FREEDOM OF ARTISTIC CREATION IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

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I. INTRODUCTION

The question of freedom of artistic creation, and of its integral aspect at the boundaries of art, is both intriguing in theoretical terms and significant in virtually every age and culture. Limitation of freedom of artistic creation is an issue that crosses various paradigms, hierarchies of values and normative systems. Given the extent and multifaceted character of the problem, attempts to determine the boundaries of artistic freedom have been made in many fields of research, and therefore in the framework of different scientific disciplines, including the theory and history of art, aesthetics, art criticism, ethics, economics, theology or law, to name but a few, each of which with its own specific axiological and methodological context.

The aim of this paper is to give an introduction to the interpretation of Article 73 of the Constitution of the Republic of Poland ("the Constitution" or "the CRP"), which provides for freedom of artistic expression.[1] In particular, the focus is put on the constitutional basis for legally limiting the freedom of artistic creation in view of the axiological preferences (decisions) of the organic lawgiver as expressed in the preamble to the CRP.[2] An emphasis on the axiological foundations of the law is of importance not only when one postulates a statutory limitation of artistic activity but also when one attempts to interpret the provisions already in place in this regard. The system of constitutional values seems to be the most universal key to a proper understanding and

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1. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, art.73 (Poland).

2. *Id.* at pmbl.

a precise definition of any legal boundaries of creative activity. Jurisprudence assumes that all legal norms, including those limiting the freedom of artistic expression, are both the emanation and concretization of any axiological decisions of the organic lawgiver. A legal system is rooted in a system of values recognized as an axiological foundation of the legal order, and therefore, in order to correctly decode legal norms out of the statutes, as well as to initiate legislative changes in conformity with the requirements of the CRP, it is necessary to accurately identify the values that the legal system should pursue and secure.

Almost needless to say, the difficulty in achieving the goal so outlined lies in the fact that any identification of the constitutional values made in the process of interpreting and applying the law is carried out, on the one hand, in the actual context of a pluralistic society, in which different worldviews and value systems compete with each other, and on the other hand, with a normative reference to Article 25(2) CRP, pursuant to which public authorities shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life.[3] This difficulty gets further exacerbated by the growing radicalization of viewpoints in the public debate and in the dispute over anthropological, ethical, religious, and civilizational assumptions fundamental to the debate itself, which are also important criteria for the assessment of artistic activity. It seems that when manoeuvring on the level of law axiology, legal professionals have particular difficulty in confronting the theses of art theorists and art critics, especially where the latter refer to the method of deconstruction of traditional values, symbols, concepts, normative, and cultural paradigms as proposed by the post-modern humanities. The obligation of being worldview-impartial on the side of public authorities, when combined with the assumptions of deconstructionism, in the long-term threatens axiological nihilism and decision-making incapacity of public authorities. These difficulties only confirm that both the constitutional values and principles must be read integrally, and applied to legal settlements of disputes over the limits of freedom of art.

II. ARTISTIC CREATION AS A CONSTITUTIONAL TERM

Article 73 CRP stipulates that the freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to

3. *Id.* at art. 25(2).

