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Juridical Relations between Freedom of Artistic Expression and Protection of the Dignity of Religion in the Light of a Lawsuit over Theatrical Performances in the Czech Republic

Abstract: This paper deals with the legal regulation of the relationship between two human rights, freedom of artistic creation and protection of the value of religion as part of freedom of religion in the Czech Republic. It first gives an overview of three models of this relationship in three historical epochs: the period of democratic Czechoslovakia in the years 1918 to 1948 (excluding the period of World War II, where the protection of human rights was completely ignored), the period of domination of the Communist Party of Czechoslovakia in 1948 to 1989, that is, a period of general violations of human rights, and in a democratic society from 1989 (until 1992 in Czechoslovakia, from the disintegration of the Czechoslovak federation to January 1, 1993, in the Czech Republic). Most attention is paid to litigation caused by the presentation of two theater performances at the Brno Theater Festival in 2018. Both performances were directed by the Croat Oliver Frljić, known for controversial means of expression, often with a religious theme. The ensuing lawsuit, in which the then president of the Czech Bishops' Conference was one of the plaintiffs, showed that the general courts preferred the protection of artistic freedom in the conflict between the two constitutionally guaranteed freedoms with only one significant restriction: vituperation or downsizing of beliefs. However, the dispute is not yet fully resolved: the plaintiffs have filed a complaint with the Constitutional Court of the Czech Republic, which has not yet ruled on the matter. Consequently, an application to the European Court of Human Rights in Strasbourg cannot be ruled out.

Keywords: human rights, constitutional law, criminal law, freedom of artistic expression, religious freedom

Introduction

Human rights and freedoms are a very important area of both legal regulation and (or above all) the practical life of individuals and their groups. In this article, we deal with the legal relationship between freedom of artistic expression and freedom of religion, specifically regarding the protection of the value of religion.

To better understand the current situation, it is necessary to be acquainted with the up-to-now legal models of the relationship between the two freedoms. The first section is devoted to the period of democratic Czechoslovakia in the years 1918 to 1948 (omitting the period of World War II, where the protection of human rights was completely ignored). The second section of this article deals with the period of domination of the Communist Party of Czechoslovakia in the years 1948 to 1989, that is, the period of general human rights violations. The third section introduces the current legal regulation in a democratic society: until 1992 in Czechoslovakia, from the disintegration of the Czechoslovak federation to January 1, 1993, in the Czech Republic.

The subject of the most extensive fourth section is a lawsuit caused by the presentation of two theatre performances at the Brno Theatre Festival in 2018. Both performances were directed by the Croat Oliver Frlić, known for using controversial means of expression, often with a religious theme. The subsequent lawsuit, where one of the plaintiffs was the then chairperson of the Czech Bishops' Conference, may point to the current solution of the relationship (or sometimes conflict) between the two named freedoms. In this section in particular, it will be necessary to draw on information from electronic media, both for the drafting of the article and even for the judicial authorities themselves.

Legal Definition of Religious Freedom and Freedom of Artistic Creation and Their Relationship in the Years 1918–1948

After the establishment of the Czechoslovak Republic in the year 1918, the existing legal order of Austria-Hungary was retained in Czechoslovakia, namely, in the Czech land the Austrian system and in Slovakia the Hungarian one.¹

¹ Act No. 11/1918 Coll., on establishment of the independent Czechoslovak state, Art. 2.

Establishment and Form of the Czechoslovak Constitution from the Establishment of Czechoslovakia Until the Communist Party Took Power in February 1948

The new republican establishment of the state required the drafting of a new constitution. Adoption of a textually short temporary constitution in November 1918² was a temporary solution.³ This constitution (having only 21 sections) did not contain provisions on basic civil rights, which therefore followed the provisions of the current Austrian constitution, drafted in 1867 after the Austro-Hungarian settlement, the so-called December Constitution.⁴

The first proper Czechoslovak constitution was adopted in February 1920⁵ and was valid until 1948 (with a de facto interruption in connection with the events around World War II, which does not apply to our topic). The final form of the constitution was the result of many long political struggles, so it was a compromise on some points, which also applies to the rights of inhabitants.⁶

Constitutional Guarantees of Religious Freedom in the 1920 Constitutional Charter

Issues of religious freedom were among the controversial topics, where the negotiations were sometimes very heated. However, the final text of the constitutional charter ultimately contains a broad definition of religious freedom:

§ 121

Freedom of conscience and religion is guaranteed.

§ 122

All inhabitants of the Czechoslovak Republic have, within the same limits as citizens of the Czechoslovak Republic, the right to exercise, publicly and privately, any confession, religion or belief, provided that the exercise is not in conflict with public order and good morals.

§ 123

No one shall be compelled, directly or indirectly, to engage in any religious activity, with the exception of the rights of paternity or guardianship.

² Act No. 37/1918 Coll., on the Provisional Constitution.

³ Karel Schelle, “Ústava Československé republiky—prozatímní [Constitution of the Czechoslovak Republic—Provisional],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 468.

⁴ Staatsgrundgesetz Nr. 142/1867 RGBl. vom 21. Dezember 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder.

⁵ Act No. 121/1920 Coll., which introduces the Constitutional Charter of the Czechoslovak Republic.

⁶ Karel Schelle, “Ústava Československé republiky (1920) [Constitution of the Czechoslovak Republic (1920)],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 472–73.

§ 124

All religions are equal before the law.

§ 125

It may be prohibited to perform certain religious acts if they are contrary to public order or public morality.

It is clear from the text of the Constitutional Charter that the legal limit for the exercise of religious freedom is the violation of public order and good morals (or public morals). The possibility of a ban on a certain religious activity emerges from these boundaries—the very wording of Section 125 allows for both an administrative ban (especially in a specific case) and legislative measures of a general nature. It can therefore be seen that the limits to the exercise of religious freedom are set quite broadly.

Constitutional Guarantees of Freedom of Artistic Creation in the Constitutional Charter of 1920

The guarantees of freedom of artistic creation are discussed in a much more concise way in the 1920 Constitutional Charter:

§ 117

(1) Everyone may, within the limits of the law, express an opinion in words, writing, printing, images, etc.

(2) The same applies to legal entities within the limits of their competence.

(3) The exercise of this right may not be to the detriment of anyone in their work or employment relationship.

§ 118

Scientific research and the proclamation of its results, as well as art, is free as long as it does not violate penal law.

The freedom of artistic creation and its communication is defined much more narrowly. On the one hand, the Constitution stipulates that it may be limited by law without giving clear criteria for the legitimacy of such laws, and, on the other hand, it provides for its limitation by penal law. Therefore, we must become familiar with the rules of penal law, dealing with the protection of the value of religion.

Criminal Protection of the Dignity of Religion

Czechoslovakia adopted its Czech part of the Austrian Penal Code of 1852,⁷ that is, from the time of the demolition of Josephinism. The Penal Code was amend-

⁷ Kaiserliches Patent Nr. 117/1852 RGBl., wodurch eine neue, durch die späteren Gesetze ergänzte, Ausgabe des Strafgesetzbuches über Verbrechen und schwere Polizei-Uebertretungen vom 3. September 1803, mit Aufnahme mehrerer neuer Bestimmungen, als alleiniges Strafgesetz

ed quite often both before 1918 and in Czechoslovakia itself, without changing its basic line. This Penal Code was in force in the Czech part of Czechoslovakia until the end of July 1950—however, since February 1948, penal practice has taken a significantly different path, with regard to the requirements of the class struggle.

The protection of the dignity of religion, especially of Christianity, was strongly emphasized in the Austrian Penal Code:

§ 122

Religious disturbance.

