ROCZNIKI KULTUROZNAWCZE
Tom XII, numer 4 – 2021
DOI: http://doi.org/10.18290/rkult21124-3

ANNA MAGDALENA KOSIŃSKA

# THE ROLE OF THE COURT OF JUSTICE IN CREATING STANDARDS FOR THE IMPLEMENTATION OF CULTURAL RIGHTS

## 1. INTRODUCTORY NOTES

The aim of this study is to answer a question whether CJEU case law in cases concerning the implementation of broadly understood cultural policies may in reality affect the extent of implementation of cultural rights—that is access to products of culture, participation in cultural life and freedom of artistic creativity—at the level of Member States. The answer to this question is problematic in the fact that culture, pursuant to Article 6 of the Treaty on the Functioning of the European Union,[1] remains only a competence supporting the activity of Member States while cultural rights are guaranteed generally at the constitutional level and thus the EU law does not apply to them. However, it seems that due to the abundant *acquis culturalis*, the achievements of EU law and the case law pertaining to the implementation of cultural policies during the last half a century,[2] such a question seems valid and necessary since EU law profoundly pervades national legal systems that concern products of culture,[3] as seen in, for example, the adoption of relevant new regulations.[4]

Dr hab. ANNA MAGDALENA KOSIŃSKA—Associate Professor at the University of Szczecin, Faculty of Law and Administration, Institute of Legal Studies; address for correspondence: Wydział Prawa i Administracji US, ul. Narutowicza 17A, 70-240 Szczecin, Poland; e-mail: anna.kosinska1@usz.edu.pl; ORCID: https://orcid.org/0000-0002-0915-874X.

[1] Treaty on the Functioning of the European Union, consolidated version OJ C 202, 7.06.2016, p. 47.

[2] More on *acquis culturalis* in Anna M. KOSIŃSKA, *Prawa kulturalne obywateli państw trzecich* (Lublin: Wydawnictwo KUL, 2018), 172ff.

[3] See Witold SOBCZAK, "Ochrona dziedzictwa kultury w systemie prawnym Unii Europejskiej," *Środkowoeuropejskie Studia Polityczne*, no. 3 (2009): 105–23.

[4] Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of products of culture, OJ L 151, 7.6.2019, pp. 1–14.

The article presents the current constitutional guarantees concerning the cultural rights and seeks to find out whether the legal provisions of EU law, and in consequence its interpretation of the Court of Justice of the EU, have the real impact on the realisation of the right to culture at the national level. Moreover, the second part of the article, based on selected CJEU judgments connected with the area of the constitutional guarantees (right to participate in cultural life, right to access to cultural heritage, freedom of art) is intended to prove that the interpretation of the EU legal provisions and elaborated standards could became a real and useful guideline for national institutions and bodies with respect to implementing guarantees of cultural rights.

## 2. DOMESTIC REGULATIONS ON CULTURAL RIGHTS

Cultural rights are traditionally regulated by the constitutions of the EU Member States.[5] Cultural rights are classified by legal scholars and commentators as second generation rights (economic, social and cultural rights), and are composed of: the right to participate in cultural life, the right to access products of culture and freedom of artistic creativity (also classified as a first generation freedom besides personal and political rights that guarantee the individual's freedom from state interference).

The 1997 Polish Constitution locates cultural rights outside Chapter 2 ("Freedoms, rights and obligations of persons and citizens")—in Chapter 1, "Republic". Article 5 of the Constitution stipulates that "the Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development."[6] In turn, Article 6 of the Constitution reads that "the Republic of Poland shall provide conditions for the people's equal access to the products of culture which are the source of the Nation's identity, continuity and development." As scholars emphasize, locating cultural rights in the categories of general rules in Chapter I of the Constitution evidently diminishes the legal protection of the

[5] See Anna M. KOSIŃSKA, *Kulturalne prawa człowieka* (Lublin: Wydawnictwo KUL, 2014), 204ff; Anna FRANKIEWICZ, "Konstytucyjna regulacja dostępu do dóbr kultury i wolności korzystania z kultury," *Przegląd Prawa Konstytucyjnego*, no. 3 (2013): 57-77; Anna MŁYNARSKA-SOBACZEWSKA, "Prawo do kultury w katalogu praw człowieka," *Przegląd Prawa Konstytucyjnego*, no. 3 (2013): 27–55.

[6] Constitution of the Republic of Poland of 2 April 1997, Dz.U. (Journal of Laws) of 1997, No. 78, item 483.

individual and makes it impossible to implement those rights using legal instruments in the event of a country failing to fulfil its obligations.[7]

Only the freedom of artistic creation and the freedom to enjoy the products of culture guaranteed in Article 73 of the basic law are constitutional norms that safeguard the claims of individuals if the state fails to implement protective actions.

