

FIVE CATEGORIES DEFINED, NO CONSISTENCY FOUND:

ECHR CONVENTION AND CASE LAW ON FREEDOM OF ARTISTIC EXPRESSION

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HUMAN RIGHTS MA LONG THESIS

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Executive Summary

A number of NGOs and other rights organisations report on attacks on artists, censorship and conflicts of arts and other rights around the globe. Freemuse, an international NGO primarily reporting on attacks on artists around the globe stated that there have been 1,028 attacks and violations of artists' rights in 2016 and this number only increased compared to the previous year.¹ These challenges exist regardless of international and regional mechanisms of protection.

The purpose of the research study is to analyse the case law of the European Court of Human Rights and its former Commission and find out whether or not the Court is delivering consistent judgements and reasoning when it comes to the protection of artistic expression in the European legal space.

The methods used in this research were case-law analysis, analysis of relevant international treaties and instruments, analysis of reports by international and non-governmental organizations, theoretical assessment on the protection of speech and research on artistic expression by other scholars.

After collecting all the data, case law, historical overview and legal framework, it was possible to divide the Court's case law into five categories. The first category is the most massive and least consistent when it comes to reasoning - the category involves clashes between freedom of artistic expression and religious sensitivities. The second category involved satire as a more consistent

¹ Ole Reitov, Rikke Nagel. *Art Under Threat*. (Copenhagen: Freemuse, 2017). Accessed November 2017. <https://freemuse.org/wp-content/uploads/2017/05/Freemuse-Annual-Statistics-Art-Under-Threat-2016.pdf>

defence used in freedom of artistic cases; however, the satirical nature of an expression even though explicitly protected by the case law of the European Court of Human Rights, is not always considered in the reasoning of the Court. Perhaps the second largest chunk of cases that occurs in regards with artistic freedom is when such freedom allegedly violates someone's reputation which makes up the third category. Protection of reputation very often prevails over artistic expression in the Court's decisions due to the discretion allowed for the protection of a legitimate aim in question. When the form of expression is in a form of some conduct, the Court explicitly states that such form of expression falls within the meaning of Article 10. The cases in this fourth category are quite consistent - the preference is given to the applicants - but at the same time, the sample size is quite small so far. The Court recognises that certain artistic forms, especially literary forms of art such as poetry and novels, have limited potential to impact large masses of people which in most cases in the fifth category, if spoken about, is used as the major factor to decide in favour of the applicants.

By collecting and analysing case-law of the Court, as the main method, it was possible to infer that the Court should revise its case-law in order to increase consistency in reasoning to ensure better protection of the rights and higher effectiveness of the European Convention overall. Even though the consistency in judgment is problematic, a tendency towards more consistent judgments in the latest cases is visible. The research ends with a number of recommendations in the area of artistic expression protection for the members states, international, non-governmental and other relevant organisations and actors.

Acknowledgements

For the completion of this research, I am grateful to my supervisor Sejal Parmar for giving me a thorough, specific and detailed guidance on finishing this thesis. I would like to express my gratitude to CEU Library for providing comfortable space where a certain part of the paper was written. I would also like to thank Nicholas Mazik for tremendous help revising this paper. I am grateful to Samuel Mellick and Asher Alter for their incredible support throughout the process of writing.

1. Introduction

European Convention of Human Rights Article 10 entitles everyone to freely express opinion, “receive and impart information and ideas without interference...”.² The European Court of Human Rights has held numerous times that “freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone”.³ Nevertheless, freedom of expression is subject to various limitations which can only be justified based on the Court’s limitation test and other limitations set forth in paragraph 2 of article 10.

Even though freedom of artistic expression is not included in the phrasing of article 10, it is, nonetheless, implied as one of the types of protected speeches under the Convention. According to the Court’s case-law,

Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression.⁴

In its judgements the Court recognizes various types of speeches, such as political or commercial; the assessment of every single one of these depends on different aspects. It is often argued

² European Convention of Human Rights, 3 September 1953, article 10.

³ Handyside v. The United Kingdom, Application No 5493/72, 7 December 1976, at para 49.

⁴ Muller and Others v. Switzerland, Application No 10737/84, 24 May 1988, at para 33.

that political speech enjoys wider protection than artistic speech and commercial speech⁵ under the Court's jurisprudence. The position the Court makes it clear that there is some sort of unwritten hierarchy of speeches. Among those artistic expression is, unfortunately, put at the end of the list, unless artistic expression overlaps with political. Paul Kearns in his book *Freedom of Artistic Expression: Essays on Culture and Legal Censure* argues that "not only is artistic freedom as legitimate a public freedom as political liberty, deprioritizing it has had the practical effect of virtually negating it in its entirety."⁶ Such a hierarchy of speeches might make sense in a certain context; however, it should not be made a rule and the judgements of the Court should have consistency in its reasoning when deciding on the cases related to freedom of artistic expression.

Besides hierarchal disadvantage, the Court seems to underestimate the value of artistic expression through giving discretion to the states when it comes to protection of morals and other legitimate aims mentioned in the Convention. If we take an example of the aim of the "protection of morals" recognized by the Court, when deciding on merits, the Court tends to give wider margin of appreciation to the contracting states because they are better positioned in protection of morals of their citizens than the Court. It appears to be logical for many; however, often times the Court "fails to protect the kind of 'offensive, shocking or disturbing' material which the Court often consistently includes in its free-expression doctrine"⁷. According to the conclusion made after an extensive research by Kearns, this "...dubious and unqualified preference for the preservation of

⁵ Paul Kerans, *Freedom of Artistic Expression. Essays on Culture and Legal Censure* (Oxford: Hart Publishing, 2013) p. 151. See also Colin Munro, *The Value of Commercial Speech* (2003): p. 134-58.

⁶ *ibid*, 152.

⁷ Howard Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence," (Hague: *Kluwer Law International*, 1996), p. 127.

accepted morality over the necessity for artistic freedom when those interests appear to conflict”⁸ should not be a prevailing factor in delivering judgements.

Apart from that, this research aims to figure out whether or not the judgements are consistent across the case law of the European Court of Human Rights. Consistency is important and according to Coons, “...normatively, the desire for consistency on the part of jurists is said to contribute to a more just society as it reduces the appearance of inequality in the administration of justice”⁹ and “for the public, consistent decision making increases confidence in the judicial system by reducing the appearance of inequality”¹⁰.

Based on the preliminary research, it was found that for cases of satire in the European Court of Human Rights, the Court seems to deliver not-so-consistent judgements. For example, in some cases satirical expression is taken into account, in others it does not seem to matter. The Court often refers to satire as the form as a “form of artistic expression and social commentary”¹¹; however, when delivering the judgement the Court might fully disregard this acknowledgement or not acknowledge the satirical expression at all.

According to Paul M. Collins Jr., “...consistency plays a central role in the administration of justice. Through stable decision making, judges advance a number of normatively desirable goals

⁸ Kearns, *Freedom of Artistic Expression*, 153.

⁹ John Coons, “Consistency,” *California Law Review* 75 (1987): p. 72.

¹⁰ *ibid.*, 80.

¹¹ *Vereinigung Bildender Künstler v. Austria*, Application No 68354/01, 25 January 2007, at para 33.

that have profound effects on actors both internal and external to the legal system”.¹² Delivering consistent judgements is indeed important for the reputation of the Court itself and for increasing the confidence in its decisions and legitimacy in the eyes of public. Frost also argues that “achieving predictability of outcomes within a jurisdiction and uniformity in the law across parallel jurisdictions helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way courts will resolve disputes”.¹³ Besides, the consistency requirement itself is in the text of the Convention. Article 30 states:

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.¹⁴

Jean Paul Costa in his speech at Leiden University in 2008 opened his speech by saying that “...one of the intended functions of the Grand Chamber is thus to contain the risk of inconsistency”.¹⁵ When there is confidence in the consistency of the Court’s judgments, as Collins stated above, it does advance the desirable goals the legal systems seeks and therefore increases the legitimacy of the Court and human rights law in general, as a representative of a functioning and consistent mechanism for human rights protection.

¹² Paul M. Collins, “The Consistency of Judicial Choice.” *The Journal of Politics* 70, no. 3 (2008), p. 870.

¹³ Kem Thompson Frost, “Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities.” *Baylor Law Review* 67 (January 2015), p. 48.

¹⁴ European Convention of Human Rights, article 30.

¹⁵ Jean-Paul Costa, “The European Court of Human Rights: Consistency of Its Case-Law and Positive Obligations,” *Netherlands Quarterly of Human Rights* 26, no. 3 (2008), p. 449.

At the same time, this research shows that even though there are no complaints about the consistency of the judgements yet, this issue can still appear as controversial, especially when questioning the legitimacy of the Court and the respect by the member state. In the same speech, Justice Costa did bring some insight on how the Court is keeping the rulings consistent:

The first stage in the process is the scrutiny of the draft judgments and decisions as soon as the weekly file is communicated to the judges. This is done by a group of Registry lawyers, known collectively as the CLCP - Case Law Conflict Prevention (this title will be changed). It pays particular attention to drafts that apply the case-law to new situations, or propose to develop the case-law in a particular direction. The group makes its report each week to the Court's Jurisconsult, one of the most senior posts in the Registry. He in turn prepares a succinct case-law update that is sent out as soon as possible to all judges and case lawyers so as to brief them in advance of imminent noteworthy legal developments - a most useful service. Where he considers that there is a potential conflict or divergence on the cards, he will draw this to the attention of the Section(s) concerned.¹⁶

He then added that the above described scrutiny of the draft judgements is done within tight deadlines, which, again, can undermine consistency due to the load of cases the Court processes on a weekly basis. Judge Costa then continued that

...if the intervention of the Jurisconsult does not resolve the matter, he may refer it to the CRB - Conflict Resolution Board. The Sections themselves may seize the CRB of a particular issue. This structure brings together the Court's most senior judges (President and Section Presidents), assisted by the senior officials of the Registry. Since its creation in 2005, it has met two or three times per year. At each meeting it typically has a number of points to consider, ranging from substantive law to questions of practice and procedure. Each point is discussed and the CRB will generally issue conclusions and recommendations to guide the Sections in their handling of those issues. I stress the advisory role of the CRB - it is not there to direct the Sections, who retain full responsibility for the cases allocated to them. But, without being binding, the advice is followed in most cases.¹⁷

¹⁶ Costa, "The European Court", p. 452.

¹⁷ *ibid.*

Since the speech has been delivered in 2008 and talks about the matters after the year of 2005, it is crucial to point out that such meetings are only held twice a year and discuss other matters as well. So far, again, there have not been any complaints about the consistency of the judgements; however, it is important to keep the Court's consistency under scrutiny for its own good.

The question of the clash between freedom of religion and expression also remains problematic. Even though secular states shall not be infringing on the artists' artistic expression when the expression can be potentially seen as "offensive" for the religious communities, the Court has not yet made its mind on when it is appropriate to do so and when it is not.

