RIGHT TO CULTURE

Anna Młynarska-Sobaczewska

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Table of Contents

Introduction. The Right to Culture – an Attempt of Reconstruction 7

Chapter 1. What Does the Right to Culture Mean Exactly? The Scope and Meaning of the Notion of Culture as an Object of Rights 13

1.1. Ambiguity of the notion of culture 13

1.2. National culture versus universal heritage 25

1.3. High and low culture 35

Chapter 2. The Normative Character and the Substance of the Right to Culture 44

2.1. Right to culture and art. 15 of the International Covenant on Economic, Social and Cultural Rights 44

2.2. Right to artistic culture 51

2.3. The nature of the right to culture 60

2.4. State's duties within the right to culture 75

2.5. Judicial protection of the cultural rights 83

Chapter 3. Freedom of Artistic Creation versus the Right to Culture. Elements of the Right to Culture in the Jurisprudence of the ECHR . . . 88

3.1. Limits of freedom of artistic expression 90

3.2. The horizontal effect of freedom of artistic expression 103

3.3. Positive obligations of a state within freedom of artistic expression 111

Chapter 4. Creators' Rights and Copyright Law – Bridges or Barriers between Creators and Recipients 119

4.1. Rights of authors, rights of creators – two systems 120

4.2. Copyright versus freedom of expression 128

4.3. Freedom of artistic creation with the use of someone else's work. Parody – a case study 132

4.4. Challenges faced by copyright in relation to the digitalisation of cultural content resources 141

4.5. EU regulations regarding access to cultural content versus copyright 152
4.6. Liberation of creativity – Creative Commons 157
4.7. Liberation of cultural heritage 163

Chapter 5. Cultural Policy and the Obligations of Public Authorities Regarding the Implementation of the Right to Culture 168
5.1. Cultural policy and the right to culture 168
5.2. Models of cultural policies 172
5.3. Arm's length principle in financing art life 177
5.4. Polish Film Institute as an attempt to implement an expert body and the arm's length principle 184
5.5. Substantive criteria – dilemmas and conditions for financing the artistic life 186
5.6. The status of the artist – mechanisms to support creators as subjects and beneficiaries of cultural life 191
5.7. Instruments for promoting the accessibility of cultural assets – book as a cultural asset 195

Conclusion. The Right to Culture – from Utopia to a Universal Standard 205

Bibliography 212

Introduction. The Right to Culture – an Attempt of Reconstruction

The second decade of the 21st century has brought many events and phenomena that induce us to reconsider the definition of artistic culture and the sphere of competences connected with it. In January 2015, an unprecedented attack took place in Paris on the editorial staff of *Charlie Hebdo*, a satirical journal known for its relatively crude jokes, aimed particularly at the religious sphere, including Islam. Twelve people, including eight members of the magazine's editorial staff: graphic artists, columnist and technical staff were killed in an attack by Muslim fundamentalists. This event caused a worldwide shock, and national mourning was declared in France immediately. It seems that for the first time in a long time there has been such a violent reaction in Europe directed at art considered as blasphemous.

Just over a year later, in October 2016, Robert Allen Zimmerman, known to the whole world as Bob Dylan, was awarded the Nobel Prize in the field of literature for "creating new forms of poetic expression within the great tradition of American songwriting." For the first time, the highest honour in the field of word art was granted a musician and a songwriter performing folk music, which itself is a part of rock and entertainment music. The verdict was not accepted unanimously – many of those criticising this decision considered it to be a result of a categorical mistake, because Dylan is first of all a musician, songwriting is his secondary occupation. However, another accusation sounded even stronger, when one of the critics used words taken from R. Kipling's poem: "It's pretty, but is it Art?"[1]

[1] J. Webb, *In honouring Dylan, the Nobel Prize judges have made a category error*, https://theconversation.com/in-honouring-dylan-the-nobel-prize-judges-have-made-a-category-error-67049 [accessed: 18.09.2017].

Lastly, a Creative Commons traffic report was published in April 2017, showing that the number of CC licenses used in 2016 was 1.2 billion, representing more than 65% of online content.[2] This means that the creators of these works have benefited from a different form of regulation that governs the use of their works. The regulation was created in response to strict copyright rules, as a result of the initiative of several enthusiasts and defenders of *free culture*.

These three events inevitably direct the observer's attention towards the content and sense of artistic culture as a phenomenon of social life, capable of generating extreme emotions, and at the same time showing how creative and willing to share one's achievements a human being can be. They also indicate that we still do not know what the boundaries and features of art, artistic culture are, what effects a clash of cultures can have, and whether artistic culture can be considered as an object to which we are entitled – and if so, what it would mean in practice.

When the right to participate freely in the cultural life of the community, the right to enjoy art was becoming part of the canon of human rights by incorporating it into the Universal Declaration of Human Rights,[3] and then also into the International Covenant on Economic, Social and Cultural Rights,[4] the objective of creators was to ensure that every member of the public would have access

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[2] R. Merkley, *Our biggest report yet: State of the Commons 2016*, https://creativecommons.org/2017/04/28/state-of-the-commons-2016/ [accessed: 07.08.2017].

[3] Art. 27 stipulates: "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

[4] According to art. 15: "The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Next section of this article oblige the States Parties to take steps 'to achieve the full realization of this right', which should include means necessary for the conservation, the development and the diffusion of science and culture and to respect the freedom indispensable for scientific research and creative activity and declare a recognition of the benefits derived

to the so-called high culture, so far elitist. Artistic culture; museums, libraries and theatres were to become a common egalitarian asset.[5] This idea of providing all people with the benefit of enjoying the cultural heritage of mankind by establishing the right to culture as a universal law and understood as the right to co-creation of cultural life, as well as access to cultural life, i.e. the right to be a viewer, a reader and an observer of this life, was captivating, but essentially enlightened and, as it turned out, utopian. Contrary to many other, and even most of the rights guaranteed by the Universal Declaration, the right to culture has not become a necessary element of the catalogue of rights in international, regional or national systems, nor has a coherent structure of this right been created, which determines its nature, scope or, even more so, the claims it may have if it were granted the value of subjective right. This right, declared seventy years ago, has remained one of the most mysterious and undervalued corners of the galaxy of rights and freedoms, both in international and national order.[6] There are two reasons for this. Firstly, culture is such a complex and ambiguous concept that any attempt to define and incorporate it into an institutional framework makes as much sense as catching the wind in a cage.[7] The authors of acts guaranteeing rights and freedoms are not very eager to look at the matter that eludes the regulations of law, as human activity is so spontaneous and extremely diverse by nature. The established law is intended to define the protected goods and consequently limit them in the scope and forms of implementation designated by it.

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from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

[5] Y. Donders, *Towards a Right to Cultural Identity?*, Intersentia, Antwerp: 2002, p. 139; R. O'Keefe, *The "right to take part in cultural life" under Article 15 of the ICESCR*, 47(4) International & Comparative Law Quarterly 904 (1998), p. 904.

[6] J. Simonides, *Cultural rights*, in: J. Simonides (ed.), *Human Rights: Concept and Standards*, UNESCO, Paris: 2000, p. 175.

[7] The term used by R. Borofsky (*Cultural possibilities*, in: *World Culture Report 1998. Culture, Creativity and Markets*, UNESCO, Paris: 1998, p. 64, after: D. Throsby, *Ekonomia i kultura*, transl. O. Siara, Narodowe Centrum Kultury, Warsaw: 2010, p. 18).

Secondly, scepticism about the concept of normative character of the right to culture, manifested in a relatively small number of acts guaranteeing this right, is connected with the reluctance of public authorities, and thus also the legislator and the will of States Parties to international agreements, to enter into new obligations towards their own citizens – obligations of an economic nature. Securing the right to culture at an individual level entails institutionalization of public authorities' obligations to guarantee access to cultural assets, minimizing economic barriers to accessibility, guaranteeing the freedom of artistic creation, supporting the development of artistic culture, and thus cultural institutions and maintaining their infrastructure. This reluctance has led to the failure of the EU project to include the right to culture in the rights guaranteed by the ECHR.[8] While Member States are fairly willing to conclude and ratify acts declaring their concern for cultural values, cultural diversity and cultural heritage, it would be quite difficult for them to agree to a commitment that is subject to individual complaint mechanism, i.e. instruments for protecting these rights which impose measurable and enforceable obligations on the States. Therefore, at the constitutional law level, the right to participate in cultural life and access to cultural heritage is rarely granted in the form of an entitlement right, it is more often the subject of the state's formulated duties, responsibilities of a progressive nature, without indicating specific obligations on the part of the state in the sphere of its protection or ensuring its implementation.

However, there is no doubt that culture is a fundamental and necessary element of human development, allowing the growth of individuality, self-awareness, creative abilities, critical thinking, sensitivity and all that constitutes human personality and intellect. Culture is also a fundamental component in creating and developing the values of social life, sense of belonging, identity, sense of community and dialogue between people. It is what constitutes a sublimation of the common good, understood as a sense of bond and the need for fellowship. It is therefore difficult to overestimate its value and not to

[8] A. Mężykowska, *ECHR Cultural Protocol debates/CAHMIN*, in: A.J. Wiesand, K. Chainoglou, A. Śledzińska-Simon, Y. Donders (eds.), *Culture and Human Rights: The Wroclaw Commentaries*, De Gruyter, Berlin: 2016, p. 53.

see its significance also in legal terms – although the dilemmas of trying to determine what this cultural life is, or culture itself, are really difficult to be resolved. Therefore, it certainly deserves the protection recognised by the law on a personal level as well, in terms of the right to participate.

Despite the difficulties in formulating entitlements in terms of participation in artistic culture, it is worth using the formula of the right to culture in the individual context, what is more, such a right can be reconstructed on the basis of cultural regulations and policies already in place. There are also traces of judicial protection of this right. This book is devoted to the identification of components and the search for the limits of the freedoms and rights that form the right to culture contained in the title. In order to find them, it is essential to arrange the definitions and scopes of concepts concerning culture in contemporary legislation, and to attempt to classify those qualities that deserve protection in international and national legal systems. The second part of the book seeks to create a theoretical model of the right to culture – its content, character and scope. In the subsequent chapters there is a description of the search for components of this right – powers and freedoms, as well as finding a system of positive state obligations concerning access and participation of citizens in culture in practice and legislation of European countries, obligations which correspond to the competences of creators and recipients of art regarding freedom of artistic creation, the rights of cultural actors – creators and users/recipients, as well as instruments concerning ensuring access to artistic culture as used in cultural policies of European countries. The fragments thus found will make it possible to give a more systematic structure to the right to culture as a right of individual character. This right – and this forms the fundamental thesis of this work – is not uniform in nature, it is not merely a second generation law, nor is it the simple correlation between the duties of public authorities and the rights of individuals. Its traces can be found in one of the fundamental human rights – freedom of expression, as well as on many levels in contemporary cultural policies, and, what is particularly interesting, it is also created through large-scale community activities.

At the same time, just as in the case of other rights and freedoms, the analysis of their actual content and scope of application as well as

the guarantee of their application requires observation on three levels: political (policy of the state), lawmaking (legislation and constitutional guarantees) and the application of law (judicial protection of social rights) and mutual relations between them. Identifying these themes will hopefully make it possible to convince the reader that accepting the concept of the right to culture, as expected by the authors of the Universal Declaration of Human Rights, in the orders of national law and in documents and case-law on human rights, will become a reality and will allow the artistic culture to obtain the status of a protected asset also in the individual context.

CHAPTER 1

What Does the Right to Culture Mean Exactly? The Scope and Meaning of the Notion of Culture as an Object of Rights

Culture is one of those concepts the definition of which exceeds the research capabilities and instruments of any scientific discipline – and certainly exceeds the ability of the legal language in terms of its definition. The qualities inherent in cultural life and art, i.e. their unpredictability, their creative and dynamic character, the phenomenon of creation in connection with reception and interpretation, and subjection to aesthetic and subjective evaluation, mean that every attempt at limiting and defining them is bound to fail. However, culture, as a social phenomenon fundamental for individual development and identity of communities, is more and more often the object of interest of scientific community and legal regulations. Legal science must therefore also make the attempt to define what, for the purposes of law, is meant by culture, cultural heritage, cultural and artistic life, and how these areas of social life are to be interpreted, granting individuals and communities the right of access to culture and recognising freedom of participation in cultural life as one of the elements that determine the status of a given person in society.

1.1. Ambiguity of the notion of culture

In 1952, two American anthropologists, Kroeber and Kluckhohn, reviewed and analysed the concept of culture; having gathered 164 different definitions.[1] In the 1990s works which tried to determine

[1] K. Avruch, *Culture and Conflict Resolution*, United States Institute of Peace Press, Washington, DC: 1998, pp. 6–7; H. Spencer-Oatey, *What is culture?*

the cultural phenomenon summarized in the monumental *Encyclopaedia of Language and Linguistics* didn't bring result – it was concluded as follows: "despite the century-long efforts to define culture in an adequate way, anthropologists still don't agree on the essence of this phenomenon in the 1990s."[2]

Currently, the most universal definition of culture seems to be the dominant one, based on an approach that perceives the ability to perpetuate the achievements of human activity and to portray standards of behaviour and thinking patterns. One of the most frequently cited definitions is the one suggested by Kroeber and Kluckhohn referred to above, according to which

> culture contains models of implicite and explicite attitudes and behaviours acquired and carried over by symbols, which together with their embodiments in human creations (artefacts) constitute significant achievements of human populations. The essence of culture is constituted by traditional (i.e. historically accumulated and selected) ideas, and especially by the values associated with them; cultural systems can be considered as effects of activity, while on the other hand – as elements determining future behaviours.[3]

The interpretation of such a definition is also prompted by Polish authors dealing with this concept; according to the definition proposed by A. Kłoskowska, "Culture is a relatively integrated whole, encompassing the behaviours of people according to patterns of education and interactions, which are common to social groups and which contain the products of such behaviours."[4]

A compilation of quotations, GlobalPAD Core Concepts, 2012, p. 1, https://warwick.ac.uk/fac/soc/al/globalpad/openhouse/interculturalskills/global_pad_-_what_is_culture.pdf [accessed: 19.03.2018].

[2] M. Apte, *Language in sociocultural context*, in: R.E. Asher (ed.), *The Encyclopedia of Language and Linguistics*, vol. 4, Pergamon Press, Oxford: 1994, p. 2001; see also: A. Lebrón, *What is Culture?*, 1(6) Merit Research Journal of Education and Review 126 (2013); H. Spencer-Oatey, *What is Culture?..., op.cit.*

[3] A.L. Kroeber, C. Kluckhohn, *Culture. A Critical Review of Concepts and Definitions*, Peabody Museum, Cambridge, Mass.: 1952, p. 181.

[4] A. Kłoskowska, *Kultura masowa. Krytyka i obrona*, PWN, Warsaw: 1983, p. 40; see also: A. Kaliszewski, *Główne nurty w kulturze XX i XXI wieku*, Wydawnictwo Poltext, Warsaw: 2012.

However, the basic problem with defining culture according to H. Spencer-Oatey is connected mainly with three different fields, or contexts, in which the notion is used, shaped in the 19th century. First, culture refers to intellectual or artistic endeavour or assets, which today are commonly referred to as artistic culture – it is a concept related to aesthetics rather than social sciences. The second meaning of culture refers to a certain observed and uncontested trait of every human community, i.e. the ability to transfer patterns of behaviour, beliefs, customs, knowledge and art within this group and the competence acquired by each member with respect to these characteristics.[5] In this regard, culture is a value and a concept that describes social life, not artistic culture. This definition, which accentuates the social character of culture, sees culture as a phenomenon created by and within the community. Owing to its dissemination in the second half of the 20th century, culture began to be understood in a slightly different way, not so much as a universal feature of each community, but rather uniqueness and originality that came into being in a particular group. As a result, culture has become not so much a concept that defines a common and universal heritage, but rather a term that distinguishes communities from each other, while at the same time each culture becomes something unique and worthy of protection for its originality and distinctive features.[6]

Aside from the observable cultural distinctiveness of different communities, there is a need to distinguish the dominant culture, i.e. the one that plays a key role in society, which gives direction and determines

[5] Edward Tylor in 1870 defined the culture as such: "culture (...) is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society" (E. Tylor, *Primitive Culture*, 1870, p. 1, after: H. Spencer-Oatey, *op.cit.*, p. 2).

[6] Compare e.g. the concept of culture as a set of attitudes, values, beliefs and behaviours shared by group of people but separate and different individually, transferred to the next generations: M. Matsumoto, *Culture and Psychology*, Brooks/Cole, Pacific Grove, CA: 1996, p. 16. Such concept of culture could be also interpreted with the definition of G. Hofstede ("The collective programming of the mind that distinguishes the members of one group or category of people from others"). See: G. Hofstede, *Cultures and Organizations: Software of the Mind*, HarperCollins, London: 1994, p. 5.

the status of individuals. It is the dominating culture that is a tool for building the identity of the community, it imposes the discourse and tone – and often also the cultural themes and constituent of identity.[7] In this respect, the theses raised by P. Bourdieu regarding cultural capital and the cultural field as a metaphor for determining the position of an individual in a community that identifies economic, social and cultural capital seem to be of great importance.[8] The latter requires many years of accumulation, but it is also non-transferable, in fact the safest and most durable, accumulating knowledge, competences and instructions enabling participation in the life of the community, learning about social norms and standards and decoding meanings contained in relations and artefacts.[9] This in turn determines the social position, prestige and ability to acquire symbolic capital.[10] It is easy to notice that this dominating culture will often contain different meanings and attitudes established in artefacts and left in intangible heritage than the culture of an ethnic group. Both cultures – dominating and ethnic, as well as the cultural life within them, are protected by law, although the need to protect cultural diversity and obligations associated with the preservation of minority cultures appeared in international and national legislation much later.

In the initial period of protection of cultural goods, the dominant approach was to treat them as a cultural resource important from the point of view of the state community. From the 17th century onwards, some European countries began to adopt regulations on the protection of archaeological sites and their resources,[11] in which

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[7] T. Zarycki, *Kapitał kulturowy – założenia i perspektywy zastosowań teorii Pierre'a Bourdieu*, 4(1–2)(10) Psychologia Społeczna 12 (2009).

[8] P. Bourdieu, *Reguły sztuki. Geneza i struktura pola literackiego*, transl. A. Zawadzki, Universitas, Kraków: 2007, p. 78.

[9] R. Johnson, *Editor's Instruction*, in: P. Bourdieu, J.C. Passeron, *Reproduction in Education, Society and Culture*, p. 7.

[10] P. Bourdieu, *The forms of capital*, in: J.G. Richardson (ed.), *Handbook of Theory and Research for Sociology of Education*, Greenwood Press, Westport, CT: 1986, p. 253.

[11] Swedish Royal Proclamation, 1666, Danish royal decree from the beginning of 19th century, British Ancient Monuments Protection Act, 1882, American Federal Antiquities Law, 1906, after: H. Cleere, *Introduction. The rationale of archaeological heritage management*, in: H. Cleere (ed.), *Archaeological heritage management*

protection took the form of state ownership. Consequently, all finds and work positions were treated as state assets. The origins of cultural protection regulations (cultural heritage) can also be found in the law of international conflicts; the first act that mentioned the protection of cultural monuments was the Fourth Hague Convention of 1907 on the Laws and Customs of the War on land, which in Article 27 called for all necessary measures to be taken during the bombings, in order to spare, among other things, the temples, buildings serving the purposes of science, art and charity, historical monuments, but at the same time ordered such objects to be marked by the besieged with specific visible signs, which would notify the enemy. The 1954 Hague Convention on the Protection of Cultural Property during the Armed Conflict[12] was entirely devoted to the protection of cultural heritage and it defined cultural goods as valuable for the cultural heritage of the nation.[13] Likewise, cultural assets were defined in the subsequent Convention for the Protection of the World Cultural and Natural Heritage.[14] There

in the modern world, Routledge, London-New York: 2000, p. 2. On protection of archeological heritage as the beginning of protection of cultural goods see also: G. Hill, *Treasure Trove in Law and Practice, from the Earliest Time to the Present Day*, Clarendon Press, Oxford: 1936; after: A.F. Vrdoljak, *Human rights and cultural heritage in international law*, in: F. Lenzerini, A.F. Vrdoljak (eds.), *International Law for Common Goods: Normative Perspectives On Human Rights, Culture and Nature*, Studies in International Law, vol. 50, Hart Publishing, Oxford: 2014, p. 147.

12 A.F. Vrdoljak, *op.cit.*, p. 141.

13 According to the Convention the term 'cultural property' covers: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.

14 The Convention signed on 16th November 1972, entered into force on 17th December 1975, Poland ratified it on 29th February 1976. See also: K. Ziegler,

is no doubt that all these acts relate to the dominant culture, artistic culture, which is important from the point of view of the identity of nations forming states, which are parties to these conventions, as well as the culture constituting a universal, global heritage.

When in 1948 culture became an object of protection and entitlement in the Universal Declaration of Human Rights, the expression "participation in the cultural life of the community" used therein was understood by its creators as participation in the dominant culture, not multiculturalism or any other kind of coexistence of ethnic cultures.[15] The concept of culture was related in the intention of artists to artistic culture; fine arts, literature i.e. the undisputed output of mankind. As Vrdoljak notes, also in the course of works on the Covenant on Economic, Social and Cultural Rights, the creators intended to provide mass audience with access to the so-called high culture, i.e. to extend in the spirit of egalitarianism, what was previously reserved for the elites. Therefore, culture meant for them cultural assets of fixed value, classified as high artistic culture; museums, libraries and theatres.[16] Furthermore, it is evident from the documented work on the Covenant that the Panel of Experts appointed by UNESCO initially proposed the wording of Article 15 to include a commitment on the part of the State to promote "the unrestricted racial and linguistic development of minorities", which would mean recognising the minority cultures and their intangible heritage, in addition to the importance of the dominant culture to individual development – but this proposal was not accepted.[17] As a result, the wording of Article 15 of the Covenant was intended to refer to participation in cultural life, but within the context of dominant culture or rather the national culture.

Cultural Heritage and Human Rights, University of Oxford Faculty of Law Research Paper Series, Working Paper no. 26/2007.

[15] J. Morsink, *The Universal Declaration of Human Rights – Origins, Drafting, and Intent*, University of Pennsylvania Press, Philadelphia: 1999, pp. 244, 269.

[16] Y. Donders, *Towards a Right to Cultural Identity?*, Intersentia, Antwerp: 2002, p. 139; R. O'Keefe, *The "right to take part in cultural life" under Article 15 of the ICESCR*, 47 International & Comparative Law Quarterly 904 (1998), p. 904.

[17] *Ibidem*.

The first period of international protection of participation in cultural life and the protection of heritage is thus dominated by thinking about national culture and the role of the state. National culture was recognised as a key factor in creating national identity, the essence of state existence, common identity, hence the state's concern for cultural sites, monuments, historical sites and of course the language.[18] Legal instruments of protection became an expression of thinking about a homogeneous structure of national culture and perceiving the state as a sole entity obliged in the international community to maintain its goods. The states became responsible for the shape and shaping of the national culture, and it was to a large extent their discretionary decision as to what should be recognised as such assets.

It was not until the middle of the 20th century that the role of cultural diversity and the role of groups, communities in culture and, in fact, the culture of groups (communities) was noticed. It was increasingly emphasised in cultural research that each culture exhibits certain characteristics shared with the others, as if universal (known also as ethical by reference to linguistics, contained in Pike's works[19]), of an epistemologically objective and emic character – that is specific to a particular culture, including its unique elements. Thus, every culture somehow creates attitudes and relationships in respect of family relations or transcendent being. The way in which the relationship and attitude towards such objects is created and cultivated – these are emic traits, but the relationship underlying them is etic, i.e. universal, and can therefore be the subject of comparisons and mutual references.[20] This is linked to the second feature, strongly emphasised in contemporary literature, which determines the epistemological attitude

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[18] A.F. Vrdoljak, *op.cit.*, p. 142.

[19] H.C. Triandis, *Culture and Social Behavior*, McGraw-Hill, New York: 1994, p. 20.

[20] Emic and etic culture (emic/etic models) are analytic models distinguished in anthropology of culture, which are the consequences of separation of inner perspective of a member of a cultural group and recognition of the features of his culture in his way (emic model) from features observed externally, with epistemological objectivity (etic model). See: M. Harris, *The Rise of Anthropological Theory: A History of Theories of Culture*, AltaMira Press, Walnut Creek, CA: 2001, pp. 570, 575.

towards cultures – the concept of culture is descriptive rather than judicious and evaluative, so there are no grounds for distinguishing certain cultures using a category of higher or lower. This in turn leads to the disappearance of an approach that seeks, at least at the human rights level, greater protection for a dominant culture or deemed 'high' in the light of traditional criteria.

The interpretation and application of the International Covenant on Social, Economic and Cultural Rights shows that the concept of cultural life has evolved following recognition of the need to protect cultural diversity. The interpretation of the concept of culture used in Article 15 of the Covenant was changed primarily by UNESCO documents, in particular the 1976 UNESCO Recommendation on Cultural Participation, in which the definition of cultural activities was significantly broadened.[21] National reports on the implementation of Article 15 of the Covenant contain information not only on the protection of artistic creativity, dissemination and guaranteeing access to it, but also on craftsmanship, folk customs, cultural rights of minorities (language rights), which indicates the adoption of a broad concept of cultural life in the Committee's remarks and work as well as in practice and reports of the States Parties.[22] Hence, as Y. Donders notes, the three concepts of cultural life, i.e. high (artistic) culture, folk culture, popular press, folk music, television and radio as well as cultural life understood as a way of life of society, behavioural and thinking patterns, are currently part of the process of applying the Covenant's norms, although the authors' intention was to include only the first meaning of this notion.[23]

Acknowledging ethnic cultures and the importance of cultural diversity in communities has also become the subject of numerous international regulations – such an act is, among others, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted on 20th October 2005 by the General

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[21] R. O'Keefe, *op.cit.*, p. 914.

[22] Y. Donders, *The legal framework of the right to take part in cultural life*, in: Y. Donders, V. Volodin (eds.), *Human Rights in Education, Science and Culture, Legal Developments and Challenges*, UNESCO/Ashgate, Paris-Aldershot: 2007, pp. 250–251.

[23] Y. Donders, *op.cit.*, p. 256.

Conference of UNESCO.[24] The objectives of the Convention are: (a) to protect and promote the diversity of forms of cultural expression; (b) to create such conditions for cultures so that they can develop fully and interact freely in a mutually beneficial way; (c) to encourage cultural dialogue in order to ensure a wider and balanced cultural exchange in the world towards mutual respect for each other's cultures and the promotion of the culture of peace; and to confirm the importance of the link between culture and development in all countries, especially developing ones. The Convention is therefore primarily aimed at promoting and protecting cultural diversity, understood as the multiplicity of forms through which cultures of groups and societies are expressed. These modes of expression of culture are communicated within and between groups and societies. The Convention also contains a definition of 'cultural content' referring to symbolic meaning, the artistic dimension and the cultural values derived from cultural identities or expressing them as well as "forms of cultural expression", which are the output of the works of individuals, groups and societies and which contain cultural content.

As a consequence, intangible cultural heritage has become increasingly important in the field of cultural protection, as evidenced by the UNESCO Convention on Cultural Protection.[25] The rationale of this Convention for the protection of culture is to introduce the protection of intangible cultural heritage sites as objects subject to equal protection, which according to Article 2 of the Convention include:

> practices, ideas, messages, knowledge and skills – as well as related instruments, objects, artefacts and cultural space – which communities, groups and in some cases individuals consider to be part of their own cultural heritage.

This intangible cultural heritage, passed on from generation to generation, is constantly being recreated by communities and groups in relation to their environment, the impact of nature and their history

[24] The Convention has been ratified by Poland on 19th July 2007.

[25] The Convention for the Safeguarding of the Intangible Cultural Heritage accepted in Paris on 17th October 2003, entered into force on 20th April 2006. Hitherto ratified by 143 states, entered into force in Poland on 16th August 2011.

and provides them with a sense of identity and continuity, thus contributing to greater respect for cultural diversity and human creativity. Therefore, the heritage is made up not only of artefacts and other human creations conducive to the preservation and transfer of traditions and culturally established meanings – but also of practices, ideas, messages and skills, while the decisive element determining the granting of protection is acceptance by groups, and sometimes even individuals. Cultural heritage has become an ethnic legacy in this respect, significant due to being the culture in emics.

Both meanings of culture – as a dominant culture and minority cultures – have also been reflected in the jurisprudence of the European Court of Human Rights – although the European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly guarantee the right to culture nor the right to participate in cultural life, the ECHR jurisprudence provides examples of the protection of certain rights, which in fact constitute the right to culture and which are reconstructed from other rights, in particular freedom of expression (Article 10 of the Convention), the right to privacy and family life (Article 8); and the right to education (Article 2, Protocol no. 1). Recent case-law indicates the growing prominence of this right and its meaning, not only in the context of private claims, freedom of artistic creation and its boundaries,[26] but above all in the context of the rights of national, religious and ethnic minorities.[27] A considerable number of rulings passed in the last twenty

[26] On limits of freedom of artistic expression guaranteed by Article 10 of ECHR decisions (among others): *Müller and Others vs. Switzerland* (24th May 1988, no. 10737/84), *Karataş vs. Turkey* (5th January 2010, no. 23168/94), *Alýnak vs. Turkey* (29th March 2005, no. 40287/98), *Vereinigung Bildender Künstler vs. Austria* (25th January 2007, no. 68354/01). On access to cultural goods – ECHR judgment *Akdaş vs. Turkey* (16th February 2010, no. 41056/04).

[27] ECHR in the *Khurshid Mustafa and Tarzibachi vs. Sweden* (decision of 12th December 2008, no. 23883/06) reaffirmed immigrants' rights to maintain their cultural bonds and habits, as well as immigrants families' rights to sustain bonds with culture and language of the state of origin. In *Chapman vs. United Kingdom* (decision of 18th January 2001, no. 27238/95), the Court confirmed the right to protect and respect private and family life – in the case circumstances meant also as right to life according to nomadic lifestyle as a part of cultural identity. In *Tourkiki Enosi Xanthis and Others vs. Greece* (decision of 27th March 2008, no. 26698/05), the Court

years, granting the right to protect own customs and tradition indicates that in terms of the need to maintain the identity of cultural groups different from the dominant one, the right to preserve own culture is of particular importance as a factor integrating the community and determining the presence of a sense of identity.

Dichotomy presented here to a large extent also reflects the differences between attributive culture, namely the culture having universal features, and distributive (characteristics that distinguish particular communities). The latter concept refers to the movement of standards, attitudes and meanings outside works of art, through the way of life, cultivated customs and traditions, which are a vital part of identity and distinctiveness.

The value of maintaining cultural diversity and the identity of ethnic groups and other minorities has not raised any major concerns so far – neither in terms of the Convention's implementation, nor in the process of adopting and ratifying the aforementioned international agreements, nor in the implementation of the Covenant's provisions. However, recent events in Europe seem to reverse the vector of support for cultural distinctiveness, and there are more and more – also in legal literature – sceptical voices about maintaining distinctiveness, which is beginning to be called the lack of assimilation. From purely political and social point of view, the analysis goes beyond the framework of this study, but it is worth pointing out two phenomena that accompany the evolution of the concept of culture worth protecting. The first was noted in the context of the application of the UNESCO Convention on the Protection of the Intangible

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confirmed that promotion of minority culture cannot be recognised as an offensive and turning against state integrity and security. The Court also rated language rights as an important part of the culture (deriving from Article 8 of the Convention): *Mentzen vs. Latvia* (decision of 7th December 2004, no. 71074/01), *Bulgakov vs. Ukraine* (decision of 11th September 2007, no. 59894/00), *Baylac-Ferrer and Suarez vs. France* (decision of 25th September 2008, no. 27977/04), *Güzel Erdagöz vs. Turkey* (decision of 21st October 2008, no. 37483/02). The same basis of rights was recognised for prisoners' rights to communicate in their own language (*Mehmet Nuri Özen and Others vs. Turkey*, decision of 11th January 2011, no. 15672/08). The language rights are also protected under Article 10 of the Convention; *Ulusoy and Others vs. Turkey* (decision of 3rd May 2007, no. 34797/03).

Cultural Heritage of 2003, which was intended to most fully express the international community's concern to preserve the distinctiveness and identity of cultural groups and their heritage and cultural life outside dominant cultures, perpetuated only through practices, messages or artefacts not yet recognised as works of art enjoying the status of state protected cultural assets. This act, while referring to intangible heritage, still uses the language and instruments that are adequate to protect the heritage in the traditional sense, that is to say, established in artefacts. Even more importantly, the entities which bear the burden of protecting this heritage are still the States Parties to the Convention, and they are also to establish registers of heritage sites worthy of protection,[28] which clearly makes the protection of diversity and cultural distinctiveness dependent on the will of the State factors, i.e. representing a dominant culture in substance. This raises, of course, a charge regarding the imminent hierarchy of cultures and their recognition, and yet their value lies in their uniqueness.

The second objection is related to the first, but is of more general nature: communities' cultures protected under the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, including immigrant groups and indigenous minorities, may be exposed to competition from dominant cultures. This tension is reflected in the Convention – Article 5 (2) states:

> The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognised human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.

The contents of this regulation reflects the essence of this dilemma well enough – how to balance the conduct of one's own cultural policies with the protection of diversity,[29] which remains in opposition

[28] Article 12 of the Convention. See also: A. Vrdoljak, *op.cit.*, p. 254.

[29] D. Wagner, *Competing cultural interests in the whaling debate: an exception to the universality of the right to culture*, 14 Transnational Law & Contemporary Problems 831 (2004), p. 843.

to culture and cultural policy of the state. At the same time, it does not indicate any method or means to avoid this type of conflict. Situations, in which instruments for the protection of these cultures remain in opposition to each other, are still in place, e.g. in the ECHR case law on the protection of the rights to cultivate one's own language and customs by the actions of the state in which members of ethnic, cultural and national minorities apply for this right.[30] It can be seen, therefore, that the protection of cultural diversity in practice often goes against the protection of dominant culture, mainly for political reasons, but also because of the intention to maintain the domination of the official culture in multicultural societies.

1.2. National culture versus universal heritage

Protection of culture is also confronted with a different problem related to the identification of the object of protection, even if we remain on the grounds of the protection of artistic culture. There is no doubt that the protection of culture and heritage should concern those cultural assets that are relevant from the perspective of national culture (recognised by the state as worthy of protection) as well as being universal in scope, constituting the heritage of the entire humanity. The values, meanings and, above all, the ways of protecting and promoting these

[30] The Court reaffirmed the right to manifest ethnic identity and promote own culture within an ethnic of national group as an element of freedom of association guaranteed by Article 11 of the Convention – in the *Sidiropoulos and Others vs. Greece* case (decision of 10th July 1998, no. 26695/95) and ruled an infringement of the freedom by ban of using the name of Macedonian Civilization House association. Also in *Gorzelik and Rother vs. Poland* (decision of 17th February 2004, no. 44158/98), the Court underlined the meaning of freedom of association for the individuals belonging to ethnic and national minorities. In turn, in the *Tourkiki Enosi Xanthis and Others vs. Greece* (decision of 27th March 2008, no. 26698/05), the Court told that promoting the minority culture cannot be recognised as turning against state integrity and security, and that minorities are entitled to memorize their historical occurrences as creating and maintaining the heritage and identity (*Stankov and the United Macedonian Organisation Ilinden vs. Bulgaria*, decision of 2nd October 2001, nos. 29221/95 and 29225/95). About language rights as cultural rights – *supra* note 27.

two spheres of heritage (and contemporary cultural life) may also be in competition against each other, creating interpretative reservations regarding the scope and content of the right to participate in culture. Meanwhile, the Declaration and the Covenant keep quiet about the nature of culture in this regard, maintaining impeccable neutrality.

It is a canon of knowledge about culture that cultural assets constitute one of the main elements of civilization, inseparably connected with their context of origin and functioning – at the same time, this context can be not only troublesome, but also lethal for cultural assets recognised as an element of universal heritage, which nowadays is depicted by the massacred Buddha's statue in Bamiyan, all that legally allowed by state authorities. The second paradox of this contradiction of national and universal culture consists in actions taken to protect and universalise the artefacts, the heritage – which can be considered an interference in the sovereign decision of states to protect them. These two types of thinking about cultural assets – national and universal – are reflected in the instruments of international protection, but they also do not sufficiently tackle emerging conflicts and dilemmas of the outlined conflict of interest.

A purely state or national approach is evidenced by the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This Convention refers to institutions of a State and national cultures – the best evidence is Article 4, which defines the cultural heritage of each State as cultural assets belonging to the following categories: (a) cultural property produced as a result of individual or collective creation of citizens of that State and cultural property of relevance for that State, created on its territory in the course of the creation of foreign nationals or stateless persons residing on its territory; (b) cultural property discovered on national territory; (c) cultural property acquired by archaeological, ethnological or nature expeditions carried out with the consent of the authorities of the relevant countries, (d) cultural objects which have been the subject of an agreed voluntary exchange; (e) cultural objects obtained free of charge or legally acquired with the consent of the competent authorities of the country where they originate. It is up to the States Parties to establish a national heritage protection service (Article 5) and to control the movement of cultural

assets (Articles 6 et seq.). The perception of culture in a national context is also clearly evidenced by the text of the preamble to the Convention, which states that cultural goods are one of the main elements of the civilisation and culture of nations and that they only acquire true value if their origin, history and environment are known as closely as possible and that it is the duty of each State to protect cultural property on its territory from the dangers of theft, illegal excavations and illegal export. The Convention thus stands for the protection of culture constituting national heritage, the depositary of which is the State.

Numerous authors emphasise the importance of assigning cultural assets to specific nations (States) and their role in creating and cultivating the structure of national identity.[31] It is therefore relatively easy to re-establish what constitutes national heritage, not only by means of an intuitive *prima facie* test, but also by applying certain criteria concerning both aesthetic categories and those pertaining to relations with national history or tradition. In some countries, these rules are actually defined – in the United Kingdom they have taken the form of so-called Waverley criteria, which are used to decide whether or not to ban the export of a work of art outside the UK.[32] The criteria formulated in such a way allow for making decisions on the detainment of a cultural object in the state, and sometimes also allow for its expropriation and nationalisation, or other limitation of the owner's rights to use them.

There is little doubt which would put into question the purposefulness and proportionality of actions undertaken in this way with regard to their aim of preserving national heritage.[33] Regardless

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[31] L. Orgad, *The Cultural Defense of Nations. A Liberal Theory of Majority Rights*, Oxford University Press, Oxford: 2016; A. Pratt, *Cultural industries and public policy: an oxymoron?*, 11(1) International Journal of Cultural Policy 31 (2005), p. 43.

[32] There are three main criteria: 1) close association to history of nation, 2) exceptional aesthetic value, 3) extraordinary meaning for cultural studies, history or teaching. D. Gillman, *The Idea of Cultural Heritage*, Cambridge University Press, Cambridge: 2010, p. 143.

[33] It is however worth to note that there are states where the national culture is not treated in so strict and strong normative way; the United States could be a key example – the idea of national heritage is even understood as "monocultural fantasy" impossible to bring into effect. See: B. Ivey, *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights*, University of California Press, Berkeley: 2008, p. 21.

of the persuasive power of the abstract in the form of national culture and its actual role as a building block for the identity of a nation (political community), the protection of cultural assets is increasingly being influenced by the second, opposing kind of thinking about cultural resources, which can be called either cosmopolitan or universal. Over time, and especially following the dramatic events of war and often deliberate measures taken to destroy monuments of culture other than that considered victorious at the time of revolution or war, it turns out that the protection provided by the state is insufficient.

Pursuant to classically understood international law, only the State may be the subject of obligations. Meanwhile, state governance may be subject to cessation of succession (through revolution) or the inability to exercise it effectively. In the actions of its authorities, a state may no longer be interested in protecting what was previously considered a national heritage, or may not consider a particular cultural object worthy of protection. Wars and revolutionary changes also provide an opportunity to plunder valuable cultural assets. Dramatic events in the first half of the 20th century have shown that existing legal instruments dealing with armed conflicts and the protection of cultural works, such as the 1954 Hague Convention or the 1935 Washington Treaty for the Protection of Artistic and Scientific Institutions (the 'Roerich Pact'), are inadequate and do not guarantee the preservation of what began to be referred to as the common heritage of humanity. The 1972 World Heritage Convention was created to protect it, on the basis of which the UNESCO list was drawn up, i.e. a global inventory of sites of fundamental importance for mankind. This Convention represents a breakthrough, as it clearly states that "damage to or destruction of any cultural or natural heritage good constitutes an irreversible deterioration of the heritage of all the world's communities", that such goods are "unique and irreplaceable, irrespective of the nationality which they belong to" and are part of the "world heritage of all the mankind", and that "protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific, and technological resources of the country where the property to be protected is situated" and requires "establishing

an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods." However, the Convention on the protection of these assets still uses State instruments; it is the State's responsibility to ensure the identification, protection, preservation, restoration and transfer of cultural and natural heritage to future generations, even though it may benefit from "international assistance and cooperation, in particular in the financial, artistic, scientific and technical sphere." It is also the State which is called upon to pursue a policy of heritage conservation, to set up the relevant services (Article 5), to take legal and technical measures.

Furthermore, however, the Convention established a mechanism of cooperation among the international community for the protection of world heritage; an Intergovernmental Committee for the Protection of Cultural and Natural Heritage of Unique Universal Value was set up at the United Nations, called the 'World Heritage Committee', which keeps an inventory of cultural and natural heritage assets located on the territory of States and listed with the consent of those States. In addition, the Committee shall keep the List of World Heritage in Danger including the assets on the world heritage list that are endangered by a serious and specific threat, for which major efforts need to be undertaken and for which assistance has been requested in accordance with this Convention. The inclusion in the list requires consultation (not consent) of the country in which they are located. The Act therefore accepts as a principle (and its purpose) the protection of the world heritage, of humanity as a whole, irrespective of whether or not the protection provided by the State is guaranteed.

The problem, however, is that the protection of the 'world heritage' depends primarily on inclusion in the list – and therefore depends, once again, on the discretion of the State and then on the Committee of State representatives, restricting eligibility for protection of those monuments that are to be recognised by these decision-making circles. Secondly, and more importantly, practice has shown that such protection can prove totally ineffective in the absence of State cooperation. This was the fate of Buddha's statues destroyed by the Taliban in the Bamiyan Valley in 2001. These works of art were only

included in the UNESCO list of endangered heritage sites in 2003, and the destruction of Buddha's statues was declared a crime against culture through UNESCO's resolution on the protection of the world heritage of mankind[34] – but in 2012 UNESCO decided not to rebuild them[35] and, as of yet, they are deteriorating. This happened because of the hostile attitude of the state authorities regarding their protection or even preservation. These are objects of foreign religion and ideology, and therefore, in the view of the state authorities, they do not deserve to be protected; for the Taliban they are an insult to Islam, in which there is a kind of iconoclasm, so it is not part of their culture – and thus they are being destroyed, despite appeals, resolutions and letters sent by UNESCO.

It is clear that both those ways of thinking about cultural resources – cosmopolitan and national[36] – remain in gridlock. A certain change in thinking in terms of national – universal categories with regard to cultural assets and, in particular, heritage, is brought about by the UNIDROIT Convention on stolen or illegally exported cultural objects,[37] as it introduces certain paradigm shift in the role of the State Party. In the light of the Convention, it is no longer only States that are parties and entities obliged and entitled to protect cultural property. The Convention allows not only for claims by a State against a State, but also for private owners who can apply for a return to the holder. Claims were thus granted the status of individual claims – not state claims.[38] This universalism of protection takes on a form in which

[34] UNESCO Resolution on the Protection of the Cultural Heritage of Humanity, Gillman, *op.cit.*, p. 12.

[35] S. Hegarty, *Bamiyan Buddhas: Should they be rebuilt?*, BBC World Service, 13th August 2012, http://www.bbc.com/news/magazine-18991066 [accessed: 07.08.2017].

[36] J. Merryman, *Two ways of thinking about cultural property*, 80(4) American Journal of International Law 831 (1986), pp. 831–853.

[37] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995; hitherto not ratified by Poland.

[38] According to Article 3 of the Convention the possessor of a cultural object which has been stolen has to return it. Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of 50 years from the time of the theft (Article 3.3.). Some objects or

it undermines the State's jurisdiction; it ceases to be the sole disposer and player in the struggle for cultural assets, but at the same time it seems doubtful whether the actions taken against it by the defenders of world heritage located in that State are effective.

On the other hand, the undeniable owner of cultural assets is still the state in which they are located. There is a considerable amount of international acts of law aimed at preventing the illegal import and misappropriation of cultural goods, including those originating in conflicting countries. The fundamental document in this respect is the Convention on measures to prohibit and prevent the illegal import, export and transfer of cultural goods signed in Paris in 1970. This Convention, recognising the illegal import, export and transfer of cultural goods as one of the main reasons for the impoverishment of the cultural heritage of the States from which they originate (Article 2), allows cultural property to be exported only with the consent of the State from which it originates and obliges States Parties to prevent museums from acquiring illegally exported cultural property on their territory (Articles 6, 7). Protection from the point of view of the necessity of saving cultural assets classified as part of the universal heritage is therefore in conflict with the provisions of this Convention, provided that it takes place against the will of the state, since universal protection remains in gridlock with the rights and sovereignty of the state, as well as protection of the heritage belonging to the nation (State).[39]

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subjects are exempted from these terms (cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use).

