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The History of Artistic Freedom as a Legal Standard in Western Culture: An Attempt at Periodization of the Process of Its Formation

Historia wolności artystycznej jako norma prawna
w kulturze zachodniej – próba periodyzacji
procesu jej powstawania

Summary: This article focuses the historical process of a radical reformulation of the mechanisms of legal regulation of creative activity in the field of visual arts on the European continent, beginning from the second commandment in the Old Testament (the prohibition of imaging) to the contemporary constitutional protection rules in place in Europe and the United States (freedom of artistic expression). The study assumes that the transition from the ban on

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imaging to the freedom of artistic expression was a result of the long-term evolution of social relations, which involved a gradual liberalization of cultural life and the liberation of the sphere of art from the dictates of religion, politics (the State), professional associations, and the rules of the art market. It characterizes specific historical periods which changed the model of regulating culture and art by the State (or religious communities), and proposes a model of periodization of the history of the formation of artistic freedom as a legal standard.

Keywords: art freedom, art and law, art censorship

Streszczenie: Artykuł skupia się na historycznym procesie radykalnego przeformułowania mechanizmów prawnych regulacji działalności twórczej w dziedzinie sztuk wizualnych na kontynencie europejskim, poczynając od drugiego przykazania w Starym Testamencie (zakaz obrazowania) po współczesne konstytucyjne zasady ochrony obowiązujące w Europie i Stanach Zjednoczonych (wolność wypowiedzi artystycznej). W opracowaniu przyjmuje się, że przejście od zakazu obrazowania do wolności wypowiedzi artystycznej było wynikiem długofalowej ewolucji stosunków społecznych, która polegała na stopniowej liberalizacji życia kulturalnego i wyzwaniu sfery sztuki spod dyktatu religii, polityki (państwa), stowarzyszeń zawodowych, zasad rynku sztuki. Opracowanie charakteryzuje poszczególne okresy historyczne, które zmieniły model regulowania kultury i sztuki przez państwo (lub wspólnoty wyznaniowe), a także proponuje model periodyzacji dziejów kształtowania się wolności artystycznej jako normy prawnej.

Słowa kluczowe: wolność sztuki, sztuka i prawo, cenzura sztuki

Introduction

Already many publications have been devoted to the subject of legal guarantees for artistic freedom in the field of visual arts and its legal restrictions.¹ They focus on different aspects of the issue simultaneously.² Most of the authors raise

¹ M. Knapp, *Cultural Controversies in the West German Public Sphere: Aesthetic Fiction and the Creation of Social Identities*, Palgrave Macmillan, Cham 2020; M. Carmilly-Weinberger, *Fear of Art. Censorship and Freedom of Expression in Art*, Bowker, New York-London 1986; M.M. Bieczyński, *Prawne granice wolności twórczości artystycznej w zakresie sztuk wizualnych* [Legal Limits to the Freedom of Artistic Creativity in the Visual Arts], Wolters Kluwer Polska, Warszawa 2011.

² J.H. Merryman, A.E. Elsen, S.K. Urice, *Law, Ethics and the Visual Arts*, Kluwer Law International, Alphen aan den Rijn 2007; R. Atkins, S. Mintcheva (eds.), *Censoring Culture: Contemporary Threats to Free Expression*, New Press, New York 2006.

questions about the normative and linguistic dimensions of regulations regarding artistic freedom in various national legal systems, as well as on the context of international human rights law (the dogmatic-legal approach).³ They also often try to define the extent to which the norms guaranteeing artistic freedom are implemented in practice when art clashes with other legally-guaranteed social goods (analysis of the law in action).⁴ The majority of authors, however, focus on describing individual cases of interference in the scope of freedom of artistic expression (case studies).⁵ With a few exceptions, the history of the formation of the legal protection of artistic freedom in the law as broadly defined is rarely the subject of academic reflection.⁶ However, such a historical analysis seems necessary to understand the essence of the issue, which is strictly connected to the social, political, and legal disputes over art, and in particular to the question of the limits of artistic creation presented to the public. The aim of this paper is to fill in this gap and to analyze historical periods in the process of formation of the contemporary standards for the protection of artistic expression.

The following research questions will be significant in this study: (1) How to describe the historical process that spanned over 3,000 years in the western European art world and the Christian culture – from the creation of the Old Testament ca. 1500 BC (which prohibited creating images), to the establishment of the Weimar Constitution in 1919, which included a legal guarantee for artistic freedom – a period in which the normative model of regulating visual arts in Europe become completely reversed? (2) Which periods can be distinguished in the history of artistic freedom, considering the differences in the approaches to this issue between legal norms and religious norms, the latter of which constituted the generally binding law up to a certain point in time? (3) What was the nature of the historical process of legal recognition of, and the establishment of guarantees for, the freedom of artistic expression and the dissemination of artistic visual works? Was it closed or open; linear or phased (gradual); circular or dispersed (chaotic); unidirectional or multi-directional?

³ Ch. Barrère, W. Santagata, *Defining Art: From the Brancusi Trial to the Economics of Artistic Semiotic Goods*, "International Journal of Arts Management" 1999, Vol. 1(2); D. Beisel, *Die Kunstfreiheitsgarantie des Grundgesetzes und ihre strafrechtliche Grenzen*, Decker, Berlin 1997.

⁴ K. Wagner, H. von Berg, M.L. Maintz, *Verbote (in) der Kunst: Positionen zur Freiheit der Künste von Wagner bis heute*, Bärenreiter, Kassel 2019.

⁵ See, among others, J. Boulègue, *Le blasphème en procès, 1984-2009. L'église et la mosquée contre les libertés*, Nova Editions, Paris 2010; V.R. Inde (ed.), *Art in the Courtroom*, Praeger, Westport 1998.

⁶ M.M. Bieczyński, *Od zakazu do wolności. Historia prawnej pozytywizacji wolności sztuki* [From Prohibition to Freedom. The History of the Legal Positivization of the Freedom of Artistic Creation], Uniwersytet Artystyczny w Poznaniu, Poznań 2017; J. Clapp, *Art Censorship – A Chronology of Proscribed and Prescribed Art*, Scarecrow Press, Metuchen, NJ 1972.