The role of the Strasbourg Court in terms of protecting artistic expression is valuable in the European legal space. The Court sets the standard of protection – just like it does for political speech, for example. It is vital to understand that the Court has to revise its attitude towards art as speech because by doing so in its judgements, it will send a clear message to the states that are abusing artistic expression – Russia and Turkey are the grossest violators within the Council of Europe. Even though there is only one case against Russia in the set of artistic expression cases in front of the Strasbourg Court that are being discussed in this paper; Turkey remains the country with the highest number of cases brought against it. In this paper I would like to argue that even though the Court has delivered a number of judgements on the issue of artistic expression and those judgements make up five categories of different directions the Court's case-law has been split into; there is still lack a of consistency in the Court's judgments. There are ways in which it is right to give discretion to the states to protect morals of their citizens; however, it is

naturally wrong to imprison people for making art. That is why there has to be a reform in the assessment of cases related to freedom of artistic expression. All that being said, what are the ways to improve the Court's consistency? This research aims to answer that question as well.

This research is divided into three parts. In the first chapter, I would like to discuss the history of the issue by looking into a very important document - ECHR's Article 10 Travaux Préparatoires. This document reveals the intent of the drafters for the meaning of Article 10 and is interesting material to look at for background understanding of the issue. The first chapter will also look into other regional and international instruments protecting freedom of expression to have a global understanding of how ECHR is indeed a more powerful regional tool for protection of human rights in Europe. The first chapter will also discuss the theoretical framework behind protecting speech as such and the arguments most relevant for the artistic expression. The second chapter focuses on the case law of the European Court of Human Rights starting with the Commission. As has been stated before, the case law will be divided into five different categories that divide the Court's judgments in relation to freedom of artistic expression cases. Those cases will be summarized and analyzed. At the end of the research, recommendations will be made as to the Court's consistency and better protection of artistic expression overall.

1.1. Research Question and Importance

The importance of this research is not universal, just like the instrument it is applicable to, it is regional and only to specific beneficiaries - artists. However, some universal importance can still be assumed. The issue is not that well researched in academia; therefore, this paper will contribute to the research on the issue as such. Additionally, it is important to review the judgements of the court and be able or unable to see consistency in the reasoning and the judgements. This paper aims to assess that in particular.

The question of this research is, to summarize, what is the emerging case law of the European Court of Human Rights on the issue of artistic expression and whether the case law is consistent. What are the ways to keep the judgements more consistent? What recommendations can be made for the better protection of artistic expression by the Court and by the member states?

Importance of art as speech is undeniable since it helps people to express themselves in any form imaginable, art helps people understand the world through the creative prism of its form. Art also helps people transform their ideas into something tangible or intangible; it helps liberate people's minds against oppression of any sort. For humanity, art is important.

Its importance has never been denied by the gross human rights violators of the previous centuries – Hitler and Stalin. According to Anthony Lester, “both dictators believed that culture had a huge capacity to mould the state of mind and beliefs of the people they controlled”.¹⁸ Indeed,

¹⁸ Anthony Lester, “Art for Art’s Sake. Artistic Expression and the European Court of Human Rights,” *The Odysseus Trust*. <http://www.odysseustrust.org/> Accessed November 2017.

Stalin controlled art's content in the Soviet Union, those who would not comply were either censored or executed. Book burnings and dismissal from jobs of artists and musicians were organized in both regimes.

At the same time, both leaders had their own agenda on art. Lenin's propaganda, for example, through "painting, sculpture, urban architecture – was intended as a way of communicating key political ideas to a largely illiterate population."¹⁹ In the hands of the regime, art was a tool to manipulate and propagate for the desired ideas, while undesired ones were cut off and the creators thereof were punished.

The goal of the research is to analyze case-law and legal framework of the Council of Europe and the ECHR; attempt to find any flaws in any of the above and recommend changes or reforms. Another goal that is tied to the importance of the topic is to be able to contribute to the academic research on the question of academic freedom and increase, at least, academic awareness of the issue.

Despite the philosophical and theoretical arguments for the protection of free speech and artistic speech included, and despite the numbers of international treaties, the right to freedom of expression and artistic expression is still being constantly violated.

¹⁹ Guntis Gerards, et al. "Semiotics of Visual Iconicity in Leninist 'monumental' propaganda' in *Visual Communication*, 7, 1, p.27.

As an example of contemporary issues that artists and individuals face in seeking to freely express their opinions, Freemuse, an independent international NGO based in Copenhagen that advocates “for and [defends] artistic freedom of expression”²⁰ in its 2016 report registered:

1,028 attacks on artists and violations of their rights in 2016 across 78 countries, continuing a worrying trend of artistic freedom increasingly coming under threat. The number of cases registered in 2016 more than doubled the amount in 2015, increasing by 119%, rising from 469 attacks. Of those more than one thousand cases, Freemuse documented 188 total serious violations of artistic freedom and 840 acts of censorship.²¹

Even though Freemuse works across the globe and the numbers mentioned above include more countries that are under the ECHR jurisdiction, it is important to see the global trend here. It is equally crucial to note that globally freedom of artistic expression is often being interfered with and the European Court of Human Rights should have a moral obligation to address the issue in its judgements and help protect artistic liberty globally by setting standards that will be followed in other parts of the world.

Another example by Article 19, England-based organisation that is aimed to monitor or advocate to protect free speech all over the world is a statement that

...the XPA22 data shows that media self-censorship is the second biggest driver in the freedom of expression decline between 2014 and 2017. Censorship mechanisms of gov-

²⁰ “About Us” Freemuse, accessed 27 November 27, 2017, <https://freemuse.org/about-us/>.

²¹ Ole Reitov, Rikke Nagel, *Art Under Threat*. (Copenhagen: Freemuse, 2017). Accessed November 2017. <https://freemuse.org/wp-content/uploads/2017/05/Freemuse-Annual-Statistics-Art-Under-Threat-2016.pdf>

²² The Expression Agenda (XpA) metric shows that global freedom of expression has declined significantly over the last three years. <https://www.article19.org/xpa-18/>

ernments such as Turkey and Poland are determined to seize control of media and restrict critical voices. In authoritarian governments and transitioning democracies, media actors face limits to their independence and editorial freedom.²³

A 2017/18 report by Amnesty International does confirm the fact that the world is experiencing issues with respect to free speech and artistic expression. In the 2018 report, it has been mentioned that artists from Cuba, Ethiopia, Indonesia, Iran, Russian Federation, Senegal, Singapore and Ukraine were in one way or another prevented from expressing their views or arrested for expressing them. For example, in Russia

...artistic expression was restricted on occasions under pressure from conservative groups that regarded specific artistic productions as an offence to their religious belief. Performances were cancelled and individuals associated with them faced harassment and violence. Criminal proceedings were initiated against a number of prominent theatre workers in Moscow and were widely condemned by their devotees as politically motivated.²⁴

According to Index on Censorship, “in an age of successful digital media platforms and the prolific production of transgressive artworks, new methods of censorship have become a controversial and impeding issue for contemporary artists”.²⁵ Even though contemporary challenges that started occurring for contemporary artists in the digital age are important, they will not be given

²³ Expression Agenda Report 2017/2018, Article 19, <https://www.article19.org/xpa-18/>

²⁴ Amnesty International Report 2017/18, p. 312.

²⁵ Index on Censorship, Gatekeepers of censorship: Contemporary erotic art in a digital age. <https://www.indexoncensorship.org/2018/12/gatekeepers-of-censorship-contemporary-erotic-art-in-a-digital-age/>

due analysis in this paper. This not to disregard to importance of those challenges but to emphasise that while the old challenges are unresolved, the new ones will not stop appearing.

It is important for the sake of this research to point out that even though the rights are set out in a number of international treaties and nevertheless artists are facing many challenges, the scope of what was intended to be protected by the European Convention has to be determined. In order to do so, we will look at the preparatory works on the Convention.

The Travaux Préparatoires of Article 10 are important for looking into the drafters' intent and to make an attempt to interpret the law before going deeply into case law. This preparatory work will actually reveal certain parts relevant for this research. The work gives a broader understanding of the meaning of Article 10 of the Convention and helps prove that the notion of artistic expression was indeed included by the drafters of the Convention.

After that, this chapter will look into other regional instruments and conventions that protect freedom of expression. It is interesting to see how different jurisdictions and regions have slightly different approach towards the same idea. It is evident that the European Court indeed decided on merits or admissibility of more cases in relation to the freedom of artistic expression than any other instrument.

1.2. Methodology

This academic paper is an overview of an issue that is not widely discussed or researched. By completing this work, I would like to contribute to the potential solution of the problem by expanding the research. This paper will examine the possible ways and contexts in which art as a part of freedom of expression is applied to a wider human rights doctrine.

Since the paper aims to mainly research the European Court of Human Rights' jurisdiction, an in-depth analysis of the Court's case law is to be expected. It was possible to come up with five major categories in which the case law of the European Court of Human Rights is currently developing. By reading and analysing the major patterns and legal issues and outcomes in the case-law, it was possible to divide the applicable cases into those five categories that are represented in the divided subchapters and discussed in a way that looks for consistencies in the reasoning of the Court and the rulings. The categories are all different - either looking at the right at stake, some particular legitimate aim or form of expression. These seem to be categories emerging within ECHR case law. After dividing the cases into categories and giving them proper assessment, conclusions and recommendations were made.

The method that has been used in this research is as follows. After conducting online research in the ECHR's database HUDOC, a number of relevant cases have been found. For the sake of this paper, those cases that touched upon artistic expression or included a form of art in question, either literal or visual or any other, have been selected. Not all the cases appeared to be relevant and the relevancy of the selected ones will be discussed in the second chapter.

2. Chapter I: Theoretical and Legal Framework

In order to underline the importance of artistic expression in a democratic society, in its report of 14 March 2013 the UN Special Rapporteur in the field of cultural rights, Farida Shaheed, stated:

The vitality of artistic creativity is necessary for the development of vibrant cultures and the functioning of democratic societies. Artistic expressions and creations are an integral part of cultural life, which entails contesting meanings and revisiting culturally inherited ideas and concepts. The crucial task of implementation of universal human rights norms is to prevent the arbitrary privileging of certain perspectives on account of their traditional authority, institutional or economic power, or demographic supremacy in society. This principle lies at the heart of every issue raised in the debate over the right to freedom of artistic expression and creativity and possible limitations on that right.²⁶

To give a better understanding of artistic expression as speech, this chapter will discuss the historical emergence of the issue as well as regional aspects. The theoretical framework as well as the history of bans of artistic expression will be discussed. Furthermore, the importance of protecting free speech will be presented in this particular chapter.

Historically, any speech can be subjected to limitation, such as censorship and prior-restraints.

It is often the case that those producing the speech in any way, including art as a form of speech, and therefore practicing their right to free speech, have been convicted which often led to a sanction like a fine or even imprisonment. It is important to understand the development of free

²⁶ Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights, the right to freedom of artistic expression and creativity*, Human Rights Council, 14 March 2013, at para 2.

speech doctrine in relation to artistic expression to be able to see the problem in the application of the Court's present day standards.

