or protect people and property.[54]

In the case of Mihael et al. No. U–I–68/98 (November 2001), the Constitutional Court reviewed the question of whether the provisions of the Education Act interfered with the positive aspects of the freedom of religion, the principle of equality, the rights of parents, and the right to free education. The Court first declared that the general prohibition against denominational activities in public schools was not inconsistent with the Constitution and the European Convention. The only inconsistency with the Constitution was the prohibition against denominational activities in licenced kindergartens and private schools concerning denominational activities occurring outside the scope of the execution of a valid public program financed from state funds.[55] The Court instructed the National Assembly to remedy that inconsistency within one year, and legislators changed the provision of Article 72 of the Education Act to allow licenced kindergartens and schools to carry out denominational activities outside the scope of the execution of a public service.[56]

This Constitutional Court decision needs to be analysed, as it is very important for the regulation of religious education in Slovenia. The Education Act was challenged before the Constitutional Court in 1998.[57] "The petitioners challenged Art. 72. 3 and 4 of the Organization and Financing of Upbringing and Education Act (hereinafter ZOFVI), according to which denominational activities are not permitted in public kindergartens and schools and licensed kindergartens and schools. As these provisions limited the carrying out of denominational activities to the private sphere of life and, in particular, prohibited denominational activities also in licensed private schools, outside the lessons considered to constitute a valid public program, they were allegedly inconsistent with Art. 41 of the

54 | Original text from 1996. English translation available at: http://www.unesco.org/education/edurights/media/docs/a36b2378af3f193c33cdfc3eb7044b55d326c81e.pdf
55 | Ivanc, 2011, p. 462.
56 | Ibid.
57 | I am using the English translation of the decision, available at: http://www.us-rs.si/documents/ea/8a/u-i-68-98-an2.pdf.

Constitution and Art. 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter EKČP or the Protocol to EKČP).[58]

The challenged provisions were allegedly also inconsistent with Art. 2 of ZOFVI, which includes among the goals of the system of upbringing and education the ensuring of the optimal development of the individual irrespective of their religion and an education emphasizing mutual tolerance, respect for differences and cooperation with other people. The petitioners suggested the annulment of the challenged provisions (point 1).

According to the Constitutional Court, ZOFVI is part of the school legislation adopted at the beginning of 1996. It represents the basis for the new system of regulations on upbringing and education that were conditioned by the social changes in Slovenia after the adoption of the Constitution in 1991. It regulates relations between the public and private school systems, the internal organization of schools and their financing, which equally apply to kindergartens, primary schools and (secondary) grammar and technical schools (hereinafter kindergartens and schools) (point 7.) ZOFVI regulates only the organization and financing of schools that carry out valid public programs, i.e. programs which enable the obtaining of a valid public diploma. Such schools can be public, licensed or private. Public and licensed kindergartens and schools are included in the public school network; ZOFVI considers private kindergartens and schools to be supplemental to the public school system. To ensure horizontal and vertical transition between public and private schools, ZOFVI contains provisions that ensure the comparable quality of public and private schools (the procedure for the adoption of programs, the monitoring of new programs, the examination of knowledge at the end of educational terms, standards for ensuring both material resources for work and the comparable education and salaries of educators and teachers). … The position of licensed schools is equal to the position of public schools in the part in which they carry out the public service: they carry out an educational program equal to that determined for public schools (Art. 15); for the entire educational program and not only for mandatory subjects, as applicable to private schools, they use mandatory textbooks and teaching requisites confirmed by the competent council of experts (Art. 21); they must be internally organized in this manner as public schools are (administrative bodies, a counseling service, a library – Arts. 46 to 68). Their financing is ensured in the same manner (Art. 85 in conjunction with Art. 77). They are not granted only 85% of the funds per student the State or the local community ensures

58 | The Constitution and EKČP allegedly ensure the freedom to profess a religion on school premises. The provisions allegedly prevented parents from exercising at school the right to provide their children with a religious and moral upbringing in accordance with their beliefs (Art. 41.3 of the Constitution). A private school is not allegedly an equivalent alternative to a licensed school, since only 85% of its activities are financed from public funds; if the existence of a public school is threatened, such funds are allegedly to be withdrawn pursuant to Art. 87 of ZOFVI. For these reasons, the provisions were allegedly contrary to the prohibition against discrimination on the basis of religious beliefs (Art. 14 of the Constitution and Art. 14 of EKČP). The challenged provisions also allegedly interfered with vested rights. The private schools which were granted a license on the basis of the previously valid Financing of Upbringing and Education Act (Official Gazette RS, No. 12/91; 'ZOFVI91' hereafter), will allegedly lose their licenses due to the challenged ZOFVI provisions if they do not discontinue the religious lessons provided in their curriculum. Para. 4.2, in conjunction with Art. 72.3, of ZOFVI was also contrary to the principle of equality before the law (Art. 14 of the Constitution), as it allegedly prevented religious communities from applying for a license. In contrast to the case of other founders of schools and kindergartens, it allegedly prevented religious communities from deciding on the substance, textbooks, teacher education, and teacher suitability.

for salaries and material expenses in public schools, as determined for private schools, but the financing of the activities they carry out as a public service is fully provided from public funds (point 8).

The court interpreted the challenged provisions in a manner that they prohibit the types of denominational activities determined in Art. 72.4 of ZOFVI from being part of a program carried out as a public service on the premises of public and licensed kindergartens and schools, and also prohibited such activities from being carried out outside the extent of such a program on the premises of public and licensed kindergartens and schools (point 10).

It reiterated that, in the framework of freedom of religion, the Constitution ensures parents the right to provide their children with a religious upbringing in accordance with their beliefs (Art. 41.3 of the Constitution). These constitutional rights of parents oblige the State to respect their religious beliefs also in the field of schooling. The duty of the state to respect the religious beliefs of parents in the field of schooling also follows from Art. 26.3 of the Universal Declaration of Human Rights ('Declaration' hereafter), which provides that parents have the right to decide on the education of their children, and from the second sentence of Art. 2 of Protocol No. 1 to the EKČP. This provides that, in carrying out its tasks in the area of upbringing and education, the State must respect the right of parents to provide their children with a religious upbringing in accordance with their religious (and philosophical) beliefs (point 14).

In the case at issue the positive aspect of the freedom of conscience of those (Art. 41.1 of the Constitution) who want to profess their religion through denominational activities in a public school or public kindergarten or a licensed school or kindergarten and the right of parents to provide their children with a religious upbringing in accordance with their religion (Art. 41.3 of the Constitution) come into conflict with the negative freedom of conscience of those who do not want to profess their religion (Art. 41.2 of the Constitution). The Constitutional Court will have to review whether Art. 72 of ZOFVI is inconsistent with the constitution in its prohibition of denominational activities outside the scope of a public service (point 15).

In this case the legislature interfered with the positive aspect of freedom of religion (Art. 41.1 of the Constitution) and the right of parents determined in Art. 41.3 of the Constitution to protect the negative aspect of the freedom of religion of other children and their parents (Art. 41.2 of the Constitution). To achieve this goal, interference with the right determined in Art. 41.1 of the Constitution was necessary. According to Art. 41.2 of the Constitution, citizens have the right not to declare their religious beliefs and to require that the State prevent any forced confrontation of the individual with any kind of religious belief. A democratic State (Art. 1 of the Constitution) is, on the basis of the separation of the State and the Church (Art. 7 of the Constitution), obliged in providing public services and in public institutions to ensure its neutrality and prevent one religion or philosophical belief from prevailing over another, since no one has the right to require that the State support them in the professing of their religion. To reach this goal it is constitutionally admissible that the State takes such statutory measures as are necessary to protect the negative aspect of freedom of religion and thereby realize the obligation of neutrality (point 17).

Furthermore, the interference with the positive aspect of freedom of religion cannot be considered inappropriate as thereby the forced confrontation of non-religious persons or persons of other denominations with a religion they do not belong to can be

prevented. This interference is also proportionate, in the narrow sense of the word, in so far as it relates to the prohibition of denominational activities in public kindergartens and schools. These are namely public (State) institutions financed by the State and are as such the symbols which represent the State externally and which make the individual aware of it. Therefore, it is legitimate that the principle of the separation of the State and religious communities and thereby the neutrality of the State be in this context extremely consistently and strictly implemented (point 18).

However, the interference with the positive freedom of religion and the rights of parents determined in Art. 41.3 of the Constitution is not proportionate in the narrow sense of the word in the part relating to licensed kindergartens and schools outside the scope of performing a public service. In this respect the adjective "public" does not refer to an institution as a premises, nor does it refer to an entire activity, but only to that part of the activity that the State finances for carrying out a valid public program. The principle of democracy (Art. 1 of the Constitution), the freedom of the activities of religious communities (Art. 7.2 of the Constitution), the positive aspect of freedom of religion (Art. 41.1 of the Constitution), and the right of parents to bring up their children in accordance with their personal religious beliefs (Art. 41.3 of the Constitution), impose on the State the obligation to permit (not force, foster, support or even prescribe as mandatory) denominational activities on the premises of licensed kindergartens and schools outside the scope of the execution of a valid public program financed from State funds. This is all the more so as there are milder measures that ensure the negative aspect of the freedom of religion. In reviewing proportionality in the narrow sense we must weigh in a concrete case the protection of the negative aspect of the freedom of religion (or freedom of conscience) of non-believers or the followers of other religions on one hand against the weight of the consequences ensuing from an interference with the positive aspect of freedom of religion and the rights of parents determined in Art. 41.3 of the Constitution on the other. There is no such proportionality if we generally prohibit any denominational activity in a licensed kindergarten and school. By such prohibition the legislature respected only the negative freedom of religion, although its protection, despite the establishment of certain positive religious freedoms and the rights of parents to provide their children a religious upbringing, could as well be achieved by a milder measure (point 19)."

With amendments made based on the decision of the Constitutional Court, Article 72 of the Education Act now reads as follows:

> "Article 72
> (Autonomy of School Premises)
> Activities not related to education may take place at a public kindergarten or school only with the permission of the head teacher.
> At kindergartens and schools, all activities of political parties and their youth sections shall be prohibited. At public kindergartens and schools, confessional activity may not be allowed. At kindergartens and schools holding a concession, confessional activity shall be allowed if it takes place outside the programme implemented as a public service. Confessional activity shall be allowed at kindergartens and schools holding a concession if it does not, in terms of time and space, interfere with the programme implemented as a public service. Confessional activities shall be organised so as to allow those who do not wish to participate to attend or leave freely.
> The confessional activity referred to in the previous paragraph of this Article shall encompass:
> – Catechesis or the confessional teaching of religion with the goal of inculcating this religion;

– Courses where a religious community decides on the content, textbooks, teacher education and adequacy of individual teachers for teaching;
– Organised religious ceremonies.
Upon the head teacher's proposal, the Minister may exceptionally allow catechesis or confessional teaching of religion on the premises of a public kindergarten or school outside instruction or working hours if there is no other suitable venue in the local community for such activity.
The head teacher's permission shall be required to pursue the activities of authorised government bodies in a kindergarten or school, except for the activities of inspection bodies and the Court of Audit.
An official may enter a kindergarten or school without the head teacher's permission if the official is authorised to do so by law or by order of competent court, or if this is absolutely necessary to directly apprehend a person who has committed a criminal offence, or to protect people and property."[59]

The Constitutional Court approved the ban on 'confessional activities' because of the strong emphasis on state neutrality prescribed by Article 7 of the Constitution. According to Stres, confessional activity encompasses the following: religious or confessional instruction aimed at educating for a particular religion; and lesson content, textbooks, teacher education, and criteria of teacher suitability decided by a religious community or organised religious rites.[60] In this way, the presence of religion is completely expelled from a public space: the school. It is true that Article 72, para 5 of the Education Act provides for an exemption from this strict rule. The minister may allow, exceptionally, catechesis or confessional teaching of religion on the premises of a public kindergarten or school outside instruction or working hours if there is no other venue in the local community suitable for such activity. A public school may not have the space or facilities required (e.g. because of a large number of pupils, a natural disaster, a fire) and may use church premises for public education. However, restrictions are placed on this exception.[61] Therefore, the court took the path by which, according to Šturm, it placed the Republic of Slovenia on the extreme edge among European countries with a doctrine described as an unfriendly or intolerant model of separation.[62] This decision was strongly criticised by Ivanc, who wrote that it has several deficiencies.[63] First, the court used a different criterion for judicial review of the contested provision of the Education Act. Second, the court failed to examine the complex nature of different measures that impose limitations on the constitutional right to freedom of beliefs, conviction, and religion.[64] Ivanc

