

## Under the Aspect of Eternity: The Human Right to Enjoy the Arts

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### ABSTRACT

*Creation and enjoyment of art are human activities universal across time and place. It was fitting, then, for the text of the 1948 Universal Declaration of Human Rights to affirm the right to enjoyment of the arts. However, this right, as stated in article 27, is barely mentioned in subsequent United Nations covenants and declarations. This Article seeks to bring the right to enjoy the arts, in particular the visual arts, back into the limelight.*

*For the philosopher Ludwig Wittgenstein, artworks are objects seen sub specie aeternitatis (under the aspect of eternity). This Article engages with the affirmation of the eternal urge to create and enjoy the arts as a universal human right. The Article first establishes the universality of art to explain why enjoyment of the arts has been affirmed as a universal human right. The Article then traces the development of the statement of the right in the Universal Declaration and beyond. This exercise reveals the potential tension between artists' claims to copyright and moral rights, and other community members' enjoyment of the visual arts. The Article considers the nature of article 27 in the contemporary world and sketches a vision of a rights-based community of art.*

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## I. INTRODUCTION

This Article is about the human right to enjoy the arts, in particular, visual art.<sup>1</sup> The Universal Declaration of Human Rights (“Universal Declaration”)<sup>2</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>3</sup> include cultural rights.<sup>4</sup> Article 27 of the Universal Declaration provides:

(1) Everyone has the right freely to participate in the cultural life of the community, *to enjoy the arts* and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>5</sup>

Article 15(1) of the ICESCR is similar in substance to article 27 and provides:

The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>6</sup>

This Article refers to these rights as a composite “cultural right,” although the principal focus lies with the right to enjoy the visual arts, as affirmed in the Universal Declaration. (The Article does not consider the right to benefit from scientific innovation.)

As well as the word “freely” being omitted, in the long process of negotiation between the Universal Declaration and the finalization of the ICESCR, an express right to enjoy the arts was, it seems, lost. The Universal Declaration was not, of course, a draft document that was superseded by the ICESCR and the International Covenant on Civil and Political Rights (ICCPR); rather, the covenants were intended

1. This restricted approach is determined by the author’s principal interest in visual art among the arts and also aligns with U.S. law’s recognition, through the Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A, of moral rights in visual works of art only.

2. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration].

3. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

4. *See also* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 19(2) provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, *in the form of art*, or through any other media of his choice.

*Id.* art. 19(2) (emphasis added). Art is, no doubt, a medium for receiving and imparting information and ideas, but it is not just that. If we equate art with an instrument of communication, such as a newspaper article, we miss something very important about being human.

5. Universal Declaration, *supra* note 2, art. 27 (emphasis added).

6. ICESCR, *supra* note 3, art. 15(1).

to express the declared rights in more justiciable terms.<sup>7</sup> The more recent Vienna Declaration and Programme of Action of the World Conference on Human Rights (“Vienna Declaration”)<sup>8</sup> emphasizes the ICESCR, but makes no mention of a right to enjoy the arts. Article 6 of the Universal Declaration on Cultural Diversity (“UNESCO Declaration”) does, however, include “equal access to art,” under the heading, “Towards access for all to cultural diversity.”<sup>9</sup> However, a discretely-stated right to enjoy the arts has not been not been reiterated in U.N. human rights declarations and treaties after the Universal Declaration.<sup>10</sup> This Article argues that this textual lacuna should not cast doubt on a human right to enjoy the arts.

Why did the drafting committees for the Universal Declaration include enjoyment of the arts as a human right? We can point to the social democratic commitment of John Humphrey and Eleanor Roosevelt—two of the key North American players in the drafting of the Universal Declaration—to ensuring access to the arts for everyone. However, getting to the root of the matter, delegates Peng-Chun (P.C.) Chang of China and Jamil Baroody of Saudi Arabia “stressed everyone’s ability for aesthetic enjoyment.”<sup>11</sup>

In a similar vein to the broad rights Chung-Shu Lo outlined in his contribution to the UNESCO symposium,<sup>12</sup> John Finnis identifies aesthetic experience as one of seven “forms of the good.”<sup>13</sup> According to Finnis:

Many forms of play, such as dance or song or football, are the matrix or occasion of aesthetic experience. But beauty is not an indispensable element of play. Moreover, beautiful form can be found and enjoyed in nature. Aesthetic experience, unlike play, need not involve an action of one’s own; what is sought after and valued for its own sake may be the beautiful form “outside” one, and the “inner experience” of appreciation of its beauty. But often enough the valued experience is found in the creation and/or active appreciation of some *work* of significant and satisfying form.<sup>14</sup>

For Ludwig Wittgenstein, “The work of art is the object seen *sub specie aeternitatis* [under the aspect of eternity]; and the good life is the world seen *sub*

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7. While the Universal Declaration was written in language intended to be intelligible to the widest of audiences, article 15(1) of the ICESCR is not expressed in any more legalistic language than article 27 of the Universal Declaration.

8. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993) [hereinafter Vienna Declaration].

9. 31st Session of the General Conference of UNESCO, *Universal Declaration on Cultural Diversity*, art. 6 (Nov. 2, 2001) [hereinafter UNESCO Declaration].

10. It may, however, be noted that article 36 of the Arab Charter on Human Rights provides: “Everyone has the right to participate in the cultural life, enjoy literary and artistic production, and be given the chance to advance his artistic thought and creative talent.” League of Arab States, *Arab Charter on Human Rights* (Sept. 15, 1994), <https://perma.cc/ZVY6-SAQR>.

11. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 219 (1999).

12. See Chung-Shu Lo, *Human Rights in the Chinese Tradition*, in *HUMAN RIGHTS: COMMENTS AND INTERPRETATION: A SYMPOSIUM EDITED BY UNESCO 186* (UNESCO ed., 1949) [hereinafter UNESCO SYMPOSIUM]. See *infra* Part III.B for a more detailed account of the UNESCO symposium and Lo’s contribution.

13. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 90 (1980).

14. *Id.* at 87–88.

*specie aeternitatis.*” If not eternal, Mohan Matthen observes, “Art has extremely ancient origins. . . . Among modern humans, art is a cultural universal.”<sup>15</sup> Matthen identifies six characteristics of that universality, the first being, “Every culture, no matter how isolated, sings, dances, tells stories, erects monuments and decorates.”<sup>16</sup> For Denis Dutton:

Art itself is a cultural universal; that is, there are no known human cultures in which there cannot be found some form of what we might reasonably term aesthetic or artistic interest, performance or artifact production: including sculptures and paintings, dancing and music, oral and written fictional narratives, body adornment and decoration.<sup>17</sup>

Abraham Maslow, the psychologist who proposed a plausible hierarchy of human needs, observes:

Quite as important for the sophisticated person is the question of aesthetic experience. This is so rich and valuable an experience for so many people that they will simply scorn or sneer at any psychological theory that denies or neglects it, no matter what scientific grounds there may be for such neglect. Science must account for *all* reality, not only the impoverished portions of it. The fact the aesthetic response is useless and purposeless, and that we know nothing about its motivations, if indeed, there *are* any in the ordinary sense, should indicate to us only the poverty of our official psychology.<sup>18</sup>

According to the philosopher George Moore, “By far the most valuable things, which we know or can imagine, are certain states of consciousness, which may be roughly described as the pleasures of human intercourse and the enjoyment of beautiful objects.”<sup>19</sup> Moore’s ideas influenced John Maynard Keynes.<sup>20</sup> As Barry Knight observes, after World War II, “Keynes in England and [André] Malraux in France believed that the mass of the people should have access to ‘elite’ art, including opera, ballet and theatre. This was uppermost in their minds in forming organizations such as the Arts Council to make public funds available to the arts.”<sup>21</sup>

Farida Shaheed, as U.N. Special Rapporteur in the Field of Cultural Rights, observed:

Art constitutes an important vehicle for each person, individually and in community with others, as well as groups of people, to develop and express their humanity,

15. Mohan Matthen, *Art and Evolution*, in THE ROUTLEDGE COMPANION TO AESTHETICS 278, 278 (Berys Gaut & Dominic McIver Lopes eds., 3d ed. 2013).

16. *Id.*

17. Denis Dutton, *Aesthetic Universals*, in THE ROUTLEDGE COMPANION TO AESTHETICS, *supra* note 15, at 267, 267.

18. ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY 298 (1954).

19. G. E. MOORE, PRINCIPIA ETHICA 188 (2004).

20. See Bradley W. Bateman, *G. E. Moore and J. M. Keynes: A Missing Chapter in the History of the Expected Utility Model*, 78 AM. ECON. REV. 1098 (1988) (Moore’s conception of the good was particularly influential on the young Keynes.).

21. Barry Knight, *Is Access to Art a Human Right?*, ALLIANCE (Mar. 2, 2015), <https://perma.cc/P4PV-WKC7>.

worldview and meanings assigned to their existence and development. People in all societies create, make use of, or relate to, artistic expressions and creations.<sup>22</sup>

Artistic creation and enjoyment of the arts are, then, fundamental aspects of being human, and human rights reflect this existential fact. Orit Fischman Afori observes that “research on the right to participate in cultural life is limited.”<sup>23</sup> Research into the right to enjoy the arts is negligible, if non-existent. This Article seeks to rectify that omission.

The Article is structured as follows: Part II explains why the rights affirmed in the Universal Declaration should be considered rights as such that may be claimed by community members and should be protected by their governments. Part III traces the historical development of the cultural right and reveals the debates that informed its ultimate wording. Part IV considers what the cultural right means in substance. The relationship between the cultural right and intellectual property rights, in particular copyright, is considered. Part V sketches a community of art that is informed by human rights. It considers how the dignity of different members of the community can be protected and nurtured in pursuit of the guarantees of article 27 of the Universal Declaration. Conclusions are then drawn.

## II. UNIVERSAL HUMAN RIGHTS AS RIGHTS AS SUCH

Under international law, an interpretive declaration, which is a statement of agreed standards, does not create legal obligations, whereas a convention has the binding status of a treaty.<sup>24</sup> Unlike the ICESCR and ICCPR, the Universal Declaration is ostensibly, then, a non-binding agreement, with only moral force or the nebulous normativity of “soft law.”<sup>25</sup> Nevertheless, even if the rights declared are moral in nature, “they are *universal* . . . [and] belong to a man simply because he is a man.”<sup>26</sup> The Universal Declaration is then, at the very least, “of an inspirational nature” for lawmakers,<sup>27</sup> but it is far more than that. As Lord Bingham, a

22. Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *The Right to Freedom of Artistic Expression and Creativity*, at 3, U.N. Doc. A/HRC/23/34 (Mar. 14, 2013).

23. Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 497, 512 (2004).

24. *Human Rights Treaty Bodies—Glossary of Technical Terms Related to the Treaty Bodies*, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, <https://perma.cc/SZ5Y-WKSW> (last visited Feb. 2, 2022). The American Declaration on the Rights and Duties of Man (“American Declaration”) was concluded closely before the Universal Declaration and has many similarities to it. Res. XXX, Final Act, Ninth International Conference of American States, Bogotá, Colombia, Mar. 30–May 2, 1948, at 38. The Inter-American Court of Human Rights has held with regard to the American Declaration: “That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect.” Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 47 (July 14, 1989).

25. On the Universal Declaration as soft law, see Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121, 175 (2010).

26. MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 7 (1973).

27. Afori, *supra* note 23, at 512.

distinguished judge of the British House of Lords (now Supreme Court), observed, the Universal Declaration “has provided the common standard for human rights upon which formal treaty commitments have subsequently been founded.”<sup>28</sup> Breaking ranks with Diceyan positivists,<sup>29</sup> Bingham also argued that adequate protection of fundamental human rights is an element of the rule of law.<sup>30</sup>

From a legal positivist perspective,<sup>31</sup> the Universal Declaration is not “law” because it does not meet the usual criteria of a norm that a court will enforce. However, as Maurice Cranston observes, “[t]here is something arbitrary and dictatorial about the positivist assertion that there is only one genuine kind of law.”<sup>32</sup> In the natural law tradition, “the requirements of his being endow man with certain fundamental and inalienable rights antecedent in nature, and superior to society.”<sup>33</sup> For the natural law theorist Jacques Maritain, “[t]he human person possesses rights because of the very fact that it is a person,”<sup>34</sup> not because a particular law-making process has been followed. Indeed, human rights are commonly asserted because positive laws have led to great injustice.<sup>35</sup> According to Cranston:

Jacques Maritain writes with eloquence, but whether one can accept his argument or not depends on one’s attitude to the crucial concept he invokes: that of natural law. One cannot speak for long about the rights of man without confronting this notion, for its customary to say that just as positive rights are rooted in positive law, natural rights—or human rights—are rooted in natural law.<sup>36</sup>

It is unnecessary to accept the proposition of natural law, either wholesale,<sup>37</sup> or from a particular ideological perspective,<sup>38</sup> in order to assert that the rights affirmed

28. TOM BINGHAM, *THE RULE OF LAW* 32 (2011).

29. See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1915).

30. BINGHAM, *supra* note 28, at 66–73.

31. For an argument on the compatibility of legal positivism and human rights, see Carlo Invernizzi-Accetti, *Reconciling Legal Positivism and Human Rights: Hans Kelsen’s Argument from Relativism*, 17 J. HUM. RTS. 215, 215 (2018).

32. CRANSTON, *supra* note 26, at 13.

33. See Jacques Maritain, *Introduction*, in UNESCO SYMPOSIUM, *supra* note 12, at 5. The American Declaration is clearly rooted in natural law and recognizes “rights that existed before the State was ever created and that flow from the very nature of the human person.” See Organization of American States Inter-American Court of Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System* at 6, Inter-Am. Ct. H.R. (updated Feb. 2012).

34. JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 65 (1945).

35. For example, the 1935 Nuremberg Laws, introduced by the Nazi regime, were laws under positivist criteria. For a discussion, see H.O. Pappé, *On the Validity of Judicial Decisions in the Nazi Era*, 23 MOD. L. REV. 260, 260–61 (1960).

36. CRANSTON, *supra* note 26, at 7.

37. Indeed, Maritain urged natural lawyers to relax from doctrinaire positions to narrow the gap between themselves and positivists for the sake of declaring universal rights. See Maritain, *supra* note 33, at 5.

38. P.C. Chang, the Nationalist Chinese delegate, reminded his co-delegates that a Confucian conception of natural rights existed independently of Western versions. See MORSINK, *supra* note 11, at 286.

in the Universal Declaration are rights as such and may be claimed by members of the community and should be protected by different branches of government.<sup>39</sup>

All members of the United Nations have agreed to uphold the Universal Declaration, and, over time, have respected its provisions (in word, if not always in action), and some, at least, of its provisions have been incorporated into the body of peremptory norms that are superior to the ordinary rules of international law (*jus cogens*).<sup>40</sup> Andrea Bianchi observes, “an almost intrinsic relationship [exists] between *jus cogens* and human rights.”<sup>41</sup> Countries are bound by *jus cogens*, even in the absence of conventional obligations,<sup>42</sup> and domestic courts may be considered at least morally bound to seek ways to incorporate international promises into domestic law.<sup>43</sup>

From a political perspective, was the Universal Declaration intended to be an *Ur* norm,<sup>44</sup> or simply a desideratum? According to Christina Cerna, the Universal Declaration

was never intended to be a legally binding instrument. The Universal Declaration was acclaimed at the time of its adoption by Eleanor Roosevelt as “a common standard of achievement” for mankind, but it was not to be considered legally binding on States as a treaty; instead, the adoption of its norms was considered an aspiration rather than a legal commitment.<sup>45</sup>

If this statement accurately reflects Eleanor Roosevelt’s opinion of the landmark document crafted under her chairing, it is not the view of many of the other key players in the formulation of the Universal Declaration. The members of the Philosophical Committee of UNESCO,<sup>46</sup> in particular, believed that fundamental and universal norms had been captured. Reflecting, twenty years after the rights in the

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39. The U.N. Human Rights Council’s Guiding Principles on Business and Human Rights explain the interlocking roles of government in protecting and respecting all human rights, and remedying breaches. See John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, at 4–9, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

40. Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT’L L. 72, 73 (2005).

41. See Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L LAW 491, 491 (2008).

42. See, e.g., Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT’L & COMP. L. 609, 609 (1977).

43. See, e.g., Sir Geoffrey Palmer, *Human Rights and the New Zealand Government’s Treaty Obligations*, 29 VICTORIA U. WELLINGTON L. REV. 57, 60–61 (1999) (explaining why countries should respect their international promises whether or not they follow a dualist doctrine).

44. On Carl von Savigny’s search for an *Ur* law, see Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 537 (2000).

45. Christina M. Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man*, 30 U. PA. J. INT’L L. 1211, 1211 (2009).

46. Rep. of the UNESCO Comm. on the Philosophic Principles of the Rights of Man to the Comm’n on Human Rights of the United Nations, *The Grounds of an International Declaration of Human Rights*, Phil./10 (July 31, 1947), <https://perma.cc/2386-6NM7>. For an analysis of the work of the “Philosophers’ Committee,” see generally Mark Goodale, *The Myth of Universality: The UNESCO “Philosophers’ Committee” and the Making of Human Rights*, 43 LAW & SOC. INQUIRY 596 (2018).

Universal Declaration were recorded, René Cassin, who is often, if erroneously, credited with drafting the first version of the Universal Declaration,<sup>47</sup> said:

the Universal Declaration of Human Rights incarnates the moral principles of our time, and as such, stands as a lasting monument towering above national constitutions and the statutes of all international agencies which must now perforce evolve and change.<sup>48</sup>

In the same publication, Seán MacBride, the Irish politician, who was later awarded the Nobel Peace Prize, wrote: “The Universal Declaration does now represent in written form the basis for the law of nations, the laws of humanity and the dictates of the public conscience as accepted in the twentieth century.”<sup>49</sup>

A right affirmed in the Universal Declaration, including the right to enjoy the arts, is therefore a right as such. But what are the origins of that right, and how did its expression become omitted from future U.N. declarations and conventions?

### III. DEVELOPMENT OF THE CULTURAL RIGHT

After the landmark rights declarations of the Enlightenment,<sup>50</sup> popular assertion of universal rights appears to have fallen into abeyance until the 1940s.<sup>51</sup> According to Jan Burgers,<sup>52</sup> the revitalization of the discourse of universal human rights is greatly, but obviously not uniquely, attributable to the efforts of the author H.G. Wells,<sup>53</sup> and Franklin D. Roosevelt, architect of the New Deal<sup>54</sup> and proclaimer of the Four Freedoms.<sup>55</sup> For Lea Shaver, article 27—indeed the Universal Declaration in general—can only be fully understood in the context of the New Deal, anti-

47. René Cassin—*Biographical*, NOBEL PRIZE (2018), <https://perma.cc/E5DR-6EV6>. There can be little doubt that Humphrey led the formulation of the first draft. See A.J. Hobbins, *René Cassin and the Daughter of Time: The First Draft of the Universal Declaration of Human Rights*, 2 FONTANUS 7 (1989), <https://perma.cc/33ZG-85R5>.

48. René Cassin, *How the Charter of Human Rights Was Born*, 21 UNESCO COURIER 4, 6 (Jan. 1968), <https://unesdoc.unesco.org/ark:/48223/pf0000078234>. See *supra* note 47 on the drafting role of John Humphrey.

49. Seán MacBride, *The New Frontiers of International Law*, 21 UNESCO COURIER 26, 26 (Jan. 1968), <https://unesdoc.unesco.org/ark:/48223/pf0000078234>.

50. Perhaps the Magna Carta (1215) (Eng.) should be recognized as an earlier rights declaration, but three key Enlightenment texts—England’s Bill of Rights Act 1689, the French Declaration of the Rights of Man, and the U.S. Bill of Rights (ratified in 1791)—are generally considered to be the foundational human rights documents for civil and political rights, at least. See Bill of Rights 1689, 1 W. & M. 2d sess., c. 2 (Eng.); Déclaration des droits de l’homme et du citoyen de 1789 [Declaration of the Rights of Man and the Citizen (1789)] (Fr.); U.S. CONST. amends. I–X.

51. Although the League of Nations failed to introduce a general bill of rights, its affirmation of labor rights under the auspices of the International Labour Organization was an important step towards the assertion of universal rights. See Sandrine Kott & Joëlle Droux, *Introduction: A Global History Written from the ILO*, in GLOBALIZING SOCIAL RIGHTS: THE INTERNATIONAL LABOUR ORGANIZATION AND BEYOND 1, 9 (Sandrine Kott & Joëlle Droux eds., 2013).

52. Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447, 448 (1992).

53. D. Gert Hensel, *10 December 1948: H.G. Wells and the Drafting of a Universal Declaration of Human Rights*, 35 PEACE RSCH. 93 (2003).

54. On the New Deal, see, e.g., D.W. BROGAN, ROOSEVELT AND THE NEW DEAL (1952).

55. *President Franklin Roosevelt’s Annual Message (Four Freedoms) to Congress (1941)*, <https://perma.cc/GEP3-L5WR> (last visited Feb. 3, 2022).



Fascism, and the Holocaust.<sup>56</sup> Similarly, the initiatives to employ artists for public works projects, “degenerate” art,<sup>57</sup> and Nazi confiscation and destruction of Jewish-owned or created art provide a particular context for understanding assertion of the cultural right.

This part of the Article is contextual and first outlines the qualities of three people who played critical roles in translating the ideas of Wells, Roosevelt, and others into the succinct provisions of the Universal Declaration—although, as John Humphrey, one of the actors discussed, observed, “literally hundreds of people . . . contributed to its drafting.”<sup>58</sup> Their belief that enjoyment of the arts was essential for human flourishing ensured its affirmation as a universal human right.

These people lived at a time when the proposition that a social democratic state was obliged to foster citizens’ personhood, including an enjoyment of the arts, was normal. The Federal Arts Project (1935–1943) (FAP) in the United States<sup>59</sup> and the founding of the Arts Council in the United Kingdom in 1946 are prime examples of this social democratic moment. A sentiment that appreciation of the arts is an essential element of a full human existence is hardly new;<sup>60</sup> but, rather than relying on philanthropy, government policies to ensure access to culture for all seems to have blossomed in the mid-twentieth century.

After sketching relevant features of these key players, the following sections trace the development of the cultural right from the first drafts of the documents that would become the Universal Declaration, through to the finalization of the ICESCR. The principal purpose here is to demonstrate that arguments, notably the tacit inclusion of intellectual property rights (IPRs) in the Universal Declaration and ICESCR, were well aired. Understanding this background aids our understanding of current issues.

## A. DRAMATIS PERSONAE

### 1. Eleanor Roosevelt

Harry S. Truman, Franklin D. Roosevelt’s successor as President of the United States, appointed Eleanor Roosevelt as a delegate to the United Nations General Assembly for the United States.

She served as the first Chairperson of the UN Human Rights Commission and played an instrumental role in drafting the Universal Declaration of Human Rights. At a time of increasing East-West tensions, Mrs. Roosevelt used her enormous prestige and

56. Shaver, *supra* note 25, at 135.

57. In 1937, the Nazi regime confiscated works of so-called degenerate art (*Entartete Kunst*) for condemnatory display. Ironically, the exhibitions collected together some of the finest examples of German modern art. See, e.g., THOMAS KÖHLER & STEFANIE HECKMANN, MAX BECKMANN AND BERLIN 253 (2016).

58. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 47 (2001).

59. See David A. Taylor, *What’s the Deal About New Deal Art?*, SMITHSONIAN MAG. (May 18, 2009), <https://perma.cc/54RM-LVMW>.

60. See, e.g., Christopher Janaway, *Plato*, in *THE ROUTLEDGE COMPANION TO AESTHETICS*, *supra* note 15, at 3.

credibility with both superpowers to steer the drafting process towards its successful completion. In 1968, she was posthumously awarded the UN Human Rights Prize.<sup>61</sup>

Eleanor Roosevelt was an indefatigable champion of numerous social causes but her involvement in FAP is less well-known. The U.S. government established the Public Works of Art Project (PWAP) as a New Deal initiative in 1934. The Federal Works Agency “hired 3,749 artists and produced 15,663 paintings, murals, prints, crafts and sculptures for government buildings around the country” within the first four months of the scheme.<sup>62</sup> Between 1935 and 1943, FAP, which superseded PWAP, operated with the aim of providing employment for artists and stimulating public art. The more than 10,000 artists—including future luminaries such as Willem de Kooning, Dorothea Lange, Georgia O’Keefe, Jackson Pollock, and Mark Rothko<sup>63</sup>—produced at least “100,000 easel paintings, 18,000 sculptures and some 13,000 prints.”<sup>64</sup> U.S. post offices still display some 4,000 murals painted as part of FAP.<sup>65</sup> FAP emphasized “participation in the production process rather than just appreciation of the finished product.”<sup>66</sup> Not only did artists become unionized, government employees, FAP “made art accessible to a previously uninitiated public across the country.”<sup>67</sup> According to the curator’s notes to an exhibition of FAP-era artworks at Bard College, “Eleanor’s advocacy for the role of art in American culture: the connection between making and participating, the appreciation of beauty in simple things, and art as a means to connect individuals to larger national narratives.”<sup>68</sup>

## 2. John Humphrey

The Canadian John Humphrey, as Director of the U.N. Secretariat’s Division for Human Rights, played a key role in drafting the first preliminary draft of the Universal Declaration.<sup>69</sup> Some debate exists on whether Humphrey or René Cassin, who “was a member of the United Nations Commission on Human Rights from its creation in 1946 . . . was the one most responsible for the draft of the Declaration of

61. *Drafting of the Universal Declaration of Human Rights*, DAG HAMMARSKJÖLD LIBRARY (2017), <https://perma.cc/JK8T-DHRF>.

62. Jerry Adler, *1934: The Art of the New Deal*, SMITHSONIAN MAG. (June 2009), <https://perma.cc/4MVN-Q7CY>.

63. See Justin Wolf, *Federal Art Project of the Works Progress Administration WPA*, ART STORY, <https://perma.cc/3LLF-UFNW> (last visited Feb. 3, 2022).

64. See Fred Stern, *How the Arts Were Saved*, 26 WORLD & I (Nov. 2011), <https://perma.cc/574N-LCSP>.

65. *Id.*

66. Lisanne Gibson, *Managing the People: Art Programs in the American Depression*, 31 J. ARTS MGMT. L. SOC’Y 279, 283 (2002).

67. Jan Marontate, *Technical Standards and Institutionalization Processes in New Deal Art Projects*, 33 J. ARTS MGMT. L. SOC’Y 281, 282 (2004).

68. *Eleanor Roosevelt: We Make Our Own History*, STEVENSON LIBRARY AND BARD ARCHIVES & SPECIAL COLLECTIONS (2014–15), <https://perma.cc/L25K-RERW> (last visited Feb. 3, 2022).