Poland is also bound by international agreements relating to the protection of human rights that guarantee implementation of culture-related entitlements.[8]

## 3. EU AUTHORITY IN THE REALM OF CULTURE

As has been mentioned above, the Union's competences in the area of cultural policies are so-called supporting competence (Article 6 TFUE),[9] which means that the Union only supports, coordinates or supplements the activity of its Member States. The treaty basis for the implementation of actions in the sphere of culture is enshrined in Article 167 TFEU.[10] According to this provision,

> action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
> – improvement of the knowledge and dissemination of the culture and history of the European peoples,
> – conservation and safeguarding of cultural heritage of European significance,
> – non-commercial cultural exchanges,
> – artistic and literary creation, including in the audiovisual sector.

[7] Anna FRANKIEWICZ-BODYNEK, *Konstytucyjna regulacja* dziedzictwa narodowego oraz dóbr kultury (Toruń: Adam Marszałek, 2019), 44. The author notes that the enumeration of values protected by Article 5 also contributes to the weakening of this legal norm.

[8] We can list here first of all the UN International Covenant on Economic, Social and Cultural Rights (opened for signature at New York on 19 December 1966), p. 3, and the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted in Paris on 16 November 1972 by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its seventeenth session, Dz.U. of 1976, No. 32, item 190.

[9] Jean-Claude PIRIS, *The Lisbon Treaty and Political Analysis.* Cambridge Studies in European Union Law (New York: Cambridge University Press, 2011), 75. On the practical dimension of implementation of this competence within the EU see Dorota JURKIEWICZ-ECKERT, "Cultural Policy of the EU – How it Works in Practice," in *Introduction to European Studies: A New Approach to Uniting Europe*, ed. Dariusz Milczarek, Artur Adamczyk, and Kamil Zajączkowski (Warsaw: Centrum Europejskie, Uniwersytet Warszawski, 2013), 729–62. See also Anna KĘSKIEWICZ, "Specyfika określenia desygnatów nazwowych dóbr o szczególnym znaczeniu dla kultury na gruncie prawnym," *Zeszyty Naukowe Uniwersytetu Rzeszowskiego*, Seria Prawnicza 101 (2018): 244.

[10] See Dorota JURKIEWICZ-ECKERT, "Rethinking Europe through Culture," in MILCZAREK, ADAMCZYK, and ZAJĄCZKOWSKI, *Introduction to European Studies*, 711–12.

However, this article is not directly effective since, as is emphasized by legal scholars and commentators: it only includes competence- and task-related norms.[11]

The Charter of Fundamental Rights of the European Union (Charter) also protects cultural rights in a very selective manner. Admittedly, according to Article 22 thereof, "the Union shall respect cultural, religious and linguistic diversity," but guarantees of classically understood protection of cultural rights and freedoms are only located in Article 13, whereby "the arts and scientific research shall be free of constraint. Academic freedom shall be respected."[12] Moreover, it needs to be stressed that guarantees of freedom of artistic creativity are protected under the Charter to the extent to which institutions and Member States apply the Union's law.[13]

The law of the European Union, according to the primacy and supremacy rules developed by the CJEU,[14] is directly effective and in the event of a collision of norms of national and EU law, primacy is held by the EU legal norm. The Court of Justice in its case law, has contributed to the development of a model of protection of, for example, fundamental rights despite the fact that in the then status of EU law, the Community did not have a catalogue of protected human rights in place.[15] When it comes to the exercise of cultural policies, in the initial period of its decision-making activity, the Court linked the subject matter of products of culture with the freedom of flow of goods within the internal market and with the issues of competition protection[16]. However, as emphasized by Rachael Croud Smith, the Member States were left a wide margin of freedom in specifying objectives of the cultural policy[17].

[11] See Anna KOSIŃSKA, *Prawa kulturalne obywateli państw trzecich w prawie Unii Europejskiej*, 160 — as quoted in: Anna SIWEK-ŚLUSAREK, "Komentarz do art. 167 TFUE," in *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*, vol. 2, ed. Krystyna Kowalik-Bańczyk, Monika Szwarc-Kuczer, and Andrzej Wróbel, articles 90–222 (Warsaw: Wolters Kluwer, 2012), LEX electronic version.

[12] Charter of Fundamental Rights of the European Union, OJ C 202, 7.10.2012, pp. 389–405.

[13] See Article 51 of the Charter.