59 | Unofficial translation to English by the Ministry of Education, Science and Sport of the Republic of Slovenia (2017), available at: https://zakonodaja.sio.si/wp-content/uploads/sites/10/2011/08/OFEA_npb_170605.pdf
60 | Stres, 2010, p. 491.
61 | Stres mentions an interesting example showing that this removal of religion from schools goes to an extreme. In one case, a school was undergoing renovations, and education was taking place on church premises. There was a cross on the wall and the pastor (*župnik*) refused to remove it. Education was discontinued in that space; ibid., p. 491. Šturm and Ivanc also state that, while legislation does not explicitly prohibit or allow the display of a crucifix or a cross in schools, these symbols are prohibited in practice as they violate the principle of separation. Šturm, Ivanc, 2019, p. 552.
62 | Šturm, 2002, p. 139.
63 | Ivanc, 2015., p. 149.
64 | Ibid.

finds that the court's doctrines supporting its argumentation are incoherent. The court's conclusion that the doctrine of state neutrality rules out the presence of religion in the public sphere, especially in the field of education, is doubtful in a democratic and pluralistic Slovene state.[65] Furthermore, Ivanc stresses that one can hardly say that the court's decision in this case provided for an appropriate protection of the positive aspects of religious freedom in public schools, with the exception of Article 72 Para. 5, according to which, when denominational activities cannot be carried out in a local community, they may take place on the premises of a public school.[66]

One should also bear in mind that this decision was handed down in 2001 and that the Education Act was enacted in 1996. The emphasis on state neutrality was significantly stronger then, as can be seen from decision U-I-92/07 of the Constitutional Court. In this decision on the constitutionality of the Religious Freedom Act, the court ruled that negative freedom has no *a priori* advantage over positive freedom in the conflict between positive and negative freedom of religion (i.e. when positive freedom of religion interferes with negative freedom of religion). This means that the right of unbelievers not to be confronted with a religious belief and religious symbols does not always and automatically take precedence over positive religious freedom, which is the freedom of believers to profess their faith and to testify it publicly.[67] The main significance of the Religious Freedom Act for the Slovene state–church model, as discussed above, was that it shifted Slovenia towards the cooperation model.

5.1. Financing of private schools and religious education

The question of public funding for private schools is a very interesting question concerning religious education. This issue is hotly disputed in Slovenia. There was an initiative, in November 2017, to amend Article 57 of the Constitution, which prescribes freedom of education and decrees that primary education is compulsory and shall be financed from public funds (and that the state must create opportunities for citizens to obtain a proper education). The Social Democrats (*Socialni Demokrati*) proposed amending the article in order to ensure that only public schools receive public funding. There were 60 votes in favour and 22 votes against (out of 90 members of the National Assembly). However, the constitutionally prescribed majority of two-thirds was not achieved, so Article 57 remained unchanged. Several parliamentary parties were strongly opposed, such as the Slovenian Democratic Party (*Slovenska demokratska stranka*) and New Slovenia (*Nova Slovenija – krščanski demokrati*), who argued that the initiative was motivated by ideology.[68]

It is necessary to mention two other decisions of the Constitutional Court: U-I-269/12 of December 4, 2014,[69] and the subsequent decision U-I-110/16 of March 12, 2020.[70] In decision U-I-269/12, the Constitutional Court found the first sentence of the second paragraph

65 | Ibid., p. 152.
66 | Ibid., p. 153.
67 | Stres, 2010, p. 492.
68 | https://www.total-slovenia-news.com/politics/157-public-funding-of-private-education https://sloveniatimes.com/controversial-bill-changing-private-primary-school-financing-passed/ (Acceesed: 20.10.2021).
69 | Uradni list RS no. 2/15.
70 | Uradni list RS no. 47/20.

of Article 86[71] of the Education Act not in accordance with the constitution. The court gave the National Assembly one year to rectify the situation (i.e. to amend the Education Act). The problem that arose concerned the financing of private (religious) schools. The Education Act prescribes that the state shall fund 85% of the costs of private schools that provide officially recognised programs of basic education, basic music education, upper secondary vocational and technical education, or *gimnazije*. The government's response made it clear that it believed it essential that private school programs include contents that public schools do not or may not include in their programs, such as confessional activities (point 24). The court concluded that such an intention was not valid, and that the contents of the compulsory primary education programs funded by public funds must be uniform for all providers of primary education. The state does not finance content that depends on the value orientations of individual providers of primary education (point 25). The outcome of this decision should have been the full funding of private schools or equal funding between private and public schools. However, the National Assembly did not act in accordance with the decision of the Court for more than five years. In 2016, a group of petitioners went before the Constitutional Court to try to force the government to enforce the 2014 decision. However, the court, in a somewhat Copernican twist, ruled that the parts of the contested provision relating to the public funding of supplementary education, morning care, and extended stay in a private primary school providing an officially recognised program are in accordance with the constitution. The court said that it first had to answer the question of whether the earlier decision referred only to the public financing of the compulsory part of primary education or to the public financing of the entire primary education program. The Constitutional Court emphasised that Decision No. U-I-269/12 found the challenged provision to be inconsistent with the constitution only in terms of the public financing of state-approved private primary school programs that correspond to the content of the compulsory part of the primary education program in public schools. It stated that the legislator has a wide margin of discretion and that the scope of this right may be adjusted over time, taking into account the needs and assets of society and individuals. However, the legislator must comply with the constitutionally protected core of the right to education and schooling (Article 57 of the Constitution; point 24). Therefore, the question arises as to whether students should, to fulfil the obligation of primary education in a private school, attend the entire program of primary education or only part of it. The court found that the extended part of the program of a private primary school does not correspond to the program of public primary schools and is not compulsory. This means that the constitutional obligation of primary school education in a private school providing officially recognised programs refers only to the program contents corresponding to the contents of the compulsory work in a program of public primary schools (point 27). Therefore, only that part of the private school program should receive 100% of public funding. The court tried to explain its view with reference to the earlier decision from 2014, stating that it assessed only the constitutionality of Article 86 (in the contested part) concerning the mandatory fulfilment of the constitutional obligation of primary education. It stated that it never held that the extended and compulsory parts of the primary school curriculum form an indivisible whole (point 31). If they did form an indivisible whole, then public funding would have to cover the whole curriculum,

71 | 'Private schools that provide the programmes as specified under paragraph 1 of this Article shall receive for the implementation of the programme 85% of funds allocated by the state or local community to the implementation of the public school programme'.

which the petitioners argued is what the court had asserted in points 25, 26, and 27 of the earlier decision.

In the aftermath of these decisions, the National Assembly amended the Education Act in June 2021.[72] This amendment was preceded by an extensive public debate about necessary changes to the act. The amended Article 86 prescribes that private schools receive 85% of the funds provided by the state or local community for the implementation of the public school program. However, in addition to that 85%, a private school providing officially recognised programs should be funded from the state budget or the local budget for the implementation of the compulsory part of the officially recognised program at a rate of up to 100% of the public school level. Therefore, private schools are underfunded (15%) for morning care, extended stays, and other programs.

The state clearly does not want to fund any part of the curricula that differs from the curricula used in public schools. One could even say that the full funding of private schools is opposed due to the ideological fear of religion because the state would have to fund the religious parts of approved curricula in private schools.

5.2. Elements of religious education in Slovene public schools

Although there is no religious education in Slovenia's public schools, elements of it appear in other subjects. For example, religious facts are part of the history, philosophy, literature, arts, and language curricula.[73]

Slovenian schools teach two courses: Religion and Ethics and Civic Patriotic Education and Ethics. The former is facultative[74] and non-confessional, and a pupil may take it in the last three years of primary school; the latter is compulsory and is offered in the 7th or 8th year of grammar school. Religion and Ethics is also an optional subject in upper secondary education.[75] Marinović Bobinac states that the syllabus for Religion and Ethics was prepared by a team of expert philosophers, sociologists, theologians (both Catholic and Evangelical), and educational experts.[76] However, Ivanc states that neither subject

72 | Zakon o spremembi Zakona o organizaciji in financiranju vzgoje in izobraževanja, Uradni list RS no. 123/21.

73 | Ivanc, 2015, p. 155.

74 | Slovene authors call it a 'compulsory-optional' subject, since the schools are obliged to offer it, and the students are free to choose it. It is an ordinary school subject. Everything concerning this subject (the training of the teachers as well as the preparation of the educational programs and textbooks) is under the competence of the responsible state institutions, as in the case of all other school matters. Neither the Catholic Church, as the largest religious community in Slovenia, nor other religious communities have any exclusive competence over this subject; Smrke, Rakar, 2006, p. 26.

75 | Ivanc, 2015, p. 155.

76 | Marinović Bobinac, 2007, p. 435; the author states that it is taught for three years, in the 7th, 8th, and 9th grades (ages 13 to 15), and the program respects three fundamental principles:
1. religious contents are divided into three units, each of which is internally coherent
2. the approach used for religious issues in every grade is appropriate for the ages and cognitive development of the students
3. the ethical and existential issues to be discussed are chosen according to the needs of the students
The themes (i.e. contents) are chosen according to two criteria:
a) they are relevant for both a holistic and analytic knowledge of religions and are covered in such a way as to connect to the experiences and questions in the students' physical and contemplative world, or are directed to them ('religiological themes');
b) they appear in the students' physical and contemplative world, the elaboration of which requires and displays connections to religions and non-religious worldviews ('life themes'); ibid., p. 436.

was implemented successfully, and some argue that few Slovenian secondary school students receive a systematic religious education.[77]

5.3. Religious education in private schools

Private schools have been allowed in Slovenia since 1991. There are no obstacles to religious education in private schools, as was stressed by the Constitutional Court. Private schools are free to decide whether to introduce religious education.[78] According to Ivanc, only two private primary schools (one established by the Catholic Church and one by a private person) provide denominational religious education. Among Slovenia's upper secondary schools, religious education is offered in only four Catholic schools.[79]

6. Conclusion

It is obvious that Slovenia chose an approach to religious education in public schools (and initially, in 1996, even private schools) that differed from that taken by all other ex-Yugoslav republics. Those republics reintroduced religious (confessional) education in public schools and opted for the cooperation model. By contrast, Slovenia opted for an extreme (or 'ultra strict', as Ivanc calls it) approach to religious education in public schools, introducing a strict separation model of religion–state/school relations. This approach is, I would argue, unusual by European standards, as religious education is offered in almost all European countries.

This education is mostly confessional, with some countries opting for education in religious culture. Slovenia is a member of a relatively small group of countries, along with France (with some exceptions in historical regions) and Albania, which do not offer religious education. As mentioned, Slovenia introduced some elements of religious education through other courses, and Religion and Ethics is offered as an optional course. However, there were (are) problems with that course's implementation, and Ivanc states that few secondary school students receive a systematic religious education. Therefore, it must be concluded that religious education in Slovenia is almost non-existent; Slovenia has always insisted on a strict separation of state and church, especially in the 1990s. However, the situation changed due to the Freedom of Religion Act. Therefore, it may be time to rethink the position of religious education in Slovene public schools. In 1999, Kodelja suggested that some obligatory courses[80] on religion and ethics should be part of

77 | Ivanc, 2015, p. 155; Šverc, 2008, p. 245.
78 | See ibid., p. 145.
79 | Ibid; in Catholic primary schools, Encountering Religion is offered in the first two academic years; in the third year, Religion and Culture is offered; in the fourth year, Religion and Culture is offered again.
80 | As obligatory subjects, Kodelja mentions world religions; Christianity, Islam, and Buddhism; religious culture, rites, symbols, and religious communities; religions and the problems of evil, sin, death and the direction of life; ethical prospects for religions; Christianity and Western civilization; the Bible (Old and New Testaments); Catholicism; Orthodoxy; Protestantism; the Enlightenment; Christianity in Slovenia; religions and the sense of life; and religious freedom and freedom of conscience; Kodelja, 1999, pp. 155-156.

school curricula, as well as some optional courses.[81] It is impossible[82] to introduce pupils to all the required topics through other subjects (e.g. history, arts), and only some pupils choose to take Religion and Ethics in Slovenia. This means that most pupils lack knowledge about, *inter alia*, major world religions, religious cultures, and religious freedom. For this reason, I argue that an obligatory course should be introduced in Slovene public schools. One could, and perhaps should, ask whether today's legal regulation on religious education enables the development of a pluralistic educational system. If there is no exploration of the vast topic of religion (not only confessional religion, but religion as a social construct and part of every society), how is it possible to ensure the existence of a pluralistic educational system in which all are equal and equally respected? The ECHR stated as follows in the Kokkinakis judgement:

[Freedom of religion is] one of the foundations of a democratic society. This freedom, in its religious dimension, is one of the most important elements that create the identity of believers and their conception of life, but it is also a precious tool of atheists, agnostics, sceptics and those who do not have any relation towards faith.