The crime of religious disturbance is committed by:

- a) anyone who blasphemes God through speech, actions, in printed works or in widely distributed writings;
- b) anyone who disrupts an existing religious practice in the state, or through dishonourable mistreatment of the devices dedicated to worship services or otherwise publicly showing contempt for religion through actions, speeches, printed works or disseminated writings;
- c) anyone who induces a Christian to apostasize from Christianity, or
- d) anyone who spreads unbelief, or a heresy contrary to that which the Christian religion seeks to spread.

§ 123

Punishment.

If the religious disorder caused public nuisance or seduction or public danger associated with the enterprise, this crime is to be punished with heavy imprisonment from one to five years, but also up to ten years in case of great malice or danger.

§ 124

If none of the circumstances mentioned in the preceding paragraph occur, the religious disorder is punishable by imprisonment from six months to one year.

§ 303

Vituperation of a legally recognized church or religious society.

Anyone who publicly or in front of several people, or in printed works, disseminated pictorial representations or writings, mocks or seeks to derogate the teachings, customs or institutions of a church or religious society recognized by law in the state, or who insults a religious servant of the same when performing worship services, or during their public activities religious practice is indecent in a way that is suitable to scandalize others, is guilty of a crime, insofar as this practice does not constitute a crime of religious disturbance (§ 122), and is to be punished with strict detention of one to six months.

über Verbrechen, Vergehen und Uebertretungen für den ganzen Umfang des Reiches, mit Ausnahme der Militärgränze, kundgemacht, und vom 1. September 1852 angefangen in Wirksamkeit gesetzt wird.

Freedom of artistic expression was quite significantly defined or rather limited by these provisions of the Penal Code. This allowed religious entities and their leaders to seek widespread protection of religion and its manifestations (especially ceremonies) from contempt or other attacks.

Summary of the Legal Definition in the Years 1918–1948

In my opinion, freedom of religious expression and of the expression of artistic creation was in an asymmetrical position in the period 1918–1948. Already in the 1920 constitutional charter, religious freedom was expressed more clearly and broadly, and public order and public morality are stated as its boundaries. Restrictions on the freedom of expression of artistic creation were set out more broadly in the Constitutional Charter and without specifying the criteria for such restrictions—with the exception of restrictions imposed by criminal law. The Penal Code of 1852, which was in force during this period, significantly protects religious freedom, especially for Christians, and thus prefers it to manifestations of artistic creation (and of scientific work).

Legal Definition of Religious Freedom and Freedom of Artistic Creation and Their Relationship in the Years of Communist Party Supremacy in 1948–1989

The Origin and Style of Two Czechoslovak Institutes During the Supremacy of the Communist Party in 1948–1989

The new constitution of the Czechoslovak Republic had been in preparation since 1946, but during the preparation, there were great differences in the attitudes of the Communists and representatives of other permitted political parties.⁸ The leadership of the Communist Party of Czechoslovakia (with personnel significantly overlapping with the leadership of the state), after seizing power in the state (25th February 1948), had the text of the constitution quickly finalized according to the communist postulates. Parliament approved it on 9 May 1948 (hence the name Constitution on 9th May),⁹ President Edvard Beneš refused to

⁸ Zdeněk Ryšavý, “Ústavní návrhy (1946–1948) [Constitutional Proposals (1946–1948)],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 524–25.

⁹ Zdeněk Ryšavý, “Ústava Československé republiky (1948)—příprava [Constitution of the Czechoslovak Republic (1960)—Preparation],” in *Encyklopedie českých právních dějin* [Encyc-

sign it and abdicated.¹⁰ This constitution nominally contained some guarantees of freedoms taken over from the 1920 constitution charter, but in practice it was decided according to other, so-called accompanying laws, which fully took into account the then decisive aspect of the class struggle.

In 1960, the preparation of a new constitution began, which was to reflect the final victory of socialism in Czechoslovakia and led society to build a communist society, which was expressed above all in the text of its preamble.¹¹ The constitution was adopted in July 1960 and, among other things, changed the name of the state to the Czechoslovak Socialist Republic.¹² Its character is clearly evidenced by the fact that it enshrines the leading role of the Communist Party of Czechoslovakia in Article 4. The most significant change in this constitution occurred in 1968 with the adoption of the Constitutional Act on the Czechoslovak Federation,¹³ however, this did not affect the issue of civil rights. Other significant changes have taken place in connection with the democratization process since the end of November 1989, which we will discuss in the next chapter.

Constitutional Guarantees of Religious Freedom in the 1948 Constitution

Religious freedom was one of the formally guaranteed constitutional rights, but—which is symptomatic—the 1948 constitution uses a much shorter wording than the previous constitution:

§ 15

(1) Freedom of conscience is guaranteed.

(2) A world opinion, faith or belief may not be to the detriment of anyone, but it may not be a reason for someone to refuse to fulfil a civic duty imposed on them by law.

lopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 554–56.

¹⁰ Constitutional act No. 150/1948 Coll., Constitution of the Czechoslovak Republic; Karel Schelle, “Ústava Československé republiky (1948) [Constitution of the Czechoslovak Republic (1948)],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 556–57.

¹¹ Karel Schelle, “Ústava Československé socialistické republiky (1960) [Constitution of the Czechoslovak Socialist Republic (1960)],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 561.

¹² Constitutional act No. 100/1960 Coll., Constitution of the Czechoslovak Socialist Republic.

¹³ Constitutional act No. 143/1968 Coll., on the Czechoslovak Federation; Karel Schelle, “Ústava Československé socialistické republiky (1960) [Constitution of the Czechoslovak Socialist Republic (1960)],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 564.

§ 16

(1) Everyone has the right to profess privately or publicly any religious belief or to be without religion.

(2) All religions and denominations are equal before the law.

§ 17

(1) Everyone is free to carry out acts connected with any religion or confession. However, the exercise of this right must not be in conflict with public order or good morals. It is not allowed to abuse it for non-religious purposes.

(2) No one may be directly or indirectly compelled to participate in such an act.

It is clear from the text of the constitution that the legal limit for the exercise of religious freedom remains a violation of public order and good morals. However, another criterion of restriction has been added: a ban on abuse for non-religious purposes. This rather vague criterion is then developed by current laws and by-laws, but, above all, by the administrative practice of the party-government apparatus, often without legal basis, mainly on the instructions of the Communist Party and/or State (secret) Police.

Constitutional Guarantees of Religious Freedom in the 1960 Constitution

This constitution also contained a formal guarantee of religious freedom, this time even more succinctly:

Art. 32

(1) Freedom of religion is guaranteed. Everyone can profess any religious faith, or be without religion, even perform religious acts, as long as it is not against the law.

(2) Religious faith or beliefs may not be a reason for someone to refuse to fulfil a civic duty imposed on him by law.

The exercise of religious freedom was thus entirely subject to any restrictions laid down by any law, or by a by-law, if the law provided for empowering provisions to that effect. In fact, however, previous practice continued, albeit less often with the use of drastic means and punishments.

Constitutional Guarantees of Freedom of Artistic Creation in the 1948 Constitution

Freedom of artistic creation is included in the provisions on freedom of speech and protection of cultural property:

§ 19

(1) Freedom of creative mental activity is guaranteed. Scientific research and the proclamation of its results, as well as art and its manifestations, are free, provided that they do not violate penal law.

(2) Cultural property is under the protection of the state. The state makes them accessible to all and supports science and the arts in order to develop national culture, progress and general well-being; in particular, it ensures that creative workers are provided with favourable conditions for their work.

§ 20

(1) Everyone has the right to make their views and results of their creative intellectual activity known to the general public and to disseminate and demonstrate them in any way.

(2) This right may be restricted by law only with regard to the public interest and the cultural needs of the people.