[14] See Nigel FOSTER, *Foster on EU Law* (Oxford: Oxford University Press, 2006), 141; Bruno de WITTE, "Direct Effect, Primacy and the Legal Nature of the Legal Order," in *The Evolution of the EU law*, 2nd ed., ed. Paul Craig and Grainne de Burca (Oxford: Oxford University Press, 2011), 323.

[15] See the following judgments: Judgment of the ECJ of 21 September 1988, Case *Pascal Van Eycke v ASPA NV*, C 267/86 (ECLI:EU:C:1988:427); Judgment of the ECJ of 13 December 1979, Case *Liselotte Hauer v Land Rheinland-Pfalz*, C 44/79 (ECLI:EU:C:1979:290).

[16] Rachael CRAUFURD SMITH, "The Evolution of the Cultural Policy in the European Union," in CRAIG and de BURCA, *The Evolution of the EU Law*, 875; Izabela SKOMERSKA-MUCHOWSKA, "Kultura," in *Polityki Unii Europejskiej: polityki społeczne. Aspekty prawne*, ed. Jan Barcz (Warsaw: Instytut Wydawniczy EuroPrawo, 2010), 84; Monika NIEDŹWIEDŹ, "Obrót dobrami kultury w Unii Europejskiej – konsekwencje dla Polski," *Kultura Współczesna* 40, no. 2 (2004): 122; Viktoriya SERZHANOVA and Jan PLIS, "Ochrona dziedzictwa narodowego jako przesłanka ograniczenia swobód rynku wewnętrznego UE," *Studia Europejskie – Studies in European Affairs*, no. 4 (2017): 141–61.

[17] CRAUFURD SMITH, "The Evolution of the Cultural Policy," 878.

The Court's case law in matters of broadly understood culture was largely developed by means of questions referred for a preliminary ruling. Pursuant to Article 267 TFEU, the national court of a Member State may suspend proceedings and direct the question to the Court in a situation when it has doubts as to interpretation of the law and compliance of national law with that of the EU. The reply to such a question is binding on the national court and in practice questions referred for a preliminary ruling usually broadly affect the practical implementation of the EU law in the Member States to a large extent. Admittedly, legal scholars and commentators do not fully accept the principle of loyalty "which asks to repeal or at least to cease the application of a national law that the Court deemed non-compliant with the EU law in the preliminary ruling procedure.… This obligation is to bind not only the state whose laws were examined in the question referred, but also all other laws that have similar regulations."[18] In my opinion, however, the Court's case law in the so-called cultural matters may be a set of general principles and good practices which contribute to a fuller implementation of cultural rights at the national level, even if the particular legal problem which is being examined by the Court does not appear in a specific Member State.

Judgments in culture-related cases passed by the CJEU often concern the rights and obligations of EU citizens.[19] As noted by Engin F. Isin, EU citizenship may be defined as a "relational … institution of domination and emancipation that governs who European citizens (insiders), strangers, outsiders and abjects (aliens) are and how these European subjects are to govern themselves and each other in that space constituted as Europe."[20] Thus, EU citizenship is a binding factor for establishing common standards in the implementation of cultural rights. The crucial rule connected with the institution of European Union Citizenship is the right of equal treatment, guaranteed in Article 18 of the Treaty on the Functioning of the European Union, under its provision that "any discrimination on grounds of nationality shall be prohibited". Despite the fact that cultural rights are mainly implemented on the basis of constitutional rights and those resulting from international

[18] Paweł MARCISZ, *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej* (Warsaw: Wolters Kluwer, 2015), 303.

[19] Citizenship of the Union was established by virtue of the 1992 Maastricht Treaty and pursuant to the currently valid Article 20 TFEU, citizens of the Union shall enjoy the rights such as: the right to move freely, the right to vote and to stand as candidates in municipal elections in their Member State of residence, the right to vote and to stand as candidates in elections to the European Parliament, the right to diplomatic and consular protection and the right to apply to the European Ombudsman.

[20] Engin F. ISIN, "Claiming European Citizenship," in *Enacting European Citizenship*, ed. Engin F. Isin and Michael Saward (Cambridge: Cambridge University Press, 2013), 27.

agreements, increasingly in contemporary world they take the form of rights implemented transnationally (as in the case of tourists—EU citizens who travel to other EU Member States).

Given the above, it seems valid to claim that the CJEU case law that relates to *acquis culturalis* may be a source of principles for a fuller and more effective implementation of constitutional guarantees of cultural rights in Member States.

## 4. CJEU CASE LAW

The cases processed by the Court presented in this paper serve as an illustration. They present the Court's broad decision-related spectrum and a linking of cases with the subject matter of the Union's citizens' exercise of cultural rights in the territory of individual Member States.