69. See *Drafting of the Universal Declaration of Human Rights*, *supra* note 61.

Human Rights approved by the General Assembly.”<sup>70</sup> However, Mary Ann Glendon reports:

By the time that the expanded committee held its first meeting in June of 1947, Humphrey had spent four full months preparing a draft declaration. Striving to be comprehensive, he borrowed freely from two models that were themselves based on world-wide surveys: a draft of a transnational rights declaration then being deliberated in Latin America by the predecessor of the Organization of American States, and a “Statement of Essential Human Rights” produced on the basis of a comparative study sponsored by the U.S. based American Law Institute. After poring over all the material available to him, he came up with a list of forty-eight items that represented, in his view, the common core of the documents and proposals his staff had collected. He had aimed, he said, at including “every conceivable right which the Drafting Committee might want to discuss.”<sup>71</sup>

Glendon sums up Humphrey’s contribution as follows:

Humphrey’s forty-eight-article draft provided the drafting committee with a distillation of nearly 200 years of efforts to articulate the most basic human goods and values in terms of rights. It contained the “first generation” political and civil rights found in British, French, and American revolutionary declarations of the seventeenth and eighteenth centuries: protections of life, liberty and property; and freedoms of speech, religion, and assembly. It also included several “second generation” economic and social rights: rights to work, education, and basic subsistence. In a separate document, Humphrey submitted an extensive annotation for each article in his draft, detailing its relationship to rights instruments then in force in the U.N.’s Member States. In total there were over four hundred pages of commentary. The U.N. Weekly Bulletin described it as “the most exhaustive documentation on the subject of human rights ever assembled.”<sup>72</sup>

Humphrey was both an art lover and a socialist. According to Ronald St. John MacDonald:

[T]he Humphreys were deeply involved in the cultural life of Montreal and other places they lived. Humphrey and his wife, Jeanne, entertained numerous intellectuals and artists, “were involved with the art community in Montreal . . . [and] got to know most of the artists in the city.” Humphrey helped found the Contemporary Arts Society and served for a time as its vice-president. Humphrey’s memoirs are full of references to cultural events attended, plays seen, and books read. The first sentence of Article 27 reflects this kind of involvement in and appreciation of the arts. As a socialist, Humphrey thought that everyone had a right to similar experiences.<sup>73</sup>

70. René Cassin—*Biographical*, *supra* note 47.

71. Mary Ann Glendon, *Book Review: Diaries of a Forgotten Framer*, 14 HARV. HUM. RTS. J. 277, 278–79 (2001). On the American Law Institute’s Statement, see generally William Draper Lewis, *The Statement of Essential Human Rights by Representatives of the Principal Cultures of the World*, 89 PROC. AM. PHIL. SOC. 489 (1945).

72. GLENDON, *supra* note 58, at 79.

73. MORSINK, *supra* note 11, at 218 (quoting R. St. J. MacDonald, *Leadership in Law: John P. Humphrey and the Development of International Law and Human Rights*, 29 CAN. Y.B. INT’L L. 3, 27 (1992)).

### 3. Jacques Maritain

The precise role Jacques Maritain played in the development of the text of the Universal Declaration is disputed.<sup>74</sup> However, according to William Sweet, “[b]y the 1930s Maritain was an established figure in Catholic thought. He was already a frequent visitor to North America” and his ideas on natural rights “were especially influential in Latin America.”<sup>75</sup> Maritain contributed the introduction and a chapter to the “symposium” on universal values conducted by UNESCO’s Philosophical Committee.<sup>76</sup> Furthermore, Maritain wrote extensively on the philosophy art.<sup>77</sup>

We are all, of course, creatures of our time but, as Baruch Spinoza advised, the wise person engages with the world with an eye to eternity (*sub specie aeternitatis*).<sup>78</sup>

In particular, the rootedness of Maritain’s philosophy in the long tradition that starts with Aristotle (if not before), and has most recently been developed in relation to human capabilities by Amartya Sen and Martha Nussbaum,<sup>79</sup> situates the cultural right in the longest time.

#### B. CAPTURING “UNIVERSALITY”

“In 1946, as part of the preliminary work of drafting the Declaration, under the auspices of UNESCO, Maritain assembled a ‘Philosophers’ Committee’ to identify key theoretical issues in framing a charter of rights for all peoples and all nations.”<sup>80</sup> UNESCO reports:

In 1947 UNESCO created a committee on the theoretical bases of human rights which included leading intellectuals, philosophers and political scientists. A questionnaire was sent out to politicians and scholars, such as Mohandas Gandhi or Aldous Huxley, soliciting their opinion on the idea of a Universal Declaration of Human Rights.

74. See Goodale, *supra* note 46, at 611 n.7.

75. William Sweet, *Jacques Maritain*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2013 ed.), <https://perma.cc/58RQ-3Y4T>. See also Mary Ann Glendon, *The Influence of Catholic Social Doctrine on Human Rights*, 10 J. CATHOLIC SOC. THOUGHT 69 (2013); Samuel Moyn, *Jacques Maritain, Christian New Order, and the Origins of Human Rights*, in INTERCULTURAL DIALOGUE AND HUMAN RIGHTS (Luigi Bonanante, Roberto Papini & William Sweet eds., 2011); Michael Novak, *A Salute to Jacques Maritain*, 21 J. INTERDISC. STUD. 124 (2009); Andrew Woodcock, *Jacques Maritain, Natural Law and the Universal Declaration of Human Rights*, 8 J. HIST. INT. L. 245 (2006).

76. See Maritain, *supra* note 37, at 9.

77. For an analysis of Maritain’s aesthetic theory, see generally JOHN G. TRAPANI, JR., POETRY, BEAUTY & CONTEMPLATION: THE COMPLETE AESTHETICS OF JACQUES MARITAIN (2011); Anthony Richard Haynes, *Jacques Maritain’s Definition of Art*, 96 NEW BLACKFRIARS 527 (2015); Anthony Richard Haynes, *Jacques Maritain’s Ethics of Art*, 99 NEW BLACKFRIARS 66 (2018).

78. See BERTRAND RUSSELL, HISTORY OF WESTERN PHILOSOPHY 556 (1991).

79. See Ingrid Robeyns, *The Capability Approach*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2016 ed.), <https://perma.cc/GV6K-7VXV>.

80. *The Long and Influential Life of the Universal Declaration of Human Rights*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21ST CENTURY: A LIVING DOCUMENT IN A CHANGING WORLD 29 (Gordon Brown ed., 2016).

Based on their responses, a report was prepared, showing that—despite cultural differences—member states of the United Nations shared two great principles and common ideals, “*the right to live a life free from the haunting fear of poverty and insecurity.*”<sup>81</sup>

According to Mark Goodale,<sup>82</sup> the idea of capturing universality was driven by Jacques Havet, Secretariat of the Preparatory Commission of UNESCO (May 1946–November 1946),<sup>83</sup> and Julian Huxley, the first Director-General of UNESCO.<sup>84</sup> Havet and Huxley sent out a convenience sample questionnaire, with a snowballing aspiration, to leading thinkers in their milieu, and, speculatively, beyond. It is understandable, then, that Aldous Huxley is highlighted as a respondent. However, despite UNESCO’s suggestion of a contribution by Gandhi’s to the Havet-Huxley initiative, his response was curt and dismissive of the project.<sup>85</sup> That document purports to be the collected papers of a “symposium,” but that word indicates people coming together to discuss issues,<sup>86</sup> not correspondents sending in discrete responses to a survey. Nevertheless, the document produced (“UNESCO symposium”) is remarkable in its attempt to capture the foundational values of a wide range of philosophies, religions and cultures.<sup>87</sup>

Each of the contributions is valuable and revealing, but those of Arnold Lien, and Chung-Shu Lo are of particular interest currently. Lien characterized human rights as “enabling qualities of human beings as human beings” and “are really the keystone of the dignity of man.”<sup>88</sup> For Lien:

In their quintessence they consist basically of the one all-inclusive right or enabling quality of complete freedom to develop to their fullest possible extent every potential

81. *UNESCO and the Declaration*, UNESCO (2017), <https://perma.cc/X3HE-QVMZ> (last visited Feb. 3, 2022).

82. Goodale, *supra* note 46, at 596.

83. *Havet, Jacques*, UNESCO ARCHIVES A TO M CATALOGUE, <https://perma.cc/W8LL-V7S9> (last visited Feb. 3, 2022).

84. *UNESCO’s Former Directors-General*, UNESCO, <https://perma.cc/ZN3K-UYHN> (last visited Feb. 3, 2022). Julian was the brother of the famous author Aldous, and grandson of Thomas Huxley—“Darwin’s bulldog” and proto-eugenicist. Remarkably, in the year after the defeat of the Nazis, Julian Huxley’s paper on the purposes of UNESCO included twelve references to “eugenics.” See Julian Huxley, *UNESCO: Its Purpose and Its Philosophy* (1946), <https://unesdoc.unesco.org/ark:/48223/pf0000068197>. For an analysis of Huxley’s views on eugenics, see Paul Weindling, *Julian Huxley and the Continuity of Eugenics in Twentieth-Century Britain*, 10 J. MOD. EUR. HIST. 480 (2012).

85. See Mahatma Gandhi, *Letter to the Director-General of UNESCO*, in UNESCO SYMPOSIUM, *supra* note 12, at 18.

86. In fact, the etymology of “symposium” lies with coming together to drink. See *Symposium*, OXFORD ENGLISH DICTIONARY (2000). Perhaps, not the best word then for a collation by distance of the ideas of some of the world’s leading philosophers and theologians on fundamental human rights. However, the COVID-19 pandemic may have changed our understanding of a symposium.

87. Currently, 193 sovereign states are members of the United Nations, whereas, in 1948, fifty-eight countries were members. In 1948, save for the Indian sub-continent, the British empire was largely intact, as were the empires of France and the Netherlands. (Indonesia, for example, did not join the United Nations as an independent nation until 1956). See *Growth in United Nations Membership, 1945–present*, UNITED NATIONS, <https://perma.cc/VL5M-GN95> (last visited Jan. 20, 2022).

88. See Arnold J. Lien, *A Fragment of Thoughts Concerning the Nature and the Fulfillment of Human Rights*, in UNESCO SYMPOSIUM, *supra* note 12, at 11, 12.

capacity and talent of the individual for his most effective self-management, security and satisfaction. In this one transcendent human-right, all others are implied. . . .<sup>89</sup>

Lo provided a traditional Chinese perspective on human rights. He asserted three basic rights claims—the rights to live, self-expression, enjoyment.<sup>90</sup> Lo explained the right to enjoyment in the following terms:

By “enjoyment”, I refer to the inner aspect of the life of the individual. Our life should not only be materially adequate and socially free but also inwardly enjoyable. . . . “Enjoyments” are of different kinds, but they are all connected with the inner life of the individual. . . . Other forms of enjoyment are aesthetic, intellectual, cultural and religious.<sup>91</sup>

Lo’s submission may not have influenced the final text of the Universal Declaration, but its broad brushstrokes usefully indicate people’s eudaemonic and hedonic needs, notably aesthetic enjoyment.

### C. DRAFTING HISTORY OF THE CULTURAL RIGHT

Once fundamental principles had been agreed, in February 1947, a small group of delegates, comprising Roosevelt (United States), P.C. Chang (Republic of China), and Charles Malik (Lebanon), was empowered to draft the International Bill of Rights. (The Drafting Committee was expanded “to include representatives of Australia, Chile, France, the Soviet Union, and the United Kingdom, in addition to the representatives of China, France, Lebanon, and the United States.”<sup>92</sup>) As Director of the U.N. Secretariat’s Division for Human Rights, Humphrey was tasked with formulating a preliminary draft.<sup>93</sup> Six published drafts of the cultural right preceded the final text of article 27.<sup>94</sup>

#### 1. Humphrey Draft

The first version, the Humphrey Draft, provided in article 44:

Every one has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science.<sup>95</sup>

89. *Id.* Compare with the Martha Nussbaum’s and Amartya Sen’s capabilities approach. See Robeyns, *supra* note 79.

90. Lo, *supra* note 12, at 187.

91. *Id.*

92. *Drafting of the Universal Declaration of Human Rights*, *supra* note 61.

93. *Id.*

94. GLENDON, *supra* note 58, at 271–314.

95. *A Draft Outline of an International Bill of Human Rights (prepared by the Division of Human Rights of the Secretariat)*, in UNESCO, COMMISSION ON HUMAN RIGHTS DRAFTING COMMITTEE OF AN INTERNATIONAL BILL OF HUMAN RIGHTS, FIRST SESSION, REPORT OF THE DRAFTING COMMITTEE TO THE COMMITTEE ON HUMAN RIGHTS, U.N. Doc. E/CN.4/21, Annex A, at 21 (1947), <https://undocs.org/E/CN.4/21> [hereinafter Humphrey Draft]. Article 43 provided: “Every one has right to a fair share of rest and leisure.”