everyone.[4] However, the organic lawgiver does not define the concept of artistic creation, which leaves one with the need to clarify the term in the doctrine and jurisprudence. The use, in any court proceedings, of court expert opinions in the field of artistic creation is problematic insofar as in the theory and history of art, aesthetics, art criticism and cultural studies diverse and sometimes diametrically different concepts of what in essence artistic activity is have competed with each other for decades. One of them is a classic, narrower concept, according to which the essence of art is to imitate nature and complement its shortcomings in the name of beauty, aesthetic values that is, and the role of the artist is to explore, experience, creatively reformulate and present ever new epiphanies of beauty. The function of art in this concept is to assist the recipient, through beauty, in getting answers to fundamental existential questions, in discovering and strengthening the essential, objective moral values present in man and culture, such as goodness, truth, justice, and love, which enable fulfilment of man as a personal being capable of knowing and choosing good for its own sake. By another concept, the one that predominates nowadays, the term "art" is an open-ended idea, which refers to the activity of human spirit unfettered by any outer limitations. Artistic activity is the self-defining exploration of the idea of art, being often an uncompromising critique of tradition, its vision of man and culture. Art in this concept is an autonomous and autotelic sphere, and at the same time a tool to deconstruct culture and denounce its idols, stereotypes, and habits. Underlying this approach to art, and at the same time justifying the activity of artists, is a philosophical assumption of relativism (cognitive and moral), a postmodern belief that there are no objective, universal and neutral criteria of cultural debate whatsoever. In the spirit of confrontation with the pre-existing aesthetic convention, innovative substitute values are elevated, such as intuition, conceptualization, improvisation, experiment, contestation, ostentatious denial, scandal, and the transgression of taboo, meaning deliberately trespassing the boundaries delimited by the most profoundly rooted social norms, whether moral, religious, or legal.

So, which concept of the essence of artistic creation should take preference in the process of interpretation of the law? A stance can be found in the literature that the constitutional guarantee of freedom of artistic creation, which does not contain a legal definition of the matter that it protects, allows for opening the law to all phenomenal forms of contemporary art. By establishing the guarantee of freedom of artistic

4. *Id.* at art. 73.

creation without specifying the scope of its subject matter, the organic lawgiver would thus explicitly waive the determination of its legal contours, which would demand that any related evaluative legal argumentation take a due account of autonomizing arguments. In other words, in accordance with the Constitution, art would be an autonomous good protected under the law. One should note, however, that artistic creation, which has its particular structure, or language, is in fact one of the kinds of social communication, so both the content and form of that communication (communication of the artist with the recipients of the work) is subject to social valuation, including a legal assessment. Artistic activity refers to the different systems of values within which it operates. One of the value groups is on the level of art studies, where artistic creation is rather autonomous. Art here defines itself and is not subject to external appraisal. Another normative level, external to the first one, is the system of legal norms, in which artistic creation, like any other activity undertaken in the social space, operates and also by which it is governed. The different normative systems cannot be identified with each other, as they derive from different sources and operate in distinct paradigms. The constitutional concept of artistic creation, which belongs to the legal system, should be interpreted not so much based on an autonomous evaluation by art critics and art theorists, but in view of the axiological assumptions and political principles resulting from the content of the Basic Law.

III. METHODOLOGICAL CHALLENGES

In interpreting the notion of artistic creation in the perspective of constitutional values and norms, one should note the methodological differences that occur within the self-defining contemporary art (and, consequently, within art studies) and under the applicable law. To a large extent, contemporary art is based on the method of deconstruction of symbols and concepts relating to any pre-existing social values, specific to the post-modernist philosophy. The deconstruction of the traditional cultural binder increasingly often becomes a substantive justification, a formal assessment criterion and the promoted structure of a work of art. Aware of certain standards of conduct in public life, the artist deliberately confronts these to deconstrue their semantics. "Unleashing free", transgressing taboos, striving to eliminate any external (social) and internal (moral) restrictions in the creative process is an essential *leitmotif* of contemporary art, being an important tool of the so-called counter-culture.

With reference to the system of moral and ethical values, the basic instrument of deconstruction is the claim of ambiguity of the concepts fundamental for an ethical evaluation, and populating these with further meanings. The outcomes are semantic humbugs, devaluation and relativization of the classic values. By tricking adversaries into an area of relativism, advocates of deconstruction argue that the concepts underpinning the moral order can be stuffed with any content. Simultaneously, the various interpretations of the concepts are to have equal cognitive power, and none of them can claim exclusivity. The legitimacy of referring in public debate to such value-carrying terms as dignity, beauty, truth, goodness, justice, and responsibility is consistently undermined.