### 4.1 Freedom of Artistic Creation

Case *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* was an excellent example of when the Court expressed its opinion on the freedom of artistic creativity,[21] in which it interpreted the term parody. The case concerned accusations from the heirs of the creator of the comic series *Suske en Viske* towards Mr Johan Deckmyn, member of the political party Vlaams Belang. At the beginning of 2001, Mr Deckmyn gave away calendars which had a parody of the cover of a 1961 comic authored by Willy Vandersteen, *De Wilde Weldoener* (The Compulsive Benefactor), on their cover. Willy Vandersteen was a popular Belgian illustrator and from 1946 he illustrated a series of comic books which in Belgium were published as *Suske en Wiske*. The comic series became immensely popular in other European countries and is also known under its English title *Spike and Suzy*. The total of 270 issues of the comic were published. Its characters became pop-culture icons and appear on murals, postal stamps and even have their own statutes.[22]

The image that is the subject of dispute in the national proceedings presented the mayor of Ghent, who, dressed in a white tunic with a rainbow

[21] Judgment of the CJEU of 3 September 2014 in Case *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C 201/13 (ECLI:EU:C:2014:2132); hereinafter Case C 201/13.

[22] See, for example, the sculpture of Spike and Suzy at https://www.flickr.com/photos/lindadevolder/41999158835 (accessed 21 June 2021); postal stamps with Spike and Suzy at https://www.allnumis.com/stamps-catalog/belgium/cartoon-comic-strip/9-francs-1987-spike-and-suzy-18034 (accessed 21 June 2021).

sash, gives away money to persons whose physical features (e.g., dress or skin colour) suggest that they are migrants. The original picture presented a mysterious stranger who floated in the air, who was also dressed in a white tunic and scattered gold coins among the city citizens. There was no doubt about similarity of the two pictures. Mr Vandersteen's heirs claimed that the parodied picture had a discriminatory message and violated their copyrights. Mr Deckmyn, in turn, claimed that the image was a parody and met the requirements of a parody regulated in the national act on copyright and related rights.[23] The national court decided to stay the proceedings and to refer a question to the CJEU for a preliminary ruling, asking if the concept of parody is an autonomous concept of the Union law and should the answer be affirmative, what features should such parody have.[24]

The Court, ruling on the question, decided that the concept of parody included in Article 5(3)(k) of Directive 2001/29/EC[25] is an autonomous concept of the EU law while

> essential characteristics of parody are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of 'parody', within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.[26]

However, parody should be a work that guarantees a balance between respect for the authors' rights and the creator's freedom of expression. Nevertheless, the Court decided that the assessment of whether the picture submitted for examination in national proceedings meets the requirements of parody and of whether we can apply provisions of the Union's law rests with the national court.

The content of the judgment in question clearly states that freedom of artistic creation is subject to limitations. Freedom, though guaranteed at the constitution level, is specified in the provisions of national law. Due to membership in the

[23] Judgment in Case C 201/13, paras. 11 and 12.

[24] Judgment in Case C 201/13, para. 13.

[25] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, pp. 10–19.

[26] Operative part of the judgment, para. 2 sent. 1 of the judgment in C 201/13.

EU, special legislative acts that may limit the freedom of artistic creation also include acts of the EU law, such as directives implemented to the national order in this case. Directive 2001/29 was implemented in Belgium as Law of 22 May 2005 transposing Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society into the Belgian law,[27] while in Poland it was done by means of the Act of 1 April 2004 on amending the act on copyright and related rights.[28]

In consequence, the scope of freedom of artistic creation does not solely result from the national law, but also from the provisions of EU law, which regulate the creator's rights more precisely.

### 4.2 Right of Access to Products of Culture

Case C-388/01 *Commission v Italy* addressed the issue of access to products of culture in museums.[29] The Commission requested that a violation of non-discrimination be declared due to the operation in the national law of the provision of Article 4(3) Decree No 507 of the Ministry of Cultural Assets and Natural Sites of 11 December 1997, titled "Regulation introducing tickets for admission to monuments, museums, galleries, archaeological digs, parks and gardens classified as national monuments."[30] Pursuant to this provision, free entry to museums was guaranteed to children and young people under the age of 19 and to seniors (in the original version of the decree—persons aged 60 and older, whereas in the amended version to persons aged 65 and older) who held Italian citizenship. The Commission received numerous complaints towards the end of 1990s concerning access to the Doge's Palace Museum in Venice and to the Municipal Museum in Padva, Treviso and Florence and conducted an investigation declaring violation of non-discrimination towards tourists from other Member States or persons who were not residents of the Italian Republic. The Commission turned to the Italian government pointing to the obligation of equalling the rights of access to museums for citizens of Italy and citizens of other Member

[27] Loi du 22 mai 2005 transposant en droit belge la Directive 2001/29/CE du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information, Moniteur Belge; published on 27 May 2005, pages *24997*-25012; information available at https://eur-lex.europa.eu/legal-content/pl/NIM/?uri=CELEX:32001L0029.