Unlike civil and political rights, which had evolved over the preceding two centuries, on social, economic and cultural rights, “Humphrey had almost no clear constitutional precedents before him.”<sup>96</sup>

Reflecting decades later, Humphrey recalled:

I was no Thomas Jefferson and, although a lawyer, I had had practically no experience drafting documents. But since the Secretariat had collected a score of drafts, I had some models on which to work. One of them had been prepared by Gustavo Gutierrez and had probably inspired the draft Declaration of the International Duties and Rights of the Individual which Cuba had sponsored at the San Francisco Conference. There were also texts prepared by Irving A. Isaacs, by the Rev. Wilfrid Parsons, S.J., by Rollin McNitt, and by a committee chaired by Viscount Sankey after a public debate conducted in Britain by the Daily Herald. One had been prepared by Professor Hersch Lauterpacht and another by H.G. Wells.<sup>[97]</sup> Still others came from the American Law Institute, the American Association for the United Nations, the American Jewish [Conference],<sup>[98]</sup> the World Government Association, the Institut de Droit International,<sup>[99]</sup> and the editors of Free World. The American Bar Association had sent in an enumeration of subjects. With two exceptions, all these texts came from English-speaking sources and all of them from the democratic West. The documentation which the Secretariat brought together ex post facto in support of my draft included texts extracted from the constitutions of many countries. But I did not have this before me when I prepared my draft.<sup>100</sup>

The American Law Institute’s Statement of Essential Human Rights, which was particularly influential on the Humphrey Draft, sought to represent, besides the United States, “Arabic, British, Canadian, Chinese, French, pre-Nazi German, Italian, Indian, Latin American, Polish, Soviet Russian, and Spanish” cultures or countries.<sup>101</sup> Article two on freedom of opinion provided “the individual must be free to receive opinions expressed by others by any means of communication.”<sup>102</sup>

96. MORSINK, *supra* note 11, at 217.

97. See H. G. WELLS, *THE RIGHTS OF MAN OR WHAT ARE WE FIGHTING FOR?* 78–84 (1940). While Wells’ declaration did not specifically refer to the arts, a capability approach to human rights was implied in article 2—everyone “is entitled to sufficient education to make him a useful and interested citizen . . . he should have easy access to information upon all matter of common knowledge.” Wells criticized the *Complément des Droits de l’homme*, adopted by the Ligue des Droits de l’homme in Dijon in 1936, *id.* at 85. Article 4(2) of the *Complément* provides for “Le droit à pleine culture intellectuelle, morale, artistique et technique des facultés de chacun” —the right to the full [development] of everyone’s intellectual culture, moral, artistic, and technical faculties.

98. See James Loeffler, *The Particularist Pursuit of American Universalism: The American Jewish Committee’s 1944 “Declaration on Human Rights,”* 50 J. CONTEMP. HIST. 274 (2015).

99. On October 12, 1929, L’Institut de Droit International (Institute of International Law) adopted an International Declaration of the Rights of Man. Expressly drawing on the French Declaration of the Rights of Man and the Citizen 1789 and the Fourteenth Amendment to the U.S. Constitution, the six articles of the declaration affirmed civil and political rights, and a limited cultural right. Article 3 guaranteed “the right of every individual to the free use of the language of his choice and for instruction in this language.” The International Declaration is reproduced in MARITAIN, *supra* note 34, at 115.

100. John P. Humphrey, *The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights*, 5 HUM. RTS. Q. 387, 406–07 (1983).

101. COMM. OF ADVISERS ON ESSENTIAL HUM. RTS., AM. L. INST., *Statement of Essential Human Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 18 (1946).

102. *Id.* at 19.

Article three on freedom of speech “includes the freedom of the individual to speak, write, use the graphic arts, the theatre, or any other art form to present his ideas.”<sup>103</sup> These freedoms may not constitute a positive right to enjoy the arts, but they do prevent arbitrary censorship of the arts and ensure freedom to receive ideas expressed in artworks.

The Organization of American States’ American Declaration of the Rights and Duties of Man (“American Declaration”) was concluded closely before the Universal Declaration in early 1948.<sup>104</sup> Article 13 of the American Declaration provides:

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.<sup>105</sup>

Article 13 of the American Declaration manifestly provided the template for article 27 of the Universal Declaration.<sup>106</sup>

The Draft Declaration of the International Rights and Duties of Man, formulated by the Inter-American Juridical Committee (IAJC) of the Organization of American States in 1945, was submitted by the Chilean delegation to the second part of the First Session of the General Assembly of the United Nations.<sup>107</sup> Article 15, entitled “The Right to Share in the Benefits of Science,” included the following paragraph:

The state has the duty to encourage the development of the arts and sciences, but it must see to it that the laws for the protection of trademarks, patents and copyrights are not used for the establishment of monopolies which might prevent all persons from sharing in the benefits of science.<sup>108</sup>

This provision appears to be the forerunner of article 13 of the American Declaration and, subsequently, article 27 of the Universal Declaration. Some points

103. *Id.*

104. Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man, May 2, 1948 (adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948) [hereinafter American Declaration]. On the Bogotá Conference, see Charles G. Fenwick, *The Ninth International Conference of American States*, 42 AM. J. INT’L L. 553 (1948).

“Despite its early beginnings, the Inter-American system of human rights progressed more slowly than its counterparts. Not until 1969 did the OAS adopt the American Convention on Human Rights, which entered into force in June of 1978.” James Nickel, *Human Rights*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Spring 2017 ed.), <https://perma.cc/YBU4-EL6H>.

105. American Declaration, *supra* note 104, art. 13; see also Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 16, 1999, art. 14 [hereinafter Protocol of San Salvador]

106. Lacking Spanish, the only language in which the *travaux préparatoires* for the American Declaration appear to be available, I have not yet been able to discover how article 13 was precisely derived.

107. *Draft Declaration of the International Rights and Duties of Man/formulated by the Inter-American Juridical Committee*, DAG HAMMARSKJÖLD LIBRARY (Jan. 8, 1947), <https://digitallibrary.un.org/record/560759?ln=en>.

108. *Id.*



of note: Indicating the novelty of the provision, none of the constitutions of the Latin American countries included a substantially similar provision.<sup>109</sup> No observations were made by the Members of the Human Rights Commission on the proposal, thereby signaling that, notwithstanding its novelty, this was not considered a contentious issue. Indeed, the U.S. delegation appears to have seen the cultural right in the context of Roosevelt's Four Freedoms, and suggested consideration should be given to a right "to enjoy minimum standards of economic, social and cultural well-being."<sup>110</sup> Finally, members of IAJC were alert to the possibility of IPRs thwarting the ability of people to share in the benefits of science, and, since they specifically mention copyright, implicitly the arts too.<sup>111</sup>

## 2. Cassin Draft

Merging the rights to leisure and culture, the Cassin Draft provided:

Every person has the right to fair share of rest and leisure and to a knowledge of the outside world.

Every person has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science.<sup>112</sup>

M. Amado, the Panamanian representative, argued this right overlapped with rights already accepted, but

Cassin demurred because the article "contained a new idea, that of participation in cultural life," and noted the provision had been included at the request of cultural organizations, notably UNESCO. . . . Havet told the representatives that UNESCO felt it "was necessary to assert that all had the same right to participation in culture and thus to affirm the priority of cultural life over materialistic conceptions."<sup>113</sup>

Article 43 of the Cassin Draft controversially introduced the following specific right for authors:

The authors of all artistic, literary and scientific works and inventors, *in addition to the just remuneration of their labour*, a moral right to the work or discovery which shall

109. Article 164 of the Constitution of Bolivia (Oct. 28, 1938) provided: "The State shall promote the culture of the people." For a discussion of Bolivia's social constitution, see Beatrice Newhall, *The New Constitution of Bolivia*, 73 BULL. PAN AM. UNION 100 (1939).

Otherwise, in 1947–48, the governments of Latin American countries ranged from progressive (Cuba, Mexico, and Panama) to quasi-fascist (Argentina). See ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE 118 (2008).

110. U.S. Proposals to the United Nations as to an International Bill of Rights, *reprinted in* Louis B. Sohn, Note, *The Development of International Law*, 33 AM. BAR ASSOC. J. 282, 283 (1947).

111. See *supra* note 107, art. 15.

112. *Suggestions Submitted by the Representative of France for Articles of the International Declaration of Human Rights*, in UNESCO, COMMISSION ON HUMAN RIGHTS DRAFTING COMMITTEE OF AN INTERNATIONAL BILL OF HUMAN RIGHTS, FIRST SESSION, REPORT OF THE DRAFTING COMMITTEE TO THE COMMITTEE ON HUMAN RIGHTS, U.N. Doc. E/CN.4/21, Annex D, at 65 (1947), <https://undocs.org/E/CN.4/21> [hereinafter *Cassin Draft*].

113. MORSINK, *supra* note 11, at 218.

not disappear even after such work or discovery has become the common property of mankind.<sup>114</sup>

The focus of the right lies with the *droits moraux* of French intellectual property law,<sup>115</sup> although it is submitted that German personal right law (*Persönlichkeitsrecht*) may better indicate the possibility of human rights that only creators might enjoy.<sup>116</sup> Of course, notwithstanding Immanuel Kant's influence on European conceptions of human dignity and rights,<sup>117</sup> German philosophy and law were not overtly represented at the negotiating table in 1947–48.<sup>118</sup> Since then, the German Basic Law<sup>119</sup> has become a beacon of human rights.<sup>120</sup>

### 3. Human Rights Commission Draft (June 1947)

Article 35 of the Human Rights Commission Draft provided:

Everyone has the right to participate in the cultural life of the community, to enjoy the arts, and to share in the benefits that result from scientific discoveries. (It was the opinion of some of the members that the thought behind this Article should be included in the Preamble.)<sup>121</sup>

The Commission added a note: “The consensus of opinion of the drafting committee was that the substance of the following draft article might receive consideration for inclusion in an International Convention [not Declaration]”:

The authors of all artistic, literary and scientific works and inventors shall retain, in addition to the *just remuneration of their labour*, a moral right on their work and/or discovery which shall not disappear even after such work and/or discovery shall have become the common property of mankind.<sup>122</sup>

114. *Cassin Draft*, *supra* note 112, art. 43, at 65 (emphasis added). Article 37 provided: “Human labour is not a chattel. It must be performed in suitable conditions. It must be justly remunerated according to its quality, duration and purpose . . . and must yield a decent standard of living to the worker and his family.” *Id.* at 63.

115. See ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* 163–216 (2006).

116. *Id.* at 217–78.

117. See, e.g., Rachel Bayefsky, *Dignity, Honour, and Human Rights: Kant's Perspective*, 41 POL. THEORY 809 (2013).

118. *But see* the American Law Institute's reference to pre-Nazi German culture, *supra* note 101.

119. Grundgesetz [GG] [Basic Law], translation at <https://perma.cc/9LT8-V6NX>.

120. See, e.g., Raymond Youngs, *Germany: Shooting Down Aircraft and Analysing Computer Data*, 6 INT'L J. CONST. L. 331 (2008).

121. *Suggestions of the Drafting Committee for Articles of an International Declaration of Human Rights*, in UNESCO, COMMISSION ON HUMAN RIGHTS DRAFTING COMMITTEE OF AN INTERNATIONAL BILL OF HUMAN RIGHTS, FIRST SESSION, REPORT OF THE DRAFTING COMMITTEE TO THE COMMITTEE ON HUMAN RIGHTS, U.N. Doc. E/CN.4/21, Annex F, at 80–81 (1947), <https://undocs.org/E/CN.4/21> [hereinafter *Human Rights Commission Draft*]. The right to leisure was once again recorded in a separate article 32, *id.* at 80, and will not be considered further in this article other than to note the idea of leisure, as well as work, being a good. John Maynard Keynes envisioned a good life based on useful leisure. See JOHN MAYNARD KEYNES, *Economic Possibilities for our Grandchildren*, in *ESSAYS IN PERSUASION* 321 (Palgrave Macmillan 3d ed. 2010) (1931).

122. MORSINK, *supra* note 11, at 220 (emphasis added).

#### 4. Geneva Draft

The Geneva Draft did not take up the recommendation noted in the immediately preceding draft and restricted the cultural right to: “Every one has the rights to participate in the cultural life of the community to enjoy the arts and to share in the benefits that result from scientific discoveries.”<sup>123</sup>

#### 5. Lake Success Draft

Like the Geneva Draft, the Lake Success Draft, which is marked by its clarity of language, provided “[e]veryone has the right to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement.”<sup>124</sup>

#### 6. Third Committee Draft

The Third Committee Draft provided:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>125</sup>

The key development of the first paragraph of the article is the inclusion of “freely,” which was proposed by José Encinas, the Peruvian delegate, in order to put creative thought on a level footing with freedom of thought in general.<sup>126</sup> And, of course, creators’ rights were reinstated, but now, extending beyond moral interests, and just remuneration to include “material interests,” an inclusion which seems to imply IPRs. According to Johannes Morsink, “the French delegation was very persistent in this matter of intellectual property rights. That persistence finally paid off in the Third Committee, for which the way was prepared in the Third Session of the Commission.”<sup>127</sup> Despite most Latin American countries not being signatories to the Berne Convention, Morsink observes that the American Declaration includes a copyright provision, which inclusion he attributes to “the new language of ‘honor and reputation’” that suited their approach to copyright law.<sup>128</sup> In fact, while article

123. *Draft International Declaration on Human Rights*, art. 30 (May 1948), reprinted in GLENDON, *supra* note 58, at 289.

124. *Lake Success Draft*, art. 25, reprinted in GLENDON, *supra* note 58, at 294.

125. *Third Committee Draft*, reprinted in GLENDON, *supra* note 58, at 300. The text of the subcommittee differs from the text of the third committee only inasmuch as the two rights are included in separately numbered paragraphs.

126. MORSINK, *supra* note 11, at 218.

127. *Id.* at 220.

128. *Id.* Article 6*bis*(1) of the Berne Convention for the Protection of Literary and Artistic Works, as revised at Brussels, June 26, 1948, provides:

Independently of the author’s copyright, and even after the transfer of the said copyright, the author shall have the right, during his lifetime, to claim authorship of the work and to object to any distortion, mutilation or other alteration: thereof, or any other action in relation to the said work which would be prejudicial to his honour or reputation.