This view was reiterated in the now- famous judgement *Bayatyan v. Armenia* (2011), in which the court stated that 'freedom of religion is one of the foundations of a democratic society. The pluralism indissociable from a democratic society … depends on it'. In addition, in *Manoussakis and Others v. Greece* (1996) and *Metropolitan Church of Bessarabia and Others v. Moldova* (2001), the court stated that freedom of religion is 'necessary to maintain true religious pluralism, which is vital to the survival of a democratic society'. When we accept that religious education (and the right to it) is a part of freedom of religion, we must acknowledge that today's legal regulation on religious education does not enable the development of a pluralistic educational system.

Confessional education may be a step too far for Slovenia, but religious education in the form of courses on religious culture would be a welcome addition to school curricula in Slovenia.

81 | For example, Judaism, Taoism, churches, sects and monastic communities, relations between church and state, religious tolerance; ibid.

82 | Some Slovene authors do not share this opinion and feel that non-confessional teaching about religions is beneficial and is an important part of general education. They feel that there are two ways of teaching about religions in public schools: first, as a part of some other compulsory subject, especially Ethics and Society or other subjects such as History and Literature; and, second, through Religions and Ethics; Smrke, Rakar, 2006, p. 25.

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FREEDOM OF CONSCIENCE AND RELIGION IN THE FAMILY AND CRIMINAL LAW OF THE SLOVAK REPUBLIC

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ABSTRACT

Freedom of conscience and religion is one of the most important areas of legal protection, reflecting a high level of both culture and democratization for contemporary states. This is especially significant for the countries of the former Eastern Bloc, which experienced decades of totalitarianism under socialist regimes. The protection of conscience and religious rights is always reflected in several sources of law, commencing with the constitution, and this is also the case of the Slovak Republic. The constitutional rights in this area were reflected also in other branches of law, such as family law, covering the private integrity of every individual, and criminal law, which deals with the most serious violations of legal norms. This study discusses the elements of state religious law contained in the family and criminal law of the Slovak Republic, starting with the nation's older legal regulations.

KEYWORDS

freedom of conscience and religion
historical background
family law
contracting marriage
protection of right to life before birth
criminal law
crimes related to religious law
sects

1. Introduction

Churches and religious societies (especially the Catholic Church) played one of the most significant roles in the history of Slovakia, especially during times of national revival, when several of those who asserted Slovakian national rights were Catholic or Evangelical priests. This history is reflected in the large number of Slovakians who avow

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religiosity or membership in a church or religious society.[2] Most Slovakians consider a church or religious society as an integral part of their social structure and, at least formally, as an important factor in their identity. It was difficult for them to accept the rise to power of the socialist regime, which regarded churches and religious societies as an ideological enemy, restricted their activities and social influence, placed them under political and economic surveillance, and led to their international isolation.[3] The current status of churches and religious societies in the Slovak Republic was made possible by the events of November 1989, which afforded them unprecedented possibilities and allowed them to continue their traditional role in the formation of the nation. The Slovakian state now fully accepts the churches' social status and cooperates with them according to the principles of partnership collaboration.[4] The status of churches and religious societies in the Slovak Republic is not only fully comparable to that of churches and religious societies in other democratic states but may even be somewhat better. In accordance with contemporary standards, religious features are reflected in several elements of Slovakia's state, family, and criminal law not omitting. Amid the social-political changes of 1989, Slovakia reformed its family law. The principal change was recognizing marriages contracted before clergy and making them equal to so-called 'civil marriages'. Moreover, Slovakia's Criminal Code novelized or added several subject matters that directly or indirectly protect the individual and collective religious freedom.

2. Family Law

As in the rest of Europe, family law was regulated according to the rules of canon law (the law of the Catholic Church) for centuries in the territory that today constitutes Slovakia. This is demonstrated by the sources compiled in the 9th century by Byzantine missionaries Constantine († 869) and Methodius († 885), who not only spread and strengthened the Catholic faith in Great Moravia but were also one of the first pioneers in matters of law. Constantine's compilation entitled 'Zákon súdnyj ľjudem' (Law for Judging Laymen) set forth rules for family and marriage law, alongside rules for property, criminal, and procedural law.[5] In a country full of pagan customs, including polygamy, fostering the purity of matrimonial monogamy was an important task for missionaries serving in Great Moravia. These social relations were regulated in a similar way in Methodius' *Nomocanon*, which also contained rules for family and marriage law, including a criminal sanction against abortion. From the times of High Middle Ages at latest, the Catholic courts dominated in the area of marriage law and this status persisted until the Protestant Reformation, when Protestants managed to acquire various civil liberties in several countries, including those related to matters of marriage. However, the territory that now comprises Slovakia continued to be

2 | According to the last population and housing census (2011), 76% of the population indicated that they followed a religion (https://census2011.statistics.sk/tabulky.html). The author could not use the results of the 2021 census of population and housing, as it was in progress during the writing of this article.
3 | Cf. Grešková, 2008, p. 10.
4 | Cf. Čikeš, 2010, pp. 8, 39.
5 | Cf. Valeš, 2008, p. 65.

governed by the authority of Catholic courts in this area until the religious reforms of Holy Roman Emperor Joseph II (1765/1780–1790). In 1781, the Patent of Toleration (the provisions of which extended even to Hungary) removed the matrimonial affairs of Protestants from the authority of the Catholic Church.[6] This trend continued into 1868, when the Hungarian Parliament confined the competence of Catholic courts to cases involving Catholics; the child of a mixed marriage had to follow the religion professed by the parent of the child's gender.[7] Another intervention in this area was the 1894 mandating of civil marriage and its state registration (with effect from October 1, 1895), after which the judgements of Church tribunals in marriage cases were no longer accepted by state bodies.[8]

The civil status of church marriage was recognized by the First Czechoslovak Republic (1918–1938), despite the frequently hostile attitude to Catholicism taken by Czech state representatives, though the republic considered married couples divorceable.[9] This allowed an alternative form of marriage contract. In Hungary, civil marriage had been obligatory, and the republic's law was favourable to the Catholic doctrine and canon law. After the socialist regime took power in 1948, its ideas were transplanted into family law. Law No. 265/1949 Sb. made civil marriage obligatory. This obligatory civil marriage contract had to precede marriage before the clergy of a recognized church or religious society. Any clergy that violated this regulation, even through negligence, faced punishment under the provisions of the Criminal Code of 1950, including the possibility of imprisonment for up to one year.[10] Marriage ceremonies could take place only before the local national committee. A related rule, Law No. 268/1949 Sb., removed from churches and religious societies authority over records of births, marriages, and deaths and transferred it to the state.[11] This trend continued in the Law on Family (1963), which similarly prohibited religious wedding ceremonies before a civil marriage had been

6 | Cf. Kumor, Dlugoš, 2003, p. 112–113. Until then, Protestants could, following the resolutions of the Congress of Sopron of 1681, elect their own superintendents, but their baptisms were henceforth subjected to the supervision of Catholics, and their marriage cases were supervised by Catholic tribunals. Mixed marriages could be contracted only before Catholic clergy, and children from these marriages had to be raised in the Catholic faith; cf. Tretera, 2002, pp. 20, 25. On the other hand, it is necessary to admit that the authority of Catholic courts over marriage matters had been restricted from the time of the Empress Maria Theresa (1740/1765–1780). Her son Joseph II indeed retained the Church form of contracting marriage, but marriage litigation was removed from the competence of Church courts and assigned to state courts. The same attitude was seen in the Austrian 'Allgemeines bürgerliches Gesetzbuch' (ABGB) of 1811, which received from canon law several institutions and regulations, such as marriage impediments and separation from table and bed (*separatio a mensa et thoro*), which were eventually extended to non-Catholics; cf. Malý, 2001, p. 230.

7 | The Austrian Constitution of 1867, directly opposing the provisions of the Concordat of 1855, accepted the exclusive competence of state courts in marriage cases and declared that children from mixed marriages should follow the confession of the parent with whom they shared a gender. The concordat recognized the sovereignty of the Catholic Church over the marriages of Catholics; cf. Samsour, 1907, p. 1092.

8 | Cf. Kumor, 2003, p. 291.

9 | Cf. zákon č. 320/1919 Sb. z. a n., vykonávacie nariadenie č. 362/1919 Sb. z. a n. and zákon č. 113/1924 Sb. z. a n.

10 | Cf. § 207 zákona č. 86/1950 Sb., Trestný zákon.

11 | Cf. Valeš, 2008, p. 146.

contracted.[12] State interference in family matters deepened during the so-called 'normalization' period (1968–1989), when liturgical ceremonies were frequently replaced by secular substitutes.[13]

After the fall of the socialist regime, family law, including that governing marriage contracts, was subsumed under the traditional scope of *res mixtae* ('mixed matters', affecting both churches/religious societies and the state) following international standards.[14] This is not surprising, since the communist-era Law on Family accepted the family as the fundamental cell of society; this was kept in the new law.[15] After the fall of the socialist regime, the Law on Family was amended by No. 234/1992 Sb., which changed not only the Law on Family but also Law No. 97/1963 Sb. on International Private and Procedural Law. This law restored marriage contract alternatives to Czechoslovakia and gave civil effect to marriages contracted before the clergy of registered churches and religious societies.[16] Religious and secular forms of marriage contract were thereby equalized, and it was no longer necessary to have a civil ceremony after being married in a religious ceremony.[17] According to § 3 of this law, marriage was contracted through the consenting proclamation of a man and woman before a competent state body or registered church or religious society.[18] This amendatory act allowed the contracting of a church marriage at a church or other appropriate place specified by the rules of the given church or religious society.[19] The application to contract a marriage had to made in writing on specified stationery at a registry office or an office specified by the given church or religious society. A report on the contracted church marriage had to be sent to the registry office by a competent body of the church or religious society within three days.[20] This office then recorded the contracted marriage into the book of marriages and issued a certificate of marriage to the spouses.[21]

12 | The clergymen were threatened with imprisonment for up to one year in case of violation; cf. § 211 zákona č. 140/1961 Sb., Trestný zákon. The law prohibited the church form of contracting marriage even in a foreign state that recognized it; cf. § 20 zákona č. 97/1963 Sb. o mezinárodnom práve súkromnom a procesnom. Although the original conception of this family law assumed a parental duty to raise children in a so-called 'scientific' world-view (i.e. atheism), these endeavours were not successful thanks to the opposition of the religious representatives. The law proclaimed, however, that the morality of the socialist society had to be the basis of all relations in a family; cf. úvod and § 31 zákona č. 94/1963 Sb. o rodine; see also Tretera, 2002, p. 12.

13 | Cf. Madleňáková, 2004, p. 63.

14 | Cf. Čeplíková, 2011, p. 137.

15 | Cf. čl. 2 zákona č. 36/2005 Z. z. o rodine.

16 | Cf. Hrdina, 1996, pp. 417–424.

17 | Cf. Fischerová, 1992, p. 25.

18 | The registration was regulated by Law No. 308/1991 Zb. on Freedom of Religious Belief and the Status of Churches and Religious Societies; cf. §§ 10–21 zákona č. 308/1991 Zb. o slobode náboženskej viery a postavení cirkví a náboženských spoločností.

19 | Of course, all the obligatory legal conditions had to be met, such as legal capacity, age as provided by law (18 years or, exceptionally, 16 years), single status, proven dissolution of preceding marriage, and absence of blood relations of specified degree. Those willing to enter a marriage had to submit the proper papers and declare their lack of knowledge of any circumstances that would preclude them from contracting marriage and knowledge of their health state; cf. § 4b zákona č. 234/1992 Sb.

20 | Cf. § 27, ods. 6 zákona č. 154/1994 Z. z. o matrikách.

21 | See also Čeplíková, 2011, p. 138.