[28] Dz.U. of 2004, No. 91, item 869.

[29] Judgment of the CJEU of 16 January 2003 in Case *Commission of the European Communities v Italian Republic*, C 388/01 (ECLI:EU:C:2003:30). The judgment in question was passed on the basis of Article 258 TFEU; this complaint means the so-called infringement proceedings due to failure of Member States to fulfil their obligations under the Treaties (Articles 258–260 TFEU).

[30] GURI No 35 of 12 February 1998, p. 13.

States. In response, the Italian government announced changes in the national law. The Commission's further investigation confirmed, however, that these changes did not include Municipal Museums, but only national museums.[31] Exchange of letters between the Commission and Italy lasted between 1999 and 2001. Owing to not having introduced uniform rules of access to all museums for seniors, the Commission decided to initiate proceedings before the CJEU. The Italian government argued that it charged foreigners for tickets because they did not pay taxes in the territory of Italy and due to the costs of maintaining these places.[32] The Court deemed such arguments as contrary to the Union's laws. The Italian government also considered itself not fit for the responsibility for the rules of access to museums since due to the division of powers between central administration and regions, it is the regions and local governments that are in part responsible for managing museums.[33] The Court also threw in this argument concluding that while the Member States have the autonomy to divide competences between central administration and local government, in the light of Union law a Member State is solely responsible for the activity of all administration bodies operating in its territory.[34] Thus, the Court recognized the responsibility of the Italian Republic for the violation of non-discrimination due to failure to ensure equal access to museums to seniors.

It needs to be noted that the Court had already ruled earlier on similar circumstances in *Commission v Spain*, in which it examined the existence of violation of obligations under the Treaties by the national law regulating access to museums.[35] Spanish laws ensured free museum access to citizens of Spain and to residents and citizens of EU states below the age of 21. The Court then linked leisure travel with the Union's freedom of services on the internal market and concluded that there must be no discrimination against citizens of other EU states.

The judgment invoked clearly shows the obligation of equal treatment of a state's own citizens and other EU citizens in access to products of culture. On the one hand, this is associated with the principle of non-discrimination laid down in the Treaties in Article 18 TFEU, which is a foundation of citizenship of the Union. On the other hand, Union citizenship is an instrument

[31] Judgment in Case C 388/01, paragraph 8.

[32] Ibid., para. 18.

[33] Ibid., para. 26.

[34] Ibid., para. 27.

[35] Judgment of the CJEU of 15 March 1994 in Case *Commission of the European Communities v Kingdom of Spain*, C-45/93 (ECLI:EU:C:1994:101).

guaranteeing satisfaction of cultural needs in the dimension of post-modern community life where travel in order to see a particular museum exhibition, thanks to the operation of the Schengen Area and availability of means of transport, has become a common occurrence.

### 4.3 Right to Participate in Cultural Life

The right to participate in cultural life may be exercised by accessing various cultural media, such as the book.

In Case C 174/15,[36] a national court requested that the CJ interpret the term "lending" used in Directive 2006/115.[37] The case concerned compliance with the Union's law of remote lending of electronic books. The national court asked for an answer to the question of whether "lending" in compliance with the Union's law may mean "making copyright-protected novels, collections of short stories, biographies, travelogues, children's books and youth literature available for use, not for direct or indirect economic or commercial advantage, via a publicly accessible establishment: by placing a digital copy (reproduction A) on the server of the establishment and enabling a user to reproduce that copy by downloading it onto his/her own computer (reproduction B) in such a way that the copy made by the user when downloading (reproduction B) is no longer usable after a limited period, and other users cannot download the copy (reproduction A) onto their computers during that period."[38] Therefore, the practice introduced by Dutch libraries was an example of modern book lending, which was analogous to the classical process of borrowing paper books. The Court, analysing provisions of the directive on the rental right and lending right and on certain rights related to copyright in the field of intellectual property concluded that such lending process in not compliant with the Union's law. It needs to be noted that at the moment the lending of digital books is gaining in popularity by allowing quick and direct contact with belles-lettres and scientific literature. Such contact gained in value especially in the time of the COVID-19 pandemic and the IBUK service run by the PWN group is one of the most available and popular book rental facilities in Poland.[39]

[36] Judgment of the CJEU of 10 November 2016 in Case *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, C 174/15 (CLI:EU:C:2016:856).