This study assumes that the transition from the ban on imaging to the freedom of artistic expression was the result of a long-term evolution of social relations that involved a gradual liberalization of cultural life and the liberation of the sphere of art from the dictates of religion, politics (the State), professional associations, and the rules of the art market.

In order to attain the aforementioned research objectives, it is necessary to adopt certain initial assumptions and to indicate the methodological basis of this study.

The basic preliminary assumption is the need to adopt a broad definition of the law-making process. According to this assumption, the legislative process can be understood as a spontaneous process and as the formation of legal norms, a process which took place in the course of both cooperation and/or struggle between different social groups representing different interests. The main interests were the social and political mechanisms that led to the formation of specific norms and to the adoption of specific legislative decisions. When considering the spontaneous creation of law, there should be a focus on the factors that shaped the content of legal norms and that limit the freedom of decision of a formal legislator.⁷

This orrelates with the dogmatic-legal concept of “the positivization of law” – defined as the process of transforming the actual norms of conduct of a given community and into binding legal norms, in response to public demand.⁸ An important factor in this process is the belief expressed by the addressees of an unofficial (non-institutionalized) standard about its legally binding character – i.e. the belief that it is important and/or required to act in a specific way.

Attaining the objectives of this study required the conscious application of appropriate scientific methods. First of all, it is necessary to refer to the concept of longitudinal, historical legal-comparative research. This concept was adapted for this study from the field of historical research and refers to Fernando Braudel's concept of “the long duration”.⁹ According to Braudel, the deeper meaning of historical events is revealed only by their long-term observation. Braudel's concept, at least on a general level, seems to correspond to the “static nature” of the legislative processes and the process of application of law. Both processes clearly tend to maintain the permanence of the assigned meanings of legal concepts. The very concept of “the long duration” of history has also been transformed and adapted

⁷ S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa* [An Outline of Legal Theory], Ars boni et aequi, Poznań 2001, pp. 100-101.

⁸ P. Policastro, *Prawa podstawowe w demokratycznych transformacjach ustrojowych. Polski przykład* [Fundamental Rights in Democratic Systemic Transformations. The Polish Example], Wydawnictwo KUL, Lublin 2002, p. 9.

⁹ J. Beckert, *The “Longue Durée” of Inheritance Law: Discourses and Institutional Development in France, Germany, and the United States since 1800*, *European Journal of Sociology / Archives Européennes de Sociologie / Europäisches Archiv für Soziologie* 2007, Vol. 48(1), pp. 79-120.

in legal literature for the purposes of “the critical analysis of law”, which recognizes the important relationship between the legislative process and parallel social processes (as law in a way is a result of such processes).¹⁰

This paper has a fairly simple structure. The first part is an attempt to indicate the earliest cases of the inclusion of artistic freedom into in a system of norms that determined the rights and obligations of the addressees. The following parts (1 to 6) characterize specific historical periods which changed the model of regulating culture and art by the State (or religious communities) and the law. The final part contains general conclusions and a model of periodization of the history of the formation of artistic freedom as a legal standard¹¹.

From the Period of Prohibition to Conditional Permission

The beginning of the so-called Western culture is most frequently associated with ancient Greece and Rome, and sometimes also with the Jewish culture that developed during the period of the so-called New Kingdom of Egypt (1570-1070 BC). If we analyze these three cultures together – despite the fact that they developed in different time periods – we can see that the initial period of European culture was, in terms of the scope of artistic freedom, marked by either prohibition or strong limitations. Its sources can be traced back mostly to the Second Commandment in the Old Testament. As stated in *The Book of Exodus* (Exodus 20: 4-6):

⁴You shall not make for yourself an image in the form of anything in heaven above or on the earth beneath or in the waters below. ⁵You shall not bow down to them or worship them; for I, the LORD your God, am a jealous God, punishing the children for the sin of the parents to the third and fourth generation of those who hate me, ⁶but showing love to a thousand generations of those who love me and keep my commandments.¹²

This regulation constitutes an absolute ban on imaging.

The next period was characterized by a conditional permission for artistic creation. While admittedly art flourished in Ancient Greece and Rome in practice, both cultures were also rather repressive towards art in theory and established strict rules on imaging (the so-called ‘canons’), ceded creativity to slaves,

¹⁰ See R.E. Lee, *Longue Durée and the Status of ‘Superstructures’*, in: idem, *Longue Durée and World-systems Analysis*, State University of New York Press, Albany, NY 2012, p. 161; J. Přibáň, *Legal Symbolism: On Law, Time and European Identity*, Routledge, London–New York 2007, p. 51.

¹¹ The preparation of this article was financed from resources supplied by Poland’s National Science Centre as a part of the project entitled *The Philosophical Backgrounds of the Legal Limitations of Artistic Freedom* no. UMO-2012/05/D/HS2/03592, carried out within the framework of the SONATA grant programme.

¹² English translation after the New International Version Bible: <https://www.biblegateway.com/passage/?search=Exodus+20%3A2-17&version=NIV> [accessed: 05.06.2016].

and created the institutional and philosophical foundations for censorship and state propaganda. Plato's philosophy played a special role in the described process. The philosopher criticized illusionist painting¹³ and believed that poets should be exiled from an ideal state.¹⁴ In Roman culture pictures were strongly politicized. There existed the concept of divine worship of emperors¹⁵ and the opposite practice of condemning their memory by destroying the images of poor rulers (*damnatio memoriae*).¹⁶

The Judaic, Greco-Platonic, and Roman traditions all blended into Christianity.¹⁷ The new religion was initially anti-iconic.¹⁸ Early Christianity was rather restrictive with respect to the creation of images, and two ideas were in both conflict and concurrence with each other – the ban rooted in the Old Testament, and conditional permission. Any decorations in churches were banned – e.g. Canon 36 adopted at the Council of Elvira in 251 banned paintings on the walls of Christian churches.¹⁹ The adoption of Christianity by the Roman Empire led to the development of the so-called 'scholastic philosophy', which was based on Plato's philosophy (which involved the censorship of art and a model of its correctness).²⁰ Christianity protected itself from paganism by destroying the images of ancient deities