13 of the American Declaration may imply copyright, it does not incorporate that specific term.<sup>129</sup> “Making only three minor stylistic changes the French delegation took over this Bogota article and proposed it to the Third Session as a second paragraph for our Article 27.”<sup>130</sup> Along with Eleanor Roosevelt, the British and Indian delegates opposed the French proposal, and “[t]he Third Session rejected the French addition by 6 votes to 5, with 5 abstentions.”<sup>131</sup>

However, the Third Committee had a larger membership, including delegations from Latin American countries, which mostly supported the inclusion of special creators’ rights.<sup>132</sup>

While the Ecuadoran and United States delegations made the point that the right to intellectual property was already dealt with by the article on property rights, other opponents argued that the right to intellectual property was not a human right at all. Corbet of the United Kingdom stated flat out that “copyright was dealt with by special legislation and in international conventions” and that since “it was not a basic human right, the declaration of human rights should be universal in nature and only recognize general principles that were valid for all men.”<sup>133</sup>

Watt, the Australian delegate, also expressed the view that “the indisputable rights of the intellectual worker could not appear beside fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work.”<sup>134</sup> Notwithstanding these reasonable concerns, “led by Latin American countries, the Third Committee adopted paragraph 2 of article 27 by 18 votes to 13, with 10 abstentions.”<sup>135</sup> The Communist countries’ delegates abstained, when they might have been expected to vote against material interests being enshrined as a human right.<sup>136</sup>

129. Morsink notes, “The Latin American delegations sponsored the second paragraph because they saw it more as a step toward the internationalization of copyright law.” MORSINK, *supra* note 11, at 221.

130. *Id.* at 220.

131. *Id.* at 221.

132. *See id.* Hernán Santa Cruz of Chile opposed inclusion of material interests. *Id.* The role of the Latin American states in the formulation of the Universal Declaration is easily overlooked from a contemporary perspective. Roger Normand and Sarah Zaidi observe:

Latin American jurisprudence was particularly well suited to bridging cultural divides in human rights by linking civil and political rights with economic and social rights. This derived from its historical intermarriage of traditional Anglo-American natural rights theories with Catholic and Thomist moral philosophy linked to the injustices of the Spanish conquest. With their dominant voting bloc, the Latin American countries would play a significant role in advancing human rights throughout the UN process.

NORMAND & ZAIDI, *supra* note 109, at 118.

133. MORSINK, *supra* note 11, at 221 (references omitted).

134. *Id.* at 221 (references omitted).

135. *Id.* at 222.

136. Although the Russian Federation did not accede to the Berne Convention until 1994, the Soviet Union introduced recognizable copyright legislation in 1925. *See* Bernie R. Burrus, *The Soviet Law of Inventions and Copyright*, 30 FORDHAM L. REV. 693, 713–14 (1962). Nevertheless, seeking to understand from a contemporary perspective what the Stalinist State expected of its artists is difficult to fathom. Observers at that time provide some insight. *See* Isaiah Berlin, *The Arts in Russia under Stalin: December 1945*, in *THE SOVIET MIND: RUSSIAN CULTURE UNDER COMMUNISM* 1 (Henry Hardy ed., 2016).

## 7. Universal Declaration

Finally, article 27 of the Universal Declaration provides:

- (1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.<sup>137</sup>

Despite the digressions of the different versions, article 27(1) is substantively the same as Humphrey's first draft. It is a broad affirmation that is consonant with the eternal and universal nature of art and creativity. Sub-article (2), however, suggests particular contemporary means of rewarding artists and recognizing their authorship. This is problematic in various ways. Copyright and moral rights are not eternal facts about human existence. Copyright, for example, did not exist before 1710,<sup>138</sup> and may not exist in the future. Furthermore, authorship is tied to copyright, since historically, artists, as members of guilds, tended to be anonymous.<sup>139</sup> It is unfortunate, then, that article 27(2) implies copyright is a universal human right.

### D. THE DEVELOPMENT OF THE CULTURAL RIGHT IN THE ICESCR

Audrey Chapman provides an authoritative history of the ICESCR,<sup>140</sup> but she concedes that she did not have access to the documents consulted by Maria Green in her paper presented to the United Nations in 2000.<sup>141</sup> Green tells us that, in 1951, UNESCO arrived at long and short proposals for a cultural right to be included in the proposed ICESCR.<sup>142</sup> The long version provided:

Article (d)

The Signatory States undertake to encourage the preservation, development and propagation of science and culture by every appropriate means:

By facilitating for all access to manifestations of national and international cultural life, such as books, publications and works of art, and also the enjoyment of the benefits resulting from scientific progress and its application;

137. Universal Declaration, *supra* note 2, art. 27.

138. See, e.g., MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 36 (1993) on the Statute of Anne, 8 Anne c. 19, which was passed in 1709 and came into force in 1710.

139. See, e.g., ERNST KRIS & OTTO KURZ, *LEGEND, MYTH AND MAGIC IN THE IMAGE OF THE ARTIST: A HISTORICAL EXPERIMENT* 18 (1979).

140. See Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, 35 *COPYRIGHT BULL.* 4 (2001).

141. *Id.* at 33 n.6.

142. Maria Green, *Drafting History of the Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights: Background Paper* submitted by Maria Green, International Anti-Poverty Law Center, U.N. Doc. E/C.12/2000/15 (2000).

By preserving and protecting the inheritance of books, works of art and other monuments and objects of historic, scientific and cultural interest;

By assuring liberty and security to scholars and artists in their work and seeing that they enjoy material conditions necessary for research and creation;

By guaranteeing the free cultural development of racial and linguistic minorities.

Article (e)

The Signatory States undertake to protect by all appropriate means the material and moral interest of every man, resulting from any literary, artistic or scientific work of which he is the author.<sup>143</sup>

The shorter alternative proposal read:

The Signatory States undertake to encourage by all appropriate means, the conservation, the development and the diffusion of science and culture.

They recognize that it is one of their principal aims to ensure conditions which will permit every one:

1. To take part in cultural life;
2. To enjoy the benefits resulting from scientific progress and its applications;
3. To obtain protection for his moral and material interests resulting from any literary, artistic or scientific work of which he is the author.<sup>144</sup>

The express and discrete right to enjoy the arts, albeit implicit in the right to take part in cultural life, ceased to be included in the text of U.N. human rights documents at this point.<sup>145</sup>

In her explication of cultural rights under the ICESCR and the ICCPR, Farida Shaheed, then the U.N. Special Rapporteur in the Field of Cultural Rights, ignored the textual omission of the right to enjoy the arts from the ICESCR, saying, “All persons enjoy the rights to freedom of expression and creativity, to participate in cultural life *and to enjoy the arts*.”<sup>146</sup> Shaheed adds that “freedom of artistic expression and creativity cannot be dissociated from the right of all persons to enjoy the arts, as in many cases restrictions on artistic freedoms aim at denying people access to specific artworks.”<sup>147</sup> Likewise, the European Union Agency for Fundamental Rights (FRA) reaffirms the Universal Declaration inasmuch as it says, “All persons have rights to enjoy and have access to art and cultural institutions.”<sup>148</sup>

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143. *Id.* at 5.

144. *Id.* at 6.

145. A survey of national constitutions has not been conducted in writing this Article.

146. Shaheed, *supra* note 22, at 3 (emphasis added); *see also id.* at 85.

147. *Id.*

148. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, EXPLORING THE CONNECTIONS BETWEEN ARTS AND HUMAN RIGHTS 7 (2017) [hereinafter FRA, ARTS AND HUMAN RIGHTS]. However, the FRA does not link this statement to a specific human rights instrument.

#### IV. THE CULTURAL RIGHT IN PRACTICE

This part of the Article considers the substance of the cultural right—in particular, the apparent tension between the right to protection of moral and material interests of creators, and the right of other community members to enjoy the arts. However, rather than competing rights, the interests of artists and others may be considered complementary. Using a simple example, if an artist is unable to earn a living from their creative labor or to prevent destruction or mutilation of their works, we will not be able to enjoy those works in the form the artist intended. This proposal is considered further in Part V.

##### A. THE NATURE OF ARTICLE 27(1)

Glendon characterizes articles 3 to 20 of the Universal Declaration as negative rights (“what must not be done *to* people”), whereas articles 22 to 27 are positive rights (“what ought to be done *for* people”).<sup>149</sup> A more plausible view, as expressed by the U.N. Economic and Social Committee, is:

The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).<sup>150</sup>

Referring to Cassin’s representation of rights in terms of a classical portico,<sup>151</sup> Glendon says, “All the rights in column four are introduced by Article 22, the chapeau or mini-Preamble that describes them as ‘indispensable’ and connects them to traditional protections of the individual.”<sup>152</sup> Thus, article 22 provides:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and *cultural rights indispensable for his dignity and the free development of his personality*.<sup>153</sup>

Article 22 expressly links human dignity to human capabilities, an idea most obviously founded in Aristotelian thinking, as developed by Aquinas, and adopted by Social Catholics, such as Maritain. However, notwithstanding papal adoption of universal human rights,<sup>154</sup> any suggestion that Catholicism has special insights into

149. GLENDON, *supra* note 58, at 187. For a discussion of negative and positive rights from a traditional liberal perspective, see Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTARIANISM AND ITS CRITICS* 15 (Michael Sandel ed., 1984).

150. U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 21 Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, Dec. 21, 1999, U.N. Doc. E/C.12/GC/21.

151. See GLENDON, *supra* note 58, at 172.

152. *Id.* at 187.

153. Universal Declaration, *supra* note 2, art. 22 (emphasis added).

154. See, in particular, *Pacem in Terris, Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty*, VATICAN (Apr. 11, 1963), <https://perma.cc/9X6C-BX3C>.

human rights must be rejected. Indeed, the Catholic Church has been the most powerful censor of art in history,<sup>155</sup> and Catholic groups continue to seek to prevent the display of artworks they consider to be blasphemous.<sup>156</sup>

Article 27(1) links everyone's right to the full development of their personality with their free and enabled participation in culture. This idea captures the neo-Thomism of Maritain,<sup>157</sup> the social democracy of Humphrey and Eleanor Roosevelt, the Confucianism of Chang and Lo, and, perhaps, something universal. However, understanding the drafting background does not imply some form of originalism.

Moments occur in human history when people assert their rights against those who misgovern or tyrannize them.<sup>158</sup> The suppression of the 1848 uprisings in Europe led to many declarations,<sup>159</sup> including the Communist Manifesto.<sup>160</sup> The horrors combatants suffered during increasingly mechanized wars led to the Geneva Conventions.<sup>161</sup> The critical point is that certain events and contexts brightly illuminate failure to comply with fundamental human values. The framers of the Universal Declaration did not concoct a right to enjoy the arts based on their personal preferences but, for various reasons—the New Deal's FAP, the persecution of “degenerate artists,” and the wholesale destruction of cultural artifacts during the recent war—they were simply in a position of heightened sensitivity to recognize and affirm it. Eleanor Roosevelt's close connection to both FAP and the Universal Declaration does not, for example, indicate that FAP provides *the* template for artists' just reward and community enjoyment of the arts. If human rights are characterized as temporally and spatially universal, their realization cannot be determined by particular practice of a time and place.

## B. IPRS AND HUMAN RIGHTS

Presaging the tension between people's enjoyment of the arts and IPRs, UNESCO's Havet argued it “was necessary to assert that all had the same right to participation in culture and thus to affirm the priority of cultural life over materialistic conceptions.”<sup>162</sup> According to Green:

Morsink's chapter doesn't give any indication of a widespread discussion of the possible tension between paragraphs 1 and 2 of article 27; the issues involved in

155. See H. MONTGOMERY HYDE, *A HISTORY OF PORNOGRAPHY* 153 (1964).

156. See, for example, Amanda Holpuch, *Andres Serrano's Controversial Piss Christ Goes on View in New York*, *GUARDIAN* (Sept. 28, 2012), <https://perma.cc/GGZ5-5ACY>. Catholics are not, of course, alone in this inclination to censor art that offends them and may be provoked disproportionately by artists. See, for example, SOCIETY FOR THE PROTECTION OF COMMUNITY STANDARDS, *A RETROSPECTIVE: THE “VIRGIN IN A CONDOM” CONTROVERSY* (2009), <https://perma.cc/C8JK-2K3X>.

157. See generally MARITAIN, *supra* note 34.

158. See *supra* note 50.

159. On the Declaration of Rights and Sentiments (1848), for example, see *FEMINIST MANIFESTOS: A GLOBAL DOCUMENTARY READER* 75–81 (Penny A. Weiss ed., 2018).

160. See, e.g., KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO: A ROAD MAP TO HISTORY'S MOST IMPORTANT POLITICAL DOCUMENT* (Phil Gasper ed., Haymarket Books 2005) (1948).

161. See *Geneva Conventions and Their Additional Protocols*, *LEGAL INFO. INST.*, <https://perma.cc/7FHY-QZ9J> (last visited Jan 27, 2022).