[37] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, pp. 28–35

[38] Judgment in Case C 174/15, para. 26.

[39] https://www.ibuk.pl/ (accessed 21 June 2021).

The Court's ruling in the case C 301/15 also pertained to the subject matter of access to books, but the Court investigated the issue of protection of authors' rights with regard to the so-called out-of-print books in the light of Directive 2001/29.[40] A French court referred a question to the Court for a preliminary ruling. Pursuant to a French national law, the so-called out-of-print book means "a book published in France before 1 January 2001 which is no longer commercially distributed by a publisher and is not currently published in print or in digital format."[41] A national register of such books was created to ensure public access to them. Pursuant to the provisions of national law, where an author of such a book did not bring any claims within 6 months from placing this title in the register, a competent national authority, named by the legislator, gained the right to reproduce it and present it in digital format.[42] When investigating the case, the Court decided that such national regulation is contrary to the Union's law as it fails to provide authors of such "forgotten books" the opportunity to withdraw from third parties the right to exercise their copyright. Certainly, the French legislator's intentions deserve credit—the regulation in dispute allows readers access to books which have not been reprinted for years. However, in the Court's opinion, the author of the book should decide how his work is made available. He may also decide to withdraw his works from the market thus limit the right of access to products of culture.

## 5. FINAL NOTES

The analysis of the CJEU's judgments presented in this paper lets me confirm the research hypothesis that the Court's case law shapes standards of access to products of culture, participation in cultural life and freedom of artistic creativity that contribute to the more effective implementation of cultural rights guaranteed in the national law of Member States and in international agreements to which these Member States are parties. This follows from the nature of the Union's law, which penetrates a national system and thanks to the principle of direct effect and supremacy truly affects the situation of the Union's citizens.

[40] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, pp. 10–19.

[41] Judgment in Case C 301/15, para. 15.

[42] Ibid.

As has been emphasized in this study, the acquis of the Court in the sphere of culture has formed largely on the basis of guarantees of the functioning of the internal market—mainly on the basis of freedom of services, ensuring "legal dynamics of integration." [43] As emphasized by Rachael Craufurd Smith, "EU law introduces an important modification to the way in which domestic cultures evolve over the time; it sets in motion a process of regulatory competition, with consumers centrally placed to determine, through their economic choices, which products and, ultimately regulatory regimes will survive." [44]

The judgments discussed in this paper only serve as an example and illustration of the problem at issue, hence the call for a comprehensive elaboration of "acquis culturalis", as was the case of the body of judicial decisions of the European Court of Human Rights pertaining to cultural rights.[45] Such a study might realistically influence the operation of Member States' national bodies and courts adjudicating in cases associated with a broadly understood cultural policy.

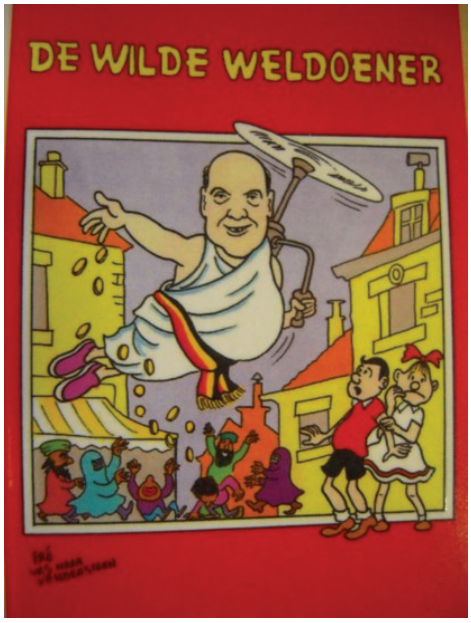


Figure 1. Cover of Johan Deckmyn's calendar.
Source: https://www.standaard.be/cnt/dmf20110117_145

[43] Loic AZOULAI and Renaud DEHOUSSE, "The European Court of Justice and the Legal Dynamics of Integration," in *The Oxford Handbook of the European Union* (Oxford: Oxford University Press, 2012), 350.

[44] CRAUFURD SMITH, "The Evolution of the Cultural Policy," 882.

[45] *Cultural Rights in the Case-Law of the European Court of Human Rights* (Council of Europe, European Court of Human Rights, 2011).