¹³ Ch. Karelis, *Plato on Art and Reality*, "The Journal of Aesthetics and Art Criticism" 1979, Vol. 34(3), p. 316; S. Halliwell, *Plato and Painting*, in: N.K. Rutter, B.A. Sparkes (eds.), *Word and Image in Ancient Greece*, Edinburgh University Press, Edinburgh 2006, p. 101; C. Cavarinos, *Plato's Teaching on Fine Art*, "Philosophy and Phenomenological Research" 1953, Vol. 13(4), p. 487; E. Keuls, *Plato on Painting*, "The American Journal of Philology" 1974, Vol. 95(2), pp. 100-127; W.M. Davis, *Plato on Egyptian Art*, "The Journal of Egyptian Archeology" 1979, Vol. 65, pp. 121-127; M.L. Morgan, *Plato, Inquiry, and Painting*, "Apeiron: A Journal for Ancient Philosophy and Science" 1990, Vol. 23(2), p. 124; A. Pontynen, *For the Love of Beauty: Art History and the Moral Foundations of Aesthetic Judgment*, Routledge, London 2006, p. 81; M. Obratz, *Das schweigende Bild und die Aussagekraft des Rezipienten in Bezug auf ästhetische und ethische Werturteile*, LIT, Berlin 2006, p. 245.

¹⁴ N. Gulley, *Plato on Poetry*, "Greece & Rome" 1977, Vol. 24(2), pp. 160-161; M.P. Battin, *Plato on True and False Poetry*, "Journal of Aesthetics and Art Criticism" 1977, Vol. 36(2), pp. 163-174; S. Hegenbart, *Does Plato Radically Reject Visual Arts? References to the Epistemological Function of Arts in Plato's Dialogues*, "St. Anne Research STAAR" 2009, p. 34; R. Naddaff, *Exiling the Poets: The Production of Censorship in Plato's Republic*, University of Chicago Press, Chicago 2002, p. XI.

¹⁵ H.F. Burton, *The Worship of the Roman Emperors*, "The Biblical World" 1912, Vol. 40(2), p. 80.

¹⁶ E.R. Varner, *Portraits, Plots, and Politics: "Damnatio memoriae" and the Images of Imperial Women*, "Memoirs of the American Academy in Rome" 2001, Vol. 46, p. 41; L.H. Petersen, *The Presence of 'Damnatio memoriae' in Roman Art*, "Notes in the History of Art" 2011, Vol. 30(2), p. 1.

¹⁷ E. Bevan, *Holy Images: An Inquiry into Idolatry and Image-worship in Ancient Paganism and in Christianity*, Routledge, London 2014 (originally published in 1940), p. 2; E.O. James, *Review: Holy Images: An Inquiry into Idolatry and Image-worship in Ancient Paganism and in Christianity*, by Edwyn Bevan (1940), "Man" 1941, Vol. 41, p. 23.

¹⁸ See A. Curtis, *God as 'Judge' in Ugaritic and Hebrew Thought*, in: B. Lindars (ed.), *Law and Religion. Essays on the Place of Law in Israel and Early Christianity*, Clarke, Cambridge 1988, p. 3.

¹⁹ R. Grigg, *Aniconic Worship and the Apologetic Tradition: A Note on Canon 36 of the Council of Elvira*, "Church History" 1976, Vol. 45(4), pp. 431-432.

²⁰ See E. Kitzinger, *The Cult of Images in the Age before Iconoclasm*, "Dumbarton Oaks Papers" 1954, Vol. 8, p. 121.

(equivalent to *damnatio memoriae*) and sought its own roots in the Old Testament tradition through theological disputes between the supporters and opponents of image-worship.²¹ Ancient art went through a period of temporary vindication in the Eastern Roman Empire. This was reflected in the legal norm of the *Theodosian Code* of 438, which read that: “[S]tatues of pagan gods should be judged by their artistic value, not by the religious reverence”.²² However, iconoclastic tendencies became apparent shortly thereafter.²³ The cultural tensions resulting from the transformation of Christianity from one of the marginalized and periodically persecuted cults of the Roman Empire into a state religion incorporated into the political propaganda erupted during the religious wars about images fought in Byzantium between 725 and 842.²⁴ The wars ended with the victory of the side in favour of holy images. The reception of image-based worship in Western Europe, both by Pope Gregory II²⁵ and by Charles the Great,²⁶ was the culmination and, at the same time, the end of the era of an absolute ban on images.²⁷ However, the same issue resurfaced during the Reformation, in the context of the secularization of art related to the development of the so-called “court culture”, which began at that time.

It can therefore be assumed that the first stage in the development of the history of positivization of artistic freedom was the initial period of prohibition. Chronologically, it covered the period from the establishment of the Decalogue (c. 1500 BC) to the lifting of the ban on created images included in the Second Commandment (787 AD, described below).

²¹ G. Laing, *The Church Fathers and the Oriental Cults*, “The Classical Journal” 1918, Vol. 13(4), p. 247; V.A. Baranov, *Origen and the Iconoclastic Controversy*, in: L. Perrone (ed.), *Origeniana octava. Origen and the Alexandrian Tradition. Papers of the 8th International Origen Congress*, Leuven University Press, Leuven 2003, p. 1044.

²² P. Krueger, T. Mommsen, P.M. Meyer, *Codex Theodosianus*, Weidmann, Hildesheim 1990, XVI.10.8.

²³ The relationship between the views of the Byzantine elites and iconoclastic disputes was highlighted by A. Cameron, *Images of Authority: Elites and Icons in the Late Sixth Century*, “Past & Present” 1979, Vol. 84, pp. 3-35.

²⁴ See B. Brock, *Der byzantinische Bilderstreit*, in: M. Warnke (ed.), *Bildersturm. Die Zerstörung des Kunstwerkes*, Carl Hanser, München 1973, pp. 30-41; T. Krannich, Ch. Schubert, C. Sode, *Die ikonoklastische Synode von Hieria 754*, Mohr Siebeck, Tübingen 2002, p. 4.

²⁵ E. Caspar, *Papst Gregor II. und der Bilderstreit*, “Zeitschrift für Kirchengeschichte” 1933, Vol. 52, pp. 29-89.

²⁶ Compare with G. Händler, *Epochen karolingischer Theologie. Eine Untersuchung über die Karolingischer Gutachten zum byzantinischen Bilderstreit*, Evangelische Verlagsanstalt, Berlin 1958.