This status was confirmed by the still-valid Law No. 36/2005 Z. z. on Family, according to which the state broadly protects marriage as a unique bond between man and woman.[22] This law also considers that a marriage is contracted through the consenting proclamation of a man and woman before the registry office established in the district of residence of one of the persons entering the marriage (in a so-called 'civil marriage')[23] or before the body of a registered church or religious society (in a so-called 'church marriage').[24] A marriage is thus contracted by a couple willing to enter the marriage before someone performing the duties of the clergy of a registered church or religious society.[25] The clergy's competence in assisting at the contracting of a marriage has an official and public-law character, since the public power to perform this act was entrusted to them by the state. A marriage is not valid if such a proclamation is made before a non-registered church or religious society or before someone who is not authorized to perform the duties of the clergy of a registered church or religious society.[26] A church marriage is contracted at a church or other appropriate place specified by the rules of the given church or religious society for religious ceremonies and acts. The equality of status and effects between marriages contracted before the body of a registered church or religious society and civil marriages was later confirmed by the 2001 Basic Treaty between the Slovak Republic and the Holy See, as well as the 2002 Agreement between the Slovak Republic and registered churches and religious societies.[27]

Of course, church marriages have to meet all obligatory conditions specified by law. Those seeking to enter a marriage file the required papers such as their birth certificate,

22 | Cf. čl. 1 zákona č. 36/2005 Z. z. o rodine and čl. 41, ods. 1 ústavného zákona č. 460/1992 Zb., Ústava Slovenskej republiky. A similar attitude is seen in the regulation of marriage contracts of Slovak Republic citizens living abroad. In 1992, a change with retrospective force and retroactive legal effects was put into practice whereby church marriages contracted by Czechoslovak citizens abroad from January 1, 1950 (day of establishment of obligatory civil marriage) to June 30, 1992 (the day facultative marriage was introduced), valid according to the law of a given state, were considered to be valid even by the law of the Slovak Republic (from July 1, 1992). Until then, civil marriage was required even if a marriage had been contracted in a state recognizing the church marriages. The form of marriage contract has since then been regulated by the law of the place where the marriage was contracted. This means that citizens of the Slovak Republic have to respect and observe the specified form of marriage contract in a given state; cf. čl. § 20 zákona č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom and § 112 zákona č. 36/2005 Z. z. o rodine.

23 | Cf. § 4 zákona č. 36/2005 Z. z. o rodine.

24 | Cf. § 5 zákona č. 36/2005 Z. z. o rodine.

25 | I suppose it is more appropriate to use the canonistic term *nupturiens*, meaning 'person contracting marriage'. Even this term could be improved by the word *nupturus*, meaning 'willing to enter the marriage', since its origin depends on the objective circumstances by which marriage comes into existence or not. However, the Law on Family, as well as the Law on Register Offices No. 154/1994 Z. z. and its Executing Edict No. 302/1994 Z. z. use the terms 'fiancé/fiancée' or 'fiancées', even though this institution is not specified in these sources. All the same, from the canon law point of view, betrothal has no impact on the origin of marriage and is thus not obligatory before the marriage; cf. §§ 1–2, 4–8 and 105 zákona č. 36/2005 Z. z. o rodine; §§ 27 and 30 zákona č. 154/1994 Z. z. o matrikách and vyhláška č. 302/1994 Z. z. I had dealt with these matters with my colleague; cf. Laclavíková, Vladár, 2017, p. 215.

26 | Cf. § 17, písm. d) zákona č. 36/2005 Z. z. o rodine.

27 | Cf. čl. 10, ods. 1 Základnej zmluvy medzi Slovenskou republikou a Svätou Stolicou vyhlásenej pod číslom 326/2001 Z. z. ako oznámenie Ministerstva zahraničných vecí and čl. 10, ods. 1 Dohody medzi Slovenskou republikou a registrovanými cirkvami a náboženskými spoločnosťami publikovanej pod č. 250/2002 Z. z. See also Čeplíková, 2011, p. 196.

certificate of residence, certificate of citizenship, death certificate, or other document proving the termination of a prior marriage to the registry office.[28] All necessary data are then sent to the locally competent church body. After the marriage is contracted, the assisting church or religious society must deliver a report on the contract to the competent registry office within three days. However, the marriage has legal effect as soon as it is contracted before the officiating clergy. Regarding the termination of marriage, state law accepts the wish to divorce as a valid reason for dissolution under the authority of the state court. The canon law-based decisions of competent Catholic Church authorities have no secular law effects. This situation is covered by the Basic Treaty between the Slovak Republic and the Holy See, according to which canon law decisions on the nullity or dissolution of marriage can be sent by the request of one of the spouses to the Slovak Republic, which will then act in accordance with state law. The state has not attempted to bring these procedures closer together through law.[29] Majority of other registered churches and religious societies in Slovakia accept state competence in matrimonial matters and divorce cases.[30]

Regarding family law and freedom of conscience and religion, it is necessary to mention the protection of life before birth – namely, the issue of abortion. The prohibition against abortion was abrogated amid the overall 20th-century trend toward secularisation, which also affected Slovakia. This prohibition had stood for centuries, and was included not only in Hungarian law but also in the first socialist Criminal Code. Abortions had been permitted only when the life of the mother was threatened or when it was suspected that the foetus had a genetic disorder. Abortion was officially allowed in 1957, and the law became increasingly liberal afterward.[31] Nevertheless, only in 1986 did Slovakian law accept that parents' right to determine and regulate the number of their children is an inseparable element of modern civilization. The state retained this view after the fall of the socialist regime.[32] However, it has been pointed out often that allowing abortions is in direct conflict with Article 15, Section 1 of the Constitution of the Slovak Republic, which guarantees the protection of life before birth.[33] In 2001, a group of representatives of the 'Kresťanské demokratické hnutie' (Christian Democratic Movement) challenged the constitutionality of Slovakia's abortion law by arguing that it was immoderate in allowing for motiveless abortion. This argument was rejected by the Constitutional Court of the Slovak Republic in 2007. In its ruling, the court agreed with the findings of the European Court for Human Rights and declared that life was sufficiently protected under the law despite the fact that a woman could obtain a legal abortion up to the twelfth week of her pregnancy. Thus, Law No. 73/1986 Zb. is considered to be in accordance with the Constitution of the

28 | These papers must be submitted only if their information is not contained in the identity card; cf. §§ 27 and 28 zákona č. 154/1994 Z. z. o matrikách.

29 | Cf. čl. 10, ods. 2 Základnej zmluvy medzi Slovenskou republikou a Svätou Stolicou vyhlásenej pod číslom 326/2001 Z. z. ako oznámenie Ministerstva zahraničných vecí.

30 | The treaty requests that the church dissolution of marriage conforms to Slovak law; cf. čl. 10, ods. 2 Dohody medzi Slovenskou republikou a registrovanými cirkvami a náboženskými spoločnosťami publikovanej pod č. 250/2002 Z. z. Elements of the Law on Family may be seen in Article 4 and § 30. Section 1 passed in accordance with the international duties of the Slovak Republic, according to which parents have the right to raise their children in ways consistent with their religious or philosophical convictions; cf. čl. 4 and § 30, ods. 1 zákona č. 36/2005 Z. z. o rodine.

31 | Cf. § 1 zákona č. 68/1957 Zb. o umelom prerušení tehotenstva.

32 | Cf. § 1 zákona č. 73/1986 Zb. o umelom prerušení tehotenstva.

33 | Cf. čl. 15, ods. 1 ústavného zákona č. 460/1992 Zb., Ústava Slovenskej republiky.

Slovak Republic.[34] This matter came up in the National Council of the Slovak Republic in 2019, when several proposals were put forward to make the law more restrictive. These initiatives were also not successful.[35]

3. Criminal Law

Canon law was also reflected in the criminal law for centuries. For example, Great Moravia (after the fashion of the Frankish Empire) before the arrival of the Byzantine mission enforced a public law conception of crime whereby it was perceived as not only a violation of secular law and a menace to society but also as an offence against God.[36] Thus, every criminal law violation was met not only by a secular punishment but also by Church sanction in the form of public penance (epitímia). Missionaries ensured that established secular penalties were softened and often replaced by Church sanctions.[37] The sanctions of the 'Zákon súdnyj ľjudem' were more severe than Byzantine models; however, most of its criminal sanctions containing capital and mutilating punishments were replaced by Church penance. Criminal law provisions included the *Nomocanon* and set out penance sanctions for murder, abortion, theft, simony, and nepotism.[38] A similar attitude was shown by the first Hungarian king, Stephen I (997/1000–1038), who published his own legal code after the fashion of Frankish law, which was markedly affected by the Christian spirit. This was evident in its criminal law provisions, which regarded crime not only as a violation of secular law but as a sin. Church sanctions were often added to secular punishments. Under King Stephen I, the public law conception of crime was reasserted in Hungary, analogous to the Frankish Empire of the ninth century. Corporal punishments were commonly replaced by Church sanctions in the form of public penance.[39]

34 | Cf. http://www.concourt.sk/sk/Tlacove_spravy/2007/TS_20071204-1.pdf.
35 | Cf. https://spravy.pravda.sk/domace/clanok/535067-parlament-neschvalil-navrh-sns-na-stazenie-pristupu-k-interrupciam/.
36 | Public penance was imposed by Church courts from the 2nd century; cf. Διδαχὴ 15,3. This institution was applied for offences against faith, murder, fornication, and other serious delinquencies considered to be crimes under Church law. Public penance also afforded public sinners conciliation with the Church and readmission to Church society (*communio*). The believer had to first confess his or her error before the whole community and repent for a sufficient length of time, fasting and praying, sometimes for life, encouraged by the prayers of the community to reconcile with God; cf. Dolinský, 1996, p. 79. Its rigidity depended not only on the gravity of the delinquency, but also on the status of the member of the Church community (clergymen were punished more rigidly). Being received back into the community of believers required completing the penance; the only exception was made for the seriously ill; cf. Markschies, 2005, p. 172.
37 | Of course, all the rules were submitted after the Byzantine fashion for the sanctioning to the Great-Moravian sovereign; cf. Pokorný, 1987, p. 169. This may be illustrated by their translation of the well-known Penitential of Merseburg, made necessary because their disciples did not read Latin. This was despite the prohibition against translating the penitentials into the vernacular to prevent them from getting into the hands of laymen; cf. Responsa Nicolai ad consulta Bulgarorum 75. This was not a verbatim translation, since the translator adapted the content and the penalties to the needs of Great Moravia, and even used analogical Eastern rules; cf. Kizlink, 1969, p. 453n.
38 | Cf. Vašica, 1996, p. 74.
39 | Cf. Kumor, 2001, pp. 111, 152.

As in family law, Church competences were restrained in the area of criminal law during the Enlightenment. For example, Empress Maria Theresa restricted the court autonomy of the Catholic Church, even in criminal cases involving clergymen; this was later confirmed by legislation under Emperor Joseph II.[40] *Privilegium fori*, according to which criminal cases involving clergymen were restricted to Church courts, was definitively abrogated in the second half of the 19th century, during the so-called 'Kulturkampf' (1871–1886), which influenced both Hungary and Slovakia.[41] The Kulturkampf may be described as an ideological controversy regarding the cultural, spiritual, political, and religious relations between the Catholic Church and the state. Hungarian criminal law remained in force in Slovakia after the formation of the First Czechoslovak Republic, including Article No. 5/1878 (Criminal Law on Crimes and Offences) and Law No. 40/1879 (Criminal Law on Offences). Thus, Slovakia was not touched by several of the Kulturkampf provisions unleashed by the Czech political representatives in Czech lands and Moravia, such as amendment No. 111/1919 Sb. z. a n., which supplemented the provision of § 303 of the Austrian Criminal Law of 1852 (the so-called 'Kanzelparagraph' ['Pulpit Law']). This law was similar to the mentioned German one and provided from one to six years of imprisonment in Czech territories, but not in Slovakia or Carpathian Ruthenia.[42] While these provisions were vulnerable to abuse, the socialist regime was paradoxically not content with them and thus abrogated them by enacting the derogatory clause of Law No. 231/1948 Sb. z. a n. for the Protection of People's Democratic Order.

Mentioned law allowed the state to prosecute all persons deemed disloyal to the regime and impose long-time imprisonment, property seizure, and the death penalty. In the two years of its existence (1948–1950), hundreds of citizens were convicted, including many believers, as well as high-level church officials.[43] Several prosecutions were conducted against the representatives of religious orders and diocesan clergymen. The provisions of this law remained in effect even after its derogation, since they were assumed into the new Criminal Code of 1950, which criminalised the obstruction of supervision over churches and religious societies.[44] This law also declared that criminal cases should be tried in such a way as to 'educate citizens to be vigilant towards enemies of working people and other disturbers of their communist enthusiasm and to the performance of

40 | Cf. Tretera, 2002, p. 20.

41 | This term was used for the first time in 1873 by Professor Rudolf Ludwig Karl Virchow (†1902) to describe the liberation of culture from the influence of the Church while discussing Prussia's so-called 'May laws' (1873); see also Weir, 2014.