[39] According to the Convention some objects derived from National Museum of Afghanistan were just returned to Museum in Kabul – since 1979 they had been taken away and hidden worldwide. Many of them had been deported to Bubendorf (Switzerland), where Afghanistan Institute and Afghanistan Museum on Exile were established. It is worth to add that during the war in Afghanistan since 1992 about 70% of collections (around 100,000 objects) just vanished. A. Lawson, *Afghan gold: How the country's heritage was saved*, 11th March 2011, http://www.bbc.com/news/world-south-asia-12599726 [accessed: 07.08.2017].

This order, essentially dualistic, can be complemented by the Council of Europe Convention on Offences relating to Cultural Property adopted on 3rd May 2017 by the Committee of Ministers of the Council of Europe, which was open for signature on 19th May and is due to enter into force upon signature by five Signatories, including at least three Member States of the Council of Europe. The Convention criminalises certain acts against cultural property, including the following: theft; conducting archaeological excavations without proper authorisation; illegal import and export of cultural objects; the handling and illegal distribution, as well as the falsification of documents and the deliberate damaging or destruction of cultural assets. This is intended to facilitate the prosecution of such crimes and to hinder the trafficking the goods stolen or illegally exported from conflict zones, in particular from the Middle East. However, time will tell whether the mechanisms provided for in the Convention are effective and, above all, whether it will be ratified by a sufficient number of States or whether it will share the fate of the previous Delphi Convention on Cultural Crimes,[40] which has never entered into force.

The international legal order thus creates quite powerful instruments designed to prevent the looting of works of art from their country of origin. This phenomenon is called *Elginism*, after the surname of Lord Elgin, who in the years 1801–1805 disassembled the sculptures of the Parthenon and transported them from Greece (which was under Turkish occupation at that time) to England, and is not so easy to combat, especially as there are relatively few collections and works that come back to their place of origin.[41]

Depriving works of art of their national identity, especially those whose origins are disappearing in the darkness of a colonial or military past, or those from countries engulfed in conflict, is a problem that can be seen in almost every museum of a country with a glorious military and colonial past. However, such a law of jungle also exists

[40] The Convention of 23rd June 1985.

[41] Marble pieces of Parthenon taken by Lord Elgin are still in British Museum – last year (2017) Greek government once again claimed turn them back (during negotiations on Brexit), https://turystyka.wp.pl/grecja-zyska-na-brexicie-slynna-kolekcja-rzezb-ma-szanse-wrocic-do-kraju-6153293518424193a [accessed: 08.08.2017].

today. An example could be the latest amendment to the U.S. Federal Immunity Act of 16th December 2016.[42] According to that law, foreign state's actions concerning the organisation of an exhibition in the U.S. may be protected by immunity from legal proceedings before federal and state courts. Such protection is excluded only in the case of the legal recovery of cultural assets which have been taken away from their rightful owners in violation of international law: 1) between 30th January 1933 and 8th May 1945 by the German government or other Ally of the Third Reich; 2) after 1900 in connection with acts of foreign government against members of a discriminated population group consisting in the systematic robbery of their cultural property. In practice, the extension of immunity means that in the U.S., which is the largest exhibition market in the world, large collections of works of art may appear, mainly from Russian museums, not at risk anymore, and such a museum exchange has been blocked by the Russian side so far out of fear of initiating an eviction procedure against the state.[43]

However, the problem lies not only in the effectiveness or concealed hypocrisy in the policy concerning works of art coming from robbery, but in the immanent opposition of both spheres and concepts of culture – national and universal. Situations of a clear conflict between the two concepts can be seen not only in terms of seized or protected cultural heritage assets. It is even more pronounced in other areas of artistic culture, where the divergent views on its values and influence may apply. A great example of such a discrepancy is provided by the case of *Akdaş vs. Turkey*[44] resolved by the ECHR in 2010, in which the Court considered whether the limits of freedom of artistic expression had been exceeded by imposing a fine on the publisher for publishing Guillaume Apollinaire's novel in Turkish (the sentence concerned outraging public decency). The Court has stated that the limits on freedom of expression must always be considered

[42] Foreign Cultural Exchange Jurisdictional Immunity Clarification Act amending Foreign Sovereign Immunities Act (FSIA), 1976.

[43] A. Jakubowski, *Immunitet państwa a międzynarodowa wymiana muzealna – zmiany legislacyjne w USA*, http://przegladpm.blogspot.com/2017/01/immunitet-panstwa-miedzynarodowa.html [accessed: 30.07.2017].

[44] ECHR decision of 16th February 2010, no. 41056/04.

in the context of the cultural, religious and moral background of a particular community and state, but given that Appolinaire's work is an essential part of Europe's cultural heritage, the international recognition and reputation of the published author as well as the fact that his works are published in a number of languages worldwide, it is difficult to consider it acceptable to restrict publication in one of the States Parties to the Convention. Such a ban would deprive the public in that State of access to the work, which is an essential part of global cultural output and heritage (§ 30). Although this ruling is a great example of the existence of the right of access to world cultural heritage and universal heritage, the conflict with national culture, assuming significant rigour in moral matters, is evident. The problem, however, is no longer who owns the heritage, but who has the right to decide on the inclusion of specific cultural assets into what we call the heritage of mankind – after all, the goods on the UNESCO list are not the only cultural and heritage assets – in the field of visual arts and literature the matter remains open and is sometimes contentious.

Another issue that is at the root of existing doubts and disputes concerns not what we call heritage, i.e. the canon of artistic culture, which has already been established, but the cultural life of today. The problem of universalism and nationalism of cultural life takes the form of a contest to gain the audience and the cultural content that is applied to it. This fight is manifested by the instruments applied in many countries' laws on radio and television broadcasting, so called the amount of time (expressed as a percentage) for the broadcasting of domestic works in relation to foreign works. This instrument was intended to ensure that radio and television stations, forced to broadcast a certain number of national works, will be able to face the predominance of Anglo-Saxon culture. Such regulations apply, among others, in France, 40% of the music broadcast by the radio stations must be French, and 60% of the time devoted to the broadcasting of films must be reserved for European production, 40% of which must be French.[45] However, in 2015, the protest of the TV

[45] The law of 1st February 1994, see: I. Bernier, *Local content requirements for film, radio, and television as a means of protecting cultural diversity: theory and reality*

presenters and radio stations swept through France[46] – an increasing number of successful French music bands are recording in English, which reduces the number of attractive works that can be broadcast in the airtime reserved for national cultural content. The same songs are therefore played in a boring loop – as calculated by the French Ministry of Culture, only 10 songs account for 74% of French works on radio NRJ,[47] which shows that the quota solution as a rigid instrument for promoting national cultural assets is counterproductive and rather discourages from their reception. The French quota has been reduced to 35% – but this is not the answer to a problem whose origins stem from the two types of culture – indigenous and universal, or perhaps it should be called cosmopolitan, whose domination is considered by states and cultural policies to be harmful and threatening to national culture.

In the context of these tensions and paradoxes, the question arises – not about the necessity to protect culture at both universal and national levels – because this is indisputable, but about how such protection – without noticing the serious objections that can be provoked by it, can affect the content of the right to culture, i.e. what this law will cover and how it will shape the obligations of states and other entities obliged in this respect towards those entitled to acquaint themselves with the heritage and to participate in cultural life.

1.3. High and low culture

Culture and above all artistic culture are concepts that are extremely difficult to absorb and define by law. It is extremely difficult to judge what art actually is, because it is based on an emotional, aesthetic

(section 1), 2004, p. 9, available at: http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/update031112section1.pdf [accessed: 07.08.2017].

[46] *French radio goes to war with language quotas in fight for musical freedom*, http://www.france24.com/en/20150928-france-radio-stations-rebel-over-french-song-quotas-stromae-boycott [accessed: 07.08.2017].

[47] D. Chazan, *France drops legal quota on French radio songs as DJs forced to play 'boring old ballads'*, http://www.telegraph.co.uk/news/worldnews/europe/france/12197192/France-drops-legal-quota-on-French-radio-songs-as-DJs-forced-to-play-boring-old-ballads.html [accessed: 07.08.2017].

experience, with a hardly measurable and descriptive language of norms. At the same time, contemporary literature strongly emphasises the view that the concept of culture is of a descriptive rather than an appreciative and evaluative nature, so there is no grounds for distinguishing certain cultures using such epithets as higher or lower. The scope and semantics of the notion of culture are thus changing significantly – from an elitist concept to a process, as well as the sphere that includes language, customs, religion and education. Moreover, since culture in sociological and anthropological terms already encompasses not only fine arts, literature and philosophy but also the organisation of social life,[48] it becomes no longer so much a value, but a way of expressing identity and identification with the group, there are no grounds for assessing and evaluating it. The aforementioned approach raises the question of the legitimacy of an over a hundred years old, traditional distinction between so-called high and low culture, mass culture (popular), functioning for over a century in the discourse on cultural life and art. High culture ("highbrow") is a term used in American literature since 1880[49] to describe a sophisticated artistic culture, a bastion of what is "beautiful, clean and valuable";[50] classical music, opera, ballet, fine arts found in museum collections; the concept of low culture is about 10 years younger and means what can be largely identified with creation aimed at mass public, audience of less sophisticated taste.

The second half of the 20th century also saw the emergence of the concept of mass culture, which refers to contemporary phenomena conveying identical or analogous content to large masses of viewers from a few sources and to the uniform forms of playful, entertaining activities of large human masses.[51] As Adorno points out,[52] its intrinsic feature is the standardisation of the outcome ("product"), and consequently the needs of the recipients. Since the raison d'être of mass

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48 Y. Donders, *The Legal Framework...*, pp. 232–233.

49 B. Ivey, *op.cit.*, p. 16.

50 *Ibidem*, p. 14.

51 A. Kłoskowska, *Kultura masowa*, PWN, Warsaw: 1983, p. 95.

52 M. Horkheimer, T. Adorno, *The culture industry as mass deception*, in: J. Rivkin, M. Ryan (eds.), *Literary Theory: An Anthology*, Blackwell Publishing, Malden, MA: 2004, p. 1242.

culture is determined by meeting the needs of the widest possible audience, the characteristic feature of such a work must be to cater for average expectations and to satisfy average needs. Millions of consumers participate in such a culture, its production process assumes easy reproduction and identical results, and cultural standards are determined by the needs of consumers, and their results must be accepted by them with minimal reluctance. This inevitably results in a retroactive approach to expectations and needs, which never reach a higher level due to this mechanism. The production of cultural goods becomes the production of goods similar to industrial goods, with a mechanism of domination shaping and satisfying market-oriented needs.

This division has been intuitively perceptible and widely accepted, but there is a fundamental problem in separating the two kinds of cultural goods and cultural life from entertainment, because that is how these two spheres could be semantically identified. P. Bourdieu suggested an attempt to indicate the criterion of distinction, pointing out that the main difference between commercial and cultural interest (production) is that the former is geared towards quick profit, thus it presupposes a short production cycle, a minimal risk of fostering the consumer's tastes and thus clearly identified needs and presentation tools. On the other hand, the production of high culture goods assumes a long cycle of production and acceptance, a significant risk in attracting recipients and compliance with the rules of art – i.e. lack of the existing market prepared to accept the outcome of cultural production.[53] When considering the characteristics and functioning of the market of symbolic goods, Bourdieu indicates that the function of the value of these goods is that of their uniqueness, the ability to create an abstract and esoteric meaning.

The culture of the 'people' has always been present and flourished next to high culture – but neither the groups of recipients nor the two spheres competed with each other until today, being clearly distinguished. However, culture which is popular in industrial society

[53] P. Bourdieu, *The Field of Cultural Production*, Columbia University Press, New York: 1993, p. 97; P. Bourdieu, R. Nice, *The production of belief: contribution to an economy of symbolic goods*, 2(3) Media, Culture & Society 261 (1980), pp. 261–293.

has become the most widely accepted type of culture and permeates all its spheres,[54] which means that "individualism is being punished more than ever" – popular culture unifies taste, shapes the mass taste[55] and causes the dominance of commercial production in culture, which puts it at the centre in contemporary culture,[56] becoming, in fact, a dominant culture – using the media as well as share in the market of symbolic goods.

Yet this differentiation between high and low (or mass) culture loses its sharpness not only because of the lack of adequately defined criteria for aesthetic evaluation. The distinction between elite and egalitarian culture, based on an accessibility parameter that was sufficient so far, is also losing significance. Access to cultural assets has changed over the last hundred years in a revolutionary way. Already in the first half of the 20th century, in order to listen to music one had to go to a concert,[57] 50 years ago, in order to watch a movie one had to go to the cinema – and ten years ago – buy or at least rent a medium containing such work. Nowadays, the method of access to cultural goods has substantially evolved. Availability in the 20th century caused rapid transformation of the scope of culture. Nowadays, we are witnessing the second wave of this revolution – an impenetrable mass of those who are practicing art has appeared. Making cultural events accessible and participating in online cultural events, as well as changing the form of communication from the broadcaster-receiver model to the model of interaction, causes yet another paradigm shift in cultural relations. Online streaming services, the universality and individualization of access to cultural content, systems of recording and easy transmission of any kind of cultural content make it possible for anyone, who has such tools at their disposal, to become acquainted with the content of their choice with an incredibly rich and incomparably wider than before offer, at a convenient time and place.[58] The new

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[54] E. van den Haag, *Szczęścia i nieszczęścia nie umiemy mierzyć*, in: C. Miłosz (ed.), *Kultura masowa*, Wydawnictwo Literackie, Kraków: 2002, pp. 70–71.

[55] *Ibidem*, pp. 73, 75.

[56] D. Hesmondhalgh, *The Cultural Industries*, SAGE Publications Ltd, London: 2012, p. 167.

[57] About technological transfomation, see: B. Ivey, *Arts...*, p. 5.

[58] B. Ivey, *Arts...,* pp. 8–9.

media, which are currently almost monopolistic in the perception of artistic culture,[59] require considerable investment and a complex model of distribution and management, and thus market forces are beginning to increasingly penetrate the relationship between the audience and the creator.[60] The position of cultural creation and what can be called the production of cultural goods has changed radically.

This is of paramount importance for the reform of the existing copyright protection system, which has hitherto been based on the assumption that creators should be able to benefit from the fruits of their work – at the moment, this model seems to be much more complex, with the main role played by rightholders exercising copyright regardless of the authors' real will and intentions.

The question about the possibilities and limits of shaping cultural policy also takes on a new meaning. The deliberately conducted activities of public authorities aimed at ensuring access to cultural heritage and guaranteeing the conditions for the development of artistic creation and access to cultural life can determine the shape and content of the right to culture. Therefore, what is the role of the state in a world dominated by cultural industry and individual reception through modern media, in a world where the model of producing and presenting works of art has undergone a change? Certainly, the model of high culture sanctified by tradition is changing, as well as participation in the reception of artistic works requiring the festivity of this behaviour and its celebration. Individualisation of the perception of artistic culture makes it increasingly difficult to locate and identify high and elitist artistic culture or one which, according to the previous criteria, could be called the dominant one. This may not be a matter of concern for cultural academics, but it may be troublesome for lawyers and those who create models of cultural policy. This separation is essential in order to define the culture which we are entitled to participate in and, consequently, identify the extent of the responsibilities

[59] Statistics presented by Bell and Oakley indicate that participation in artistic culture consist in 90% in watching TV, 80% of listening to music in individual audience. D. Bell, K. Oakley, *Cultural Policy*, Routledge, London–New York: 2015, p. 37.

[60] B. Ivey, *op.cit.*, p. 9.

of the State and national public authorities and at international level with a view to making this participation in cultural life feasible.

At least two major problems have arisen with force in this context. The first is the need for aesthetic evaluation of cultural assets, related to the duties of public authorities in providing protection and support for cultural life. Cultural policy in support of culture has always been based and must be based on aesthetic judgements.[61] The extent of the significance of culture, which deserves to be supported in a significant (and even crucial) way, affects the scope of the right to culture, in terms of the right of access to it and the extent of the State's obligations to support it financially. In the meantime, the production of cultural works has already changed its character – the production of cultural goods is becoming a production of goods similar to industrial goods, with a mechanism of dominance in shaping and satisfying market-oriented perceived needs.

Maintaining, promoting and protecting cultural creation (cultural life) typically absorbs a significant share of public funds, usually inversely proportional to the revenue from their sale (consumption).[62] The revolution in the preservation and distribution of cultural goods at first, followed by a change in the way of distribution and the broadcaster-receiver's relationship to artistic culture, both in terms of its reception and content. This in turn had to influence the current paradigm of cultural policy, which had been based on a diagnosis according to which the perception of art (artistic culture) was to be facilitated and subsidised. Artistic culture has entered homes and has become accessible through the media as never before. At the same time, a fundamental paradox of cultural policy has manifested itself with unprecedented force. There was always a certain shadow cast over subsidising cultural creation and facilitating access to it – it was necessary to subsidise those genres and types of creation that did not perform well in the market conditions, to put it straightforwardly – those that were not in high demand. The individual and extremely easy as well as relatively cheap new model of participation in cultural life in recent years

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61 A. Pratt, *Cultural industries and public policy: an oxymoron?*, 11(1) International Journal of Cultural Policy 31 (2005), p. 46.

62 D. Bell, K. Oakley, *Cultural Policy*, p. 21.

has made this problem glaringly visible – it turned out that since creativity reaches people easily through the market and the world of new media, rather than through state subsidies – it is increasingly legitimate to say that the latter serve to support creativity addressed to a very small number of recipients. Subsidised culture – the 'higher' one and enjoying support – reaches a small percentage and is clearly that part of artistic culture that people in fact do not want to pay for. This pattern is obviously exaggerated – but it also reveals the second problem – that conducting a policy of funding, subsidising or any other support for cultural creation must be based on a system of evaluation, including an assessment of the artistic value of the proposed creation. Such an evaluation is extremely cumbersome and sometimes embarrassingly hidden in the model of contemporary culture – after all, it is nothing but an evaluation of the quality of aesthetic experience, an appraisal of the quality of cultural content, what, according to the contemporary paradigm, is actually impossible. In accordance with the existing standards established over the years, such an assessment, which qualifies for any kind of assistance financed from public resources, is carried out by bodies set up specifically for this purpose, carrying out a kind of peer review of the proposed artistic works and projects. Such bodies are to carry out an evaluation, which the allocation of various forms of financial support from public funds depends on – therefore it is not directly done by political entities. This kind of mechanism is called in Anglo-Saxon tradition acting "on arm's length."[63] Such bodies are composed of experts and, through the authority of their members, provide a guarantee of fair and impartial judgment. However, in this state patronage mechanism, so alleviated by the mediation of independent experts, there is an irresistible problem of objectivity in the evaluation of what is worthy of subsidisation and the criteria applied, not to mention the trivial problem of selecting the members of such intermediary

[63] As quoted by Bell and Oakley, this term has been used in this context in Great Britain since 1919, when University Grants Committee was established to qualify and evaluate studies to public support, then the term and principle were transferred to cultural funds, with the formation of Arts Council of Great Britain in 1946 (Bell, Oakley, *op.cit.*, p. 123).

bodies and the importance of their judgments. So, how long is this arm, the length of which is used to distance the evaluation of artistic culture projects from politics, and how this evaluation is carried out if the evaluation of art (especially of projects) is bound to be subjective in terms of aesthetic experience and tied to its own categories concerning the assessment of the quality of the work. And it is this evaluation that the artistic culture, high culture and the quality label of the state patronage depend on in terms of what is considered worthy of support and protection for public authorities.

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Culture can be observed, analysed on several levels: artefacts, i.e. material and intangible cultural assets, such as works of visual art, crafts, songs, literary and musical works, culture can also include all objects belonging to the so-called culture of existence, i.e. culture within the meaning of the system of recreating attitudes, characteristics and values of a given community. Another level at which culture can be analysed is the one of cultural values, i.e. those goods for which culture is created and preserved, which in turn stems from the least visible, deepest level of attitudes, unconscious and deep assumptions, for which the system of values is shaped in such a way – and then, in subsequent stages, the artefacts are preserved. These may include relations towards nature, time, human, human activity, the place of a human being in the world, transcendent entities and other assumptions that are fundamental for human consciousness, which lie at the heart of every civilisation or social group.[64]

At all these levels, the cultural boundaries and categories that are applied to this phenomenon and of which a minor part is presented here are neither permanent nor certain. A turbulent discussion about multiculturalism, assimilation in dominant culture, which takes place with the participation of the greatest intellectuals of our times and – unfortunately – not only with their participation, doubts and perplexity after awarding the highest literary distinction to an

[64] E.H. Schein, *Coming to a new awareness of organizational culture*, 2 Sloan Management Review 3 (1984), p. 4.

artist from the circle of musical culture, enjoying the appreciation of the audience on a mass scale, i.e. from the sphere of popular culture, as well as disputes over the mysterious and hasty purchase of one of the largest collections of the national cultural heritage which had been in private hands thus far – all these processes and events indicate that artistic culture and culture of existence are the most interesting as well as most controversial social phenomena. The age-old categorical disputes, as well as the new challenges that arise from the widespread and individualised access to cultural goods and contemporary artistic culture, cause that with appropriate humility and a sense of limitations we should start to analyse phenomena and manifestations of culture, especially artistic culture. It can be interpreted in different scopes and meanings that determine its shape, and these boundaries are not rigidly delineated and, as recent events show, there are still significant controversies as to how they proceed. However, this does not mean that such attempts should not be made, or that they should remain outside the interests of lawyers. The considerations regarding what constitutes a protected value and the meaning of the right to participate in cultural life constitute the beginning and the grounds for an analysis of the right to participate in culture and constitute a necessary element for the consideration on models and instruments of cultural policy, which represents an organised activity of public authorities within the framework of positive obligations to ensure the implementation of this right. In fact, the invisible protagonist of these reflection on the boundaries and types of culture protected by law is the right to culture itself – understood as a set of entitlements and freedoms determining participation in the cultural life of the community and, consequently, individual and collective identity.

CHAPTER 2

The Normative Character and the Substance of the Right to Culture

2.1. Right to culture and art. 15 of the International Covenant on Economic, Social and Cultural Rights

In order to describe the right to culture we must start with the most universal and canonical document concerning this right, the Universal Declaration of Human Rights. In Article 27 (1) the Declaration states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." Paragraph 2 grants protection to the right of every human being to protect the moral and material benefits derived from scientific, literary or artistic activity. These rights were subsequently guaranteed by the International Covenant on Economic, Social and Cultural Rights. Article 15 guarantees everyone's right to participate in cultural life (Article 15.1.a) and the right to benefit from the achievements of scientific progress and its applications (15.1.b) and, furthermore, the right for creators to enjoy the protection of moral and material interests arising from any scientific, literary or artistic creation of their authorship (15.1.c). The General Commentary of the Committee on Economic, Social and Cultural Rights no. 21[1] noted that all the cultural rights referred to in Article 15 of the Covenant are, like the other rights guaranteed in the Covenant, universal and indivisible, but also interdependent and closely linked. Moreover, the rights referred to in Article 15 and in particular the right to participate in cultural life have a close

[1] Committee on Economic, Social and Cultural Rights, General Comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), 2nd-20th November 2009.

connection with the right to education (Articles 13 and 14 of the Covenant). The first is the right of all nations[2] to self-determination and identification of their political status, free economic, social and cultural development (Article 1). Addressing the close relation between the right to participation in cultural life and the right to self-determination and free cultural development draws attention to the communitarian character of the former, i.e. the possibility of its implementation in communities and by the collective. The Commentary also points to a close relationship between the right to participate in cultural life and the right of everyone to an adequate standard of living and continuous improvement of living conditions (Article 11). In turn, indication of this connection highlights the individual dimension of the right to participate in culture as an element that builds the standard of living and development. This dualism in the perception of the right to participate in culture is constantly present in the Commentary and even expressed by the Committee when it defines the subject of this right.

Participation in cultural life, as outlined in the Commentary, can take one of three forms. First of all, it can mean participation – understood as the right of everyone to freely choose his or her cultural identity and engage in cultural practices, to seek and develop his or her knowledge and expression, to share with others and to contribute to creative activity (paragraph 15a of the Commentary). Participation may also consist in accessibility, i.e. getting familiar with one's own culture, receiving education in order to acquire a cultural identity by any means of communication, as well as gaining access to cultural heritage and creativity of other people and communities (paragraph 15b). Finally, participation can also comprise involvement in cultural life, i.e. being engaged in the creation of spiritual, material, intellectual and emotional expressions of the community (paragraph 15c).

The Commentary draws attention to the link between the right guaranteed by Article 15 of the Covenant and other instruments and acts securing the cultural rights of individuals belonging to

[2] The term 'all peoples' has to be meant not only as right of nations but also right of all groups with their own identity which could be identified.

particular groups, which refer to equal and full right to participate in cultural activities of different groups protected from discrimination based on race, gender, age as well as the rights of immigrants, people with disabilities and ethnic minorities.[3] The need for special protection of the right to culture granted to particular groups and communities is being addressed in a separate part of the Commentary (sections 25–39), listing among them: women, children, the elderly, people with disabilities, as well as minorities and their members, migrants, indigenous peoples and people living in poverty. The comment on how to exercise the right to participate in culture also clearly underlines the community nature of the implementation of the right and stresses the importance of activity in this area within the framework of a community culture, referring to the universal culture much less.

In the General Commentary, the Committee also sought to clarify the concept of culture and cultural life in Article 15.1 (a) for the interpretation of law, but has first of all drew attention to the ambiguity of the very concept. It referred to the features and definitions of culture previously developed in UNESCO documents. Therefore, culture should be perceived as "a set of spiritual, material, intellectual and emotional traits characterising a society or social group and encompassing, apart from art and literature, ways of life, forms of mutual coexistence, systems of values, traditions and beliefs."[4] It also noted that, in accordance with the UNESCO Recommendation on the Participation by the People at Large in Cultural Life and their

[3] In Commentary there are indicated guarantees contained, i.a, in: International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (e) (vi), Convention on the Elimination of All Forms of Discrimination against Women, art. 13 (c), Convention on the Rights of the Child, art. 31, para. 2, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43, para. 1 (g), Convention on the Rights of Persons with Disabilities, art. 30, para. 1, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2, paras. 1 and 2, Framework Convention for the Protection of National Minorities (Council of Europe, ETS no. 157), art. 15, United Nations Declaration on the Rights of Indigenous Peoples, in particular arts. 5, 8, and 10–13 et seq. This category of rights are also guaranteed by the International Covenant on Civil and Political Rights, arts. 17, 18, 19, 21 and 22.

[4] UNESCO Universal Declaration on Cultural Diversity, 2001.

Contribution to it,[5] culture is, in essence, a social phenomenon resulting from the integration and cooperation during creative activity and is not limited to having access to works of art, but is also aimed at life style expectations, access to knowledge and communication needs. It also means those values, beliefs, ideas, languages, knowledge and art, traditions, institutions and ways of life through which people express their humanity and meanings, which are important for their existence and development individually and as a community.[6] The Committee also quoted a definition according to which culture is

> the sum of material and spiritual activities and their effects of a particular social group, which distinguishes it from other groups and a system of values and symbols, as well as a set of practices recreated in the group, which makes it possible to identify meanings and symbols in behaviour and social relations among its members.[7]

These aforementioned attempts to define cultural phenomena more precisely are definitely heading towards conclusions on granting cultural phenomena primarily an identity-related dimension, connected with identification and meanings conveyed by symbols, rituals and artefacts in specific groups. However, the Committee's comments on this point are more general and inclusive. It suggests that culture is based on all manifestations of human existence, and the term 'cultural life' refers to culture as a dynamic and evolving process.[8]

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[5] UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it, 1976 (the Nairobi recommendation).

[6] Fribourg Declaration on Cultural Rights (2007) art. 2 (a).

[7] "(...) the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life." R. Stavenhagen, *Cultural Rights: A social science perspective*, in: H. Nieć (ed.), *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights*, UNESCO Publishing and Institute of Art and Law, Paris-Leicester: 1998.

[8] Para. 11. General Comment no. 21: "In the Committee's view, culture is a broad, inclusive concept encompassing all manifestations of human existence.

The term must therefore be understood not as a series of isolated manifestations or separate elements, but as an interactive process in which people and communities, while maintaining their specificity and goals, express their humanity.[9] The Committee acknowledges that the culture referred to in Article 15 of the Covenant includes, i.a., ways of life, language, verbal messages, literature, music and songs, non-verbal communication, religions and belief systems, rituals and ceremonies, sports and games, production methods and technologies, the natural environment as well as the one processes by mankind, food, clothing, shelter, the arts, customs and practices through which individuals, groups and communities express their humanity and meanings they give to their existence build up a world representing their approach to the outside world, which influences their lives. Culture shapes and reflects the values of prosperity and economic, social and political life of individuals, groups and communities (section 13).

Therefore, General Commentary to Article 15.1 (a) contains an extremely broad definition of culture, including as many activities, effects and forms of communication between people as possible. It is impossible not to notice that this definition is, firstly, a very broad one – the Covenant also authorises natural environment as a form of culture – although one of the oldest and most classical forms of distinguishing what we call culture is to indicate its limits through the world of nature. This definition encompasses all forms of knowledge, techniques, crafts, ways of spending time, landscapes, religion and beliefs, as well as means necessary for human existence such as food and clothing. The intention of the commentators was probably to emphasise the value of the diversity of forms of these manifestations of human life and the purposefulness of their protection and intact conduct. It is an expression of the noble intention

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The expression 'cultural life' is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future."

[9] Para. 12. General Comment: "The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society."

not to discriminate against communities and groups of culture other than that what we can call it a culture dominating in modern civilization, as Bourdieu puts it. Certainly, such an inclusive definition contained in the Commentary makes it possible to achieve coherence with the acts mentioned above, noting the importance of cultural diversity, non-discrimination and the need to preserve the cultural separateness of all human communities and groups.

Such an understanding of culture is supported by a section of the Commentary which refers to the need to protect cultural diversity and the right to participate in cultural life (sections 40–43), where it is stated that the protection of the former is ethically necessary and cannot be dissociated from respect for human dignity, it is a commitment to man and its preservation requires the full exercise of cultural rights, including the right to participate in cultural life. As the Committee points out, the phenomena of migration, integration, assimilation and globalisation cannot adversely affect the preservation of cultural distinctiveness. However, it is hard to resist the impression that in such a broad sense, Article 15 would provide for the right of "everyone to everything", that is to the things that surround them and to which they feel attached, without any differentiation of the areas closer to and further from what we used to treat as manifestations of culture in the traditional understanding, close to the one of creators' of the Universal Declaration and the Covenant, which was contained in Chapter I. This rupture between the understanding of the right to culture as the right to preserve the cultural separateness of a group and the right to participate in culture is also visible in the Commentary – the right to participate in cultural life means, in the case of a minority, their right to "participate in the cultural life of the society" and also "to preserve, promote and develop their own culture" (section 32). Minorities and their members therefore have the right "not only to their own identity, but also to development in all areas of cultural life", and programmes of "constructive integration" should be based on inclusion, participation, non-discrimination with a view to preserving the distinctive character of minority cultures (section 33).

The commentary therefore highlights not only the right to preserve one's own culture within the group, but also the right to participate in culture that can be defined as dominant, while underlining

its importance for the intellectual development and social status of the members of each community. The section on the first element of the right to participate in cultural life, called Availability, refers to ensuring the presence of cultural assets and services for everyone, including libraries, museums, theatres, cinemas, sports stadiums, literature, including folklore and art in all its forms, as well as other open spaces, gifts of nature, intangible cultural goods (such as languages, customs, traditions, beliefs, knowledge as well as history and values that form cultural diversity). This importance of cultural life and culture – as a universal phenomenon and an element of the common good, in addition to knowledge as a basic resource enabling intellectual and aesthetic development and thus a better standard of living – is also referred to in the commentary on the obligation imposed by Article 15 on States towards persons in need to take specific measures to ensure adequate protection and full realisation of the rights of such persons and their communities to participate in cultural life (section 39), because their poverty seriously limits the exercise of their right to participate in cultural life, which in turn greatly increases their hope for the future and their ability to benefit fully from their own culture (section 38).

As indicated in the previous chapter, culture is such an ambiguous concept that the will to protect it and to recognise its significance in social life results in the emergence of many spheres of protection and gives rise to various powers, both on the part of communities and individuals. The spheres of protection thus created are sometimes correlated, but at times they collide with each other, and may also cause some misunderstandings as to the meaning of the protected value and the resolution of possible doubts regarding the spheres of exercising the rights. This is the case with the interpretation and application of the right to participate in cultural life under Article 15 of the Covenant. It seems that combining the sphere of the right to maintain one's own cultural distinctness with all its manifestations, so convincingly justified in the commentary, is an independent sphere of competence and deserves individual protection from the right of access to cultural goods universally recognised as the common heritage of human civilisation, giving rise to certain cultural and social competences. This does not have to mean the appraisal of cultures, nor any attempt to

diminish the value of cultures of particular groups and communities – to which everyone belongs anyway and with which they are more or less identified. The point is, however, that the attempt to capture both spheres of competence in one normative category causes the blurring of the meaning of each sphere of competence. This poses a double risk. On the one hand, assuming the original meaning of the separate right to culture as a right to universal culture, or rather what constitutes a common cultural heritage that generates cultural capital according to the dominant population, may lead to the disappearance of the importance of cultural diversity, as it may no longer be considered as a source of identity and values conveyed by symbols and artefacts.

On the other hand, if we consider the perspective of cultural diversity to be the only relevant one, it is easy to miss out on the need to protect culture as a common good of mankind and condemn the right to culture to vernacularisation, thus depriving it of the status of the universal good of all mankind – a fundamental bond and the environment of communication. Furthermore, adopting such an attitude only condemns human communities, especially those living in minority cultures, to the ghetto of living in their own identity without being able to search for and find other meanings and cultural assets relevant to building the necessary cultural capital and social status recognised outside their own community. Such cultural ghettoisation certainly was not the conception of the authors of the Universal Declaration of Human Rights, who for the first time introduced the right to participate in culture into the legal and human order, the same goes for the authors of the Covenant on Economic, Social and Economic Rights. General Commentary recognises this risk, as it draws attention to the need to guarantee the free choice of culture which they wish to identify themselves with, by requiring States to ensure the free access of all to their own cultural and linguistic heritage – but also to others, of their own choice (section 49 d).

2.2. Right to artistic culture

It is therefore worth making an attempt to create two understandings of the right to culture – the first one is the right to common culture, concerning universal artistic culture, or, according to the writings

of Bourdieu, the dominating one, which is a fundamental element of the common good of humanity and from the point of view of its usefulness for developing one's own social and cultural position. The second meaning will concern the right to one's own culture, i.e. the preservation of what is important from the point of view of the group's identity and the transfer of values relevant to it through a specific system of meanings and symbols, beliefs and customs. The above dichotomy concerns to some extent also the basic chapter of symbolic culture and the culture of material existence understood as all physical, material manifestations of society's life[10] – although it is easy to notice that this division is neither simple nor complete.[11] Archaeological discoveries often involve tangible cultural assets, for example, while intangible heritage and the protection of cultural diversity equally concerns religious objects, language and customs connected with everyday life and celebration of important events in the community. Yet, it should be emphasised once again that, in the sense intended by the authors of the Declaration and the Covenant, the concept of cultural life referred primarily to symbolic culture, particularly to artistic culture, combined with knowledge as the basic common good and heritage of mankind.

In this paper, the author takes the perspective regarding the first meaning of the right to culture, i.e. the right to universal culture. Accepting, or rather upholding this understanding of the right to culture is supported by, firstly, the origin of the right to participate in cultural life,[12] which was already mentioned in Chapter I; at the time of writing the Declaration and the Covenant the participation in universal, dominant culture was to be covered by this right; culture was understood primarily as fine arts, literature and the common heritage

[10] M. Gruchoła, *Kultura w ujęciu socjologicznym*, 1 Roczniki Kulturoznawcze 95 (2010), p. 99.

[11] About necessity of distinction between these both spheres, see: M. Wółkowska, *Prawa kulturalne w Europejskiej Konwencji Praw Człowieka. Analiza w oparciu o orzecznictwo Europejskiego Trybunału Praw Człowieka w Strasburgu*, 13 Studia Iuridica Toruniensia 241 (2014), pp. 242–243. The author proposes two terms for these two different rights to differentiate rights to ethnic and artistic culture.

[12] J. Morsink, *The Universal Declaration of Human Rights – Origins, Drafting, and Intent*, University of Pennsylvania Press, Philadelphia: 1999, p. 244.

of the entire mankind, and not as individual groups distinguished in terms of culture or any other way. We must therefore return to the original meaning in order to consider to what extent this law can be and is implemented today.

The second reason is of a more serious nature, and it concerns the very axiological grounds for recognising culture as an object worthy of protection, and making it available to all people as required by the Universal Declaration of Human Rights. All the quoted definitions and indicated levels of interpreting the culture lead to the conclusion that culture can develop and be created and nurtured among people with a common experience and system of features that allow certain meanings and patterns to be transferred. Without a community, culture cannot exist because identity is built on values and attitudes expressed in culture. Culture is the fabric of society, and without the group in which it was created and cultivated – it does not exist, even its material assets cannot be correctly read, they lose their meaning.

However, culture is not the same thing as identity, understood as a sense of belonging; this identity is a conscious sense of shared attitudes, experience and values, and a perception of being separate from other groups (communities). In the meantime, culture is a set of patterns, attitudes of a less conscious nature and acquired more through belonging to a group on an individual basis. Therefore, it is a way of perceiving and understanding the meanings of attitudes, symbols and artefacts – but it does not mean conscious choice, but competence developed through education in a specific society and group to understand and feel. Identity allows us to answer the question of belonging and is based on mutual perceptions, stereotypes and emotional relationships – but not on the relation towards values.[13] At the same time, the sense of identity is fluent and depends on the environment of "Others." Culture means a much less emotional and more educated attitude towards values, attitudes and, above all, their meanings, which means that despite a different identity (feeling of belonging to a group other than the one in which one functions), people remain capable of reading the code and understanding objects, attitudes and behaviours.

[13] G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations across Nations*, Sage Publications, London: 2001, p. 10.

Thus, high and universal culture, the cultural heritage of all humanity becomes the primary code for the reading of meanings, which makes it possible to function in any group, or at least in any community, which should be considered as the dominant civilisation. This code not only allows us to function in a conscious way, but also to participate fully in the life of such a community, obtaining high status conditioned by what we call cultural capital.[14] This capital determines an individual's position in the community and is also non-transferable, safe and sustainable.[15]

Such is the individual benefit of participation in artistic culture. And since culture is a core fabric, a backbone of social bond that everyone can draw from without harming others, and the immersion in it unites individuals with a bond that cannot be replaced by anything else – culture is what we call the common good. According to the Aristotle's understanding of this term, the common good must be considered to be what all people want, something that is a desirable and undisputed common value. The term "common" also refers to a certain rationality of this claim – the common good would mean something that is an object of human will endowed with rationality, simplicity and naturalness in this aspiration. Something that is accessible and achievable can be considered a common good.[16] The common good as an important philosophical category was described by Plato, Aristotle and St. Thomas Aquinas, treating it as a certain point of reference for the evaluation and analysis of human life and the life of the community as well. Also modern philosophy has frequently referred to this concept, especially in political and legal considerations.[17] The utilitarianists used the concept of the common good

[14] P. Bourdieu, *The forms of capital*, in: J.G. Richardson (ed.), *Handbook of Theory and Research for Sociology of Education*, Greenwood Press, Westport, CT: 1986, p. 253.

[15] T. Zarycki, *Kapitał kulturowy – założenia i perspektywy zastosowania teorii Pierre'a Bourdieu*, 4(1–2)(10) Psychologia Społeczna 12 (2009), p. 12, 15.

[16] S.I. Udoidem, *What is the common good*, (94–95) Christian Law Review (1987), pp. 101–102.

[17] J. Locke, *Second Treatise of Government*, Cambridge University Press, New York: 1963, pp. 131, 158; D. Hume, *Treatise on Human Nature*, Clarendon Press, Oxford: 1981, pt. 2, sec. 2.

considering it "the greatest good for the greatest number of people"[18] and thus making it a central teleological category of their doctrine.

In the neo-Tomistic philosophy,[19] which had a significant influence on the normativity of the notion of the common good, the common good means as much as the good life of all, taking into account their diversity; the key element of the common good is the free development of individuals in the community, taking into account the guarantee of their freedom. This value is composed of civic awareness, political virtues, a sense of law and freedom, spiritual and material values, moral honesty, justice, courage, solidarity.[20] In this sense, the common good achieves world-view neutrality, emphasising the value of pluralism and diversity of factors necessary for the development of people forming a community. The common good is not a single object, it contains all the conditions and circumstances that constitute freedom and ability of a human person to develop and achieve perfection. Although this definition seems far from being precise and complete, it is more useful than other considerations to assess whether something can be a common good or not.[21] At the same time, it is evident that the description of the common good perfectly reflects everything that can be indicated as the value of universal culture. John Finnis refers directly to the category of artistic culture, offering a short list of basic values (goods) important for everyone and universally irreducible to others. The list includes: life, knowledge, fun, aesthetic experience, interpersonal relations (friends), reasonability and religion.[22] Immersion in artistic culture allows one to benefit from at least two of these values, significantly affecting the ability to communicate with other people and participate in social life at a different, higher level. Heritage and culture are ways

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[18] S.I. Udoidem, *op.cit.*, p. 105.

[19] J. Maritain, *The Person and the Common Good*.

[20] G.N. Schram, *Pluralism and the common good*, 36(1) American Journal of Jurisprudence 119 (1991), p. 119.

[21] R.L.M. Orsy, *The common good and special interests in the legislative process*, 29(2) Catholic Lawyer 146 (1984), p. 147. See also: encyclical by John XXIII *Mater et Magistra.*

[22] J. Finnis, *Natural Law and Natural Rights*, Oxford University Press, New York: 1980 (Polish edition: *Prawo naturalne i uprawnienia naturalne*, Dom Wydawniczy ABC, Warsaw: 2001, p. 98).

of thinking and communicating in human communities, shared habits, practices, norms, manifesting the pursuit of values indicated by Finnis – in addition to life, knowledge, aesthetic experience, as well as fun, interpersonal ties and religion.[23]

Such a meaning of culture within the meaning of the Declaration and the Covenant is also evidenced by the fact that it has been placed together with science and hence the knowledge in one editorial unit. Therefore, they are the resources the use of which creates important value in human life, increasing one's awareness and quality of life.

At the same time, one of the intrinsic attributes of culture is its social or rather Community-oriented character. At the same time, however, cultural experience and cultural meaning is created within the framework of an individual experience – this is yet another mysterious but also immanent feature of culture, especially artistic one. As Matsumoto has accurately put it, culture is as much an individual construct as it is social. Individual understanding allows us to see differences between people in the perception of attitudes, values, beliefs and behaviours that make up culture as a social construct and avoid stereotypical perception of the group and its cultural attitudes.[24]

This particular character of an aesthetic experience (concerning art) and more broadly a cultural experience makes it particularly difficult to determine the nature of the rights associated with participation in cultural life. Many doubts arise especially in view of the developing doctrine of so-called collective rights (solidarity rights, 3rd generation rights).[25] The specificity of these rights is that they are in a way twofold – on the one hand, they are enjoyed by individuals, as are all human rights, and on the other hand, they become the subject of claims made by entire social groups, nations and even the total population. Such

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[23] D. Gillman, *op.cit.*, p. 21.

[24] D. Matsumoto, *Culture and Psychology*, Brooks/Cole, Pacific Grove, CA: 1996, p. 18.

[25] The term of human rights generations was entered by K. Vasak, *A 30-year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights*, 30(11) The UNESCO Courier 28 (1977), p. 29, available at: http://unesdoc.unesco.org/images/0007/000748/074816eo.pdf#nameddest=48063. See also: P. Alston (ed.), *People's Rights*, Oxford University Press, Oxford: 2001; D. Sanders, *Collective rights*, 13 Human Rights Quarterly 368 (1991), p. 368.

rights include, among others, the right to development, the right to environmental protection and the right to common heritage of mankind,[26] peace and freedom from genocide, humanitarian aid.[27] The concept of collective (solidarity) rights dates back to the last two decades of the 20th century and was developed in relation to the rights of individuals (groups) in developing countries. However, there is still no clear line between individual and collective rights in human rights studies, even though some writers claim that such rights cannot form an integral part of the human rights order, since claims related to them cannot be attributed to the human person as a right holder.[28] Others, in turn, believe that collective rights should be understood as the rights of individuals belonging to particular groups endowed with a specific status.

With regard to the right to participate in culture, the issue is also connected with the connotation of this right as the right to preserve the individual and group culture (symbolic and culture of existence) that creates social identity. In this context, the right to participate in culture is of particular significance, becoming a right of the group (members of this group) to retain their distinctness and identity in relation to other groups (members of other groups).[29] The groups attain their identity and then they maintain it through culture and memory of the community.[30] Therefore, the right to culture is sometimes recognised as a group right, because of the importance of culture for creating and maintaining the identity of a group.[31]

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[26] J. Zajadło, *Prawa solidarnościowe*, in: A. Szmyt (ed.), *Leksykon prawa konstytucyjnego. 100 podstawowych pojęć*, Wydawnictwo C.H. Beck, Warsaw: 2010, pp. 378–380.

[27] P. Alston, *op.cit.*, p. 369.

[28] P. Sieghart, *The Lawful Rights of Mankind*, Oxford University Press, Oxford: 1986, p. 161; M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, Hart Publishing, Oxford: 2016, p. 16.