²⁷ See M.T.G. Humphreys, *Law, Power, and Imperial Ideology in the Iconoclast Era c. 680-850*, Oxford, Oxford University Press 2015.

The Period of Approval

The most important decision of the Second Council of Nicaea in 787 was to allow the use of images (and in a broad sense – art) in religious worship, and thus to allow artistic creation in general. The Council came to the conclusion that the veneration of holy images was not against the First Commandment that prohibited worshipping other gods.²⁸ From the perspective of art, the most important aspect was the adaptation of the biblical Decalogue to the changed principles of the Post-Nicaean Church. The Second Commandment, which prohibited the veneration of images and statues (“You shall not make for yourself an idol”) was removed, while the Tenth (“You shall not covet your neighbor’s house”) was divided into two to preserve the original number of Ten Commandments (with the Ninth Commandment reading “You shall not covet your neighbor’s wife” and the Tenth: “You shall not covet your neighbor’s goods”). Conciliar files were promulgated, due to which they gained legal force.²⁹

The arrangements of Nicaea were restated at the end of the iconoclast struggle in 842 by the regent Theodora, who ruled on behalf of her son, the future Emperor, Michael III.³⁰ This marked the beginning of the tradition of icons in the Eastern Christian world.³¹

In the West, the attempt to canonize artistic religious images in Byzantine form was criticized in the Carolingian books (*Libri Carolini*), while some images were considered morally indifferent and therefore permitted. It was concluded that they did not depict the saints portrayed on them directly.³² This interpretation was subsequently confirmed by the Council of Frankfurt in 794.³³ This resulted in the opening of European culture and, in the long term, contributed to the development of a separate tradition of narrative painting.³⁴ One of the main theological concepts that favoured this process was the idea of the so-called *Bible pauperum*, i.e., the assumption that images exist to teach illiterate people about

²⁸ M.H. Shepherd Jr., *Christology: A Central Problem of Early Christian Theology and Art*, in: K. Weitzmann (ed.), *Age of Spirituality. A Symposium*, Metropolitan Museum of Art, New York 2013, p. 108.

²⁹ D. Bordwell, *Catechism of the Catholic Church Revised*, Libreria Editrice Vaticana, Vatican 2006, p. 463.

³⁰ A.A. Vasiliev, *History of the Byzantine Empire*, Vol. 1: 324-1453, University of Wisconsin Press, Madison 1980, p. 287.

³¹ J. Folda, *Byzantine Art and Italian Panel Painting. The Virgin and Child 'Hodegetria' and the Art of Chrysography*, Cambridge University Press, Cambridge 2015, p. 30.

³² B. Neil, *The Western Reaction to the Council of Nicaea II*, “The Journal of Theological Studies” 2000, Vol. 51(2), pp. 533-552; L. James, *Seeing is Believing but Words Tell No Lies: Captions Versus Images in the Libri Carolini and Byzantine Iconoclasm*, in: A. McClanan, J. Johnson, *Negating the Image: Case Studies in Iconoclasm*, Routledge, London 2005, p. 98.

³³ H.B. Meyer, *Zur Stellung Alkuins auf dem Frankfurter Konzil (794)*, “Zeitschrift für katholische Theologie” 1959, Vol. 81, p. 457.

³⁴ See J. Folda, op. cit.

the tenants of faith.³⁵ However, the approval of images and artistic expression was conditional. It remained under the strict control of the State and the Church. The norms were formulated at the central level (e.g. in the context of the war against heretics)³⁶ as well as the local level (e.g. by Savonarola).³⁷ Such norms were particularly strict at the time religious wars were tearing Europe apart, connected with the reformation movements (Protestantism opposed the veneration of images)³⁸ and the Catholic response to them in the Counter-Reformation.³⁹ The provisions of the Council of Trent can serve as an example here. Artistic expression was allowed, but it became subject to strict control by bishops.⁴⁰ Even the greatest artists could not escape censorship – genitals were painted out of Michelangelo's frescos in the Sistine Chapel.⁴¹ Legal proceedings were brought by the inquisition against Paolo Veronese in 1573 for his thematically inappropriate painting *The Last Supper*.⁴² Marcantonio Raimondi, a close associate of Raphael, was arrested for publishing the pornographic illustrations *Modi*.⁴³

The period of approval can be considered to have flexible boundaries, although it can be assumed to have begun in 787 with the Council of Nicaea. The period ended with the creation of a model of official, Church-funded narrative art (c. 1300-1565, Council of Trent). A gradual departure from the restrictive nature of the Second Commandment can be regarded as its characteristic feature. At that time, art had primarily utilitarian functions and was closely related to religion

³⁵ C.J. Hilsdale, *Byzantine Art and Diplomacy in an Age of Decline*, Cambridge University Press, Cambridge 2014, p. 65.

³⁶ B. Kienzle, *The Clash between Catholics and Cathars over the Veneration of the Cross*, in: W.J. van Asselt, P. van Geest, D. Müller (eds.), *Iconoclasm and Iconoclasm. Struggle for Religious Identity*, Brill, Leiden 2007, pp. 263-278.

³⁷ J. Burke, *Changing Patrons. Social Identity and Visual Arts in Renaissance Florence*, Pennsylvania State University Press, University Park, PA 2004, p. 155; D. Seward, *The Burning of the Vanities: Savonarola and the Borgia Pope*, Sutton, Stroud 2006, p. 171.

³⁸ G. Litz, *Die Problematik der reformatorischen Bilderfrage in den schwäbischen Reichsstädten*, "Historische Zeitschrift" 2002, Vol. 33, pp. 99-116; J. Phillips, *Reformation of Images. Destruction of Art in England, 1535-1660*, University of California Press, Berkeley 1973, p. 166; D. Burkard, *Bildersturm? Die Reformation (en) und die Bilder*, in: E. Garhammer (ed.), *BilderStreit. Theologie auf Augenhöhe*, Echter, Würzburg 2007, p. 124.

³⁹ F. Pacheco, *The Art of Painting (1649)*, in: J. Cowans (ed.), *Early Modern Spain: A Documentary History*, University of Pennsylvania Press, Philadelphia 2003, p. 170.