42 | This sanction could be applied to the clergy of any confession who, during divine worship (e.g. teaching, procession, pilgrimage) or their preaching dealt with any matter of state or public life, criticized state laws, preferred any political party, or intervened in an election. The literature agrees that this law was then not used against churches and religious societies in Czechoslovakia; cf. Valeš, 2008, p. 128–129.

43 | Illicit religious activities consisted mostly of abusing spiritual offices or similar offences and incitement to violent or other hostile acts against groups of people based on their nationality, race, religious beliefs or irreligious state, or status as followers of the republic. This was typically used against clergy, for whom more severe penal sanctions were applied; the vague provisions allowed judicial arbitrariness, and crimes were alleged against the state, its external and internal security, and foreign relations; cf. §§ 26 and 28 zákona č. 86/1950 Sb., Trestný zákon; cf. Tretera, 2002, p. 44.

44 | Cf. §§ 173–174 zákona č. 86/1950 Sb., Trestný zákon. None of the religious orders could dispose of their own novices, while violating this prohibition was considered a crime (that of obstructing the supervision over the churches and religious societies); cf. § 178 zákona č. 86/1950 Sb., Trestný zákon. See also Fiala, Hanuš, 2001, p. 103.

civic duties'.[45] The strict measures against churches and religious societies also included Law No. 218/1949 Sb. on the Economic Assurance of Churches and Religious Societies, § 7 of which stipulated that clergyman may hold office only after obtaining consent from the Civil Office for Church Matters.[46] Clergymen were often punished for violating the law on obligatory civil marriage (i.e. for performing marriage ceremonies with persons who had not contracted a civil marriage).[47] The state's totalitarian attitude was manifested in its creation of forced labour camps designed for the 're-education' of ideological opponents.[48] Objective provisions limiting individual and collective religious freedom were abrogated immediately after the fall of the socialist regime.[49] Since then, legislators have carefully considered the interests and needs of believers and churches/religious societies.[50]

From the *ius vigens* point of view, the current Criminal Code of the Slovak Republic contains only one provision concerning religious freedom, specifically the subject matter of the 'Restriction of the Freedom of Religion'.[51] A special category of crime covers offences motivated by a negative attitude towards religious faith. These crimes (e.g. blackmail, murder, or bodily harm) are punished more severely if they are committed to incite violence or hatred against a group of people due to their religious faith.[52] The crime of restricting freedom of religion is paradoxically not new.[53] It falls under the category of 'crimes against freedom', and its class object is conceived in the widest possible sense. The law protects the right to religious faith as an absolute subjective right not subject to any legal restrictions, the right to be irreligious,[54] the right to manifest religious faith externally and publicly, the right to change religious faith, and the right to choose a clerical or religious life. Criminal acts include forcing another to participate in a religious act,[55] restraining another from participating in a religious act, and restraining another from

45 | Cf. Valeš, 2008, p. 143.

46 | In the hands of the socialist regime, this was the perfect tool to use against clergy. The required conditions for its acquisition were citizenship, reliability, probity, and a vow of fidelity to the republic; see also Loužek, 2004, p. 40.

47 | Cf. § 207 zákona č. 86/1950 Sb., Trestný zákon; § 211 zákona č. 140/1961 Sb., Trestný zákon; § 7 zákona č. 265/1949 Sb. o rodinnom práve; § 10 zákona č. 94/1963 Sb. o rodine and § 20 zákona č. 97/1963 Sb. o medzinárodnom práve súkromnom a procesnom.

48 | Cf. zákon č. 247/1948 Sb. o táboroch nútenej práce. A large number of so-called 'politically unreliable' persons was also forced to work from 1950 to 1954 in so-called 'technical auxiliary battalions' (PTP); see also Balík, Hanuš, 2007, p. 103n.

49 | Cf. zákon č. 159/1989 Sb; see also Chenaux, 2012, p. 156n.

50 | Cf. §§ 101, 178 and 207 zákona č. 140/1961 Sb., Trestný zákon a zákon č. 159/1989 Sb.

51 | Cf. § 193 zákona č. 300/2005 Z. z., Trestný zákon.

52 | Cf. §§ 140, 189, ods. 2, písm. c); 145, ods. 1, písm. d) and 155, ods. 2, písm. c) zákona č. 300/2005 Z. z., Trestný zákon.

53 | This crime could be found in the Criminal Code No. 140/1961 Sb., although the ability to claim for the protection of religion was restricted by the provisions of other laws, especially Law No. 218/1949 Sb. on the Economic Assurance of Churches and Religious Societies by the State and the Constitution, since its Article 24, Section 3 required education to be founded on a scientific worldview and close connection with the lives and work of the people. Moreover, § 101 of the Criminal Code sanctioned clergy abuse of their religious function; see also Casaroli, 2001, p. 209n.

54 | Cf. čl. 24, ods. 1 ústavného zákona č. 460/1992 Zb., Ústava Slovenskej republiky.

55 | The term 'religious act' means any act or ceremony relating to the profession of faith of any church or religious society, such as divine worship, the administering of sacraments, or the teaching of religion. 'Coercing' means using corporeal or mental violence, threats of violence or of other heavy loss; cf. Čentéš, 2013, p. 351.

some other exercise of freedom of religion.[56] A qualified subject matter requires special gravity; a commission of the crime on a protected person, acting with special motive, or acting in public.[57] A crime that falls under fundamental subject matter is punishable by imprisonment for up to two years; a crime that falls under qualified subject matter is punishable by imprisonment for up to six years.[58]

Religious freedom is also protected by sanctioning crimes motivated by religious hatred or intolerance. This includes genocide, inhumanity and crimes of extremism consisting in foundation, support or propagation of a movement that causes the suppression of fundamental rights and freedoms or demonstration of sympathy with it; the vituperation of a nation, race or conviction; and the incitement to national, race, and ethnic hatred or apartheid.[59] These laws are meant to foster the peaceful existence of religious communities and their members, as well as their biological reproduction, identities, and lives.[60] The seriousness of the crimes is reflected in the strong penal sanctions against them. Special provisions include the disculpating rules of § 340 section 3 of the Criminal Code (misprision) and § 341 section 4 of the Criminal Code (non-foiling of crime).[61] Special subjects are under their authority exempt from criminal responsibility. For example, the clergy of registered churches and religious societies are exempt when meeting the provisions of the law would lead to the violation of the seal of confession.[62] Here, the state recognizes the duty of silence on the part of those delegated to perform spiritual activities by churches and religious societies in accordance with their regulations.[63] According to § 340 section 3 of the Criminal Code, someone who does not inform competent bodies of a crime punishable by a penal sanction of a minimum of 10 years or a crime of corruption is not criminally liable if it would lead to a violation of the seal of confession or compromise the information entrusted to the person orally or in writing under the understanding that the person was providing pastoral care. Analogously, a person is not culpable of the non-foiling of crime under § 341 section 4 if meeting this duty would violate the seal of confession. The Criminal Code also protects the right of a witness to refuse to testify if

56 | Under 'other obstruction', we understand a violation that leads to the destruction of items used in religious ceremonies; cf. Čentéš, 2018, p. 391.

57 | A 'special motive' is an intention to incite violence or hatred against an individual or group of people for their religious faith; cf. § 193, ods. 2 zákona č. 300/2005 Z. z., Trestný zákon.

58 | Cf. § 193 zákona č. 300/2005 Z. z., Trestný zákon.

59 | In criminal law, 'religious faith' means an active or passive relation to the given religion as a general theory, as well as to the worldview presented by any church or religious society; see also Čentéš, 2020, pp. 908–911, 941–945, 953–963.

60 | Cf. §§ 130, 140a, 418, 421–424, 424a and 425 zákona č. 300/2005 Z. z., Trestný zákon.

61 | See also Čeplíková, 2011, pp. 170–171.

62 | Cf. čl. 8 Základnej zmluvy medzi Slovenskou republikou a Svätou Stolicou vyhlásenej pod číslom 326/2001 Z. z. ako oznámenie Ministerstva zahraničných vecí and čl. 8 Dohody medzi Slovenskou republikou a registrovanými cirkvami a náboženskými spoločnosťami publikovanej pod č. 250/2002 Z. z. This may be explained by the fact that whoever receives information from a confessing person or some other person making a legitimate disclosure has a right not to share it with the state, even when there is a legal duty to do so. Slovak laws also guarantee the inviolability of secret information orally or in written form entrusted to a person carrying out pastoral care; cf. Šmid, Vasiľ, 2001, pp. 460–461. Not surprisingly, the socialist regime did not accept the right of clergy to refuse to testify on matters protected by confessional secrets. In several cases, they even tried to pierce into this intimate sphere and utilize such information against political opponents; cf. Hrdina, 2004, pp. 166–167, 223n.

63 | Cf. čl. 24, ods. 1 ústavného zákona č. 460/1992 Zb., Ústava Slovenskej republiky.

doing so would violate the seal of confession or compromise the information entrusted to the person orally or in writing under the understanding that the person was providing pastoral care.[64]

In a broader context, there are state religion laws regulating the competences of registered churches and religious societies in the area of penitentiary care. According to § 4 of the Code of Criminal Procedure, bodies acting in criminal proceedings may cooperate to produce an educational effect during a criminal procedure or prevent criminal activities; the scope of this law includes special-interest associations, such as registered churches and religious societies.[65] This is reflected in agreements with churches and religious societies to provide spiritual and pastoral care to prisoners. Such organisations have the right to access places of detention and imprisonment,[66] and convicted persons have the right to possess spiritual and religious literature.[67] Slovak law concerning prisoners in collusive detention is paradoxically more severe, even though such prisoners should be considered innocent according to the principle of the presumption of innocence. An accused in collusive detention may be provided with pastoral care only with the consent of a competent body acting in criminal proceedings or a court, or if spiritual or pastoral care is not being provided by penitentiary clergy that keeps the individual register about it.[68] The activities of churches and religious societies in these institutions most frequently take the form of worship, confessions, conversations, pastoral visits connected with spiritual care, spiritual services, providing and explaining religious literature, offering lectures or concerts, guiding study groups, and assisting in the resocialization of prisoners to prepare them for life after release.[69] Whereas clergy have to respect the rules regulating the execution of punishment and the constitutional order of the institution, its representatives are obliged to provide clergy with a suitable space for their activities.[70]

64 | Cf. § 130, ods. 2 zákona č. 301/2005 Z. z., Trestný poriadok. An analogous regulation granting the right to refuse to provide information to Slovak Republic police is intended for those for whom this would violate confessional secrets or confidential information entrusted to them as people carrying out pastoral care; cf. § 17, ods. 4 zákona č. 171/1993 Z. z. o Policajnom zbore Slovenskej republiky.
65 | These may, for example, offer a guarantee for the correction of an accused person; a guarantee to complete the correction of the person and ask for his or her parole; or a conditional suspension of the punishment; eventually, they will propose that the detention be replaced by their guarantee and ask for a petition of pardon; cf. Čeplíková, 2008, p. 23; Čentéš, 2019, p. 16.
66 | After all, this opportunity assumes the fundamental regulation of state religious law, which is Law No. 308/1991 Zb. on Freedom of Religious Belief and the Status of Churches and Religious Societies; cf. § 9 zákona č. 308/1991 Zb. o slobode náboženskej viery a postavení cirkví a náboženských spoločností. Their participation in the correction of convicted persons is regulated in more detail in other regulations; cf. § 68 vyhlášky č. 368/2008 Z. z., Poriadok výkonu trestu and § 44 zákona č. 221/2006 Z. z. o výkone väzby.
67 | Cf. Čeplíková, 2011, p. 173.
68 | Cf. čl. 7 Zmluvy medzi Slovenskou republikou a Svätou stolicou o duchovnej službe v ozbrojených silách a zboroch publikovaná pod č. 648/2002 Z. z. and čl. 8 Dohody medzi Slovenskou republikou a registrovanými cirkvami a náboženskými spoločnosťami o výkone pastoračnej služby ich veriacim v ozbrojených silách a ozbrojených zboroch Slovenskej republiky publikovaná pod č. 270/2005 Z. z.
69 | Cf. § 17 vyhlášky č. 368/2008 Z. z., Poriadok výkonu trestu and § 44 zákona č. 221/2006 Z. z. o výkone väzby.
70 | According to canon law, Catholics in detention or imprisonment in Slovakia fall under the jurisdiction of the armed forces of the Slovak Republic. Regular spiritual care is provided to them by military chaplains; cf. čl. 1–3 Zmluvy medzi Slovenskou republikou a Svätou stolicou o duchovnej službe v ozbrojených silách a zboroch publikovanej pod č. 648/2002 Z.z. ako oznámenie ministerstva zahraničných vecí Slovenskej republiky.