[29] It seems there are some references to such concept of collective rights in multicultural societies in: W. Kymlicka, *Individual rights and collective rights*, in: *Multicultural Citizenship: a Liberal Theory of Minority Rights*, Clarendon Press, Oxford: 1996.

[30] J. Raz, *Value, Respect and Attachment*, Cambridge University Press, Cambridge 2001; D. Gillman, *op.cit.*, pp. 188, 190.

[31] J. Moustakas, *Group rights in cultural property: justifying strict inalienability*, 74 Cornell Law Review 1179 (1989), pp. 1193–1195.

However, assuming the initial assumption and limitation of the analysis of the right to participate in culture to artistic culture and the culture of universal nature (and the dominant culture can be concealed under this name), we should concentrate on the nature of the right to participate in the culture which is not exclusive, but inclusive, in the sense that other participants of cultural life understood in this way do not want to search for their own identity and individuality, but rather to search for a common world of ideas, symbols and meanings and that something that determines the existence of art – aesthetic experience. If we limit the scope of consideration this way (and this is the proposal that forms the basis of this study), then it turns out that the notion of a community that could be either a subject or simply an environment in which the right to participate in culture makes sense should be interpreted quite differently. In the Universal Declaration, the wording of this law reads "the right to participate in the cultural life of the community." There is no unanimity in literature as to how the term used should be understood. According to Y. Donders, many authors acknowledge that it is supposed to mean every form of human organisation[32] and according to others, it is a term defining national communities or the community of all people, the human community.[33] However, there is no convincing argument that the wording of the Declaration could concern individual cultural and ethnic communities, or any other community in which cultural life takes place according to its own semantic systems and rules. This is also evidenced by the form applied – the Declaration speaks of one community, not communities. The right to participate in cultural life of the community was intended to unite rather than divide people. The right to culture serves all people, not just members of certain groups, which could be a distinctive factor of collective law. Moreover, this is also pointed out by the word "everyone" used in both

[32] N. Robinson, *The Universal Declaration of Human Rights – Its Origin, Significance Application and Interpretation*, Institute of Jewish Affairs, New York: 1958, p. 139, after: Y. Donders, *The legal framework of the right to take part in cultural life*, in: Y. Donders, V. Volodin (eds.), *Human Rights in Education, Science and Culture, Legal Developments and Challenges*, UNESCO/Ashgate, Paris-Aldershot: 2007, p. 246.

[33] *Ibidem,* pp. 246–247.

the Declaration and the Covenant on Economic, Social and Cultural Rights. Therefore, since there are no legitimate grounds for distinguishing groups – at least in the wording of Article 27 of the Declaration, in which the right to participate in cultural life should be exercised, the condition of granting this right the status of collective law, at least in terms of the right to high culture, is not fulfilled.

The right to participate in culture is realised through individual experience and individual perception, although obviously the world of values, meanings, symbols and artefacts must be shared at some level with other members of the human community – in which case art and culture in general can be experienced at all. Consequently, culture, including artistic culture, is always created through interaction, but it is not only the relation between the creator – the work – and the recipient. It is also a system of meanings, values and signs that can be used by the creators – and that can be interpreted by the viewers, and this world is created in community and through the common experience of its members. Culture is created thanks to the community, and the community gains the opportunity to develop and transfer meanings and values through generations because of culture. In this sense, experiencing of culture, and thus participation in culture, is collective.[34] However, this is insufficient to assume that the right to culture is a collective right, or that members of only certain groups are its subjects. It is perfectly natural that certain rights and freedoms can only be exercised within the community or in cooperation. Even considering the most classical freedoms, such as freedom of expression or religion (its cultivation), make sense only in a relation or as part of certain communal practices. Collective law – as we should understand the intentions of the supporters of this category, is different from others in that it serves the group and not its members. If we are talking about the right of the community to self-determination, then this is a right that is inherently different from the rights of individuals within that community, although the sceptics will not give up, claiming that such a right is already in a category outside human rights.

[34] R. Stavenhagen, *Cultural rights: a social science perspective*, in: A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights – a Textbook*, M. Nijhoff Publishers, Dordrecht: 2001, pp. 89–92.

Without the participation of an individual person who creates a work of art and without a specific recipient, who receives it, the work does not have the right to participate in a culture called universal culture.

By contrast, the right to culture in terms of the right to cultural distinctiveness must be interpreted very differently. Such distinctiveness, maintaining identity by a certain community, based on shared experience of meanings, transfer of values and aesthetics, as well as the way of life and customs is a feature of the group – and in this sense, such a law can be bestowed with the value of collective law.

In the Commentary on the subject referred to in Article 15 as "everyone", the Committee explains that this phrase can be understood as: any person acting individually, any person acting with others, or within a community or group (section 9 of the Commentary). That last phrase draws attention to the possibility of exercising the right to participate within a certain community – although it is worth emphasising that a person remains the subject of law, not the collective as such. Hence, the right to participate in cultural life remains in principle an individual right. At the same time, however, when stating that this right may belong to an individual, an individual in a community or a community, the General Comment causes a certain level of contamination of these two meanings of the right to culture – universal or artistic – and the preservation and maintenance of one's own culture, which is the source and foundation of one's identity. States' reports submitted within the framework of the Covenant's obligations indicate a broad understanding of the cultural life; the states therefore report on artistic life, the protection of artists, the freedom of creation, as well as craftsmanship and folk culture, but also on the cultural rights of minorities.[35]

2.3. The nature of the right to culture

Identifying the nature of the right to participate in culture requires one more intriguing element to be discussed, i.e. classification of the right, and thus an indication to which category of rights (personal, political or social rights) it belongs. At first glance, the question seems

[35] Y. Donders, *op.cit.*, p. 251.

naive and the answer very simple – after all, the right to participate in cultural life together with the other rights referred to in Article 15 of the Covenant create a category of cultural rights – and therefore belongs to social rights.

Social rights are juxtaposed against personal and political rights; this opposition often becomes a central point in the discourse on them, forming the basis for assertions about their different nature and the content of the obligations they give rise to. The definition of social (or social and economic) rights is far from being unambiguous and is defined rather unwillingly. Firstly, social rights may represent positive rights – that is to say, in line with the categorisation by K. Vasak regarding second-generation rights, which require the state to act actively, provide benefits and ensure a certain standard of implementation.[36] However, this meaning is somewhat mitigated under the Covenant by the progressive nature of State's commitments, i.e. the failure to set a rigid standard for their implementation and the absence of an individual protection measure (individual complaint). In another context, social rights (economic, social and financial) denote the rights to benefits or protection in certain spheres of life – that is to say, the material status and level of existence – for this reason, in many constitutions property rights may fall into the category of economic rights, for instance, although this is clearly a first generation right, a classical negative law, defined as freedom from interference rather than the right to any benefit related to it. Cultural rights under Article 15 of the Covenant, including the right to participate in cultural life, are automatically recognised as social rights in both of the above meanings. Therefore, they are supposed to be positive rights, i.e. giving rise to certain obligations on the part of the state to ensure the level of their implementation; secondly, they are intended to denote the right to benefits (protection) in the sphere of cultural needs, and thus the sphere of human life connected with satisfying higher needs, i.e. determining a certain level of state benefits related to these needs.

It turns out, however, that in both of the above meanings such a classification of the right to participate in culture is somewhat misleading. The dogma of the state's active role in assuring and protecting

[36] K. Vasak, *op.cit.*, pp. 29–30.

the human rights is becoming equally pertinent with regard to political and personal rights as well as social rights – there are no rights or freedoms that do not require an active role of the state in their protection, such as protection against third party infringements. The division into "cheap" negative laws and "expensive" positive (social) laws is inadequate and outdated.[37] Moreover, it is becoming less and less relevant to analyse rights on the basis of their uniformity. Both in the process of interpretation and application, it is not uncommon – or indeed usual – that rights and freedoms are made up of many different components of diverse character, which together form the proper content of the guaranteed law at international or constitutional level. These constituent entitlements are often of a contrasting nature, often requiring the State to take on positive responsibilities, but also those related to the sphere of negative rights. Furthermore, the exercise of rights and the analysis of their content show that they remain very closely related to other rights and cannot be exercised separately. These rights may be of a different nature; there are sometimes close functional links between personal and social rights – so, for example, the right to healthcare, seen as a purely social right, is closely linked to the protection against unauthorised medical experiments and the prohibition of cruel or degrading treatment, which in turn is a negative right and are personal rights.

The above observations also concern the right to participate in culture, which is closely related to the rest of the cultural rights provided for in the Covenant, i.e. the right to benefit from scientific progress and its applications, and above all to the rights of creators to benefit from their creation (Article 15.1. c). Creators' rights are in turn strongly linked to copyright, to intellectual property rights, categorised in case law as enjoying the protection of property rights. Above all, however, it is impossible to imagine taking part in cultural life without guaranteed freedom of expression and creation, which are among the most classical personal freedoms. Ensuring free and full participation in cultural life also requires precise definition of the limits

[37] C.R. Sunstein, *Social and Economic Rights? Lessons from South Africa, John M. Olin Program in Law and Economics*, Working Paper no. 124, 2001, http://nrs.harvard.edu/urn-3:HUL.InstRepos:12785996 [accessed: 17.08.2017].

of protection of other rights, including, i.a., the freedom of religious beliefs, the right to the protection of honour and privacy – these rights and values can restrict the exercise of the freedom of artistic creation. Participation in cultural life is also determined by the limits of copyright protection, and the intersection of these two orders is becoming more and more crucial due to the universality and generality of access to cultural assets.

The right to participate in cultural life does not, therefore, necessarily mean exclusively the right to satisfy certain claims to access cultural life or the State's obligations in this respect, since it is closely linked to the sphere of other freedoms and rights, which delineate borders and sometimes also determine the content of the right to participate in cultural life. This makes it difficult to clearly attribute the character of social law to the right in question.

It should also be noted that the General Commentary of the Committee states that the right to participate in cultural life can be characterised as freedom (section 6).[38] The Committee stressed that the provision of such freedom requires States to refrain from interference in the performance of cultural practices and access to cultural goods, and to take active efforts to ensure the conditions for cultural participation, access and protection of cultural goods. Calling the right to participate in cultural life a freedom can be explained by the fact that the Committee strongly emphasises in its comments the right to maintain cultural distinctiveness – section 7 of the Commentary states that the decision to choose the culture one wishes to cultivate must be made freely and respected by the authorities, taking into account the principle of equality and non-discrimination, with regard to indigenous peoples in particular. The Committee therefore draws attention to the freedom of 'cultural affiliation' and the development of the means of expression[39] – both individually and in relation to the group.

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[38] "The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods)."

[39] Y. Donders, *op.cit.*, p. 256.

The right to participate in cultural life is therefore non-homogeneous as a result of its complex structure. As Y. Donders points out, this right is of transversal nature,[40] and thus consists of elements of many other spheres of entitlements. The thesis about the indivisibility of the system of human rights and the difficulties in categorising, or even more so the hierarchy of the importance of individual rights within this order, is particularly justified in this context.

These considerations are largely confirmed by the observation of constitutional guarantees of cultural rights in European countries. At the level of European regulations, the right to participate in cultural life appears in many constitutions, although it is difficult to find a pattern in the way cultural rights are approached, particularly the right to participate in cultural life.

The first approach treats the guarantee of participation in cultural life as a constitutional category corresponding to the commitments of states formulated as a programme or priorities of public authorities. For example, the right to participate in cultural life is recognised as a State task by the Belgian Constitution[41] of 1831 (as amended in 1994), which states in Article 23:

> Everyone has the right to live a life that meets human dignity requirements. To this end, the act, decree or rule referred to in Article 134 guarantees, with due observance of the relevant obligations, economic, social and cultural rights, and lays down the conditions for their use. These rights include in particular: (...) the right to cultural and social development.

Also the Swedish Constitution,[42] more precisely Section 2 of the 1974 Instrument of Government, in the consolidated version of 26th November 1998, declares that personal, economic and cultural well-being should be the primary objective of public activity. The Swiss Constitution also treats access to culture as a state action – Article 41 in the chapter entitled "Social objectives" states: 1) The Federation and cantons, in addition to personal responsibility and individual initiative, are committed to: (...) provide groups of children and young

[40] *Ibidem,* p. 233.

[41] La Constitution Belge (Constitution of Belgium), 1831.

[42] Lag om Andring i Regeringsformen (The Instrument of Government), 1974.

people with support in their development towards independent and socially responsible people and with support in their social, cultural and political integration. This Article also stipulates that no direct claims for benefits from the State can be derived from the regulation of social objectives (Article 41 (4)).

In contrast, the constitutions of many other countries emphasise the right to cultural distinctiveness and to cultivate one's own culture. Whereas the Finnish Constitution of 1999[43] in § 17, while guaranteeing by law the right of everyone to use their own language, Finnish or Swedish, provides that the State shall satisfy the cultural and social needs of Finnish and Swedish citizens on equal footing, the Sami, being indigenous people, as well as the Roma and other ethnic groups, shall have the right to preserve and develop their mother tongue and culture, which means not only guaranteeing equal access to certain goods between the national and ethnic groups listed here, but also a positive obligation for the state to ensure access to these goods. The Norwegian Constitution applies in a similar way to nationals of Laplandan descent; according to § 110a (1), state authorities are obliged to create the conditions enabling the Lapland national group to preserve and develop their language, culture and lifestyle (content under the Constitutional amendment of 27th May 1988). The Turkish constitution also declares the guarantee of human rights in this area as a general principle. The Austrian Constitution[44] in Article 8 states that the Republic of Austria (federation, lands and municipalities) recognises its linguistic and cultural diversity, which is reflected in the existence of indigenous national groups. The language, culture, existence and continuance of these groups must be respected, preserved and supported.

Another solution applied in the European constitutions is to place the sphere of cultural life solely within the sphere of freedom of creation or artistic expression. Many constitutions, therefore, provide only for the freedom of art or artistic creation, as is the case, for example, in the Basic Law for the Federal Republic of Germany

[43] Suomen perustuslaki (Constitution of Finland), 2000.

[44] Österreichische Bundesverfassung (the Austrian Federal Constitution), 1920.

of 1949,[45] guaranteeing only freedom of art as one of the fundamental rights (Article 5 of the Basic Law, which explicitly refers to the origins of freedom of art and science as derived from freedom of expression, since these freedoms are treated by the legislator together in a single editorial unit). By contrast, the Italian Constitution treats these freedoms completely separately,[46] placing their guarantees in the chapter on "moral-social relations" and stating in Article 33 "Art and science are free and teaching them is also free."

Much more space is devoted to these freedoms in the constitutions created in the last thirty years of the 20th century – for example Greek constitution[47] in Article 16, which guarantees freedom of art, science, research and teaching, as well as the right to education and compulsory education. The constitution of Estonia[48] also guarantees (Articles 38 and 39) the freedom of science and art and the author's right to his work. The freedom of establishing cultural institutions by national minorities for the benefit of their own national culture is also separately guaranteed (Article 50). Similarly, the Lithuanian Constitution[49] guarantees the freedom of science, culture, research and teaching (Article 42), and states that "the State shall support culture and science, protect Lithuanian historical monuments, protect works of art and cultural monuments" (Article 42, sentence 2). Artistic creation is placed among freedoms also in the Latvian Constitution (Article 113), at the same time guaranteeing the right of persons belonging to national minorities to preserve and develop their language, ethnic and cultural identity (Article 114).

Finally, the third solution is to establish rights in the category of social rights (and similarly classified cultural rights) as an explicit obligation for the legislative bodies and thus to establish the right to participate in cultural life at constitutional level. This group

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45 Grundgesetz für die Bundesrepublik Deutschland (the Basic Law for the Federal Republic of Germany), 1949.

46 Costituzione della Repubblica Italiana (the Constitution of the Italian Republic), 1947.

47 Σύνταγμα της Ελλάδας / Syntagma (the Constitution of Greece), 1975.

48 Eesti Vabariigi pohideadus (the Constitution of the Republic of Estonia), 1992.

49 Lietuvos Respublikos Konstitucija (the Constitution of the Republic of Lithuania), 1992.

of regulations includes the regulation of the French Fifth Republic's Constitution,[50] and in particular the preamble to the 1946 constitution in which the following passus is found: "The nation guarantees children and adults equal access to education, vocational training and culture." A lot of attention is devoted to the issue of access to culture and artistic creation in the Constitution of Portugal.[51] In Article 42, freedom of artistic creation is guaranteed as freedom of a personal nature (this provision reads: "Intellectual, artistic and scientific creation is free. This freedom includes the right to create, produce and distribute scientific, literary and artistic works and to protect copyright law"). However, in a separate chapter of the Constitution, which deals with cultural rights and obligations and education, there is Article 73 guaranteeing the right of access to culture, paragraph 1 of which reads:

> The State shall take action to democratise culture and shall encourage and ensure access for all citizens to cultural assets and the possibility of cultural creation, in cooperation with the media, associations and foundations with cultural objectives, cultural and entertainment institutions and associations for the defence of cultural heritage, citizens' organisations and other cultural institutions,

and subsequently Article 78, which states:

> 1. Everyone shall have the right to benefit from cultural assets and cultural creation and shall be obliged to preserve, protect and enhance the value of national heritage. It is the responsibility of the State, in cooperation with all cultural institutions, to encourage and ensure access to the means and instruments of cultural activities to all citizens and to reduce the inequalities existing in this field in the country, (b) supporting initiatives that stimulate individual and collective creativity in its various forms and expressions, and stimulate greater dissemination of high-quality cultural works and goods, (c) promoting the preservation and enhancement of cultural heritage and turning it into a revitalising element of a common cultural identity (...).

[50] La Constitution du 4 octobre 1958 (the Constitution of 4 October 1958 of the French Republic).

[51] Constituição da República Portuguesa (the Constitution of the Portugese Republic), 1976.

The Spanish Constitution[52] also places this sphere of activity and individual rights as a right, stating in Article 44 that "the public authorities shall promote and care for access to culture to which everyone is entitled." Moreover, Article 46 imposes an obligation on the public authorities to preserve and promote the enrichment of the historical, cultural and artistic heritage of the Spanish peoples and the goods which they are made up of.

The right to participate in cultural life has gained a relatively high but non-uniform rank in many post-communist constitutions, which were created in the 1990s. A good example here is a regulation of the Polish constitution, which devotes a lot of attention to cultural heritage and its role in the life of the community, nation and state. Already in the preamble there is a reference to the role of culture and heritage in shaping Polish statehood and national identity.[53] In the chapter entitled "The Republic", containing a catalogue of political principles and indicating the objectives and tasks of the state regarding the right of access to culture, there is Article 6, according to which "The Republic of Poland shall provide conditions for the people's equal access to the products of culture which are the source of the Nation's identity, continuity and development." Moreover, the Republic of Poland is to provide assistance to Poles living abroad in preserving their ties to the national cultural heritage. This principle has been included in the literature among the so-called program norms, i.e. the norm which determines a specific direction of the state's actions and the goal which the country should pursue.[54] This regulation constitutes a definition of the tasks of the state in terms of ensuring access to culture, indicating the principle of state policy, however, it was to be made more specific by Article 73 of the Constitution,

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[52] Constitución Española (the Constitution of Spain), 1978.

[53] Preamble consists such words: "(...) We, the Polish Nation – all citizens of the Republic, (...) beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values, recalling the best traditions of the First and the Second Republic (...)."

[54] M. Zieliński, *Zasady i wartości konstytucyjne,* in: A. Bałaban, P. Mijal (eds.), *Zasady naczelne Konstytucji RP z 2 kwietnia 1997 roku*, Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, Szczecin: 2011, p. 40.

according to which "The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone." The relationship between the constitutional principle of Article 6 of the Constitution and the freedoms set out in Article 73 of the Constitution must be examined in more detail. In literature, this relation is understood as the relation between "one of the more detailed principles of state policy" and Article 73 "concretising it."[55] Leszek Garlicki, on the other hand, treats Article 6 as a "binding course of action with regard to the freedom of artistic creation and freedom of access to cultural assets."[56] In order to explain the legal function of such a principle it is worth referring to the statement made by the Constitutional Tribunal, according to which the normative content of the political principles expressed in the first chapter is usually focused and detailed, at least to a certain extent, in subsequent provisions of the Constitution.[57] In this sense, the norm contained in Article 6 may become an "operational directive", the foundation for determining other provisions of the Constitution and laws by the bodies applying the law and the Court.[58] As P. Tuleja claims:

> understanding the principles as optimisation orders, determining their clear content by settling conflicts based on the principle of proportionality is now a canon of constitutional reasoning. Today, it is difficult to imagine interpreting the constitution without referring to optimization orders and prohibitions. It is not a matter of considering the principles as optimization orders and prohibitions, but rather a proposed way of determining their normative content [...].[59]

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55 P. Sarnecki, note 2 to the art. 6, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. V, Wydawnictwo Sejmowe, Warsaw: 2007.

56 L. Garlicki, note 9 to the art. 72, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. III, Wydawnictwo Sejmowe, Warsaw: 2003.

57 Judgment of the Constitutional Tribunal of 29th April 2003, SK 24/02.

58 Judgment of the Constitutional Tribunal of 25th February 1997, K 21/95, judgment of 23rd November 1998, SK 7/98. See also: M. Granat, *Pojmowanie konstytucyjnych zasad prawa w orzecznictwie Trybunału Konstytucyjnego*, in: *Zasady naczelne...*, p. 145.

59 P. Tuleja, *Zasady prawa a zasady konstytucyjne*, in: *Zasady naczelne...*, p. 333.

Such treatment of principles, including the norm – principle derived from Article 6 of the Polish Constitution, ordering the state to create conditions for dissemination and equal access to cultural assets as a source of identity of the Polish nation, its duration and development, cannot be in place without affecting the interpretation of Article 73 of the Constitution, which in turn should result in the emergence in practice of the concept of the "right to access to cultural life" in a dimension broader than hitherto.

Freedom of artistic creation means liberty to perform any artistic activity, also in terms of its form and method of performance, as well as the freedom to disseminate its outcome. The possibility to freely publicise the results of artistic activity is an indispensable prerequisite for its performance, since art is a kind of human activity whose characteristics take on the final shape only in the contact between a work and its recipient. In this sense, contact with the recipient of a work of art is an essential final element of the creative process and the freedom of artistic activity. The notion of artistic activity (or art, which is a similar concept) is not defined by the constitution, nor are the acts of statutory rank due to their very nature, as they belong to the so-called open-ended concepts, which means that it is possible to define the designations of these notions only through their generic resemblance, similar characteristics, without seeking the necessary common features. By presenting aesthetics as a separate field of philosophy, dealing, among other things, with the search for an answer to the question about the meaning, the essence of art and the value of the effects of creative activities as useful for evaluation in legal practice, one can quote an alternative definition of the art by W. Tatarkiewicz: "Art is the reconstruction of things or the construction of forms, or the expression of experiences – if the production of such reproduction, construction, expression is capable of admiration, astonishment or being moved."[60] The Polish Constitution employs the category of "cultural goods", however, this concept is not defined by the Legislator, who treats it as concepts of the already existing meaning, in order not to confine the meaning of this term into an arbitrary framework, especially at the level of normative acts. Leaving the creation

[60] W. Tatarkiewicz, *Dzieje sześciu pojęć*, PWN, Warsaw: 1988, p. 52.

and classification of cultural phenomena and cultural functions to the representatives of other social sciences, it is worth pointing out that human activities understood as cultural in this sense must therefore satisfy three qualities: they require creativity, they are aimed at generating and conveying symbolic message, and they potentially produce an outcome which is subject to intellectual property.[61] Cultural assets will therefore be the products of human activities that combine these three features, and will also provide a source of interaction between the creator and the audience, relations concerning meanings, symbols and content brought about by this outcome. Consequently, such goods have a value other than functional or marketable value, which can be described as a cultural value. It is composed of: aesthetic, spiritual, social, historical, symbolic and authentic value.[62] Cultural goods understood in this way constitute the tangible and spiritual achievements of the Polish nation[63] and provide the source for a system of meanings, references and values that form a community with its own culture.

The scope of freedom guaranteed by Article 73 of the Constitution in fine includes the possibility to familiarise oneself with an asset deemed a cultural good,[64] however, there is no clear understanding of the scope of the State's obligation to guarantee the realization of a freedom specified in this way. In L. Garlicki's view, the rights described in Article 73 as freedoms give rise to subjective rights,[65] which means in particular that the public authorities are prohibited from creating restrictions regarding access to existing cultural objects, and that access restrictions must satisfy the conditions of proportionality set out in Article 31 (3) of the Constitution.

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61 D. Throsby, *Ekonomia i kultura*, transl. O. Siara, Narodowe Centrum Kultury, Warsaw: 2010, p. 20.

62 D. Throsby, *op.cit.*, p. 39.

63 B. Banaszak, *op.cit.*, p. 55.

64 M. Jabłoński, *Wolności z artykułu 73 Konstytucji RP*, in: A. Preisner, B. Banaszak (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, C.H. Beck, Warsaw: 2002, p. 563.

65 L. Garlicki, note 3 to the art. 73, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. III, Wydawnictwo Sejmowe, Warsaw: 2003.

The Polish Constitution, on the other hand, provides Polish citizens belonging to national and ethnic minorities with the freedom to maintain and develop their own language, to maintain customs and traditions and to develop their own culture, as well as with the right to establish their own educational, cultural and institutional institutions for the protection of religious identity and to participate in the resolution of matters concerning their cultural identity using separate provisions. The Polish Constitution adopts a complex regulation – in paragraph 1 of Article 35 it guarantees the rights of persons belonging to national and ethnic minorities, therefore it is rooted in the concept of the individual character of those rights whose subject is a person who declares a bond with a community defined as a minority, but at the same time in paragraph 2 of this article we see the right of those communities to establish their own institutions for the protection of their identity.

However, controversies over the catalogue of social and economic rights included in the constitutions of these countries related to the fear of excessive burden upon the state and the return of real socialism caused that the discussion on the constitutionalisation of cultural rights was completely marginalised by the discourse on the right to work, social security and of cultural rights – only the right to education.

Nevertheless, we see a tendency, particularly visible in the constitutions of the last thirty years (the constitutions of Spain, Portugal and most post-communist countries), that the freedom of artistic creation and the right to participate in cultural life should be constitutionally based. The community aspect of cultural life is also strongly emphasised, building a true and lasting identity of the society. Therefore, many constitutions also guarantee the right of minorities to preserve their own culture, perceived as a collective right,[66] although there is also a clear distinction between the right to artistic culture/high culture and the right of communities to preserve their own culture.

The sphere of rights and freedoms associated with participation in cultural life guaranteed by the Covenant therefore finds its

[66] K. Ziegler, *Cultural Heritage and Human Rights*, University of Oxford, Faculty of Law, Legal Studies Research Paper Series, Working Paper no. 26/2007. Available at SSRN: https://ssrn.com/abstract=1002620, p. 1.

place in most of Europe's constitutional regulations, although the way in which it is presented varies considerably. The constitutional regulation of the right of access to or participation in cultural life is based on the premise that access to participation in cultural life is an important and necessary element of developing human identity and is essential for the protection of human dignity, the right to individual development and self-determination. On the other hand, the cultural factor in community life is strongly emphasised. Cultural identity is undoubtedly the key factor for building a community, it is even called the "soul of a democratic community", it contributes to a true, lasting identity of the community. Thus, many constitutions also guarantee the minorities' right to preserve their own culture, perceived as the community right.[67]

At the same time, it is justified to distinguish a category of the right to culture within the meaning of the individual right to participate in artistic culture. In this sense, the right consists of several elements. First of all, therefore, it is made up of a collection of rights and freedoms closely related to the freedom of artistic expression. Hence, it is the freedom to create, make available and distribute their works. This freedom is closely linked to freedom of access to other works and participation in cultural life. In this respect, it is particularly important to draw a line between the sphere of copyright protection and the freedom of access to cultural assets, i.e. to draw a line in the horizontal sphere. The egalitarian nature of the cultural life that is currently underway, connected mainly with a radical change in accessibility caused by, among others, the factors such as Internet communication and digitalization, changes the existing model of access to cultural assets from the relation between passive viewer – creator to the model of participation, i.e. a more active participation of the recipient, who often becomes a creator himself or a reproducer of the work. The right to culture in this sense involves guaranteeing the rights of authors, which are usually associated with copyright regulations. They cannot be considered to be identical, nor can they be deemed to have exhausted the exercise of these rights under copyright law. On the other hand, the right to culture means the right of access to cultural life and what

[67] *Ibidem.*

we used to call cultural heritage, i.e. the tradition-based transfer of cultural content considered valuable and constitutive for our consciousness and civilisation. Another element of the right to culture in contemporary countries, especially in European countries where the culture of state patronage traditionally dominates, is fair access to subsidies for cultural creation. This requires not only a guarantee from public authorities that they will refrain from interference in the sphere of artistic expression and access to artistic culture, but also the fulfilment of a number of positive obligations, in particular those related to universal and transparent access to financing of artistic life. In this regard, the right to culture remains a social right whose implementation requires not only judicial protection but also the design and implementation of state activities in order to implement them, i.e. legislation and cultural policy, in order to ensure access to artistic culture to the broadest possible audience. It also requires that people from disadvantaged groups – including people with disabilities, elderly people, as well as people living in remote and small towns away from cultural centres – be given the opportunity to participate in artistic culture.[68] One of the State's responsibilities in the sphere of ensuring access to culture is also the protection of cultural heritage.

The above list of the key elements of the right to participate in cultural life shows that this right is clearly of a non-uniform nature, consisting not only of elements which can be classified as negative rights, remaining in close relation with freedom of expression (Article 10 of the Convention, Article 19 of the Covenant on Civil and Political Rights), but also of many components which must be classified as rights requiring the public authorities to act positively and implement specific social and cultural policies. The degree of protection of the right to culture is therefore not homogeneous, and the responsibilities of the state, as well as other entities in terms of guaranteeing and respecting it, belong to different spheres of action.

[68] R. O'Keefe, *The "right to take part in cultural life" under Article 15 of the ICESCR*, 47(4) The International and Comparative Law Quarterly 904 (1998), pp. 907–908.

2.4. State's duties within the right to culture

In a broader context reconstructing the entitlements constituting the right to culture can help to establish a system of rights based on the corresponding obligations of States to ensure the exercise of social rights, including the right to culture. Commitments in this respect are included in many acts of international law, most frequently formulated in the sphere of the tasks of States Parties – this is how it is done in The 1954 European Cultural Convention, among others, in which states parties are tasked with protecting the common cultural heritage and stimulating cultural development in the Member States. Similar obligations are laid down in the other Conventions: the Convention for the Protection of the Architectural Heritage signed in Granada in 1984, and the Convention for the Protection of Audiovisual Heritage adopted in Strasbourg in 2001.[69]

These obligations are set out at international level in General Commentary no. 3[70] and, with regard to the rights in Article 15 of the Covenant, in General Commentary no. 21. In line with the Committee's recent position, States are to take not only legal but also administrative, financial, educational, social and judicial measures to ensure that the right to culture is exercised and to ensure at least a minimum level of implementation (sections 10 to 11).

General Comment no. 21 does not explicitly mention elements of the right to participate in culture, but instead defines five conditions for the implementation of this right, namely "Five A's" (Availability, Accessibility, Acceptability, Adaptability, Appropriateness) – section 16). Under these conditions, cultural assets and services are to be accessible (open) to all, including libraries, museums, theatres, cinemas and sports stadiums, as well as literature, folklore and art in all its forms. All intangible cultural assets, such as language, customs,

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[69] Z. Mikołajek, *Wpływ kultury na rozwój demokracji i na demokratyczne przemiany w Europie od czasu powstania Rady Europy*, in: J. Jaskiernia (ed.), *Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989–2009*, Wydawnictwo Adam Marszałek, Toruń: 2010, pp. 691–692.

[70] CESCR General Comment no. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant), Committee on Economic, Social and Cultural Rights, adopted on 14th December 1990 (Document E/1991/23).

traditions, beliefs, knowledge and history, are to be available, as are the values that create identity and serve the cultural diversity of individuals and communities. An important prerequisite for accessibility is also that there are effective and realistic opportunities to enjoy culture without financial or physical constraints. Accessibility also means the right of everyone to seek, receive and share information on all manifestations of cultural life and the access of communities to all means of expression.

In General Commentary no. 21, the obligations of states with regard to the exercise of the right to participate in cultural life are presented in three dimensions, classic for the protection conferred by the Conventions,[71] as obligations of respect, protection and provision (section 48).[72] The obligation of respect requires states to refrain above all from interfering in the exercise of the right to culture – both the rights of individuals and groups (section 49). In fact, the state's responsibilities in this respect are essentially to preserve the sphere of freedom of choice of cultural identity, which means in particular the right of everyone to have access to and participate in the exchange of information and cultural goods and services, as well as the right and freedom of access to cultural and linguistic heritage – their own and that of others (section 49 (d)). It also means securing the freedom to participate in cultural life, as well as free access to cultural heritage. The sphere of freedom guaranteed through the establishment of such obligations is closely linked to the authors' rights under Article 15.1. c of the Covenant. Above all, however, this sphere is closely connected with the scope and content of freedom of expression and artistic creation.

The obligations regarding the protection (section 50) of the right to participate in cultural life require the State to take measures to prevent interference in the exercise of rights by third parties. Therefore, it is not hard to realize that these duties concern the horizontal

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[71] Such meaning can be found, i.a., in: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (1997), para. 6: "Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights (...)."

[72] Compare: Y. Donders, *op.cit.*, pp. 257–259.

sphere of action of the right to culture. Moreover, in accordance with the General Commentary, the countries are under the obligation to actively protect and respect their cultural heritage in all forms, to care, maintain and restore, among others, historical sites, monuments, works of art and literature. This obligation applies to the heritage of all groups and communities as well as indigenous peoples. The protection must therefore concern not only the sphere of individual rights but also the preserved heritage – both in the form of artefacts and intangible heritage.

The State's duty to exercise the right to participate in cultural life is presented in the Commentary in quite a general sense – it consists in taking appropriate legislative, administrative, judicial, budgetary and promotional measures to implement the right (section 48). In this respect, in its commentary the Committee has identified three areas of activity: facilitation, promotion and provision (section 51). The implementation of this right is to be achieved through the adoption of a wide range of cultural policy measures, in particular the establishment and support of public institutions constituting cultural infrastructure in order to ensure the universality and accessibility of cultural goods and services, including activities intended to enable people from different groups to engage in their own creation and access the creation of others. Such activities also include financial assistance and other support for artists and public or private organisations involved in the development of scientific and creative activities. The obligation to implement also means implementing programmes for the protection and restoration of cultural heritage. This includes the obligation to ensure universal, non-discriminatory access for all to places of access to culture, such as museums, libraries, cinemas and theatres, as well as to cultural activities, services and events. Moreover, the state's responsibilities are linked to the requirement to include cultural education at all levels of education. According to the approach expressed in the Commentary, such education is intended to cover history, literature and music of other cultures.

A specific area of obligations regarding the exercise of the right to participate in cultural life is linked to the requirement to guarantee access to culture to minority groups, but also to persons with limited access opportunities, including those living in rural areas, deprived

urban areas, disabled people as well as the poor and the elderly. As the Committee points out, the obligation to comply with this requirement calls on states to introduce enforcement measures where individuals cannot do so (section 54) through the introduction of appropriate legislative measures and effective mechanisms to ensure that individuals or groups can participate in the decision-making process, declare the protection of rights, and to provide adequate compensation in the event of infringement.

These commitments extend also to the prohibition of excessive interference with the sphere of the right. According to the General Commentary, any restrictions placed on the right to participate in cultural life can only be introduced if they have a legitimate purpose and are compatible with the nature of the right and necessary in a democratic society. They must also be proportionate (section 19).

An extensive catalogue of obligations created by the right to participate in cultural life shows that the exercise of the right to participate in cultural life affects numerous spheres of life. The obligations associated with the sphere of respect are above all negative, aiming in particular at protecting the sphere of freedom of artistic creation and free access to cultural assets. The obligations concerning the protection of the right are designed to guarantee this right in the sphere of horizontal relations and to protect cultural heritage assets. Finally, the State's fulfilment of the right to culture is primarily linked to the formation of effective mechanisms for participation in cultural life, including for people with reduced participation opportunities and also creation of a policy for the protection of cultural heritage. This duty also implies a requirement for action to develop cultural needs and competences within the framework of educational programmes and to establish protective mechanisms in the event of a breach or reduction of protection.

The right to participate in culture guaranteed by the Covenant on Economic, Social and Cultural Rights has become an ambiguous concept shared by many spheres protected by several branches of law, in various aspects. It is therefore the right that demands coordinated action to be taken by States at several levels. The first is the legislative sphere. Legislation determines, among other things, which forms the protection of cultural heritage takes, how the boundary between the sphere of freedom of artistic creation and the protection of other values (morality,

privacy, freedom of religion) is determined, how the limits of using the works of someone else's authorship are defined. In terms of social and cultural policy, the state in turn takes actions and makes decisions which determine the form and scope of protection of the social status of creators, implementation of artistic programmes and activities, supporting and financing them, as well as promotion in international relations. In this context, there is also a huge margin of appreciation for the exercise by all those entitled to access cultural goods and services.

Finally, it is in the sphere of administration that individual decisions are made in matters of support for artistic activity, protection of cultural goods – both in the sphere of covering them with state guardianship and financial subsidies for their restoration and maintenance. These activities are associated with significant risks, which have been identified in literature for many years and are connected mainly with paradoxes and conflicts of scope of activities and areas considered to be cultural life, i.e. the object of protection, as mentioned in the first chapter.

Among the most significant things we should mention the dependence of the scope of cultural life on the political will or bureaucratic preferences of the state authorities, which the granting of funding depends on.[73] This hazard also entails the risk stemming from the inevitability of aesthetic judgment concerning works and activities intended to be supported and financed by state agencies and bodies. Addressing these dilemmas requires the State to create an appropriate structure and procedures for supporting artistic activity and mechanisms facilitating access to cultural goods in order to ensure an adequate level of realisation and to make access to cultural life a reality.[74] The duties connected with it, especially the positive obligations in terms of guaranteeing access to cultural life, determine not so much the content, but the direction and form of actions in the cultural policy pursued, just as social rights determine the social policy in place.[75]

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[73] R. O'Keefe, *op.cit.*, p. 916.

[74] Y. Donders, *op.cit.*, p. 237.

[75] K. Rittich, *Social rights and social policy: transformations on the international landscape*, in: D. Barak-Erez, A.M. Gross (eds.), *Exploring Social Rights. Between Theory and Practice*, Hart Publishing, Oxford: 2007, p. 116.

The scope of rights and obligations regarding the right to participate in cultural life can be shaped in this respect by means of two principles of protection of the rights covered by the ICESCR, namely a prohibition of regression, resulting from mandatory requirement to act progressively to ensure that the rights are exercised, and the obligation to ensure the minimum core content of each right. The prohibition of regression and this core of the right must be considered in relation to the status quo – and it, regardless of the country, is always based on the cultural policy already pursued and the activities in the sphere of artistic culture carried out by the state and other public bodies. In European culture, states adopt a public patronage strategy,[76] which is implicitly based on three assumptions: 1) cultural life requires financial support, 2) there is a fundamental difference between the sphere of high culture and entertainment, which does not require such support, 3) public authorities are to ensure not only accessibility but also adequate quality of cultural goods that are being protected. This means that cultural policy must be pursued by providing financial support for artistic creation and with the requirement for aesthetic judgements. Judgments on art must be legitimized,[77] and therefore carried out by appropriate bodies. In this context, the principle of arm's length principle has been worked out, i.e. the principle of dividing and allocating funds for artistic activity by expert bodies appointed for this very purpose, independent from political power and endowed with authority in the communities of artists. The allocation of financial resources for artistic activities, but also for other purposes relating to the protection of cultural life such as protection of cultural heritage, must be subject to certain procedures – including a right of appeal before courts, as any assistance awarded from public funds.

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[76] About models of the states' roles in this scope: H.H. Chartrand, C. McCaughey, *The arm's length principle and the arts: an international perspective – past, present and future*, in: M.C. Cummings, Jr., J.M. Davidson Schuster (eds.), *Who's to Pay for the Arts: The International Search for Models of Support*, American Council for the Arts, New York: 1989.

[77] C.R. Sunstein, *"It's the government money": funding speech, education, and reproduction*, in: C.R. Sunstein, *The Partial Constitution*, Harvard University Press, Cambridge: 1998, p. 309.

The principle of transparency and equal treatment has to be respected in relation to all other mechanisms of supporting the cultural sphere addressed directly to creators, e.g. in the area of social security, health insurance and fiscal mechanisms.

Obviously, the powers that fall within the scope of this right to participate in cultural life are exercised to varying extent, which depends primarily on the policy pursued by the state in this regard and the status quo in which cultural life is protected and provided at state level. To varying degree, these powers can be exercised under judicial protection. The search for traces of judicial protection of the right to culture must take into account this complex nature of the right and should not avoid all the difficulties involved in attributing the nature of a law that may give rise to claims to social right (2nd generation). International regulations and declarations concerning cultural rights do not make cultural rights a subject of judicial protection, including a predefined right to participate in cultural life. The progressive nature of this right stems from the formulation of Article 2 of the Covenant, which requires States Parties to

> take appropriate steps individually and within the framework of international assistance and cooperation, in particular in the economic and technical sectors, with the maximum use of measures at their disposal, to progressively achieve the full realisation of the rights recognised in this Covenant by all appropriate means, including, in particular, legislative steps

and to implement them without discrimination. There is no universal protection of human rights in order to protect individual cultural rights – the Optional Protocol adopted by the General Assembly of the United Nations in 2008 provides for the right to lodge international (Article 10) and individual complaints (Article 1)[78] before the Committee on Economic, Social and Cultural Rights, although this is not a judicial body and it has been ratified only by 21 countries and only 13 complaints have been lodged so far (two of which have been recognised).[79] In turn, the European Convention does not

[78] It has entered into force on 5th May 2013, after tenth ratification.

[79] http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx [accessed: 11.07.2017].

guarantee social rights at all, and the instruments of protection of these rights provided for in other international agreements are not usually accompanied by judicial protection in the form of individual complaint. The constitutional formulas also treat the programme norms as tasks of the state, intended for gradual implementation, and their proper scope is defined by the statutory order, i.e. state policy.

It is not only the lack of adequate formulas which guarantee these rights that makes it difficult to accept the thesis about their judicial application. Their progressive nature, programme oriented character and the vagueness of the scope of these rights also determine the difficulties in building potential claims on their basis. This is partly because countries do not want to take on rigid commitments, fearing the costs and burdens associated with them. However, thinking about social rights as 'expensive' and about personal and political rights as 'cheap', negative, requiring the state to refrain from interference is a harmful stereotype. It has been well known for a long time that the first generation rights, too, require considerable investment and the creation of an adequate network of guarantees, instruments and resources by the State.[80] The problem with their application and judicial protection also lies in the fact that the right to culture is complex, and there are also relations between them which add meaning and form, content and guarantee protection. None of the social and cultural rights, including the discussed right to culture on an individual basis, creates a single, simple model of the relationship between right and obligation. These rights are rather a conglomerate of powers and freedoms and the associated burdens, both for the authorities and other entities.

There is yet another problem related to the judicial protection of social rights – and this reason is most interesting from the point of view of the analysis of the right to culture – namely that the judicial application of such laws may mean the jurisprudence entering the sphere of state policy, and thus raises a question about the real sense of the division of power in such a situation.[81] If a court derives specific duties of public

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[80] *Ibidem*, pp. 11, 83.

[81] C. Curtis et al. (eds.), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative experiences of justiciability*, International Commission of Jurists, Geneva: 2008, p. 73.

authorities from social rights, it means that the courts can derive specific obligations of the state and an order to conduct certain policy – legislative actions and proper conditions for the exercise of the rights and benefits granted – and thus they enter the sphere reserved in the classical division of power for executive and legislature. These reservations concerning the judicial protection of social rights, however, do not apply only to social rights; the unspecified wording of human rights applies equally to individual and political rights, whose standards are also developed in case law. This does not mean, however, that they are impossible to apply – their content is created in a correlation between the actions of the legislative, executive and judicial authorities – law, political actions, jurisprudence and decisions issued in individual cases.[82] With regard to cultural rights, the claim of interference by the judiciary with state policy is intriguing in that it concerns not only the relationship between the judiciary and the legislature and the executive, but also the sensitive sphere of political power's influence on artistic culture. The right to culture in practical and judicial context will often boil down to whether specific creative activities – or the protection of certain cultural assets require financial support from the state. Such a decision will always cast a political shadow and, at the same time, must be based – even indirectly, on an aesthetic judgement – while these two judgements clearly go beyond the powers and capabilities of the judiciary. On the other hand, the lack of judicial control over the performance of such tasks condemns the right to culture to arbitrariness of decisions of other authorities.

2.5. Judicial protection of the cultural rights

However, it has been clear for quite a long time now that the content of social rights can be subject to judicial protection, i.e. they can give rise to claims brought before courts in certain areas. The paths of judicial protection of social rights have been largely examined and classified.[83] First of all, one should mention those most frequently

[82] *Ibidem*, p. 15.