⁴⁰ J.W. O'Malley, *The Council of Trent (1545-63) and Michelangelo's "Last Judgment" (1541)*, "Proceedings of the American Philosophical Society" 2012, Vol. 156(4), p. 392.

⁴¹ P. De Vecchi, *Michelangelo's Last Judgment*, in: C. Pietrangeli et al. (eds.), *The Sistine Chapel: The Art, the History, and the Restoration*, Harmony Books, New York 1986, pp. 190-197; E. Steinmann, *Die Sixtinische Kapelle*, Bruckmann, München 1905, pp. 515-516.

⁴² A. Nagel, *The Controversy of Renaissance Art*, University of Chicago Press, Chicago 2011, p. 7.

⁴³ B. Talvacchia, *Taking Positions: On the Erotic in Renaissance Culture*, Princeton University Press, Princeton 2001; P. Findlen, *Humanism, Politics and Pornography in Renaissance Italy*, in: L. Hunt (ed.), *The Invention of Pornography. Obscenity and the Origins of Modernity, 1500-1800*, Zone Books, New York 1993, p. 51.

(i.e. it was strongly instrumentalized). As a result of changes in theological justifications, which were reflected in both canon law and secular law, the prohibitions of the past period were finally abandoned in favour of institutionally-regulated approval. Until the end of the 13th century, the Church could easily control art because it remained its main funder.

The Period of Privilege

Artists were well-aware of being constantly under the scrutiny of the Church and the State. Consequently, they answered to their needs. This resulted in granting individual and group privileges to artists. Individual privileges were granted to court artists⁴⁴ or to artists who wished to protect their artistic patterns as a part of their authorship.⁴⁵ Group privileges included, for example, guild privileges granted the Saint Luke Brotherhood,⁴⁶ or the founding privilege of the Royal Academy of Painting and Sculpture.⁴⁷

Privilege as a legal institution meant that the entity (i.e. its addressee) was given more rights than other members of society. With regard to art, the privileges protected artists against the negative consequences of exceeding certain legal standards within the content of their works. This normative construction reflects the conviction that “artist are allowed to do more than others”. However this conviction – at least on the theoretical level – later proved to be a burden for artists in their struggle to expand their scope of freedom. The dispute over the plagiarism by Marcantonio Raimondi of Albrecht Durer’s works, which ended with the German Emperor granting the latter the exclusive privilege of making his own graphics with the signature “AD”, went down in the history of copyright.⁴⁸ This case was the basis for the formation of copyrights to works of art, which took place later. Another privilege – the founding privilege of the Royal Academy of Painting and Sculpture

⁴⁴ J.R. Mulryne, E. Goldring, *Court Festivals of the European Renaissance: Art, Politics, and Performance*, Ashgate, Aldershot 2002, p. 184; M. Warnke, *Hofkünstler. Zur Vorgeschichte des modernen Künstlers*, DuMont, Köln 1996, p. 12.

⁴⁵ W.Y. Ottley, *An Inquiry into the Origin and Early History of Engraving upon Copper and in Wood*, vol. 2, M’Creery, London 1816, p. 780.

⁴⁶ J. von Bonsdorff, *Kunstproduktion und Kunstverbreitung im Ostseeraum des Spätmittelalters*, Helsinki-Helsingfors 1993, p. 24; J. Wilhelm, *Augsburger Wandmalerei 1368-1530*, Mühlberger, Augsburg 1983, pp. 21-27.

⁴⁷ A.M. Schmitter, *Representation and the Body of Power in French Academic Painting*, “Journal of the History of Ideas” 2002, Vol. 63(3), pp. 399-424; L. Shiner, *The Invention of Art: A Cultural History*, University of Chicago Press, Chicago 2001, p. 60.

⁴⁸ S. Gregory, *Vasari and the Renaissance Print*, Taylor and Francis, London 2012, p. 33; I.H. Shoemaker, E. Broun, *The Engravings of Marcantonio Raimondi*, Spencer Museum of Art, University of Kansas, Lawrence 1984, p. 62; L. Pon, *Prints and Privileges: Regulating the Image in 16th Century Italy*, “Harvard Art Museum Bulletin” 1998, Fall, p. 41.

in Paris in 1648⁴⁹ – was even more important as it established a new hierarchy of importance in the art world. Under this privilege, artists of the Academy ceased to be craftsmen. Their social status increased significantly and the scope of freedom of those selected was greatly expanded.

It can be assumed that privileges made people “outlaws”, albeit in a rather positive sense, i.e. that the standards in question were not abstract and general, but individual and specific. They were elitist in their nature, and therefore undemocratic. At that time it was not yet possible for everyone to enjoy the same degree of freedom.

On a chronological level, the beginning of the period of privilege overlaps with the period of approval. It is difficult to specify a date that marked the beginning of popularization of this form of the legal regulation of art. It can be conventionally assumed that this period commenced at the beginning of the 16th century (circa 1500). Around that time printing rights and copyright privileges became widespread and artists gained more autonomy within guild structures. The culmination of this period was the establishment – under royal privilege – of the Royal Academy of Fine Arts in Paris. The period ended with the French Revolution, which abolished privileges and introduced new standards of legal protection (1789).

The Period of Legal Positivization of Artistic Freedom

The French Revolution that broke out in 1789 marked the beginning of a new period in legal history, which can be described as the predominance of positive law over customary law. It also brought about the last great iconoclast movement.⁵⁰ The adoption of the Constitution and the establishment of the Declaration of the Rights of Man and of the Citizen changed the status of artists. They lost their privileges, but at the same time were freed from their previous dependencies – they went from being craftsmen and courtiers to being self-deciding citizens.⁵¹ This important change resulted from the replacement of royal privileges by general legislation, including new criminal law provisions prohibiting the distribution of indecent content,⁵² modern copyright provisions,⁵³ or the first regulations

⁴⁹ A. Boime, op cit.

⁵⁰ S.J. Idzerda, *Iconoclasm during the French Revolution*, “The American Historical Review” 1954, Vol. 60(1), p. 15.

⁵¹ C. Landauer, *Mosaic Imaginings: French Art and Its Revolutions*, “Yale Journal of Law & the Humanities” 1995, Vol. 7(2), p. 434.

