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

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
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, począwszy 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 wyzwalań 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. They focus on different aspects of the issue simultaneously. Most of the authors raise

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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). 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). The majority of authors, however, focus on describing individual cases of interference in the scope of freedom of artistic expression (case studies). 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. 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?


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 correlates 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

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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):

4 You 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. 5 You 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, but 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,


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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 painting and believed that poets should be exiled from an ideal state. In Roman culture pictures were strongly politicized. There existed the concept of divine worship of emperors and the opposite practice of condemning their memory by destroying the images of poor rulers (damnatio memoriae).

The Judaic, Greco-Platonic, and Roman traditions all blended into Christianity. The new religion was initially anti-iconic. 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. 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). Christianity protected itself from paganism by destroying the images of ancient deities.


(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. 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”. However, iconoclastic tendencies became apparent shortly thereafter. 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. 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 II and by Charles the Great, was the culmination and, at the same time, the end of the era of an absolute ban on images. 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).

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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.


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 (\textit{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 \textit{Bible pauperum}, i.e., the assumption that images exist to teach illiterate people about


\(^{34}\) See J. Folda, op. cit.
the tenants of faith. 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) as well as the local level (e.g. by Savonarola). 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) and the Catholic response to them in the Counter-Reformation. 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. Even the greatest artists could not escape censorship – genitals were painted out of Michelangelo's frescos in the Sistine Chapel. Legal proceedings were brought by the inquisition against Paolo Veronese in 1573 for his thematically inappropriate painting *The Last Supper*. Marcantonio Raimondi, a close associate of Raphael, was arrested for publishing the pornographic illustrations *Modi*.

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.

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(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 artists or to artists who wished to protect their artistic patterns as a part of their authorship. Group privileges included, for example, guild privileges granted the Saint Luke Brotherhood, or the founding privilege of the Royal Academy of Painting and Sculpture.

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. 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

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in Paris in 1648\textsuperscript{49} – 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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{52} modern copyright provisions,\textsuperscript{53} or the first regulations

\textsuperscript{49} A. Boime, op cit.
regarding monument protection.\textsuperscript{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.\textsuperscript{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 caricature\textsuperscript{56} and theatre.\textsuperscript{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 \textit{lese majeste} for creating a drawing depicting the king transforming into a pear in four phases.\textsuperscript{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.\textsuperscript{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.\textsuperscript{60} A similar pattern of tightening state censorship could be observed in other countries – i.e. in Great Britain\textsuperscript{61} and in Germany.\textsuperscript{62}

The development of positive law in the 19th century also influenced the legal framework for the activities of theatres.\textsuperscript{63} The exhibition of nudity onstage\textsuperscript{64} and the presentation of political topics were banned in most European countries.\textsuperscript{65}

\textsuperscript{60} R.J. Goldstein, \textit{Censorship of Caricature…}, p. 15.
\textsuperscript{62} J. Clapp, op. cit., p. 174.
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 Hoghart-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.\(^{70}\)

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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. 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) and the Soviet declaration of socialist-realism as the official art of the East contributed to this development, 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.

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, Germany, the U.S., and many others.

The problem of artistic freedom is also reflected in the case law of the European Court of Human Rights in Strasbourg. 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.

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.
76 Y.-G. Mix, Kunstfreiheit und Zensur in der Bundesrepublik Deutschland, De Gruyter, Berlin 2014.
78 See S. Frimmel, Kunstarteile: Gerichtsprozesse gegen Kunst in Russland nach der Perestroika, Böhlau Verlag, Köln 2015.
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. 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. 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)). 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).

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 installment 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 guarantees already set forth by the constitutions of those countries.


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.

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”. 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 positivation 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,

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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