[83] E. Brems, *Indirect protection of social rights by the European Court of Human Rights*, in: D. Barak-Erez, A.M. Gross (eds.), *Exploring Social Rights. Between Theory and Practice*, Hart Publishing, Oxford: 2007, pp.139–160.

applied by the courts, i.e. those based on the interpretation of personal and political rights and freedoms and on finding positive obligations in the rights recognised until recently as so-called negative rights, i.e. those which only give rise to the State's obligation to refrain from interference, defined as the "redistributive implications of first generation rights."[84] Such search methods are applied in particular by the Strasbourg Court, and their motto may be one of the terms used in the 1979 *Airey vs. Ireland* ruling[85] on "no watertight division separating the sphere from the field covered by the Convention."[86]

The European Court of Human Rights also underpins the protection of elements of social rights in the protection provided for in Article 6 of the ECHR, namely through the right to a court and more generally, procedural protection[87] and the prohibition of discrimination.[88] The method of seeking protection within the content of procedural guarantees is also referred to by courts which review constitutionality, often also referring to the prohibition of arbitrariness

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84 Y. Shany, *Stuck in a moment in time*, in: *Exploring Social Rights*..., p. 77.

85 ECHR judgment of 9th October 1979, no. 6289/73.

86 I.a.: *Roche vs. UK* (app. no. 32555/96), judgment of 27th October 2005 (2005), 42 EHRR 30, *Keenan vs. UK* (app. no. 27229/95), judgment of 4th March 2001, 33 EHRR 38, *McGlinchey and Others vs. UK* (app. no. 50390/99), judgment of 28th May 2000 (2000), 37 EHRR 41, *Pentiacova & Others vs. Moldova* (app. no. 14462/03) judgment of 4th January 2005 (2005), 40 EHRR SE23, *Zawadka vs. Poland* (app. no. 48542/99), judgment of 6th November 2003 (2003), *Marzari vs. Italy* (app. no. 36448/97), judgment of 4th May 1999 (1999), 28 EHRR CD175. See also: I.E. Koch, *Human Rights as Indivisible Rights. The Protection of Socio-economic Demands under the European Convention on Human Rights*, Martinus Nijhoff Publishers, Leiden: 2009, pp. 29–38.

87 Especially cases regarding labour rights: *Vocaturo vs. Italy* (app. no. 11891/85), judgment of 24th May 1991, *Lestini vs. Italy* (app. no. 12859/87), judgment of 26th February 1992 (1992), *Delgado vs. France* (app. no. 38437/97), judgment of 14th November 2000 (2000), *Pramov vs. Bulgaria* (app. no. 42986/98), judgment of 30th September 2004 (2004). On access to court in social security cases, see *Burdov vs. Russia* (app. no. 33509/04), judgment of 15th January 2009 (2009), *Makarova and Others vs. Russia* (app. no. 7023/03), judgment of 24th February 2005 (2005).

88 *Gaygusuz vs. Austria* (app. no. 17371/90), judgment of 31st August 1996 (1996), 23 EHRR 365, *Sidabras and Dziautas vs. Lithuania* (app. nos. 59330/00, 55480/00), judgment of 27th July 2004, 42 EHRR 104.

in granting or receiving specific benefits. In national courts, this means that even the lack of a standard of social law at constitutional level allows for this type of control, based solely on the procedural standard. The standard of prohibition of arbitrariness means examining the margin of discretion of the legislator, which by its very nature takes place mainly in the process of verifying the constitutionality of solutions.

The second group of methods of judicial protection is in use where there is a model of social law protection – although it is usually formulated in a way that requires progressive application. It consists in the use of traditional instruments for the rights classified as social rights, i.e. searching for the substance (core content) of a given right or for a standard of rationality, adequacy and proportionality of the applied measures in the case law.[89] The application of such a method is carried out within the framework of constitutional review of statutory solutions and is possible where there is an appropriate constitutional standard (e.g. appropriate maintenance, adequate protection, education, etc.). Although the legislative margin of discretion is considerable, this type of control examines the rationality of legislative measures and the conduct of policy from the point of view of the standard of law, including ensuring a minimum level of their implementation – i.e. defining the core content, the essence of a right that is not subject to restrictions.[90] A particular case of such a method is the determination of State omissions, i.e. failure to regulate a certain issue that is important from the standpoint of constitutional guarantees.[91]

A different type of judicial instrument for the protection of the content of social rights results from the development of a standard

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[89] *Courts and the Legal Enforcement...*, p. 34.

[90] *Courts and the Legal Enforcement...*, p. 22. On existence minimum, see: German Federal Constitutional Court, BVerfGE 82, 60(85), BVerfGE 87, 153(169). The Polish Constitutional Tribunal judgment on the content of right to healthcare and duties of public authorities to ensure equal access to public funded healthcare see: Polish CT judgment of 7th January 2004, K 14/03.

[91] Probably the best known example is the judgment of South African Constitutional Court of 11th May 2000 on unconstitutionality of neglecting of taking reasonable legal and other measures to ensure rudimentary shelters for children and others in the need. Other examples – see: *Courts and the Legal Enforcement...*, p. 41.

of prohibition of regression, i.e. reduction of the scope and unjustified standstill in the implementation of the law. The International Covenant on Economic, Social and Cultural Rights in Article 2 (1) requires States Parties to take steps, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present. This formulae implies direct obligations to take measures to fully enforce the rights.[92] However, while progress itself is a standard not measurable and not subject to judicial review, the prohibition of regression itself, i.e. taking actions limiting the already implemented and guaranteed scope of the right, has been settled by case law – because it is relatively easy to compare the condition of the newly designed regulation and the current status of implementation of the right.[93] The right to culture, i.e. the right to participate in cultural life in many of its aspects, may be – and in practice is – subject to judicial protection, although the entitlements from its scope are not very often given such a name and their origins are not determined in this way by the courts. However, there is a tendency according to which rights related to participation in culture are becoming more and more often granted the status of individually protected rights.

Certainly, the rights associated with participation in cultural life are nowadays moving from the level of declarative international documents to the level of implementation within the framework of national laws and policies. Adding to the activities in the sphere of protection and support of artistic culture the legal-human perspective will make it possible to identify the powers that make up the right to culture as the centre and keystone of cultural policy, the objective of legislative and administrative actions in this sphere. The axis of the right to culture is to guarantee participation in contemporary cultural life, including access to knowledge and experience of the heritage of past eras, as well as respect for the achievements of universal and life

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[92] CESCR General Comment no. 3, *The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, paras. 3, 4, 5 and 7.

[93] *Courts...*, p. 29. Examples of such resolutions: Portuguese Constitutional Tribunal, Decision (*Acórdão*) no. 509/2002, 19th December 2002, Belgian Court of Arbitration (*Cour d´Arbitrage*), case no. 5/2004, 14th January 2004, para. B. 25.3.

relevant significance from the point of view of national and local communities.[94] This right, as a category composed of many competences and corresponding duties on the part of public authorities but also other persons, cannot therefore be perceived only in terms of social law, the progressive implementation of which allows them to be treated as proposals whose execution cannot be verified. The conceptualisation of the content and scope of the right to culture in the proposed approach requires an analysis of the freedoms of participation in and protection of cultural life, as well as the presentation of legislative, political and administrative instruments for access to artistic culture. It is only the synthesis of these elements, made in the context of the principles developed in the doctrine of human rights and declared in international documents (such as the prohibition of regression, preservation of the essence of the rights declared in international instruments) and in the constitutional acquis of contemporary states, such as the right to a fair trial, the transparency of public authorities' actions, makes it possible to conceptualize the right to culture and bring it closer to the understanding of its current content.

[94] "(...) right to culture (...) it is to be understood that every man has the right of access to knowledge, to the arts and literature of all peoples, to take part in scientific advancement and to enjoy its benefits, to make his contribution towards the enrichment of cultural life." B. Boutros-Ghali, *The right to culture and the Universal Declaration of Human Rights*, in: *Cultural Rights as Human Rights. Studies and documents on cultural policies, no. 3*, UNESCO, Paris: 1970, p. 73, http://unesdoc.unesco.org/images/0000/000011/001194eo.pdf [accessed: 04.10.2017].

CHAPTER 3

Freedom of Artistic Creation versus the Right to Culture. Elements of the Right to Culture in the Jurisprudence of the ECHR

The fundamental element of the right to culture is the right to create and share freely artistic output along with guaranteed freedom of access to the resulting cultural content. Freedom of artistic creation and access to cultural assets are regulated by international and national law, primarily in terms of freedom of creation and artistic expression. Both of these concepts mean freedom to perform any artistic activity, including the free choice of form and method(s) of execution, as well as freedom to disseminate its results. Being able to freely publicise the results of artistic activity is an indispensable prerequisite for its performance, since art is a kind of human activity whose characteristics assume their final form only during the contact between the work and the audience. In this respect, personal contact with the recipient of a work of art is an essential final element of the creative process and the freedom of artistic activity. At the same time, however, the approach to treat the freedom of creation in one of two ways – either as an autonomous freedom or as a derivative of freedom of expression – has certain consequences in terms of defining its character, content and potential limitations, as well as its relation with other rights and freedoms. Freedom of artistic creation belongs to the category of freedom of thought, opinion and religious beliefs – these are human attributes that are difficult to curtail, both for practical reasons and, more importantly, for axiological reasons. They are connected very closely with the very essence of being a human as well as human autonomy and dignity, which constitute the cornerstone of the modern universal human rights systems and many national ones. Thus, the first important issue while considering the extent to which freedom of artistic creation is exercised

within the scope of artistic expression will be to examine whether such assimilation of both these values has in practice (primarily the ECHR's jurisprudence) contributed to the development of specific characteristics of freedom of artistic expression that distinguish such a form from other forms of expression. From the point of view of searching for traces of the right to culture, including the freedom of creation and access to its results, it may be very interesting to analyse the scope and delineate the limits of the freedom of artistic expression, in particular with regard to such intangible values as public morality, freedom of religion and establishing a demarcation line between offending someone's religious feelings and the freedom of creation, and also to point out limitations in view of the need to protect state integrity and national identity, i.e. limiting the freedom in the field of artistic life due to fears of incitement to violence or incitement to hatred based on nationality, religion or ethnicity.

The second element deserving particular attention while analysing the freedom of artistic creation is the determination of its scope in the context of horizontal relations. Artistic freedom often provokes, touches upon the areas protected by the rights and freedoms of others, and may also be connected with the use of others' creative work – this sphere is therefore especially controversial and the limits of freedom of creation are determined in this respect in an extremely difficult way, hardly susceptible to generalization, all the more so as in the judgments on this matter it is impossible to avoid ethical and aesthetic evaluations, which by their very nature are difficult to be classified.

Finally, the third element significant from in the context of finding the content and guaranteeing the right to artistic creation is the search for elements connected with the freedom of access to cultural life and its dissemination channels in the classical freedom of artistic expression. The freedom of creation means not only the freedom of the creator, but also the freedom of the public – the right of everyone to free and accessible use of the output of artistic creation – of contemporary cultural life as well as access to cultural heritage.

Examination of these three basic paths will make it possible to present the actual scope of the right to culture in this aspect, and will also facilitate the identification of the most controversial and difficult to define limits of the freedom of artistic creation.

3.1. Limits of freedom of artistic expression

The concept of artistic activity and art itself is not often defined by legal acts, neither at international nor national level. As is accepted in contemporary literature, art and creativity by their very nature are not easily defined, as they belong to the so-called open concepts, which means that it is possible to define the designations of these notions only through their generic resemblance, similar features, without searching for the necessary common features. The law in this place gives way to aesthetics as a separate field of philosophy, dealing, among other things, with finding the answer to the question about the meaning, the essence of art and the value of the effects of creative activities as useful for evaluation in legal practice. Art is a human activity which, thanks to the use of imagination and skills, produces works capable of evoking an aesthetic experience, difficult to be classified as emotional or intellectual.[1] However, it is worth noting that although the law (legal regulations as well as judgments of jurisprudence) modestly abandons attempts to define the art, legal regulations often determine what is considered art, the works worthy of protection or support from public authorities. Thus, we see a paradox where public authorities determine the scope and content of the concept of art through legislative, administrative activities and jurisprudence, and such activities are based to a certain extent on aesthetic judgment and ideological choice, changing over time and are dependent on many social and political factors.

Such freedom of artistic expression is usually treated in human rights order as an element and a derivative of freedom of expression. This concept is reflected in Article 19 of the International Covenant on Civil and Political Rights, which guarantees the right to hold one's own views and the right to freedom of expression, which includes the freedom to "seek, receive and impart information and ideas of all kinds, regardless of national borders, either orally, in writing or in print,

[1] "Art is a conscious human activity of either reproducing things or constructing forms or expressing experience if the product of this reproduction, construction or expression is capable of evoking delight or emotion or shock", W. Tatarkiewicz, *A History of Six Ideas: An essay on Aesthetics*, transl. Ch. Kasparek, Nijhoff-Kluwer Boston, The Hague-Hingham, MA: 1980, p. 38.

in the form of art, or through any other media of his choice." Freedom of expression is similarly protected by Article 10 of the European Convention, which guarantees everyone's right to freedom of expression, including freedom to hold opinions and to receive and communicate information and ideas without interference from public authorities and regardless of national borders. In the European system for the protection of human rights, freedom of artistic expression was therefore initially derived from freedom of expression, which largely determined the directions of jurisprudence and the very analysis of this freedom.

However, the Charter of Fundamental Rights of the European Union guarantees freedom of art in Article 13, combining it with freedom of research as a separate sphere of human activity guaranteed in the international legal order.[2] On the other hand, the link between artistic creativity and scientific activity seems to indicate the distinctive character of both activities, characterised by their original and creative nature. The combination of these two freedoms within a single drafting unit of the Charter (and in some constitutions) also indicates a close relationship between these two types of human activity and the right to free development.

The European constitutions regulate the freedom of artistic creation inconsistently, as was mentioned in the previous chapter. In certain constitutional acts, it is closely linked to freedom of expression; this is the case, for example, with Germany's Basic Law, guaranteeing the freedom of art as a basic right and clearly indicating the origins of freedom of art and science derived from freedom of expression. By contrast, the Italian Constitution treats these freedoms completely separately, placing their guarantees in the chapter on "moral-social relations" and stating in Article 33 "Art and science are free and teaching them is free as well", while freedom of expression is guaranteed in Article 21 of the Constitution. A similar character of this freedom is enshrined in the Greek Constitution in Article 16, guaranteeing freedom of art, science, research and teaching

[2] Article 13 of the Charter of Fundamental Rights of the European Union, Freedom of the arts and sciences: "The arts and scientific research shall be free of constraint. Academic freedom shall be respected."

and in the Swiss Constitution (Articles 20 and 21) by guaranteeing freedom of science, research and artistic creation separately from freedom of expression. The same applies to the Constitution of Finland, which in Section 16 guarantees the freedom of science, arts and higher education, as well as the Constitution of Portugal, Article 42 of which declares the protection of the freedom of artistic, intellectual and scientific creation. In the Polish constitutional order, freedom of creation has also been guaranteed separately. Article 73 of the Constitution states: Freedom of artistic creation, scientific research and the publication of results, freedom of teaching and freedom to use cultural goods shall be guaranteed to everyone. Freedom of artistic creation and access to cultural assets are closely linked to the Republic of Poland's obligation to guarantee participation in cultural life, as referred to in Article 6.[3]

Consequently, as we can see, some European constitutional acts, especially the younger ones, point to a tendency to separate the sphere of freedom of artistic creation from freedom of expression, giving the former a distinct place in the order of human rights. They also often provide straightforward access to cultural goods and cultural creation. Considerably more and more space is devoted to the importance of art and culture in creating collective identity and shaping individual development in the constitutions created over the last 30 years. From a cultural and social point of view, these are quite obvious statements, but it should be noted that they have recently gained their place in the constitutional clauses, although their nature is heterogeneous. Creating and guaranteeing the freedom of art (artistic art) as an autonomous freedom and a value confirm the growing rank of this category in European constitutionalism and human rights order and emphasising the importance of artistic culture in individual and social life. At the same time, the distinct nature of this freedom allows for a slightly different approach to the issue of its limitations,

[3] Article 6 (sections 1–2): "The Republic of Poland shall provide conditions for the people's equal access to the products of culture which are the source of the Nation's identity, continuity and development. The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage."

since while restricting the exercise of the freedom to disseminate the output of creative activity derived from freedom of expression can easily be compared to restricting the exercise of freedom of expression by applying the same standards and the case-law already developed by the European Court of Justice and national judicial authorities, the application of the same criteria to the freedom of creation – artistic activity – should be treated with some caution. They are very strongly linked to freedom of thought, self-fulfilment and, as such, they struggle to control and limit their use. Freedom of artistic creation (art) can benefit from a privileged position in this respect, with reference to its distinct character and different value of art and expression in this respect, deserving to be protected per se. Some authors are even inclined to believe that the creation process is a value worthy of absolute protection.[4] If, however, we are to remain (as the existing European acquis on the protection of freedom of artistic expression in the framework of the protection guaranteed by the European Convention on Human Rights) within the paradigm in which freedom of artistic expression is a component of freedom of expression, this means adopting a model of restrictions on freedom of expression in this area too. The limits of freedom of artistic expression must therefore be determined by the need to protect other goods and values such as public morality, security and the integrity of the state, as well as to protect the rights of others, including freedom of beliefs and religious feelings. The delimitation of such boundaries by the established law is continuously carried out in case law, and doing so is connected not only with the assessment of the threat or infringement by a piece of art of legally protected goods, but also with the assessment of the work of art itself. This delicate relation between governance and art can be observed both at the level of national courts and through the ECHR case law in the area of establishing the limits of freedom of artistic creation protected by Article 10 of the Covenant. The most important impact on the development of the concept of freedom of artistic creation and the development of a European standard of protection

[4] Similarly as it seems: I. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka: analiza krytyczna*, Wolters Kluwer Polska, Warsaw: 2010, p. 430.

of artistic creation is precisely the jurisprudence of the European Court of Human Rights, although it should be noted that the issues of borders and guarantees of this freedom have so far been relatively rarely reviewed for compliance with the guarantees contained in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[5] Until 2016, only 29 cases were considered concerning this issue – 24 cases were heard by the European Court of Human Rights, five of which were heard only by the European Commission for the Protection of Human Rights. In nine of them, the Court found that there was a violation of the limits of freedom of expression.[6]

As early as in the first ruling on the freedom of artistic expression, in *Müller and Others vs. Switzerland*,[7] the Court found that such a declaration enjoys the protection afforded by Article 10 of the Convention. However, at the same time, already in the first case, a whole range of problems emerged concerning the definition of the essence of the protection of freedom of artistic expression and the determination of its boundaries. First, therefore, the Court has expressly

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[5] E. Polymenopoulou, *Does one swallow make a spring? Artistic and literary freedom at the European Court of Human Rights*, 16 Human Rights Law Review 511 (2016), p. 511.

[6] These are the following ECHR decisions: judgment of 5th January 2010, *Karatas vs. Turkey* (app. no. 63315/00), judgment of 29th March 2005, *Alinak vs. Turkey* (app. no. 40287/98), judgment of January 2005, *Dagtekin vs. Turkey* (app. no. 36215/97), judgment of 25th January 2007, *Vereinigung Bildender vs. Austria* (app. no. 40287/98), judgment of 8th July 1999, *Karatas vs. Turkey* (app. no. 23168/94), judgment of 4th June 2013, *Ulusoy vs. Turkey* (app. no. 9049/06), judgment of 18th March 2008, *Kuliś, Różycki vs. Poland* (app. no. 15601/02), judgment of 16th February 2010, *Akdaş vs. Turkey* (app. no. 41056/04). In six cases Turkey was the infringing state. In cases which had been considered before a reform of procedure the Commission ascertained the breach of art. 10 of the Convention in cases: *Müller and Others vs. Switzerland*, 8th October 1986 (app. no. 10737/84), *Otto-Preminger-Institut vs. Austria* (app. no. 13470/87), *Wingrove vs. United Kingdom* report of 10th January 1995 (app. no. 17419/90) but in all these cases the Court did not affirmed the infringement of the Convention.

[7] Judgment ECHR of 24th May 1988 (app. no. 10737/84). Earlier, as was mentioned by I. Kamiński, the Commission rejected application *N. vs. Switzerland* (decision of 13th October 1983, app. no. 9870/82) and ascertained, that the protection under art. 10 of ECHR includes also artistic expression. I. Kamiński, *op.cit.*, p. 395.

confirmed that this freedom covers both the process of creating and disseminating the results of creative work.[8] Therefore, not only is the expression and its communication protected by the Convention, but the creative process itself, too.[9]

Secondly, the Court has stated that artists and those involved in making their works available are not excluded from the possibility of restricting those activities set out in Article 10 (2) of the Convention and must submit to the obligations and responsibilities associated with them (paragraph 34). The Court recognised that the Swiss courts had not infringed Article 10 of the Convention and that their action (the order for confiscation of work deemed obscene) was within the margin of assessment of the State. In this regard, the independent voice of Judge Spielman reverberated particularly strongly, as he considered this view to be inaccurate, citing examples from the history of art concerning similar, in his opinion, French court rulings on the works of G. Flaubert and C. Baudelaire. However, as seems to be indicated by successive rulings in the context of the conflict of these values, the Court takes a rather cautious approach to interfering in the discretion of national courts and interpreting the condition that a reduction is necessary for the protection of public morality.[10] However, in the Court's reasoning on the Müller case, there is no reference at all to the aesthetic assessments made by the Swiss courts (section 18), and the Court has therefore avoided assessing the artistic value of the works that were to be confiscated. This tendency to avoid valuing works that are the object for which authors demanded protection from the Court has become a fairly permanent feature of decisions made against the background of the protection of artistic expression.

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[8] On subjects of artistic expression: "Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society", para. 33 of the Commission report *Müller and Others vs. Switzerland*, note 6.

[9] Broader, see: M.M. Bieczyński, *Prawne granice wolności twórczości artystycznej w zakresie sztuk wizualnych*, Wolters Kluwer Polska, Warsaw: 2011, p. 156.

[10] In acordance with the first, fundamental and canonic, for the system of protection of freedom of expression ECHR judgment of 7th December 1976, *Handyside vs. United Kingdom* (app. no. 5499/72).

This is what the Court did in another case, in which it had to address the assessment of a work of art (a film) considered by national courts to be iconoclastic and offensive to the feelings and religious beliefs of Catholic believers, i.e. *Otto-Preminger-Institut vs. Austria*.[11] The European Court's judgment once again acknowledged the right of national authorities to assess the necessity of protecting public morality values in a democratic society with a wide margin of appreciation, noting that such an evaluation must be carried out with regard to the specific communities concerned – including local and regional communities within the state (section 50). At the same time, the Court has placed emphasis on duties and responsibilities of the subjects of free artistic expression, and in particular, it has pointed out that it may be justified to consider a measure limiting such an expression if it is "unnecessarily offensive towards others" and does not contribute to public debate (section 50) in the context of religious views and feelings (section 49). The Court therefore assessed and balanced the value of protected works of art, but avoided answering the question of their aesthetic value and the need to protect a work of art as a form of expression in this respect.

However, this value was recognised in the *Vereinigung Bildender Kunstler vs. Austria*.[12] In its judgment, the Court acknowledged (although with the 4:3 distribution of the votes) the primacy of freedom of expression and therefore found that there had been an infringement of the limits of freedom of expression by the prohibition imposed by the national courts on the display of images depicting public figures (Mother Teresa, Jörg Haider and others, including the plaintiff before the national court, the deputy and the chairman of the Meischberger party) during an orgy. The Court expressly stated in the grounds for its ruling that the contested image was of a satirical nature and satire was granted very wide limits to freedom of expression. Satire, as the Court pointed out, deserves special treatment, since its objective in an immanent way is to provoke, and therefore it uses exaggeration and distortion of reality as a medium of communication.[13] Again, the Court did not

[11] ECHR judgment of 20th September (app. no. 13470/87).

[12] ECHR judgment of 25th January 2007 (app. no. 68354/01).

[13] Para. 33: "It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality,

find that it was necessary to protect public morality, but only the rights of those 'portrayed', which freed the Court, in accordance with the policy in place, from the need to provide a wider margin of the State's assessment as to whether there had been a breach of the limits imposed by the protection of the first value. The Tribunal awarded the primacy to the freedom of artistic expression, but there was also certain controversy in the case – the opposite opinion was most eloquently expressed by judge Loucaides, who declared that the fact of being an artist or creating a work of art cannot exonerate from responsibility for offending others.[14] There are also numerous voices in literature which consider this ruling to be irreconcilable with the previous jurisprudence, in particular by granting satire such wide limits of freedom of artistic expression due to the fact that it is a particular kind of art. In this ruling, an interesting aspect of the assessment of the limits of freedom of expression was outlined through its nature and the requirements placed on the recipients by a particular selection of artistic means.[15]

In several other cases, the Court – although it does not define art and does not intend to determine its boundaries a priori nor formulate models of protection in isolation from specific circumstances, thus avoiding distant generalisations[16] – has pointed out that the limitation of message and artistic form, in particular fiction, poetry, or on the other hand – a satirical form – may cause the limits of expression in such a case to be defined with greater tolerance. This was the Court's view in the case of *Karatas vs. Turkey,*[17] in which it held that censorship of a volume of poetry on grounds of provocation to religious confrontation was excessive interference into the sphere of freedom of artistic expression. Or in the case of *Arslan vs. Turkey*[18] in which

naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care."

14 After: E. Polymenopoulou, *op.cit.*, p. 523.

15 See: I. Kamiński, *op.cit.*, p. 428.

16 As was affirmed in ECHR judgment *Lindon, Otchakowsky-Laurens and July vs. France*, creators are not exempted from liability for infringement of the limits indicated in art. 10 sec. 2 of the Convention (judgment of 22nd October 2007, app. nos. 21279/02 and 36448/02).

17 ECHR judgment of 5th January 2010 (app. no. 23268/94).

18 ECHR judgment of 8th July 1999 (app. no. 23462/94).

the infringement of Article 10 was related to confiscation of fine literature accused of inciting ethnic discord and the similarly settled case of *Alinak vs. Turkey*.[19] In these cases, the subject of state interference was literary work regarding the genocide of the Kurds and reviews of events from the past of the state and nations inhabiting Turkish territory contradictory to official Turkish propaganda. The Turkish authorities' decisions which impeded freedom of expression were motivated by the State Party's need to protect the integrity of the State, understood as preservation of a certain heritage and the memory of past events, while confiscated items of fine literature in the aforementioned cases were deemed as inciting ethnic or religious discord. However, the Court held that the assessment of the admissibility of interference with artistic expression in such a context cannot be made a priori from the point of view of content and without taking into account the form and extent of artistic expression. In those cases, the Court concluded that there had been an infringement of the limits of the freedom of artistic expression on account of the failure to demonstrate the need for interference in a democratic society, since the works concerned by the decisions of the national courts had a narrow and specific public, so that the works subject to restrictions did not in fact endanger the goods identified as having a value requiring protection in State action.[20]

However, it cannot be considered that such observations contained in the judgments presented herein draw a line that evaluates the limits of freedom through aesthetic assessment, type or even more so artistic value of works. While the Court analyses the character of the works, it does so only to a limited extent, namely by analysing the relevant

[19] ECHR judgment of 29th March 2005 (app. no. 40287/98).

[20] In *Alinak vs. Turkey* decision (*supra* note 6) – para. 45, the Court observed that the applicant, although a former Member of the Parliament, had been at the material time a private citizen expressing his views in a novel, which would necessarily reach a smaller audience than that afforded by the mass media. This limited its potential impact on "public order" to a substantial degree. Thus, even though some of the passages from the book seemed very hostile in tone, the Court considered that their artistic nature and limited impact reduced them to an expression of deep distress in the face of tragic events, rather than a call to violence.

audience and hypothetical impact on the protection of incriminated values. The sole exception is the above-mentioned ruling concerning a satirical form, in which the Court imposes certain requirements on recipients and persons whose interests have been infringed by a work of this nature, although it is difficult to acknowledge that the far-reaching conclusions concerning the extensive protection of the satirical form expressed in the *Vereinigung Bildender Kunstler vs. Austria* judgment constitute a long-standing case law.

As a consequence, it cannot be ascertained that the jurisprudence of the Court has permanently developed an explicit scope for admissible artistic expression in the context of a conflict with other values, which, in accordance with Article 10 (2), justify a restriction of the exercise of freedom. In particular, the "defence by art" paradigm was not recognised or perpetuated, that is recognition of the expression contained in a work of art or a creative process as a circumstance excluding the unlawfulness of an act. As E. Polymenopoulou observes, the Court has not referred to the scope of the concept and definition of art nor to the model conditions under which it can be concluded that the specific freedom of artistic expression is infringed.[21]

Nor can it be deduced from the Court's case-law to date that there are model limitations regarding the content of artistic expression. Public morality, religious sentiments, order and security, as well as maintaining state integrity are the values whose appraisal in the process of balancing the boundaries of artistic expression is particularly difficult and it is not easy to define clear criteria in this respect.

Our attention should be drawn to two issues that have been the subject of the Court's deliberations concerning the delimitation of the freedom of artistic expression. The first is the interpretation of the category of state integrity as a value that justifies restricting the freedom of artistic expression. To date, this problem has arisen mainly in the context of the Turkish cases (*Karatas vs. Turkey,*[22] *Arslan vs. Turkey,*[23] *Alinak vs. Turkey*[24]). Assessment of artistic expression in terms of its limits

[21] E. Polymenopoulou, *op.cit.*, pp. 535–536.
[22] ECHR judgment of 5th January 2010 (app. no. 23268/94).
[23] ECHR judgment of 8th July 1999 (app. no. 23462/94).
[24] ECHR judgment of 29th March 2005 (app. no. 40287/98).

from the point of view of protecting the values mentioned in Article 10 (2) of the Convention must be made taking into account the real threat posed by the expression – thus including the recipients of the work, so indirectly it depends on the artistic form, as it determines the extent and strength of the work's influence. The Court has therefore taken a rather cautious approach to the assessment of this condition that justifies the restriction of freedom of expression, emphasising the need to analyse the real impact of literature and more broadly of art on social relations, in particular the potential for inciting religious disputes. There is no doubt that, in this category of cases, the Court, which is rather cautious in its assessment of the limits of permissible state interference in the area of freedom of expression, took a firm stance granting primacy to the freedom of artistic expression, denying it the status of political expression, in particular calling for internal discord.

About one third of all the cases in which the violation of the limits of freedom of artistic expression has been alleged have raised the issue of determining the limits of freedom of artistic expression in the extent in which such an expression concerns blasphemous matters or even violate religious feelings, i.e. the conflict between freedom of expression and freedom of religious belief, as guaranteed by Article 9 of the Convention. Thus, the problem of blasphemy, which undermines religious sentiments and the admissibility of punishing them or actions to prevent and remedy the consequences of the infringement (through a ban on publishing, displaying or through confiscation of works of art, the elements of which have been considered by state authorities to be detrimental to religious feelings) that has emerged. Such a confrontation of these two values occurred, for instance, in the ruling on *Otto-Preminger-Institut vs. Austria*[25] and in the judgment in *Wingrove vs. UK*[26] in which the Court, contrary to the Commission's earlier position, held that there had been no violation of Article 10 of the Convention by refusing to permit the distribution of a film containing blasphemous scenes in the sense of the Catholic religion. In these cases, the Strasbourg Court has taken a very cautious approach to the issue of delimiting different boundaries from

[25] ECHR judgment of September 1994 (app. no. 13470/87).
[26] ECHR judgment of 25th November 1996 (app. no. 17419/90).

those drawn up by the authorities of the States Parties, considering that, in this particular matter, the limitation of freedom of expression – including artistic freedom – depends to a large extent on the recognition of the state and the needs and attitudes represented in specific communities.

However, as I. Kamiński observes, the position of the Council of Europe bodies on manifesting attitudes deemed to be unacceptable due to offensive nature of images undergoes a significant evolution, primarily under the influence of the position contained in the political documents of that body.[27] In 2006 and 2007, the Council of Europe adopted two documents to facilitate the demarcation of these borders, namely, the extension of the limits of freedom of artistic expression. Resolution 1510 (2006) on freedom of expression and respect for religious beliefs states that freedom of expression should no longer be restricted in the name of protecting "the increasing sensitivity of certain religious groups." At the same time, it states that hate speech cannot be reconciled with the values contained in the Convention. Recommendation no. 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion states that national law can only punish those religious expressions that intentionally and seriously violate public order and incite public violence. The question of the limits of freedom of artistic expression, to the extent that such an expression concerns the matter which offends religious feelings, is still open though, and the content of the aforementioned documents of the Council of Europe makes this problem camouflaged by other premises which, in the view of a State Party, justify interference in freedom of expression, such as the ban on the proclamation of statements inciting violence, acts of terror or rebellion. The borderlines between the socially accepted sense of morality, feelings connected with religious life and tradition, national heritage and values considered by the state to be constitutive for the political community are immanently blurred, and their designation is a matter of rather subtle evaluation.[28] In such a situ-

[27] I. Kamiński, *op.cit.*, p. 414.

[28] For example, in two pending cases: *Samodurov and Vasilovskaya vs. Russia* (app. no. 3007/06) *and Alekhina and Others vs. Russia* (app. no. 38004/12

ation, presenting the integrity of the state as a protected value will "pass" the Proportionality Test of Restrictions better than Freedom of Religion and the need to ensure a peaceful and undisturbed artistic provocation to cultivate religious beliefs, as well as the need to ensure public peace and security, or ethnic (religious) groups against whom such an artistic statement can be interpreted. The need to grant such protection in the light of the criteria of Article 10 (2) of the Convention may be in the future assessed by the Court in the light of the previously indicated reservations concerning the reality of the threats posed by artistic expressions, particularly in terms of their range of effect and the actual impact on protected goods.

However, the limits of freedom of artistic expression are also determined by the need to protect other values – an interesting clash of protected goods was resolved under the Convention in the case *Ehrmann and SCI VHI vs. France,*[29] in which the Court heard a complaint from an artist and a construction company accused of violating planning prohibitions by placing drawings and inscriptions on the walls of a building (belonging to the artist), which, according to local authorities, caused damage to the city landscape and view over historical monuments. The Court rejected the complaint and held that the protection of the country's cultural heritage was a legitimate objective and that the measures imposed on the applicants were in the public interest within the meaning of Article 10 of the Convention. Thus, in this case, two values in the field of broadly understood artistic culture and aesthetics were confronted, and the public interest and protection of the status quo, which could be irreversibly distorted by new artefacts, were the decisive criterion.

Thus, the previously indicated scope of freedom of expression and more broadly: artistic creation was established in Strasbourg jurisprudence within the framework of the traditionally understood duties of the state to guarantee freedom – that is, the obligation

– the famous Pussy Riot case) – defendant state has justified an application of severe measures taken against applicants with the threat of integrity, security of the state and the incitement for the national or religious hatred.

[29] ECHR judgment of 7th June 2011 (app. no. 2777/10). See also: *Cultural Rights in the Case Law of the European Court of Human Rights*, Council of Europe 2011 (updated 2017), p. 6.

of public authorities to refrain from excessive interference. Public morality, religious sentiments, order and security, as well as preservation of state integrity, understood also as a certain heritage and memory of past events – as in the Turkish cases, constitute the boundaries whose designation is not an easy and unambiguous task, which cannot be completed without considering not only the content, but also the form and scope of artistic expression, as was demonstrated in the previous ECHR rulings. However, the disputes over the scope of freedom of creation in the cases considered pertain the analysis within the framework of the State's duties to refrain from infringement. The freedom of artistic creation, regardless of the way in which the national courts and the Court have delimited the boundaries in terms of the need to protect other values, is treated as negative freedom in the cited judgments, that is to say, freedom in which the State's obligations are reduced to refraining from taking any action which might infringe this freedom.

3.2. The horizontal effect of freedom of artistic expression

There are many rulings in Strasbourg jurisprudence, in which values related to the necessity of protection of art and artistic creation require state authorities to develop a system of positive obligations, orders to act with the aim of securing them or guaranteeing them – both in relations between the subject of freedom and the state, and in relations between individuals as well.

First and foremost, there are rulings on the protection of cultural heritage. In the aforementioned case of *Ehrmann vs. France*, the Court found the cultural heritage to be a value that justifies interference with freedom of expression due to its importance as an element of public interest. Heritage protection is recognised in the case-law of the Court as a value that justifies restricting the exercise also of other rights protected by the Convention, in particular the right to property guaranteed by Article 1 of Protocol 1 to the ECHR. This was the view of the Court in the *Beyeler vs. Italy,*[30] where the complaint covered the State's right

[30] ECHR judgment of January 2000 (app. no. 33202/96).

of pre-emption towards the applicant's painting by Vincent van Gogh. The Court concluded that the pre-emptive right to acquire works of art as a restriction of the right of disposal is justified by the objective of ensuring that works of art which form part of the universal culture and cultural heritage of humanity remain accessible to the general public. At the same time, however, it also stated that in the circumstances of the case there had been an infringement of the applicants' rights, more precisely, of the right to property, since the procedure for redeeming the work was too severe and the state of legal uncertainty had been maintained for too long. In the *Debelianovi vs. Bulgaria*[31] and *Kozacioglou vs. Turkey*[32] the Court ruled that the applicants' property rights were infringed in situations where the public authorities decided to limit the rights of the owners by protecting the buildings without due compensation. The Court found that the legitimate objective is the protection of cultural heritage in the State (citing, i.a., the Council of Europe Framework Convention on the importance of cultural heritage for society,[33] known as the Faro Convention), but inclusion on the list of monuments without compensation may impose a disproportionate burden on the owner. The ECHR ruled similarly in the pilot judgment on *Potomski, Potomska vs. Poland*.[34] In that case, the Court observed that the hindrances to the applicants' right to the undisturbed use of their property were provided for by law and justified, because within those hindrances they sought to achieve protection of the cultural heritage of the country. However, it was held that the State had infringed Article 1 of Protocol no. 1 to the Convention by failing to provide, under national law, a procedure by which applicants could assert their claims for expropriation before a judicial authority and request the authorities to acquire their property and due to a long period of time during which the applicants had to bear with the inconvenience while exercising their right of ownership.

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[31] ECHR judgment of 29th March 2007 (app. no. 61951/00).

[32] ECHR judgment of 19th February 2009 (app. no. 2334/03).

[33] Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 27th October 2005, Faro.

[34] ECHR judgment of 29th March 2011 and final judgment of 4th November 2014 (app. no. 33949/05).

Two issues are most relevant in these rulings from the point of view of the right to culture. Firstly, there is no doubt that the value in the form of national heritage and the protection of cultural assets are a legitimate objective of State action and may constitute goods for which the exercise of the rights and freedoms provided for by the Convention is curtailed. Secondly, the Court acknowledges that, in this regard, States Parties are obliged to take certain measures within a defined period of time and under a procedure guaranteeing the protection of the ownership rights and, therefore, the protection of heritage by the Parties to the European Convention on Human Rights requires compliance with certain requirements of transparency, a reasonable period of time within which the owners of goods deemed to be in need of special protection in connection with the restriction of their property rights must be compensated. Failure to comply with such obligations exposes the State to liability for an infringement under Article 1 of Protocol 1 to the Convention and is therefore a standard set by the Convention.

An even more interesting area of drawing up the limits of freedom of artistic expression is the area in which the scope of protection is decided on at a horizontal level, i.e. the conflict of protected rights in relations between individuals. Several ECHR rulings can be mentioned here, where the charge of violation of Article 10 was made by national courts for violations of honour or privacy by artistic expression. In *Lindon, Otchakovsky-Laurens and July vs. France*[35] the Court has expressly held that writers, like other authors, are not exempt from observing the limits of freedom of expression laid down in Article 10 (2) of the Convention.[36] Likewise, there was no violation of Article 10 in the case of a writer convicted for violating the private

[35] The case concerned suing for slander of Jean-Marie Le Pen, ECHR judgment of 22nd October 2007 (app. nos. 21279/02, 36448/02).

[36] As the Court concluded: "novelists – like other creators – and those who promote their work are certainly not immune form the possibility of limitations as provided in para. 2 of Article 10. Whoever exercise his freedom of expression undertakes, in accordance with the express terms of that paragraph, duties and responsibilities" (para. 51).

lives of the heroes described in the judgment of 12th March 2015.[37] By contrast, in *Jelsevar and Others vs. Slovenia*[38] in which the plaintiffs alleged that the right to the protection of private life had been infringed when national courts refused protection against the dissemination of the literary work describing their private life, the Court did not find that the right to privacy had been infringed and thus the limits of freedom of artistic expression had not been exceeded, stating that "artistic freedom enjoyed, among others, by writers is a value in itself and thus attracts a high level of protection under the Convention."[39] The Court carefully examined the decision of the Slovenian Constitutional Court in the context of this case and considered that it did not exceed the limits of the margin of appreciation when balancing the protection of freedom of expression and protection of private life. In its decision, the Court drew attention to the value of artistic expression and a work of art, and to the fact that this value can be contrasted with other goods protected under national law and regarded state interference in the sphere of protection afforded by the Convention as justified. Moreover, it was also stated that the freedom of writers must enjoy a high level of protection under the Convention and that national courts must have serious reasons and grounds for curtailing freedom of expression in balancing values that deserve protection.

It seems that the Court also in this ruling did not make a significant shift of emphasis on the protection of art (the artistic expression) as such. First of all, it should be noted that, in the cases referred to above, the Court did not recognise the need to protect freedoms and rights against the decisions of national courts, which could mean that it is acting very cautiously in this regard, maintaining a margin of discretion on the part of the Member States, and without categorically defining the sphere of positive obligations to protect the freedom of artistic expression in this area. Secondly, the Court has made it quite clear – at least in the *Lindon, Otchakowsky and July vs. France* ruling

[37] ECHR judgment of 12th March 2015, *Almeida Leitao Bento Fernandes vs. Portugal* (app. no. 25790/11).

[38] ECHR judgment of 11th March 2014 (app. no. 47318/07).

[39] "(...) artistic freedom enjoyed by, among others, authors of literary works is a value in itself, and thus attracts a high level of protection under the Convention" (paras. 35–39), after: *Cultural right...*, p. 8.

– that artistic creation in the phase of presenting its results and, therefore, in the exercise of freedom of artistic expression, remains under the restrictions of Article 10 of the Convention and its limits must be set in accordance with them. However, in the *Jelsevar and Others vs. Slovenia* case, the Court's decision indicates that the value of artistic expression is an asset, the protection and respect of which must be balanced with the other goods referred to in the Convention, in particular the protection of the rights of others. This obligation to balance the values while deciding on their limits, in particular the limits of freedom of artistic expression, is an order addressed at the state and its authorities (particularly courts) to shape both the provisions and instruments of their application.

However, the most interesting cases in terms of resolving such conflicts are those concerning the distinction between the protection afforded by the rules of copyright law and the protection of the freedom of artistic creation. The links between the freedom of artistic creation, the rights of creators and the rights of the audience and copyright will be discussed in more detail in the next chapter, but it should be noted already in the framework of the discussion of the content and the limits of freedom of creation that the rights of creators to enjoy the protection of their moral and material interests, arising from all scientific, literary or artistic creation, are guaranteed in the Article 15 para. 1 (c) of the International Covenant on Economic, Social and Economic Rights, but it is not self-evident that the rights so defined are identical to copyright. The latter come from a different legal regime and differ significantly from human rights in their construct – they are transferable, time-limited and in some systems their protection depends on the fulfilment of certain formal requirements. Creators' rights, on the other hand, are part of the human rights order according to Article 15 (1c) of the Covenant and, more importantly, remain closely related to the right to participate in cultural life. In the meantime, the most serious conflict and tension regarding access to art and artistic culture appear when confronted with the protection of copyrights, since these rights – according to a strong statement used in the *Ashdown* case by a British court – may even constitute antithesis of one

another.[40] Freedom of creation and access to it and the copyright regime give rise to many contrasts,[41] although there are also voices about the necessary relationship and complementarity between the two systems.[42]

In recent years there have been more and more rulings in European countries on this issue, although courts are not very willing to engage in resolving this relation.[43] The cause of such caution may be the completely different nature and sources of copyright law and freedom of expression – the former derives from property rights and is protected as such, so that the 'sacred relationship between the work and the author' (moral rights) is also considered to be subject to the regime of ownership rights.[44] Meanwhile, freedom of expression is not regulated by law in such detail – in particular in private law, so that the conflict is often omitted or unnoticed.

In the case law of the European Court of Human Rights, the problem of the conflict between the rights of creators and the subject of copyright has emerged in the famous verdict in *Ashby Mcdonald and Others vs. France,*[45] in which the Court has explicitly recognised

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[40] Y.H. Lee, *Copyright and Freedom of Expression: A Literature Review*, CREATe Working Paper 2015/04, p. 62, http://www.create.ac.uk/publications/copyright-and-freedom-of-expression-a-literature-review/ [accessed: 08.10. 2017].

[41] More: J. Rubenfeld, *The freedom of imagination: copyright's constitutionality*, Faculty Scholarship Series, paper 1556, 112(1) Yale Law Journal 1 (2002), http://digitalcommons.law.yale.edu/fss_papers/1556, pp. 5–7. The tension between access to culture and knowledge and intellectual property rights was also concerned in Venice Commission Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, Venice 1 10, Statement of Expert Group convened by UNESCO in Venice, Italy, 16–17th July 2009, http://unesdoc.unesco.org/images/0018/ 001855/185558e.pdf) [accessed: 02.10. 2017].

[42] Y.H. Lee, *op.cit.*, pp. 64–65, M.D. Birnhack, *The copyright law and free speech affair: making-up and breaking-up*, 43(2) IDEA: Journal of Law & Technology 233 (2003), pp. 266–272 (and cited there *Eldred vs. Ashcroft*, 537 US 186 (2003)).

[43] P.B. Hugenholtz, *Copyright and freedom of expression in Europe*, in: R.C. Dreyfuss, H. First, D. Leenheer Zimmerman (eds.), *Innovation Policy in an Information Age,* Oxford University Press, Oxford: 2000, pp. 344–345.