162. MORSINK, *supra* note 11, at 218.



balancing the individual creator's rights with those of the community as a whole do not appear to have been substantively debated, or at least not in any detail.<sup>163</sup>

However, Morsink observes:

The second paragraph of Article 27 lands us in the middle of a controversy about international copyright law . . . In the late 1940s, when the Universal Declaration was being written, no international consensus had been reached and the issue was very much contested. The discussion about Article 27's second paragraph reflect these international tensions.<sup>164</sup>

While there were differing views on the proper scope of IPRs, the jurists of the IACJ who made the raw proposal were acutely aware of the negative possibilities of IPRs—after all, they had highlighted the monopoly potential of copyright, trademarks, and patents.<sup>165</sup>

Shaver argues that intellectual property had a different economic and social significance in 1948 from its current exalted status.<sup>166</sup> She is, no doubt, right, but while the people negotiating the Universal Declaration could not have anticipated the current economic importance of IPRs, they were not ignorant of basic principles of intellectual property, and conducted their negotiations at the same time the Berne Convention on copyright was being revised. If the Brussels Act indicated to them what moral interests were, it, and earlier iterations of the Berne Convention (and Paris Convention),<sup>167</sup> surely also indicated what material interests might be? The cultural right does not explicitly refer to copyright, but, save for the right to sell an artifact one has created, it must be asked what “material interests” could mean to an author,<sup>168</sup> other than copyright, or, perhaps, *droit de suite*.<sup>169</sup> Besides, just four years after the Universal Declaration, the preamble to UNESCO's Universal Copyright Convention included the following statement:

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts. . . .<sup>170</sup>

The FRA identifies copyright as a threat to artistic freedom, and by implication, free enjoyment of the arts, and argues that “developments in international economic

163. GREEN, *supra* note 141, at 4. She adds: “Not surprisingly, there is also no intimation of the issue of traditional knowledge or of indigenous peoples’ particular concerns with regard to ownership of intellectual property.” *Id.*

164. MORSINK, *supra* note 11, at 219–20.

165. Technically, copyright creates exclusive exploitation rights, rather than a monopoly.

166. Shaver, *supra* note 25, at 131–32.

167. Article 4*ter* of the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, provides: “The inventor shall have the right to be mentioned as such in the patent.”

168. But see LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 173 (2011) on a distinction drawn between “creators’ rights” and IPRs.

169. See, e.g., Monroe E. Price & Aimée Brown Price, *Rights of Artists: The Case of the Droit de Suite*, 31 ART J. 144 (1971).

170. Universal Copyright Convention, Sept. 6, 1952, 216 U.N.T.S. 132.

law have led to the extensions of copyright laws long beyond the lives of authors and artists to the point where it is arguable that copyright terms are now routinely too long.”<sup>171</sup> Copyright commonly vests in multinational corporations which do not have rights under article 15(1)(c) of ICESCR.<sup>172</sup> The FRA further argues that article 15(1)(c) “does not dictate that current intellectual property protection is the only or even the most desirable form of such protection.”<sup>173</sup>

These are plausible arguments, but the same countries that have affirmed universal human rights have also concluded treaties, notably TRIPS,<sup>174</sup> that protect and extend the scope of current IPRs. We cannot, therefore, simply wish away current forms of IPRs, but, in the field of human rights, must learn to live with them.

One possibility for constraining overly vigorous assertion of IPRs is indicated by freedom of expression jurisprudence. In *Ashdown v. Telegraph Group Ltd.*,<sup>175</sup> the United Kingdom’s Court of Appeal established the principle that freedom of expression guaranteed by article 10 of the European Convention on Human Rights may, in extraordinary circumstances, act as an external constraint on copyright.<sup>176</sup> Could the right to enjoy the arts similarly constrain IPRs in appropriate circumstances?

Accommodation of IPRs within the human rights framework requires a degree of intellectual dexterity since IPRs, as legal constructs, are categorically different from the right to enjoyment of the arts, which is “a genuinely universal moral right,”<sup>177</sup> because it goes to the root of being human. IPRs, which are partial, time-constrained, transferable, waivable, and commonly owned by corporations, are an instrument for achieving cultural rights. If the cultural right could be fully satisfied without recourse to IPRs, their role in human rights discourse would be marginal. However, to reiterate, UNESCO has endorsed copyright as a means of ensuring respect for the cultural right.

Artists, like all workers, should, in principle, receive just remuneration for their labor. Artists can be rewarded through means other than IPRs or, indeed, sales of

171. FRA, ARTS AND HUMAN RIGHTS, *supra* note 148, at 8.

172. But see the obligations incumbent on businesses to respect all human rights, as set out in the U.N. Guiding Principles, *supra* note 39.

173. FRA, ARTS AND HUMAN RIGHTS, *supra* note 148, at 8. See also U.N. Econ. & Soc. Council, *General Comment No. 17: (2005) The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1 (c), of the Covenant)*, 35th Sess., Jan. 12, 2006, U.N. Doc. E/C.12/GC/17, <https://perma.cc/67R2-VTFA>.

174. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS]. See HELFER & AUSTIN, *supra* note 168, at 172, on the TRIPS conception of IPRs as private rights.

175. [2002] Ch. 149 (C.A.) at 45.

176. For a discussion of the relationship between article 10 and the fair dealing permissions provided for the Copyright, Designs and Patents Act 1988 (UK), see Graham Smith, *Copyright and Freedom of Expression in the Online World*, 5 J. INTELL. PROP. L. & PRAC. 88 (2010).

177. CRANSTON, *supra* note 26, at 67 (sets this test for ascertaining whether a rights claim is plausibly described as a human right).

artifacts, as FAP demonstrated.<sup>178</sup> Copyright for artworks is a relatively recent development in human history.<sup>179</sup> Besides, if an artist does not intend to exploit their works through reproduction, a right to copy is practically meaningless from an *economic* perspective. (While such an artist has a legal right to prevent another copying their works, beyond ensuring scarcity, that does not provide a direct economic benefit in the way that reproducing should.) For literary and musical authors in Western countries, copyright has been a normal way of making a living for centuries, but copyright is not, of course, a necessary prerequisite to creation.<sup>180</sup> Furthermore, common law counties did not until recently include moral rights in their copyright legislation.<sup>181</sup>

Chapman argues:

A human-rights approach must be particularly sensitive to the interconnections between intellectual property and the rights “to take part in culture life”. . . . To be consistent with the full provision of Article 15, the type and level of protection afforded under any intellectual property regime must facilitate and promote cultural participation . . . and to do so in a manner that will broadly benefit members of society both on an individual and collective level.<sup>182</sup>

A creator’s right is just one right among many. Intuitively, moral and material interests might be first understood in relation to the textually closest right—that to cultural access. However, a balancing exercise based on textual propinquity is not enough. According to article 5 of the Vienna Declaration:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>183</sup>

The next part of the article sketches a model for rights-based community of art which incorporates and balances relevant rights for different actors in such a community.

178. See Jonathan Barrett, *Doing Art Work: Patronage, Precarity, and Beyond*, 22 MEDIA & ARTS L. REV. 1 (2018) (different ways in which visual artists might receive just reward).

179. The Engraver’s Act, 8 Geo. II, c. 13 (1735) (UK) (the first Anglophone copyright statute to grant copyright in visual images).

180. On the promotion of open-source art, see *Arts & Culture*, CREATIVE COMMONS, <https://perma.cc/7DAS-SEW5>.

181. See Thomas F. dear, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997). It is debatable whether the rights included in VARA are copyrights since they protect the embodiment of a visual work, rather than an immaterial artistic work. See ADENEY, *supra* note 115, at 477 (“Although only copyright works may give rise to protection under VARA, VARA-protected works are only a tiny proportion of copyright works.”).

182. Chapman, *supra* note 140, at 14.

183. Vienna Declaration, *supra* note 8, art. 5.

## V. A RIGHTS-BASED COMMUNITY OF ART

Laurence Helfer and Graeme Austin observe:

A human right to benefit from one's creative productions arguably casts new emphasis on the role and vulnerabilities of individual creators. Recognition of human rights obligations connects creative work to the grounding of all human rights obligations in the dignity of the human person.<sup>184</sup>

Likewise, for Chapman, “intellectual products have an intrinsic value as an expression of human dignity and creativity.”<sup>185</sup> Recognition of human dignity as the wellspring of human rights takes us back to fundamentals.<sup>186</sup> As Aharon Barak observes: “Most central to all human rights is the right to dignity. It is the source from which all other rights are derived. Dignity unites the other human rights into a whole.”<sup>187</sup> In the longest term—the “aeternum” that Spinoza and Wittgenstein had in mind in relation to ethics and art—IPRs may prove to be fleeting but artists will always create and other community members will continue to enjoy their creations.

For the artist—indeed, for all actors in an arts ecosystem<sup>188</sup>—community membership is a critical idea. The language of the Universal Declaration and ICESCR is clear—rights are dependent on and developed within communities. While we may have hopes for worldwide respect for human rights, from a practical perspective, they are only realizable within particular political communities. In this regard, Jacques Rancière observes:

[H]uman rights cannot be the rights of the human as human, the rights of the bare human being . . . the bare, apolitical human has no rights, since in order to have rights one needs to be “other” than a mere “human.” “Citizen” is the historical name for this “other than human.”<sup>189</sup>

The sketch of a community of art informed by human rights presented in this part is not an attempt to construct an imaginary utopia but rather points to existing or previous laws and practices that support the dignity of artists and general community members who hold a right to enjoy the visual arts. Each of the features indicated deserve full analysis—the aim here is to do no more than flag them.

184. HELFER & AUSTIN, *supra* note 68, at 180.

185. Chapman, *supra* note 140, at 5.

186. Universal Declaration, *supra* note 2, Preamble (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, . . .”).

187. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 85 (2006) (footnote omitted).

188. See Nathalie Moureau, Dominique Sagot-Duvaurox & Marion Vidal, *Contemporary Art Collectors: The Unsung Influences on the Art Scenes*, DÉPARTEMENT DES ÉTUDES, DE LA PROSPECTIVE ET DES STATISTIQUES (2015), <https://perma.cc/GYE4-2KSM> (on a nourishing and flourishing art ecosystem in Paris).

189. JACQUES RANCIÈRE, *AESTHETICS AND ITS DISCONTENTS* 118 (Steven Corcoran trans., 2009).

## A. THE ARTIST

An artist is not a monadic genius abstract from “the community in which alone the free and full development of his personality is possible.”<sup>190</sup> Rather, they are rights-bearing community members, who also owe duties to their communities.<sup>191</sup> Their rights, like those of every other community member, are subject to limitations.<sup>192</sup>

### 1. Education

Children must be nurtured and guided into autonomous adulthood.<sup>193</sup> The community should therefore ensure that children experience the guidance of John Dewey’s “wise parent.”<sup>194</sup> Children’s right to education necessarily includes exposure to the arts.<sup>195</sup> Some of those children will become artists and others will constitute the members of the community who support and enjoy the arts.

### 2. Freedom of Opinion and Expression

Article 19 of the Universal Declaration provides: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>196</sup> Copyright can impact on an artist’s freedom of expression.<sup>197</sup> Indeed, it may be argued that the right to prevent reproduction of a visual artwork is incompatible with artistic traditions and

190. Universal Declaration, *supra* note 2, art. 29(1).

191. *See id.* Compare with the American Declaration, *supra* note 104, which includes specific duties as well as rights, such as a duty to pay taxes, *id.* art. XXXVI. However, article XXIX provides similarly to the Universal Declaration, i.e., “It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.” *Id.* art. XXIX. See MORSINK, *supra* note 11, at 239–80, on the debate among negotiators on whether specific duties in the style of the American Declaration should be included or excluded from the Universal Declaration. Following the example of the American Declaration, it seems unlikely that a corresponding duty to the cultural right would have been included had the negotiators chosen to include specific duties.

192. *See* Universal Declaration, *supra* note 2, art. 29(2) (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”).

193. *Id.* art. 26(2) (“Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”).

194. JOHN DEWEY, *THE SCHOOL AND SOCIETY* 19 (1907).

195. *See, e.g.,* Mary Renck Jalongo, *The Child’s Right to the Expressive Arts: Nurturing the Imagination as well as the Intellect*, 66 CHILD. EDUC. 195 (1990).

196. Universal Declaration, *supra* note 2, art. 19.

197. *See* Stephen Fraser, *The Conflict between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1 (1998) (discussing the relationship between the First Amendment and copyright); *see also* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES (Jonathan Griffiths & Uma Suthersanen eds., 2006) (broader consideration of copyright and free speech across jurisdictions).

practices.<sup>198</sup> Likewise, as Paul Kearns observes, obscenity and related “laws seldom respect the fact that art has a unique ontology that does not easily fit the workings of general legal mechanisms designed and utilised for censorship purposes.”<sup>199</sup> Nevertheless, from a rights perspective, an artist does not have an untrammelled license to create works that impact on the dignity of others.<sup>200</sup> Indeed, we are seeing an increasing intolerance of artworks that directly or indirectly impact on the dignity of others.<sup>201</sup> The critical goal is to balance respect for dignity of all members of the community. Engagement with transgressive or what was traditionally seen as obscene art requires particular consideration.

In *Sidley’s* case (1663),<sup>202</sup> it was held that public exhibition of the naked person or any other act of open and notorious lewdness was obscene and constituted an indictable misdemeanor. The general test for obscenity for publications was established in *Hicklin’s* case, i.e., the likelihood of the relevant material “to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”<sup>203</sup> Following this test, a medical textbook which included explicit drawings of the human reproductive organs would not be obscene because they were aimed at a select group but the same images sold to the general public would meet the benchmark for obscenity.<sup>204</sup> Artworks could enjoy similar immunity from charges of obscenity, if aimed as an aesthetic elite.