The freedom of artistic creation and its communication is more narrowly defined than in the previous constitution. It is again stated that this freedom may be restricted by law without giving clear criteria for the legitimacy of such laws, and leaves its restriction by penal law. In addition, however, it introduces restrictions “in the public interest and the cultural needs of the people,” and only the Communist Party, as the vanguard of the working class, is entitled to determine what is in the public interest and for the benefit of the people.

Constitutional Guarantees of Freedom of Artistic Creation in the 1960 Constitution

The guarantees of freedom of artistic creation are dealt with in the 1960 Constitution in two places: within the section on Social Establishment (Article 16) and under the section on the Rights and Obligations of Citizens (Article 28):

Art. 16

(1) All cultural policy in Czechoslovakia, the development of education, upbringing and teaching are conducted in the spirit of scientific worldview, Marxism-Leninism, and in close connection with the life and work of the people.

(2) The state, together with social organizations, makes every effort to support creative activity in science and the arts, strives for ever wider and deeper education of workers and their active participation in scientific and artistic creation, and ensures that the results of this activity serve all people.

(3) The state and social organizations are constantly striving to eliminate the survivors of an exploitative society in the consciousness of the people.

Art. 28

(1) In accordance with the interests of the working people, all citizens are guaranteed freedom of expression in all areas of society, in particular freedom of speech and of the press. Citizens use these freedoms both to develop their personalities and their creative efforts, and to exercise their active participation in the administration of the state and in the economic and cultural construction of the country. To the same end, freedom of assembly and freedom of street processions and demonstrations are guaranteed.

(2) These freedoms are ensured by making publishing and printing enterprises, public buildings, halls, open spaces, as well as radio, television and other means available to workers and their organizations.

Freedom of artistic creation and its communication are defined far more strictly than in the 1948 constitution. It is newly required that this must be in accordance with the interests of the working people, which is again interpreted—as usual—by the Communist Party. There is no explicit reference to penal law, but even that played a significant role here.

Criminal Protection of the Dignity of Religion

It was only after 1948 that legal dualism was overcome in Czechoslovakia (totalitarian regimes are faster and more effective than democratic regimes in enforcing legal changes). This was significantly reflected in the field of penal law, which underwent a rapid development, especially in the years 1949 to 1959.

Penal codes are the fundamental norms. During the Communist Party's supremacy, two penal codes were passed: the first in 1950¹⁴ which was very punitive (and sharpened by other accompanying laws), the second in 1961 as milder, but still very restrictive and class-conditioned.¹⁵

The Penal Code of 1950 provides protection of religion very briefly:

§ 119

Whoever publicly defames a group of the population of the republic for their nationality, race or religion, or for being without religion or supporters of the people's democratic order, will be punished by imprisonment for up to one year.

§ 234

Restrictions on freedom of religion.

Whoever by violence, threat of violence or other serious harm

- a) compels another to participate in a religious act,
 - b) delays another without authorization from such participation; or
 - c) otherwise prevents another from exercising freedom of religion,
- will be punished by imprisonment for one to five years.

An even shorter provision is contained in the Penal Code of 1961:

§ 198

Defamation of a nation, race and belief.

Whoever publicly and insultingly defames

¹⁴ Act No. 86/1950 Coll., Penal Code.

¹⁵ Act No. 140/1961 Coll., Penal Code.

- a) a nation, its language or a race; or
 - b) a group of inhabitants of the republic because they are supporters of a socialist social and state establishment, for their religion or because they are non-religious,
- will be punished by imprisonment for up to one year or by corrective measures.

Freedom of artistic expression was not explicitly mentioned in these provisions of the Penal Code. Legal protection of the exercise of religious freedom was formally guaranteed by individuals in the Penal Code of 1950, but only by a group of persons in the Penal Code of 1961. In fact, however, there was a systematic struggle against religion as a “bourgeois survival,” primarily through administrative restrictions, but often also personal ridicule, especially of primary school pupils.

Summary of the Legal Definition in the Years 1948–1989

Freedom of religious expression and freedom of expression of artistic creation were formally guaranteed in the period 1948–1989, but to a significantly limited extent compared to the previous period. Religion was generally fought against as a bourgeois relic, in all areas of social life, including artistic creation.

Artistic creation was subject to even more restrictions: art had to serve the public interest. The 1960 Constitution even required that art be developed in accordance with the scientific worldview—Marxism-Leninism. In practice, both criteria were determined by the Communist Party, and so there was a de facto distinction between permitted (and possibly also supported) art and non-permitted art, of which the creators and distributors were persecuted.

Penal law then continued to reduce the protection of religious beliefs, especially by abolishing the protection of individuals in the Penal Code of 1961.

Although visually it may seem that more pronounced legal restrictions were placed on the arts, both areas came under the control repressive party and state policies of the Communist Party, thus many manifestations of both religious and cultural life were pushed into illegality.

Legal Definition of Religious Freedom and Freedom of Artistic Creation and Their Relationship since the Velvet Revolution in November 1989

Establishment and Form of Constitutional Guarantees of Civil Liberties after November 1989

The Velvet Revolution of November 1989 significantly changed the situation in terms of real respect for human rights and freedoms. Already on 29th November 1989, the Czechoslovak parliament (still in its original “communist” composition!) adopted an amendment to the constitution,¹⁶ which deleted the passages guaranteeing the leading position of the Communist Party of Czechoslovakia and also amended the above-cited Article 16, which also includes freedom of artistic creation.¹⁷

Its new wording was the following:

- (1) All cultural policy in Czechoslovakia, the development of education, upbringing and teaching are conducted in the spirit of scientific knowledge and in accordance with the principles of patriotism, humanity and democracy.

The Constitution was amended more than ten times by the end of 1992, mainly in the area of property rights and the powers of state and self-governing bodies.

However, the newly created legislation has played a crucial role, especially since 1991. It includes the creation and enactment of the Charter of Fundamental Rights and Freedoms, adopted on 9th January 1991 as part of the Czechoslovak constitutional order.¹⁸

This constitutional law contains quite exceptional final provisions in § 6:

- (1) Laws and other legal regulations must be brought into line with the Charter of Fundamental Rights and Freedoms by 31 December 1991 at the latest. On

¹⁶ Constitutional act No. 135/1989 Coll., amending constitutional act No. 100/1960 Coll., the Constitution of the Czechoslovak Socialist Republic.

¹⁷ Pavel Polakovič, “Ústavní návrhy politických stran (1990–1992) [Constitutional Proposals of Politic Parties (1990–1992)],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 589.

¹⁸ Constitutional act No. 23/1991 Coll., which introduces the Charter of Fundamental Rights and Freedoms as a constitutional act of the Federal Assembly of the Czech and Slovak Federal Republic. This act also amended some provisions of the constitution.

that date, provisions which are incompatible with the Charter of Fundamental Rights and Freedoms shall cease to have effect.

This Charter still plays an extremely important role, especially in the Czech legal system. In connection with the split of Czechoslovakia into two independent states, the Czech Republic and the Slovak Republic, on 1st January 1993 both successor states adopted new constitutions. These constitutions differ significantly in enshrining the guarantee of human rights and freedoms. While the Constitution of the Slovak Republic¹⁹ contains its own provisions in this area, while maintaining the Charter of Fundamental Rights and Freedoms for its territory, the Constitution of the Czech Republic²⁰ does not contain provisions on the rights and freedoms of citizens and in this matter refers to the Charter, which the then Czech National Council re-enacts as a constitutional law in a formally unquestionable manner.²¹ For this reason, we will continue to rely on the provisions of this Charter.

Constitutional Guarantees of Religious Freedom in the Charter of Fundamental Rights and Freedoms

Religious freedom is guaranteed quite widely²²:

Article 15

(1) The freedom of thought, conscience, and religious conviction is guaranteed. Everyone has the right to change her religion or faith or to be non-denominational.