[44] ECHR of 11th October 2005, *Anheuser-Busch vs. Portugal* (app. no. 73049/01). See: P.B. Hugenholtz*, op.cit.*, p. 347; Y.H. Lee, *op.cit.*, p. 29.

[45] ECHR of 10th January 2013, *Ashby McDonald and Others vs. France* (app. no. 36769/08).

that the conditions for restrictions on freedom of expression provided for by copyright law must be in line with the test contained in Article 10 (2) of the Convention, i.e. they must be necessary in a democratic society, provided for by law and with a justified, intended purpose. Thus, in that decision, the Court interpreted national (French) copyright law from human rights perspective, more specifically freedom of expression, although in this case it did not protect the author of a work from accusations of publishing it against the will of the acquirer of the rights to the work. Also, in the second famous ECHR ruling in *Neij and Sunde vs. Sweden*[46] the Court did not find any infringement of Article 10 of the Convention in national court's decision to penalise the operators of a website offering the exchange of digital files containing works protected by copyright. In that ruling the Court expressly acknowledged that the subject-matter to be considered required balancing the two interests, plaintiffs' – to facilitate the exchange of relevant information, and on the other hand, the protection of copyright holders' rights and stated that there were serious reasons for restricting the applicants' right to freedom of expression. The court's actions and the penalties provided for have been considered by the Court to fall within the margin of the State's assessment, meeting the condition of 'necessity in a democratic society' as meeting an urgent social need.

These rulings make it evident that the Court recognises the issue of deciding on a horizontal level, i.e. between entities governed by private law, a conflict concerning the restrictions on the exercise of freedom of expression – including artistic expression – also in relation to works protected by the system of copyright law and therefore the protection of intellectual property rights, which are protected under Article 1 of Protocol 1 to the Convention.

Although it is difficult to clearly demonstrate the standard of the limits of freedom of expression protected by Article 10 of the Convention from the judgments referred to above, it is worth underlining some of the features which the Court has identified. First of all, this freedom also includes the freedom of creation, and thus the process leading to the creation of artistic expression. Secondly,

[46] ECHR judgment of 19th February 2013 (app. no. 40397/12).

the limits of freedom of artistic expression where they affect religious feelings and public morality must be determined with due regard to those documents of the Council of Europe, which require particular prudence in the application of these criteria. Thirdly, the limits set out in Article 10 (2) of the Convention are applicable to freedom of artistic expression, but the balance between the protection of these values and the freedom of artistic creation must include not only the content but also the form of expression and its area of coverage.[47] Fourthly and finally, in the ECHR jurisprudence the protection of cultural heritage and cultural assets being created today constitutes a justified goal of actions restricting the exercise of freedoms and rights – including the right of ownership, as well as in horizontal relations between the right to protection of honour, privacy and intellectual property.

The standard developed in this way brings us closer to understanding the content of the right to culture in terms of freedom of creation and access to cultural goods, as well as cultural life. The duties of the States thus laid down in jurisprudence belong to a large extent to classical negative obligations, i.e. refraining from any infringement, although it is evident that they also set a model of appropriate conduct for protecting goods covered by cultural rights. This standard includes well-designed rights used in court proceedings in the process of limiting rights and freedoms,[48] as well as the obligation to balance protected values appropriately with emphasis on the protection of the freedom of artistic creation and on considering the actual impact and shape of these expressions on rights whose protection may necessitate their limitation.

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[47] More: M.M. Bieczyński, *Prawne granice wolności twórczości artystycznej w zakresie sztuk wizualnych*, Wolters Kluwer Polska, Warsaw: 2011, p. 160 et seq.

[48] The duty of public authorities to ensure the effective right to court to protect copyrights – see: *Nemec and Others vs. Slovakia* (app. no. 48672/99), ECHR judgment of 15th November 2001. See also: L.R. Helfer, G.W. Austin, *Human Rights and Intellectual Property. Mapping the Global Interface*, Cambridge University Press, Cambridge: 2011, pp. 197–198.

3.3. Positive obligations of a state within freedom of artistic expression

This let interpret the freedom of artistic expression (and the freedom of access to it) into the plane of obligations other than negative ones – that is, to refrain from excessive interference in the sphere of protected freedom. The protection of the exercise of the rights provided for in the Convention – although mainly classified as the first generation rights, consequently as negative rights – no longer requires the abstention from excessive interference. To understand the nature of the State's obligations, it is essential to accept what the Court stated a long time ago; that the actual, effective exercise of the rights protected by the Convention does not depend solely on the State's obligation to refrain from interference, but may require specific action to ensure protection and the fulfilment of positive obligations.[49] These obligations – in the context of horizontal relations, such as resolving the conflict between the freedom of creation, also in terms of its dissemination, consist primarily in the creation of a system of assurances which enable an appropriate balance to be struck between protected goods and interests, and are therefore similar to the formula which should be defined on the foundations of cultural rights as obligations to protect and ensure the exercise of rights and freedoms.

This is even more evident in the rulings concerning freedom of access to cultural assets and services, which also appeared in the ECHR case law. Reflecting on the issue of freedom of access to cultural assets and services requires at the outset an indication that the freedom of creation – or artistic expression is enjoyed by everyone, i.e. also the recipients of cultural works and services. Both at the level of international documents and constitutional systems, the freedom of artistic creation is regulated in a way that makes "everyone" the subject of the indicated freedoms, which means that the guarantee of freedom of artistic creation is not dependent on the characteristics of the subject, in particular any specific professional status or artistic recognition. The subject of the freedom of artistic creation is any

[49] I.a.: ECHR judgment of 30th November 2004, *Öneryıldız vs. Turkey* (app. no. 48939/99), para. 134.

person who creates, but also anyone who is the recipient of artistic output. Since freedom of expression falls within the category of freedom of expression under Article 10 of the Convention, the provision itself already contains a phrase about the right to obtain information and views. Such an entitlement, as a constituent part of the exercise of freedom of expression, has been confirmed by the case law of the Court, to mention here the judgment of the ECHR in *Sunday Times vs. the United Kingdom* (I),[50] in which the Court made it clear that the public is entitled to receive media coverage of relevant cases. In other judgements, the Court made quite a broad and consistent reference to findings on the right to information, both in the context of media coverage[51] and personalised communication, addressed to a particular person (or group of persons) about circumstances relevant to him/her.[52] However, the Strasbourg jurisprudence regarding the right to obtain information and views has also developed a line in which access to materials of a nature other than information relevant to the public (public opinion) or individuals is emphasised. This right takes the form of a right to get acquainted with the artistic message or access to sources from which one can learn about the surrounding world – also in terms of cultural life. The first judgment of this kind is the *Akdaş vs. Turkey*[53] in which the Court considered whether the limits on freedom of artistic expression had been exceeded by imposing a fine on the publisher for publishing the Guillaume Apollinaire's novel in Turkish. The Court has stated that the limits on freedom of expression must always be considered in the context of the cultural, religious and moral background of a particular community and state, but given that Apollinaire's work is an essential part of Europe's cultural heritage, the international recognition and reputation of the published author as well as the fact that his works are published in a number of languages worldwide, it is difficult to

[50] ECHR judgment of 26th April 1979 (app. no. 6538/74).

[51] Similarly – ECHR judgment *Lingens vs. Austria*, 8th July 1986 (app. no. 9815/82). See more: I. Kamiński, *op.cit.*, p. 473 et seq.

[52] Judgment of 26th March 1987, *Leander vs. Sweden* (app. no. 9248/81), also: ECHR judgment of 7th July 1989, *Baskin vs. United Kingdom* (app. no. 10454/83), *Guerra vs. Italy* of 19th February 1998 (app. no. 14967/89).

[53] ECHR judgment of 16th February 2010 (app. no. 41056/04).

consider it acceptable to restrict publication in one of the States Parties to the Convention. Such a ban would deprive recipients in that country of access to a work of art that is an essential part of the world heritage and cultural heritage (§ 30).

Based on the ruling in *Aktaş vs. Turkey*, it appears that the freedom of artistic expression under Article 10 also means the right to get to know human heritage and access to cultural heritage. However, this right means that it is still the responsibility of the State and its authorities to refrain from blocking access to the universal cultural heritage, and not to provide this access through any active action. This means that the right of access, against the background of this ruling, takes the form of free access to cultural content – and thus requires the State Party to refrain from taking action – rather than creating a standard of positive obligations. Thus, while this ruling constitutes a breakthrough in defining a model of the right of access to the cultural heritage of humanity, it would be premature to conclude that the Strasbourg jurisprudence would create a standard of the right of access to cultural life as creating a model of positive state obligations. According to this ruling, the state is under no obligation to guarantee access to cultural assets, either horizontally or in relations between the state and the individual.

The same goes for the judgements of the Court which concern infringement of Article 10 by imposing a ban on internet use or blocking access to specific websites, as in the *Ahmet Yildrim vs. Turkey*[54] where the Court found infringement of Article 10 in prohibition of access to Google search engine, with the result, in the view of the Court, of depriving the right to information not provided for by law. The most significant judgment in this respect seems to be the one concerning access to YouTube (*Cengiz and Others vs. Turkey*).[55] In that case, the complainant (including academics) accused the Turkish court of blocking their access to YouTube, because some of the materials

[54] ECHR judgment of 18th December 2012 (app. no. 3111/10). Otherwise – in the case *Akdeniz vs. Turkey* (app. no. 20887/10, judgment of 11th March 2014) ECHR did not ascertain a violation of art. 10, when Turkish court banned an access to websites infringing copyrights, because an applicant had an access to others.

[55] ECHR judgment of 1st December 2015 (app. nos. 48226/10 and 14027/11).

they uploaded harmed the memory of "Father of the Turks", Mustafa Atatürk, which constitutes a violation of national law. However, the Strasbourg Court found that YouTube is of great importance for the communication of content, the exercise of freedom of expression, not only artistic but also social and political, and such a general ban, preventing access to the whole service, constitutes an infringement of the Article 10. As is clear from the case law line presented, the Strasbourg Court strongly emphasises the importance of the Internet – not only in ensuring access to information,[56] but also in providing access to other forms of social life, including culture. The ban on access to the sites, even because of the protection of the rights of others (in copyright infringement cases), cannot lead to deprivation of access to this medium in an excessive manner, unjustified by the need to protect other goods. However, the obligation to implement this right continues to require the State Party only to refrain from any measures aimed at blocking or prohibiting the use of certain resources – not establishing a system of activity consisting in providing individuals with access to Internet sources or other forms of access to cultural goods and services.

However, certain traces of obligations in terms of exercising the right of access to cultural assets can be found in rulings concerning marginalized, alienated and excluded groups.[57] Thus, in a number of judgments, the Court has held that Article 8 is infringed by depriving people from other countries and cultures of access to television and programmes from their home country.[58] However, this jurisprudence is associated with ensuring access to ethnic culture, the right to educate children in tradition and their own culture, maintaining ties

[56] Compare: ECHR *Times Newspapers Ltd vs. United Kingdom* of 10th March 2009 (app. nos. 3002/03, 23676/03). In para. 45 the Court observe that Internet archives are to preserved and make available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free, while the primary function of the press in a democracy is to act as a "public watchdog", it has a valuable secondary role in maintaining and making available to the public archives containing news.

[57] Y. Donders, *op.cit.*, pp. 258–259.

[58] ECHR judgment of 16th December 2008, *Khurshid Mustafa and Tarzibachi vs. Sweden* (app. no. 23883/03).

with homeland – and thus creates a certain standard of good practices on the part of the state towards the right to preserve own ethnic culture, beyond the dominant culture. Due to the different nature of both the subject-matter of the protection and the powers that arise in this respect (they concern primarily Article 8, i.e. the right to preserve private and family life), this line of jurisprudence has little application in this respect, although it may constitute a certain point of reference.

However, there are groups of people who, for various reasons, are left under the supervision of public authorities and at the same time are forced to operate in an environment determined by the actions of public authorities to an extent completely incomparable with others. Prisoners and detainees are among them – analysing their situation in terms of access to services offering cultural content is an interesting addition to the Strasbourg standpoint on freedom of access to cultural expression. In several decisions concerning the rights of detainees in prisons, the Court has issued a ruling on their access to television programmes and the Internet. In its judgment in the *Laduna vs. Slovakia*[59] the Court found that the lack of access to television, when other detainees can watch television, constitutes an infringement of the prohibition of discrimination (Article 14 of the Convention, read in conjunction with Article 8 of the Convention). It was also stated that watching television programmes was considered to be a means of meeting the cultural and educational needs of prisoners.

In another case, *Kalda vs. Estonia*, the Court ruled that a ban on access to websites, in particular those concerning human rights, infringes Article 10 of the Convention. The Court considers that, while Article 10 of the Convention cannot be interpreted as establishing an obligation to provide the prisoners with online services or access to websites, but for prisoners, interference with the prisoners' right to have information in the particular circumstances in which they find themselves cannot be regarded as a necessary restriction in a democratic society (paragraph 54).[60] In the *Jankovskis vs. Lith-*

[59] ECHR judgment of 4th June 2012 (app. no. 31827/02).

[60] Article 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners, "however, the interference with the applicant's right to receive information in the specific

uania case,[61] the Court ruled on the restriction of access to university websites and found that depriving a prisoner of the right to access university websites for the purpose of enrolment for studies is an unauthorised denial of the right to information, as provided for in Article 10 of the Convention. In its statement of reasons, the Court expressly stated that the infringement did not consist in general prohibition of access to university websites – they were accessible to the public, but in the applicant's situation it was a matter of providing access to information – in particular Internet access – in order to consult the content published on the website of the Ministry of Education and Science (paragraph 53). The Internet, as stressed by the Court, has a special role in access to information and although the Convention does not create a right of access to the Internet, in this particular situation, a prisoner's lack of access to the Internet constitutes an infringement of his right to information. The Court also draws attention to the particular nature of the content to which the applicant sought access, considering that the educational content is intended for the reintegration of prisoners and that it is changing dynamically, so access to such official information websites must be regarded as justified and necessary.

While these three rulings relate primarily to the right to communication and information, the standard they set out is relevant for determining a certain minimum level of access to cultural life, as well as the right to individual and social development through access to the media and the content conveyed therein. The Court recognises in them not only the need to discontinue the ban on access, but also the need to create opportunities for specific categories of persons to use media services, to access online content in accordance with a standard defined by previous case-law on freedom of dissemination and to familiarise themselves with information and views. Therefore, if such a standard can be said to exist, it creates, at least potentially, the content and core of access to cultural content, and also sets out a ban on discrimination in this

circumstances of the present case cannot be regarded as having been necessary in a democratic society" (para. 54).

[61] ECHR judgment of 17th January 2017 (app. no. 21575/08).

regard – and in certain situations it already requires the state to fulfil positive obligations to ensure access to them.

The examination of the elements of the system for the protection of the freedom of artistic expression created by the case-law of the Court shows that, in the process of interpretation and application of Article 10 of the Convention, there are certain elements which demonstrate that the Strasbourg Court has recognised the elements of the State's positive obligations in terms of the protection of the creative process itself, the freedom of artistic creation, the importance of cultural heritage and the individual's right to become acquainted with cultural content. Treating the freedom of artistic expression in terms of negative freedom, i.e. one which obliges the state only to refrain from interfering in the sphere of free activity of an individual, is becoming obsolete. It is increasingly clear that in the content of such rights and freedoms, the European Court – and other courts, in particular the constitutional courts of European countries – find the content of the positive obligations of states.

As far as the right to culture is concerned, the search for these positive obligations of the state has already started in the Strasbourg jurisprudence to some extent, which means that one can begin to consider the sphere of positive obligations of states with regard to the protection of rights related to artistic activity. First of all, they are rights related to the protection of the freedom of creation and artistic expression in horizontal relations, mainly related to the most critical collision, namely the protection of copyright. In other respects, the search for positive responsibilities in the sphere of ensuring freedom of art will consist in searching for procedural standards, especially in the area of heritage protection and the creation of legal instruments and social support for artistic activity, as well as creating appropriate mechanisms for the protection and promotion of cultural heritage. Finally, these positive obligations will include instruments allowing universal and non-discriminatory access to cultural content. The instruments and actions of the state mentioned here are, of course, part of cultural policy and, more generally, of the social policy that they pursue. Just as social rights are linked to social policy, the exercise of cultural rights, including the right to culture, must be linked to cultural policy. Therefore, individual powers in this area will be in close relationship

with the programmes implemented by the state, policy guidelines implemented by the state, as well as legislation and administrative actions. The analysis of all these levels of implementation and all the factors will make it possible to determine whether the execution of the right can be conducted in an environment allowing for its actual use.[62] Human rights and freedoms, according to A. Sena's increasingly popular and accepted concept, are not only an expression of a moral order that does not allow anyone to be harmed and depriving them of their fundamental axiology of powers and freedoms. They can also be seen as an expression of the guarantee of the fulfilment of human capabilities that allow for full implementation within the framework of individual development and within the community as well. This approach allows us to re-conceptualize the rights, which until now have been unequivocally classified as belonging to certain categories, with different degrees of protection and implementation depending on external conditions and the will of the authorities. The instruments of protection developed in international and national jurisprudence, in particular the case law of constitutional courts, make it possible through these instruments to identify the trails of such powers and increasingly find correlation with legislative and administrative actions carried out at national and transnational level, and, in the field of the right to culture, in a particular way with regard to what is known as cultural policy.

[62] K. Rittich, *Social rights and social policy: transformations on the international landscape*, in: *Exploring Social Rights. Between Theory and Practice*, D. Barak-Erez, A.M. Gross (eds.), Hart Publishing, Oxford: 2007, p. 116.

CHAPTER 4

Creators' Rights and Copyright Law – Bridges or Barriers between Creators and Recipients

The presentation of the content and scope of the freedom of artistic creation, understood as an element of participation in cultural life, cannot be done without analysing copyrights. There is an obvious and intentionally recognised link between the author and his work, the work is in a natural way connected to its author, who has the right to benefit from the fruits of his work. Therefore, from the point of view of the right to culture, the rights of creators to dispose of a work, to shape it, to display it, to exhibit it, to protect against its unfair use and to benefit from its economic effects are one of its pillars. However, the rights of authors must not be equated to the current shape of copyright, but to the challenges of a digital environment of content.

Although the author's right to enjoy both the personal and economic fruits of his work seems to be so age-old and natural, their final shape, known today, was not always so evident and unambiguous. The relationship between the rights of authors, which belong to the catalogue of cultural rights, and the current form of copyright is not very clear, either, as both of these categories belong to different systems of law and protection orders. It is even more complicated to decide to what extent the rights associated with the authorship of a work remain an indispensable element of the right to participate in culture and remain in certain symbiosis with it, and to what extent these rights remain in conflict, especially in the case of exhibition of works in the digital environment.

4.1. Rights of authors, rights of creators – two systems

Initially, the rights associated with the authorship of a work meant first of all the rights that today we call moral rights, and therefore associated with the author's right to decide on the fate and shape of his work. They belonged rather to the sphere of good manners and standards of behaviour. It was rather late to come up with the first regulation, which is considered to be the Statute of Queen Anne of 1710 in England, establishing the author's exclusive right to decide on publishing the work (but only until the time of the first publication). In the eighteenth century, many acts concerning authors' rights were enacted, including the revolutionary French act of 1791 and 1793 on the staging of works in theatres and the right to sell works and the rights to them. In Spain, there was a law dated 1762 on the privilege of printing a book (granted to the author) and ordinance from 1741 in the Kingdom of Denmark and Norway granted ownership for life to authors and their successors in law.[1] As Grzybowski points out,[2] the genesis of copyright was to a large extent related to the perception and attempts to remedy tensions that arose between authors and people using the publication of their works (printers and booksellers), but they did not, however, deal with property rights, or regulated them only to a limited extent.

Confirmation of the authors' rights to their works is included in the U.S. Constitution, which in Article 1 § 8 provides for the right of Congress to: "(...) support the development of science and useful skills by providing for a limited period of time the authors and inventors with exclusive rights to their works or inventions." In 1790,

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[1] S. Hodes, *Legal Rights in the Art and Collectors' World*, Oceana Publications, Inc, New York: 1986, p. 45; K. Lewandowski, *Krótka historia prawa autorskiego*, http://www.zaiks.org.pl/220,0,54_krotka_historia_prawa_autorskiego [accessed: 24.10.2017]. About history of copyright see also: L. Górnicki, *Rozwój idei praw autorskich: od starożytności do II wojny światowej*, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław: 2013, p. 121, available at: http://www.biblioteka-cyfrowa.pl/publication/41089.

[2] S. Grzybowski, *Geneza i miejsce prawa autorskiego w systemie prawa*, in: J. Barta (ed.), *Prawo autorskie, System prawa prywatnego,* vol. XIII, Instytut Nauk Prawnych PAN, Warszawa: 2012, pp. 3–4.

a federal copyright law was passed, which established, among other things, the protection of authors of books. But the way to protect the author's rights against plagiarism or attempts to use the author's work in another way without his consent has been bumpy and long – even in the United States, famous for its particularly restrictive protection today. At the turn of the 19th and 20th century, there were situations in which the author was refused protection of his works in courts – one of the famous cases of this kind is the lost case of Mark Twain at a trial with a bookseller who offered to sell *The Adventures of Tom Sawyer*, published without the knowledge and consent of the author.[3]

In the second half of the 19th century, copyright law was largely codified, which was also made possible by the acquis of international law; a breakthrough came with the Berne Convention for the Protection of Literary and Artistic Works, which was established in 1886 (through the initiative of Victor Hugo), ratified by nearly 180 countries from all continents. It has provided universal protection for works, and states have committed themselves to ensure a minimum level of protection for the author's rights for life and at least 50 years after his death (Article 7 of the Convention). A second milestone in the development and codification of copyright is the 1952 Geneva Convention (on copyright), which was to remove the formal barriers to copyright protection in various jurisdictions. Copyright law has developed – and continues to develop – in two independent systems. The first one, European (Romanesque – droit d' auteur), is based on the assumption that the author has close connection with the work and guarantees personal rights against property rights in the first place, and it also guarantees automatic protection, independent of the completion of any formalities. The copyright system adopted,

[3] This story is cited by S.L. Burr, *Entertainment Law in a Nutshell*, Thomson/West, St. Paul: 2007, p. 249. Mark Twain had written after that: "A Massachusetts judge has just decided in open court that a Boston publisher may sell not only his own property in a free and unfettered way, but also may as freely sell property which does not belong to him, but to me – property which he has not bought and which I have not sold. Under this ruling, I am now advertising that the judge's homestead is for sale and if make as good a sum out of it as I expect, I shall go out and sell the rest of his property."

among others, in the USA and Australia is based on a mechanism requiring formal registration of a work, and emphasises the protection of rights to reap the benefit of the work to the owner. These two families and traditions of copyright have developed independently and have significantly unified the system, which today we regard as the classic structure of copyright protection.

In 1948, the Universal Declaration of Human Rights introduced the author's rights to the catalogue of cultural rights. Article 27 paragraph 1 gives everyone the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits, and in paragraph 2 it states that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". In 1966, these rights were incorporated into the International Covenant on Economic, Social and Cultural Rights (Article 15 para. 1c[4]) – the rights of authors to the protection of moral and material interests arising from any scientific, literary or artistic creation are thus guaranteed.

Inclusion of authors' rights formulated in this way in the Declaration and the Covenant represents a point in time when they have become a part of the system for the protection of human rights. Simultaneously, the formulation of both acts, which deal with the rights of creators to protect their own interests resulting from their work, is quite enigmatic and raises the question of the relation between these

[4] Article 15 of ICESCR:

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

rights and the already developed copyright and, more broadly, intellectual property rights. Authors' rights laid down in Article 15 para. 1c are categorically different, although they may appear to incorporate copyright law at first glance, which is known to the civil and international law system. To perceive them only in terms of intellectual property rights and historically shaped copyright would be a considerable oversimplification and could lead to false conclusions, which would in fact be unacceptable on the grounds of human rights.

The differences in the nature of these powers concern at least three elements deemed as constitutive for the legal and human order. Human rights are therefore non-transferable and inherent, while copyright (at least property rights and to some extent also personal rights) are transferable and thus can be effectively exercised. Secondly, human rights, and therefore also the rights of authors as referred to in the documents cited above, essentially belong to every human being, so it is very problematic to assign categories of rights to entities other than individuals (legal person, collective) and are permanently linked to the existence of their subject, namely the life of the creator. However, due to the possibility of its transfer, copyright does not have to be related to the author, what is more – in principle, it is transferred for execution to collective entities (collective management organisations) and legal persons that deal with its exploitation. Finally, the foundation for the rights of authors, understood as human rights, is the author's association with the work and the protection of his or her rights and interests in maintaining this link. At present, copyright is reduced in practice to the benefits gained from a work, or rather its ways of exploitation.[5] The rights to protect the moral and material benefits referred to in the Covenant should therefore be understood more broadly and quite differently from the order of copyright protection.

[5] These differences were underlined in General Comment no. 17 (2005): "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author" (article 15, paragraph 1 (c), of the Covenant), GE.06 40060 (E) 020206, Committee On Economic, Social And Cultural Rights, 35th Session, Geneva, 7–25th November 2005, http://www.refworld.org/pdfid/474d35ca2.pdf [accessed: 24.10.2017].

However, this position provokes at least two considerations. Firstly, the question arises of the relationship between copyright and the rights of authors referred to in the Covenant. But the second question is even more difficult and its answer has serious consequences for the right to culture at issue. If we assume that copyright comes from a completely different legal regime than human rights, protecting interests and establishing relations of a legal and private nature, the fundamental issue arises – what the share of copyright is, developed regardless of the human rights order in exercising the right to participate in cultural life and whether there is an inherent conflict between the order of copyright and the right to culture, or whether there is a partial symbiosis. Setting this dilemma is important not only because of purely academic curiosity or due to an attempt to categorize concepts and structures – it is relevant for the practical definition of mutual relations and borders, as well as having a significant impact on the scope and content of the right to participate in cultural life. The answer to this question is not at all simple, because copyright law – similarly as the right to culture – is in fact a complex of institutions and at least several threads should be examined here.

The first question was answered extensively by L. Shaver,[6] who pointed out that at the time of signing the Universal Declaration, the right to participate in cultural life and the right of access to education placed within a single article, together with the declaration on the protection of the rights of authors, did not remain in such a sharp conflict as is the case at present. Seventy years ago, intellectual property rights and, in particular, copyright were at a completely different stage of development than they are today. The late 1940s, when the Universal Declaration was drawn up, favoured an atmosphere of wide access to the goods of artistic culture, the idea of universal enlightenment. The UNESCO Constitution of 1945 declared "the wide diffusion of culture", which is a "sacred duty of all nations."[7] Since the Universal Declaration was created,

[6] L. Shaver, *The right to science and culture*, 2010 (1) Wisconsin Law Review 121 (2011), p. 124.

[7] Lea Shaver cites that during elaboration of Universal Declaration, delegates of the U.S. and United Kingdom expressed their skepticism in including rights

the protection of authors' rights has increased radically[8] and seems to have somewhat changed the nature of those rights. Modern standards for the protection of intellectual property, such as those set by the TRIPS agreement,[9] mean, as Shaver demonstrates, a "maximalistic approach";[10] they set a minimum level of protection due, but first of all, this level is already quite significantly pushed forward, and secondly, they leave it to the States to set upper limits and protection standards.

The world of intellectual property has been dominated not only by high standards, but also by draconian sanctions and multitude and diversity of regulations concerning the protection of this sphere, especially copyright. As a result, it is becoming increasingly difficult to talk about the complementarity or symbiosis of copyright and other rights related to the participation in cultural life, as is stated by Shaver, they remain in a systemic disagreement.[11] Since the right to participate in culture means in the individual dimension the right of access to knowledge, to fine arts and literature without restrictions, it must therefore remain with a certain conflict with copyright – but does it mean also the rights of authors referred to in Articles 15 and 27; the inevitable side effect of the development of the sphere of intellectual property protection is to limit the availability and free use of cultural assets.

The General Comment to Article 15 of the Covenant discusses in a fairly general way the issue of the reciprocal relation between authors' rights and copyright vis-à-vis the right to culture. The General Comment no. 17 indicates that a provision guaranteeing the rights of authors (Article 15 para. 1 c) means that States Parties have an obligation to protect authors from unauthorised use of works that become easily accessible and are reproduced by means of communication and technology, i.a. by setting up collective management systems or creating notification systems for the use of their works, and must

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of creators to human rights order, as belonging strictly to copyright system, *ibidem*, pp. 147–148.

8 *Ibidem,* p. 132.

9 Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.

10 L. Shaver, *op.cit.*, p. 133.

11 *Ibidem*, p. 124.

provide for a system of appropriate compensation for damages related to the illegal use of works.[12] States are obliged to implement these rights progressively and to ban regression (sections 26 and 27). The right to protect the interests of creators is to be exercised by meeting State obligations at three levels. The first is a level of respect, which primarily implies an obligation on the part of the State to refrain from interference directly or indirectly in this area. The second level of implementation relates to the protection, namely the taking of measures by the state to prevent third parties from interfering in the moral and economic interests of authors. To this end, States must protect against the unauthorised use of works that are now easily accessible through modern technologies, and must maintain a system of collective management of copyright, or adopt legislative measures that create appropriate instruments requiring users to communicate the use of their works and ensure adequate compensation for it. Finally, the duty of compliance implies the responsibility of the State to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures in order to implement Article 15 (1c) and provide adequate compensation for the breach (section 34). The Commentary also requires States Parties to guarantee authors the right to judicial and administrative remedies for the protection of their rights and to facilitate the exercise of authors' rights by, i.a., facilitating the creation of associations of artists and creators, as well as the obligation to consult with their communities the decisions on issues relevant to them.

However, the Committee notes in its Commentary no. 17 that the scope of the right to benefit from the protection of moral and material output of creative work does not necessarily correspond to intellectual property rights under national and international law. It also

[12] States Parties must prevent the unauthorized use of scientific, literary and artistic productions that are easily accessible or reproducible through modern communication and reproduction technologies, e.g. by establishing systems of collective administration of authors' rights or by adopting legislation requiring users to inform authors of any use made of their productions and to remunerate them adequately. States Parties must ensure that third parties adequately compensate authors for any unreasonable prejudice suffered as a consequence of the unauthorized use of their productions.

stresses that these rights must not be equal. It also notes (section 35) the tension and the need for balance between the obligations under Article 15.1c and other guaranteed rights – in particular, it argues that consideration should be given to the public interest in broad access to works. Conversely, the General Comment no. 21 of the Committee on Human Rights,[13] although it stresses that culture is an interactive process, and participation in cultural life means both access and active participation, and therefore it recognises the problem of relations between the rights of authors, as well as copyright and the right of access, in no way does it determine the internal relations of these spheres of protection and values within the framework of the Covenant.[14] The connotation of authors' rights, as well as copyright as belonging to the human rights system, is still rather weak and raises many doubts.[15]

Both the context and formulation of authors' rights in Article 27 of the Declaration and Article 15 (1c) of the Covenant points to their autonomous nature in relation to copyright. The inclusion of a guarantee of authors' rights in the Declaration and the Covenant draws attention, first of all, to the close connection between artistic and scientific creation and the sphere of protection of the rights of its creators, but secondly, it requires that the rights related to creation be recognised in a broad context of the right to culture.[16] The wording of Article 27 (2) of the Declaration, followed by Article 15 (1c), is included in editorial units concerning and regulating the right to participate in culture. Creators' rights and the rights of authors cannot therefore

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[13] General Comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), The Committee on Economic, Social and Cultural Rights at the 43rd Session, E/C.12/GC/21, 21st December 2009.

[14] L.R. Helfer, G.W. Austin, *Human Rights and Intellectual Property. Mapping the Global Interface,* Cambridge University Press, Cambridge: 2011, p. 241.

[15] More: A.R. Chapman, *Approaching intellectual property as a human right (obligations related to Article 15 (1)(c))*, 35(3) Copyright Bulletin 4 (2001), pp. 10–13.

[16] *Ibidem*, p. 233, also: D. Bécourt, *International Association of Copyright Lawyers (IACL): copyright and human rights*, 32(3) Copyright Bulletin 13 (1998), pp. 13–14, available at: http://unesdoc.unesco.org/images/0011/001146/114665eb.pdf#114680 [accessed: 13.10.2017].

be considered in the national order, especially private law, intellectual property rights without considering this context. The standard on the protection of moral and material interests of creators is closely linked to the rest of this article and should be understood as a condition for the exercise of cultural freedom and participation in culture.

4.2. Copyright versus freedom of expression

It is even more difficult to determine the relationship between copyright and freedom of expression. In literature and case law there are many voices indicating their necessary relationship and even symbiosis,[17] often using the famous metaphor of copyright as an "engine" for freedom of expression used by the U.S. Supreme Court Judge O'Connor.[18] The purpose of copyright is, in accordance with this line of reasoning, to promote and support creation and free speech.[19] Both values and both rights have therefore the same purpose and they protect similar values, at the same time co-creating a market of ideas and expressions, thus creating an ideal environment for the development of diverse creativity, expression and their exchange.[20] Meanwhile, however, even supporters of such an approach to the relationship between copyright and freedom of expression point out that the protection of authors' rights represents a significant breakthrough in the protection of free speech – particularly in a system of U.S. law, where the power of the First Amendment means that this latter value is extremely strongly protected. Copyright therefore allows interference in the sphere of freedom of expression, and the boundary of this' immunization' of infringements of the sphere of free speech

[17] J.E. Cohen, *Information rights and intellectual freedom*, in: A. Vedder (ed.), *Ethics and the Internet*, Intersentia, Antwerp-Groningen-Oxford: 2001, p. 20.

[18] *Harper & Row Publishers vs. Nation Enterprises*, 471 US 539.

[19] *Eldred vs. Ashcroft*, 537 US 186.

[20] M.D. Birnhack, *The copyright law and free speech affair*, Tel Aviv University Law Faculty Papers, vol. 57, 2008, pp. 266–272; N.W. Netanel, *Copyright and a democratic civil society*, 106(2) The Yale Law Journal 283 (1996), pp. 288–289, 347–352; P. Samuelson, *Copyright and freedom of expression in historical Perspective*, 10 Journal of Intellectual Property Law 319 (2003). Broader also: Y. Lee, *op.cit.,* pp. 64–65.

by copyright law is the use of someone else's work in such a precise form that it is protected by copyright.[21]

Numerous authors see a fundamental threat to freedom of expression and the inherent conflict of both values in this monopoly on the use of a work created by copyright. This position was most categorically and vividly expressed, among other things, in the *Ashdown* case, where it was stated: "Copyright is in fact a negative right. The right gives the copyright holder the right to prohibit others from doing what he alone can do. Copyright is therefore contrary to freedom of expression, prohibiting all others from formulating the expression in the form in which it is protected."[22]

From this point of view, copyright is beyond the order determined by the rules that are known from the system of protection of freedom of expression: it may mean a priori limitation of the expression due to its content in those situations in which the utterance uses others' works, it may also force the use of preventive measures, including cautionary judgements, which is also the exception in the case of restrictions on freedom of expression. Finally, the permitted ways of using another person's work, as defined by copyright, assume that the content and form of the work will be examined, including its relation to the original work, which may mean in practice certain forms of discriminating against statements made on the basis of another person's work.[23] Thus, as we can see, the American approach to the relations between the two spheres of protection and of rights allows us to see a clearly outlined conflict of values and rules that are difficult to reconcile.

In European countries, the conflict between copyright and freedom of expression, including artistic expression, has long been ignored

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[21] "Judicial immunization of traditional copyright from First Amendment scrutiny", Helfer, Austin, *op.cit.*, p. 250.

[22] "...copyright is essentially not a positive but a negative right (...). The Act gives the owner of the copyright the right to prevent others from doing that which the Act recognises the owner alone has a right to do. Thus copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright." Y.H. Lee, *op.cit.*, p. 62.

[23] J. Rubenfeld, *The freedom of imagination: copyright's constitutionality*, Faculty Scholarship Series, paper 1556, 112(1) Yale Law Journal 1 (2002), pp. 5–7.

or marginalized in literature.[24] There was relatively little case-law that considered this conflict or the relation between copyright and freedom of expression. There are several reasons for this. One of them is the much less developed doctrine of freedom of expression than in the USA and its less sharp borders. Secondly, copyright also has a slightly different character on the European continent, as the system of droit d' auteur emphasises the author's link with the work, and thus the system of personal rights, which allows for a slightly different balance between the protection of the interests of both parties in the event of conflict. Thirdly, resolving the conflict between copyright and freedom of expression requires courts to enter the horizontal sphere of protection of freedom of expression, and thus consider to what extent private law relations can be determined by the content of rights and freedoms belonging to the human rights system, which is classically designed to protect an individual from the authority of the state.[25] Under the European Convention, intellectual property rights are covered, but under Article 1 of Protocol 1 to the Convention, i.e. as part of the protection of proprietary rights, they are therefore seen primarily in terms of property rights. Such a position was taken by the European Commission for the Protection of Human Rights[26] on patent and copyright matters concerning works of art. The European Court has set out the same position in *Anheuser-Busch vs. Portugal*[27] concerning the trade mark and other strictly copyright cases, in particular *Balan vs. Moldova*[28] in which the Court found that the use of the plaintiff's work (photographs) in identity documents by the State without

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[24] B. Hugenholtz, *Copyright and freedom of expression in Europe*, in: R.C. Dreyfuss, H. First, D.L. Zimmerman (eds.), *Expanding the Boundaries of Intellectual Property, Innovation Policy for the Knowledge Society*, Oxford University Press, Oxford: 2001, p. 343.

[25] Hugenholtz, *op.cit*, pp. 344–345; Y.H. Lee, *op.cit.*, p. 40.

[26] In case *Smith Kline & French Laboratories vs. the Netherlands* regarding patent issues (Commission statement of 4th October 1990, 66 DR 7), as well as – few years later – in cited beneath *France 2 vs. France* case (app. no. 30262/96, Commission statement of 15th January 1997).

[27] *Anheuser-Busch vs. Portugal*, ECHR judgment of 11th October 2005, Grand Chamber judgment of 11th January 2007 (app. no. 73049/01).

[28] *Balan vs. Moldova*, ECHR judgment of 29th January 2008 (app. no. 19247/03).

remuneration for the author constitutes an infringement of Article 1 of Protocol 1.[29] However, the status of copyright shaped in this way, consistent with the canon of classical knowledge and doctrine of highly protected ownership under private law and guaranteed in the system of human rights, is not fully adequate, especially due to the dual nature of these rights, since treating copyright as ownership does not take into account the personal nature of the rights derived from the author's personal relationship with his work, in particular under the droit d'auteur system, including the right to decide on publication, copyright supervision, and the integrity of the work. This position, as it appears, does not fully take into account the specific nature of the author's rights to works, its dual character; the economic nature of copyright, whose protection according to the paradigm of the protection of property rights is fully applicable, while personal rights, which are an expression of a bond with the work, are often considered to be closely related to the author and have a character similar to human rights.[30] Thus, the right to inviolability (integrity) of a work, the right to authorship, fair use and the right to make a work available for the first time are personal rights, and their protection on the grounds of property rights seems far from perfect, if possible at all.

It is also difficult not to see that the nature of the relationship between the subject of copyright and the work itself is not always a simple property-wise relationship. Often, works are composed of many other works of different character (audiovisual works are the simplest example), thus creating a co-ownership and shareholding relationship between the respective co-authors. Moreover, unlike in the case of property rights, rights to works are not always individually enforceable, which is why for many years there have been collective management systems for copyright and, within them, a collective

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[29] See also: C. Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, Edward Elgar Publishing, Cheltenham-Northampton, MA: 2013, p. 88.

[30] In Germany moral copyrights are recognised as protected by art. 1(1) and 2(1) of Basic Law – dignity and right to development, while economic copyrights by art. 14 (1) – right to ownership and hereditary right. See: Hugenholtz, *op.cit.*, p. 347; Y.H. Lee, *op.cit.*, p. 29.

licensing system for certain groups (classes) of authors.[31] Without going into detailed decisions regarding these solutions and collective rights management systems in general – it should be noted however, that copyright relationships are sometimes quite distant from the classical understanding of a simple ownership relationship.

4.3. Freedom of artistic creation with the use of someone else's work. Parody – a case study

Placing copyright in the context of a system of human rights – creators' rights, freedom of expression, access to cultural assets and property rights – is therefore a challenging task. An important reason why this relationship remains unclear and full of white spots in border regions is that copyright is still firmly embedded in national legal orders and that acts of international law set certain universal standards only to a limited extent. Meanwhile, harmonisation and convergence of rules regarding the scope of rights, their content and permitted use that undermine the copyright protection, seem necessary within the digital environment. So far, such efforts have yielded somewhat disappointing results, at least from the perspective of guaranteeing the right to participate in cultural life and its freedom of artistic creation which constitutes its key element. An example is the attempt to consolidate copyright protection issues in European law made in Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive).[32] It was intended to harmonise in a significant way the content of copyright, as well as the rules of permitted

[31] R.T. Hilty, *Individual, multiple and collective ownership – what impact on competition*, in: D. Gervais, *Collective Management of Copyright and Related Rights*, Kluwer Law International, Alphen aan den Rijn: 2006, pp. 264–265 (Max Planck Institute for Intellectual Property and Competition Law Research Paper no. 11–04).

[32] Directive 2001/29/EC of the European Parliament and of the Council of 22nd May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, also known as the Information Society Directive or the InfoSoc Directive.

use in European countries, being one of the pillars of Community law in this field.[33] According to it, Member States give the authors the exclusive right to authorise the temporary or permanent reproduction of their works (for performers – in respect of recording of their performances, for producers of phonograms, for film producers – in respect of works produced by them and for radio and television organisations – in respect of recording of their programmes, respectively). The Directive also introduced the principle that EU States grant authors the exclusive right to authorise any public access to their works, including making them available online (i.e. making their works public in such a way that members of the public have access to them at a time and place of their choice).

The Information Society Directive has extended the catalogue of permitted uses hitherto recognised by international law (Bern Convention), i.e. exclusions from the author's protection and monopoly. Thus, in addition to the classic exclusions made with regard to

[33] These are some other EU acts concerning copyright: 1) Directive 2014/26/EU of the European Parliament and of the Council of 26th February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, 2) Directive 2012/28/EU of the European Parliament and of the Council of 25th October 2012 on certain permitted uses of orphan works, 3) Directive 2009/24/EC of the European Parliament and of the Council of 23rd April 2009 on the legal protection of computer programs, 4) Directive 2006/115/EC of the European Parliament and of the Council of 12th December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 5) Directive 2006/116/EC on the term of protection of copyright and certain related rights (amended by Directive 2011/77/EU of 27th September 2011), 6) Directive of 29th April 2004 on the enforcement of intellectual property rights, 7) Directive of 27th September 2001 on the resale right for the benefit of the author of an original work of art, 8) Directive 96191EC on the legal protection of databases, 9) Council Directive 93/83/EEC of 27th September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 10) Regulation EU no. 386/2012 of the European Parliament and of the Council of 19th April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights.

public interest, in view of the free flow of information, the importance of communicating on current affairs – also via the Internet and other media (Article 5 (2)), as well as exemptions for libraries, museums and educational needs, permitted use under the Directive may refer to a quote used for the purpose of review or criticism and caricature, parody or pastiche (Article 5 (3) d-k). In both categories of these exceptions, the Directive only allows for such permitted use, leaving it to the Member States to decide definitively on their form (Article 5 (3)), stipulating that such exceptions and limitations should be applied only in certain specific cases which do not prejudice the normal exploitation of the work or other protected subject-matter and do not unduly prejudice the legitimate interests of rightholders. In addition to this rule, which covers all cases of envisaged restrictions on copyright monopoly, the Directive also contains clauses concerning individual permitted uses, largely limiting their scope and impact. Also in the case of exceptions which are particularly relevant in the context of the freedom of creative activity, i.e. the right to quote for the purpose of review or criticism, such a restriction has been provided for, but the right to quote in this respect is admissible provided that "the use is done in accordance with honest practices and to the extent justified by a specific purpose" (Article 5 (3)(d)). Such reservations, however, are absent from the right to perform parody and related genres.

Both cases of permitted use mentioned here, i.e. the right to quote and parody (pastiche) are of particular importance for artistic creation, as they constitute the basis for the use of someone else's work for the purpose of self-expression. The quotation refers to the use of a fragment (and sometimes a whole) of the work in extenso in order to establish a particular dialogue with someone else's work, thought or expression contained therein, while the parody is a deliberate imitation of the features of someone else's work, emphasising its certain features in order to create a comic effect or to comment on certain phenomena or events in public life. In principle, parody is the use of someone else's work in order to achieve a humorous effect in statements of a political, social and moral nature, while pastiche imitates certain features of someone else's work in order to highlight, and most often also to ridicule its characteristics – thus it is rather a genre in the field of literary (artistic) games, without serving a satirical

function. All these artistic forms, however, require the use of someone else's work in order to create a new, original one, which is an essential part of artistic creation, and the presence of such borrowings or uses of works is a traditional and classic way of using them in literature, audiovisual and visual arts.