2.1. Theoretical Framework: Free Speech Justifications

As of today, most people without any prior legal knowledge would not doubt the importance of free speech in a democratic society - any democratic constitution that explicitly includes a bill of rights in its text will most likely have a clause on freedom of expression. International and regional human rights treaties, whether binding or not, like Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention of Human Rights - all those are the provisions protecting freedom of speech on international law level. Nonetheless, it is important for the sake of this research to discuss why free speech should be protected in the first place.

Andras Sajo in his book on Freedom of Expression mentions that restrictive practices against free speech were introduced not only by states but also by churches. He states that “most of human history is characterised by the domination of the binding views promulgated by religions and churches and sanctioned by states”.²⁷

Limitations and bans on art had been a part of any expression, including artistic expression for a long time. In the United Kingdom, a Star Chamber decree of 1538 required printers to obtain a

²⁷ Andras Sajo, “Justifications,” in *Freedom of Expression*. Institut Spraw Publicznych. Warsaw: 2004, p. 13.

license before publishing because monarchs wanted to prevent “circulation of heretical or seditious literature that might cause constitutional instability”, the penalties for not conforming with the decree were described as “draconian”. During the Civil War the decree lost its power but in 1643 a decree of the same character was enacted. “Criticism of the government was then regulated *after*²⁸ the publication using the legal mechanism of seditious libel”. The beginning of the eighteenth century marked two “minor unreported cases” that showed the ability to ban artistic works by the above mentioned decree because of the probability of “corrupting public morals” – James Read’s “The Fifteen Plagues of Maidenhead” in 1708 and Edmund Curll’s “Venus in a Cloyster” in 1727. Time went on and a century later laws of this kind had become contrary to public opinion. By 1851 blasphemous libel laws had been left without support. Enactment of Lord Campbell’s Obscene Publications Act in 1857 though was not directed against any form artistic expression but ‘high art’, had, nonetheless, negative effect on it. The twentieth century became remarkable for recognition of human rights and importance of freedom of expression as a part of it, in 1999 Lord Steyn “referred to freedom of expression as a right that must yield to other cogent social interests...”.²⁹

²⁸ Emphasis added by the author.

²⁹ Kearns, *Freedom of Artistic Expression*, 15-17.

Despite these historical observations, Sajo states that “the problem of government intervention in the communication of ideas is not a matter of the past”.³⁰ Evidently, there are cases all over the globe where people are being censored or arrested for expressing their views. A more detailed assessment of the artistic expression issue will be presented later; it is now necessary to establish why speech should be protected in a democratic state. There are several arguments we are going to look at.

The first argument is a truth-related argument primarily by John Stuart Mill and Justice Holmes, where “both defenses argue that dissenting speech plays a critical role in a collective truth-seeking endeavour, and they are often grouped together as advocating for a “marketplace of ideas”...”³¹ The arguments basically state that the state should not have the privilege of determining what speech constitutes truth and which does not; at the same time, simply saying, people are free to express their opinions because in a so-called “marketplace of ideas” there will be the opportunity to seek the truth.

³⁰ Sajo, “Justifications”, p.16.

³¹ Irene M. Ten Cate, “Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendel Holmes’s Free Speech Defenses,” *Yale Journal of Law and the Humanities*, no. Issue 1 (2010): 35. See also “The Politics of Truth: Selected Writings of C. Wright Mills C. Wright Mills John H. Summers.” 2009. *Contemporary Sociology*, no. 6: 609; and Tom Bradshaw, *John Stuart Mill: Freedom of Expression and Harm in the ‘Post-Truth’ Era*, 2016.

It is also true that Mill's truth argument can only be applied to certain aspects of life and not to everything that freedom of expression tries to cover. For instance, according to Eric Barendt, Mill's argument does not refer to "commercial advertising or sexually explicit material, which may consist of both information and ideology or fit into neither category".³² Additionally, the arguments from truth are not applicable in the situations where an employee or a public servant tries to reveal information to a newspaper, even if those are true - here comes the issue of privacy.³³ To sum up, as Barendt states, Mill's argument only applies "to speech stating beliefs and theories about political, moral, aesthetic, and social matters".³⁴

The second argument, and perhaps the most relevant when it comes to freedom of artistic expression is the self-fulfilment argument. According to Campbell and Sadurski, "the theory might regard freedom of speech as an intrinsic, independent good; alternatively, its exercise might be regarded as leading to the development of more reflective and mature individuals and so benefiting the society as a whole".³⁵ It is safe to say that "the reflective mind, conscious of options and the

³² Eric Barendt, *Freedom of Speech*, Oxford: Clarendon Press, 1987, p. 10.

³³ *ibid.*, 10.

³⁴ *ibid.*, 11.

³⁵ T. Campbell, "Rationales for Freedom of Communication", in T. Campbell and W. Sadurski, *Freedom of Communication* (Aldershot: Dartmouth, 1994) pp. 33-4.

possibilities for growth, distinguishes human beings from animals”.³⁶ At the same time, free speech as a right is also tightly connected to other rights like freedom of conscience; however, the latter does not infringe on other’s freedoms in a way speech does.³⁷ Thus, if intellectual and personal growth is of particular value, then rights like “to education, to cultural goods and to travel should also be protected”.³⁸ It is nevertheless important to argue why free speech has to be protected.

First of all, when it comes to judicial interpretation, freedom of expression is a so-called negative right, which simply put, is a right that the government does not need to allocate any additional resources to enforce (as it is with the above mentioned education, cultural goods and travel). The duty of the government in situations of free speech is not to violate the right and not to limit it unlawfully. However, even though it is a negative right, its basis for protection is rooted to people’s autonomy. Such basis makes the argument be the least vulnerable to criticism. At second, the right does not apply to legal persons, companies and corporations - as it simply would not make sense. Self-autonomy and self-fulfilment are attributes of a human being; the same can be said about applying this principle to the media and press.

³⁶ Barendt, p.13.

³⁷ *ibid.*

³⁸ *ibid.*, p.14.

Nevertheless, the self-fulfilment argument, unlike the argument on truth, “does not rest on any assumption that truth will emerge from open discussion”.³⁹ According to the justifications made by Scanlon, “the individual has a right to hear views and consider acting on them, even though this process will damage society - although it is conceded that some limits may be imposed during times of extreme emergency”.⁴⁰ This theory not only applies to political speech but all forms of expression, including artistic and commercial. Additionally, Scanlon’s argument emphasises why suppressing speech is wrong: “it prevents free people from enjoying access to ideas and information which they need to make up their own minds”.⁴¹

To sum up, a South African judge Makgoro J, in one of the judgements stated that,

Freedom of speech is a *sine qua non* for every person’s right to realise her or his full potential as a human being, free of imposition of heteronomous power. Viewed in that light, the right to receive other’s expressions has more than merely instrumental utility, as a predicate for the addressee’s meaningful exercise of her or his own rights of free expression. It is also foundational to each individual’s empowerment to autonomous self-development.⁴²

³⁹ Barendt, p. 16.

⁴⁰ *ibid.*

⁴¹ *ibid.*, p.18

⁴² Case v Ministry of Safety and Security, 1996, 3 SA 617 (CC) [26].

Brian Murchison, Professor of Law at Washington and Lee University School of Law forced three thinkers Thurgood Marshall, Charles Taylor and Kazuo Ishiguro to have a conversation about the self-realisation value of speech and concluded that

Speech can open the self to greater awareness of issues of justice, and it can pave the way to profound insights about sources of value, but it can also trap the self, close it off from other speech and hence other modes of being. In the process account, speech prompts a variety of complex effects on human personality.⁴³

Undoubtedly, the self-fulfilment argument can be seen as the most vulnerable argument of free speech protection justification; however, its importance is undeniable. Specifically applied to the suppression of artworks, self-fulfilment of artists as well as the audience to aesthetic aspects of life should be protected based on the theories and arguments provided above.

The third argument is the democratic theory of speech argument. This argument is not that complicated to comprehend and is best viewed by bringing an example from Brandeis judgement in *Whitney v California*:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces

⁴³ Brian C. Murchison, "Speech and the Self-Realization Value." *Harvard Civil Rights-Civil Liberties Law Review*, no. Issue 2 (1998), p. 499.

should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁴⁴

The idea behind this argument, according to Alexander Meiklejohn, is that “commitment to democracy justifies freedom of speech ... [and] it is the equal rights of everyone to participate in society through exercise of free speech rights and other related freedoms...”⁴⁵ Minorities thus have a right to freely express their opinions with the majority view.

On top of all these theoretical and philosophical arguments for the protection of free speech, expression is not only protected on the national levels through constitutional framework, it is also protected on the international level through a number of human rights treaties and conventions which not only strengthens the arguments described in this subchapter but also gives them legitimacy and mechanisms that can be enforced through a relevant treaty, which will be described in the next subchapter.

⁴⁴ *Whitney v California*, 274 US 357; 1927.

⁴⁵ Barendt, p. 20. See also M.H. Redish, “The Value of Free Speech” (1982) *University of Pennsylvania Law Review* 591.

2.2. Legal Framework: ECHR and Other International Instruments

Article 10 of the European Convention of Human Rights provides the legal basis for the protection of freedom of expression within the Council of Europe. However, there are other international instruments and treaties that provide regional and international legal framework for the protection of freedom. For the sake of comparison, I am going to discuss the main regional and international instruments regarding freedom of expression, such as the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, the American Convention on Human Rights, the African Charter on Human and Peoples Rights, the Arab Charter on Human Rights and the Asian Human Rights Charter.

UDHR, as a non-binding treaty that is partially recognized as customary law these days, was a treaty on which ICCPR was based. Both these documents were taken into consideration while drafting the European Convention. Article 19 of UDHR states that,

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.⁴⁶

ICCPR, a binding treaty to the state parties that signed and ratified the document, elaborates on the meaning and limitations. Article 19 of ICCPR primed the following:

1. Everyone shall have the right to hold opinions without interference.

⁴⁶ Universal Declaration of Human Rights, article 19.

2. 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.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.⁴⁷

For example, UDHR mentions "any media" as a form of receiving or imparting ideas and information; whereas, ICCPR specifies on the forms as "either orally, in writing or in print, in the form of art, or through any other media of his choice".⁴⁸ It is important to point out that art as a form of speech is included, and that according to the Preparatory Work on Article 10 all these forms were copied into the initial phrasing of the ECHR but were later erased in order to give wider protection to the newly emerging forms of expression.

ICCPR, just like ECHR, makes it clear that freedom of expression is not absolute, and it implies certain duties and responsibilities. Because of those, ICCPR allows to limit freedom of expression for the sake of "respect of the rights or reputations of others; [and] ... the protection of national security or of public order, or of public health or morals".⁴⁹ The list of limitations is much

⁴⁷ International Covenant on Civil and Political Rights, article 19.

⁴⁸ *ibid.*

⁴⁹ *ibid.*, 19 (3)

shorter than the one of the European Convention that includes territorial integrity, prevention of disorder and crime, prevention of the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.⁵⁰

UDHR, as a soft law treaty, only recognises that expression is a part of a larger human rights law and doctrine; however, due to its non-binding nature it does not provide for any limitations. IC-CPR and ECHR, on the other hand, explicitly provide all the limitations that can be found legitimate if justified by the member states. In addition, both binding treaties introduce the notion of “duties and responsibilities”, which is an important concept in judicial practice of the European Court.