⁵² L. Hunt, *Pornography and the French Revolution*, in: eadem (ed.), *The Invention of Pornography. Obscenity and the Origins of Modernity, 1500-1800*, Zone Books, New York 1993, pp. 110-112.

⁵³ R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)*, Hart, Portland 2004, p. 111.

regarding monument protection.⁵⁴ Art became subject to the regulations of generally applicable law and lost its privileged status as entertainment for the rulers and upper social classes. One can therefore say that the democratization of society contributed to art becoming gradually more egalitarian. The price for broadening access to artistic professions and excluding them from the control of guilds and the Academy of Fine Arts was subjecting art to closer state supervision.⁵⁵ The state control over artistic content on the basis of positive law – established in the period after 1789 – was particularly evident in the field of political caricature⁵⁶ and theatre.⁵⁷

The best-known example of the conflict between an artist and the State was the show trial of Charles Philipon, accused in 1831 of *lese majeste* for creating a drawing depicting the king transforming into a pear in four phases.⁵⁸ The artist, who acted as his own defender, argued that it was not possible to offend the king with a drawing, because it was not logical to identify the representation with a person to whom the drawing bore resemblance.⁵⁹ The artist's firm position was one of the direct reasons for the adoption of a new, even more restrictive law to prevent drawings containing political criticism in 1835.⁶⁰ A similar pattern of tightening state censorship could be observed in other countries – i.e. in Great Britain⁶¹ and in Germany.⁶²

The development of positive law in the 19th century also influenced the legal framework for the activities of theatres.⁶³ The exhibition of nudity onstage⁶⁴ and the presentation of political topics were banned in most European countries.⁶⁵

⁵⁴ J.L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, "Michigan Law Review" 1989, Vol. 88, pp. 1143-1144.

⁵⁵ R. Reichardt, H. Kohle, *Visualizing the Revolution: Politics and the Pictorial Arts in Late Eighteenth Century France*, Reaktion Books, London 2008, p. 247.

⁵⁶ D. O'Brien, *Censorship of Visual Culture in France 1815-1852*, "Yale French Studies" 2012, Vol. 122, p. 45.

⁵⁷ R.J. Goldstein, *Censorship of Caricature and the Theater in Nineteenth-century France: An Overview*, "Yale French Studies" 2012, Vol. 122, p. 17.

⁵⁸ O. Watts, *Daumier and Replacing the King's Body*, in: A. Wagner, R. Sherwin (eds.), *Law, Culture and Visual Arts*, Springer, New York-London 2014, p. 430.

⁵⁹ E. Childs, *The Body Impolitic: Press Censorship and the Caricature of Honore Daumier*, in: D. De la Motte, J.M. Przybylski (eds.), *Making the News: Modernity and the Mass Media in Nineteenth-century France*, University of Massachusetts Press, Amherst 1999, p. 51.

⁶⁰ R.J. Goldstein, *Censorship of Caricature...*, p. 15.

⁶¹ T.W. Laqueur, *The Queen Caroline Affair: Politics as Art in the Reign of George IV*, "The Journal of Modern History" 1982, Vol. 54(2), p. 417.

⁶² J. Clapp, *op. cit.*, p. 174.

⁶³ See R.J. Goldstein, *The Frightful Stage. Political Censorship of the Theater in Nineteenth-century Europe*, Berghahn Books, New York-Oxford 2009.

⁶⁴ J. Collier, *Short View of the Immorality and Profaneness of the English Stage*, in: J. Kinsley, H. Kinsley (eds.), *John Dryden: The Critical Heritage*, Routledge, London-New York 1971, p. 227.

⁶⁵ P.J. Crean, *The Stage Licensing Act of 1737*, "Modern Philology" 1938, Vol. 35(3), p. 240; M.J. Kinservik, *Disciplining Satire: The Censorship of Satiric Comedy on the Eighteenth-century London Stage*, Associated University Presses, London 2002, p. 9.

In a way, the period of positivization, i.e. of legal norms setting the limits on artistic freedom, can be perceived as a period of regress in comparison with the previous period, when artists working at the royal and princely courts enjoyed a relatively wide range of freedom. On the other hand, the transformations that took place in the period of the legal positivization of artistic freedom mobilized artistic communities and increased their legal awareness. This resulted in numerous legislative initiatives aimed at adapting the legal norms to the specificity of cultural activities. An example can be the successful campaign against the tightening of the German law against indecency in 1900 (*Lex Heinze*),⁶⁶ or the successful campaign in favour of copyright that would take into account the interests of artists launched in the UK in the 18th century (the Hogarth-Act of 1735).⁶⁷

The period of the legal positivization of artistic freedom was characterized by the introduction of regulations that created a legal framework for art. According to the proposed model of periodization, this period spans between 1789 and 1919. It was a period when artistic freedom appeared as a legal norm and ends with turning her into a constitutional.

The Period of Freedom

The symbolic beginning of the period of freedom of artistic expression was the establishment of the Weimar Constitution in 1919, which for the first time in history elevated the principle of freedom of art to a constitutional norm: "Art, science, and instruction in them are free" (Article 142 of the Weimar Constitution).⁶⁸ This declaration, however, did not mean the abolition of the supervision of art, as best evidenced by the 1921 trial brought against George Grosz for a drawing depicting Christ on the cross wearing a gas mask.⁶⁹ Although the artist was cleared of the charges, it was not based on a new constitutional guarantee, but rather on community-related grounds. Other authors of political caricatures were less fortunate.⁷⁰

⁶⁶ R.J.V. Lenman, *Art, Society, and the Law in Wilhelmine Germany: The Lex Heinze*, "Oxford German Studies" 1973, Vol. 8, pp. 86-113.

⁶⁷ H. Hubbart, *William Hogarth, the Founder of the English Painting*, "Journal of the Royal Society of Arts" 1932, Vol. 80(4139), p. 437; P. Crown, *Clothing the Modern Venus: Hogarth and Women's Dress*, in: E. Goodman (ed.), *Art and Culture in the Eighteenth Century: New Dimensions and Multiple Perspectives*, Associated University Presses, London 2001, p. 99.

⁶⁸ H. Ridder, *Freiheit der Kunst nach dem Grundgesetz*, "Schriftenreihe der Internationalen Gesellschaft für das Urheberrecht" 1963, Vol. 29, p. 16.