Article 16

(1) Everyone has the right freely to manifest her religion or faith, either alone or in community with others, in private or public, through worship, teaching, practice, and observance.

¹⁹ Constitutional act No. 460/1992 Coll., Constitution of the Slovak Republic; Eubor Cibulka and Marek Domin, “Ústava Slovenské republiky (1992) [Constitution of the Slovak Republic (1992)],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 651–52.

²⁰ Constitutional act No. 1/1993 Coll., Constitution of the Czech Republic; Karel Klíma, “Ústava České republiky (1992) [Constitution of the Czech Republic (1992)],” in *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], vol. XIX, ed. Karel Schelle and Jaromír Tauchen (Plzeň: Aleš Čeněk, 2020), 611–12.

²¹ Resolution of the Presidency of the Czech National Council No. 2/1993 Coll., on the promulgation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic.

²² For the English text of the Charter, we use the official published version at the website of the Chamber of Deputies of the Parliament of the Czech Republic: <https://www.psp.cz/en/docs/laws/listina.html> (accessed December 20, 2021), although some shortcomings of this translation could be objected to.

- (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 given at state schools shall 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 relatively large scope of the text stems from the efforts of legislators to explicitly guarantee religious freedoms in those areas where it was most violated during the communist regime.

It is clear from the text of the Charter that the legal limit for the exercise of religious freedom remains a violation of public security and order, health and morals, as well as respect for the rights and freedoms of other persons (physical and legal). The necessary restrictions must be set by law (by legislative power), not by administrative measures not supported in a legal text.

Constitutional Guarantees of Freedom of Artistic Creation in the Charter of Fundamental Rights and Freedoms

Freedom of artistic creation is expressed very briefly in the Charter:

Art. 15

- (2) Freedom of scientific research and artistic creation is guaranteed.

Interestingly, the Charter does not explicitly state any restrictions on the guarantee of this freedom. However, this does not mean that the fundamental rights and freedoms are absolute in freedom of artistic creation: the exercise of other constitutionally guaranteed rights and freedoms, the rights and freedoms of others, and the provisions of criminal law must certainly be taken into account, although this is not explicitly stated here.

Criminal Protection of the Dignity of Religion

The current Penal Code of 1961 was amended many times after November 1989. However, the new Penal Code of 8th January 2009 is the starting text to describe the current situation.²³

The Penal Code of 2009 provides very briefly for the protection of religion:

§ 176

Restrictions on freedom of religion.

- (1) Whoever by violence, threat of violence or threat of other harm

²³ Act No. 40/2009, Penal Code.

- a) compels another to participate in a religious act,
 - b) delays another without authorization from such participation; or
 - c) otherwise prevents another from exercising freedom of religion,
- will be punished by imprisonment for up to two years.
- (2) The offender shall be punished by imprisonment for one to five years or by a fine if he commits the act referred to in paragraph 1
- a) on at least three persons, or
 - b) with a weapon.

§ 352

Violence against a group of people and against an individual.

- (1) Whoever threatens a group of inhabitants with death, injury or large-scale damage shall be punished by imprisonment for up to one year.
- (2) Whoever uses violence against a group of individuals or individuals or threatens to kill them, injure them or cause extensive damage because of their actual or perceived race, ethnic group, nationality, political beliefs, religion or because they are actual or perceived without religion, will be punished by imprisonment for six months to three years.
- (3) As in paragraph 2, he shall be punished,
- a) who associates or tumults in the commission of such an act; or
 - b) if he commits the act referred to in paragraph 1 by printing, film, radio, television, a public computer network or any other similarly effective means.

§ 355

Defamation of a nation, race, ethnic or other group of persons.

- (1) Whoever publicly defames a nation, language, race or ethnic group; or a group of persons for their actual or perceived race, ethnicity, nationality, political beliefs, creed or belief, or because they are genuinely or allegedly non-denominated, shall be punished by imprisonment for up to two years.

Freedom of artistic expression is mentioned by these provisions of the Penal Code only indirectly, in the case of § 355: defamation of a nation, race, ethnic or other group of persons.

Legal protection of the exercise of religious freedom is guaranteed in the Penal Code of 2009 by both a group of persons and individuals. However, in the case of defamation on the grounds of religion or belief, protection is only guaranteed for a group of people.

Summary of the Legal Definition after November 1989

Freedom of religious expression and freedom of expression of artistic creation were, after November 1989, that is, after the Velvet Revolution (removal of the communist regime), both more realistically observed and also legally enshrined in the 1991 Charter of Fundamental Rights and Freedoms readopted for the Czech Republic as part of its constitutional order. The longer text is devoted to religious freedom; the much shorter text is devoted to the freedom of artistic creation. While in the case of religious freedom, the Charter itself explicitly

states how it may be restricted, in the case of freedom of artistic creation any explicit restriction is missing in the Charter.

The protection of religious freedom is guaranteed in the Penal Code of 2009 for individuals and groups of people, both in the event of a violation of religious freedom by violence and the threat of violence, as well as the threat of other harm. Artistic creation is not explicitly mentioned in this context. It is therefore clear that—in the absence of explicit legislation—the relationship between religious freedom and the freedom of artistic creation must be sought primarily through case law, if they come into conflict and the case is brought before a court.

Searching for the Relationship between Two Constitutionally Guaranteed Freedoms Regarding the Example of a Civil Litigation Concerning Theatre Performances Held in 2018 in Brno

The Holding of Controversial Theatre Performances in Brno in 2018 and Discussions around Them

The Center for Experimental Theater presented two author's performances guided by Croatian director Oliver Frljić as part of the annual Theatre Brno Festival in 2018: *The Malediction* (24th May 2018) and *Our Violence and Your Violence* (26th May 2018).²⁴

Both performances included controversial scenes with religious undertones. In the first performance, the actor on a statue commemorating Pope John Paul II depicted fellatio, the pope was subsequently labelled the “protector of paedophiles” and, in the end, symbolically hanged, and the actors also cut down a wooden cross with a chainsaw. At the end of the second performance, the

²⁴ Contradictory information is provided regarding these performances. While all the reports on the performances in the press speak of the author's work of stage director Frljić, the court writings of the first instance, which we will discuss below, mention the Slovenian Youth Theatre as the author. However, the mentioned name was the actor, not author, and this ensemble performed only the performance *Our Violence and Your Violence*, while the performance of *The Malediction* was performed by the Polish ensemble Teatr Powszechny, cf. the programme of the festival at “Divadelní svět Brno 2018: Divadlo, tanec a svoboda [Theater World Brno 2018: Theater, Dance and Freedom],” 26.02.2018, accessed November 16, 2021, <http://www.mestohudby.cz/zpravodajstvi/divadelni-svet-brno-2018-divadlo-tanec-a-svoboda>.

figure of a young man with signs of the crucified Jesus Christ descends from the cross and, signifying violence, depicts coitus with a young Muslim woman (who had previously pulled the national flag of the Czech Republic out of her vagina).