The *Hicklin* test was applied haphazardly in the United States before being rejected in *Roth v. United States*, which shifted emphasis from the susceptible to the

198. See generally ROBERT SHORE, BEG, STEAL & BORROW: ARTISTS AGAINST ORIGINALITY (2017).

199. PAUL KEARNS, FREEDOM OF ARTISTIC EXPRESSION: ESSAYS ON CULTURE AND LEGAL CENSURE 147 (2013).

200. See Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversary*, 6 CAN. J.L. & JURIS. 249 (1993) (In postcolonial societies, such as Australia, Canada, and New Zealand, appropriation of Indigenous art and designs—in effect, impinging of the dignity of a community—is a fraught issue.).

201. See, for example, Aimee Ortiz & Johnny Diaz, *George Floyd Protests Reignite Debate Over Confederate Statues*, N.Y. TIMES (Sept. 12, 2020), <https://perma.cc/9PKP-Z5YG>. Like many of the Confederate statues, the statue of Edward Colston, a generous benefactor to the UK city of Bristol, was erected long after he died. No mention on the plinth was made of the source of his wealth. In fact, he became rich from a pivotal role in the slave trade. Once the source of his wealth became widely known, groups of Bristolians have petitioned for thirty years to have the statue removed from its very public place or for the true story of his slaving to be provided on the plinth as public information. On June 7, 2020, a large crowd, which had gathered to demonstrate support for the Black Lives Matters movement, toppled the statue and deposited in the city harbor. Four activists were charged with criminal damage, a statutory offence which allows for a lawful excuse as a defense. The defendants argued that they removed the statue to prevent the more serious offence of public indecency. A defendant claimed that the statue was “offensive to the true character of Bristol . . . [it is] wrong to celebrate an individual who had such crimes against humanity in such a multicultural city.” Graeme Hayes, Brian Doherty & Steven Cammiss, *We Attended the Trial of the Colston Four: Here’s Why Their Acquittal Should Be Celebrated*, CONVERSATION (Jan. 8, 2022), <https://perma.cc/XM9W-2NW8>.

202. 1 Keb 620. In this case, a drunken member of the nobility exposed himself to the public.

203. *Hicklin* [1868] LR 3 QB 360.

204. See Sarah Bull, *Managing the “Obscene M.D.”: Medical Publishing, the Medical Profession, and the Changing Definition of Obscenity in Mid-Victorian England*, 91 BULL. HIST. MED. 713 (2017).

average citizen.<sup>205</sup> The State's ability to suppress freedom of expression, particularly in the area of art, was further proscribed by the Supreme Court in *Miller v. California*; this decision established a criterion of absence of serious artistic value.<sup>206</sup> It would require an aesthetically confident jury to decide that works of a professional artist, such as Jeff Koons's highly sexualized *Made in Heaven* series, lack serious artistic value.

Rather than relying on criminal law, sub-federal government may seek to stifle controversial works by withholding funding to host institutions. These attempts, however, appear to have been generally ineffective.<sup>207</sup> Private sponsors may also be discouraged from funding works that may be considered offensive by certain groups, although a current narrative is the ousting of sponsors who are themselves considered repugnant.<sup>208</sup> Concluding their discussion of art and obscenity, Leonard DuBoff and Christy King observe, "the restraint on free expression of ideas is anathema to the American scheme of justice."<sup>209</sup> It is, however, unlikely that conservatives, including perhaps a predominantly conservative Supreme Court would agree with the authors on the untouchability of transgressive art.<sup>210</sup>

American privileging of freedom of expression is not necessarily shared with other human rights states, which may seek to balance competing rights. The Canadian Supreme Court in *R. v. Butler*,<sup>211</sup> for example, favored women's rights over pornography as a protected expression of ideas. In the United Kingdom, Richard Gibson's *Human Earrings* (2001), which comprised earrings made from freeze-dried human fetuses, was the subject of a successful prosecution for outraging public decency.<sup>212</sup> Both Gibson and Peter Sylverie, the proprietor of the London gallery where the work was exhibited, were found guilty. Tom Lewis argues that this common law offence is inconsistent (in relation to artworks) with the guarantee of freedom of expression affirmed in the Human Rights Act 1998 (UK).<sup>213</sup> This conclusion may be plausible but affirmation of universal human rights is based on respect for human dignity, and requires a balancing of different rights. (The European Convention on Human Rights, which the Human Rights Act brings into UK law, is itself designed to further the Universal Declaration.) It is not obvious that using human fetuses to express one's artistic ideas is consistent with respect for human dignity.

205. *Roth v. United States*, 354 U.S. 476 (1957). For a comprehensive analysis of the law relating to art and obscenity, see JOHN HENRY MERRYMAN, ALBERT E. ELSEN & STEPHEN K. URICE, *LAW, ETHICS AND THE VISUAL ARTS* 679–94 (5th ed. 2007).

206. *Miller v. California*, 413 U.S. 15 (1973).

207. *See, e.g., Esperanza Peace & Just. Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001); *see also Brooklyn Inst. of Arts & Sci. v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

208. *See, e.g., Sarah Cascone, In a Landmark Move, the Metropolitan Museum of Art Has Removed the Sackler Name from Its Walls*, ARTNET NEWS (Dec. 9, 2021), <https://perma.cc/SAZ6-KAEJ>.

209. *See* LEONARD D. DUBOFF & CHRISTY O. KING, *ART LAW* 255 (4th ed. 2006).

210. *See, e.g., Supreme Court approval of additional screening of National Endowment for the Arts grant applications in National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

211. *R. v. Butler* [1992] 1 S.C.R. 452.

212. *See Gibson* [1991] 1 All ER 439.

213. *See Tom Lewis, Human Earrings, Human Rights and Public Decency*, 1 ENT. & SPORTS L.J. 50, 66 (2002).

### 3. Just and Favorable Remuneration

Like all workers, artists have a right to just and favorable remuneration.<sup>214</sup> This Article is principally concerned with the visual arts—in copyright terminology, “pictorial, graphic, and sculptural works.”<sup>215</sup> Because visual artists typically produce singular artworks, copyright is of less relevance to them as a source of income than it is to authors of literary or musical works.<sup>216</sup> Visual artists are likely to focus on obtaining a fair price in the primary market and, perhaps, sharing in gains in the secondary market through some form of *droit de suite*.<sup>217</sup> These reward systems assume the artist is an independent entrepreneur. Historical models of patronage and the employment of unionized artists in the New Deal era indicate that market-based enterprise is not the only way that artists might be rewarded. However, while we may imagine ideal ways of remunerating independent artists, such as through an adequate universal basic income,<sup>218</sup> we need to engage with current realities without losing sight of fundamental principles. By way of analogy: It may be claimed that a human right exists to internet access.<sup>219</sup> There are universal and natural rights to participate in one’s community. Under the conditions of current technology, access to the internet is likely to be a prerequisite to such participation. Likewise, on the one hand, fair reward for artists cannot be tied to copyright, a relatively recent institution in human history, but, on the other hand, copyright, as an instrument, cannot be ignored in this context because of its contemporary significance.

214. Universal Declaration, *supra* note 2, art. 23(3) (“Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”). See also article 12 on freedom from attacks on honor and reputation.

215. See 17 U.S.C. § 101.

216. The Statute of Anne 1710 (UK), 8 Ann. C. 21, protecting literary works, is generally recognized as the first copyright statute. The Engraving Copyright Act 1735 (UK), 1735, 8 Geo. II, c. 13 (also known colloquially as Hogarth’s Act) extended protections to engravings, and the Fine Art Copyright Act 1862 (UK) granted copyright in other artistic works and photographs. On the origins of copyright, see generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993). See U.S. CONST. art 1, § 8, cl. 8. Pursuant to the Copyright Clause of the U.S. Constitution, and based on the Statute of Anne, Congress legislated for federal copyright protection for literary works in 1790. Photographs became protected in 1865, and works of fine art in 1870. See Benjamin J. Rudd, *Notable Dates in American Copyright 1783–1969*, U.S. COPYRIGHT OFF., <https://perma.cc/N3EN-2PAG>.

217. The *droit de suite* (“right to follow”) or artist’s resale royalty aims to compensate artists who produce singular artworks from their inability to gain income from licensing copies of their works. First introduced by France in 1920, the *droit de suite* grants an artist a small portion of the gross (or occasionally net) proceeds from resales of a qualifying work in the secondary market. See generally LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY* (1991). The United States has not enacted a federal *droit de suite*.

218. See, e.g., David Pledger, *The Case for a Universal Basic Income: Freeing Artists from Neo-Liberalism*, ARTSHUB (June 19, 2020), <https://perma.cc/WL26-7MMC>.

219. See, e.g., Nicholas Peyton, *Internet Access Is a Human Right*, UNIVERSITY WIRE, Mar. 22, 2017.



#### 4. Right to Protection of Moral Interests

Article 27 further protects the moral rights of artists. P.C. Chang, the Nationalist Chinese representative at the negotiations for the Universal Declaration, presented an argument consonant with the useful arts doctrine of the United States.<sup>220</sup> In order to safeguard the interests of everyone, Chang argued, “literary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artist were protected.”<sup>221</sup> In other words, paragraph (2) of article 27 was an instrument for achieving the right set out in paragraph (1). This will not do. First, accessibility to artworks in their original form can be achieved without proclaiming a universal right to moral interests. Second, and more importantly, no universal human right is a mere instrument for achieving other rights; they are all ends in themselves.

Moral rights, which “take account of the intimate, emotional involvement between an artist and his or her creation,” are derived from French law.<sup>222</sup> Although provided for in article 6*bis* of the Berne Convention, moral rights laws vary in their scope between jurisdictions.<sup>223</sup> Helfer and Austin, and Chapman, have sought to disassociate creators’ rights in general from particular, economic copyright law provisions. Similarly, we may link moral rights to respect for human dignity, rather than to a particular legal expression of those rights. Artists should therefore be able to maintain control over their works to the extent that such control promotes respect for their dignity, without disproportionately impacting the dignity of other members of the community.

#### B. COMMUNITY MEMBERS IN GENERAL

To reiterate, around the time the universal human right to enjoy the arts was declared, social visionaries, including Eleanor Roosevelt, John Maynard Keynes, and Andr. . . Malraux, championed measures to permit cultural access for all.<sup>224</sup> Adult education is a gateway to cultural access and is important if people, particularly those who have been disadvantaged in life, are to fully enjoy the arts.<sup>225</sup> Governments must ensure and facilitate participation for all who wish to participate, for example, by adequately funding public galleries and museums. (Government’s role is considered further in Section D.) It is particularly important that admission charges are only payable by those who can afford them.

220. See Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 262 (1914).

221. MORSINK, *supra* note 11, at 222.

222. RUTH REDMOND-COOPER, *Moral Rights*, in DEAR IMAGES: ART, COPYRIGHT AND CULTURE, 69, 69 (Daniel McClean & Karsten Schubert eds., 2002).

223. See *id.* at 71 (summarizing the differences between the approaches to moral rights under French, UK, and U.S. law).

224. See Knight, *supra* note 21; Taylor, *supra* note 59.

225. The so-called moral economists, Richard H. Tawney, Karl Polanyi, and E.P. Thompson, all taught working-class adults in the United Kingdom. See Katrina Navickas, *What’s Missing: Review of The Moral Economists: R. H. Tawney, Karl Polanyi, E. P. Thompson and the Critique of Capitalism* by Tim Rogan, 40 LONDON REV. BOOKS 35 (2018).

### C. OWNERS OF ARTWORKS

In practice, a key source of disharmony may arise from the proprietary interests of the purchaser or owner of an artifact. The price paid for a work in the primary market may lead to perceptions of insufficient reward for the artist.<sup>226</sup> Furthermore, the owner of an artifact may withhold it from public view or even destroy it.<sup>227</sup> However, such concerns may easily be overstated. In a thriving art community or ecosystem, all actors contribute to enjoyment of the arts.<sup>228</sup> With regard to owners, privacy and property rights deserve special note.

#### 1. Freedom from Interference with Privacy

Article 12 of the Universal Declaration provides: “No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>229</sup> Simply because I know a person has a particular Chagall on the wall of their apartment, I cannot assert my right to enjoy the arts by demanding the owner give me access to the painting. Of course, many collectors are extremely generous in sharing their artworks through loans or

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226. The famous spat between the artist Robert Rauschenberg and the collector Robert Scull demonstrated how an artist might think that they are underpaid in the primary market.

Rauschenberg—whose 1958 work *Thaw* was bought by the Sculls for \$900 and sold for \$85,000—shoves Robert Scull in the chest. ‘I’ve been working my ass off for you to make that profit.’ Scull smiles back at him. ‘How about yours now your work can sell for that too? I’ve been working for you. We’ve been working for each other.’

See Dan Fox, *Art Doc “The Price of Everything” is so Hypnotized by Price that It Neglects to Say Much of Value About Value*, FRIEZE (Oct. 26, 2018), <https://perma.cc/HA7V-5YGC>. However, as John Merryman observes, “critics, museum curators and venturesome collectors” contributed to the artist’s success. See John Henry Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC’Y U.S.A. 241, 248 (1992). As Scull pointed out, after the high prices achieved at auction, Rauschenberg’s new works would find higher prices in the primary market. Indeed, Rauschenberg died very wealthy, leaving an estate estimated to be worth \$2.3 billion. See Marion Maneker, *Rauschenberg’s \$2.3bn Estate and the Three Trustees Who Want \$60m from It*, ART MKT. MONITOR (Aug. 21, 2013), <https://perma.cc/66RS-QZU5>.