One should note, however, that the methodological assumptions of deconstructionism, admitted in contemporary humanities (especially philosophy and art studies) cannot be used in the process of determining the axiological and normative content of legislation. Interpretation of the sources of law is based on the assumption that the terms used by the legislator, as tools to identify the content of the applicable legal norms, have their coded but specific range of meaning (the signified), which only requires establishing. The law, with its specific method of enactment and interpretation, unlike the idea of deconstruction, seeks to clarify the concepts, construe definitions and precisely describe the signified. The principles of good legislation and recognized methods of interpretation require the utmost unequivocalness and substantive focus on delivering certain values which are axiological foundations of the legal system. Owing to a kind of conservative character on the levels of semantics and axiology, the law provides itself stability, interpretative potential and systematic continuity. On the contrary, post-modernism as a rule refutes the pre-existing research paradigms, hence any integration of jurisprudence with the humanities saturated with the idea of deconstruction is extremely difficult, if not impossible.

Cultural changes can be depenalized, legalized or promoted on a legal level, but this is only by defining them and changing the law, which requires a broader social consensus, rather than by deconstruing concepts in the interpretation of normative acts. The legal system evolves along with culture but only by amendment, not a deconstruction of the concepts of legal language. In the interpretive process, an authority that applies the law cannot rely on a free, individualistic, arbitrary interpretation of terms, unfettered – as post-modernists say – by "the great meta-narratives", because that authority would then create a legal norm instead of decoding it out of a provision. This would be

contrary to the principle of separation of powers. The authority must take into account the objectives, the axiological preferences (i.e. "meta-narratives") that the legislator relied on. In continental law systems, a legal act by essence is a barrier to arbitrary decisions by an authority that applies the law, and not an invitation to more or less free interpretive activity. With that approach, an authority that applies the law would then claim the role of the legislator, in violation of the principle of separation of powers, legality and the rule of law.

The essential methodological differences make the method of deconstruction useless in the interpretation of the law. Therefore, any criteria of artistic creation based on post-modern assumptions are of little use in constitutional interpretation. The meaning of the concept of artistic creation should be derived immanently from the order of values and norms contained in the Basic Law. Thus, there may be kinds of activity considered artistic in the circles of art theory and art criticism, which do not coincide with the scope of the subject matter given to artistic creation in the CRP. If the legally guaranteed freedom of artistic expression is to take precedence over other forms of expression, then this activity must be harmonized with the constitutional values and norms. The guarantee of freedom of artistic creation cannot be a handy formula used to attack these values and norms. Freedom of artistic creation makes taking account of the axiology of the Constitution a must.

IV. AXIOLOGICAL FRAMEWORK OF FREEDOM OF ARTISTIC CREATION

In an attempt to outline the axiological framework of freedom of artistic creation, one cannot ignore the preamble to the Constitution. Though one cannot derive legal norms from the text of the preamble in the strict sense, its analysis, as the Constitutional Court held, may provide guidance, based on a true expression by the organic law-giver, as to the directions for interpretation of provisions of the normative part of the Constitution as originally intended.[5] The preamble, in turn, identifies four basic universal values, i.e. truth, justice, goodness, and beauty.[6] The emphasized universality of these values means that in the opinion of the organic lawgiver the concepts that express them carry objective moral content. They are relevant to the entire legal order, and therefore constitute a point of reference (evaluation) for the legal

5. Trybunał Konstytucyjny [Constitutional Tribunal] May 11, 2005, K 18/04 at 8 (OTK-A 2005, No. 5, item 49).

6. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, pmbl.

relationships of all citizens of the Republic. The map of constitutional axiology is made more precise by the emphasis in the preamble put on the values of culture rooted in the Christian heritage of the Nation and in universal human values. Moreover, the organic law-giver links the freedoms of the individual to justice and social dialogue, and formulates the obligation of solidarity with others, combined with concern for the preservation of human dignity, which means, among other things, the rejection of the idea of class struggle. Freedom of artistic expression, which enjoys constitutional protection, is not alienated vis-a-vis the constitutional values and norms, and therefore it is not absolute or unlimited. The very notion of artistic creation is not at the same time indefinable or capacious enough to be able to justify an omission, neglect or breach of the axiological preferences of the organic lawgiver as expressed in the basic law.