It is important to mention in the case of ICCPR that the General Comments have authoritative interpretation function and, simply said, interpret the treaty. The United Nations Human Rights Committee is responsible for writing general comments and

...the Committees’ decisions represent an authoritative interpretation of the treaty concerned. They contain recommendations to the State party. All Committees have developed procedures to monitor whether States parties have implemented their recommendations (so-called follow-up procedures), since they consider that by accepting the procedure, States parties have also accepted to respect the Committee’s findings.⁵¹

⁵⁰ ECHR, article 10(2).

⁵¹ “Human Rights Treaty Bodies - Individual Communications”, OHCHR website, accessed November 2018, <https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx>. See also Christian Johann, "The International Covenant on Civil and Political Rights and Its (First) Optional Protocol - A Short Commentary Based on Views, General Comments and Concluding Observations by the Human Rights Committee," *German Yearbook of International Law* 48 (2005): 656-660

General comment No. 34 interprets the rights set forth in the Article 19 of the ICCPR. In the general remarks, the Comment mentions that “freedom of opinion and freedom of expression are indispensable conditions for the full development of the person”.⁵² Paragraph 11 of the General Comment 34 provides,

Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.⁵³

The General Comment explicitly states that forms of dissemination of expression, such as artworks, are explicitly protected under the Convention. In one of the Committee decisions, in the case of a Korean artist, the Committee stated:

The Committee observes that the picture painted by the author plainly falls within the scope of the right of freedom of expression protected by article 19, paragraph 2; it recalls that this provision specifically refers to ideas imparted “in the form of art”. Even if the infringement of the author’s right to freedom of expression, through confiscation of his painting and his conviction for a criminal offence, was in the application of the law, the Committee observes that the State party must demonstrate the necessity of these measures for one of the purposes enumerated in article 19 (3).⁵⁴

⁵² General Comment no 34, Human Rights Committee, Geneva: 2011, at para 2.

⁵³ *ibid.*, at para 11.

⁵⁴ Communication No. 926/2000, *Shin v. Republic of Korea* (Views adopted on 16 March 2004, eightieth session).

Thus, the ICCPR does protect artistic expression and recognizes forms of art as one of the protected forms.

Though the Universal Declaration and International Covenant were the basis of the European Convention, the Convention was still modified in order to accommodate interests and possibilities of all drafting member states.

The American Convention on Human Rights (ACHR) was adopted during the Inter-American Specialized Conference on Human Rights in 1969 and also recognizes the UDHR in its preamble. Since it was adopted after both ICCPR and ECHR, the Convention has a lot in common with those treaties. For example, the forms of expression are exactly the same as those in ICCPR. Limitations are phrased and placed in the exact same manner as in the Covenant; however, with the omission of duties and responsibilities. ACHR specifies that the right "may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint..."⁵⁵ and so on; nonetheless, prior censorship on the public is possible in order to protect the morals of children. In addition, propaganda of war and incitement of hatred is to be punished by law.⁵⁶ Inter-American Court of Human Rights system also has a separate Declaration of Principles on Freedom of Expression which explicitly states that "prior censorship, direct or indirect interference in or pressure exerted upon any expression, ... transmitted through any means of

⁵⁵ American Charter on Human Rights, article 13(3).

⁵⁶ *ibid.*, article 13(5).

oral, written, artistic, visual or electronic communication must be prohibited by law".⁵⁷ Here, again, the Court explicitly recognizes art as a form of speech and prohibits state interference.

ECHR and ACHR are regional human rights instruments that enforce human rights through the court system. Even though they have differences and similarities, these are internationally recognized systems that protect human rights regionally. The other instruments that are to be discussed are of a slightly different character. Those treaties accommodate state religious or cultural values appropriate for the regions they apply to.

To conclude, one of the reasons the ECHR case law is specifically analyzed in this paper is due to its highest effectiveness compared to other instruments and treaties - even though it is limited to the members of the Council of Europe, the European Court delivered and keeps delivering a significant amount of judgements which are in the most cases are respected by the relevant member states and rarely ignored by them.

⁵⁷ Declaration of Principles on Freedom of Expression, principle 5. <http://www.oas.org/en/iachr/expressions/showarticle.asp?artID=26>

2.4. ECHR Drafters' Intent

Preparatory Work on Article 10 of the European Convention of Human Rights which is a Travaux Préparatoires document for the Convention shows how the draft article was modified during various conferences by the members of Council of Europe. The Convention's text was based on Article 19 of the Declaration of the United Nations and then was changed in order to accommodate interests of the member states of the Council.

Initially the text that was submitted by the UN Conference on Freedom of Information 1948 on freedom of expression, paragraph 1, was worded as follows:

Every person shall have the right to freedom of thought and the right to freedom of expression without interference by governmental action; these rights shall include freedom to hold opinions, to seek, receive and impart information and ideas, regardless of frontiers, either orally, by written or printed matter, in the form of art, or by legally operated visual or auditoria devices.⁵⁸

This text was an initial proposal for article 10; however, if we compare it to the text that is in the Convention now, it looks slightly different in the same paragraph 1:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.⁵⁹

⁵⁸ European Commission on Human Rights, Preparatory Work on Article 10 of the European Convention of Human Rights, Strasbourg, 17 August 1956, p.4

⁵⁹ European Convention on Human Rights, article 10 para 1.

In the official wording of article 10 as we know it today, there is no mentioning of artistic expression or possibility to receive or impart ideas in the form of art; however, other types of expression are also omitted in the text. Therefore, on the basis of this one may conclude that form of art was indeed one of the protected forms of speech but was excluded from the text together with other forms of speech. There might be different reasons for that. For example, having a long open-ended list might mean that it would be difficult to include other forms of speech once they appear in the future. Second, the list, if the Commission decided to continue working on it, would be somewhat very extensive and perhaps confusing. Third, it makes a lot of sense to let the Court interpret whether one or another form of speech actually constitutes speech.

On the 7th of August, 1959, the Committee of Ministers modified the first paragraph and deleted the words “either orally, in writing or in print, in the form of art or by duly licensed visual or auditory devices”.⁶⁰ However, as it has already been discussed above, all these forms were still implied in the meaning of the article 10 of the Convention.

There is no doubt art is a form of protected speech under the European Convention and both the Court and the Commission interpreted that in their judgement. However, implied in the same article all forms of expression – political, commercial and artistic, should enjoy the same level of protection. Unfortunately, the Court’s practice does not necessarily reflect what was intended. Obviously, there might be reasons for that, those are to be discussed in the very last chapter concerning freedom of expression between law and politics.

⁶⁰ Preparatory Work on Article 10, p. 17

It is also very important to notice that in the initial text, ‘the right to freedom of thought and the right to freedom of expression’ were seen as two differing rights divided by the clause ‘and’. It was indeed recognized by the drafters since “these rights” appeared in the text. Later on, the amendment by the British drafters was proposed in January 1950 that led to the deletion of ‘freedom of thought and to’ and made the new phrasing of the article look as follows: “everyone shall have the right to freedom of expression without governmental interference”. The rationale for dividing and then deleting the rights was that it is not really in the power of any state institution to restrict anyone’s freedom of thought and opinion due to the fact that it “was purely a private matter, belonging as it did to the realm of the mind”⁶¹, therefore, “no law could regulate [one’s] opinion and no power could dictate what opinion [one] should or should not entertain”.⁶²

As to the second paragraph of the initial text submitted by the same United Nations Conference on Freedom of Information, that states the following:

The right to freedom of expression carries with it duties and responsibilities and may, therefore, be subject to penalties, liabilities or restrictions clearly edited by law, but only with regard to:

- a. Matters which must remain secret in the interests of national safety;
- b. Expression which invite persons to alter by violence the system of the government;
- c. Expression which directly incite persons to commit criminal acts;
- d. Expression which are obscene;

⁶¹ Preparatory Work on Article 10, p. 21

⁶² Ibid.

- e. Expressions injurious to the fair conduct of legal proceedings;
- f. Infringements of literary or artistic rights;
- g. Expressions about other persons, natural or legal, which defame their reputations or re otherwise injurious to them without benefitting the public;
- h. The systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States...⁶³

If compared to the second paragraph of the Convention:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary...⁶⁴,

there are certainly differences and similarities. First of all, the protection of health or morals was not included in the initial wording of the proposed text by the UN Conference. It was later endorsed by the British Government “to enumerate specific limitation ... which are to be permitted”⁶⁵. The modified list of limitations included protection of health and morals and another limitations on maintaining the authority and impartiality of the judiciary.

⁶³ Preparatory Work on Article 10, p.5

⁶⁴ ECHR, Article 10, para 2.

⁶⁵ Preparatory Work on Article 10, p.7

Secondly, the points on obscene expressions and infringements of literary or artistic rights, which are relevant for the sake of this research, were omitted eventually. However, since the ‘morality’ component was added to the limitation list, it therefore included obscenity. Nevertheless, it is unclear from the preparatory work what exactly those morals included and what exactly obscenity would mean since morals of any society are subject to changes and revision, which later will be well accommodated by the principle of Margin of Appreciation.

Thirdly, point (g) with its excessive inclusion of various limitations such as defamation of natural and legal persons and the expressions without benefitting public were changed to protection of the reputation or rights of others. On the one hand, the initial phrasing of point (g) could create a number of issues with interpretation and was seen as slightly over-broad. However, the inclusion of undefined concept of rights of others, which these days is widely used to lower the protection of artistic expression, was a price to pay. Protection of the rights of others can be defined in many ways. For example, it can be used when one right is interfering with freedom of expression or vice versa. The very common excuse for limiting artistic expression is freedom of religion. However, it is important to note that in the UN Conference that whilst blasphemous statements as limitations were suggested, they were nevertheless not included.

It is also important to notice the duties and responsibilities that freedom of expression carries. According to the appendix of the Preparatory Work, “those who opposed the proposals contended that the general purpose of the covenants was to set forth civil and political rights and to guarantee and protect them rather than to lay down “duties and responsibilities” and to impose them

upon individuals”.⁶⁶ However, “those supporting the proposal were of the opinion that freedom of expression was a precious heritage as well as dangerous instrument, and... in view of the powerful influence the modern media of expression exerted upon the minds of men and upon national and international affairs, the “duties and responsibilities” in the exercise of the right to freedom of expression should be specifically emphasized”.⁶⁷ Both these views make a lot of sense to me, while I understand that freedom of expression should not be absolute unconditionally, there is another problem of the use of these ‘duties and responsibilities’ against individuals when not that necessary. This usage is to be discussed in the following chapter.

Lastly, with regard to the question of censorship by the UN document, it was mentioned that it was offered to include that “prior censorship of the press should be explicitly banned” and “previous censorship of written and printed matter, the radio and news reels should not exist”.⁶⁸ However, none of these offers were adopted due to already formulated understanding that restrictions set forth in the article “were not understood as authorizing censorship”.⁶⁹

To sum up, the drafters’ intent is connecting the Universal Declaration, the ICCPR and the European Convention and, as reflected in the case law, does intend to protect freedom of artistic expression in the European legal space, among other things. After having looked into the theoretical framework and the justifications for protection as well as the text of the Convention and similar international human rights treaties and the intent of the drafters, the jurisprudence of the Eu-

⁶⁶ Preparatory Work on Article 10, p.23.