In the Czech Republic, as in other countries, these performances have also caused controversy.²⁵ On the one hand, there were people who defended freedom of artistic expression, but, on the other hand, there was a wave of resistance to the performances. The Czech Bishops' Conference distanced itself from the performances in its declaration of early April 2018,²⁶ and Muslims also joined their protest.²⁷ A petition was signed against the performances by about 6,000 people, and the organizers handed it to the mayor of Brno on 11th May 2018.²⁸ Protest demonstrations took place in several places in the city of Brno. A group of twenty-five persons from the movement Decent People burst onto the stage of the Theatre Goose on a String after the beginning of the production *Our Violence and Your Violence* and formed a chain in front of the actors, thus separating the actors and spectators and interrupting the performance. However, most of the audience disagreed with them, applauding the actors and shouting "Decent People away!" After about an hour, an anti-conflict police team arrived at the theatre and the performance continued. The whole controversy resulted in the filing of several criminal reports from both sides, but the police discontinued the investigation.²⁹

²⁵ For example, the performance *The Malediction* was presented at the Teatr Powszechny in Warsaw in 2017, which also provoked strong protests and criminal reports (still pending). It is interesting that the semi-monthly revue *Divadelní noviny* [Theatre Newspaper] submitted a detailed article about this event, in which it states (in the original Polish version) the reactions to the presentation of this performance and controversies that arose. See "Skandal s papežem v Teatru Powszechny [Scandal with the Pope at the Teatr Powszechny]," 23.02.2017, accessed November 17, 2021, <https://www.divadelni-noviny.cz/skandal-s-papezem-v-teatru-powszechny>.

²⁶ Česká biskupská konference [Czech Bishops' Conference]. Biskupové nesouhlasí s divadelní hrou Naše násilí a vaše násilí [Bishops Disagree with the Performance *Our Violence and Your Violence*], 18.04.2018, accessed November 15, 2021, <https://www.cirkev.cz/cs/aktuality/180418biskupove-nesouhlasi-s-divadelni-hrou-nase-nasili-a-vase-nasili>.

²⁷ "Biskupové nesouhlasí s divadelní hrou Naše násilí a vaše násilí. Muslimové se přidávají [Bishops Disagree with the Performance *Our Violence and Your Violence*. Muslims are joining]," 20.04.2018, accessed November 15, 2021, <https://islam.cz/2018/04/20/biskupove-nesouhlasi-s-divadelni-hrou-nase-nasili-a-vase-nasili-muslimove-se-pridavaji/>.

²⁸ "Jsou křesťané občané druhé kategorie? tážou se odpůrci kontroverzní hry [Are Christians Second-class Citizens? Opponents of the Controversial Performance Ask]," 15.05.2018, accessed November 15, 2021, https://www.idnes.cz/brno/zpravy/nase-nasili-a-vase-nasili-kontroverzni-hra-petice-krestansti-aktiviste.A180515_140626_brno-zpravy_krut.

²⁹ "Kontroverzní hra Naše násilí a vaše násilí spustila smršť trestních oznámení [The Controversial Performance *Our Violence and Your Violence* Has Triggered a Whirlwind of Complaints]," 29.05.2018, accessed November 15, 2021, <https://brnensky.denik.cz/zlociny-a-soudy/kontroverzni-hra-nase-nasili-a-vase-nasili-spustila-smrst-trestnich-oznameni-20180529.html>.

However, it is far more beneficial for our research to follow another court case that has the nature of a civil dispute.

Civil Litigation Concerning Theatrical Performances Conducted by Representatives of the Catholic Church—Basic Data and Time Path

The plaintiffs are Card. Dominik Duka, then President of the Czech Bishops' Conference, and his lawyer Roland Němec.

The defendants are the Center for Experimental Theater in Brno and the National Theatre in Brno.

The plaintiffs filed a lawsuit with the Court of First Instance, Brno Municipal Court, 11th July 2018; they requested that both defendants publish an apology on their websites. The Municipal Court ruled on 18th March 2019, rejecting the plaintiffs' claims.³⁰ The Court of Appeal of the second instance, the Brno Regional Court, handed down a judgment on 20th November 2019, in which it again rejected the plaintiffs' claims.³¹ The plaintiffs lodged an extraordinary appeal against this judgment: an appeal to the Supreme Court of the Czech Republic, which also dismissed the lawsuit on 28th April 2021.³²

After exhausting the procedural steps in the general judiciary, the plaintiffs lodged a constitutional complaint with the Constitutional Court of the Czech Republic on 4th August 2021.³³ The Constitutional Court has not yet ruled on this complaint. If its decision is negative from the applicants' point of view, they are considering bringing an action before the European Court of Human Rights.

Arguments of the Plaintiffs and of the Court in the Proceedings before the Court of First Instance

In the action sent to the court of first instance (Brno Municipal Court), the plaintiffs state:

- The right to equality has been violated (Article 1 of the Charter), in which a group of persons is denied the right enjoyed by others without a fair justification for such a situation. Their portrayal of equality was affected by the portrayal of Jesus in this way, as the plaintiffs, for example, cannot stage a performance where Muhammad has sex with a puppeteer.
- The performance may therefore be aimed at promoting the hatred of a group of the population towards another, that is, conduct contrary to Article 2 (3) of the Charter, when in this way the security and life of the plaintiff, Card.

³⁰ Sentence of the Municipal Court in Brno File no. 112 C 88/2018-190 of 18th March 2019.

³¹ Sentence of the Regional Court in Brno File no. 70 Co 170/2019-243 of 20th November 2019.

³² Sentence of the Supreme Court of the Czech Republic File no. 25 Cdo 1081/2020-282 of 28th April 2021.

³³ Constitutional complaint of His Eminence ThLic. Dominik Duka and of JUDr. ICLic. Ronald Němec, Ph.D. of 4th August 2021.

Duka, as a herald of the teachings of Jesus Christ as well as the security of the prosecutor JUDr. Němec, resp. the right to safety of his children.

- Interference with the right to freedom of religion and expression of faith, as well as the freedom of thought and conscience of the plaintiffs (Articles 15 and 16 of the Charter), as they cannot identify with a person that is being reported as raping a woman, or with a person representing a religion that rapes Islam. If the depiction of rape should have any symbolism, then it was malicious symbolism, which also applies to the treatment of the flag and of figure of John Paul II. Jesus Christ was portrayed in *Our Violence*, and if not, it is not clear why the character was endowed with the attributes and appearance that are usually attached to Jesus. These performances do not lead to any dialogue.
- Violation of the dignity of the plaintiffs—the said woman pulling the flag of the Czech Republic from her vagina during the same performance interfered with the plaintiffs' rights so that as Czech citizens they have the right to use the Czech Republic symbols only in a way that does not harm the seriousness of the symbols and of the state.

The court first recapitulated the de facto findings where the role of the media plays a significant role:

- From an annotation of the play *Our Violence and Your Violence*, the court found that it should question Europe as a whole and ask, among other things, “whether we are aware that our wealth depends on thousands of deaths in the Middle East, whether we have equal access to the dead after the terrorist attacks in Europe like those in Baghdad. When were we supposed to convince ourselves of the greater power of our God than the others?” The second theatrical performance *The Malediction* was then to ask questions such as “to what extent our decisions are influenced by Catholic morality, how the Church influences the behaviour of atheists, or to what extent contemporary art is within the limits of censorship and avoidance of accusations of insulting the faith.”
- The court investigated the course of the theatrical performance *The Malediction* of video recording on the website www.youtube.com (the performance *The Malediction* held in Poland), from an article in the magazine *Konteksty* 3/2018, which talks about oral sex, and the performance *Our Violence and Your Violence* with an (abbreviated) video recording of the Czech Television, which contains almost complete scenes, except for the alleged rape, where the recording ends with the actor taking off the actress' shorts, but the rest is evident from an interview with the director of the National Theatre Brno on the website www.aktualne.cz from 16th April 2018.
- The court rejected the plaintiffs' proposals for the examination of witnesses (director, actors, Prof. Osolobě): they could not contribute to the outcome of the proceedings or to supplement the facts. The intention of the actors

and the overall impression of the results of their activities can be completely missed, and in the opinion of the court, this was the case. The plaintiffs interpreted the actors' intention in a certain way, but the court concluded that the actual execution and the impression created did not coincide with the claims.