Elements of state religious law, such as article 12 section 2 of the Constitution of the Slovak Republic, are to be found in the Criminal Code's protection of foreign perpetrators of criminal acts; banishment abroad is not permitted if this would endanger the offender's freedom or life, or if it is based on religious membership.[71] Procedurally, anyone facing banishment abroad can present evidence of potential persecution because of their religion.[72] The question of sects is connected to both the state religious law and criminal law. Although Slovak law does not recognize the term 'sect', state bodies use either the sociological definition applied by the Ministry of Culture or the definition elaborated by the Department of Home Affairs of the Slovak Republic,[73] which describes a sect as a destructive religious group based on fanaticism produced by a deceptive founder that hinders moral development (particularly that of youth), violates law and order, or with their ideology and opinions endangers life, health, or property and violates public statutes. This crime can be committed only by a natural person, not a corporate entity, and thus may not be committed directly by a sect or religious society. The fact that this crime was committed by the member of a sect would thus have only informational value for the internal needs of Slovakian police monitoring their activities in order to assess their negative impacts on members and on society as a whole.[74]

4. Conclusion

Churches and religious societies traditionally perform important social tasks that manifest also in family and criminal law. The state accepts religion's role in strengthening the family, seeing it as the fundamental cell of society.[75] Most churches and religious societies in Slovakia follow the same goal, following, for example, the Biblical principle about the indissolubility of marriage, which produces families. In Europe, the obligatory civil form of the marriage contract was retained only by countries in the Napoleonic-Bismarck tradition, to which Slovakia does not belong. Slovakia's high degree of religiosity and longstanding excellent experiences with churches and religious societies, which exclude any historical anticlericalism, suggest that alternative forms of the marriage contract will be preserved.[76] A marriage thus may be contracted before the representative of the state or that of a registered church or religious society; this may be considered one of the most fundamental signs of Slovakia's full respect for freedom of conscience and religion. References of state law to the law of individual churches and religious societies may be perceived as a demonstration of respect for their right to administer their own matters freely and independently.[77] The ideal *de lege ferenda* proposal improving state

71 | Cf. § 65, ods. 2, písm. e) and f) zákona č. 300/2005 Z. z., Trestný zákon.
72 | Cf. §§ 501 and 510, písm. b) zákona č. 301/2005 Z. z., Trestný poriadok; see also Čentéš, 2019, pp. 939, 950.
73 | The Department of Home Affairs monitors extremist groups, and sects are considered religiously oriented extremists; see also Nemec, 1997, p. 21; Čikeš, 2010, p. 12–13.
74 | Cf. Nariadenie Ministerstva vnútra SR č. 45/2004 o postupe v oblasti boja s extrémizmom a o zriadení monitorovacieho strediska rasizmu a xenofóbie.
75 | Cf. čl. 2 zákona č. 36/2005 Z. z. o rodine.
76 | Cf. Tretera, 2002, pp. 16, 146–147.
77 | Cf. čl. 16, ods. 2 ústavného zákona č. 23/1991 Zb., ktorým sa uvádza Listina základných práv a slobôd.

religious law could consist in a full and automatic acceptance of the judgments on nullity of marriage handed down by Catholic courts and of judgments on the dissolution or separation of marriage given by Church authorities.[78] The decisions of Church courts are more important to believers than are the decisions of secular courts. Moreover, parties who apply to a Church court for nullity are not interested in validating their marriage using the *convalidatio simplex* or *sanatio in radice*.[79] It is thus redundant to force believers to undergo the same procedure before the state court, which evokes the socialist era, when a church marriage could be conducted only after the marriage had been contracted before a state body. Concerning criminal law, its substantial law portion contains rules protecting the interests of individuals, churches, and religious societies (i.e. personal and collective religious freedom). The provisions of criminal procedural law help churches and religious societies perform the important task of taking care of prisoners, while protecting the confidentiality rights of those who provide spiritual care.

78 | Cf. čl. 10, ods. 2 Základnej zmluvy medzi Slovenskou republikou a Svätou Stolicou vyhlásenej pod číslom 326/2001 Z. z. ako oznámenie Ministerstva zahraničných vecí.
79 | Cf. cann. 1156n and 1161n CIC 1983.

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CRIMINAL LAW ASPECTS OF COMBATING FAKE NEWS IN POLAND

Marcin WIELEC[1]

ABSTRACT

This scientific paper analyzes legal criminal protection against fake news in Poland. First, it presents introductory comments on issues related to the main research area. The general characteristics of substantive criminal law in Poland are also presented. The presentation of the characteristics of formal criminal law is that procedural law or criminal procedures will also have a similar character. The next piece of the analytical puzzle is the characteristic of fake news. All these parts will give rise to the analysis of fake news and criminal law in Poland. This refers to the correlation between these designations. Following the above discussion, draft legislation on fake news in Poland is presented. The comments in this section will show how national law can regulate fake news and legal liability under this phenomenon. At the end of the paper, a short summary contains conclusions related to the analyzed matter.

KEYWORDS

fake news
criminal law
Poland
freedom of expression
legal protection

1. Introduction

This paper aims to present the current legal status regarding the conditions for incurring criminal liability for acts considered to be 'fake news' (i.e., disinformation activities) in the Polish legal system.

The Polish criminal law system consists of two separate, though highly harmonized areas. The first area of criminal law is substantive law, the legal basis of which is the Penal Code Act of June 6, 1997. The other area of criminal law is formal criminal law, also known as procedural criminal law, or simply the criminal procedure, the legal basis of which is the Code of Criminal Procedure Act of June 6, 1997.

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Substantive criminal law, that is, the regulations essentially contained in the Penal Code, provides for the basic principles and conditions of the broadly understood criminal liability of persons, or in other words, their liability for offenses. It is in this area (the Penal Code) that answers can be found as to who is to be held criminally liable, what conduct or acts are crimes, what penalties are provided for offenses committed, etc.

In contrast, formal criminal law (procedural criminal law, criminal procedure) mainly consists of the regulations contained in the Code of Criminal Procedure, which defines the rules of investigation and prosecution activities for detecting the offender, presenting charges or a bill of indictment, and bringing them to a trial. As a side note, this Act governs matters related to the conditions for initiating criminal proceedings, collecting, recording, and taking evidence, the rules of adjudication, or matters related to the bodies and authorities involved in the criminal procedure. Thus, formal law serves as a trigger that initiates the application of substantive criminal law, which means that the former plays an auxiliary role in the latter.[2]

Our analysis focuses on these two areas and their coverage of the issue of fake news. That fake news is something negative – judging by the very name – is clear from the use of the word 'fake', meaning 'false', 'counterfeit', 'fabricated', or 'imitated'.

Since fake news is something negative, it is worth considering what protection against it there is in the Polish legal system – in a system that is utterly dominated by the authority of state institutions, affecting criminal law and procedure as well.

2. General characteristics of substantive criminal law in Poland

As mentioned above, the Polish criminal law system in its basic version starts with the Penal Code (PeCo) as the fundamental legal act in this area. It is a rather extensive, complex, and detailed legal act that consists of three parts. The first is general governing the rules of criminal liability and related issues. The general part contains, among others, a description of what an offense is. According to PeCo Art. 1, only a person who commits an act punishable under the law in force at that time incurs criminal liability.

Nevertheless, a prohibited act is not a crime if the harm caused to society is negligible, nor does the offender of a prohibited act commit a crime if they cannot be attributed to any culpability at the time of the Act. Further, PeCo Art. 2 states that only a person with a specific legal duty to prevent criminal consequences may be held criminally liable for a consequential offense committed by omission. Art. 5 of the Penal Code stipulates that the Polish Penal Code (criminal law) applies to an offender who commits a prohibited act in the territory of the Republic of Poland or on a Polish vessel or aircraft unless the Republic of Poland is a party to an international agreement stating otherwise. Elsewhere, a catalog of penalties for offenses is also provided. Hence, under PeCo Art. 7 (in the system of Polish criminal law), a crime is either a felony or a misdemeanor. Furthermore, a felony is a prohibited act punishable by imprisonment for a term not less than three years, or a more severe penalty.

2 | Skorupka, 2017, p. 46.

In contrast, a misdemeanor is a prohibited act punishable by a fine of more than 30 daily rates or more than PLN 5,000, a penalty of restriction of liberty for more than one month, or imprisonment for more than one month. There is also a reservation that a felony must involve criminal intent (deliberation), while a misdemeanor may be committed unintentionally, as provided by the law. A prohibited act is committed intentionally if the offender has the intent to commit it, that is, either they are willing to commit it or are foreseeing the possibility of committing it and accepting it. A prohibited act is committed unintentionally if the offender, having no intent to commit it, still fails to exercise due care under the circumstances, even though they foresaw or could have foreseen a possibility of committing the prohibited act. As to the age threshold above which one may be held criminally liable, the Penal Code provides that its rules apply to anyone aged 17 years or older who commits a prohibited act. A minor aged 15 or older who commits a prohibited act in specific instances provided in the Penal Code may be held liable under the principles set out in the Code if deemed appropriate given the circumstances of the case and the level of mental development of the offender, the characteristics and personal situation, and especially if the previous attempts at educational or correctional measures have proved to be ineffective. The Penal Code include Art. 134 (assassination attempt on the life of the President of the Republic of Poland), Art. 148 § 1, 2 or 3 (homicide), Art. 156 § 1 or 3 (grievous bodily harm), Art. 136 § 1 or 3 (active assault or insult of a representative of a foreign state), Art. 166 (piracy, i.e., hijacking aircraft or a sea vessel), Art. 173 § 1 or 3 (causing a traffic disaster), Art. 197 § 3 or 4 (rape and sexual extortion), Art. 223 § 2 (active assault), Art. 252 § 1 or 2 (taking or holding a hostage), and Art. 280 (robbery). If an offender commits a misdemeanor after turning 17, but before turning 18 years old, the court will adopt educational, therapeutic, or correctional measures prescribed for juvenile delinquents, instead of a penalty, if it is deemed appropriate given the circumstances of the case and the level of mental development of the offender, the characteristics, and the personal situation. In addition to penalties, the Polish criminal law system also employs penal measures. Under the Penal Code, penal measures include deprivation of public rights; disqualification from specific posts; the exercise of specific professions or engagement in specific economic activities; disqualification from activities involving raising, treating, and educating minors or taking care of them; prohibition of staying in certain communities and locations; contacting certain individuals or leaving a specific place of residence without the court's consent; prohibition of entering a mass event; prohibition of entering gaming centers or participating in games of chance; an order to leave premises jointly occupied with the aggrieved party, disqualification from driving, monetary performance, and public announcement of the sentence.

The second part is specific and lists individual and individualized acts recognized as offences in the criminal system, such as offences against peace, mankind and war crimes, offences against the Republic of Poland, offences against defense capabilities, offences against life and health, offences against public safety, offences against traffic safety, offences against the environment, offences against freedom, offences against freedom of conscience and religion, offences against sexual freedom and morals, offences against the family and guardianship, offences against good names and personal integrity, offences against the rights of people performing paid work, offences against state and local government institutions, offences against the administration of justice, offences against elections and referendums, offences against public order, offences against the protection of information, offences against the reliability of documents, offences against

property, offences against economic transactions and property interests in civil law transactions, offences against trading in currencies

The last, third, part of the Penal Code is devoted to the criminal liability of military service members. It is named the 'military part' and governs the principles of criminal liability solely in relation to soldiers, setting out individual blocks of offenses that can only be committed by soldiers.

3. Characteristics of formal criminal law (procedural law, criminal procedure)

The basic legal act in the other area of criminal law, that is, the area of formal criminal law, procedural law, or simply the criminal procedure, is the Code of Criminal Procedure. It sets out the principles of the implementation of substantive criminal law, while its main objective is to determine whether a prohibited act – an offense – has been committed or not, and the rules for detecting the offender and bringing them to criminal liability. The Code of Criminal Procedure also lays down the rights and obligations of the bodies involved in the procedure, including courts and prosecutors. It indicates participants of criminal proceedings such as the suspect, defendant, aggrieved party, defense attorney, and their rights and obligations. In general, we can conclude that the criminal process aims to achieve substantive criminal justice and a state of procedural criminal justice. Hence, the Code of Criminal Procedure in Art. 2 provides that the purpose of the Code is to establish rules for the criminal process so that: 1) the offender is detected and held criminally responsible, and no innocent person is so held liable; 2) through the correct application of the measures provided for in criminal law and the disclosure of the circumstances conducive to committing an offense, the objectives of criminal proceedings are achieved not only with regard to combating crime but also in preventing it and strengthening the respect for the law and the principles of social coexistence; 3) the legally protected interests of the aggrieved party are secured, while their dignity is fully respected; and 4) the case is resolved within a reasonable time.