⁶⁷ Ibid.

⁶⁸ Ibid., p. 26.

⁶⁹ Ibid.

ropean Court can be assessed with higher confidence and demands for consistencies in the judgments that are being delivered.

3. Chapter II: Case-law of the European Court of Human Rights

From 1959 to 2017, according to the Court's statistics, it has delivered more than twenty thousand judgements, of which seven hundred were on the topic of Article 10 - freedom of expression.⁷⁰ The total number of judgements does not represent the majority of the ECHR case-law. For example, the highest number of judgements was delivered on the issues of length of proceedings, fair trial rights, right to liberty and security, protection of property, inhuman and degrading treatment, and effective remedy.⁷¹ The highest number of cases was brought against Turkey, in the cases of freedom of expression Turkey also makes up the respondent state for the highest number of cases brought up against.⁷²

This chapter will focus on relevant ECHR case law starting with the Commission and old Court up until the very latest judgements. It will analyse the rulings and reasoning and will look for consistencies. However, the preliminary research shows that the Court is lacking consistency in its judgements when it comes to deciding on artistic freedom cases; it is evident however that the Court is adapting a more positive approach towards the recognition of artistic freedom.

Twenty two relevant cases have been selected for the sake of this research. The cases related to issues of copyright law, intellectual property law, benefits and allowances of the artists, cases related to the selling and/or buying artworks will not be analysed in this paper since the rights at

⁷⁰ "Violations by Article and by State 1959-2017", ECHR-Statistics, accessed on 20 January 2018. https://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf

⁷¹ *ibid.* Note: length of proceedings - 5,668 judgements; fair trial rights - 4,712; right to liberty and security - 3,546; protection of property - 3,217; effective remedy - 2,345 and inhuman and degrading treatment - 2,044.

⁷² *ibid.* Total number of cases against Turkey - 3,386; cases related to article 10 - 281.

issue are not protected under the Article 10 of the Convention's freedom of expression doctrine. Inadmissible cases will not be analysed in this research either due to the fact that those cases do not create a precedent that the Court can later rely on in its judgements. However, three inadmissible cases still made it into this paper as they are used as illustrative examples for several categories.

After initial case-law research it became evident that the cases involve a variety of issues, legitimate aims, rights at stake, and forms of art. Nevertheless, it was possible to divide them into five categories. Some cases overlap in the categories.

The first category involves cases in which artistic expression was at stake against freedom of religion. There are eight cases in this category: three of them were decided to have a violation of Article 10, four were lacking violations and one was found inadmissible.

The second category involves four cases that are dealing with satire in artistic expression. Three cases were decided in favour of the applicants and three in favour of the Governments, one case was found inadmissible but still is relevant for the sake of this research.

The third category represents the cases when artistic expression is being suppressed because of others' reputation. This category consists of six cases, three of them were found to have violations, two were lacking violations, and one was inadmissible.

The fourth category approaches freedom of artistic expression from the perspective of it being in a form of conduct. There are three cases in this category. Two of them were decided in favour of the applicants and one was in favour of the Government.

The last category consists of the four cases in which the Court infers that certain forms of artistic expression do not attract a substantial amount of people in order to be able to conclude that those forms can be dangerous. There are three cases that were found to violate the applicants' freedom of speech; however, the Court has mentioned such reasoning in a number of other cases where this factor was not considered sufficient to rule in favour of the applicants.

Most of the cases are against Turkey - six cases in total; there are three cases against France; Austria and Switzerland have two cases brought against each; each Denmark, Hungary, Poland, Russia, Slovakia, Slovenia, Spain, Ukraine and the United Kingdom have one relevant case brought up against.

All five of the categories reflect the most distinctive notions in the Court's jurisprudence, some are quite problematic and some are less, at the same time the Court shall consider the consistency of all the upcoming cases relevant to artistic expression regardless of the category it falls into; however, the categorisation might help on the way to consistency.

3.1. Freedom of Artistic Expression and Freedom of Religion

Freedom of expression in general has been clashing with freedom of religion for a while. It was never obvious which is more important - free speech or the feelings of religious believers. The ECHR case-law has a significant number of cases in regards to the question of balancing the two rights; however, this research concerns itself with artistic expression primarily.

There have been some frameworks created around the issue. For example, the Parliamentary Assembly of the Council of Europe in Resolution 1510 (2006) on freedom of expression and respect for religious beliefs⁷³ stated the following,

Blasphemy has a long history. The Assembly recalls that laws punishing blasphemy and criticism of religious practices and dogmas have often had a negative impact on scientific and social progress. The situation started changing with the Enlightenment, and progressed further towards secularisation. Modern democratic societies tend to be secular and more concerned with individual freedoms. The recent debate about the Danish cartoons raised the question of these two perceptions.⁷⁴

Indeed, blasphemy laws in the United Kingdom have been discussed in the previous chapter from the historical perspective. However, the case of Danish cartoons represents an interesting situation here.

Ben El Mahi and Others v. Denmark, 2006

⁷³ Assembly debate on 28 June 2006 (19th Sitting) (see Doc. 10970, report of the Committee on Culture, Science and Education, rapporteur: Mrs Hurskainen). Text adopted by the Assembly on 28 June 2006 (19th Sitting).

⁷⁴ *ibid.*, at para 7.

The case was brought to ECHR in 2006 under the name of Ben El Mahi and Others v. Denmark. The first applicant was a Moroccan national living in Morocco, the second and third applicants were two Moroccan associations.⁷⁵ The facts were as follows. A Danish newspaper published twelve cartoons which were caricatures of Prophet Muhammad. Many Muslim organizations reported the newspaper to the police but the public prosecutor decided not to initiate proceedings.⁷⁶ The applicants claimed that they have been discriminated against by Denmark and submitted that the permitted publication of the cartoons was offensive to their religious beliefs.⁷⁷ The Court found the application to be inadmissible due to the lack of jurisdictional link between the applicants and the member state.⁷⁸

The case is often assessed as a “missed [opportunity] for Strasbourg”.⁷⁹ Indeed, the case did offend Muslim minorities around the world; there have been protests against the cartoons.⁸⁰ However, there were no Danish nationals willing to bring the case against the publisher claiming it to be offensive. The Court, not being able to link the case jurisdictionally to the member states, lost a great opportunity to make an interesting judgement on the balance between respect for religious freedom and the freedom of artistic and political expression. Nevertheless, similar cases will be discussed in this sub-chapter.

⁷⁵ Ben El Mahi and Others v. Denmark, Application No 5853/06, 11 December 2006, the Facts.

⁷⁶ *ibid.*

⁷⁷ *ibid.*, Complaints.

⁷⁸ *ibid.*, the Law.

⁷⁹ Eleni Polymenopolou, “Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights”, *Human Rights Law Review*, 2016, p. 517.

⁸⁰ “Thousands protest against prophet cartoons”, The Telegraph, accessed 27 October 2018, <https://www.telegraph.co.uk/news/1510225/Thousands-protest-against-prophet-cartoons.html>.

The case of *Muller and Others v. Switzerland* decided in 1988 is not only a fine arts-related case but also the first artistic expression case that has been decided by the Commission.⁸¹ However, there was another case - *N v Switzerland*, that was decided before *Muller* and was found manifestly ill-founded, still plays an interesting role as for the recognition of the protection of artistic expression.

N. v Switzerland, 1983

The applicant, Naegeli, was a graffiti artist who painted his art on a number of buildings in Zurich and was sentenced to nine months of imprisonment.⁸² Addressing his freedom of expression rights, “the Commission [considered] that in the present case the question as to whether artistic expression enjoys more extensive protection, under Article 10, than any other form of expression can remain open”.⁸³ The quote above is important because it created the notion of possibly different perception and treatment of artistic expression under Article 10.

Even though only *Muller’s* case had explicitly recognized artistic expression as one protected under the Convention, the Court was not sure about the wider protection of artistic expression in the case of *N. v. Switzerland*. The applicant was convicted for vandalising and his case did not

⁸¹ The case of *Handyside v. The United Kingdom* was argued by the author as an art-related issue that ought to be protected by the Convention. Nevertheless, the Commission’s approach to *Handyside* with the view that the contents of the book intended for children would be *inter alia* morally harming and encouraging criminal behaviour in children; therefore, there was no violation of Article 10. Full case: *Handyside v. the United Kingdom*, Application No 5293/72, 7 December 1976.

⁸² *N v. Switzerland*, Application No 9870/82, Commission Report, 13 October 1983, p. 210.

⁸³ *ibid.*, p.212.

really achieve any concrete goals other than became a historically known case for the times before artistic expression was even recognised by the Court.

Muller's case set an interesting precedent. The Commission decided that the actions of the government were in violation of the artists' freedom of expression; however, the judgement was reversed.

Muller and Others v. Switzerland, 1988

The facts of Muller's case are as follows: Josef Felix Muller together with nine other artists have displayed the artworks in question on several occasions since 1981 in private galleries and museums.⁸⁴ "In 1981, the nine last-mentioned applicants mounted an exhibition of contemporary art in Fribourg at the former Grand Seminary, a building due to be demolished".⁸⁵ Muller displayed three large paintings there within the period of three nights. The advertisements of the exhibition had been made and the photographic reproduction of the paintings had been included in the catalogue specifically created for the exhibition.⁸⁶ On the day of the official opening, the prosecutor, acted on information about the violent reaction to the paintings, brought the investigation charges that the paintings had an obscene character and infringed freedom of religious belief - both ille-

⁸⁴ Muller and Others v. Switzerland Application No 10737/84, 24 May 1988, at para 9.

⁸⁵ Ibid., at para 10.

⁸⁶ ibid., at para 11.

gal under the Criminal Code.⁸⁷ The investigating judge “had the disputed pictures removed and seized”.⁸⁸ The applicants were fined and the artworks were confiscated.⁸⁹

The Commission, as was mentioned in the report of 8 October 1986, “took the view that there had been a breach of [Article 10] in respect of the confiscation of the paintings (by eleven votes to three) but not in respect of the conviction (unanimously)”.⁹⁰ The Commission took a positive view that the confiscation indeed exceeded the possible discretion of the state. The Court, however, reversed the positive judgement.

Being the first judgement on artistic expression, the Court famously noted that Article 10 “includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds”.⁹¹ This gave instant recognition to artistic expression in general and has been explicitly cited in the Court’s case-law from there.

The Court approached the issue of applicants’ conviction with the proportionality test. At first, it did confirm that the infringement has been prescribed by law. ECHR acknowledged the impossibility to give a full definition of obscenity in universal terms due to “the need to avoid excessive rigidity and to keep pace with changing circumstances [which] means that many laws are in-

⁸⁷ Muller and Others v. Switzerland., at para 12.

⁸⁸ *ibid.*, at para 13.

⁸⁹ *ibid.*, at para 14.

⁹⁰ *ibid.*, at para 24.