227. Perhaps the most famous example of an owner destroying a work that should have been preserved for the national estate was Lady Churchill’s destruction of Graham Sutherland’s portrait of her husband that had been commissioned by both houses of the United Kingdom Parliament. IAN CHILVERS, *THE CONCISE OXFORD DICTIONARY OF ART AND ARTISTS* 517 (2d ed. 1996) records that Sutherland’s “most famous portrait, that of Winston Churchill (1954), was so hated by the sitter that Lady Churchill destroyed it.” A recent example of an owner destroying an artwork against the wishes of the artists and the public was the destruction of the hugely popular murals at 5Pointz. See Enrico Bonadio & Olivia Jean-Baptiste, *Another Win for 5Pointz: Destroying Street Art and Graffiti Does Not Always Pay Off*, 2 NUART J. 8 (2020).

228. The language of the Universal Declaration and ICESCR is clear that development of the human person can only be realized within the community. In particular, article 29(1) affirms “[e]veryone has duties to the community in which alone the free and full development of his personality is possible.” Universal Declaration, *supra* note 2, art. 29(1). For a discussion of the significance of the inclusion of the word “alone,” see MORSINK, *supra* note 11, at 245.

229. Universal Declaration, *supra* note 2, art. 12.

donations to public galleries, but their privacy must be respected. As discussed below, government should take measures to encourage public display.

## 2. Property Rights

The Nazi confiscation or otherwise unconscionable acquisition of artworks from Jewish owners provides a salutary lesson in the importance of protecting owners of artworks from arbitrary deprivation of their property.<sup>230</sup> Indeed, article 17 of the Universal Declaration provides:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.<sup>231</sup>

Nevertheless, laws that comply with the rule of law which, following Lord Bingham,<sup>232</sup> includes respect for fundamental human rights, might restrict property interests: for example, preventing sales abroad that might diminish the national estate.<sup>233</sup>

## 3. Duties

A purchaser of an artwork in the primary market may be expected to pay a fair price to an artist in order to respect the latter's right to just and favorable remuneration. Similarly, if a *droit de suite* scheme exists, a purchaser in the secondary market should not avoid paying royalties to the artist. Ideally, an owner of a culturally significant artwork should behave in a curatorial way, preserving the works for future generations.<sup>234</sup> Of course, great collections are usually held by public galleries,<sup>235</sup> which present an ideal model of art ownership,<sup>236</sup> since they are typically bound by strict codes of ethics.<sup>237</sup>

230. See, e.g., BRUCE L. HAY, NAZI-LOOTED ART AND THE LAW: THE AMERICAN CASES (2017).

231. Universal Declaration, *supra* note 2, art. 17.

232. See Bingham, *supra* note 28, at 66–73.

233. European countries commonly impose strict restrictions on art exports. See, e.g., *Germany's Onerous New Art Export Law, Explained*, ARTSY (July 11, 2016), <https://perma.cc/S5PB-8XCV>.

234. Laws which prevent free export of artifacts provide an indication of what may constitute a culturally significant artwork.

235. It is likely that many culturally valuable artifacts are kept in crates in freeports. See generally JOHN ZAROBELL, ART AND THE GLOBAL ECONOMY (2017); John Zarobell, *The Role of Freeports in the Global Art Market*, ARTSY (July 14, 2017), <https://perma.cc/35EV-QLAN>; Ron Corver, *Money Laundering and Tax Evasion Risks in Free Ports*, EUROPEAN PARLIAMENT (Oct. 2018), <https://perma.cc/XQT5-J4UR>.

236. A particularly relevant development is the debate among members of the International Council of Museums as to the role of museums and galleries in promoting human rights. See *All Museums Can Be Human Rights Museums: ICOM COMCOL 2018*, INTERNATIONAL COUNCIL OF MUSEUMS (Oct. 16, 2018), <https://perma.cc/683B-HQSS>.

237. See *AAM Code of Ethics for Museums*, AMERICAN ALLIANCE OF MUSEUMS (1993, amended 2000), <https://perma.cc/23DT-WLC2>; *ICOM Code of Ethics for Museums*, INTERNATIONAL COUNCIL OF MUSEUMS (2004), <https://perma.cc/CY3M-AZCS>.

#### 4. Restitution and Repatriation

Collections of artworks may include artifacts which have tainted provenance. For example, the items may have been confiscated or otherwise unconscionably obtained in Europe during the Nazi era (1933–1945). Various statutes and forums have been established to determine whether such works should be returned to the original owners or their descendants, and how different interests may be balanced.<sup>238</sup> A broader issue is the matter of works that were obtained under conditions of colonialism. Two prime examples are the so-called Elgin marbles, held by the British Museum in London,<sup>239</sup> and Benin bronzes, held in collections around the world, including the Brooklyn Museum.<sup>240</sup> While the moral grounds for returning Indigenous artifacts are compelling;<sup>241</sup> political and practical considerations are less straightforward.<sup>242</sup>

238. See e.g., Katharine N. Skinner, *Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. L. 673 (2020).

239. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Paris, 14 Nov. 1970, art. 13 provides: “The States Parties to this Convention also undertake, consistent with the laws of each State . . . (b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of *illicitly* exported cultural property to its rightful owner.” Greece argues that the marble friezes were illegally taken from the Parthenon in Athens before the formation of the Greek state. The UK Prime Minister, Boris Johnson, currently argues that the friezes were legally acquired, although this contradicts an essay he wrote as an undergraduate. See, e.g., Angela Guiffrida, *Italy Returns Parthenon Fragment to Greece Amid UK Row over Marbles*, GUARDIAN (Jan. 5, 2022), <https://perma.cc/XP57-C8XQ>.

240. The Brooklyn Museum has the largest collection of African art in the United States, including a Benin sculpture of a horn blower, thought to have been cast in the sixteenth century in copper alloy and iron. The museum does not—and almost certainly cannot—publicize the full history of ownership of the sculpture. The bulk of its African collection was bought in 1922 from dealers in Brussels, London, and Paris. See TREASURES OF THE BROOKLYN MUSEUM 53 (Kevin L. Stayton ed., 2017). It is highly likely that some objects were obtained indirectly from the sacking of Benin city by British forces in 1897. See generally DAN HICKS, *THE BRITISH MUSEUMS: THE BENIN BRONZES, COLONIAL VIOLENCE AND CULTURAL RESTITUTION* (2020).

241. It seems, for example, indefensible for Western collections to include Māori mokomokai (shrunken heads). See, e.g., *The Repatriation of Māori and Moriori Remains*, MUSEUM OF NEW ZEALAND TE PAPA TONGAREWA, <https://perma.cc/7M8M-MKCA>.

G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, art. 11 (Oct. 2, 2007) provides:

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

242. See, e.g., Catherine Hickley, *Nigeria Seeks to Calm Tensions over Return of Benin Bronzes*, ART NEWSPAPER (Jan. 7, 2022), <https://perma.cc/Y7QG-FUU6>.

#### D. THE STATE

The Rousseauvean references to “community” used in the Universal Declaration mutated into an arguably more Hobbesian “State” in the ICESCR.<sup>243</sup> The Leviathan State has legislative, taxing, and spending powers to promote a community of art by, among other measures: protecting the national estate;<sup>244</sup> funding cultural institutions;<sup>245</sup> commissioning public artworks;<sup>246</sup> funding education; promoting public access to private works, including discouraging freeports;<sup>247</sup> and enacting equitable laws to protect the interests of artists.<sup>248</sup>

In order to preserve the national estate, some European jurisdictions exempt works of art from net wealth<sup>249</sup> and inheritance taxes.<sup>250</sup> The United Kingdom, among other countries,<sup>251</sup> permits a taxpayer to settle their tax debt by transferring a culturally important artifact to the state.<sup>252</sup> Under the Acceptance in Lieu scheme, which is managed by Arts Council England, a panel of experts determines whether an object is sufficiently preeminent to be accepted instead of monetary settlement of inheritance tax.<sup>253</sup> Artworks may also receive preferential capital gains tax treatment.<sup>254</sup> Consumption taxes may be structured so as to promote public access to cultural goods and services: For example, gallery entrance fees may be taxed at lower than standard rates.<sup>255</sup>

Occasionally, tax privileges may be granted directly to artists. The most significant concession in this regard is the Irish Artists Tax Exemption, which permits up to €50,000 of an artist’s annual income to be exempted from income

243. See MORSINK, *supra* note 11, at 239 (discussing the avoidance of the use of the word “State” in the Universal Declaration). On Rousseau contra Hobbes, see RALF DAHRENDORF, *LAW AND ORDER* (1985).

244. See *supra* note 216.

245. See, e.g., *Supporting the Arts in Your Community*, NATIONAL ENDOWMENT FOR THE ARTS, <https://perma.cc/6BWE-5H8A>.

246. See GSA Art in Architecture Program, <https://perma.cc/87NN-3JSM> (last visited Jan. 19, 2022).

247. Hito Steyerl describes freeports as “a luxury no man’s land, tax havens where artworks are shuffled around from one storage room to another once they get traded.” See HITO STEYERL, *DUTY FREE ART: ART IN THE AGE OF PLANETARY CIVIL WAR* 81 (2019).

248. See Graeme W. Austin, *Authors’ Human Rights and Copyright Policy*, 40 COLUM. J.L. & ARTS 405, 423–29 (2017) (discussing the termination right under U.S. copyright law).

249. OECD, *THE ROLE AND DESIGN OF NET WEALTH TAXES IN THE OECD* (2018), <https://perma.cc/WE2V-J6VV>.

250. EY, *WORLDWIDE ESTATE AND INHERITANCE GUIDE* (2017), <https://perma.cc/YJ7L-JMWJ>.

251. Capital Acquisition Tax Consolidated Tax Act 2003 (Act No. 1/2003) (Ir.), § 77 exempts receipts of qualifying cultural heritage property from the capital acquisition tax. See also *Cultural Gifts Program*, OFFICE FOR THE ARTS, <https://www.arts.gov.au/funding-and-support/cultural-gifts-program>.

252. See Inheritance Tax Act 1984, c. 51, § 230 (UK).

253. *Acceptance in Lieu*, ARTS COUNCIL ENGLAND, <https://perma.cc/5XRB-MVKS>.

254. Annabelle Gauberti, *Taxation of Acquisition and Sale of Art Works: Auctions and Private Sales*, CREFOVI (Nov. 5, 2015), <https://perma.cc/49QB-845L>. U.S. roll-over relief (I.R.C. § 1031(a) on like-kind exchanges) for artworks has been abolished, but “investment in qualifying Opportunity Zones may offer similar deferral or even elimination of CGT on the disposal of artworks.” Georgina Adam, *Trump’s Tax Act Offers Potential Tax Havens for Art*, ART NEWSPAPER (Jan. 3, 2019), <https://perma.cc/9VS3-2KHL>.

255. See Value Added Tax Act 1994, c. 23, § 31(1) (UK).

tax.<sup>256</sup> Governments may also set up *droit de suite* schemes to ensure artists receive a percentage of the sales price of a work when it is resold.<sup>257</sup>

### E. CONCLUDING COMMENTS

This part of the article sought to bridge the gap between the high-level affirmation of the right to participate in the arts and the practicalities of ensuring this right is realized. “All human rights are universal, indivisible and interdependent and interrelated,”<sup>258</sup> and they are also dynamic and contextual. To reiterate, everyone, including artists, the state, collectors, and general community members, “has duties to the community in which alone the free and full development of his personality is possible.”<sup>259</sup> This part has identified areas where the right to enjoy the arts requires special attention.

### VI. CONCLUSION

John Humphrey observed in 1983:

I am satisfied in my own mind that the Declaration is now binding on all states. But whatever its juridical force may be, its great political and moral force, which it owes to the fact that it was adopted by the United Nations and its response to the deepest aspirations of mankind, cannot be denied; and this authority increases with the years. Its impact on world public opinion has been as great if not greater than that of any contemporary international instrument, including the Charter of the United Nations.<sup>260</sup>

Ideally, the formulation of the Universal Declaration would have been a matter of distilling the fundamental principles of natural law accepted across time, place, and culture. In many regards it does, indeed, capture basic norms that would be followed in any sustainable legal or ethical system, religious or secular. However, in Immanuel Kant’s aphorism, nothing straight was made from the crooked timber of humanity.<sup>261</sup> The Universal Declaration was negotiated by people with diverse beliefs; the Cold War was looming; horse trading took place; compromises were made. The inclusion of moral and material interests in the cultural right was one such compromise. The British-heritage delegations rejected copyright, as implied, as a human right because—as their laws then reflected—it was a purely economic interest. Conversely, for the French and Latin American delegates, intellectual property was principally about the personhood of the author, but they insisted on including material interests, notwithstanding monopoly concerns.

256. See Taxes Consolidation Act 1997, § 195 (Act. No. 39/1997) (Ir.).

257. See Catherine Jewell, *The Artist’s Resale Right: A Fair Deal for Visual Artists*, WIPO MAG. (June 2017), <https://perma.cc/5HWB-74K4>.

258. Vienna Declaration, *supra* note 8, ¶ 5.

259. Universal Declaration, *supra* note 2, art. 29.

260. Humphrey, *supra* note 100, at 438.

261. See ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 19 (Henry Hardy ed., Princeton Univ. Press 2d ed. 1990) (1959).

There was, however, no opposition evident from any quarter to a right to enjoy the arts. This right may not have been expressly and discretely included in later human rights documents, but it is an eternal aspect of being human, in a way that IPRs are not. As Dutton argues:

A balanced view of art will take into account the vast and diverse array of cultural elements that make up the life of artistic creation and appreciation. At the same time, such a view will acknowledge the universal features the arts everywhere share, and will recognize that the arts travel across cultural boundaries as well as they do because they are rooted in our common humanity.<sup>262</sup>

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262. Dutton, *supra* note 17, at 275.





