

# BOOK REVIEWS

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## *Right to Culture* Anna Młynarska-Sobaczewska

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There is a palpable need today to deepen reflections on the concept of the right to culture. This is proven by the currently ongoing, multi-faceted discussions on its interpretation and scope, taking place primarily at the academic level. The issue of the right to culture has become a focal point of scientific enquiry (e.g. by lawyers, culture scholars, anthropologists, and political scientists), and at the same time an object of social concern, exemplified by such initiatives as the 2016 project of the National Centre for Culture and the City of Wrocław on including the right to culture in the Additional Protocol to the European Convention on Human Rights; or the joint publication initiatives and seminars by practitioners, creators, and professionals from the cultural industry, as broadly understood. One of the voices in this scientific discourse is the monograph of Anna Młynarska-Sobaczewska, *Right to Culture*, published in 2018 by the Scholar Publishing House in Poland.

The publication under review is comprised of five chapters, attempting to define and classify the elements that constitute the right to culture and its scope in the national and international arenas. In the first theoretical and introductory chapter, "What does the Right to Culture Mean Exactly? The Scope

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of Meaning of the Notion of Culture as an Object of Rights”, the author emphasizes the terminological ambiguities and uncertainties surrounding the definition of culture which, as she stresses in the subsequent part of her work, additionally complicate the deliberations on the right to culture. As aptly observed by the author, these ambiguities lead to a situation where it is often not entirely clear what precisely the object of safeguarding rights is. Thus the author asks: The right to culture, but in what meaning? It is worth bearing in mind that – as also mentioned by the author – the right to culture as such does not exist, nor it is in any place precisely defined or guaranteed. Thus perhaps a more accurate term would be “the concept of the right to culture” rather than “the right to culture” on its own. This imprecision makes it necessary to paint a broader picture of the contemporary scientific debate on the definition and status of the right to culture (i.e. the concept of the right to culture in contemporary scientific discourse), which – like every other concept – has its advocates and detractors. Furthermore, it would also be interesting to showcase the myriad of definitions and approaches to the right to culture. In fact the existing literature on the subject defines the right to culture in a variety of ways. To quote only some examples, Annamari Laaksonen<sup>1</sup> and Eleni Polymenopoulou<sup>2</sup> interpret it as the right to access culture and the freedom of artistic expression. In turn, Yvonne Donders<sup>3</sup>, as well as Avishai Margalit and Moshe Halbertal,<sup>4</sup> link it with the right to cultural identity (including group rights) and the right of the individual to self-identify (in the socio-anthropological understanding). On the other hand, Lucy Claridge and Alexandra Xanthaki<sup>5</sup> understand it as the right of cultural and ethnic minorities to express and practice their customs. This wide variety of approaches and definitions does not, however, in any way diminish the value of the reviewed work, as the author differentiates at the very beginning between two dimensions of interpreting the right to culture, and strongly emphasizes that the misunderstandings in these deliberations stem from understanding the right to culture solely as artistic culture.

In chapter II, “The Normative Character and the Substance of the Right to Culture”, the author delves into particular issues connected with the right to cul-

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<sup>1</sup> See: A. Laaksonen, *Making Culture Accessible. Access, Participation and Cultural Provision in the Context of Cultural Rights in Europe*, Council of Europe Publishing, Strasbourg 2010; Muriel Marland-Militello, *Report for the Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe. The Right of Everyone to Take Part in Cultural Life*, 9 January 2012.

<sup>2</sup> See: E. Polymenopoulou, *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights*, “Human Rights Law Review” 2016, Vol. 16(3).

<sup>3</sup> See: Y. Donders, *Towards a Right to Cultural Identity?* (School of Human Rights Research Series No. 15), Intersentia/Hart, Antwerp – Oxford – New York 2002.

<sup>4</sup> See: A. Margalit, M. Halbertal, *Liberalism and the Right to Culture*, “Social Research” 2004, Vol. 71(3).

<sup>5</sup> See: L. Claridge, A. Xanthaki, *Protecting the Right to Culture for Minorities and Indigenous Peoples: An Overview of International Case Law*, <https://minorityrights.org/wp-content/uploads/2016/07/Protecting-the-right-of-culture-for-minorities-and-indigenous-peoples.pdf> [accessed: 30.03.2019].

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ture. She considers its inception as being the 1948 Universal Declaration of Human Rights (Article 27), followed by Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights. However, even though she rightly accentuates the key role of Article 27 of the Declaration, seeing it as the cornerstone for said right,<sup>6</sup> one can clearly see the traces of its protection and formation much earlier – as early as in the second half of the 19th century.

While the author omits the role of the 1874 Brussels Declaration and the 1886 Berne Convention (where Victor Hugo actively fought for copyright protection), nevertheless one can consider them as the beginnings of the reflection on the need for legal safeguarding of culture and on rights to it. Had more light been shed on such a historical perspective of the formulation of the right to culture in the monograph, perhaps the reader would be able to attain a broader perspective. Having noted that, it must be added that in the same chapter the author defines the concept of the right to culture legibly and clearly, differentiating two ways of understanding it: first, relating to universal artistic culture (calling it the “dominating concept”); and second as the right to preserve one’s own culture, interpreted as all elements that culturally distinguish a group. This division is completely correct – however there is a visible tendency to broaden the scope of interpretation of the concept of the right to culture, accompanied by a progressive broadening of the objects under safeguarding in the UN (universal) system; one which gravitates towards the anthropological approach, which is particularly noticeable in UNESCO legislation.