⁹¹ *ibid.*, at para 27.

evitably couched in terms which, to a greater or lesser extent, are vague”.⁹² Based on the fact that the national court issued a number of similar and consistent judgements in this regard, the Court found it substantial to satisfy the “prescribed by law” part of the test.⁹³ Secondly, the legitimacy of the aim pursued, namely protection of morals, also fit the test’s requirements. Thirdly, to assess the necessity in a democratic society, the Court claimed that the presence of “pressing social need” implies the discretion given to the state and found such discretion to be proportional to the aim pursued. Most importantly, the Court stated that

...Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.⁹⁴

The statement above is now one of the general principles applied to almost all artistic expression cases to prove the importance of such expression.

It is also important to mention that the Court emphasized the “duties and responsibilities” that freedom of expression implies and the fact that when it comes to protection of public morals, a wide margin of appreciation is given.⁹⁵ As of the confiscation, the Court claimed that “the first applicant was deprived of his works for nearly eight years, but there was nothing to prevent him

⁹² Muller and Others v. Switzerland, at para 29.

⁹³ *ibid.*, at para 29.

⁹⁴ *ibid.*, at para 33.

⁹⁵ *ibid.*, at para 34.

from applying earlier to have them returned”⁹⁶; hence, the judgement was reversed. There was no violation of Article 10 found by the European Court of Human Rights.

The importance of this case is tremendous. First, it shows the less positive approach by the Court rather than the one of the Commission. When the Commission found the violation of the right, the Court stated that the infringement was not arbitrary or unlawful. However, the protection of morals that is a legitimate aim that very often gives wider margin of appreciation of the states is a concept to which the member states have not yet established a “uniform” concept to.⁹⁷ The Court itself recognised such issue in its Muller’s judgement; however, such reliance on unidentified concept of morality is problematic. According to Nowlin,

...these decisions are problematic not simply because they rely logically upon an undefined, ill-defined, or simply contentious notion of morals, but also because they can be seen to conflict with the ECHR’s firm commitment to “pluralism, tolerance and broad-mindedness.”⁹⁸

As long as there is no uniform concept of morals - what if it will never be? - the Court gives wide discretion to the states when they claim to aim at protecting morals. In situations like these, there can not be any consistency imagined at all when seeking justice, other than the Court’s consistency at giving wide discretion in those situations.

⁹⁶ *ibid.*, at para 43.

⁹⁷ *Handyside v. United Kingdom*, at para 49.

⁹⁸ Christopher Nowlin, “The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms.” *Human Rights Quarterly* 24 (2002), p. 264.

Second, the case is extremely important for studying artistic expression within the Council of Europe because this particular case gave recognition to artistic expression as a type of expression protected by the Convention. Even though in this case the decision was not made in favour of the applicants, it created the entire “freedom of artistic expression” concept within the meaning of Article 10. Lastly, as in *Handyside*, the Court emphasized that any expression, including artistic expression, implies “duties and responsibilities”, scope of which depends on the situation and means used.⁹⁹

While the case law on the subject was still developing, the Court obviously could not touch upon every single issue. However, protection of morals of others as a justification in the very first case already seems problematic as to the protection of artistic expression as such. While the same argument could have made when arguing political expression, that one would not have appeared convincing for the Court. Regardless, the importance of those duties and responsibilities discussed in *Muller*, as well as more concise application of the standard or the emergence of such standard is evident from the following artistic expression case.

Otto-Preminger-Institut v. Austria, 1994

A private Austrian audiovisual media association aimed at promotion of creativity, communication and entertainment¹⁰⁰ announced that it would show six films that included satirical tragedy depicting “trivial imagery and absurdities” of Christianity available for general public charging

⁹⁹ *Handyside*, at para 49.

¹⁰⁰ *Otto-Preminger-Institut v. Austria*, Application No 13470/87, 20 September 1994, at para. 9.

admission fee.¹⁰¹ After the request of Roman Catholic Church and after a private screening in front of the duty judge, the public prosecutor filed an application for seizure of the films for "disparaging religious doctrines".¹⁰² "The Court of Appeal considered that artistic freedom was necessarily limited by the rights of others to freedom of religion and by the duty of the State to safeguard a society based on order and tolerance".¹⁰³ "...The Regional Court order the forfeiture"¹⁰⁴ and concluded that:

...Artistic freedom cannot be unlimited. The limitations on artistic freedom are to be found, firstly, in other basic rights and freedoms guaranteed by the Constitution (such as the freedom of religion and conscience), secondly, in the need for an ordered form of human coexistence based on tolerance, and finally in flagrant and extreme violations of other interests protected by law...¹⁰⁵

The European Commission of Human Rights reviewed the case and in the report of 14 January 1993 concluded that there indeed was a violation of Article 10 in regard with the seizures and the forfeiture of the film.¹⁰⁶

¹⁰¹ Otto-Preminger-Institut v. Austria, at para 10.

¹⁰² Ibid, at paras. 11 and 12.

¹⁰³ Ibid., at para 13.

¹⁰⁴ *ibid.*, at para 16.

¹⁰⁵ *Ibid.*, at para 16

¹⁰⁶ *Ibid.*, at para 32.

The government requested the Court to review the application and asked to review the admissibility of the case based on the six-months-rule^{107,108} The Court denied the claim of the Government and found the case admissible; it proceeded to the merits. ECHR, when assessing the legitimacy of the infringement, found it to be prescribed by law¹⁰⁹, the legitimate aim under Article 10 in this case was found to be “the protection of others”.¹¹⁰ When assessing the necessity of such infringement in a democratic society, the Court mentioned several things. First, citing *Handyside* yet again, it claimed that freedom of expression under the Convention implies “duties and responsibilities” carried by the beneficiary of the right,

...amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.¹¹¹

The Court stated that it is impossible to define to what extent such infringement can be legitimate when it comes to the balance between freedom of expression and freedom of religious belief; therefore, certain margin of appreciation is granted to the member states.¹¹²

¹⁰⁷ According to the European Convention of Human rights, Article 35 (1) on Admissibility criteria: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken”.

¹⁰⁸ *Otto-Preminger-Institut v. Austria*, at para 33.

¹⁰⁹ *ibid.*, at para 44-45.

¹¹⁰ *ibid.*, at paras 48.

¹¹¹ *ibid.*, at para 49.

¹¹² *ibid.*, at para 50.

Applying the principles mentioned above, in regards with the seizure of the film - the Court claimed that although the access to the screenings was restricted based on age and admission fee, the mere fact that the basic contents and the nature of the film were advertised publicly made it enough to consider it a “public offence”.¹¹³ The Strasbourg Court, agreeing with the national courts that “did not consider that [the film’s] merit as a work of art or as a contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction”¹¹⁴ found no violation of Article 10. Citing *Handyside*, the Court found the forfeiture of the film lawful under Article 10 of the Convention.

In this case the Court found that the duties and responsibilities in cases of clashes between freedom of expression and freedom of religion imply that offensive to religion expressions do not contribute to the public debate. Here the Court found that the feelings of religious people are more important than the applicants’ right to freedom of artistic expression. The Court affirmed such reasoning in the next case where the question was between the importance of artistic expression and religious sensitivity. It is quite problematic that the Court finds religious sensitivities more important in a democratic society. At first, no-one was forced to go see the films mentioned in the case - everyone willing to go would have been charged with the admission fee. At second, stating that the advertisements did constitute public offence is a potential for creating a chilling affect on others. While the Commission found a violation of article 10, the Court disregarded its reasoning and created a precedent for restricting artistic expression in the cases of clashes between artistic and religious freedoms. The next case continues the illustrating the diffi-

¹¹³ *Otto-Preminger-Institut v. Austria*, at para 54.

¹¹⁴ *ibid.*, at para 56.

cultities where between the religious sensibilities and artistic expression are at stake, freedom of expression instantly loses.

Wingrove v. The United Kingdom, 1996

Nigel Wingrove, a film director, wrote a script and directed a no-dialogue movie containing St. Teresa of Avila, a nun that appears to have “intense erotic arousal” with a woman, the nun’s psyche, and Jesus Christ.¹¹⁵ “...The viewer has [almost] no means of knowing from the film itself that the person dressed as a nun...is intended to be St. Teresa or that the other woman who appears is intended to be her psyche”.¹¹⁶ The applicant submitted the movie to the British Board of Film Classification for a classification certificate to be able to lawfully sell the movie but the application was rejected for blasphemy.¹¹⁷

After exhausting domestic remedies, the applicant submitted the application to the European Commission of Human rights, which in its report of 10 January 1995 concluded that there had indeed been a violation of Article 10 of the Convention.¹¹⁸

The Court assessed the case with the proportionality test. Even though there is no certainty on the legal definition of blasphemy in English law, having been afforded the legal aid, the applicant

¹¹⁵ *Wingrove v. The United Kingdom*, Application No 17419/90, 25 November 1996, at paras 7-9.

¹¹⁶ *ibid.*, at para 10.

¹¹⁷ *ibid.*, at paras 11-13.

¹¹⁸ *ibid.*, at paras 32-33.

could foresee the movie to fall within the scope of blasphemy. Therefore, the Court inferred that the interference with the applicant's freedom of expression right was prescribed by law.¹¹⁹

Citing *Otto-Preminger-Institut v. Austria*, the Court concluded that the legitimate aim of the restriction was to protect the rights of others, namely Christian believers.¹²⁰

In assessing the necessity of the interference, there are two requirements to satisfy - to prove that there was "pressing social need" and that the interference was "proportionate to the aim pursued". The applicant argued that blasphemy laws are "incompatible with the European idea of freedom of expression" and concluded there was no pressing social need to ban a movie and the ban "of a video work that contained no obscenity, no pornography and no element of vilification of Christ" was disproportionate.¹²¹ For the Commission that found there was a breach of Article 10, the mere fact that the film at issue was not a feature film but a short video meant that it would have less public attraction.¹²² The Court stated that even though there are other European countries where blasphemy laws are still present, most of the member states are repealing them. Nevertheless, there is still no consensus on "legal and social orders" which makes it impossible to claim that "a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incom-

¹¹⁹ *Wingrove v. The United Kingdom*, at paras 43-44.

¹²⁰ *ibid.*, at paras 46 - 51.

¹²¹ *ibid.*, at para 54.

¹²² *ibid.*, at para 55.

patible with the Convention”.¹²³ Due to the fact that “it is the manner in which views are advocated rather than the views themselves which the law seeks to control”¹²⁴, the Court found it understandable that authorities banned the film having their margin appreciation in doing so. The Court, therefore, found no violation of Article 10 and reversed the Commission’s decision.¹²⁵

It is extremely fascinating to see that even though there was no pressing social need to ban a movie in a secular state, the sensitivity of Christian believers prevailed over the freedom of artistic expression of the applicant. At this point in time, the case-law of Strasbourg Court is quite consistent - when it comes to balancing freedom of art and religion, the Court tends to favour religion the most.

ECHR claimed in its case-law back in 1976 that Article 10 applies not only to the expressions that are favoured by the Government and the majority but also those ideas and expressions that “offend, shock or disturb the State or any section of the population”.¹²⁶ Nevertheless, that important part is not being challenged because it was not the idea itself that was inappropriate but the way it was delivered which was that offensive to the sensitivity of Christians.