The limits of permitted use of works in the form of parody, pastiche or quote become the subject of many well-publicised decisions and regulations adopted especially in the EU, but although they have been known since ancient times, it is still difficult to determine the limits of permitted use in this respect for the identification of clear rules or demarcation lines. By way of example, discrepancies concerning the right to quote can be pointed out. Quotation, i.e. borrowing a part of a work or a small work in its entirety without the author's consent and without the author's right to remuneration for its use, is until recently the most common form of exploitation of the work within the permitted use. It is therefore not considered to be copyright infringement, although in some countries regulations such exercise of the right to quote must be justified by a specific purpose (informational, educational, scientific). Both legal provisions and practice are, however, far from uniform wording in individual European countries as to the limits and premises of admissibility of quotation. German jurisprudence presents a liberal case law in this respect, e.g. in a judgment of the Federal Constitutional Court (Germania 3)[34] of 29th June 2000, the Court held that, in the context of artistic creation, the freedom to quote works should be greater in order to allow the artist to include protected works in his own works, even if this is not connected with the fulfilment of the condition of 'special purpose' referred to in copyright law,[35] although the quote must

[34] Germania 3 (German Constitutional Court, 29th June 2000), after: C. Geiger, *Copyright's fundamental rights dimension at EU level*, in: E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Edward Elgar Publishing, Cheltenham–Northampton, MA: 2009, pp. 47–48.

[35] Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz): § 51 Zitate: Zulässig ist die Vervielfältigung, Verbreitung und öffentliche Wiedergabe eines veröffentlichten Werkes zum Zweck des Zitats, sofern die Nutzung in ihrem Umfang durch den besonderen Zweck gerechtfertigt ist. Zulässig ist dies insbesondere, wenn 1. einzelne Werke nach der Veröffentlichung in ein

fulfil the condition of being the author's instrument or artistic expression. Only such treatment of the right to quote is consistent with that guaranteed in Art. 5 (3) of the German Basic Law on freedom of art and science.[36] So while the inclusion of a significant portion of a literary work into the defendant's work may have caused some harm to the author of the original work (it was a fragment of Bertolt Brecht's play), the principle of proportionality demands respect for the artist's right to include quotations as prevailing. As we can see, the German Constitutional Court, in the process of balancing values and goods, granted the freedom of art and artistic expression the primacy while defining the boundaries of expression containing a quotation.[37]

French case law, on the other hand, provides examples[38] of a regulatory approach to the right to quote – relevant evidence can be found in the very restrictive approach to television broadcasts, which include presenting visual works of art. The judgment of the Parisian court concerning the broadcasting of a television programme by France 2 (Antenne 2) on the opening of the Théâtre des Champs-Elysées in Paris could serve as an example here. The footage featured Edouard Vuillard's frescos for 45 seconds. The collective rights management organisation, which included the protection of author's rights (SPADEM), brought an action against the television station. Initially, the station was victorious, but in the second instance the court found copyright infringement.[39] The station complained to the ECHR, but according to Committee decision (*France 2 vs. France*)[40] the complaint was declared inadmissible, and the Committee confirmed the right

selbständiges wissenschaftliches Werk zur Erläuterung des Inhalts aufgenommen werden, 2. Stellen eines Werkes nach der Veröffentlichung in einem selbständigen Sprachwerk angeführt werden, 3. einzelne Stellen eines erschienenen Werkes der Musik in einem selbständigen Werk der Musik angeführt werden.

36 C. Geiger, *op.cit.*, p. 48.

37 About other earlier decisions, see: C.B. Graber, C*opyright and access – a human rights perspective*, in: C.B. Graber, C. Govoni, M. Girsberger, M. Nenova (eds.), *Digital Rights Management – The End of Collecting Societies?*, Stämpfli Publishers, Bern: 2005, pp. 20–22.

38 Y.H. Lee*, op.cit.*, pp. 30–31, 56.

39 Paris Court of Grand Instance, 23rd February 1999, after: Y.H. Lee, *op.cit.*, pp. 55–56.

40 App. no. 30262/96, Commission statement of 15th January 1997.

of the State to set a limit on freedom of expression in this respect. However, at the same time, a different ruling was issued by the Paris court in a case in which the television station was sued for broadcasting a two-minute film about the works of Maurice Utrillo. The owner of the rights to the displayed works complained about copyright infringement. The television station defended the right to quote, protected by Article L-122.5 of the French Intellectual Property Code and the right to obtain and distribute information protected by Article 10 of the European Convention on Human Rights. The Supreme Court in Paris shared the view of the station that a strict interpretation of copyright law restricting the right to quote constitutes a violation of Article 10 of the Convention, and the broadcasting the coverage from the opening of a museum containing photographs of images thus served the fulfilment of the right to information and the public interest. However, as it can be seen from these decisions, the question of admissibility and scope of quotation, even in information activities, raises considerable doubts under national law, and the Directive leaves this issue to the discretion of the Member States.

It is also difficult to speak of an established European standard when speaking about the right to parody others' works. The parody is, as has been mentioned, a distinctive type of work that cannot be created and have artistic expression without the original work. However, it is not a typical dependent work, it has a completely autonomous existence and sense as compared to the parodied piece. Nevertheless, it may – and it often is the parody (pastiche) creator's intention – violate the integrity of the original work, violate the artist's relationship with the work and his control over its shape,[41] i.e. immanently encroach upon the author's personal rights. At the same time, however, it creates a new work that is also protected and therefore deserves separate protection and recognition of its use as justified. The issue of the recognition of parody as a permitted use

[41] Y.H. Lee, *op.cit.*, p. 116; M. Spence, *Intellectual property and the problem of parody*, 114 Law Quarterly Review 594 (1998), pp. 597–598, 612–613; R. Deazley, *Copyright and parody. Taking backwards the goers review*, 73 The Modern Law Review 785 (2010), p. 798; R.A. Posner, *When is parody fair use*?, 21 Journal of Legal Studies 67 (2002), p. 71.

of someone else's work has, however, been the subject of much controversy in national jurisprudence and regulations. The Strasbourg Tribunal has issued several judgements on the admissibility of parody,[42] setting limits on the freedom of artistic expression in specific cases, acknowledging the broad limits of satirical expression, justified by this particular artistic form and giving artists (drawers, actors) greater freedom of critical and mocking expression. The ECHR rulings on the extent of interference caused by the need to protect copyright have so far been few and rather cautious, leaving the Court with a wide margin of appreciation for the need to restrict national law. However, freedom of satirical expression is not absolute in the case law of the ECHR; in *M'Bala M'Bala vs. France*[43] the Court found that these boundaries were exceeded and State's interference in this area was justified due to the anti-Semitic tone of expression. However, the Court in Strasbourg has never yet commented on the horizontal relationship between the author of the parody and the creator of the original work. Other European countries' legislation and jurisprudence are dominated by the tendency that parody falls within the permitted use[44] – under certain conditions, though. Such criteria for admissibility of the parody of someone else's work have been developed, among others, in German jurisprudence.[45] They require a parody to possess the features of a new work

[42] ECHR judgment in the case of *Vereinigung Bildender Künstler vs. Austria* (25th January 2007, app. no. 68354/01), *Alves da Silva vs. Portugal* (20th October 2009, app. no. 41665/07), *Bohlen vs. Germany* (19th February 2015, app. no. 53495/09), *Kuliś Rózycki vs. Poland* (6th October 2009, app. no. 27209/03). Also: *Palomo Sanchez and Others vs. Spain* (judgment of 12th September 2011, app. nos. 28995/06, 28957/06, 28959/06, 28964/06), *M'Bala M'Bala vs. France* (10th November 2015, app. no. 25239/13).

[43] *M'Bala M'Bala vs. France*, *supra* note 42.

[44] For example U.S. copyright does not settle parody as statutory free use exception, there is only judicial protection of parody – as in Supreme Court judgment *Campbell vs. Acuff-Rose Music* (510 US 569).

[45] The *Alcolix* case, German Federal Supreme Court, 11th March 1993, *Geis Eagle* case, Federal Supreme Court, 20th March 2003 (the case concerns parody of German emblem as illustration of an article about tax abuses; German court ruled it was permitted as free use of a work (141 German Copyright Act, s 24(1), after: Y.H. Lee, *op.cit.*, p. 50).

and demonstrate a fundamental difference between the work from which it draws and the parody itself, which is defined as a requirement of an internal distance.[46] This criterion, however, leaves a considerable margin of appreciation, especially in aesthetic terms, as well as in terms of the content of both works. In European legislation, the relationship concerning authors' rights in relation to parody was to be resolved by the Information Society Directive,[47] which recognised the parody, caricature and pastiche as cases of permitted use of a work. Indeed, the implementation of the Directive has led to the fact that in some EU countries the parody has been recognised by law as a new instance of permitted use.[48] However, it soon became apparent that the question of the admissibility of parody under copyright protection was not at all settled, as evidenced by the *Deckmyn vs. Vandersteen* case, in which the EU Court of Justice gave its ruling. This case concerned the parody of drawing from the famous 1960's comic (Spike and Suzy) – the parody was used for political purposes and it conveyed a strong xenophobic message. The original rightholder stated that the drawing exceeded the boundaries of parody and permitted use, as confirmed by the Belgian courts. However, a doubt arose as to how the parody clause of the Directive should be understood (Article 5 (3)(k)). The Court of Justice of the EU ruled[49] that, although the concept of parody under the Directive is an autonomous concept of European law, its definition and scope cannot therefore be entirely covered by national law, there is a wide margin of discretion on the part of States. At the same time, the Court of Justice of the EU has also established a principle – that if the parody contains discriminatory, xenophobic content, it is incompatible with the principle of non-discrimination, which is one of the overriding

46 "Sufficient 'inner distance' requirement", see also: K.H. Pilny, *Germany: copyright: protection of comic strips under copyright law – "Alcolix"/"Asterix" – parodies*, 17(7) European Intellectual Property Review D198 (1995); Y.H. Lee, *op.cit.*, p. 50.

47 Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

48 UK Copyright, Designs and Patents Act, 1988, s 30A(2) since 1st October 2014: "Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work."

49 CJEU judgment of 3rd September 2014, C-201/13.

principles of EU law.[50] Application of the exception provided for parody within the meaning of Article 5 (3)(k) in the dispute situation of the Directive 2001/29 should strike the right balance between the interests and rights of rightholders on the one hand and those of users of the protected work on the other. In such a situation, rightholders have a legitimate interest in ensuring that the protected work is not associated with such a message.

This ruling consequently means that the recognition of parody as a possible exception to the protection of copyright in respect of the original work requires not only an examination of its form, but also of its content. First and foremost, however, such a study goes beyond the assessment of compliance with the preconditions of parody and aesthetic judgment. Furthermore, it also means applying the criteria from a completely different order in resolving a horizontal dispute (between the rightholder and the author of the parody) concerning the scope of rights, in this case the control of the content of the communication with regard to discriminatory content. It is hard not to recognise that this is a serious step backwards in establishing the limits of artistic freedom of expression in this aspect. The CJEU ruling raises considerable doubt from the point of view of the doctrine of freedom of expression due to the application of criteria beyond the formal and aesthetic prerequisites of parody. It exposes the authors of such works to the risk of civil (and also criminal) sanctions connected not so much with the violation of the limits of freedom of expression, as with the infringement of copyright, and yet the parody and related forms of creative work (satire, caricature) are intrinsically more harsh and offensive than the usual artistic expression.

The two above-mentioned examples indicate that there are many different and even confusing trails in deciding on the limits of freedom of artistic creation in disputes caused by infringement of copyright and the horizontal effect, and it is difficult to identify a developed standard or even the tendency to define boundaries. Deficit is all

[50] The principle is incorporated i.a. in Council Directive 2000/43/WE of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and in art. 21 sec. 1 of Charter of Fundamental Rights.

the more striking because in this respect, an aesthetic criterion often appears, as the bodies applying the law have to issue judgements on art (as is the case in the assessment of the admissibility of quotations and parody), which at the very beginning introduces a considerable margin of recognition and uncertainty, since these are assessments which usually go beyond the competences of the court and escape strict legal regulations. The introduction of a certain standard of rights and freedoms of use for the creation of new works as part of the right to culture could introduce a unified presumption of the admissibility of such use of others' works, and on the part of public authorities, in particular courts, it could provide an instrument for the exercise of the right's protective function – also in horizontal relations.

4.4. Challenges faced by copyright in relation to the digitalisation of cultural content resources

Concerns about establishing a standard for the use of others' works in order to create one's own work belong to the classic ones, which have been known since the beginning of copyright. However, reality seems to set new trends in the admissibility of processing digitalised content and using excerpts from others' works. The most serious controversies concerning the shape and scope of copyright protected on the basis of national and international legal systems provoke the appearance of phenomena accompanying the revolutionary increase of accessibility to cultural assets, connected mainly with the digitalization of cultural content and creation of a digital environment.[51] In virtual world, access to culture means also access to new content and new functions, accompanied by rapid development and expansion of copyright, not necessarily related to the author himself.[52] A dramatic increase

[51] M.D. Birnhack, *The Copyright Law*..., pp. 234–235, N. Elkin-Koren, *Cyberlaw and social change*, 14 Cardozo Arts & Entertainment Law Journal 215 (1996), pp. 269–274; D. Henningsson, *Copyright and Freedom of Expression in Sweden and the European Union. The Conflict Between Two Fundamental Rights in the Information Society*, Lund University, 2012, pp. 23–24.

[52] Y.H. Lee, *op.cit.*, p. 32; L.R. Helfer, *The new innovation frontier? Intellectual property and the European Court of Human Rights*, 49(1) Harvard International

in the availability of cultural assets creates new phenomena and doubts about the effective scope of copyright. Sharing cultural events and participation in them via the Internet, as well as changing the form of communication from the broadcaster-receiver model to the model of mutual cooperation and interaction, introduce a change into the paradigm of cultural relations. New tools for the transmission of cultural content mean that anyone who has access to them can get acquainted with the incredibly rich offer of cultural content at a convenient time and place, the offer incomparably wider than before.[53] It therefore changes the nature and content of the right of access to cultural life. New forms of communication and, at the same time, an incalculable increase in the exposition of cultural goods make the barriers to access to culture and certain forms of artistic creation more and more visible, the importance of copyright (IP) increases[54] and the conflict between freedom of access and copyright is becoming more and more tangible.

The digital revolution has also resulted in a change in the model of creating and presenting works of art. New media require considerable investment and a complex distribution and management model – market forces are starting to enter the relationship between the audience and the creator with much more energy.[55] The author (or his or her successor) rarely remains the rightholder of the copyright – usually it is a legal person, most often with significant potential and market share for cultural goods and services. This makes the conflict between copyright and freedom of creation and access to it even more serious.

Conflicts are possible at the meeting point between copyright and freedom of creation – i.e. the rights of other authors to use works, as

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Law Journal 1 (2008), pp. 4–5; M.D. Birnhack, *op.cit.*, pp. 233–234; L.R. Patterson, *Free speech, copyright and fair use*, 40 Vanderbilt Law Review 1 (1987), pp. 11–12.

53 B. Ivey, *op.cit.*, pp. 8–9.

54 Y.H. Lee, *op.cit.*, p. 32; Helfer, *The new innovation frontier...*, pp. 4–5; M.D. Birnhack, *The copyright law and free speech affair: making-up and breaking-up*, 43(2) IDEA: Journal of Law & Technology 233 (2003), pp. 233, 234; L.R. Patterson, *Free speech, copyright and fair use*, 40 Vanderbilt Law Review 1 (1987), pp. 11–12.

55 B. Ivey, *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights*, University of California Press, Berkley: 2008, p. 9.

well as in the relationship between the rightholder and the recipients. However, the division between these two groups entitled in the sphere of the right to culture is not strict – the universality of access to culture and democratisation of artistic culture make the recipient increasingly often become a creator, at least to some extent.

The nature of access to digitalised artistic creation is also changing, as digital access makes it extremely easy to duplicate and further disseminate cultural content (file-sharing). The galaxy of cultural content created as user-generated content is also a completely new phenomenon. Yet another phenomenon from the so-called creative synthesis sphere is sampling, i.e. using fragments of a work published earlier in one's own work (musical recordings). These and other phenomena cause a change of the passive paradigm of the recipient (consumer) of cultural goods and services into an active participant of cultural life, and the audience of artistic culture becomes much wider than before.[56] The issue of restricting the freedom of creation and access to cultural content through the rigid corset of copyright is inherently connected with this problem. The mass use and processing of cultural content thanks to that form, which allows for ease of operation and accessibility – is not subject to a rather restrictive protection regime.

Revolutionary changes in access to cultural goods and resources made possible due to the digitalisation of collections and contemporary cultural life, cause that the tension between the copyright holders and the right of access to culture becomes more and more evident,

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[56] Y.H. Lee, *op.cit.*, p. 118 and there cited: M.W.S. Wong, "*Transformative*" *user-generated content in copyright law: infringing derivative works or fair use?*, 11(4) Vanderbilt Journal of Entertainment & Technology Law 1075 (2009), pp. 1077–1078; S. Hetcher, *The kids are alright: applying a fault liability standard to amateur digital remix*, 62 Florida Law Review 1275 (2010), p. 1275; A.S. Long, *Mashed up videos and broken down copyright: changing copyright to promote the First Amendment values of transformative video*, 60 Oklahoma Law Review 317 (2007), p. 352; D.M. Morrison, *Bridgeport redux: digital sampling and audience recoding*, 19 Fordham Intellectual Property, Media & Entertainment Law Journal 75 (2008), p. 82; S.D. Jamar, *Crafting copyright law to encourage and protect user-generated content in the internet social networking context*, 19 Widener Law Journal 843 (2010), pp. 843–844.

both within the framework of repressive protection (criminal sanctions for copyright infringement) and preventive protection, e.g. by applying technical measures to prevent unauthorised access to cultural content.[57]

The problem of access to knowledge and culture in the context of limitations related to copyright protection is being increasingly highlighted in literature; authors draw attention to the potentially hampering or freezing effect of curbing something that should be in the public domain and help co-create the common good[58] as well as blocking the development of creativity.[59]

The question therefore arises as to whether the current model of copyright protection, shaped prior to the emergence of a digital environment, fits in with such an image of free culture, and in particular whether the restriction on the right to use works already published online fulfils the conditions for restrictions on freedom of expression and free participation in cultural life.

This matter was considered during two cases closed with ECHR rulings. In the first case (*Ashby McDonald and Others vs. France*[60]), the complainant – including the author of the work and the owners of an Internet portal – were convicted of posting the photos of one of them on the website without the consent of the fashion house for which the photographer was working, thus infringing copyright acquired by the fashion house.[61] The ECHR found that the limitation is legitimate and justified by the objective of protecting the rights of third parties, and that there is no public interest in this case, which

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57 L. Shaver, C. Sganga, *The right to take part in cultural life: on copyright and human rights*, 27 Wisconsin International Law Review 637 (2010), pp. 656–657.

58 A. Boyle, *The Public Domain: Enclosing the Commons of the Mind*, Yale University Press, New Haven-London: 2008, http://thepublicdomain.org/thepublicdomain1.pdf, pp. 10–16 [accessed: 10.11.2017].

59 L. Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2003), available at: http://www.free-culture.cc/. Also: A. Kapczynski, *The access to knowledge mobilization and the new politics of intellectual property*, 117 Yale Law Journal 804 (2008), pp. 821–826.

60 ECHR 10th January 2013, case of *Ashby Donald and Others vs. France*, app. no. 36769/08.

61 See: D. Voorhoof and I. Høedt-Rasmussen, *Copyright vs. Freedom of Expression Judgment*, ECHR Blog: http://echrblog.blogspot.com/2013/01/copyright-vs-freedom-of-expression.html, 22nd January 2013 [accessed: 13.10.2017].

would advocate narrowing of the State's margin of appreciation in regulating the limits of freedom of expression and balancing the interests expressed by the rights of both parties to the conflict – that is, freedom of expression and property rights (owned by the fashion house) protected under Article 4 of Protocol. In the circumstances of this case, the perspective of freedom of expression was quite obvious, as the case was a matter of restricting the freedom to communicate one's own work, the effect of one's own creativity. However, although the Court recognised this aspect in its judgment, no grounds were found for concluding that in terms of the three-step proportionality test there was an unjustified breach of the right guaranteed by the Convention.

In the second case concerning file-sharing – *Neij and Sunde vs. Sweden*,[62] the Court also failed to find infringement of Article 10 of the Convention in actions taken by the Swedish courts, which have convicted the operators of The Pirate Bay website, offering illegal access to content protected by copyright. In that judgment, the Court balanced the two interests – of the applicants, to facilitate the exchange of relevant information and, on the other hand, of copyright holders, and considered that there were serious grounds for restricting the applicants' right to freedom of expression, through the fulfilment of the requirement of 'necessity in a democratic society' as an answer to an urgent social need.

Both decisions of the Strasbourg Court lead to one basic objection – both judgements do not reflect on how the perpetrators (the author and the operators of webportals) have actually infringed the interests of the rightholders. Assuming that sharing files with copyrighted content automatically infringes authors' rights is quite a priori and often groundless. However, file-sharing certainly broadens the access to culture,[63] artistic expression, which is rarely contrary to the interests of authors. Dissemination and sharing of content on the Internet is becoming the 'engine of free speech', as U.S. Supreme Court stated.[64]

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62 ECHR judgment of 19th February 2013, app. no. 40397/12.

63 J. Jones, *Internet pirates walk the plank with Article 10 kept at bay: Neij and Sunde Kolmisoppi vs. Sweden*, 35(11) European Intellectual Property Review 695 (2013), p. 699.

64 *US SC Harper & Row, Publishers Inc. vs. Nation Enters* 471, 539, 558 (1985), after: E. Bonadio, *File sharing, copyright and freedom of expression*, 33(10) European Intellectual Property Review 2 (2011), p. 620.

In addition, penalties and very high damages awarded to copyright managers are a drastic measure of protection against such infringements[65] – other, less stringent forms of protection against such infringements can be easily designed and applied.

Consequently, the decisions made so far by Strasbourg Court remain in the traditional paradigm of a 'wide margin of appreciation', thus leaving this type of copyright legislation to the discretion of a State Party and, at the same time, to a rather superficial examination of the 'necessity in a democratic society' of the restrictions introduced, leaving the question of accessibility to cultural goods out of focus as well as considering the reasons for which the above-mentioned copyright infringements took place. In addition, these rulings also lose sight of the interests of the recipients of content whose protection is in dispute, but also the actual interests of authors. This issue is particularly evident in the circumstances of the Ashby case, where the European Court held that the action of the authorities to impose very high sanctions on the author for infringement of the rights of the entity to which he has acquired copyright in the works was justified. The infringement, in turn, consisted in publishing photographs of his own authorship. In the second case, *Neji vs. Sweden*, the actual damage to the economic and moral rights of authors of the exchanged works has also in fact been ignored by both the national courts and the Strasbourg Court.

These reasons, as well as the universality of the activities mentioned above, raise the question of whether this type of behaviour can be regarded as legitimate and acceptable under copyright law. While treating the processing of digitalised cultural content and the use of fragments to create a new piece of art under the existing model of copyright law, we should consider these phenomena as: user-generated content and the use of a quote (sampling), respectively, which requires the author's consent, unless it is deemed acceptable under permitted use. In turn, file-sharing comes closest to making a work available (disseminate) without the author's knowledge and consent (or more broadly, the rightholder's consent), which is inconsistent with the basic

[65] R. Danay, *Copyright vs. free expression: the case of peer-to-peer file sharing of music in the United Kingdom*, 8 Yale Journal of Technology (2006), pp. 60–61.

principle adopted by the Berne Convention.[66] These problems with creating a new environment in which creators' and users' rights operate cause some proposals to emerge and attempts to regulate these new developments and avoid this conflict between the freedom of creation, the freedom of digital and online access and the rights of copyright holders. They are beginning to be perceived in contemporary copyright law, although in a rather fragmentary and inconsistent manner.

The first group of such proposals to introduce new copyright practices into the legal order includes the creation of a new type of permitted use from these behaviours, or the creation of a new exception to copyright protection (depending on the adopted concept of rights).[67] Such a solution was adopted in the Canadian legal order regarding user-generated content, for instance.[68] According to Canadian copyright law, copying or using a work currently does not constitute copyright infringement; if the work is already made available to the public and if it is necessary for the creation of a new work and the use of another person's work is not performed for commercial purposes, and if the authorship of the original work is clearly indicated, the user may assume in the circumstances of his or her activity that the copyright is not materially infringed and the use or distribution does not prejudice the interests of the subject of the rights to the exploited work. However, the law of European countries does not allow 'user-generated content' as an acceptable exception or authorised use.[69]

Sampling is also beginning to be recognised and included in some jurisdictions in the scope of permitted use – this is what happened

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[66] More about limits of creation new works based on other works, see: J. Rubenfeld, *the freedom of imagination: copyright's constitutionality*, Faculty Scholarship Series, paper 1556, 112(1) Yale Law Journal 1 (2002).

[67] R. Tushnet, *Legal fictions: copyright, fan fiction, and a new common law,* 17 Loyola of Los Angeles Entertainment Law Journal 651 (1997), p. 651; M. Katz, *Recycling copyright: Survival and growth in the remix age*, 13 Intellectual Property Law Bulletin (2008), p. 53. See also: Y.H. Lee, *op.cit.*

[68] Canadian Copyright Act, s 29.21(1), after: Y.H. Lee, *op.cit.*, p. 131.

[69] Y.H. Lee, *op.cit.*, p. 122; L. Lessig, *Free(ing) culture for remix*, 2004(4) Utah Law Review 961 (2004), p. 965. For the argument that Lessig has put his case too high in making such a claim, see: Hetcher, *The Kids Are Alright*, pp. 1280–1283, 1317–1323.

in Great Britain – sampling has become one of the new exceptions to the principle of the author's exclusive right to distribute the work. In the United States, however, case law has led to the development of a rule whereby sampling is not allowed and is treated as copyright infringement.[70]

Another form of introducing new activities into the legal order and reconciling them with the existing rules of copyright law is the concept, formulated in literature and sometimes applied in practice, of protecting users by *de minimis* defence, i.e. by demonstrating that the infringement thus committed does not constitute a threat or prejudice to the rights of the author (rightholder) to a significant extent, which would justify taking protective measures.[71]

The first solution, i.e. to seek to protect the distribution or use of digitalised works through the development of a new case of authorised use, is based on the need to protect other interests – in particular freedom of access to content which deserve protection for certain reasons. In the copyright system, the cases of permitted use are always exhaustively calculated, but they must fulfil a number of common premises, formulated in the doctrine;[72] all of them concern the relation between the conduct of the "user" of a work and the interests of the author of the original work and the scope

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[70] Significant two U.S. court rulings: *Grand Upright Music vs. Warner Brothers Records*, in which the New York Court ruled on use by an artist three words and a scrap of song: 'Alone Again (Naturally)' by Gilbert O'Sullivan. The court overrode an opinion that rap is specific kind of music which is based of fragments of other pieces of music – in its reason was introduced by quotation „Shall not steal." In second case (*Bridgeport Music vs. Dimension Films*), U.S. Court of Appeals for the Sixth Circuit ruled that sampling is an infringement of copyright, overriding *de minimis* defence and stated: "Get a license or do not sample."

[71] R. Ashtar, *Theft, transformation, and the need of the immaterial. A proposal for a fair use digital sampling regime*, 19 Albany Law Journal of Science & Technology 261 (2009), pp. 287–292; D. Morrison, *Bridgeport redux: digital sampling and audience recoding*, 19 Fordham Intellectual Property, Media & Entertainment Law Journal 75 (2008), pp. 137–141.

[72] So called 'Laddie factors': M. Vitoria et al., *Laddie, Prescott & Vitoria: the Modern Law of Copyright and Designs*, LexisNexis, London: 2011; Y.H. Lee, *op.cit.*, p. 90.

of his or her rights. The permitted use must therefore relate to a work already published. It is also necessary to examine what the meaning and extent of the original work is and, finally, whether the use that is made of the work actually competes with the use of the work by the author. The latter premise is the most interesting from the point of view of the right to culture, as it allows – although indirectly – to perceive the interest of the recipient (user) in the process of copyright protection against the used work; to examine the purpose of its action and the actual impact on the detriment in the rights of the author (rightholder). The second route, in turn, uses evidence to demonstrate that the infringement of an author's rights has a negligible impact on the content and scope of his rights and therefore does not deserve to be taken into account in the process of copyright protection.

Referring to the above-mentioned proposals for solving the conflict between new phenomena and ways of using the works, it should be pointed out that both of them – i.e. a formulated *de minimis* defence concept and shaping of a new exception to copyright monopoly in the form of fair use – in fact have the same foundations. In both of these methods of searching for the permitted use of works in virtual environment, to the extent not yet known, there is a motif of investigating whether the infringement may significantly affect the interests of the creator. At the same time, both methods in the process of applying the right have a similar practical dimension – they require the user (the recipient of cultural content) to demonstrate activity under an acceptable exception or a negligible degree of copyright infringement. The burden of proof for these circumstances lies therefore on the recipient – user.

Similar results are also achieved by the third path of seeking a solution to the problem of infringement of copyright by users having access to digitalised content, i.e. defence by justifying an action within the public interest. This category, as a potential instrument for opposing the expansion of intellectual property rights and, as a consequence, threatening to hamper the development of knowledge, was recognised in the position of the High Commissioner for Human Rights in 2001, where it was stated the need for a system of intellectual property protection to be designed so as to balance the public interest in access

to new knowledge and the legitimate interests of authors,[73] as well as in the position of the Committee on Economic, Social and Cultural Rights in 2001[74] and the 2005 UNESCO report.[75]

Seeking individual protection from the accusations of copyright infringement is thus frequently used in case law practice, particularly in Great Britain, but is nevertheless highly controversial and rather limited in scope.[76] In the most famous judgment in this matter – the judgment of the English Court of Appeal in the *Hyde Park Residence Ltd. vs. Yelland*,[77] the court held that defending the infringer by presenting his actions as an act under public interest is fundamentally different from the event of infringement of other rights protected by law and must be used with great caution – even if the act of the offender has resulted in the release of content of great importance to public life. However, in none of such cases did the "public interest" instrument balance the freedom of artistic creation and even more so access to the creative output, as the cases did not concern infringement of copyright to artistic works, but those of an informative nature or protected under industrial property rights. The European Court of Human Rights in the judgments

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[73] Report of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, 10, U.N. Doc. E/CN.4/Sub.2/2001/13 (27th June 2001), http://shr.aaas.org/articlel5/Reference_Materials/ECN.4_Sub.2200112-Add.1_Eng.pdf.

[74] U.N. Committee on Economic, Social & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human rights and intellectual property: Statement by the Committee on Economic Social and Cultural Rights, U.N. Doe. E/C.12/2001/15 (14th December 2001).

[75] UNESCO World Report, Towards Knowledge Societies, 26 (2005), http://unesdoc.unesco.org/images/0014/001418/141843e.pdf. Also: Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, 16–17th July 2009, available at: https://www.aaas.org/sites/default/files/VeniceStatement_July2009.pdf.

[76] It is worth to cite in this context two cases: *Beloff vs. Pressdram Ltd.* (1973), F.S.R. 33, 57 and – after a decade – *Lion Laboratories Ltd. vs. Evans*, in both British courts allow clause of legitimate public interest in similar (but not the same) circumstances as breaching of protected confidentiality. C.L. Saw, *Is there a defence of public interest in the law of copyright in Singapore?*, 2003(2) Singapore Journal of Legal Studies 519 (2003), pp. 519–556. See more: Y.H. Lee, *op.cit.*, p. 197.

[77] [2000] R.P.C. 604.

of *Neji vs. Sweden* and *Ashby vs. Great Britain* also refers indirectly and a contrario to balancing copyright protection with public interest, when it points out that the public interest is not in favour of limiting the wide margin of national discretion in these matters. The Court therefore found no reason to strike a balance between the protection of copyright and freedom of expression under the public interest criterion.[78] This criterion, as a general formula allowing for the protection of the infringer against the accusation of copyright infringement is highly controversial for many reasons, first of all it is a very general and non-statutory formula. With regard to content other than the disclosure of facts and data from public life, which may have an impact on citizens' attitudes and knowledge, it appears to be a much less appropriate instrument. Furthermore, the defence mechanism based on acting in the public interest might mean that any type of work covered by copyright could be treated as a common good, to which everyone may be entitled or at least should have access – so it would be a rather radical instrument and could, as a result, mean that the author would be deprived of any control over the work and the benefits of its use due to the rather vague rationale behind it. Finally, it would be a non-statutory way, and therefore also outside the cases of protection of permitted use, which would essentially mean that such a defence would be undertaken for reasons other than premises of legal, catalogued exceptions established, after all, largely because of the operation and protection of the public interest. Defence through the public interest could thus become an instrument used against authors, allowing the use of works without providing sufficient clarification of reasons and without appropriate compensation for authors.[79]

Thus, although every product of culture that is digitalised is available in a liberal, modern and infinitely diverse world literally at hand

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[78] Y.H. Lee, *op.cit.*, p. 45.

[79] J. Swanson, *Copyright versus the First Amendment: forecasting an end to the storm*, 7 Loyola of Los Angeles Entertainment Law Review 263 (1987), pp. 289–297. However, as it was stressed by Griffiths, such defence could have been used when copyright formulates fair use exemptions too narrowly – Griffiths, *Copyright law and censorship: the impact of the Human Rights Act 1998*, in: E. Barendt, A. Firth et al. (eds.),*Yearbook of Copyright and Media Law*, vol. IV, Oxford University Press, Oxford: 1999, pp. 26–27.

– using it without a proper license is considered a tort. At the same time, the copyright system remains conservative and provides little response to the needs of the market of digitalised cultural content. It is equally pervasive for both authors and viewers of digitalised content that copyright law is still subject to the regulations of national law, and therefore to some vernacularity – it is subject to the rules of the recipient's local environment – which obviously affects both sides of the relationship arising from the reception of cultural content, and also – in particular within the framework of the open market of the European Union countries – it differentiates the situation of recipients and creators in an incomprehensible way.

4.5. EU regulations regarding access to cultural content versus copyright

Attempts to harmonise copyright rules more strictly still remain in a rather conservative paradigm. The Directive 2014/26/EU on collective management of copyright and related rights[80] is a good example of the conservative approach to regulating access to cultural content on the Internet and also an attempt to harmonise the rules of access. This Directive is the result of the recognition of a serious problem in requiring a licence for all the rights to be able to use musical compositions online (in the form of streaming or downloading). Any user who offers access to musical compositions should therefore acquire relevant rights to the works from different rightholders and collective management organisations. This situation was difficult to be made compatible with the reality of a dynamic and fragmented market of online music services and, above all, the fact that it is by its very nature a cross-border market (like all online services). Therefore, the Directive introduces the institution of multi-territorial licences to be managed by collective management organisations, which are obliged under the Directive to be effective in granting protection,

[80] Directive 2014/26/EU of the European Parliament and of the Council of 26th February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

updating data, transparency and representation of other collective organisations in the Member States (Articles 24–30 of the Directive). The introduction of such a mechanism within the European Union may to some extent facilitate obtaining permission for online distribution of music services – but the mechanism remains the same and the rules in place are intact – any release online requires the consent of the relevant entity. In addition, the regulation only deals with music content and files – it therefore regulates the rules of access to cultural content in a fragmented manner.

Efforts to harmonise fees for use and reproduction, including personal use permitted in European countries, have still not been fully successful. In accordance with Directive 2001/29/EU (point 38), Member States should be entitled to take into consideration, for a fair compensation, exception or restriction regarding the right to reproduce for certain types of reproduction of sound, visual and audiovisual material intended for private use. However, as noted in the Directive, the existing discrepancies between these remuneration systems hinder the proper functioning of the internal market, and digital copying in private can be more widespread and become more significant from an economic point of view.

Up to now, the only successful, or at least practised, compromise between free access to digitalised content and the protection of the rights of copyright holders has been the regulation imposing flat-rate charges on digital content media, intended as compensation for copying works within the permitted personal use.[81] For example, Polish copyright law provides for such a fee in Article 20, pursuant to which manufacturers and importers of certain equipment (magnetic tape recorders, video recorders and other similar devices, photocopiers, scanner machines and other similar reprographic, empty media storage) used to record a piece of music or objects of related rights for personal use, are required to pay fees to collective management organisations in the amount of no more than 3% of the sell value of such

[81] On such proposal – N.W. Netanel, *Impose a Noncommercial Use Levy to allow free peer-to-peer file sharing*, 17 Harvard Journal of Law & Technology 1 (2003), p. 6. Available at SSRN: https://ssrn.com/abstract=468180 or http://dx.doi.org/10.2139/ssrn.468180.

devices. Resources from such fees are distributed among authors, performers, phono and video producers, publishers. The above regulation, however, first of all strikes with its anachronism; at present, VCRs have only a minimal significance, and all devices used nowadays to access content protected by copyright (mobile phones, tablets, mobile computers) are not regulated in any way. Secondly, not only the fee but also the mechanism itself seems to be too flat-rate – it is ultimately a matter taken a priori concerning the way in which the amounts obtained from these fees are to be passed on to authors, and the calculation and management of these funds by collective management bodies is completely beyond the control of authors and those paying the amount. In fact, there is no reason to believe that the fee actually compensates the creators themselves for making their works available in digital form.

This leaves access to cultural content covered by protection virtually unchanged, despite a radical shift in circumstances, in the legal status. There is no doubt that the spontaneously and massively developing phenomena of the use of digital cultural content will not be covered by copyright protection using such instruments. Moreover, the key question in this context is whether it is indeed in the interest of authors and performers that access to their online works is so restricted, in a manner that is completely independent of the purpose for which their works are used, and how to separate the legitimate interests of authors and rightholders from the right of access to cultural content.

This issue can be partly explained when analysing another copyright institution, namely the public domain. The public domain encompasses works that are not covered by legal protection, i.e. works that can be used freely,[82] primarily works to which copyright has expired, as well as those that have been excluded from copyright protection.[83] It is a common heritage, something that can be used without infringing copyright or having to comply with any requirements. Digitalised public domain becomes

[82] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Note on the Meanings of the Term "Public Domain" in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, WIPO 2010.

[83] E.g.: official documents texts, simple media information.

a huge cultural resource, thanks to which digital libraries have been created, granting access to works the rights to which have already expired. But the public domain is limited in scope, more precisely, it cannot include works whose authors are not known or whose term of protection has not expired. In the meantime, many works without commercial significance, and therefore without any financial benefits for their creators, cannot be made available or used, despite the possibilities offered by the digitalisation of cultural resources.

In September 2011, thanks to the European Commission, a Memorandum of Understanding was concluded between libraries, authors, publishers and collective copyright management organisations representing their interests regarding the basic principles of digitalisation and public dissemination of works that are not available on the market. According to the agreement, scientific books and journals of no commercial significance are to be made available under licensing agreements for the digitalisation and accessibility of such works (licences for digitalisation are to be granted by a collective management organisation). Copyright in some European countries has already been amended as a result of this agreement – provisions of the copyright law have been introduced in Poland too (Article 35 (10) – 35 (12)), under which works which are unavailable (which include works published in books, newspapers, journals, magazines or in other forms if they are not available to the public for sale) may be reproduced and distributed by archives, educational establishments, colleges, research institutes and cultural institutions under an agreement concluded with a collective management organisation, so that anyone can have access to the works at a selected time and place. The Minister of Culture and Heritage is obliged to prepare a list of such works and make it available in the Public Information Bulletin. The aim of this regulation is to increase accessibility to works that are little-known or forgotten via the Internet and thus de facto enable their dissemination by institutions and organisations involved in the maintenance of cultural and scientific heritage.

Another legislative measure aimed at increasing the accessibility of works is the Orphan Works Directive,[84] which requires States

[84] Directive 2012/28/EU of the European Parliament and of the Council of 25th October 2012 on certain permitted uses of orphan works.

to implement mechanisms to resolve and harmonise issues concerning the status of an orphan work and its consequences in terms of permitted uses of the works (including phonograms) which have been considered orphan works. The Polish copyright law has been amended pursuant to the Directive (Article 35 (5) – 35 (9)), so that it has defined orphan works and authorised cultural and scientific institutions to reproduce orphan works published or, in the absence of publication, broadcast for the first time in the territory of the European Union and make them available to the public in a manner that allows each orphan work to be accessed at the chosen place and time. The use of orphan works is permitted for the purpose of carrying out statutory tasks in the public interest of those entities, and in particular of preserving, renewing and making available for cultural and educational purposes the works in their collections. Entities authorised to share works are obliged to perform searches of each and every one of the right-holders who is entitled to copyright to this work in the country in which the work has been first published or broadcast; they may also order that the diligent search be carried out by a third party, including collective copyright management organisations. According to the Directive, the recognition of a work as orphan work in one country means that it acquires the same status throughout the European Union, and thus each institution of culture, in which a copy of the work can be found, digitalised and made available to the public.

The above examples of EU legislation demonstrate that the existing copyright framework is being supplemented, taking into account the possibility of distributing works previously condemned for oblivion, also because the legal framework is too narrow (orphan works) and the technical capacity is insufficient (unavailable works). The rationale behind liberalising the rules governing these matters is public interest, understood in this context as the legitimate rights of the recipients of cultural content to become acquainted with them through relevant institutions, which are responsible for taking measures to make it available. In this respect, the public interest criterion is therefore not only a normative justification, but also underpins the new responsibilities of the public institutions responsible for maintaining and making cultural and scientific heritage available.

However, far-reaching proposals to widen the limits of artistic creation's freedom at the expense of protecting the ongoing copyright do not bring any results. A rigid scheme of protection is still in place, which prevents content from being made available as long as it is protected by copyright – and one can risk claiming that these works are a major part of the imagined world of contemporary man. Defenders of copyright notice only a dissemination activity that violates the literal content of copyright, completely ignoring the aspect of getting acquainted with art. In this way, two orders seem to be increasingly separated – on the one hand, there are the demands and declarations concerning access to culture in the order of human rights and actions aimed at ensuring this access, especially in the Internet, which has become the memory of the world over the last twenty years and provides more sharing opportunities than ever before. On the other hand, there is a rigid and restrictive system of protecting copyright holders, open to new phenomena in so far as they can be described in the language of new fields of exploitation.

4.6. Liberation of creativity – Creative Commons

Copyright was created to protect the rights to use the fruits of one's own work – and in this original sense it can be considered as fully coherent with the rights of authors referred to in Article 15.1c of the International Covenant on Economic, Social and Cultural Rights. It is difficult to ignore the fact that this ratio norm of copyright in the Court's cited case law has become less important and has succumbed to the primacy of economic interests of entities that have become owners or copyright managers.[85] Copyright, at least in terms of the application and co-application of human and legal norms – and hence the resolution of conflicts between them – should not be interpreted in such a way that the authors' own rights are treated secondarily or even ignored or denied protection. They are also completely omitted from the examples cited, concerning the freedom of artistic expression in the conditions

[85] C. Geiger, E. Izyumenko, *Copyright on the human rights' trial: redefining the boundaries of exclusivity through freedom of expression*, 45(3) International Review of Intellectual Property and Competition Law 316 (2014), pp. 322–323.

of digitalisation, lawmaking and application of legal acts; also the judgments of the ECHR and the CJEU fail to recognise the second aspect of the freedom of artistic creation, which is essential for structuring and exercising the right to participate in cultural life – that is, the freedom of access to cultural content. Although they should be assessed from the point of view of protecting the copyright, users' activities consisting in the exchange of files, the processing of cultural content online and the use thereof, it should not be forgotten that such activities in so far as they concern cultural content broaden the access to culture to an extent previously unknown,[86] which is not in principle contrary to the interests of the creators of such content.

Meanwhile, reality and creators are writing a completely different scenario for the same issue, allowing us to look at the problem of resolving horizontal relations in the sphere of cultural (and also scientific) creativity in a completely new way. For over a dozen years, the crusade has been taking place – both artists and users alike – for the right to free access to culture and knowledge, which is hard to ignore. The revolution began in 1998 in the USA, when the Sonny Bono Copyright Term Extension Act[87] extended copyright protection to 70 years after the artist's death. American law professor Lawrence Lessig tried to tackle this bill, but he lost in the U.S. Supreme Court, unsuccessfully invoking the constitutional clause on limited copyright. Shortly afterwards (in 2001), Lessig founded Creative Commons movement, offering protection in a new formula and in the form of "some rights reserved" licence instead of the previously known "all rights reserved" formula. In 2003, the term "Free Culture" was introduced, applied and developed in 2004 in the book *Free Culture* by Lessig. The primary objective of the Creative Commons movement was to create a new legal environment that would allow for the decision on the shape of access to the author's works and thus broaden

[86] J. Jones, *Internet pirates walk the plank with Article 10 kept at bay: Neij and Sunde Kolmisoppi vs. Sweden*, 35(11) European Intellectual Property Review 695 (2013), pp. 695, 699.

[87] This act was passed to protect copyrights which belonged to huge production studios, mainly for Walt Disney Studio, and was named after Sonny Bono, a congressman who was a sponsor of the bill and famous songwriter and rock musician.

the sphere of free access. The movement is based on the premise that non-commercial culture as a free and spontaneous activity inherently connected with social life had not been and should not be subject to legal regulation, and creation cannot develop without access to works that have already existed and been published, guaranteeing the "freedom to build upon the foundations of the past"[88] while the practice and shape of the hitherto formed copyright law create many barriers to this access, making it difficult to use and draw on work, sometimes contrary to the will and interests of creators.[89]

The movement does not deny the need to protect the rights of creators – authors' rights remain in force, but the way in which they are used and the extent of the authors' will to manage them are changing, which makes it possible to better develop free culture.[90] The movement uses metaphors of shared spaces where everyone can enjoy equal rights of use and individual right of use does not exclude the rights of others.[91] Of course, this allows to create a much more user-friendly environment – but above all, it returns subjectivity to authors. It is they – and not the publishers, producers – who decide on the form of sharing and can influence it directly and according to individual needs.