The criminal process is *ius publicum*, a segment of law in which a public authority always prevails. As a result, a public body is stronger in terms of competence, organization, and power than an individual, which enables it to arbitrarily (authoritatively) influence an individual by influencing (shaping) the legal position of a person or other organizational units by issuing a decision, which is defined as a form of public administrative activity.[3] Hence, it is emphasized that as a *differentia specifica*, this public law segment establishes direct coercion exercised by state authorities in the event of disobedience to the applicable norms, which is not the case in the segment of civil law.

The guiding principle of criminal proceedings is the principle of truth expressed in Art. 2 § 2 of the Code of Criminal Procedure, according to which any determinations must be based on true factual findings. The Code of Criminal Procedure is a much larger act than the Penal Code. In general, the criminal process is characterized by the authority

3 | Knosala, 2011, p. 23.

of public bodies, coercion exercised by the state, and a considerable conflict of values.[4] There is no doubt that criminal law and criminal procedure are a domain of state bodies, where there is no place for private feelings or actions. In its adjudication, the court passes the final verdict on behalf of the state, and the public prosecutor, when presenting and pressing charges, performs their duties under the mandate of the state. This implies an obvious conclusion about a stronger position and a clear procedural privilege of these bodies at the expense of others representing the specific interests of the remaining participants. For systemic reasons, state structures always prevail over private participants in criminal proceedings. It manifests itself in the procedural position of the court and the prosecutor as two bodies with strong competencies in the criminal process. When one considers the guarantees under the Constitution of the Republic of Poland, such as the right to privacy, the right to information, and the right to the fair criminal process, it is clear that in criminal proceedings, there is a collision of objectively understood interests with not infrequently subjectively delimited interests of individual entities involved in the criminal process. As a result, situations emerge where a specific value (or values), in combination with the principles of criminal proceedings, force a choice that essentially will never be entirely right or equitable, as something will be chosen over something else, and that something else will be sacrificed. The above collision is visible, among others, under the assumption of seeking truth in criminal proceedings. However, it turns out that in certain specific situations, the truth remains unattainable in criminal proceedings. As we can see, these are pivotal issues in the heart of the criminal process. Meanwhile, a conflict is generated because it turns out that in criminal proceedings, the truth, albeit a value raised to the rank of one of the most important principles, is not reached at any cost. In this context, an important issue in criminal proceedings is to collect, interpret, and introduce evidence as the primary elements that confirm or deny someone or something. Evidence is taken at the request of the parties or *ex officio*. It is important that the taking of evidence follows the rules provided in the Code of Criminal Procedure.

4. Characteristics of fake news

The above-described area of Polish criminal law today lacks provisions on criminal liability for fake news offenses. In other words, there is no such category as a fake news crime, and therefore there is no criminal liability for activities involving fake news. Admittedly, this is not surprising, as there is no doubt that establishing a legal construct of a fake news offense means venturing into a multifaceted and complex effort, the effects of which are often difficult to predict. The scale of the impact of fake news can be either laughable, with no consequences, penalty, or terrifying. The difficulty lies in the construction of a possible fake news offence, and in predicting the effects of fake news that may emerge in various areas covered by law.

Since the legal acts currently in force in Poland do not contain a definition of a fake news offense, it is worth presenting at least briefly one of the many definitions in the scholarly literature. It is emphasized, among others, that the term 'fake news' is a neologism and has no formal definition. Roughly speaking, it is a deliberate message intended

4 | Wielec, 2017, p. 125.

to mislead the recipient. It is neither true nor lie. Fake news is usually based on disinformation or a prank, often containing some elements of truth. 'Fake news can pretend to be real information, articles, social media posts, memes, etc. It can be created with various intentions, ranging from fraud, propaganda tools, sensationalism, to a prank.'[5] Moving in this direction, in very general terms, we can define fake news as: (1) a false message with the characteristics of a true one; (2) a satirical message created deliberately for entertainment purposes; (3) one which we think is true, but it is false; (4) one designed to mislead for financial, political, and prestige gains; and (5) a false message, regardless of the intention of the sender.'[6] In dictionary terms, "fake news" is defined as untrue, false information most often disseminated by tabloids with a view to causing controversy or slandering or libeling someone (usually a politician).[7] Therefore, the concept of fake news is often referred to as various cases of information manipulated or tampered with by authors/broadcasters.'[8]

It is clear then that criminal liability for fake news is nowhere to be found. This is extremely difficult because the creation, publication, and use of fake news are the various stages of a premeditated activity that entails a specific kind of liability. The kind of liability for this type of act depends only on the legislator. That is why liability for fake news, for its production, dissemination, and effect, may take the form of civil, criminal, administrative, or disciplinary liability.

There is no doubt that the most severe and spectacular form of legal liability is criminal liability. If we compare this area of criminal law to other areas of law, such as civil law or administrative law, it is a criminal law that interferes with the guarantees of the rights of an individual and thus is *strictly* controversial. Criminal liability carries the above-mentioned specific load of power on the part of public administration bodies in relation to the legal position of an individual. Certain behaviors should always be penalized under the criminal law regime as *the ultima ratio*. Therefore, if the legislator decides to introduce criminal liability for specific conduct, it must do it very prudently, thoughtfully, effectively, and efficiently. A legal provision in criminal law should be structured so that it is understandable and, above all, effective. To this end, we should also add the structure of the provisions of procedural criminal law. This is especially true when taking evidence. If a specific type of a new offense is to be introduced to the criminal law system, then it is also necessary to consider the evidence-related process for the offense. The question is how to prove it, what evidence to produce, how to produce it, how to consolidate the necessary evidence, and finally arrive at the truth. With fake news, there will often be non-standard evidence at variance with what is characteristic of criminal proceedings, such as witness statements, etc. Here, digital evidence will be key, and the problem of digital materials in the criminal process is only poorly recognized at this stage.

Another problem is the interference of criminal law, in general, with liability for fake news. There appears to be a real conflict-driven confrontation. With fake news, there is a unique collision of values. On the one hand, there is a constitutional right to freedom of speech, the right to information, etc., there is a guaranteed right to protection of honor, good name of an individual or other entity, etc., and the construction of a fake news offence

5 | https://cik.uke.gov.pl/news/fake-news-czyli-falszywa-prawda,191.html (Accessed: April 8, 2021).
6 | Palczewski, 2019, p. 17.
7 | https://sjp.pwn.pl/mlodziezowe-slowo-roku/haslo/fake-news;6368870.html (Accessed: May 10, 2021).
8 | Daniel, 2018, p. 99.

will naturally limit and interfere with the most important rights in a democratic state. Fake news is not only information that may infringe upon the good names of individuals. After all, fake news can also cause enormous damage in the public sector, such as national security and international security.

Therefore, the problem lies in the development of criteria for assessing whether something is fake news, proving it, indicating entities responsible for fake news, etc. Generally, the problem is how to contain the phenomenon of fake news, whether criminal law is needed here, or perhaps the problem should be resolved with soft instruments, such as civil law.

What eventually is at stake is the huge load of various collisions generated by fake news. In Poland, it is often pointed out that various groups operating here often fall prey to censorship, with their published content being removed or blocked on the Internet. There is also a growing number of fake news on websites, and when someone wants to defend themselves against it, they are prevented from asserting their rights. Time will show that there will be an extreme need for regulations to protect freedom of speech on the Internet, and to protect against the abuse of large internet corporations. Even so, such regulations will have to allow, with full control, combatting violations of the law in social networks. What is key are the criteria for assessing fake news, its content, the degree of fraud, the degree of violation of the truth and, last but not least, its effect; these criteria will determine the area of law, whether civil, administrative or criminal, should govern criminal liability for fake news. Hence, the following classification of fake news can be proposed, where the criterion for assessment is the type and effect of disinformation. The first group covers *first-degree fake news*, which represents the gravest misrepresentation, false information, and content load, with the greatest impact. The examination covers who and what such fake news concerns and whether the creation and publication of fake news do not threaten the highest values enjoying protection under law, such as public order, health, and life of citizens. In this case, such actions should be penalized under criminal law. In other words, the construction of an appropriate criminal provision should be envisaged, which would penalize fake news as a cause of action with enormous effects on multiple levels. Examples would include alteration, manipulation, falsification of indisputable historical facts, or presentation of the course of a certain event carrying a huge social load in a manipulated, falsified manner to misrepresent, ridicule, or discredit key historical facts or state leadership, or creation and dissemination of such information that will endanger public security.

However, the constituent elements of the crime must be precisely defined and should include, among others, the intent and purpose of creating or disseminating fake news. The next group consists of *second-degree fake news*, which would be an act with a much more limited impact, affecting the reputation of a person or a fact and violating only the private area of the person or fact. There is no major impact on the public, but the entity that is the main subject of fake news is discomforted. In this case, the message is too satirical and too distorted so that, in principle, any reasonable bystander would point to a significant transgression of, for example, aesthetic or moral norms. Although private interests are violated, penal measures need not be used. Therefore, the best domain of legal liability is civil law and civil action, along with the use of tools that exist even now (court action, redress, etc.). In this case, it is under civil law that all issues related to the creation, dissemination, and use of fake news will be resolved. The third group features *third-degree fake news*, which would be manipulated content and false information within

one's professional group. This is a much more limited area of impact than that indicated above. An important factor here is the professional or social group, which functions according to the generally established principles of professional deontology. In this case, disciplinary/professional liability comes into play, that is, a type of liability reserved for a specific group of entities. Finally, *fourth-degree fake news* would be a minor, essentially non-punitive, formal-only (i.e., non-consequential) production and dissemination of fake news for satire, fun without major consequences for production, distribution, or use. This type of fake news is not penalized in any way.

5. Fake news and criminal law in Poland

The conclusion from the above analyses is quite straightforward: at the moment, in the criminal legal system in Poland, there is no direct provision that would make the creation, dissemination, use of fake news, and so on. This does not mean, however, that it is impossible to find legal provisions that indirectly trigger criminal liability for false information.

First, it should be noted that the Penal Code is the basic legal act in the Polish criminal law system. Where fake news takes the form of stalking, discrediting, or harming the good name of a person, etc., then the above legal act provides for the offense of persistent harassment. Pursuant to PeCo Art. 190a, any person, who by persistent harassment of another person or their next of kin evokes a justified sense of threat, humiliation, or distress, or significantly violates their privacy, is subject to the penalty of deprivation of liberty for a period of six months to eight years. Any person who pretends to be another and uses their image, personal data, or other data serving their public identification to cause them property or personal damage is liable to the same penalty. If an act specified above results in a suicide attempt by the person, the offender is liable to the penalty of deprivation of liberty for a term from two to twelve years. This prohibited act is prosecuted ex officio but upon the motion of an injured party.

If the fake news is to present, for example, a person, institution, then it is an offense of defamation. In this case, according to PeCo Art. 212, any person who slanders another person, a group of persons, body corporation, or an organizational unit without legal personality for conduct or characteristics that may discredit them in public opinion, or result in a loss of confidence necessary to perform duties in their position, occupation, or type of activity, is liable to fines or the penalty of restriction of liberty. If the offender commits the above act through the mass media, they are liable to fines, restriction of liberty, or deprivation of liberty for up to one year. If the offender commits the act specified in § 1 through the mass media, they are liable to fines, the penalty of restriction of liberty, or deprivation of liberty for up to one year. In the event of a conviction for the offense specified above, the court may award exemplary damages to the aggrieved party or the Polish Red Cross, or another social cause designated by the aggrieved party. Here, too, the offense of defamation analyzed here is prosecuted on a private complaint.

A very similar regulation can be found in Art. 216 of the Penal Code, concerning the offense of insult, under which any person who insults another person in their presence, publicly in their absence, or with the intention that the insult will reach the person, is liable to fines of the penalty of restriction of liberty. Any person who insults another

person using the mass media is liable to fines, restriction of liberty, or deprivation of liberty for up to one year. Private prosecution also applies to this offense.

Where disinformation leads to fraud, it is possible to apply PeCo Art. 286, whereby anyone who (with the intent to achieve a material benefit) causes another person to unfavorably dispose of their property, or the proper of a third party, by misleading the person, or by taking advantage of a mistake or an inability to properly understand the action undertaken, is liable to the penalty of deprivation of liberty for a term between six months and eight years.