What follows is that artistic creation, the freedom of which is subject to legal protection, cannot be explained by an open-ended, autonomous definition, but should be referred to other constitutional values and norms, including–at the axiological level–to beauty, truth, goodness and justice, which the legislator considers the objective criteria of evaluation. Beauty is not recognized in purely formal terms (aesthetic terms) but in axiological terms, as corresponding to goodness, truth, and justice (beautiful is what is true, just, and good on the basis of constitutional axiology). Of course, these values should not be made instrumental by public authorities, as they were in modernism (a variety of idealism) and totalitarian systems rejected by the organic lawgiver, as projections of party ideology to be guarded by an institution of censorship. They should be read on the basis of cognitive realism from the perspective of the common good– that is, in conjunction with Article 1 CRP.[7] Thus, if artistic activity attempted to impose or promote anti-values within the meaning of constitutional axiology, i.e. falsehood, injustice, evil, ugliness (understood axiologically), then such activity would not mean artistic creation whose freedom is guaranteed by the Constitution. Furthermore, no one could rely on that freedom if it were to justify the violation of human dignity, class struggle, or attack on culture rooted in the Christian heritage of the Nation (that without additional reference to Article 53–freedom of conscience and religion, or Article 54–freedom to express opinions, including their limitations).[8]

7. *Id.* at art. 1.
8. *Id.* at art. 53-54.

V. STATUTORY BOUNDARIES OF FREEDOM OF ARTISTIC CREATION

Contrary to what one sometimes hears from people professionally operating in the world of art, entertainment and media, one should note that the legal guarantees of freedoms and civil rights, including freedom of expression and artistic creation, also assume their limitations. Interdependencies between individual constitutional freedoms and rights imply the necessity of limiting them, so as to prevent the abuse of rights. Relying on the constitutional guarantee of a freedom or right does not allow one the freedom to interfere in another freedom or right. One of the foundations of constitutionalism is the principle of setting boundaries to the freedom of the individual where it encounters the freedom or right of another entity. The constitutional freedom of artistic creation is not by itself a legal basis to justify the artist's violating the law. There is no reason to believe that freedom of artistic creation enjoys a special constitutional protection, a much stronger one than the other freedoms and rights, and takes precedence in the event of a conflict with the other rights and freedoms. One may not treat freedom of artistic creation as a key to open the boundaries of freedom in which this freedom is embedded.

The constitutional guarantee of the protection of freedoms, including freedom of artistic creation, is a mandate addressed to the ordinary legislator to provide for guarantees of such freedoms in statutes governing the various spheres of life, and implies the determination of their boundaries in the form of statutory prohibitions or orders, taking into account the respect for and delivering on the constitutional axiology. Freedom of artistic expression is therefore subject to restrictions with regard to the provision of Article 31 CRP, and thus in order to determine its boundaries it is necessary to formulate and analyze the various norms contained in the legal acts of the statute rank.[9]

The competence of the legislature to define the limits of freedom of artistic creation is confirmed by the jurisprudence of the European Court of Human Rights. Under the Convention for the Protection of Human Rights and Fundamental Freedoms, public morality was decided to be a value which limits the freedom of art, for instance.[10] The Court emphasized in this context that although one must not unnecessarily interfere with the freedom of expression, it is the wide margin of appreciation and the absence of a European concept of morality that allows the state to interfere with the freedom of artistic expression, if the

9. *Id.* at art. 31.
10. Müller v. Switzerland, 133 Eur. Ct. H. R. (ser. A) at 18 (1988).