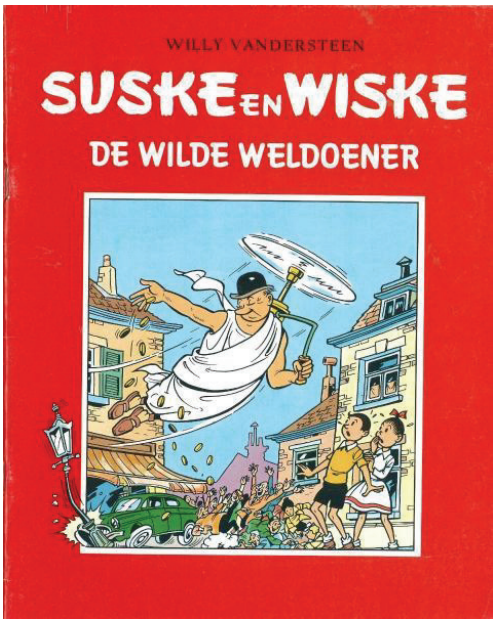


Figure 2. Cover of 1961 Willy Vandersteen's comic book.
Source: http://stripinfo.be/reeks/strip/10739_Suske_en_Wiske_44_De_wilde_weldoener

Figure 3. Doge's Palace Museum.
Source: Museum's official website
(https://palazzoducale.visitmuve.it/it/il-museo/la-sede-e-la-storia/sede)

## BIBLIOGRAPHY

AZOULAI, Loic, and Renaud DEHOUSSE. "The European Court of Justice and the Legal Dynamics of Integration." In *The Oxford Handbook of the European Union*, edited by Erik Jones, Anand Menon, and Stephen Weatherhill, 350–64. Oxford: Oxford University Press, 2012.

CRAUFURD SMITH, Rachael. "The Evolution of the Cultural Policy in the European Union." In *The Evolution of the EU Law*, 2nd ed., edited by Paul P. Craig and Grainne De Burca, 869–94. Oxford: Oxford University Press, 2011.

*Cultural Rights in the Case-Law of the European Court of Human Rights.* Council of Europe, European Court of Human Rights, 2011.

DE WITTE, Bruno. "Direct Effect, Primacy and the Legal Nature of the Legal Order." In *The Evolution of the EU Law*, 2nd ed., edited by Paul. P Craig and Grainne De Burca. Oxford: Oxford University Press, 2011.

EUROPEAN COURT OF HUMAN RIGHTS. *Cultural Rights in the Case-Law of the European Court of Human Rights.* Council of Europe, European Court of Human Rights, 2011.

FOSTER, Nigel. *Foster on EU Law*. Oxford: Oxford University Press, 2006.

FRANKIEWICZ, Anna. "Konstytucyjna regulacja dostępu do dóbr kultury i wolności korzystania z kultury." *Przegląd Prawa Konstytucyjnego*, no. 3 (2013): pp. 57–77.

FRANKIEWICZ-BODYNEK, Anna. *Konstytucyjna regulacja dziedzictwa narodowego oraz dóbr kultury*. Toruń: Adam Marszałek, 2019.

ISIN, Engin F. "Claiming European Citizenship." In *Enacting European Citizenship*, edited by Engin F. Isin and Michael Saward, 19–46. Cambridge: Cambridge University Press, 2013.

JURKIEWICZ-ECKERT, Dorota. "Cultural Policy of the EU – How it Works in Practice." In MILCZAREK, ADAMCZYK, and ZAJĄCZKOWSKI, *Introduction to European Studies*, 729–62. Warszaw: University of Warsaw, 2013.

JURKIEWICZ-ECKERT, Dorota. "Rethinking Europe through Culture." In MILCZAREK, ADAMCZYK, and ZAJĄCZKOWSKI, *Introduction to European Studies*, 703–28. Warsaw: University of Warsaw, 2013.

KĘSKIEWICZ, Anna. "Specyfika określenia desygnatów nazwowych dóbr o szczególnym znaczeniu dla kultury na gruncie prawnym." *Zeszyty Naukowe Uniwersytetu Rzeszowskiego*, Seria Prawnicza 101 (2018): 239–47.

KOSIŃSKA, Anna M. *Kulturalne prawa człowieka*. Lublin: Wydawnictwo KUL, 2014.

KOSIŃSKA, Anna M. *Prawa kulturalne obywateli państw trzecich w prawie Unii Europejskiej*, 160, as quoted in: Anna SIWEK-ŚLUSAREK, "Komentarz do art. 167 TFUE," in *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*, vol. 2, edited by Krystyna Kowalik-Bańczyk, Monika Szwarc-Kuczer, and Andrzej Wróbel, articles 90–222. Warsaw: Wolters Kluwer, 2012, LEX electronic version.

KOSIŃSKA, Anna M. *Prawa kulturalne obywateli państw trzecich*. Lublin: Wydawnictwo KUL, 2018.