The Court of First Instance (based on the defendants' replies and the applicants' replies) dismissed the action in its entirety, arguing:

- Lack of active legitimacy of the plaintiffs—they did not see the mentioned performances in the Brno version.
- Depictions of John Paul II and of Jesus Christ are not historical, but allegorical, in the context of the targeting of the performances, evident from their annotations. Both performances in a portrayed form showed phenomena that existed or still exist, they only did so in a form that is not very common and is non-standard, on the other hand, the court is not here to determine the level of taste of the audience and decide what happens on scene, only because it does not like the performance or, on the contrary, it likes it, the court could not decide what is or is not good to act, which is not the task of the plaintiffs too.
- Equality of rights (Article 1 of the Charter)—the plaintiffs have the right to stage theatrical performances with the content what they want. This provision of the Charter does not apply to horizontal relations, that is, between entities that are gifted in equality of rights, but to vertical relations, that is, between them and the state, which is obliged to act equally in relation to all and also to respect their same position. It was not relevant to the present case if it was claimed that according to the current mood in society, Muslims and Christians did not have the same rights. This is why it is always appropriate to judge every action from the point of view of the potential for interfering with rights from the point of view of the average person, not the “extremist.”
- The dignity of the plaintiffs was to be violated by the fact that the actress pulled the flag of the Czech Republic from her vagina. The applicants' rights could not be affected. The factual substance of the offense within the meaning of Section 13 of Act No. 352/2001 Coll., on the use of state symbols, could have been fulfilled to the maximum. The plaintiffs do not have standing to bring an action for the protection of such a symbol when infringement proceedings should be instituted by the competent authority.
- The objection to the dignity, honour and reputation of the depiction of Jesus Christ or John Paul II is also unfounded, with regard to the reasonable and average viewer. In any case, the institute of John Paul II's post-mortem protection may seem to be more appropriate in the given case in the performance *The Malediction*, to which, however, in the opinion of the court, the plaintiffs do not have active legitimacy.

— Regarding freedom of conscience and religion (Articles 15 and 16 of the Charter), in the court's view, theatrical performances cannot change society's view of the nature of the teachings in which the plaintiffs believe and thus endanger the plaintiffs in their professional and family lives. The findings of the Austrian Constitutional Court do not support the reasoning, because the penal law protection of religious symbols applies there.

It is important that the court also based its argument on the wording of the provisions of the Civil Code³⁴ for the protection of personality:

§ 81

(1) Personality of an individual including all his natural rights are protected. Every person is obliged to respect the free choice of an individual to live as he pleases.

(2) Life and dignity of an individual, his health and the right to live in a favourable environment, his respect, honour, privacy and expressions of personal nature enjoy particular protection.

§ 82

(1) An individual whose personality rights have been affected has the right to claim that the unlawful interference be refrained from or its consequence remedied.

(2) After the death of an individual, the protection of his personality rights may be claimed by any of his close persons.

Even in this area, the court did not find the plaintiffs actively legitimated and rejected their arguments.

Arguments of the Plaintiffs and of the Court in the Proceedings before the Court of Second Instance

The plaintiffs state in the appeal sent to the court of the second instance (Regional Court in Brno):

- They do not agree with the conclusion of the Court of First Instance that the performances in question did not infringe the applicants' rights.
- They claim that the performances are extreme and extremist and as such do not enjoy protection. It is the duty of the plaintiffs not to remain silent, to draw attention to acts of violence and, if they consider such conduct to be dangerous to the plaintiffs, their families and the society in which they live, to respond adequately to them by bringing an action.
- They believe that they have fewer rights because they are Catholic and defend their rights against interference in the Catholic faith. They complained

³⁴ Act No. 89/2012 Coll., Civil Code. The official English translation is available at: <http://obcanskyzakonik.justice.cz/index.php/home/zakony-a-stanoviska/preklady/english>, accessed November 20, 2021.

that the Court of First Instance had unjustifiably suspended their rights from those of others and that it had not carried out a proportionality test in that case.

- They did not agree with the average viewer’s criterion of a European growing up in a legal environment.
- Regarding the removal of the flag from the vagina, the plaintiffs stated that it was not at all decisive whether it was “just” an offense, because the flag as a symbol of the state is not just a thing, it is a morality, a principle and the values it carries. They insisted that the performances served to support or promote movements aimed at suppressing the rights and freedoms of citizens.

The court of second instance dismissed the appeal in its entirety with the following arguments:

- Freedom of speech, although not absolute, is worthy of protection even for such thoughts as they offend, shock or disturb. This freedom may be restricted by law in favour of the fundamental values of a democratic society. However, the present case does not constitute a restriction on freedom of artistic expression for any conceivable legitimate reason, generally provided for in the Charter or the European Convention for the Protection of Human Rights and Fundamental Freedoms, but solely a restriction on the protection of the rights and freedoms of others (Article 17 (4)), resp. protection of the reputation or rights of others (Article 10 § 2 of the Convention). However, the protection of any possible public interests (e.g., to maintain morality or prevent religious unrest in society, etc.) as limits of freedom of expression is not at all in this type of court proceedings, and such public interests cannot therefore be given in this context when exercising the right to privacy (private interest of the applicants). The protection of human personality cannot be confused with the protection of public order.
- However, the right to hold a particular religious belief is not automatically affected if the individual is exposed to a different religious opinion from third parties.
- Regarding the protection of artistic freedom: works of art can also be critical, offensive, shocking or disturbing. The guide here is the criterion of rational thinking of an independent person with the reason of an ordinary person, able to use his reason in the position of a spectator.
- In resolving conflicts between freedom of expression and the protection of religious sentiment of believers, there is in the ECHR case law both decisions favouring the protection of religious sentiment of believers (e.g., *Otto-Preminger-Institut v. Austria*, judgment of 20th September 1994, complaint no. 13470/87, *E.S. v. Austria*, judgment of 25th October 2018, complaint no. 38450/12) as well as decisions favouring freedom of expression (e.g., *Giniewski v. France*, of 31st January 2006, complaint no. 64016/00,

Sekmadienis Ltd. v. Lithuania, judgment of 30th January 2018, complaint no. 69317/17). That part of the ECHR's decision, which ultimately favoured the protection of religious sentiment over freedom of expression, is understood very critically and controversially in the local context and does not meet with understanding. In relation to freedom of religion, the ECHR mentions in a number of decisions that standards in this area differ from country to country, given national traditions and requirements given the need to protect the rights and freedoms of others and to maintain public order.

- With regard to the active legitimacy of individuals, the court recognizes that unjustified interference with the right to protection of personality may violate the right to protection of personality of several natural persons and then all at the same time, or any of them (independently), have the right to bring their claims to court. On the other hand, in an intervention addressed not to an individualized individual (person) but to a group of persons, the courts must always examine how an individual attack will affect the individual sphere of a particular individual. The plaintiffs were not directly affected by the intervention in question, either as the characters covered by the scenes in question, or directly as eyewitnesses (spectators) to either of the two performances. The immediate factual, temporal and local connection between the intervention and the person affected is therefore not given here. Immaterial property damage to religious sentiment could only be caused to the plaintiffs by the reflection of parts of the performances in which they were not present in person, in the media, resp. in public space. In that situation, in the light of all the foregoing, the Court of Appeal makes the logical conclusion that the protection against non-pecuniary damage caused by the reflection of an intervention cannot be so broad that, as such, the perpetrator should be required to make good any individual Christian (as a character that the scenes deal with) or directly (as an eyewitness to the performance) and affected only by the reflection of isolated parts of the performance in public space.
- Regarding the flag, the protection of state symbols is reserved to public law and does not form part of the right to the protection of human personality.
- The Court of Appeal reviewed the decision of the Court of First Instance and the proceedings before it to the extent challenged on appeal and went beyond the grounds of appeal, and concluded that the applicants' appeal should be denied of any justification.