Alinak v. Turkey, 2005

¹²³ Wingrove v. The United Kingdom, at para 57.

¹²⁴ *ibid.*, at para 60.

¹²⁵ *ibid.*, at para 64.

¹²⁶ Handyside, at para 49.

The applicant wrote a novel that was requested to be seized by the public prosecutor for inciting “hatred and hostility by making distinctions between Turkish citizens based on grounds of their ethnic or regional identity”¹²⁷; such request had been affirmed by the domestic courts.¹²⁸

When reviewing the application in Strasbourg, both parties agreed there was an interference with the applicant’s right under Article 10. The interference was found to be “prescribed by law”, the legitimate aim was considered to be “prevention of disorder and crime”.¹²⁹

The applicant claimed that his book was a fictional novel based on a real story. He also claimed that the authorities ordered seizure of his book without carefully looking into the content of it and assessing its fictionality.¹³⁰ The Government claimed that certain pages of the book were insulting against the security forces and could have been interpreted by the local population as inciting to hatred.¹³¹

The Court stated that based on its case law¹³² prior-restraints are not prohibited under the Article 10; however, such restraints are subject to “the most careful scrutiny by the Court”.¹³³ The Court

¹²⁷ Alinak v. Turkey, Application No 40287/98, 29 March 2005, at para 11.

¹²⁸ *ibid.*, at paras 11-19.

¹²⁹ *ibid.*, at paras 25-28.

¹³⁰ *ibid.*, at paras 29-30.

¹³¹ *ibid.*, at paras 31-33.

¹³² See also *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30; *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165.

¹³³ Alinak v. Turkey, at para 37.

claimed that certain passages in the book could indeed have been interpreted as inciting hatred and revolt; however, in the Court's eyes "the medium used by the applicant was a novel, a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media".¹³⁴ The Court continued that this fact limited the potential to lead to public disorder that the Government was trying to prevent.¹³⁵ Hence, the interference was disproportionate to the aim pursued and that was in breach of the Convention.

This case only partially took on the religious beliefs of the population; however, it represents an interesting reasoning that has become a precedent for a variety of cases that included literary works. The Court decided that a novel does not stand for a form of expression that can reach an amount of people that can lead to revolt or incite hatred. Interestingly enough, the Court later judged that poetry as well, as perhaps any literary form expression except for slogans on banners, does not attract enough people to be lawfully suppressed.

The next case only confirmed an already established tendency in the Court's reasoning when it comes to cases where expression is directed against religion. Even though the medium of the work chosen by the applicant was also a book that presumably only appeals to a small number of people, the Court did not find in favour of the applicant. This is an example when the Court does not deliver consistent judgments - if the claim is that a novel is such a form that does not attract too many people to incite anything, why doesn't the Court apply the same reasoning for other similar cases? Why then using such principle as a justification in the first place? If the Court ar-

¹³⁴ Alinak v. Turkey, at para 41.

¹³⁵ *ibid.*, at para 45.

gues that a monetary fine is not too strict as compared to conviction, which is true, it still does not make a lot of sense when talking about the protection of artistic expression in a democratic society as such.

I. A. v. Turkey, 2005

The applicant, a managing director of a publishing house, wrote a book where he expressed his views on “philosophical and theological issues in a novelistic style”.¹³⁶ An expert wrote a report accusing the applicant of criticizing religion, the public prosecutor based his indictment on the report and Criminal Code. The applicant questioned the impartiality of the expert and his report; domestic courts fined the applicant.¹³⁷

The Court in its judgement concluded that there was no dispute that the interference was “prescribed by law” and aimed to prevent disorder and protect morals and the rights of others.¹³⁸ The Court found that the passages mentioned in the case had shocking and provocative opinions and stated that, though secular, the Muslim majority of Turkish society could have been offended. Then taking into account that based on its case-law, novels are considered to attract only small amount of the audience; the Court still found since the measure taken was a fine and not seizure of the book, it was proportionate to the aim pursued.¹³⁹

¹³⁶ I.A. v. Turkey, Application No 42571/98, 13 December 2005, at para 5.

¹³⁷ *ibid.*, at paras 7-16.

¹³⁸ *ibid.*, at para 22.

¹³⁹ *ibid.*, at paras 29-32.

The Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert, an opinion has been expressed that “the time has perhaps come to “revisit” this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press”.¹⁴⁰

Here is the controversy - it is true that a book attracts less people and therefore can offend less people. At the same time, it is the Convention that protects the kinds of expressions that “offend, shock and disturb”. In any way, the Court still finds no violation of the applicant’s right to freedom of artistic expression because the measure taken was just a fine. Fines can be a symbolic penalty; however, interfering with freedom of expression should not be justified, based on the Court’s reasoning in other cases, even if it was in the form of a fine.

To prove the inconsistency of the reasoning, here is a different case of 2010 that does not touch upon religion but is considered to be purely artistic in the form of a book.

Akdas v. Turkey, 2010

The applicant published a translation of a French erotic novel that contains descriptions of sexual intercourse, sadomasochism, vampirism and pedophilia.¹⁴¹ National courts ordered seizure of the book and fined the applicant for “publishing obscene or immoral material liable to arise and exploit sexual desire among the population”.¹⁴²

¹⁴⁰ I.A. v. Turkey, Dissenting Opinion, at para 8.

¹⁴¹ Akdas v. Turkey, Application No 41056/04, 16 February 2010, Legal Summary.

¹⁴² *ibid.*

The Court, assessing the circumstances of the case, found that the interference with the applicant's rights under Article 10 was "prescribed by law" and the legitimate goal was "protection of morals".¹⁴³ Regarding the necessity of the interference, the Court claimed that when it comes to protecting morals of the population, member states are given a certain margin of appreciation. However, given the fact that it has been a century since the book was initially published, having been translated to a number of different languages, denying access to it in a particular language like Turkish exceeds the limits of the discretion. The Court called the book "a work belonging to the European literary heritage" and claimed that there was a violation of Article 10.¹⁴⁴

In this case the Court found in favour of the applicant even though the Government saw the book as one that can be offensive to the majority of the population. Perhaps due to the fact that the book did not touch upon protected freedom of religion rather than shocking ideas in the contents of the book; the Court found in favour of the applicant.

Yet again, if in *Muller*, the Court states that there is no "uniform" concept of morals among member states, when it comes to so-called "European literary heritage" - how is that being decided? If following the logic of *Muller* - the state was trying to protect the morals of its citizens, which is not being decided by the Court due to the lack of well defined concept of morals, this should have granted wider margin of appreciation. At the same time, the punishment, as in *I.A. v Turkey*, was also a fine - which in the eyes of the Court was not that big of a deal. Nevertheless,

¹⁴³ *Akdas v. Turkey*.

¹⁴⁴ *ibid.*

the Court goes against all the principles it applied in the previous cases and claims that “European literary heritage” is vital.

If put in a vacuum, the judgement seems to be just and makes a lot of sense as to the arguments. However, if we look at the case from the perspective of consistency of judgements, it becomes problematic. Not to mention the fact that the Court finds some art more important than other in its judgments. Most importantly, Strasbourg observers stated:

...if one would decide to go deeper in examining the test the Court used to determine whether the novel is part of European literary heritage, one would find it not convincing – even though the novel was first published in 1907, it was officially banned in France until 1970, and even though “*La Pléiade*” also includes classics of world literature, it has strong emphasis on works that were originally written in French.¹⁴⁵

The very last case in this category is a very controversial case against Russia. The Government claimed the actions of the applicants were inciting religious hatred; however, it was evident for the Court and all the third party interveners that the case was of a political nature rather than religious. Based on that fact, it is one of those cases when artistic expression overlap with political, which enjoys better protection; at the same time, the case is touching upon religious sensibilities and hatred.

Mariya Alekhina and Others v. Russia, 2018

¹⁴⁵ “What is the European literary heritage?”, StrasbourgObservers, accessed January 2019, <https://strasbourgobservers.com/2010/04/13/what-is-the-european-literary-heritage-2/>.

The applicants are members of a Russian feminist punk band, Pussy Riot. They performed “a series of impromptu performances of their songs [...] in various public areas in Moscow”.¹⁴⁶ The performances included dancing and singing the band’s songs, the content of most of which was responding to the political situation in Russia; the band’s signature outfits consisted of colourful balaclavas and dresses.¹⁴⁷ On one of those occasions they performed at the Christ the Saviour Cathedral. The song was directed against the endorsement by Patriarch Kirill of Putin’s presidency.¹⁴⁸ Church staff members dragged the band out of the altar; the entire performance lasted for less than two minutes.¹⁴⁹ The applicants were arrested in the following weeks. They were charged with inciting religious hatred and eventually imprisoned.¹⁵⁰ During the proceedings, the applicants were held in terrible conditions, they could not properly communicate with their lawyers due to the conditions they were held in in the courtroom, the transportation used was extremely small and did not allow for the applicants and the rest of the detainees to have an appropriate amount of space.¹⁵¹ The video of the performance as well as other video material of the band, that included their blog posts and other songs, were banned on the internet by the state for promoting religious hatred and being extremist.¹⁵²

¹⁴⁶ Mariya Alekhina and Others v. Russia, Application No 38004/12, 17 July 2018, at para 6.

¹⁴⁷ *ibid.*, at para 7-8.

¹⁴⁸ *ibid.*, at paras 11, 13.

¹⁴⁹ *ibid.*, at para 15.

¹⁵⁰ *ibid.*, at para 18.

¹⁵¹ *ibid.*, at paras 32, 36-37.

¹⁵² *ibid.*, at para 76.

The Court found that the described conditions in which the applicants were held and transported was inappropriate and constituted a violation of Article 3. The Strasbourg Court stated that the treatment of the applicants was indeed in breach of the Convention, was humiliating and degrading and not in line with the standards adopted by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.¹⁵³ The Court also found violation of Article 5(3) but found it unnecessary to address the remainder under Article 6 (1,3d).¹⁵⁴

Apart from bringing up the arguments by the applicants and the Government, a number of third-party interveners argued for and against the alleged violation of Article 10. The Court started its assessment by stating that there was indeed expression infringed in a “form of [both] artistic and political”.¹⁵⁵ It was found to be “prescribed by law” pursuing the legitimate aim of “protecting the rights of others”.¹⁵⁶ On the issue of the necessity of such infringement in a democratic society, the Court pointed out several things. First, the circumstances of the case reveal that the expression was a matter of public interest, which is a political expression that enjoys high level of protection under the Convention.¹⁵⁷ The Court added that

...holding an artistic performance or giving a political speech in a type of property to which the public enjoys free entry may, depending on the nature and function of the place, require respect for certain prescribed rules of conduct.¹⁵⁸

¹⁵³ Alekhina and Others v. Russia, at paras 135-150.

¹⁵⁴ *ibid.*, at paras 151-173.

¹⁵⁵ *ibid.*, at para 206-207.

¹⁵⁶ *ibid.*, at paras 208-210.

¹⁵⁷ *ibid.*, at para 212.