Since its inception, Creative Commons has grown extremely dynamically and one can already say that it has had a significant impact on the flow and accessibility of cultural and scientific content worldwide. By January 2016, around 1.1 billion compositions had been licensed under one of the Creative Commons licenses. This means that so many musical works were chosen by their authors to be made available under CC law – different, in principle more liberal and enabling a much broader perception than the traditional provisions of copyright law.

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88 L. Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Penguin Press, New York: 2004, p. 37.

89 N. Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit. The Future of the Public Domain*, P.B. Hugenholtz, L. Guibault (eds.), Kluwer Law International, 2006, p. 2.

90 S. Corbett, *Creative Commons Licenses: A Symptom or a Cause?*, Working Paper Series, Working Paper no. 67, 2009.

91 *Ibidem*, pp. 9–10.

Nowadays there are a number of types of CC licences, but all of them are based on the fact that you are allowed to copy, distribute, present and perform a copyrighted work and derivative works created therefrom, provided that the author's original name is mentioned. The other groups of terms and conditions that occur in different configurations in the licenses are as follows: 'non-commercial use' (free to copy, distribute, present and perform a copyrighted work and derivative works created therefrom for non-commercial purposes only), 'on the same terms' (free to distribute derivative works only under a licence identical to that under which the original work had been made available) and 'without derivative works' (free to copy, distribute, present and perform a work only in its original form – creating derivative works is not permitted). The concept of the license means that the licenses and tools offered by Creative Commons are free of charge and anyone who wants to use them can share their work on the same terms. The unbelievable popularity of CC licenses (including so-called "license 0", which allows the use of a work as if it was a public domain work) indicates that there was an urgent need among authors to abandon strict copyright requirements (all rights reserved) in favour of a more liberal formula, in simple terms, the authors want their works to be disseminated and used more widely than it had been possible to date.

However, this social phenomenon also raises a very interesting question concerning the law, i.e. how the licenses made available by the social movement in the Internet change the image of the copyright paradigm in its present form as a barrier against unauthorized use of the authors' creative output. The success of the Creative Commons license depends primarily on the extent to which these licenses and the protection granted (both to users and authors) will be recognised by the courts and other authorities applying the law. Practice shows that courts in many countries increasingly recognise the validity and effectiveness of such licences. Although there have been cases in which the legitimacy and effectiveness of the CC licence was undermined[92] – because of the failure to comply with the written form

[92] Spanish Provincial Court of Pontevedra ruling of 29th November 2005, *Sociedad General de Autores Y Editores (SGAE) vs. Luis.*

requirements, for instance,[93] users and authors have successfully used the instrument before national courts in a number of cases. This was the case, among other things, in *Curry vs. Audax Rechtbank Amsterdam*, where the Dutch court confirmed the validity of the licence in national law.[94] Adam Curry brought an action against the magazine for the use and publication of his photos taken from the Flickr account, which were accompanied by a CC BY-NC-SA (Attribution Non-Commercial Share Alike) license, for infringing the terms of such license. Although the Court dismissed the claim for damages submitted by the claimant, it recognised the validity of such a licence under Dutch law. This also happened in a case settled by the Spanish court in July 2007,[95] in which the court relieved the bar owner of the obligation to pay royalties to the collective rights management organisation, since music was broadcast in the bar only under the CC licence. By contrast, in a 2010 case[96] in Belgium, the court held that the CC licence was valid – and found that there had been a breach – but refused to apply commercial tariffs for compensation.[97]

Also other types of licenses created outside the national law, of a similar status (such as the Open Source Artistic Licence for software) are beginning to be recognised by courts, which means that users can use the works protected by them under conditions designed and proposed by the authors themselves.[98] This phenomenon cannot be disregarded,

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[93] R.M. Olwan, *Intellectual Property and Development. Theory and Practice*, Springer, Berlin-New York: 2013, p. 343.

[94] Ruling of March 2006, no. 334492/KG 06–176 SR, after: *Creative Commons License Upheld by Dutch Court*, http://www.groklaw.net, cited also by R.M. Olwan, *op.cit.*, pp. 342–343.

[95] *Sociedad General de Autores y Editores (SGAE) vs. Owner of Buena Vistilla Club Social*, Madrid Court of Appeal (28th section), 5th July 2007.

[96] Ruling of 28th October 2010 *L'ASBL Festival de Theatre de Spa* (T.N. 10/7597), after: C.G. Vassiliades, O. Vrondou, *Copyrights in an era of evolution,* The Trademark Lawyer 39 (2015), CTC Legal Media, available at: http://www.vasslaw.com/wp-content/uploads/2015/05/Copyrights-in-an-era-of-evolution-03052015.pdf.

[97] *Ibidem.*

[98] US District Court Northern District of Texas Dallas Division, 27th November 2007, 42 *Robert Jacobsen vs. Matthew Katzer and Kamind Associates, Inc.* 535 F.3d 1373, after: Corbett, *op.cit.*, p. 15. There are a constellation of other licences, especially concerning software; i.a.: GFDK – GeoFrame Developer's Kit,

nor can it be perceived as a standard manifestation of contractual relations between parties in the private law regime. This is a different kind of phenomenon, because here we see the creation of a different system of copyright than the one functioning officially and sanctioned by the legislative body, the long-standing doctrine, practice and international agreements. Licenses such as Creative Commons create a new meaning for the horizontal nature of relationships based on them – it is not only a right that the creator can shape independently and thus create a set of rights and permissions for users, but also the system itself is designed in order to create a maximally open world of works made available in this way, which is already important for legal relations and not only in the world of virtual access. This phenomenon has such a great extent and significance that it profoundly changes not only the scope but also the content of access to cultural life, making the world of culture considerably more open. What is even more important and distinctive, it happens only thanks to the will of creators and recipients. It therefore appears that it is in the interest of authors, especially non-commercial creators who massively use CC licences, that cultural goods – their works – should be as accessible as possible, and that their use should in principle be exempt from additional conditions and fees.

It is not so, either, that authors waive their rights through Creative Commons licenses – more than 60% forbid commercial use of their works and one third reserve the right not to exercise dependent rights.[99] Creative Commons licenses, however, provide an opportunity for greater control over the availability and use of copyrighted works, especially in the sphere of non-commercial culture, which is of particular importance in countries where copyright has hitherto operated under the copyright system with much weaker protection of authorship related personal rights.[100]

Thus, it is evident that the Creative Commons movement and to a lesser extent similar initiatives have opened up new possibilities for creating, sharing and supervising creative output, especially for

OGL – The Online Gaming League, OOGL – Object Oriented Graphics Library, EABA – 'Open Supplement License' in an Open Game License.

[99] Corbett, *op.cit.*, p. 24.

[100] M.T. Sundara Rajan, *Creative commons: America's moral rights?*, 21 Fordham Intellectual Property Media and Entertainment Law Journal 905 (2011), p. 910.

the non-commercial culture created by amateurs or artists who do not expect any major market success, often creating cultural content of the highest order. The same happens in the world of science and access to knowledge. Simultaneously with Creative Commons, in a completely different place, though for similar reasons, the Open Access literature movement appeared[101] as an initiative of the scientific circles, promoting the dissemination of works in a digitalised form, available online, free of charge and most limitations related to the exercise of copyright. As indicated by the founding declaration of Open Access, sharing own research results is in line with the old academic tradition and ethos of sharing with others for the development of further research and new knowledge. Thus, liberation of culture and knowledge is slowly becoming a reality – thanks to creators' initiative and conscious resignation from the rights established in the rigid framework of the existing copyright law – and for the future development of artistic culture, expression and sharing of the results of their creative work.

4.7. Liberation of cultural heritage

The movements presented above, as well as other practices – such as the extremely popular crowdfunding of artistic events and creation,[102] provoke reflection not only regarding the limits and needs of creators connected with the protection of their rights and guarantees of access to artistic creation. To a large extent they constitute evidence of the correctness of the assumption referred to in Chapter II on the place of artistic culture in the creation of the common good. Making the output of creative work available, consenting to its free reception, commenting, using it and releasing the work, is not only indicative of the fact that the creators want their work to be as accessible as possible, but also of the fact that the recipients want to benefit from it, they are prepared to bear the costs of this work and consider it important for the community to make it as available as possible.

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101 Budapest Open Access Initiative, February 2002.

102 As an example – Polish project „Wolne lektury" (Free Readings) of Foundation Nowoczesna Polska (Modern Poland), based on digitalization and dissenting literary works.

The role of cultural resources in creating social bonds and building identity is best evidenced by these informal activities and movements supporting artistic creation, but if one is serious about the aforementioned assumption of a constitutive role of artistic culture for the common good, it is important to ask about the availability of cultural assets which are created with the support of public funds or remain in the resources of public bodies such as museums and libraries.

This last issue, i.e. making public resources available to institutions established to maintain them, such as museums, archives and libraries, has become the subject of EU regulation, in particular Directive 2003/98/EC on the re-use of public sector information[103] and Directive 2013/37/EU of 26th June 2013 amending it. Directive 2003/98/EC was created because of two basic axiological assumptions: firstly, it was observed that part of the administration's information resources is universal and goes far beyond the performance of public tasks, constituting an enormous body of knowledge which may influence the development of knowledge and practical effects of its use. Making these resources available can foster such development, while at the same time ensure the transparency and efficient use of publicly funded resources. This latter element is connected with the second assumption of the directive, according to which what is produced from public funds should be accessible to all taxpayers – i.e. citizens.[104] The directives are primarily aimed at developing the information society and making digital content more accessible. A more detailed discussion of their impact on the exercise of the right of access to the resources of cultural assets held by entities with public functions will be discussed in the following chapter, but at this point it should be emphasised that their content remains in a certain relation with copyright for works whose resources are to be open and which can be reused.

Point 22 of Directive 2003/98/EC states that it does not affect or restrict the exercise of intellectual property rights of third parties, public

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[103] Directive 2003/98/EC of the European Parliament and of the Council of 17th November 2003 on the re-use of public sector information.

[104] M. Maciejewski, *Relacja prawa ponownego wykorzystywania informacji publicznej i praw własności intelektualnej*, in: M. Maciejewski (ed.), *Prawo do informacji publicznej. Efektywność regulacji i perspektywy jej rozwoju*, Biuro Rzecznika Praw Obywatelskich, Warsaw: 2014, p. 136.

sector bodies, nor does it restrict the exercise of those rights and that the obligations imposed by it should apply only if they are compatible with the provisions of international agreements on the protection of intellectual property rights, in particular the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). However, it also stipulates that "public sector bodies should exercise their copyright in a way that facilitates the re-use of documents."[105] The Directive specifies minimum standards for such re-usage, but excludes from this scope the documents held by educational and research establishments, such as schools, universities, archives, libraries and research facilities including, where relevant, organisations established for the transfer of research results; and, where applicable, documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres (Article 1 (e), (f)).

By contrast, the subsequent Directive 2013/37/EU[106] indicates that libraries, museums and archives, with a rich collection of valuable information from the public sector, should allow the re-usage, especially when these resources are digitalised and have entered the public domain. These cultural heritage collections, together with the related metadata, provide a potential basis for digital content in terms of products and services, and have a great potential – including cultural. The scope of the amending directive therefore covers the entire resources of libraries, archives and museums – i.e. those that constitute public information and the resources of cultural heritage. The Directive obliges Member States to ensure that documents for which intellectual property rights are held by libraries, including university libraries, museums and archives for commercial and non-commercial purposes, can be reused (Article 3 (2)). Other cultural institutions (theatres, orchestras, operas) have been excluded from the scope

[105] According to Article 2, point 3 of Directive 'document' means: any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) or any part of such content.

[106] Directive 2013/37/EU of the European Parliament and of the Council of 26th June 2013 amending Directive 2003/98/EC on the re-use of public sector information.

of this obligation, since, as indicated in point 18 of the Directive, most of their acquis is covered by third parties' intellectual property rights and would therefore remain outside the scope of this Directive and their inclusion in its scope would have little effect.

The Directive therefore covers resources, including cultural content, to which copyright belongs to public entities. The Directive therefore does not modify the copyright regime. Nevertheless, its action may result in a considerable increase in the availability of cultural content, and more precisely in making the cultural heritage of libraries, museums and archives, i.e. those institutions which have been set up to maintain and share them, available for re-use. Moreover, it should be noted that the resources made available in this way do not have to be identical to the content of the public domain – after all, the works at the disposal of these institutions need not be those whose copyright has expired or never been created. This may significantly increase the availability of cultural content held by libraries, museums and archives, insofar as they are holders of copyright in these works. The works covered by the Directive are primarily the most important elements of cultural heritage, and therefore works that have been made long enough to be considered as a significant and constitutive part from the point of view of the artistic culture of a given community. The Directive also addresses those works in which copyright has passed on to cultural institutions. However, in this reservation, the act in question leaves the liberation of cultural content in a paradigm of copyright protection, without resolving the issue which seems to be of greatest interest, i.e. the extent to which works and cultural objects financed by public funds should be made available to the public, even if the copyright is held by the author or another entity (e.g. in the case of audiovisual works). For, if the creation of works is financed or co-financed by public funds, there ought to be instruments that guarantee their availability to the funders themselves – that is those for the money of whom they were actually created, and therefore to taxpayers – and more generally to citizens. So far, however, such mechanisms have not taken a real shape, and works created with the participation of public funds, including literary and musical works, films, as well as works of fine and performative arts, are subject to the same rules of market access as the remaining ones, with only minor concessions for public institutions referred to in the last chapter.

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The model of free and democratic culture should be based on four factors: the right to distribute creative output freely, the right to exchange ideas and opinions with others, the right to free and creative use of cultural content already made available and to share the results of one's work with others, as well as the right to participate in and produce cultural content independently.[107] All of these elements may to a large extent concern activities in the sphere of horizontal relations, and thus may be hampered by violations of the rights of others. The protection of the freedom of creation and the right of unrestricted access to cultural assets and artistic creation are being curtailed in the sphere of these relations, in particular by copyright, which becomes particularly visible and harsh in the era of universal access to all manifestations of creative life and its use in a digitalised environment. To date, however, legal regulations and jurisprudence have resolved conflicts in these relations in a rather conservative manner, with small concessions to broaden the freedom of creation, by developing new cases of permitted use or liberalising access to unavailable or orphan works. Nonetheless, incredible development of social movements aimed at limiting the primacy of copyright over the possibility to familiarize oneself with manifestations of creative activity provokes reflection that the need for "Free Culture" is greater than it would result from the previous paradigm of copyright protection. On the other hand, the sharing cultural assets held by public institutions in a digitalised environment has already become an obligation, the execution of which is the responsibility of European Union Member States.

The evolution of access to both heritage and content created today leads to the conclusion that the argument about the right to participate in cultural life is therefore starting to emerge ever more widely and has increasingly visible consequences, both in social life and in legal regulations.

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[107] J.M. Balkin, *Digital speech and democratic culture: A theory of freedom of expression for the information society*, 79(1) New York University Law Review 1 (2004), p. 53.

CHAPTER 5

Cultural Policy and the Obligations of Public Authorities Regarding the Implementation of the Right to Culture

5.1. Cultural policy and the right to culture

Development of positive obligations of states in terms of the right to participate in culture is a process taking place mainly within the framework of the cultural policy pursued by the state.[1] However, the definition and analysis of cultural policy poses many difficulties, as it is a very diverse activity and occurs in many varieties. It is not simply a variant of public policy, which can be defined as the sum of state activities undertaken in order to produce a certain, intended impact on citizens and social life. Cultural policy would be aimed at achieving the goals set out in advance by means of selected measures and procedures, whereas such activity in the sphere of artistic culture is so little measurable that it is difficult to indicate both its clear objectives and methods (processes, instruments) which would lead to them.[2] In the field of culture there are too many atypical correlations, artistic creativity by its nature demonstrates spontaneity and goes beyond the patterns and paradigms adopted so far, and the phenomena managed by it are complex and ambiguous.[3]

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[1] It refers especially to policy towards the arts – in contrary to policies regarding ethnic and cultural groups – this differentiation was described in chapter 2.

[2] K.V. Mulcahy, *Cultural policy: definitions and theoretical approaches*, 35(4) The Journal of Arts Management, Law, and Society 319 (2006), p. 320.

[3] O. Bennett, *The torn halves of cultural policy research*, 10(2) International Journal of Cultural Policy 237 (2004), p. 238.

Generally speaking and without being ideologically entangled[4] one can attempt to determine what cultural policy is, not by classical references to public policy but by simple indication of the domains involved – thus, as stated by Mulcahy, cultural policy refers to all activities in the sphere of support, maintenance, promotion and dissemination of cultural goods and other artistic effects – in traditionally understood cultural institutions (museums, libraries, theatres, cinemas, etc.). Therefore, it is the sum of state activity and its agendas focused on art, humanities and cultural heritage. Strategies applied under cultural policy include both legal regulations and the activities of administrative bodies and state agencies in terms of creating and maintaining institutions responsible for supporting artistic activity, as well as instruments for supporting artists and facilitating access to cultural goods (cultural heritage and contemporary cultural life). Such policies are pursued at the level of a country, regions or states in federal countries.[5] Cultural policy actions can also be carried out at supranational level, which has been successfully and to a large extent done by the European Union and its bodies.[6] Finding the content of the right to culture therefore requires not only an examination of international guarantees and judicial practice, but also an examination of national legal regulations, strategies and tools used by states under their cultural policies. The formulation of common,

[4] E.g. in Foucault theory (cited by Mulcahy) cultural policy would be contained in the "governmentality scope", therefore it would be based on activities and efforts to keep and maintain the power mediated by dominant culture and impact of education, religion, philosophy and esthetics. See: Mulcahy, *op.cit.*, p. 321.

[5] As example of such solution: cultural policies in German federal states and the lack of such policy on the national level, as well as the lack of state administration responsible for that.

[6] As well known example of such activity could serve Europeana project, i.e. constructing and fulfilling the portal including digitised cultural goods (and contents) derived from European libraries, archives and museums. This project is mainly based on the European Library project, which had been founded to present contents of national libraries. Europeana portal started in 2008, since 2007 in the scope of European Digital Library Network (EDLnet) it has been created as repertory of documents from numerous and different cultural institutions, i.e. libraries, museums and archives, giving an opportunity to browse European cultural heritage.

permanent and sanctioned by legislation and jurisprudence, as well as the practice of administrative bodies, elements of policies guaranteeing participation in cultural life will constitute – at least potentially – the core of public duties which correspond to expectations, as well as to the claims of entities entitled to participate in culture, will therefore be incorporated into the content of the right to culture. However, the analysis of instruments and actions related to fostering artistic life, protecting, preserving and promoting national heritage, facilitating access to cultural assets and services in contemporary European countries and even within a single country is an extremely difficult and arduous task, and the actual status of rights and guarantees associated with participation in cultural life cannot be extracted by simply presenting or even analysing regulations on a huge number of issues, such as the maintenance of museums and libraries, protection of monuments, cultural education, financing the media, audiovisual arts, regulating the prices of books or promoting culture outside the state and facilitating the access to cultural assets for certain categories of people. Attempts to generalise entail the risk of numerous exceptions and differences specific to a given country, its traditions and structure. In most countries, all of these issues are subject to more or less detailed regulation, and in all of them there are legal acts that form a certain framework for the regulation of the ongoing cultural life and protection of heritage, but issues that often remain outside the scope of these regulations, or treated only marginally – such as the composition of bodies responsible for decisions concerning the allocation of funds for the financing of cultural projects and works of art, and decisions taken incidentally and outside the sphere of action of public authorities in this area[7] can have a significant impact on the image of the actual implementation of the right to culture,

[7] It is worth to mention (as example of such activity) that in 2016 Polish Ministry of Culture and National Heritage signed the agreement to buy the collection of Princess Czartoryski – one of the most important private art collections in Europe, containing 250,000 historic documents and 86,000 cultural artifacts, most notably – as Leonardo, Rembrandt, Dürer and others. This transaction evoked many controversies, however the price was just a fraction of real value, it was stressed that the Czartoryski Collection resources were public and available, and the most of the goods were banned to export. Nonetheless, the transaction

the scope of the obligations of states in this respect and the actions actually undertaken, which shape the scope of expectations and then the powers and, finally, the claims of citizens.

Furthermore, political specificity, traditions, cultural and historical circumstances cause that the analysis of statutory and constitutional regulations does not allow to make reliable assessments of observance and guarantees of the right to culture in individual dimension solely on this basis. The structure of individual rights classified as social as well as cultural is founded on the tissue of much more subtle processes and phenomena than mere legal regulations, often of a declarative nature or petrifying the existing state of affairs and the scope of ruling and administrative activities. The development of the content of such rights at constitutional (as well as international) level requires a long-term process of weighing the values, a balanced problem-solving process aimed at ensuring the intended standard of implementation,[8] which does not necessarily result directly from provisions of law. The actual nature of such rights – especially in their purely social dimension, i.e. giving rise to positive obligations on the part of public authorities – requires long-term cooperation and dialogue between the legislature, courts and administration, and also depends on the already shaped expectations of citizens and their organisations, recipients of artistic culture and in particular artists actively involved in the process of co-creating cultural life and artistic culture. The extraction of "positive" elements of the right to culture at European and even national level is therefore an extremely complex challenge – the present analysis will concern only certain areas of cultural policies selected as distinctive and comparable, i.e. the definition of the method of financing artistic creation, determining the social and economic status of the creator and one of the instruments intended to regulate and facilitate access to a selected category of cultural assets. These elements have been selected from among many others (including instruments concerning the protection and preservation

was regarded as a great success of Polish cultural policy and the significant effort to maintain Polish national heritage.

[8] K.G. Young, *Constituting Economic and Social Rights*, Oxford University Press, Oxford: 2012, p. 6.

of cultural heritage, analysed repeatedly and thoroughly in contemporary scientific literature, also in Poland).[9] First of all, the choice was dictated by the fact that these issues are relatively rarely analysed from a legal point of view, in particular their impact on the implementation and content of the right to culture. Secondly, in these areas, comparative research can be used to try to find certain patterns that can set a standard for the individual's right to participate in cultural life. Finally, the cultural policy instruments used in these areas take the form of active legislative and administrative measures, creating cultural life infrastructure in a way that was unknown a few decades ago – this means that they form new standards and shape the content of cultural rights today through new and original instruments.

5.2. Models of cultural policies

However, at the beginning it is worth pointing out a few issues connected with the conduct of cultural policy, i.e. active support for artistic life in modern countries, as well as models that can be distinguished within its framework.

The concept of cultural policy in its present form stems from the tradition of patronage (sponsorship) over artists, known in Europe primarily from its Renaissance prosperity and subsequent achievements of rulers and magnates. In the model of patronage over the artistic culture, the mighty and eminent of this world supported and maintained the artists, ordering works from them and providing for them in their courts. This centuries-old practice assumed, first of all, that aesthetic choices were made by the sponsor – so he decides on both taste and artistic value. Secondly, in this environment, artistic

[9] I.a. (in Polish): B. Gadecki, W. Pływaczewski (eds.), *Ochrona dziedzictwa kulturalnego i naturalnego. Perspektywa prawna i kryminologiczna*, C.H. Beck, Warsaw: 2015; K. Zeidler, *Prawo ochrony dziedzictwa kultury*, Wolters Kluwer Polska, Warsaw: 2007; J. Sobczak, *Wolność korzystania z dóbr kultury – standardy europejskie i konstytucyjna rzeczywistość polska*, in: T. Gardocka, J. Sobczak (eds.), *Prawna ochrona dóbr kultury*, Wydawnictwo Adam Marszałek, Toruń: 2009; K. Zeidler (ed.), *Prawo ochrony zabytków*, Wydawnictwo Uniwersytetu Gdańskiego, Warsaw-Gdańsk: 2014.

life revolves around orders placed by patrons, therefore according to the wishes and indications of the commissioners. The scope of creative freedom depends on the will and intentions of the patrons; the aim of art created in such circumstances was, among other things, to glorify the ordering parties, and works of art were to preach their greatness and glory, just as sacred works were to preach the glory of God. Thus, the patronage model was political, namely the will of persons and entities holding power was crucial to determining the directions of creativity and the creation of works, and creation was to intentionally favour their interests and build authority. Financing, which was an essential element of this cultural policy in its beginnings, was dependent on the effect, the subject matter of the works and aesthetics were the subject of the order, sometimes the agreement between the sponsor and the creator, so the direction of the policy was determined vertically and by the party holding the right status or financial power, considered to be an art connoisseur.

Nowadays, the patronage over art and the cultural policy connected with it basically face the same challenges while adopting different attitudes towards artistic life. The typology of Chartrand and McCaughey[10] is among the most well-known and differentiates four types of policies, distinguished by their specific funding mechanisms, policy objectives and the standards they set. These policies are classified by the designated roles of the state, defined as: Engineer, Facilitator, Patron, Architect.

The first one mentioned is a characteristic for totalitarian countries extreme state model – Engineer, in which the state, through its agendas, exercises its own cultural policy in the sense that it owns media and creative resources. It sets political standards for art, and the permission to practice it is a kind of licence granted by officials, or rather in the reality of this system – by party commissioners. The policy in such a model is carried out by methods characteristic of the times of revolution, therefore it consists in imposing an ideology, as well as

[10] H.H. Chartrand, C. McCaughey, *The arm's length principle and the arts: an international perspective – past, present and future*, in: M.C. Cummings, Jr., J.M. Davidson Schuster (eds.), *Who's to Pay for the Arts: The International Search for Models of Support*, American Council for the Arts, New York: 1989.

the form, and it is the authorities that determine who has the right to create, and thus who is an artist.

In demoliberal countries, cultural policy models cannot, of course, take such a form, as it contradicts the assumptions of both democracy and the fundamental principle of freedom of expression and creation. Other models refer to policies conducted with the declared respect for the freedom of artistic creation and the assumption of influence on the shape of artistic life through the use of aesthetic criteria. The first of these models of cultural policy has been developed in France. In this model, the state plays the role of an Architect, actively participating in shaping the objectives and directions of artistic culture development. The State-Architect model, as Chartrand and McCaughey point out, has its roots in the way cultural patronage was exercised during the period of absolutism and is therefore very close to the traditional patronage model, but still many countries accept it as a natural support system. The state authorities (or local government) shape the policy of financial support for artistic creation, basing on the needs of the community, which, according to the model, are known to them because of their public functions, legitimised people's choice. In this model, it is the government, headed by the Minister of Culture and his bureaucratic apparatus, who decide on financing of culture, bearing in mind not only the quality of the projects proposed, artistic perfection, but rather the goal of satisfying the needs of the community. Artists can count on financial support, as long as they represent a society recognisable to the state apparatus, i.e. they are associated in appropriate unions and creative organisations. In principle, they are supposed to play a more servant-like role, and their status depends on current social policy and simply on state policies. From time to time, such a cultural policy is shaken by crises and scandals – the one that took place in the Netherlands at the end of the 1960s is the most famous in literature, when impatient and rebellious artistic youth protested violently against the traditional cultural policy, respectful of conservative and academic tastes, embodied during the crisis by the repertoire of public theatres (the so-called Tomato Revolution).[11] It seems that this

[11] *The Tomato Revolution*, https://blog.americansforthearts.org/by-program/reports-and-data/legislation-policy/naappd/the-tomato-revolution [accessed: 02.12.2017].

model is particularly exposed to such controversies and accusations in a democratic society, which is also exemplified by contemporary disputes and controversies related to the financing of cinematographic works, as well as theatrical exhibitions and performances in Poland.[12] The lack of transparent mechanisms for the appointment to expert committees and supervision over cultural institutions means that the criticism focuses directly on the government and, in particular, the Minister of Culture. The cultural policy exercised in this way is therefore sensitive to the accusation of politicisation and generates strong dissatisfaction either among the artists or the public displeased with the cultural undertakings.

The third model is the patronage system, the standard was developed in the UK. The assumption of this model is to support artistic activity based on non-political criteria, solely on the evaluation of quality – aesthetic value. The State – Patron supports creativity and cultural life through the involvement of expert bodies, formed according to the "arm's length arts councils" principle. The members of expert bodies – arts councils (experts/curators/trustees) – include persons endowed with appropriate competence and authority, appointed by the government. The state budget, and thus the decision of the executive and legislature, decides how much money is allocated to finance cultural life, while the arts councils decide who will be granted the funds and in what amount. Financing is based on the system of grants, and the award and settlement procedures based on expert evaluation make the arts council responsible for the quality of the resulting works of art. The Arts Council of Great Britain (ACGB) was established in 1945 to separate decisions regarding the support of artistic culture from political and bureaucratic factors. The point of reference for creating this structure were similar bodies operating

[12] E.g. performance *Nasza przemoc i wasza przemoc* (*Our Violence and Your Violence*) directed by Oliver Frljić on a Premiere Festival cofinanced by Polish Ministry of Culture and National Heritage and organized by Polish Theatre in Bydgoszcz or *Adoration* film, exhibited in 2013 in Ujazdowski Castle Centre for Contemporary Art (Polish state cultural institution) within the exhibition *British British Polish Polish: Sztuka krańców Europy, długie lata 90. i dziś*, which was blasphemous for Catholics.

within the framework of financing scientific research[13] and regulation of broadcasters' activity as an expert body in the field of freedom of the press).[14] In the English Arts Council, following the 1994 reform and the separation of the three Councils operating in the United Kingdom (the Council for Wales, England and Scotland), there is a 15-person Governing Board composed of five regional representatives and 10 representatives from the cultural sector.

The last model, in which the state assumes the role of the Facilitator, is characteristic for the United States and has its origins in the fundamental principles of state neutrality in world-view matters and the belief in free development of creativity and self-fulfilment. In this model, the Facilitator State does not interfere with the objectives and content of creation and art; it supports cultural life only by facilitating its operation and sponsorship by non-state actors, primarily through tax exemptions (e.g. a tax mechanism whereby donations are tax-deductible). In this way, the policy is aimed at diversifying activity and fine arts, supporting the creative process itself, not just its outcome. This is achieved through action based on donors' tastes and preferences. It is therefore a system of famous "cultural Darwinism." The state thus assumes a passive and neutral position – status of creation depends on two factors independent of it; that is, market results – the recognition of recipients and the tastes of sponsors – private patrons. A huge advantage of this system is the lack of room for accusations of politicisation of sponsored artistic culture, and its strength lies in the diversity of donors and preferences. Therefore, there are no national standards of art, artistic excellence, evaluation based on artistic criteria or any other criteria. The United States are the homeland for this kind of cultural support approach, although today the model of pure "facilitation" of artistic activity has lost its clarity and even its relevance. The creation of the National Endowment for the Arts in the U.S. in 1965 was a significant step in this direction. The NEA budget is proposed by the President,

[13] University Grants Committee was established in 1919 as a body consists of academics, to advise the government and parliament in financing scientific research.

[14] The British Broadcasting Corporation was established in 1923 as advisory body in the scope of media freedom.

approved by Congress. The NEA plays an important role in this process, mediating between the separate authorities – President and Congress. The National Endowment for the Arts began to act as an arts council,[15] which decides on support for specific artistic activities, and this model started to resemble the patronage model. In the U.S., there is an increase in the importance of a more active cultural policy, and this cultural Darwinism is becoming somewhat ostensible, as the participation of the public patronage is much greater than it seems from the NEA budget alone.[16]

The above classification of cultural policy models is, of course, encumbered with all the model drawbacks, thus devoid of nuance and schematic approach to the cultural strategies adopted by public authorities. Nevertheless, these models do well reflect the constitutive features that characterise approaches to and access to cultural heritage and contemporary cultural life. The models were distinguished primarily by the application of the criterion concerning the influence of political power on the ongoing cultural life, and in particular the way of supporting creativity through public funds. According to Bell and Oakley, these are the key functions of cultural policy,[17] although, of course, these are not the only factors that determine the actual state policy towards cultural life, creating the right background and conditions for social life.[18]

5.3. Arm's length principle in financing art life

From the point of view of the right to culture, i.e. a complex of rights related to participation in cultural life in the presented models, the conditions for the functioning of the guarantee of freedom of artistic

[15] L.D. DuBoff, C.O. King, *Art Law in a Nutshell*, Thomson/West, St Paul: 2006, pp. 139–142.

[16] Mulcahy, *op.cit.*, p. 328. The most instructive example is the Smithsonian Institution, created in 1846 as an agency of the parliament by the Congress according to the will of James Smithson. The Congress appoints Board of Regents and determines an amount of its annual financing.

[17] D. Bell, K. Oakley, *Cultural Policy*, Routledge, London–New York: 2015, p. 56.

[18] J. Ahearne, *Cultural policy explicit and implicit: a distinction and some uses*, 15(2) International Journal of Cultural Policy 141 (2009), p. 144.

creation are most important. There is no doubt that the most complete assurances of freedom are created by the Facilitator's model, i.e. the policy of full distancing of public authorities from supporting creation. In this model, the freedom of artistic creation is guaranteed in a way that is classic for liberal doctrine, including the doctrine of freedom of expression, i.e. through the pluralism of means and instruments of support. The "hands off" cultural policy pursued in this way (if any such strategy is a policy at all) is resistant to allegations of politicisation of art, the development of creativity depends on chance, individual tastes and market competition conditions. The activities of public authorities are limited to the creation of certain legal instruments that motivate private operators to promote cultural life, such as a system of tax reliefs or obligations imposed on investors to allocate a certain fraction of the value of their investments to the purchase of works of art to office buildings. Other models, on the other hand, provide instruments with much more active support from public funds and authorities in a variety of ways. However, the dilemma arises here of how to ensure both creative freedom and freedom of art, and at the same time to create mechanisms of public support – some of which are chosen from the point of view of certain criteria for works of art, projects and creators. This concerns both selection criteria and the way in which the choice is made. The extreme model known from totalitarian systems, the Engineer model, introduces hardly subtle mechanisms, without even attempts to conceal purely political instrumentarium and the goal of the cultural policy being pursued – works of a specific subject matter are to be created, as well as works with aesthetic determined by external orders. Art becomes entirely subordinate to political, or rather ideological, goals, because totalitarian systems have an immanent tendency to create a new world and a new man, striving to fully take over also the world of his imagination and system of symbols and values. Therefore, individual preferences and freedom of creation do not matter, they are denied and sacrificed in the name of creating a new order.

The remaining two models, the Patron and Architect model, which are characteristic for most demoliberal countries, obviously present a completely different approach to managing cultural life and supporting artistic creation, although the dilemmas remain the same.

Firstly, therefore, the question of what kind of art and creativity can be supported by the state must be resolved. In both models the answer differs – in a country that serves as the Architect the needs of the recipients will be decisive – of course, these needs can be defined in different ways, so it is crucial who makes such decisions and choices. At the same time, there is a risk that the attitude towards art (trends in art) may change overnight – it is still an arbitrary decision of political authorities, who determine social needs and expectations more or less arbitrarily. By contrast, in a country which has the ambition of the Patron of Art, the aesthetic criterion is supposed to decide[19] – the criterion separated from the needs of real financiers, i.e. taxpayers. It is a model that often faces accusations of elitist and conservative foundations of such support, and further, management of the conditions of ongoing cultural life. Yet, it is not a matter of aesthetic criterion that determines the uniqueness of this model, but rather the procedures and system of evaluation of works of art and projects worthy of support, based on decisions made by art councils. These councils are essential for the legitimacy of such an effective cultural policy, as they ensure that decisions are made firstly by recognised experts, and therefore the authority derived from knowledge and experience, characterised by recognition of the artistic community. Secondly, they allow us to break away from making specific decisions from politics and particular interests – and hence only based on criteria in the field of art. It is precisely the creation of such a mechanism that makes it possible to conclude that certain standards of aesthetic quality exist and are developed, while artistic creativity is developing evolutionarily

[19] E.g. American National Foundation on the Arts and Humanities Act, after amendments in 1990, requires from National Endowment for the Arts to decide on funding after evaluation of "artistic excellence and artistic merit, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public", in: E. Chemerinsky, *Constitutional Law: Principles and Policies*, Wolters Kluwer, New York: 2009, p. 1236. See also: British Film Certification Schedule prepared by DCMS (Department of Culture, Media and Sport), amended in 2015, and included there test for films pretending to be sponsored – Cultural Test for films in UK (http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-revised-cultural-test-for-film-guidance-notes-2015–03.pdf [accessed: 10.11.2017).

according to its own dynamics. This evaluation of quality, carried out by recognised experts endowed with authority and experience, also means that this support system is subject to the accusation of elitism, however, the controversy of the council's decisions over the choice of financing – both political and aesthetic – is also undermined by the persuasive power of the art council's decisions, which in fact replaced the traditional role of patronage of the aristocracy. The operation of arts councils does not exhaust the area of support, since the government and parliament undertake legislative and executive measures aimed at supporting specific cultural objectives, as well as the creation of other collective bodies with a view to supervise cultural activities.

That is why the application of the instrument of Patron model in certain variants is an increasingly common solution in modern countries. The model of bureaucratic power over the support and maintenance of cultural life still prevails in countries such as France, Italy and Russia[20] and the system of financing culture in Austria is also being brought closer to this model. In many countries, however, there are management structures and those involved in the financing of cultural life similar to British arts councils; in the Federal Republic of Germany[21] the German Arts Council acts as an expert body and the Federal Cultural Foundation responsible for financial management in this area. The Culture Council has also been established in the Netherlands. The model of financing and participation of expert bodies in cultural management has gained a new dimension in the Scandinavian countries. An interesting example is the development of a model of financing cultural life in Sweden, since this model in its current shape is an effect of convergence and assimilation of the solutions of the Patron model into a typical Swedish policy being influenced by the welfare state doctrine and practice and strong

[20] In Russia, for example, there are sector experts groups, but funding management is provided – in principle – by Russian Cultural Foundation.

[21] It is needed to add that German model of cultural policy has some idiosyncratic features, as: lack of government department responsible for culture at federal level; there is only parliamentary commission for culture and media and federal committee which are responsible for issues linked with cultural life on this level (Parliamentary Committee on Cultural and Media Affairs, Federal Commissioner for Cultural and Media).

support for the social status of artists.[22] Equal access to high quality artistic culture has been the main assumption of Swedish cultural policy since the 1930s.[23] Thus, institutions began to be established as early as in the 1950s, which through the evaluation of artistic endeavours were supposed to ensure this quality and accessibility: the Film Institute, the Authors' Fund (established in 1954) in order to provide grants for writers, a system of support and reimbursement of public libraries, and reading policy. A breakthrough came with the institutionalisation of the model of financing culture through the creation in 1974 of the Swedish Arts Council (Statens kulturråd) as a government agency responsible for conducting cultural policy. The Council is responsible for the allocation of state funds for theatre, dance, music, literature, public libraries, fine arts, museums and exhibitions (no fewer than 30 museums are still managed directly by the Ministry, as is the Royal Opera and Royal Dramatic Theatre). In addition, it is responsible for collecting and providing the government with information and data on cultural life for policy purposes (e.g. to conclude agreements with local governments on regional cultural policy and to manage the resources at regional level). Grants are awarded following a competitive procedure for one to ten years on the basis of decisions taken by a committee of experts from the given field of art. The Swedish Arts Council has 130 experts who assess the merits of more than 40 grant programs. The Council awards grants to cultural institutions (non-State theatres, studios, galleries, etc.) and also finances exhibitions for individual artists. The Swedish Authors' Fund (Sveriges författarfond), in turn, is responsible for supporting individual artists by financing various projects and endeavours undertaken by creators, especially in the field of literature, it also compensates remuneration for loans from public libraries. There are also other agencies and councils (about 40 of them), including: The National Council of Heritage (Riksantikvarieämbetet) – a government agency responsible for cultural heritage issues, the Media Council, established

[22] This model is even called nordic model (Ball, Oakley, *op.cit.*, p. 117).

[23] Data and information about Swedish policy towards financing cultural life are from report on Sweden published by Compendium (T. Harding, *Country profile. Sweden*, 2016, http://www.culturalpolicies.net/web/countries-profiles-download.php [accessed: 13.11.2017]).

in 2011, as well as special committees and funds providing support in the form of grants for artists (Konstnärsnämnden, Författarfonden). A special source of funding is the Foundation for Culture of the Future (Stiftelsen framtidens kultur) established in 1994, currently transformed into the Culture Bridge Foundation (Kulturbryggan) pursuant to the new Law on Culture.[24] The Council and the Director of the Foundation are appointed by the government and its main objective is to support long-term and innovative cultural projects.

The Swedish model not only assimilated the mechanism of financing artistic culture through procedures involving an expert body, independent in its decisions from government authorities, but also equipped such bodies with the competence to allocate funds for cooperation in terms of purchases of works of art by entities other than public authorities. It is worth noting that it is a mechanism borrowed from the Facilitator's system (facilitating and encouraging the support for the purchase of cultural goods by private entities) and at the same time it retains the features of patronage (independent body and open procedure for deciding on financing). The impact on the transparency and procedural fairness of the funding process is obvious – and these elements are becoming components of the right to culture in the sense that they are elements of a system guaranteeing the independence of creators and the freedom of access to the ongoing cultural life, facilitating and enabling the creation of works recognised by expert bodies as works of high aesthetic quality.

Against this background, the Polish model of financing cultural life is still based on the canon of the Architect system, if such a status can be attributed to it at all, since it is difficult to identify the basic element of such a system, i.e. a coherent and clearly defined cultural policy, which defines objectives and development strategy.[25] There are many reasons for this state of affairs, but there are two most important reasons for it. First of all, in Polish public law cultural institutions

[24] Prop. 2009/10:3, Tid för kultur.

[25] More about this disfunction of public authorities activity – in report written by J. Głowacki, J. Hausner, K. Jakóbik, K. Markiel, A. Mituś, M. Żabiński, *Finansowanie kultury i zarządzanie instytucjami kultury*, prepared for National Centre for Culture. This lack of clear and transparent cultural policy was also identified in National Strategy of Culture Development for years 2004–2013.

are quite rigidly formalised and subordinated not only to control or supervision, but also directly to the state or local government authorities that manage them. In accordance with the Law on the organisation and conduct of cultural activities,[26] the State acts as a patron of cultural activities, consisting in supporting and promoting your community, education and cultural activities, and initiatives, as well as the protection of monuments (Article 1 (2)), but the basic structure of such cultural activity is constituted by cultural institutions – run by state or local government (Articles 8 and 9 of the Act) organized by ministers, managers of central institutions and self-government units. These institutions are also not financially independent enough, which results in their deeper administrative, bureaucratic dependence and practical incapacitation; as the authors of the quoted report write: "This means their permanent escape from the market and taking on the role of a dependent object (working facility) in the state system of culture. Such an orientation ensures continuity, but at the same time limits independence", these institutions follow a bureaucratic pattern of persistence, while maintaining the status quo, their own resources of assets and personnel, without indicating and defining the objectives and methods of functioning, in an opportunistic and clientelistic attitude,[27] dependent on ad hoc politics or the views of successive ministers and officials of the ministry. The second institutional factor is the lack of an educated system for evaluation of the quality of functioning of cultural institutions correlated with their financing. Decisions on the funding of cultural institutions and scholarships for authors continue to be granted by the Minister (Article 7b) – although, after reviewing the recommendation of a ministerial committee composed of staff from the ministry, the committee in turn, while issuing a recommendation is guided by or at least consult the expert opinions. As we can see, the substantive assessment of quality and aesthetic value is deeply, almost embarrassingly, concealed within this process, and its outcome does not necessarily have to be related to it. According to the authors of the report:

[26] Ustawa z dnia 25 października 1991 r. o organizowaniu i prowadzeniu działalności kulturalnej (Dz.U. z 1991 r. Nr 114, poz. 493).

[27] J. Głowacki et al., *Finansowanie kultury...*, pp. 6–7.

> The public patronage resembles the conduct of an enlightened ruler, who allows all of his subjects to address him directly and who considers petitions (applications) filed to him wants to do good. The number of applications has been steadily growing, but as a result the whole system is radically bureaucratic and the good ruler gets increasingly separated from the people by officials surrounding him, including those who have political legitimacy and ambitions.[28]

5.4. Polish Film Institute as an attempt to implement an expert body and the arm's length principle

Currently (in 2017) there are over sixty cultural institutions in Poland, organized by the Minister of Culture and National Heritage (among others, the National Royal Opera, Adam Mickiewicz Institute, many museums, film studios, National Cultural Centre, National Heritage Institute, etc.). However, it would be difficult to say that any one of them enjoys full autonomy, guaranteeing the rights of creators to free creation and transparency and procedural justice of the decisions being made. For example, the Polish Film Institute[29] established just over a decade ago was supposed to create the institutional foundations of a system of transparent and decoupled from current political influence, and at the same time an effective and efficient mechanism for financing motion pictures. According to the Act on Cinematography (Article 3 (1)), the state acts as a patron of cinematography related activities, as part of the national culture, in particular, it supports the production and promotion of films, disseminates film culture and protects film heritage. The tasks of the state in the field of cinematography are performed by the Minister of Culture and National Heritage Protection, whose role is, among others, 1) to design directions in the implementation of the national cultural policy in the field of cinematography; 2) to ensure universal public access to the achievements of the Polish, European and world film art; 3) to create conditions for the development of all genres and kinds

[28] *Ibidem*, p. 53.