Arguments of the Plaintiffs and of the Court in the Proceedings before the Supreme Court

The plaintiffs state in the appeal sent to the Supreme Court of the Czech Republic:

- The Court of Appeal was then criticized for having erred in its assessment of the conflict of rights in the present case. It is not the right to freedom of expression and the right to protection of honour and good repute, but the right to freedom of expression under Article 10 of the Convention and the right to freedom of thought, conscience and religion under Article 9 of the Convention, which includes the right not to be challenged in their religious beliefs.
- Although the right to hold a particular religious belief is not directly affected if an individual is exposed to another religious opinion by third parties, if such activity does not reach the intensity of intolerable psychological coercion or physical coercion, the right not to be exposed can also be considered another internal fori component grossly offensive to religious sentiment, especially if it is a targeted attack or exercise of another religion.
- The appellants do not consider the Court of Appeal's conclusion correct that the performances in question could not have outraged the average viewer. On the one hand, the Court of Appeal did not define such a viewer in any way, and, on the other hand, it ignores the fact that Czech culture is based on Christian roots, which is why even an average, albeit unbelieving, person can be affected by a blasphemous statement. The Court of Appeal errs in considering the Czech population to be mostly atheistic; most of the society has a positive attitude towards the Church; according to discussions on the Internet, the performance has offended a number of people who do not actively profess Christianity.
- The appellants consider that the applicants were not directly concerned by the mention of the play in question as incorrect. It follows from the fact that the applicants feel affected by their rights that the interference actually took place. The Court of Appeal also erred in finding that the plaintiffs lacked active standing to bring proceedings.
- They reiterated that they felt discriminated against as Christians, and were granted fewer rights in the public sphere than adherents of Islam, which they concluded that they themselves could not make similar offences in relation to Islam.

The Supreme Court rejected the appeal in its entirety with the following argument (selected only as regards the conflict between the right to religious freedom and the right to freedom of artistic expression):

- If our legal system guarantees citizens the right to freely choose their religion and its uninterrupted practice, including the right not to be subjected to grossly offensive acts against the foundations of their faith, and if the law

guarantees freedom of expression, locution of own opinions and uncensored ideas, it is clear that there may be a conflict between the two rights in their exercise.

- The legal limit of the right to freedom of expression of one person is the limits set out in Article 17 (4) of the Charter and Section 81 of the Civil Code to protect the freedom, dignity, respect, honour and privacy of another.
- Freedom of religion is restricted by freedom of expression, including speech that supports other religions or atheism or criticizes or disputes certain religions and its manifestations. Freedom of expression applies not only to information and ideas that are received favourably or are considered harmless or insignificant, but also to those that are offensive, shocking or disturbing the state or any group of the population. If the exercise of one right exceeds the acceptable limits of the protection of another right, the originally permitted exercise of the right becomes illegal.
- In the event of a conflict between two fundamental human rights, it is necessary to carefully consider in each case which of them should be given priority and protection, as these boundaries cannot be well-defined and specifically described prohibitions and guidelines.
- If it were a grossly offensive and derogatory expression, directed against a religious symbol or an expression of faith without justifiable motive, such an expression would be to deny protection and grant it to the affected right to freedom of religion. On the contrary, speech dealing with a religious symbol could be found to be both controversial and negative, if it were driven by a desire for dialogue, an expression or an opinion, and its aim would not only be to shock and offend those for whom the symbol is sacred. Such speech would be appropriate to provide protection at the expense of the protection of religious sentiment, this internal component of the right to freedom of religion.
- The expression of the realization of the right to freedom of expression is, among other things, a work of art, and if its main goal is not to attack a religion without insignia, insult and disparage its symbols and representatives, then it does not interfere with the right to freedom of religion.

Arguments of the Plaintiffs and of the Court in the Proceedings before the Constitutional Court

The complainants state the main reasons for their constitutional complaint:

- The complainants disagree with the opinions of the courts, which argued that the defendants had the right to present the performances as they were presented, because in a democratic state freedom of speech is so wide that its restriction can only be in exceptional cases. One can agree that freedom of speech should be wide, but that the river must not be the sea. It is easy to drown in a river without borders.

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- The complainants allege that the reasons of the ordinary courts for dismissing the action are unconstitutional. Protection of complainants, resp. of their Christian faith is much less than the rights of Muslims or other non/religious denominations.
 - The merits of the dispute are three points:
 - I. Who has the right to defend the honour and reputation of Jesus Christ and St. John Paul II, as prominent representatives of the faith practised by the complainants?
 - II. Who has the right to insult and ridicule non/faith, resp. where the limits of freedom of artistic creation are?
 - III. Does a citizen of the Czech Republic have the right to defend the basic symbols of the Czech Republic in court?
 - The complainants alleged that the decision of the ordinary courts had infringed their constitutional rights. These are rights based on the Charter of Fundamental Rights and Freedoms:
 - Articles 1 and 3 (3) and the Charter of Fundamental Rights of the European Union, Article 20 (equality of rights);
 - Article 5 and Article 7 (2), in conjunction with Article 10 (1) and (2) Article 15 (1), incl. European Convention on Human Rights Article 9 (Jesus Christ and John Paul II are denied the right to protection of personality);
 - Article 16 (1) and (2), with reference to the Charter of Fundamental Rights of the European Union Article 10 (1) (the right to manifest one's religion, including the defence of the honour and reputation of religious representatives and societies);
 - Article 36 (2) with reference to the Charter of Fundamental Rights of the European Union Article 47 (violation of the right to a fair trial, as the general courts did not teach the complainants their obligations to assert and demonstrate a general perception that the general average person would feel the flag being pulled out of a woman's vagina, as unworthy and it caused him mental suffering—the absence of this proof was judged by the Supreme Court).

The Constitutional Court rejected this complaint in its decision of 4th October 2022,³⁵ stating:

- on the one hand, on the basis of a summary of the case law of the European Court of Human Rights and the ordinary courts of the Czech Republic, the court admitted that the personality rights of persons who were not physically present at the theatre performances themselves could be violated by the content of those performances;

³⁵ Decision of the Constitutional Court of the Czech Republic File No. II.ÚS 2120/21 of 4 October 2022, published on 11 October 2022.

- on the other hand, the Constitutional Court finds that both games pursued a legitimate aim, to provoke public discussion about religious violence and sexual incidents within one of the churches;
- they did so by means which, although partly blasphemous, did not, on the whole, suppress the underlying message;
- the substance of the content of the plays, including the controversial scenes, was made known to the public in advance and it was everyone's free choice whether to attend the performance;
- the inevitable public awareness of the scenes complained of in the constitutional complaint, as well as of the incident during one of the plays, was accompanied by a wide media discussion; thus, even in terms of the intensity of the effects of the facts complained of, there was no substantial interference with the applicants' fundamental rights and freedoms;
- the Constitutional Court concluded that the contested sentences of the Municipal Court in Brno, Regional Court in Brno and the Supreme Court did not violate the fundamental rights and freedoms of both complainants, it therefore dismissed the constitutional complaint pursuant to Article 82(1) of the Constitutional Court Act.

Summary of the Results of the Search for a Relationship between Two Constitutionally Guaranteed Freedoms

It is clear that in a conflict between constitutionally guaranteed freedoms religious freedom and freedom of artistic expression, the ordinary courts give priority to the protection of artistic freedom with only one significant restriction: if the offensive artistic expression did not pursue a justifiable aim other than insulting religious beliefs or downplaying religion.

It is a question of how the Constitutional Court, and possibly also the European Court of Human Rights, will deal with this dilemma.