It is also possible to imagine situations in which false information constitutes the basis for action against the security of the state. In such cases, PeCo Art. 132 provides for liability for intelligence disinformation, according to which any person, who, while providing intelligence services to the Republic of Poland, misleads a Polish state authority by delivering counterfeit or altered documents other items, or by concealing the true information or furnishing false information of essential importance to the Republic of Poland, is liable to the penalty of deprivation of liberty for a term between one-year and ten years.

Another example where the creation or dissemination of fake news may be part of the structure of a specific offense is the provision of Art. 257 of the Penal Code, concerning the offense of racism and stipulating expressly that any person who publicly insults a population group or an individual because of their national, ethnic, racial, or religious affiliation, or irreligiosity, or for these reasons violates personal integrity of another person, is liable to the penalty of deprivation of liberty for a term of up to three years. An interesting case is the provision of the Act of December 18, 1998, on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws of 2021, item 177). This is Art. 55, according to which anyone who publicly and contrary to the facts denies crimes referred to in the Act is subject to a fine or imprisonment of up to three years. The judgment is made public. It is about the crimes, among others, committed on persons of Polish nationality or Polish citizens of other nationalities in the period from November 8, 1917, to July 31, 1990, that is, Nazi crimes, communist crimes, crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich, or other offenses constituting crimes against peace, mankind, or war crimes, etc.

6. Draft legislation on fake news in Poland

Given the above considerations, the legislative work envisaging liability for fake news in Poland includes a draft act on the protection of the freedoms of social network users, which was conveyed on January 22, 2021, to the chancellery of the Prime Minister requesting an entry in the list of legislative work of the Council of Ministers.[9] The new legislation is intended to protect the constitutional right to freedom of speech, as well as the rights of individuals violated by anonymous Internet users.

9 | https://www.gov.pl/web/sprawiedliwosc/zachecamy-do-zapoznania-sie-z-projektem-ustawy-o-ochronie-wolnosci-uzytkownikow-serwisow-spolecznosciowych (Accessed: 1 September 2021).

In the preamble, the Act is adopted in recognition of the special constitutional value of freedom of speech to strengthen its role in the search for truth, the functioning of a democratic state, respect for the principle of freedom of expression, and human dignity.

The purpose of the Act is to create conditions for 1) supporting freedom of expression; 2) guaranteeing the right to truthful information; 3) improving the degree of protection of human rights and freedoms in online social networks made available in the territory of the Republic of Poland, with at least one million registered users; and 4) observance by online social networks of the freedom of expression, sourcing information, disseminating information, expressing religious and philosophical views and beliefs, and the freedom of communication.

As the first-ever instrument in the Polish legal system, the Act introduces concepts necessary for the construction of liability for fake news, creating a specific catalog of statutory expressions. See the following examples:

– an online social network service is understood as a service provided electronically, allowing users to share any content with other users or the general public, which is used by at least one million registered users in the country.

– a service provider supplies online social network services, involving the storage of information provided by users in an online social network at their request, with at least one million registered users.

– a country representative is an individual or a body corporation with a place of residence or registered office in the territory of the Republic of Poland, having the exclusive right to represent a service provider in the territory of the Republic of Poland and to conduct internal audit and control procedures on its behalf.

– a user is a service recipient and an individual, a body corporate or an organizational unit without legal personality that uses an online social network service, even in the absence of a user profile;

– a user profile is a set of settings for the working environment of a social network service user.

– disinformation is false or misleading information, produced, presented, and disseminated for profit or violation of the public interest;

– content of criminal nature praises or incites the commitment of prohibited acts as specified under articles of the Penal Code[10] or meeting the criteria of a prohibited act.

illegal content violates personal rights, disinformation, the content of criminal nature, as well as content that violates morality, in particular, by disseminating or praising violence, distress, or humiliation.

The limitation of access to content covers all acts and omissions taken in any form to limit access to content posted on online social network service, including by deleting a user-posted content that is not illegal and a limitation of access to content through the algorithms used by the service provider, or tags that indicate possible violations in the published content.

– a limitation of access to the user's profile is removing or preventing access to the user's profile, limiting or preventing the sharing of content on the user's profile, including through the algorithms used by the service provider, which limits the display of content posted by the user or tags that indicate possible violations in the published content.

10 | The following articles of the Penal Code: 117–119, 127–130, 133, 134–135, 137, 140, 148–150, 189–189a, 190a, 194–204, 222–224a, 249–251, 255–258, 343 of the Penal Code Act of 6 June 1997 (Journal of Laws of 2020, items 1444 and 1517).

A crucial body to be established under this Act is the Freedom of Speech Council. It is a public administration body monitoring the observance by social network services of freedom of expression, freedom to source information, disseminate information, express religious and philosophical views and beliefs, and freedom of communication.

In the context of legal liability, one should note that the sanctions provided for in this Act are mainly administrative penalties. These are fairly high fines, ranging from PLN 50,000 to PLN 50,000,000. These are administrative fines imposed by the Freedom of Speech Council. For example, a financial penalty is imposed on a service provider who fails to fulfill the obligation to

1) prepare the report referred to in Art. 15 (1);[11]

2) appoint a country representative referred to in Art. 16 (1);[12]

3) immediately notify the President of UKE (Office of Electronic Communications) of the appointment or change of its country representative and provide its details, as referred to in Art. 16 (3).[13]

4) immediately inform the President of UKE of any change in the details referred to in Art. 16 (4);[14]

(5) publish in an online social network in a visible, directly and permanently accessible manner the full details referred to in Art. 16(5);[15] 6) provide the persons conducting an internal audit and check process with training, as referred to in Art. 17 (1);[16]

7) put in place an effective and understandable internal audit and check process in the Polish language, on matters referred to in Art. 19 (1).[17]

11 | Art. 15 (1): A service provider who receives over 100 user complaints in a calendar year regarding dissemination of access to unlawful content, a limitation of access to content or a limitation of access to the user's profile, is obliged to prepare a semi-annual report in the Polish language concerning the resolution of such complaints and to publish it on its social network site no later than one month after the end of a six-month period.

12 | Art. 16 (1): A service provider is required to appoint at least one, but not more than three, representatives in the country.

13 | Art. 16 (3): A service provider is obliged to immediately inform the President of UKE about the appointment of a representative in the country or a change to the person, and to provide their data, including e-mail address and address for service. Where the country representative is a body corporate, a service provider provides the data of natural persons authorized to act on behalf of that body corporate.

14 | A service provider is obliged to immediately inform the President of UKE about any change of details.

15 | Art. 16 (5): A service provider is obliged to publish in an online social network in a clearly visible, directly and permanently accessible manner: 1) full details of its country representative, including the e-mail address and address for service, and if the country representative is a body corporate, also the details of natural persons authorized to act on behalf of that body corporate; 2) full details of the service provider, including the full name of the entrepreneur running the social network site or their name and surname, registration address or residence address, address for service, registration details and e-mail address.

16 | Art. 17 (1): A service provider provides persons conducting internal audit and check processes with regular, at least every six months, training in the Polish language.

17 | Art. 19 (1): A service provider is obliged to put in place, in the Polish language, effective and understandable internal audit and check processes in matters relating to user complaints concerning: 1) a limitation of access to content; 2) a limitation of access to the user's profile; 3) dissemination of access to unlawful content.

8) post on the online social network site, in the Polish language and available to all users, the terms of use of the online social network site, including the internal audit and check process referred to in Art. 19 (2).[18]

9) provide a visible, directly, and permanently available mechanism for submitting complaints under the internal audit and check process referred to in Art. 19(3).[19]

10) implement a Council decision to restore the previously limited access to content or the previously limited access to the user's profile, as referred to in Art. 25(1);[20] etc.

Further, a service provider is liable to a financial penalty for the failure of its country representative to fulfill the obligation to consider a user complaint filed under the internal audit and check processes and to provide responses and any information to institutions and authorities in relation to any conducted proceedings.

When imposing a financial penalty, the Council considers the following: 1) the impact of the service provider's omission on the extent of disinformation caused; 2) the degree of breach of the public interest; 3) the frequency of past breaches of an obligation or breach of a prohibition of the same type as the breach of an obligation or breach of the prohibition, as a result of which the penalty is to be imposed; 4) record of penalties for the same conduct; and 5) actions taken by the party voluntarily to avoid the consequences of a violation of the law.

The only element related to criminal law is the activation of prosecution authority. A public prosecutor's authorization to act at every procedural level follows mainly from the provisions of the source act for the prosecutor's office, which is the Public Prosecutor's Office Act of June 20, 1985 (Journal of Laws of 2011, No. 270, item 1599, as amended). In the Polish legal system, the public prosecutor's office acts as a body that ensures the rule of law in all legal proceedings. The task of the prosecutor's office is to uphold the rule of law and to supervise the prosecution of offenses. A public prosecutor is established systemically as the 'guardian' of the rule of law, that is, an entity that watches over the due and lawful operation of state bodies. A public prosecutor acting in legal proceedings is also a 'guardian of the public interest'.[21] Therefore, an effective guarantee of the protection of the rule of law in the performance of a public prosecutor's tasks is to undertake checks aimed at eliminating a state contrary to the law, caused by the actions of a public administration body. When analyzed in this spirit, the act stipulates that where criminal content is found, a public prosecutor may request a service provider or its country representative to send the necessary information, particularly regarding user data and publications posted on the online social networking site. The content of a criminal nature includes

18 | Art. 19 (2): A service provider is obliged to publish the terms of use of the social network site, in the Polish language, available to all users of the social network site, which also contain the rules for conducting internal audit and check processes. The terms of use may not be in conflict with the provisions of generally applicable law.

19 | Art. 19 (3): A service provider is also obliged to ensure that complaints are sent in an internal audit and check process in a clearly visible, directly and permanently accessible manner.

20 | Art. 25 (1): As a result of the conducted proceedings, the Council issues a decision in which: 1) it either orders the restoration of the previously limited access to content or the previously limited access to the user's profile, if it finds that the content or user profile to which access was limited do not constitute illegal content; or 2) refuses to restore the previously limited access to content or the previously limited access to the user's profile, if it finds that the content or user's profile to which access was limited constitute illegal content. 2. The Council issues a decision within 7 days of the date of receipt of the complaint.

21 | Szubiakowski, Wierzbowski, and Wiktorowska, 1998, p. 251.

publication with pornographic content with the participation of a minor or content that praises or incites to commit acts of a terrorist nature. Access to the publication creates the risk of causing significant damage or causing effects that are difficult to reverse, a public prosecutor immediately issues an order for a service provider to prevent access to such content. This order is immediately enforceable. A copy of the order is delivered to the e-mail address of the country representative. A complaint to any such order may be filed with the district court having territorial jurisdiction for the public prosecutor who issued the order. Proceedings to examine the complaint is carried out pursuant to the Code of Criminal Procedure Act of June 6, 1997.

Another interesting construction in the draft act is a 'name-blind civil action', which has so far been unknown in the Polish legal system. It is an instrument that enables an action to be brought to court to protect personal rights in the event of activities based on, for example, fake news. The interesting thing about this construction is that the statement of claim in this action does not indicate the respondent's details. By their nature, these details are extremely important for each statement of claim understood as a pleading to initiate a specific court process brought by a specific claimant against a specific respondent. The details identifying both the claimant and the respondent have been necessary to bring any type of action to court under Polish law. However, in the construction of the 'name-blind civil action', for the lawsuit to be filed effectively, it is sufficient to indicate the URL where the offensive content was posted, the date and time of publication, and the name of the user profile or log in.

7. Conclusions

The presented analysis shows that criminal liability for fake news is not *strictly* provided in the Polish criminal law system. This means that the basic legal Act in the form of the Penal Code does not list prohibited acts that directly involve the creation, dissemination, or changing information to the extent that it becomes a carrier of false content.

Criminal law, however, is a specific law in any legal system. Therefore, criminal law should deal with fake news of the greatest impact, that is, disinformation that threatens the highest values, such as state security. Disinformation of minor importance should be addressed in other branches of law, such as civil law, administrative law, and disciplinary law. To answer the question of whether there is a possible punishment for fake news, it is necessary to balance the conflict between the constitutional value of freedom of expression and the construction of a fake news offense. To have disinformation covered under criminal law, one must start off by establishing a catalogue of types of conduct and behaviors that make up this type of offense. Compiling such a catalog is very difficult. Therefore, there are and will be difficulties in the legal definition of fake news; therefore, it will also be difficult to prove this type of offense in a criminal trial. However, the legislative work agenda in Poland features a draft act on the protection of the freedom of social network users. It is a thorough administrative regulation, and this character of the act should be preserved. Criminal law should always be used as a last resort in *ultima ratio* regulation.

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