⁶⁹ B. von Becker, "Gegen Grosz und Genossen" – *Der Gotteslästerungsprozess gegen George Grosz*, "Neue Juristische Wochenzeitschrift" 2005, Vol. 9, p. 559.

⁷⁰ B. von Mickwitz, *Streit um die Kunst. Über das spannungsreiche Verhältnis von Kunst, Öffentlichkeit und Recht. Fallstudien aus dem 19. und 20. Jahrhundert mit dem Schwerpunkt Deutschland*, Scaneg, München 1996, pp. 25-26.

The understanding of artistic freedom as a constitutional guarantee changed significantly after the Second World War, when it became the constitutional standard in democratic countries.⁷¹ The discriminatory cultural dictatorship of totalitarian states – Nazi Germany and Soviet Russia – with the German concept of avant-garde art as “degenerate art” (*Entartete Kunst*)⁷² and the Soviet declaration of socialist-realism as the official art of the East contributed to this development,⁷³ and the opposition to the systemic censorship of the Second World War motivated democratic countries to include guarantees for the freedom of art as a human right in their national legal systems. This trend is reflected in the regulations of international human rights law.⁷⁴

However, the problem that proved to be thorny in many countries was the lack of concrete protective norms for art in subordinate acts (ordinary acts). As a result, according to many interpretations the constitutional guarantee as a standard remained an amorphous blanket provision. Lawsuits were brought against artists in countries like France,⁷⁵ Germany,⁷⁶ the U.S.,⁷⁷ and many others.⁷⁸

The problem of artistic freedom is also reflected in the case law of the European Court of Human Rights in Strasbourg.⁷⁹ This jurisprudence is not homogenous and is strongly correlated to areas of conflict between art and other legally protected values – there is a trend toward giving priority to art over politics, while at the same time to put other individual interests (e.g. protection against indecency) before artistic freedom.⁸⁰

⁷¹ K. Dahm, *Der Schutz des Urhebers durch die Kunstfreiheit*, Mohr Siebeck, Tübingen 2012, p. 99; F. Dessemontet, *Copyright and Human Right*, p. 7, <http://www.unil.ch/webdav/site/cedidac/shared/Articles/Copyright%20&%20Human%20Rights.pdf> [accessed: 17.05.2019].

⁷² See H. Prolingheuer, *Hitlers fromme Bilderstürmer*, Dittrich, Köln 2001; M. Struwe, *Nationalsozialistischer Bildersturm. Funktion eines Begriffs*, in: M. Warnke (ed.), *Bildersturm. Die Zerstörung des Kunstwerkes*, Carl Hanser, München 1973, pp. 121-140.

⁷³ See I. Golomstock, *Totalitarian Art in the Soviet Union, the Third Reich, Fascist Italy and the People's Republic of China*, Collins Harvill, London 1990.

⁷⁴ See F. Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, Oxford 2014, p. 10.

⁷⁵ See E. Janssen, *Limits to Expression on Religion in France*, “Agama & Religiusitas di Eropa, Journal of European Studies” 2009, Vol. 5(1), p. 23.

⁷⁶ Y.-G. Mix, *Kunstfreiheit und Zensur in der Bundesrepublik Deutschland*, De Gruyter, Berlin 2014.

⁷⁷ M. Heins, *The ‘Miracle’ of Burstyn v. Wilson*, in: J. Russomanno (ed.), *Defending the First: Commentary on First Amendment Issues and Cases*, Routledge, London 2006, pp. 62-63.

⁷⁸ See S. Frimmel, *Kunsturteile: Gerichtsprozesse gegen Kunst in Russland nach der Perestroika*, Böhlau Verlag, Köln 2015.

⁷⁹ 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, p. 517.

⁸⁰ Compare L. Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions*, Cambridge University Press, Cambridge 2014, p. 150.

The period of freedom can therefore be defined as a period of intense cultural dispute over the importance of freedom of the arts as a legal norm, and the chronological framework that can be set for this is the period between 1919 and 2000.

The Period of Protection

Since 2000, some new trends have emerged in legislation related to the issue of freedom of the arts. They can be perceived as a step towards developing constitutional guarantees at the level of secondary legislation.

One example of this trend is the act on the protection of works of art in public space passed in France in 2015.⁸¹ A similar trend can be observed in the amendment to the Polish Penal Code of 2005, in which there is only one exception regarding the arts – so-called “hate speech” (Article 256(3)).⁸² This direction in legislation is also supported by UNESCO, which monitors the extent to which guarantees regarding freedom in the arts are respected by individual countries, both in Europe (2005) and worldwide (2018).⁸³

This period is characterized by strengthening of the protection of creative liberties through the establishment of additional legal norms aimed at making constitutional guarantees more concrete, as well as by the decisions of judicial authorities recognizing the intrinsic social value of art – both in its contemporary form and as part of the so-called “cultural heritage”. This value can counterbalance some other legally protected goods (e.g. public morality, protection of religion). Although it is far too early to declare the growing trend as permanent, the logic of the transformations in the process of legal positivization we have witnessed so far with respect to artistic freedom give grounds to consider it as the first instalment of a new stage in the history of artistic freedom (“the period of the protection of artistic freedom”). This thesis can be supported by cases wherein criminal proceedings have been abandoned against artists in many European countries; by the liberalization of international standards for the evaluation of old works of art once considered “indecent”; and by the fact that some countries have passed additional acts specifically protecting works of art, apart from the constitutional

⁸¹ C. Gibault, C. Michel, A. Lucas, *Avant-projet de loi relatif à la liberté de la création, à l'architecture et au patrimoine*, June 2015; C. Fabre, *Les députés inscrivent la « liberté de la création artistique » dans la loi*, “Le Monde”, 29 September 2015, http://www.lemonde.fr/arts/article/2015/09/29/les-deputes-inscrivent-la-liberte-de-la-creation-artistique-dans-la-loi_4776846_1655012.html#PmTwzKYptLKXxbar.⁹⁹ [accessed: 04.01.2017]; *Loi n° 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine* [Act No. 2016-925 of 7 July 2016 on Freedom of Creation, Architecture, and Heritage], *Journal officiel de la République française* 0158, 8 July 2016.