In the same chapter the author attempts to illustrate the normative character of the right to culture and its judicial protection. It is precisely here – as the reader gains the impression that the author sees the right to culture as *pretending* to become a basic right – that it would be interesting to see a reference to the theory of constitutional rights<sup>7</sup> (or even a reference to the concept of public subjective rights, e.g. the so-called Bernatzik triad), complemented by an elucidation of the mechanisms and criteria that create basic rights and the reasons why the right to culture has not yet gained such a status. Such a theoretical supplement could better elucidate the process and its evolution into a form where it is guaranteed (or at least guaranteeable), and in this way illustrate the current stage of this right.

Chapter III, “Freedom of Artistic Creation versus the Right to Culture. Elements of the Right to Culture in the Jurisprudence of the ECHR”, essentially constitutes an analysis of the safeguarding of the right to freedom of artistic expression from the perspective of the jurisprudence of the European Court of Human Rights (ECHR), which is an ideal resource for tracing the elements of such right and its formulation (assuming the principle of dynamic statutory interpretation), particularly

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<sup>6</sup> See the report commissioned by UNESCO: B. Boutros-Ghali, *The Right to Culture and the Universal Declaration of Human Rights*, 10 July 1968.

<sup>7</sup> See: R. Alexy, *A Theory of Constitutional Rights*, Oxford University Press, Oxford 2002.

considering that international jurisprudence can in some cases act as a catalyst for new rights.<sup>8</sup> The author meticulously summarizes the decisions, particularly those related to Article 10 of the European Convention of Human Rights, in the context of the right to culture. However, it would certainly be interesting to look deeper into the jurisprudence related to the elements of the right to culture stemming from other articles that are not explicitly tied to cultural rights, e.g. the right to respect for private and family life (Article 8 of the Convention); the right to freedom of expression (Article 10, which was mentioned); and the right to education (Article 2 of Protocol No. 1).<sup>9</sup> In this way the outline of a sort of conflict between the Convention articles (which in some cases has been noted by the Court) could be laid out. For example, the newest general report of the Council of Europe from 17 January 2017<sup>10</sup> showcases the realization of cultural rights as widely understood, which can be traced to ECHR jurisprudence and which can be considered somewhat as sources of the right to culture.<sup>11</sup>

Furthermore, inasmuch as the author emphasizes the legislation and cultural politics of the Council of Europe, while at the same time repeatedly referring to Article 27 of the Universal Declaration of Human Rights, an interesting supplementation of her argument could be a wider discussion on the Council of Europe itself – including for instance the 2005 Faro Convention (Council of Europe Framework Convention on the Value of Cultural Heritage for Society), which directly refers in Article 1 to the text of Article 27 of the Universal Declaration of Human Rights.<sup>12</sup>

Chapters IV and V – “Creators’ Rights and Copyright Law – Bridges of Barriers between Creators and Recipients (IV)” and “Cultural Policy and the Obligations of the Public Authorities Regarding the Implementation of the Right to Culture (V)” – examine the practical dimension of how the right to culture functions. As the author devotes her monograph to interpreting the right to culture, generally understood as participation in cultural life (artistic culture); both chapters include a thorough analysis of copyright law, creators’ rights, and the functioning of these rights in the modern digital reality (taking into consideration, *inter alia*, the EU regulations). She also rightly draws attention to the issues of financing and supporting creators and artistic ventures, as well as to the intricate relationship between creators’ factual rights and copyright. The publication also addresses the problem of

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<sup>8</sup> See: J. Viljanen, *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, <http://www.corteidh.or.cr/tablas/r26759.pdf> [accessed: 28.03.2019].

<sup>9</sup> See European Court of Human Rights Research Division, *Cultural Rights in the Case-law of the European Court of Human Rights*, January 2011 (updated 17 January 2017), [https://www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf), p. 3 [accessed: 28.03.2019].

<sup>10</sup> *Ibidem*.

<sup>11</sup> *Ibidem*.

<sup>12</sup> Article 1 – Aims of the Convention: “The Parties to this Convention agree to: (a) recognise that rights relating to cultural heritage are inherent in the right to participate in cultural life, as defined in the Universal Declaration of Human Rights”.

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the obligations and roles of public authorities in realizing the right to culture, and contains a comparative analysis of the orders/models of selected countries (including Poland); which perfectly illustrates the wider dimension of the functioning of the right to culture in a variety of types of national legislation.

In conclusion, Anna Młynarska-Sobaczewska's publication is an excellent work which tackles the very timely issue of the right to culture. The author's attempts to encompass the ambiguities of the term "culture" itself and the resulting multitude of ways in which it is considered, including a thorough historical venture into the arborescent origins and evolution of the right under question against the backdrop of rights of a similar nature, and the theoretical, judicial, and practical framework of both its emergence and entrenched forms and shapes in international organizations and their legal acts, altogether make for a commendable, widely arrayed analysis of this multifaceted and complex topic. One may consider a portrayal of such a heterogeneous concept as the right to culture to be impossible due to the level of intricacy of the elements of culture itself – however in reading this monograph we cannot help but get the impression that its conciseness and structure is deeply thought out and based on a sound analysis of source data, and the problem of the right of culture itself is illustrated in a very clear and reader-accessible manner.

I consider the book to be a valuable contribution, one which lays out a new perspective on the perception of the right to culture. It can become a cornerstone for subsequent research expanding on the threads addressed in the book. A particularly commendable feat is the legible classification and organization of the plethora of its dimensions, preceded by a thorough search for its elements in normative acts, which in reality regulate the framework of the right to culture and its realization. This, in effect, forms an accurate diagnosis of the current state of its legislative functioning. Finally, the monograph might serve as a source database not only for scholars of cultural rights, human rights, or copyrights, but also for practitioners, creators, and professionals in the art industry as broadly understood.