Moreover, it is clear that the media play a major role in both creating the factual situation and proving the facts.

Conclusion

The legal relationship between freedom of religion and freedom of artistic expression has been resolved in significantly different ways in the territory of today's Czech Republic in the period since the founding of Czechoslovakia, that is, since 1918.

The first model of regulation of this relationship was characteristic for the period 1918 to 1948. The starting point was mainly the wording of the Czechoslovak Constitution of 1920, which enshrined both freedoms (in the case of freedom of artistic expression with explicit reference to penal law), and the wording of the Austrian Penal Code of 1852, which was carried over into the Czechoslovak legal system. In particular, the wording of the Penal Code set relatively strict boundaries of artistic expression in relation to freedom of religion. It can therefore be stated that freedom of religion enjoyed greater legal protection during this period.

The second model is characteristic for the period of the supremacy of the Communist Party of Czechoslovakia in the years 1948 to 1989. Both Czechoslovak constitutions of 1948 and 1960 formally guaranteed the exercise of both investigated freedoms. The Penal Codes of 1950 and 1961 severely reduced the protection of religious freedom; the 1961 Code penalized only violations of the religious freedom of entire groups, not individuals. In fact, however, both other laws and by-laws, as well as administrative practices, severely limited the exercise of both freedoms examined; in the case of freedom, this was all the more so as the 1960 Constitution itself required that all artistic creation be in accordance with the scientific worldview—Marxism-Leninism. The third model is characteristic for a democratic society, which began to develop after the Velvet Revolution in November 1989. The key texts for the current description of the legal relationship are the 1991 Charter of Fundamental Rights and Freedoms and the Penal Code of 2009. While in the case of religious freedom it is explicitly stated in the Charter itself how it may be restricted, in the case of freedom of artistic creation, explicit restrictions are missing in the Charter. The Penal Code sanctions violations of freedom of religion in the form of oppression, but not through the exercise of freedom of artistic expression. It is therefore clear that—in the absence of explicit legislation—the relationship between religious freedom and the freedom of artistic creation must be sought primarily through case law, if the freedoms come into conflict and the case is brought before a court. The most significant court proceedings in the area of the relationship between freedom of religion and freedom of artistic expression is a lawsuit between the then President of the Czech Bishops' Conference and his lawyer on the one hand, and the Center for Experimental Theater in Brno and the National Theatre in Brno on the other. The subject of the conflict was the presentation of two theatrical performances directed by the Croatian director Oliver Frlijić: *The Malediction* and *Our Violence and Your Violence*. The plaintiffs alleged violation of personal rights and incitement to interfaith conflict on the basis of the controversial means of expression with a religious subtext used in these performances. The ordinary courts (Brno Municipal Court, Brno Regional Court, and the Supreme Court of the Czech Republic) consistently rejected their arguments, after which the applicants lodged a constitutional complaint, which was

finally rejected by the Second Chamber of the Constitutional Court in its decision of 4 October 2022. It is clear that in the conflict between these two constitutionally guaranteed freedoms, the ordinary courts prefer the protection of artistic freedom with only one significant restriction: when the offensive artistic expression does not lead to any justifiable goal other than insulting religious beliefs or downplaying religion.

A very important role of the media also emerges from the description of the case in question. The courts themselves stated that the entire court proceedings would almost certainly not have taken place without such great information about the controversial performances in the media. The courts themselves drew information from the media in evidentiary proceedings. In addition, the whole case was massively published in the media. All this shows how important the media are in today's society.

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Damián Němec

Relations juridiques entre la liberté d’expression artistique et la protection de la dignité de la religion à la lumière d’une affaire judiciaire concernant les représentations théâtrales en République tchèque

Résumé

Cet article traite de la réglementation juridique de la relation entre deux droits de l’homme, la liberté d’expression artistique et la protection de la valeur de la religion dans le cadre de la liberté de religion en République tchèque. Le texte donne un aperçu de trois modèles de cette relation à trois époques historiques : la période de la Tchécoslovaquie démocratique de 1918 à 1948 (à l’exclusion de la période de la Seconde Guerre mondiale, au cours de laquelle la protection des droits de l’homme a été complètement ignorée), la période de domination du parti communiste de Tchécoslovaquie de 1948 à 1989 – période de violations généralisées des droits de l’homme, et dans une société à nouveau démocratique depuis 1989 (jusqu’en 1992 en Tchécoslovaquie, depuis l’écroulement de la fédération tchécoslovaque, depuis le 1er janvier 1993 en République tchèque).

La plus grande partie de l'article est consacrée à la description du litige causé par la présentation de deux représentations théâtrales lors du festival de théâtre de Brno 2018.

Le metteur en scène des deux représentations était le Croate Oliver Frlić, connu pour son utilisation de moyens d'expression controversés, souvent sur des thèmes religieux. Le procès qui en a résulté, dans lequel le président de la Conférence épiscopale tchèque de l'époque était l'un des plaignants, a montré que les tribunaux ordinaires privilégiaient la protection de la liberté artistique dans un conflit entre deux libertés garanties par la Constitution, avec une seule restriction importante : les moyens artistiques devaient avoir un but autre que celui d'offenser ou d'humilier les sentiments religieux. Toutefois, le litige n'a pas encore été entièrement résolu : les plaignants ont fait appel devant la Cour constitutionnelle de la République tchèque, qui n'a pas encore statué sur la question. Par conséquent, une plainte auprès de la Cour européenne des droits de l'homme de Strasbourg n'est pas à exclure.

Mots-clés : droits de l'homme, droit constitutionnel, droit pénal, liberté d'expression artistique, liberté religieuse

Damián Némec

Rapporti giuridici tra libertà di espressione artistica e tutela della dignità della religione alla luce del caso giudiziario sugli spettacoli teatrali nella Repubblica Ceca

Sommario

Questo articolo riguarda la regolamentazione giuridica del rapporto tra due diritti umani, la libertà di espressione artistica e la tutela dei valori religiosi nel quadro della libertà di religione nella Repubblica Ceca. Il testo presenta una panoramica di tre modelli di questo rapporto in tre epoche storiche: nel periodo della Cecoslovacchia democratica nel 1918–1948 (escluso il periodo della Seconda Guerra Mondiale, in cui la tutela dei diritti umani fu completamente ignorata), nel periodo della dominazione del Partito Comunista Cecoslovacco nel 1948–1989, con una diffusa violazione dei diritti umani, e di nuovo in una società democratica dal 1989 (fino al 1992 in Cecoslovacchia, dallo scioglimento della federazione cecoslovacca il 1° gennaio 1993 nella Repubblica Ceca). Gran parte dello spazio è stato dedicato alla descrizione del contenzioso legale derivante dalla presentazione di due spettacoli teatrali al Festival teatrale di Brno nel 2018. Il regista di entrambi gli spettacoli è stato il croato Oliver Frlić, noto per l'uso di mezzi espressivi controversi, spesso con temi religiosi. Il conseguente processo, nel quale fu parte ricorrente l'allora presidente della Conferenza episcopale Ceca, dimostrò che i tribunali comuni preferivano la tutela della libertà artistica nel conflitto tra due libertà costituzionalmente garantite con un'unica significativa limitazione: che i mezzi artistici avevano uno scopo diverso da quello di offendere o umiliare i sentimenti religiosi. Tuttavia, la controversia non è stata ancora del tutto risolta: le parti attrici hanno presentato ricorso alla Corte Costituzionale della Repubblica Ceca, che non si è ancora pronunciata sul caso. Non è quindi da escludere un ricorso alla Corte europea dei diritti dell'uomo di Strasburgo.

Parole chiave: diritti umani, diritto costituzionale, diritto penale, libertà di espressione artistica, libertà religiosa