[29] Established by Cinematography Act of 30th June 2005 (Dz.U. z 2005 r. Nr 132, poz. 1111).

of film creations; 4) to support the artistic development of the youth. The task of supporting the development of cinematography is carried out by the Polish Film Institute (Articles 7 and 8 of the Act) mainly by co-financing the preparation of film projects, production and distribution of films, promotion of the Polish film industry and promotion of film culture. The minister supervises the Institute's activities: he approves the annual activity plan and the draft annual financial plan of the Institute, as well as the annual activity report and annual financial statement of the Institute. He also grants the Institute a statute, defining the specific scope of the Institute's activities, its internal organisation, as well as the responsibilities of its governing bodies and modes of operation (Article 11). After holding a contest, the Minister also appoints the Director of the Institute. The Contest Commission is appointed by the Minister, in particular from among candidates nominated by film circles, including filmmakers and film producers, as well as professionals working in cinematography (Article 14), for a five-year term of office. The members of the Institute's Board are also appointed by the Minister, with the members being proposed by filmmakers (3), producers (1), trade unions (1), broadcasters (cinema operators, television broadcasters, digital platform operators, cable operators) (5), and the Minister (1). PISF possesses at its disposal subsidies, revenues from film exploitation, funds from the Minister – thanks to them it can perform its task of subsidizing film undertakings (Article 22) in the form of grants, loans or guarantees. The law sets out the funding limits (up to 50% of the film's budget, and in some cases up to 90%) and the criteria for awarding it, which are as follows: 1) artistic, cognitive and ethical values; 2) significance for national culture and strengthening Polish tradition and native language; 3) enrichment of European cultural diversity; 4) anticipated effects of the planned project; 5) economic and financial conditions of its implementation. The funding of the film is awarded in the form of a civil contract, which is concluded by the Director after consultation with experts, as provided for in Article 23 (3) of the Civil Code, which means that it is not bound by it. In addition, these experts are also appointed by the Minister (Article 24 (7)) for the period of 12 months from among representatives of film circles and opinion-forming circles.

As it can be seen from the briefly presented regulation, the minister responsible for cultural affairs not only does create the directions of the development of cinematography, but also has a significant influence on the decision making by the agenda, which PISF is in principle at each stage of the proceedings – beginning with the appointment of the Institute's authorities and ending with the appointment of experts to assess the quality of film works. Moreover, the opinion of experts does not have to be binding on the Director of the Institute, even less on the Minister. Therefore, the participation of expert bodies and their independent position in the Polish model of cultural policy is still not a standard, but controversies about financing or refusing to finance specific artistic projects are still a matter of dispute, inevitably related to the political background of such decisions.

Therefore, the lack of separation of ownership and supervisory functions, decentralization of support management and maintenance of cultural life and institutions, financial and programmatic autonomy of cultural institutions, as well as the lack of clear and precise rules of financing and competition procedures for performing expert assessments by independent and professionally qualified bodies[30] are the main drawbacks of such a policy of supporting cultural activities. Introduced institutions dealing with the participation of advisory, expert and creative bodies (such as museum councils, media programme councils) are rather of a facade character, creating only the appearance of a collegial mode of making decisions on cultural matters and the influence of substantive and aesthetic evaluation on them.

5.5. Substantive criteria – dilemmas and conditions for financing the artistic life

The schematically outlined model of patronage of modern art, traditionally accompanying its evolution in the years of its development and prosperity, as well as the institutional solutions adopted in several systems, reveal three fundamental problems that accompany cultural policy. Public activities in the field of cultural life are largely based on

[30] *Finansowanie kultury...*, p. 29.

organisational and above all financial support for creative initiatives provided by public authorities using public funds. The first problem therefore concerns who is to decide on support for specific actions and creators. If cultural life in contemporary countries is to take place according to the rules of states and democratic societies, and every citizen is guaranteed the right to participate in cultural life, it means that, first of all, public authorities have public resources at their disposal, derived from taxes and other contributions, so that the decision to issue them must be both justified in terms of social needs and made in transparent manner, i.e. it must be properly legitimised. A fairly common and rather worrying phenomenon in European countries is the dependence of the decision making process to finance and support cultural life on factors related to political power. The depoliticisation of cultural policy and making it independent of the individual preferences of the factions and political parties at state level, as well as of its regional and local government units, is a major challenge that is difficult for all cultural policy structures and systems. This problem may therefore be – at least in terms of assumptions and model-wise – resolved at the level of designing the financing system, the bodies and processes in which decisions on state patronage are taken. In general, the structure of cultural institutions should therefore guarantee their autonomy and accountability, which means that the objectives and intended effects of such institutions should be clearly defined, as well as precise mechanisms of support and funding on the part of public authorities.

Another issue that is connected with this troublesome support for cultural life in the context of democratic cultural policies is closely linked to ensuring that the right of everyone to participate in cultural life is properly exercised. It is not easy to answer the question what, and in particular whose cultural needs and how the artistic culture receiving support from public funds should satisfy. Since contemporary cultural policy is to comply with the standards of a democratic state, it must be designed to meet the needs of citizens; it must therefore not only support works and creativity recognised by the elite (represented in the bodies that decide on the allocation of funds), but must also be able to respond to the real needs of citizens, who ultimately are its sponsors. As Mulcahy illustratively put it, the democratisation

of cultural policy must mean action not only "from top to bottom" but also "from bottom to top",[31] that is to support cultural activities considered by the general public, or at least a large part of them worthy of support and participation. It is therefore a question of separating high culture, which is by its very nature elitist and difficult to perceive, at least at the time of its creation, from entertainment, in essence regressive, namely corresponding to the already existing and awakened need of fun and filling spare time. Obviously, this dichotomy can be called into question – in the end, Dickens' or Sienkiewicz's works have been very popular since their inception and have ignited the readers' imagination on a mass scale, and this does not mean that they are less valuable or can be called mere "entertainment." However, mass access to cultural creation and the visible popularity of its effects – or lack thereof – raises the question of what, in fact, constitutes the element of this common good among the flood of emerging works, i.e. contributes to the imaginary world and creates an environment for the development and maintenance of the identity and competence of members of societies, plays the role of 'cultural Enlightenment',[32] which requires support and maintenance. It is even more difficult to determine whether, in the conditions of democratic cultural policy, it may be a rule that projects and activities which are not able to meet market conditions as having been less popular – and thus are not covered by the preferences of the members of the communities that contribute to their subsistence – are financed and supported. In this aspect of cultural policy making, it is important to what extent the public authority – or an expert body formed with its participation and approval – can decide not so much about public tastes, but about the way public funds can be spent. The terms of such public financing of art are convincingly formulated by C.R. Sunstein[33] based on the assumptions of the democratic system and its governance, which include legalism, respect for the will of the majority and protection

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[31] K.V. Mulcahy, *op.cit.*, p. 323.

[32] *Ibidem*, p. 325.

[33] C.R. Sunstein, *"It's the government money": funding speech, education, and reproduction*, in: C.R. Sunstein, *The Partial Constitution*, Harvard University Press, Cambridge: 1998, p. 309.

of minority rights, as well as the integration of state policies. Firstly, acts of artistic creation can be qualified for public funding under the conditions of a democratic state, as long as they do not potentially constitute acts against the law, in particular, they are not a crime – they are not, among other things, obscene, insulting, incitement to commit crimes and any acts of violence. Secondly, public support should be provided for creative acts that are not too controversial for members and groups of society, and therefore do not, for example, contain discriminatory or contrary to social ideas and feelings shared by members of the community. Observance of the conditions formulated in this way is essential in view of the axiological and structural assumptions of a democratic state, legalism, transparency of governance, preservation of procedural justice and protection of minority rights. This is important for purely pragmatic reasons; the public funding of culture, and therefore limited funds, always means that there will be people and goods not covered by such support – and therefore procedures and assumptions should be in place, which will help to verify the decisions made and also reduce the reasons for expressing dissatisfaction with the exclusion or limitation of funding. These conditions were to some extent confirmed, among others, by the U.S. Supreme Court's judgment in the case of National Endowment for the *Arts vs. Finley*,[34] where it was considered whether the criteria for awarding art funding, formulated in such a way that apart from artistic excellence, require fulfilment of the condition of "decency and respect for the diversity of beliefs and values of the American public." The Supreme Court settled that such a criterion is admissible and consistent with the First Amendment, which also means a ban on formulating a prohibition of speech due to the criterion of its content, since the Fund's actions do not result in a ban on any other kind of statement, but only constitute an expression of authority in the scope of supporting certain artistic statements; such action does not constitute discrimination.

Thirdly and finally, although there is, in principle, considerable flexibility in the allocation of funds, and the criteria are given a considerable margin of subjective appreciation, resisting strict

[34] 524 U.S. 569 (1998). About this decision in the context of First Amendment doctrine: E. Chemerinsky, *op.cit.*, pp. 1238–1239.

accountability and demonstration, the conditions of support from public authorities must be based on convincing judgements regarding the art. This means that such judgements have to be properly justified both in terms of substance and procedure. So far, the best remedy for such allegations and controversies related to the financing of specific projects is the Anglo-Saxon concept of independent expert bodies, whose task is to decide on the selection of projects and creators that deserve funding in subsequent editions. The members of these bodies, with their professional and scientific authority, guarantee an appropriate level of expertise of the decisions made, thus they represent a substitute for the sponsor's "taste" – patron in the traditional patronage model. Last but not least, their authority and the manner in which they are selected in accordance with the substantive criteria must also guarantee the independence and apoliticism of the decisions made.

The formulated conditions for maintaining and supporting cultural life as well as preserved cultural heritage sites through public funds should be a standard guaranteeing the actual exercise of the right to participate in cultural life. Such a standard would make it possible to assess in a fairly reliable way whether the criteria required of an activity in terms of the exercise of the individual right to culture – both the creators and the recipients of artistic culture – are being met. What is most important, however, is that their formulation at the international level, as well as their inclusion in the constitutional standard of protection of cultural life and artistic expression may mean that their final verification may be subject to proceedings – both before national courts, in the framework of monitoring decisions made in the field of support, organisation and financing of cultural activities and in the process of constitutionality control. Certain aspects of this well-formed standard may also be examined at the level of conventional protection at the European Court of Human Rights, since, as previously indicated, both the search for the essence of freedom of artistic expression and the prohibition of discrimination, as well as for the right to a judicial remedy and, more broadly, for procedural justice, are firmly embedded in the protection of the rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, cultural policy – its model, the essential features of the system for promoting and maintaining cultural life and heritage conservation in modern countries – can, at least in some respects, be protected at individual level, creating a standard that is not only in line with procedural requirements and the prohibition of discrimination. The normative and practical fixation of objectives, directions and methods of supporting the ongoing cultural life as well as the protection of cultural goods, especially at the national level, may become the basis for setting a standard in terms of positive state obligations with regard to guaranteeing conditions for the development of artistic culture and its accessibility – this corresponds in the sphere of protected activity or individual expectations that are justified in the light of the determined level of support to the right to culture.

5.6. The status of the artist – mechanisms to support creators as subjects and beneficiaries of cultural life

As mentioned above, the cultural policy of contemporary countries is an extremely diverse group of strategies and mechanisms, in addition very strongly connected with other areas of state activity and regulation in fields as distant from artistic culture as social security, tax law or competition protection regulations. However, it is precisely these instruments that often determine important parameters and factors determining the actual level of protection of cultural life, as well as the sphere of positive state rules – and the corresponding powers, sometimes also claims of cultural life participants. One of such areas of regulation in contemporary countries is to guarantee the status of an artist, i.e. not only his independence but also his social status.

Creators belong to many professional groups, which are characterized by their specificity, but most of them, regardless of the choice of the artistic career path, struggle with the instability and insecurity of employment or even its immanent absence (e.g. in visual art). In general, they are therefore excluded from the system of employment relationship protection, not to mention the working conditions, as well as social security and insurance. Meanwhile, the social status of creators of artistic culture determines the conditions for the creation and maintenance of artistic creativity in a very meaningful way.

Artistic practitioners are key players in maintaining and developing culture. If we recognise that culture is a phenomenon and a source of socially important values and relevant for individual development, as modern legal regulations do, its sustainable development and maintenance is of fundamental importance and the right to participate in culture makes us all entitled to benefit from its effects, and thus, above all, the fruits of creative work. Therefore, it is difficult to assume that this right is realized in the situation of depriving the creators of elementary social guarantees available to other professionally active persons.

This problem has been recognised in the UNESCO Recommendation on the status of artists,[35] which includes recommendations for Member States to implement provisions and take legal and other actions to protect the social and creative status of artistic professionals. The Recommendation recognises anyone who "creates or processes works, acknowledges creativity as the essence of his or her life, develops art and culture independently of associations and unions" as a member of this group, or alternatively employing the classification of creative professions recognised under the Berne Convention[36] that protects literary and artistic works and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.[37] In accordance with the Recommendation, while defining social policy towards these professional groups, Member States should first of all take into account the specificity of artistic careers. Artists should have access to trade unions and professional organisations that will formulate demands for cultural policy (item 4). They must also be guaranteed the necessary social security and social rights comparable to those of the active population as regards employment, working conditions and protection

[35] UNESCO Recommendation on the status of artists, UNESCO General Conference, 27th October 1980.

[36] Universal Copyright Convention and the Berne Convention for the Protection of Literary and Artistic Works, as well as performers and interpreters within the meaning of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

[37] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

in the event of self-employment. Countries should consider measures to, i.a., support artists at the beginning of their creative journey, promote the recruitment of artists in their disciplines and increase employment opportunities – thus subsidising cultural organisations, supporting individual artists, organising artistic events and establishing art funds (Article VIc) allowing artists to operate in the public system, through the creation of jobs for them in such places as libraries, museums, academies and other public institutions, as well as creating effective employment policy instruments for both job-seeking and hiring, and also seeking methods and resources to ensure that artists are protected in accordance with the International Labour Organisation's standards (e.g. in terms of working hours, holidays, travel) and to guarantee the status of artists' family members. The specificity of the artistic professions must therefore be taken into account when determining the retirement age, preventive medical care, fiscal forms of creative activity, as well as the conditions of trade in works of art.

Member States, including European countries, are adopting different approaches to regulating the social and labour status of creative workers. These instruments can be classified into three groups: those relating to the status of social security (retirement, health), second, those which regulate tax reliefs and exemptions related to the performance and marketing of creative work, and, finally, those relating to the functioning of the art market itself, i.e. purchases made using public funds.

As far as the instruments for guaranteeing an adequate social status are concerned, specific regulations concerning the social security of artists have been adopted in many countries.[38] These arrangements concern retirement age, contributionary age, unemployment insurance, benefits, pensions and sickness or permanent disability allowances. In a few countries (Germany, the Netherlands), artists' social security legislation was adopted in the 1980s, but it did not appear

[38] It has happened, i.a., in Austria (Law on Social Security for Artists, 2001), Germany (1981), Bulgaria (2000), Belgium (2003), Croatia (2000), Estonia (2004), Lithuania (2004), the Netherlands (1998), Hungary (1995), Lithuania (2004). Data in: Compendium of Cultural Policies and Trends in Europe, Council of Europe, ERICarts; i.a. Social Security Laws and Measures to Support Self-Employed Artists, http://www.culturalpolicies.net/web/comparisons-tables.php?aid=34&cid=45&lid=en [accessed: 03.12.2017].

in most countries until the 21st century. German regulations may serve as an example of such solutions. Therefore, the instruments guaranteeing a minimum level of protection for the working conditions of artists have been created there – the regulation of the 'quasi-employees' group (Arbeitnehmerähnliche Personen), among which authors occupy a prominent place. These provisions give them the right to appeal before a labour court (Article 5 (1) ArbGG (Law on proceedings before labour courts)), the right to conclude collective agreements (Article 12a of the TVG (Law on Collective Labour Agreement)) and the right to time off work (Article 2 of the BUrlG (Law on Leave)). Secondly, in the German social security system there are regulations for artists who are not employed on a permanent basis – in 1981, the Artists' Social Insurance Act (KSVG) established the Künstlersozialkasse (KSK), a sectoral social insurance scheme for artists. Those entitled to use this system also pay half of the health insurance premium rate.[39] Some of the contributions are paid by companies which earn income from artistic and journalistic works, instead of artists.[40]

In France, the social system designed for artists is subordinate to membership in the organisations associating artists.[41] A number of creators enjoy a special status between periods of employment – although they do not actually work, they do not lose employment rights during breaks in employment itself. However, France is above all an example of a country using a significant number of fiscal instruments to support artistic life. Such instruments include in the first place purchases of works of art made from public funds – by the National Fund for Contemporary Art (Fonds National d'Art Contemporain – FNAC), which purchases works of contemporary art from living artists, in particular debutants. Purchases are decided

[39] S. Stano-Strzałkowska, *Niemcy*, in: D. Ilczuk (ed.), *Wsparcie dla twórców i artystów. Perspektywa międzynarodowa*, cooperation: A. Karpińska, S. Stano-Strzałkowska, W. Walczak, Uniwersytet SWPS, Ogólnopolska Konferencja Kultury, Warsaw: 2017, p. 60.

[40] *Ibidem*.

[41] La Maison des Artistes – La Sécurité Sociale des artistes-auteurs (MDA) and L'Association pour la Gestion de la Sécurité Sociale des Auteurs (AGESSA). See also: S. Stano-Strzałkowska (cooperation: A. Janowska), *Francja*, in: D. Ilczuk, *op.cit.*, p. 32.

on by a committee composed of representatives of artistic circles, art critics and officials.[42] Works can be purchased from specific artists not more often than every two years. In France, there is also a system of tax advantages for artists (they are exempted from the commercial activity tax for the sale of their own works, they are entitled to a flat-rate deduction of the cost of income in the cases indicated by the legislator (i.a., opera and drama artists, filmmakers and choreographers, musicians, choir members, conductors, play directors, designers of clothing, writers and composers). Many goods and services having the character of cultural goods enjoy preferential VAT treatment (tickets for performances, concerts, to cinemas, museums, books).[43]

A comparable mechanism does exist in Sweden – as mentioned earlier, the Public Art Agency of Sweden (Statens konstråd) purchases the works of contemporary artists;[44] the works purchased are exhibited in public places and public institutions, such as universities, courts and offices. This council also co-finances non-public partners in the procurement of works of art for display in public places (schools, housing estates, squares, etc.).[45] The selection procedures for projects worthy of funding are carried out with due respect for the principle of artistic independence in matters of the content and quality of artistic works, guaranteed by expert evaluation and the influence of creative circles on the composition of councils, foundations and agencies deciding on support (which is even called the double arm's length principle),[46] which is intended to provide protection against political pressure and interventions.

5.7. Instruments for promoting the accessibility of cultural assets – book as a cultural asset

Another group of regulatory instruments in the sphere of cultural life are those related to the development of conditions for better

42 *Ibidem*, p. 34.
43 *Ibidem*, p. 37.
44 T. Harding, *op.cit.*
45 *Ibidem.*
46 *Ibidem.*

accessibility of cultural goods and services. Therefore, they refer to a category of participants of cultural life who benefit from artistic culture as recipients, although – as it has already been shown – the division between 'active' artists and 'passive' viewers/readers/listeners is not complete or fully adequate for the description of contemporary cultural life. There are many instruments for facilitating access to cultural life, and they apply to all spheres and activities of artistic life – starting with cultural education, through facilities for the use of performing arts and plastic arts, as well as the creation of preferences and facilities for people who, for some reasons, have limited access – including people with disabilities. The latter is determined by the provisions laid down in Article 30 of Convention on the Rights of Persons with Disabilities[47] that obliges States Parties to take action to ensure that persons with disabilities have access to cultural material, performative arts (films, theatres, television programmes) in accessible forms, as well as cultural activities and services (such as theatres, museums, cinemas, libraries and tourist services, as well as cultural heritage and sites significant for national culture).

To facilitate access for people who, on grounds of disability or for social reasons, have difficult access to cultural goods, anti-discrimination measures, which are distinct and of a different nature, have been designed due to and in the context of constraints that they have to face and overcome in order to equalise the availability of certain goods and services. On the other hand, from the point of view of the right to culture as a universal standard, reconstruction of which is the intention of this publication, it is more important to have regulations and instruments whose function is to improve accessibility to cultural life with all its participants taken into account. There is a great deal of such elements in cultural policies; they can be divided into three groups because of the function they perform. The first concerns access to cultural infrastructure (facilitating accessibility and creating mechanisms to encourage the use of infrastructure, maintained with public funds, cheaper tickets, free access to galleries, making cultural assets more available). Another group consists of mechanisms concerning the protection of cultural assets and cultural heritage, which will

[47] UN Convention on the Rights of Persons with Disabilities, 2006.

be omitted here, as they constitute a separate system of influence on the sphere of protection of cultural assets. The third category is made up of market-accessibility instruments, in particular measures aimed at removing possible economic barriers to the availability of cultural goods and services.

The vast number of regulations and activities undertaken in these spheres in contemporary cultural policies causes that their presentation, and even more so the attempts to generalise them in this area, significantly exceeds the framework of elaboration and impact assessment on the actual level of implementation of the right to culture. However, it is worth looking at the instruments and developments in terms of access to one of the cultural assets, especially the second most popular one in European countries – that is, the instruments supporting the market accessibility of books. Cultural policies for books imply different systems of preferences, the most commonly used include a reduced VAT rate. This preferential rate on books is applied in almost all European countries (among them: Albania (0%), Austria (10%), Belgium (6%), Croatia (0%), Czech Republic (10%), Estonia (4%), Finland (10%), France (5.5%), Germany (7%), Greece (6%), Hungary (5%), Spain (4%), Ireland (0%), Italy (4%), Latvia (12%), Lithuania (9%), Luxembourg (3%), Macedonia (5%), Malta (5%), Moldova (0%), the Netherlands (6%), Norway (0%), Poland (5%), Portugal (6%), Romania (5%), Slovenia (9.5%), Slovakia (10%), Sweden (6%), UK (0%)).[48] Reduced VAT rates on so-called audio books and e-books on physical media have been introduced in most EU Member States: Croatia, France, Germany, Hungary, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden.[49]

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[48] Data derived from comparison made by Compendium of Cultural Policies (Measures to Support Book Markets in Europe, http://www.culturalpolicies.net/web/comparisons-tables.php?aid=33&cid=45&lid=en), according to data in Report of European Commission (Taxud.c.1 (2017), VAT Rates applied in the Member States of the European Union), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf [accessed: 03.12. 2017].

[49] Document: VAT rates on books in EU countries and FEP Members 2015, Federation of European Publishers, 2015.

Within the framework of the European book markets, a debate has been taking place in recent years regarding the regulation of the VAT rate for books in digital form distributed electronically. Directive 2006/112/EC does not allow for the application of reduced VAT rates to books published in digital form and other electronic publications, since such books are a service within the meaning of that Directive, while allowing Member States to introduce a reduced VAT rate for books on physical media (commonly used, as previously indicated), which means that traditionally printed books and those e-books which are supplied on another physical medium (CD, pendrive, etc.) may be subject to a preferential VAT rate. However, Article 98 (2) of the VAT Directive, read in conjunction with item 6 of Annex III to that Directive excludes the possibility of applying reduced VAT rates to electronic books delivered in the form of a file sent over the Internet (e.g. by e-mail or made available for download on the seller's website after logging in) and electronic books delivered by means of the so-called streaming. Some European countries such as France or Luxembourg have chosen to apply the preferential VAT rate to e-books, but the judgments of the CJEU clearly prohibited such measures.[50] Nevertheless, the actions of countries advocating lowering the VAT rate[51] also for e-books ultimately led to a positive outcome – in December 2016, the European Commission announced a draft of legal solutions which left this issue to the Member States to decide on the application of a reduced VAT rate to e-books and electronic

[50] CJEU decisions of 5th March 2015: C-479/13, *European Commission vs. French Republic*, ECLI:EU:C:2015:141 and (C-502/13, *European Commission vs. Luxembourg*, ECLI:EU:C:2015:14. In these circumstances Polish Constitutional Tribunal requested for the CJEU preliminary ruling (Polish CT decision of 7th July 2015, K 61/13). However on 7th March 2017 CJEU ruled that "the difference in treatment – resulting from Article 98(2) of Directive 2006/112, read in conjunction with point 6 of Annex III thereto – between the supply of digital books electronically and the supply of books on all physical means of support must be regarded as duly justified" (C-390/15).

[51] It is worth to mention that ministries from Poland, France and Germany submitted on 22nd March 2015 to the European Commission declaration on reduction VAT on ebooks (http://www.mkidn.govs.pl/pages/posts/polska-francja-niemcy-i-wlochy-apeluja-o-nizszy-vat-na-e-booki-5389.php [accessed: 03.12.2017]).

magazines. This solution was adopted in May 2017 by the Economic and Monetary Affairs Committee of the European Parliament. The vote in the European Parliament took place on 1st June 2017. The proposal was voted through and the decision to extend the reduced VAT rate to e-books shall be left to individual Member States, but this is already an acceptable solution under European law.[52]

Another instrument which favours the market position of a book and therefore influences its availability is the regulations enabling subsidising the national publishers, applied in Austria, Bulgaria, Croatia, Denmark, Georgia, Greece, Ireland, the Baltic States (Lithuania, Latvia, Estonia), Romania, Russia, Serbia, Slovakia, Spain and Sweden, as well as in Ukraine.[53] Similar support mechanisms for national and even state publishers are particularly active in the educational books market, which are used in some European countries, such as Greece and Latvia.

The use of Fixed Book Price is a highly valued and respected instrument that has long been associated with the preservation of the book market. It is an instrument thanks to which publishers set the price at which a book is to be sold in retail sale. The agreements between publishers and bookkeepers on the price of books were already known in the 19th century.[54] Such a mechanism can be introduced either by means of a general law (e.g. in Germany[55] or France[56]) or

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[52] Despite of this the project has been proceeded by Polish parliament in 2017 (parliamentary document no. 1430, http://www.sejm.govs.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1430) by subcommittee of tax law monitoring.

[53] Data from comparison Measures to Support Book Markets in Europe, http://www.culturalpolicies.net/web/comparisons-tables.php?aid=33&cid=45&lid=en [accessed: 17.10. 2017].

[54] The first such agreement was signed in 1829 among British publishers and booksellers to avoid uncontrolled sales, eight years later the similar one was made in Denmark, and in 1888 German association of publishers and booksellers Börsenverein included such clauses on fixed price into its statute. See: Global Fixed Book Price Report, 2014, International Publishers Association, https://www.internationalpublishers.org/images/reports/2014/fixed-book-price-report-2014.pdf [accessed: 03.12.2017].

[55] Buchpreisbindungsgesetz – BuchPrG, 2nd September 2002.

[56] Loi relative au prix du livre (called "loi Lang" – 'Lang Law', after Jack Lang, the French Minister of Culture at the time), 10th August 1981, entered into force in January 1982.

by means of industry agreements between bookkeepers and publishers (the example here is Norway). Uniform book pricing is used in many European countries, i.a., Austria (since 2000), Bulgaria, Croatia, France (since 1981), Germany (current Act of 2002), Greece (since 1997), the Netherlands (2005), Spain and Portugal (since 1996), Italy (since 2001) and Switzerland (since 2012). This instrument was also applied in the Scandinavian countries of Sweden and Finland, but was abandoned in 1970 and 1971, while the United Kingdom (since 1995), Belgium (since 1981) and Denmark (2011) also abandoned the uniform price mechanism. The last wave of the adoption of uniform price laws in EU countries is linked, firstly, to the reluctance of EU bodies and EU law to enter into industry agreements and, secondly, to the growing fear of threats to the market for national booksellers and publishers created by the online book market.[57]

The supporters of this instrument, and there are many of them especially among publishers, stress that the book is a specific commodity, which is at the same time a cultural good, and therefore the book market requires specific instruments to protect these goods against aggressive market practices, in particular overpricing and sales, which in an uncontrolled manner depreciate books and the value of their publishing services. A single price stabilizes the relation between the sale of novelties and sales; a particular effect of protection is saving the independent bookshop market of small bookshops and creation of better conditions for the functioning of a diversified bookshop offer – including niche and less popular positions, authors, it also actively influences the maintenance of the variety of offers, as well as the preservation of small markets (i.e. other than English-speaking ones). Opponents, in turn, point out that the introduction of a fixed price is an interference in the operation of the market, which is not in the public interest and artificially

[57] H. Rønning, T. Slaatta, O. Torvund, H. Larsen, T. Colbjørnsen, *Books – At what price? Report on policy instruments in the publishing industry in Europe*, 2012, pp. 1–2; http://www.europeanbooksellers.eu/wp-content/uploads/2015/03/Books-at-which-Price.pdf [accessed: 03.12.2017]. See also: W. Williams, *France passes so-called 'Anti-Amazon' Law: The French parliament passed an amendment that would ban Amazon from offering a combined discount and free shipping to customers in France*, https://www.csmonitor.com/Books/2014/0627/France-passes-so-called-Anti-Amazon-Law [accessed: 3.12.2017].

determines the price at which readers can buy books. They also point to the lack of evidence that a single price mechanism affects a wider offer, greater diversification in the book market, which is a demand and the rationale behind the solutions.

It is very difficult to summarise clearly the effects of this mechanism regarding cultural rights for at least three reasons. Firstly, while assessing the impact of the same instrument, much depends on the specificities and conditions of the bookshop market – its structure, integration and concentration, as well as the publishing market and readers in general (e.g. the language of publication, on which their scope and availability depend). Secondly, any comparisons and conclusions are hampered by the fact that there is no uniform method of compiling statistics on the book market in European countries. The authors of the quoted report, with some caution due to difficulties in collecting relevant data and comparing them, point out that although the choice of the book price system (free or uniform prices) has an impact on the diversity of the book market, because the uniform price means that books that are less popular for a certain period of time (e.g. one year) must remain at a fixed price, the price system has no impact on the volume of books sold and the average book price.[58] The selection of a price system also has no observable effect on the concentration of publishers or booksellers. Above all, therefore, there is no significant impact on the situation of the author, who is the weakest link in this chain, in a position where he often has to waive property rights and sometimes finance the publication of his works. Therefore, from the point of view of the creator, the realization of the right to culture does not change. On the other hand, the situation of the reader is influenced by the fact that there is a more diversified offer of available books, which results in a higher level of exercising the right of access to cultural assets. However, the obvious effect is also that a fixed price set by the publisher may be too high a price for many readers. On the other hand, there is no demonstrable link between the choice of a book pricing system and an increase or decrease in readership in general.

However, it is still a rather controversial instrument and its impact on accessibility to culture is difficult to grasp. Protection against

[58] *Ibidem.*

the Internet market, which is undoubtedly (even undisguised) the intention of those who postulate this mechanism, seems to limit access to books. The most important for assessing the impact of the presented instrument on the implementation of the right to participate in culture is, however, the fact that the online market is increasingly influencing the market for these goods – books available online and readership data indicate that traditional paper books become only one of the carriers of text, including literary texts. The market for books published in the traditional way is only a part of the offer concerning access to their content, which means that the importance of the market's protection instruments – notwithstanding their detailed assessment – is becoming less important in terms of authors' and readers' rights to participate in this sphere of cultural life.

This is confirmed by the results of a report commissioned by the European Commission in 2013.[59] The report shows that the most common form of contact with cultural life is watching or listening to cultural programmes on television or radio (72% of Europeans declare that they used the media that way at least once a year)[60] – the number of respondents in this category has fallen from 78% since 2007, which may indicate that the Internet is becoming increasingly competitive as a medium for disseminating cultural content. In 2013, more than half of Europeans declared that they use the Internet for cultural purposes and 30% do so at least once a week. In contrast, 68% of Europeans state that they have read at least one book over the past year – the second most popular form of participation in cultural life. Interestingly, the least popular forms of participation in culture, such as ballet and opera performances (18% of the declared participation during the year) are quite resistant to the new media environment.

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[59] Special Eurobarometer 399 "Cultural Access and Participation" of 2013. Conducted by TNS Opinion & Social at the request of the European Commission, Directorate-General for Education and Culture. Survey co-ordinated by the European Commission, Directorate-General for Communication (DG COMM "Research and Speechwriting" Unit), http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_399_en.pdf [accessed: 10.11.2017]

[60] *Ibidem*, pp. 5–6.

In terms of the way and extent of cultural participation, much depends on country-specific habits – for example, the Scandinavian people are much more engaged in reading (90% of Swedes, 86% of Norwegians, 82% of Danes) and in southern Europe the figure is 51% in Romania and 50% in Greece. Similarly, the overall rate of cultural participation is very high or high in the Scandinavian countries,[61] while it is several times lower in Greece, Portugal, Romania and Hungary.[62]

Only around 10% of Europeans declare active participation in cultural life,[63] and the number of active cultural players has fallen dramatically in recent years.[64] However, the most interesting from the point of view of cultural policy that aims at increasing access to cultural life were the reasons identified by the respondents for lack of participation or lack of greater participation in cultural life. The main reason (given as the first one for five of the surveyed cultural activities) was directly stated lack of interest of respondents. Another reason was shortage of time (it was the first choice in four other cultural activities). The reasons such as excessive costs or limited choice or poor quality of the services offered placed next. Therefore, studies have mercilessly demonstrated that the level of cultural participation is moderately influenced by accessibility policy, while the combination of individual and social factors, created with regard to cultural needs and preferences, is decisive. Therefore, it is actually the cultural capital already accumulated – a lifestyle, established preferences and tastes – that determines participation in cultural life much more strongly than the legal regulations and actions, as well as strategies concerning costs, facilities, privileges and even the quality of cultural content that

[61] 43% of respondents in Sweden, 36% in Denmark and 34% in the Netherlands, *ibidem*, p. 5.

[62] It amounts 5% in Greece, relatively: in Portugal 6%, in Romania and Hungary – 7%. *Ibidem*.

[63] 13% of respondents declare cultural activity in dancing, 12% in photography or moviemaking, 11% in singing, significantly less in writing (5%), acting (3%) and playing instruments (8%). *Special Eurobarometer*..., p. 6.

[64] In 2007 27% of examined declared taking pictures or making films, 19% declared dancing and 15% – singing. *Ibidem*.

are shaped within the framework of the policy of accessibility of cultural goods and services.[65]

The variety and multitude of instruments adopted in the indicated areas makes it impossible to present them in their entirety and to attempt to generalise them, which would allow for the adoption of a universal model of their influence on the standard of accessibility – and thus participation in cultural life. There is no doubt, in the light of previous remarks on the extent to which social rights have had an impact, and in particular the prohibition of regression and the retention of the substance already acquired in the exercise of their rights, that such standards are to a large extent dependent on cultural policies in this respect. Thus, the model of conducted policy, in particular the use of mechanisms and tools allowing to separate the sphere of public funding of cultural activities from the sphere of political power, the introduction of rules and procedures for transparent and compliant with the principles of procedural justice in deciding on the allocation of public funds, becomes the standard of cultural life in democratic countries articulated in literature and fulfils the long-term role of a guarantee instrument for the right to participate in culture. The system of protection of the status of artistic professionals is similar, although in this respect it is much more difficult to have clearly defined standards guaranteeing a minimum level of protection due to the specific nature of social and financial law systems, also in European countries. On the other hand, the instruments of cultural policies that have the most direct impact on the sphere of participation in cultural life seem to play a lesser guarantee role and influence the emerging standard of realization of the right to culture. Instruments, particularly in terms of access to infrastructure for cultural services and assets and the elimination of economic barriers to their accessibility, do not turn artistic culture into an egalitarian or democratic phenomenon. Cultural capital remains an elite commodity, and artistic culture is not so much a rare good but still difficult to perceive and attractive for those who want to benefit from it.

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[65] See more about social indicators and individual proclivities in Poland: T. Kukołowicz, *Dostępność kultury. Definicje i wskaźniki*, in: T. Kukołowicz (ed.), *Statystyka kultury w Polsce i Europie. Aktualne zagadnienia*, Zespół ds. Statystyki Kultury NCK, Warsaw: 2015, p. 68.

Conclusion. The Right to Culture – from Utopia to a Universal Standard

The inclusion of the right to participate in culture into the human rights order in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, as well as many national constitutions, which were created in the last three decades of the 20th century in particular, has been a manifestation of the desire to ensure that all people benefit from and contribute to the cultural heritage of humanity and the universal tissue of the human community, in which the values and attitudes through which it is shaped are being expressed. However, the evolution of guarantees and the content of the right to participate in culture has not been linear and has not produced any definite results so far, nor has it led to optimistic conclusions. The right to culture has struggled to pave the way for itself in the contemporary postmodern world of shared values and axiological and conceptual chaos.

However, this does not mean that establishing the right to participate in culture, understood as artistic culture, as a universal right, is doomed to be forgotten as an idea that is based on the already unfashionable paradigm of universal enlightenment and common values and patterns. Art culture – regardless of the multiplicity and controversial nature of attempts to define it – has certain characteristics that allow it to be distinguished and protected; these include the ability to evoke an aesthetic experience that is significantly distinct from other human emotions, as well as the transfer of attitudes and meanings conveyed through it. Therefore, it constitutes an environment in which people learn to perceive and understand the meaning of their attitudes, behaviours, symbols and works – it is the most universal language and a code of understanding between people, so it constitutes the greatest and most comprehensive legacy of human civilization, at the same time being an extremely valuable resource,

a common good that allows us to find common meanings, values and attitudes, i.e. to fully participate in the life of human community.

The concept of universal guarantee of the right to participate in the world of culture understood as artistic culture has been expressed at the international level through the design of the second generation right, finding its place in the catalogue of economic, social and cultural rights. However, the problems identified in the subsequent chapters concerning the freedom of artistic creation and the horizontal impact of the freedom of creativity and the right to use it, as well as the cultural goods, indicate that the right to culture has a complex structure and it is difficult to clearly qualify it as a right of purely social character. Moreover, an in-depth analysis of the elements, content and scope of many rights and freedoms indicates that it is neither possible nor necessary to clearly define entitlements according to the criterion of their specific nature. The study on the right to culture is a good example of this. It is impracticable to present the content of this right, designed at the level of international documents, i.e. the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and guaranteed in many national constitutions, in isolation from the standards of freedom of expression and, therefore, artistic expression. The findings made with regard to constitutional regulations, and above all the jurisprudence of courts, especially the European Court of Human Rights, fully support the conclusion that there is a heterogeneous structure of the right to participate in culture, called a 'transverse' right in literature for this reason. At the same time, the above-mentioned pathways of searching for the content of social rights in freedoms and rights of a negative nature allow us to find certain standards of positive state obligations and those of public authorities with regard to observance of rights traditionally classified as social rights. Among such methods, it is worth paying attention to the search for and analysis of the core of every right and freedom, as well as the prohibition of regression of the degree of observance and realization of rights. When investigated by national and international courts, these methods can lead to those positive state obligations that are necessary to preserve the content and minimum protection of the right to culture.

The analysis of the case-law also demonstrates that the protection provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms in the area of freedom of artistic expression in a number of judgments also means finding positive obligations on the part of public authorities in this field, in particular with regard to protection which is granted horizontally, as well as towards groups that are marginalised, excluded and dependent on public authorities more than others. The set of rights related to participation in cultural life is becoming increasingly widespread in judicial protection and evolves from declarative international documents to the level of implementation within the framework of national laws and policies.

In its case-law, the European Court of Human Rights also strongly emphasises the importance of the Internet in ensuring access to information and cultural life. Although these rulings primarily concern the right to communicate and inform, the standard they designate is significant and may constitute the starting point for determining a minimum level of access to cultural life, as well as the right to individual and social development through access to the media and their content. This standard requires the state to fulfil its positive obligations to ensure access to them – and thus provide a basis for the creation of a specific structure of claims, expectations and guarantees, which constitute components of the right to culture, understood as the right to freely participate in artistic culture. The egalitarian nature of the contemporary cultural life, connected above all with a radical change in accessibility caused by Internet communication and digitalization, among other things, changes the existing model of access to cultural assets from the relation passive recipient – creator to the model of participation, i.e. an increased activity on the part of the recipient, who often becomes the creator – or recreates the work.

Following the transformations in the sphere of accessibility and active participation in cultural life, where everyone can become a creator or a person who conveys cultural content, the right to participate freely in artistic culture must be reconstructed and supplemented – with such elements as the right to freely share creative work, the right to exchange ideas and opinions with others, the right to freely and creatively use cultural content already made available and the right to participate in and produce cultural content.

All these elements may to a large extent concern horizontal actions, in particular with regard to copyright protection. The collision of the right to culture and rights related to works of art becomes particularly visible and relevant in the era of universal access to all manifestations of creative life and its use in a digitalized environment. In this respect, however, both legal regulations and the jurisprudence of courts are only some of the factors that shape this relationship, and thus the scope and content of the right to participate in culture, as there are unbelievably strong social activities in this sphere, which may undermine the hitherto shaped model of copyright. On the other hand, sharing in the digitalised environment cultural assets held in the resources of public institutions has already become an obligation, the execution of which belongs to the Member States of the European Union, which significantly affects the content of the right to culture.

In terms of other elements that contribute to the right to participate in culture, many belong to the sphere of cultural policy and, more generally, to social policy. The right to culture in contemporary countries, in particular in countries where the culture of state patronage is traditionally dominant, requires not only that public authorities ensure that they refrain from interference in the sphere of artistic expression and access to artistic culture, but also that they fulfil a number of positive obligations, in particular regarding fair and universal access to financing of artistic life. In European culture, countries adopt a strategy of public patronage based on three principles: 1) cultural life requires financial support, 2) there is a distinction between artistic culture and the sphere of entertainment, 3) public authorities are obliged to ensure access to artistic culture and cultural assets for their citizens. This means that cultural policy must be pursued through the financial support of artistic creativity, preceded by the requirement of aesthetic judgments. Judgments on art must be legitimized, and therefore issued by appropriate bodies and using transparent procedures. In the European countries, it is slowly becoming apparent that such a standard has been developed – in most countries, financial means intended for the support of culture are granted through competitive procedures and by independent expert bodies, so it is becoming more and more important to define the standard of allocation of funds for artistic creation in the sense of minimum

requirements of independence of bodies determining the allocation, transparency of procedures and the criteria in use. This is yet another important condition for the freedom of artistic creation and the associated right to participate in cultural life in the context of positive state obligations.

The exercise of the right to culture thus requires not only judicial protection but also the design and implementation of state activities, i.e. legislation and conducting cultural policy. Only the entirety of these entitlements guarantees that the right to participate in cultural life gains its proper meaning. It is therefore a right, the implementation of which requires state action coordinated at many levels. The first one is the sphere of legislative action. Legislation determines, among other things, which forms the protection of cultural heritage takes, how the boundary between the sphere of freedom of artistic creation and protection of other values (morality, privacy, freedom of religion) is determined, how the limits of using the works of others' authorship are defined. In turn, in the area of social and cultural policy, the state takes actions and decisions that decide on the form and extent of protecting the social status of creators, implementing artistic programmes and activities, supporting and financing them and promoting them in international relations. In this area there is also a huge field of recognition for the exercise of rights of access to cultural goods and services by all entitled persons. Finally, it is in the sphere of administration that individual decisions are made in matters of support for artistic activity, protection of cultural goods – both in the sphere of covering them with state guardianship and financial subsidies for their restoration and maintenance.

Yet in this respect, too, one can find the very beginnings of developing standards, which co-create the model of the right to culture – free access to artistic creation and freedom of art. Such standards concern many spheres, the most interesting of which seems to be the procedural sphere, connected with the model of supporting cultural life and the use of mechanisms devised in other areas of public law aimed at achieving procedural justice and transparency of decisions made. They also relate to social guarantees of support for artistic activity, as well as instruments giving universal and non-discriminatory access to cultural content.

In contemporary countries, in particular those that are subject to the European system of Conventional Protection of Rights and Freedoms, the scope and content of increasingly explicit cultural policy instruments may become the basis for formulating a certain standard of protection. The ban on regression and the obligation to preserve the essence of rights, including social rights, must be considered in relation to the status quo – and it is always based, independently of the state, on cultural policy already pursued and artistic activities carried out by the state and other public bodies.

Finding the standard of exercising the right to culture within the framework of cultural policy, i.e. creating a real possibility of using cultural goods and participating in cultural life, especially from the perspective of the rights of an individual (creators and recipients of cultural content) is difficult and most controversial, as is the search for any positive obligations of states with regard to social rights. It is not the case, however, that national courts – especially at the level of constitutional courts – are powerless in this area, and the participants to cultural life are deprived of the option of protection and demand for ensuring that their rights are exercised, also in terms of positive state obligations. Documents on the interpretation and application of the International Covenant on Economic, Social and Cultural Rights oblige states to exercise their rights progressively through legislative, administrative, judicial, economic, social and educational measures in order to fulfil their obligations under the Pact. In legal practice this means a ban on the regression of established standards of granted rights, arbitrariness in their application and determination of their limits and content, the obligation to maintain rationality in limiting them, as well as the obligation to maintain the essence of the declared right at the constitutional level constitute instruments of judicial protection, which will allow to protect the standards of cultural policy developed in this sphere.

It is crucial for the exercise of the right to participate in cultural life to determine the level of state policy and legislation that is already guaranteed, and thus to develop the essence of powers in judicial case-law. On the other hand, the addition of a legal and human perspective to the activities in the sphere of protection and support of artistic culture will make it possible to identify the rights that make up the right

to culture as the centre and keystone of cultural policy; guaranteeing an individual right to culture should become the primary objective of legislative and administrative efforts made in this field, so as to satisfy the protection of the sphere of contact with art, symbol and the ability to evoke aesthetic experience – a true rationale for the creation and interpretation of the right to culture.

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The outstanding work by Prof. Anna Młynarska-Sobaczewska devoted to an extremely important and pressing issue of the right to culture was based on an extensive source material, which consists of both international, regional (including European) and national normative acts, as well as judicatures of the European Court of Human Rights and national courts. At the same time, the book presents in an interesting way the current state of research and the results of scientific discussions concerning the title issue in relation to the latest publications on the subject. It is noteworthy that during the discussion the author convincingly supported her arguments with an insightful comparative analysis of selected legal systems of European countries.

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