MARCISZ, Paweł. *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*. Warsaw: Wolters Kluwer, 2015.

MILCZAREK, Dariusz, Artur ADAMCZYK, and Kamil ZAJĄCZKOWSKI (eds.). *Introduction to European Studies: A New Approach to Uniting Europe*. Warsaw: Centre for Europe, University of Warsaw, 2013.

MŁYNARSKA-SOBACZEWSKA, Anna. "Prawo do kultury w katalogu praw człowieka." *Przegląd Prawa Konstytucyjnego* 3 (2013): 27–55.

NIEDŹWIEDŹ, Monika. "Obrót dobrami kultury w Unii Europejskiej – konsekwencje dla Polski." *Kultura Współczesna* 40, no. 2 (2004): 122.

PIRIS, Jean-Claude. *The Lisbon Treaty and Political Analysis*. Cambridge Studies in European Union Law. New York: Cambridge University Press, 2011.

SERZHANOVA, Viktoriya, and Jan PLIS. "Ochrona dziedzictwa narodowego jako przesłanka ograniczenia swobód rynku wewnętrznego UE." *Studia Europejskie – Studies in European Affairs*, no. 4 (2017): 141–61.

SKOMERSKA-MUCHOWSKA, Izabela. "Kultura." In *Polityki Unii Europejskiej: polityki społeczne. Aspekty prawne*, edited by Jan Barcz, 64–88. Warsaw: Instytut Wydawniczy EuroPrawo, 2010.

SOBCZAK, Witold. "Ochrona dziedzictwa kultury w systemie prawnym Unii Europejskiej." *Środkowoeuropejskie Studia Polityczne*, no. 3 (2009): 105–23.

UNITED NATIONS ORGANIZATION. International Covenant on Economic, Social and Cultural Rights (opened for signature at New York on 19 December 1966). Treaty series 993.

## THE ROLE OF THE COURT OF JUSTICE IN CREATING STANDARDS FOR THE IMPLEMENTATION OF CULTURAL RIGHTS

### Summary

The present study seeks to answer the question whether the case law of the Court of Justice of the European Union in cases concerning the exercise of broadly understood cultural policies may in reality affect the extent of implementation of cultural rights — that is, access to products of culture, participation in cultural life and freedom of artistic creativity — at the level of Member States. Cultural rights are traditionally regulated by the constitutions of EU Member States and are classified by legal scholars and commentators as second generation rights. Culture, in turn, according to primary legislation of the European Union, is only a supporting competence (Article 6 of the Treaty on the Functioning of the European Union). However, a review of the Court's case law demonstrates that CJEU's judgments form standards that contribute to a more effective implementation of cultural rights guaranteed in the national law of the Member States and international agreements to which they are parties. This results from the nature of the Union's law, which penetrates a national system and thanks to the principle of direct effect and supremacy truly affects the situation of EU citizens.

**Keywords:** cultural rights; freedom of arts; CJEU case law; access to culture; participation in cultural life.

## ROLA TRYBUNAŁU SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ W TWORZENIU STANDARDÓW REALIZACJI PRAW KULTURALNYCH

S t r e s z c z e n i e

Prezentowany artykuł podejmuje próbę odpowiedzi na pytanie, czy orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej w sprawach dotyczących realizacji szeroko rozumianych polityk kulturalnych może realnie wpływać na zakres realizacji praw kulturalnych – tj. dostępu do dóbr kultury, uczestnictwa w życiu kulturalnym oraz wolności twórczości artystycznej – na poziome państw członkowskich. Prawa kulturalne są tradycyjnie regulowane przez Konstytucje państw członkowskich UE i ujmowane w doktrynie jako prawa II generacji. Dziedzina kultury natomiast, zgodnie z prawem pierwotnym Unii Europejskiej, jest określana jedynie jako kompetencja wspierająca (art. 6 Traktatu o funkcjonowaniu Unii Europejskiej). Ilustracyjny przegląd orzecznictwa Trybunału wskazuje jednak, że wyroki TSUE kształtują standardy wpływające na skuteczniejszą realizację praw kulturalnych gwarantowanych w prawie krajowym państw członkowskich i umowach międzynarodowych, których państwa członkowskie są stronami. Wynika to z charakteru prawa Unii, które przenika system krajowy i dzięki zasadzie *direct effect* oraz *supremacy* realnie wpływa na sytuację obywateli Unii.

**Słowa kluczowe:** prawa kulturalne; wolność sztuki; orzecznictwo TSUE; dostęp do dóbr kultury; uczestnictwo w życiu kulturalnym.