⁸² R. Wieruszewski et al. (eds.), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne* [Hate Speech and Freedom of Speech. Legal and Social Aspects], Wolters Kluwer Polska, Warszawa 2010 and the texts contained in this publication.

⁸³ L. Cuny, *Freedom & Creativity: Defending Art, Defending Diversity*, UNESCO, Paris 2020.

guarantee of the freedom of art. One argument against the thesis which could be put forward is the turn to the far-right in world politics and the fact that conservatives tend to be reluctant towards contemporary art. It should be noted however that the changes happening across the world do not necessarily mean that in the long-term perspective (*longue durée*) the process of systematic expansion of legal guarantees for artistic freedom described in this paper will be permanently stopped or changed.

At the same time, the new trend toward the concretization of artistic freedom is only slightly visible in national legislation, and it is difficult to predict if this trend will prevail. It seems however that although the history of art and culture in the broader sense is marked by numerous regressions (involving the restriction of previously-granted creative freedoms), in the long run it has turned out that the process of social liberalization seems to be a permanently ongoing one. However it will be necessary to wait longer to verify the thesis put forward here that art will be protected to an even greater extent over time.

Conclusions

The analyses carried out in this study show that “artistic freedom” was originally a non-legal concept. Put simply, we can assume that it formed over the course of the development of philosophical reflections about art, especially in the field of aesthetics. Initially it was mainly associated with the formal aspects of the work, originally determined by the strict canons of imaging. Thus artistic freedom was initially understood in the context of the freedom artists had in the process of creating a given work (technological correctness). Later, the concept of “artistic freedom” was adopted by artistic communities trying to liberate themselves from social organizations and escape their limitations by espousing their freedom to perform a profession. Subsequently, it evolved to become a postulate for liberating artists from the state-created legal restrictions in the wider communicative aspect (freedom of content). It was only then that the notion of “artistic freedom” entered the legal and juridical spheres – including legal science – and became subject to constitutional regulations.

In summarizing the chronology of the process of the formation of artistic freedom as a legal norm in the Western tradition, it seems justified to draw attention to the most important social processes that influenced the process, understood as the positivization of the postulates of artistic circles. These included: (1) secularization of the State; (2) liberalization of the law; (3) the division of social life into public and the private spheres.

The separation of art from religion, which was one of the most visible consequences of the above-mentioned progressive secularization, resulted in numerous tensions and disputes between the Church and artists about the right to actually use religious symbols in art. In most European countries, artistic scan-

dals have erupted and continue to erupt as the so-called “critical artists” use direct references to the tradition of religious art – especially images of God and the saints. The history of controversies surrounding religious art dates back to the time when the very notion of “secularization” was not in common use, and relates to the regulation by the *Theodosian Code*, which was extensively analysed in the first part of this paper. It established that: “statues of pagan gods should be judged by their artistic value, not by the religious reverence”.⁸⁴ From the perspective of “the long duration” (*longue durée*), this rule paved the way for numerous instances of consolidation of the principle of separation of art from the precepts of religious theology. It may be assumed that the “rule of law” introduced by Theodosius gained its confirmation in social practice long after the regulations themselves were no longer in effect. This confirms the validity of the assertion that legal norms related to artistic creation have had a direct impact on art history. As a manifestation of the further secularization of both social life and art itself, we should consider the development of court culture, in which art for the first time became independent from the requirements of religion and theology. This process was reinforced by the legal and social transformations accompanying the French Revolution, which initiated the idea of a permanent separation of Church and State. This led to the total rejection of the institutional patronage of the creators of art in the period preceding the First World War. Although these processes did not completely exclude the participation of artists in the production of church/religious symbolism, after the Second World War religious themes were increasingly viewed from a critical perspective in works of art.

Another important factor that contributed to the process of “legal postivization of artistic freedom” was the progressive liberalization of social life – a long-term trend in European culture closely linked to the above-described process of transformation of the role of religion in society. This liberalization consisted of a gradual reduction in the State’s control over private life, as well as the humanization of the law itself, manifested, inter alia, in ensuring that a defendant was able to defend himself in departing from the class distinctions in the law, or in abolishing torture and corporal punishment. The formation of the legal guarantee of artistic freedom was a part of the broader issue of the development of a universal human rights doctrine – first in the form of their surrogate, e.g. state privileges, and then in the form of universal guarantees of human rights in their modern understanding. This process therefore involved an increase in the protection of fundamental rights as a result of the development of jurisprudence (e.g. adopting legal forms) in the relationship between political power and society (government and opposition, etc.), aimed at democratization. More broadly, the formation of the legal guarantee of artistic expression, which manifested itself in the freedom of art as a human right,

⁸⁴ P. Krueger, T. Mommsen, P.M. Meyer, op. cit., XVI.10.8.

was therefore extended over time. This reflected political and socio-cultural transformations, and thus artistic freedom shares a common history with the general evolution of human rights.

One important factor that contributed to the development of the idea of artistic freedom as a constitutional and legal guarantee was, apart from secularization and liberalization, the separation of the public and the private spheres. In the period of monarchy as traditionally understood, where the Church played a strong role, the state apparatus exercised almost unlimited control over individuals. The French Revolution was the breakthrough moment for the separation of these two spheres of life. The ideal of a secular State based on mechanisms of social control through political power, which was formulated in the wake of the Revolution, also contributed to changes in the field of art. Defining the model of governance and its control instruments as a "public sphere" reflects the acknowledgement of explicit expressions of views, demands, and needs – which are fundamental for the legal realization of human subjectivity in the form of a legal guarantee of the freedom and rights of individuals. Together with the introduction of constitutional guarantees, there was a marked change in the perception and understanding of the social function of art. The civilizational progress related to the evolution of forms of exercising state power was closely connected with the extension of the scope of artistic freedom. It can therefore be postulated that the level of social tolerance towards artistic attitudes – especially those that go beyond the norms of conduct of a given community – corresponded to the level of democratization of the State. This idea is the basis for the thesis that appears in numerous academic studies, according to which while artistic diversity can be considered a reflection of the degree of pluralism of a democratic State, the actual scope of artistic freedom can serve as a measure of democracy.

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