work is presented in a public place.[11] The Court held, among other things, that if the work is without a reason and offensive to others, it does not gain legal protection.[12] It appears also that the provision of Article 13 of the Charter of Fundamental Rights of the European Union, which stipulates that the arts and scientific research shall be free from restrictions, should be read in conjunction with the principle of proportionality, as set out in Article 52 (1) of the Charter.[13] In this context, the freedom of art may be subject to restrictions with a view to protecting the public order or public morality. Moral argumentation here is of a particular nature, as it refers to the realm of tradition and cultural heritage of the Member States, due to the fact that there is no single European morality. Member States enjoy in this respect the power of assessment and the margin of appreciation, which lend legitimacy to the application of national measures restricting the freedom of art. It would be difficult to accept the view that the European legislator does not recognize any boundaries of freedom of artistic activity. The historical experience of Europe has shown that uncontrolled art may violate the limits of dignity and the freedom of others, and serve the escalation of violence and the emergence of social unrest. Suffice it to say that anti-Semitism, also present in literature and art, was a path paved to the Holocaust.

VI. CONCLUSION

At the heart of the debate on the boundaries of art there is the problem of reconciling two legitimate aspirations. The first one is the desire to respect and preserve the fundamental social values, protected by moral, religious and legal norms rooted in the culture of a society. On the other side there is the desire to respect the freedom of artistic activity and creative sovereignty, which, however, sometimes takes on a formula of not only uncompromising criticism of the pre-existing system of values, but of deliberate public trespassing of boundaries, violation of norms, and breaking of social prohibitions. With a view to protecting goods such as public order and safety, environment, public health, morality or the rights and freedoms of others, the legislator imposes statutory restrictions also on artists and organizers of artistic activity. In contemporary culture, this task is extremely difficult because of the

11. *Id.* at 17-18.

12. Otto-Preminger-Institut v. Austria, 295-A Eur. Ct. H. R. (ser. A) at 14 (1994).

13. Charter of Fundamental Rights of the European Union art. 13, 52(1), 2010 O.J. C 83/02, at 394, 402.

ideas of deconstruction of the traditionally recognized concepts, values and social norms penetrating the humanities as grown from post-modern philosophy.

The point of reference for setting legal limits to freedom of artistic creation lies in the constitutional values that emanate from the four basic universal (considered objective) "mega-values"–that is, truth, justice, goodness and beauty–being the carriers of moral content corresponding to the axiological preferences of the organic law-giver. Beauty on this list is recognized axiologically as corresponding to the goodness, truth and justice within the framework of the other constitutional values and norms. This understanding of beauty is a clue to guide the interpretation of the constitutional term of artistic creation and the setting of the boundaries of free creative activity. The constitutional concept of artistic creation can be interpreted in neither an autonomizing nor a utilitarian (instrumental) manner, as it refers art to the system of universal values identified in the Basic Law. The legally guaranteed freedom of artistic creation, without a doubt, encompasses the possibility of using contemporary means of artistic expression recognized in art studies (innovation, conceptualization, shock), yet using them–if it is to be protected by the law–must fall within the scope of activities aimed at delivering on the constitutional values.

Public authorities, generally, should not interfere with artistic creation themselves and are obliged to protect artists against such interference from other entities, may, for the purposes of constitutional values, not particular ideological purposes, support financially and organizationally selected artistic projects. Such a policy does not discriminate against those artists whose activities are directed towards the deconstruction of the values preferred by the organic lawgiver. What is more, if an artist or organizer of art in the course of their artistic activities fulfilled the attributes of an offence, they may not, in principle, rely on the freedom of art as a circumstance legally justifying their behaviour. In the absence of any specific provision allowing the behaviour fulfilling the attributes of an offence within such activities, the artistic context of the act does not exclude the legal liability of the artist or the exhibitor of a work of art for trespassing the statutory limits under the law.