¹⁵⁸ *ibid.*, at para 213.

Nevertheless, due to the fact that the same kind of performance with the same song held at a different church has never initiated any kind of proceedings against the applicants and the fact that performance in question did not “disrupt any religious services”, caused no damage or injury, the punishment imposed was found to be “very severe”.¹⁵⁹

Second, the Court, considering the form of expression and its content, concluded that the medium chosen by the applicants, poetry rather than mass media, “could not be justified by the special security context otherwise existing in the case”.¹⁶⁰ Citing the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Court stated that artistic expression “should be considered with reference to its artistic value and context, given that art may be used to provoke strong feelings without the intention of inciting violence, discrimination or hostility”.¹⁶¹ The Court could not agree with any of the arguments made by the Government that the performance was inciting religious hatred.¹⁶²

According to Strasbourg Observers, “most importantly the judgment confirms that criminal prosecution and imprisonment for non-violent speech may have a chilling effect and amount as such

¹⁵⁹ Alekhina and Others v. Russia, at paras 214-215.

¹⁶⁰ *ibid.*, at para 220.

¹⁶¹ *ibid.*, at para 222.

¹⁶² *ibid.*, at para 225.

to a disproportionate interference of the right to freedom of expression in a democracy”,¹⁶³ and stated that:

...in principle, peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence..., and that interference with freedom of expression in the form of criminal sanctions may have a chilling effect on the exercise of that freedom, which is an element to be taken into account when assessing the proportionality of the interference in question...¹⁶⁴

The Court did not find any “relevant and sufficient” reasons for the applicants’ conviction in the national courts’ reasoning and found the measure taken to be disproportionate and in breach of the Convention.¹⁶⁵

Deciding on the proportionality of the ban of the video material produced by the band and available on the internet for being allegedly extremist, the Court stressed the failure of the national courts to examine the content and condemned them for relying solely on the experts’ reports.¹⁶⁶ On top of that, the decision was made without the applicants which means that they had no opportunity to contest the findings of the report which is incompatible with Article 10 of the Convention.¹⁶⁷

¹⁶³ “Pussy Riot, the right to protest and to criticise the President, and the Patriarch: Mariya Alekhina and Others v. Russia”, Strasbourg observers, accessed January 2019, <https://strasbourgobservers.com/2018/09/11/pussy-riot-the-right-to-protest-and-to-criticise-the-president-and-the-patriarch-mariya-alekhina-and-others-v-russia/>.

¹⁶⁴ Alekhina and Others v. Russia, at para 227.

¹⁶⁵ *ibid.*, at para 228.

¹⁶⁶ *ibid.*, at para 262-263.

¹⁶⁷ *ibid.*, at para 268.

The reasoning of Russian courts was based on the fact that the performance happened in the Church and was in line with the laws on “hooliganism”. However, going through the content, and as the Court noted, there was nothing in the song that could have been interpreted as inciting religious hatred, ruled in favour of the applicant. Perhaps if the song was indeed inciting religious hatred, the Court would have found freedom of religion to prevail over the expression again. Still, in the absence of a case like that so far and in the circumstances of the present case, the Court did not find reasons that justified the imprisonment of the applicants.

Based on the relevant case law of the European Court of Human Rights, it is safe to infer that the judges do find it important to revisit the case-law when writing dissents; however, when it comes to artistic expression and respect for religious sensitivity, the Court ruled in the majority of cases that religion would prevail. Except for the case of *Mariya Alekhina and Others*, where the Court actually took position that the expression was not motivated by religious hatred rather than the venue of the expression was strategically selected to reflect on current political situation in the country. When deciding on the merits, however, the Court also considers the medium chosen by an applicant - whether it is a book, a movie or any other. Perhaps after the Resolution of Parliamentary Assembly, the Court will take artistic expression in its artistic value.

Before the new Court, the Commission held a slightly different view. According to Polymenopoulou,

...until its merging with the Court, the Commission showed consistency in excluding all religious sensibilities from the Convention, stating unequivocally that the “members of a

religious community must tolerate and accept the denial by others of their religious beliefs”.¹⁶⁸

The cases of *Otto-Primenger* and *I.A.* were decided in favour of the applicants but were later reversed by the new Court that took a more conservative view. The Court and the Commission happened to come to different conclusions and in the new Court’s reasoning in case-law, it is evident that expressions of offensive nature directed against religious communities should be avoided. This reasoning undermines the strength of artistic expression and holds the view that art can be offensive in a way that it can be restricted.

Seems to me that the Commission was more keen on delivering consistent judgements rather than the Court - some principles are being followed, in similar cases they can be absolutely omitted. The next subchapter about satirical expression is one of the brightest examples of the inconsistencies in the Court’s judgements.

¹⁶⁸ Polymenopolou, “Does One Swallow Make a Spring?”, p.522.

3.2. Freedom of Artistic Expression and Satire

Previously mentioned Resolution made by PACE, among other things also stated the following:

...the culture of critical dispute and artistic freedom has a long tradition in Europe and is considered as positive and even necessary for individual and social progress. Only totalitarian systems of power fear them. Critical dispute, satire, humour and artistic expression should, therefore, enjoy a wider degree of freedom of expression and recourse to exaggeration should not be seen as provocation.¹⁶⁹

There is recognition among member states and the world in general on the offensive nature of satire. The following case marked an interesting finding in the case-law of Strasbourg Court.

Vereinigung Bildender Künstler v. Austria, 2007

The applicant is an association of artists that exhibited, among other paintings, a work of art that had images of a number of famous Austrian public figures having intercourse with each other, and other famous figures, including, for example, Mother Teresa. The painting was of satirical nature - the bodies were painted with certain exaggerations, the faces were blow-ups from newspapers. Among those people was Mr. Meischberger, who at the time was a member of the National Assembly.¹⁷⁰ During the exhibition, the painting was damaged and Mr Meischberger's figure got covered in red paint.¹⁷¹ The Court of first instance, after Mr. Meischberger brought up the proceedings, claimed that the association's right to freedom of artistic expression outweighed Mr.

¹⁶⁹ Assembly debate on 28 June 2006, at para 9.

¹⁷⁰ *Vereinigung Bildender Künstler v. Austria*, Application No 68354/01, 25 January 2007, at paras 7-8.

¹⁷¹ *ibid.*, at para 11.

Meischberger's personality rights as a public figure.¹⁷² The Appeals Court found that "the limits of artistic freedom were exceeded when the image of a person was substantially deformed by wholly imaginary elements without it being evident that the picture aimed at satire or any other form of exaggeration" and ordered the applicants to pay the fine.¹⁷³ The Supreme Court decided that "a picture of Mr. Meischberger had been used in a degrading and insulting manner" and rejected the appeal by the applicants.¹⁷⁴

The Court found that the interference with the applicant's right to freedom of expression has been "prescribed by law" and the legitimate aim was the protection of "the reputation and rights of others".¹⁷⁵ Assessing the necessity of the interference, the Court claimed that national Courts admitted that the images were not reflecting reality since only the faces were taken from the newspapers, eyes were covered in black and the bodies were painted unrealistically which was found to be satirical. The Court continued,

...that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.¹⁷⁶

¹⁷² *Bildender Künstler v. Austria*, at paras 13-14.

¹⁷³ *ibid.*, at para 16.

¹⁷⁴ *ibid.*, at para 17.

¹⁷⁵ *ibid.*, at paras 28-29.

¹⁷⁶ *ibid.*, at para 33.

Examining the case with particular care, the Court stated it is somewhat impossible to imagine that an average person will consider the depiction as a real representation of Mr. Meischberger's private life and concluded that the measure taken did not allow the applicants for displaying any kind of artworks;¹⁷⁷ therefore found it disproportionate to the legitimate aim.

The case gave rise to the nature of satire and made it not only a part of artistic expression but also social commentary which expanded the possible use of satire as a defense in freedom of expression cases. The next case confirmed this judgement.

Kulis and Rozycki v. Poland, 2009

The applicants were the owner of a publishing house and editor in chief of a weekly magazine and a supplement for children. An article was published with a cartoon on the first page of the magazine, both referring to and criticising an ad campaign for potato chips calling a dog from the ad "a murderer".¹⁷⁸ Next to the article there was

...a small cartoon featuring two cats holding a packet with the word "crisps" on it and the dog *Reksio* in the background. One cat holds a piece of paper with the slogan "Reksio murderer" apparently taken out from the packet and says to the second cat - "surely, he is sometimes unpleasant, but a murderer?!"¹⁷⁹

¹⁷⁷ *Bildender Künstler v. Austria*, at paras 35-37.

¹⁷⁸ *Kulis and Rozycki v. Poland*, Application No 27209/03, 6 October 2009, at paras 6-8.

¹⁷⁹ *ibid.*, at para 9.

The owner of the ad filed a civil claim for protection of personal rights.¹⁸⁰ The national court fined the applicants and ordered them to write an apology. The appeal was dismissed.¹⁸¹

The applicants claimed that the cartoons were of satirical nature and within the limits accepted criticism in a democratic society.¹⁸² The Government submitted that by calling the product “muck” in the cartoon, the applicants discredited the product without any factual basis.¹⁸³

The Court found that the interference was “prescribed by law” and the legitimate aim was protection of “the reputation or rights of others”.

Assessing the necessity, the Court pointed out that the states enjoy margin of appreciation “to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation”.¹⁸⁴ The applicants claimed that “the publication had contributed to a public debate on the question of the ill-considered and harmful advertising campaign”¹⁸⁵, the Court noted that the form of expression was a “satirical cartoon” that was not sufficiently considered by the national courts as such.¹⁸⁶ After that the Court noted that it “must exercise caution when the measures taken by the national authorities are such as to dissuade the press from taking part in

¹⁸⁰ Kulis and Rozycki v. Poland, at para 10.

¹⁸¹ *ibid.*, at para 11-13.

¹⁸² *ibid.*, at paras 21-22.

¹⁸³ *ibid.*, at para 26.

¹⁸⁴ *ibid.*, at para 35. Originally in *Steel and Morris v. the United Kingdom*, no. [68416/01](#), § 94, ECHR 2005-II.

¹⁸⁵ *ibid.*, at para 37.

¹⁸⁶ *ibid.*, at para 37.

the discussion of matters of public interest”.¹⁸⁷ Talking about the words used in the headings of the cartoon, the Court found that they were indeed exaggerated and perhaps the tone was criticizing; however, it was reflecting the same level of insensitivity used by the advertising campaign. The Court found that the reaction of the national authorities was disproportionate to the aim pursued and found that there was a breach of Article 10 of the Convention.¹⁸⁸

In this particular case, the Court affirmed the Bildender judgement and the main defence in the Court’s reasoning was the fact that satirical cartoon was treated as such and also was based on the content created by the ad campaign owner.

At the same time, satire is not a complete defense in cases of artistic expression. For example, when satirical expression can be interpreted as supporting extremism, treating of such expression can be problematic. For example, in the following case, the applicant lost because his satire was directed at the shocking events of 9/11.

Leroy v France, 2008

The applicant is a cartoonist who submitted cartoons representing Twin Towers attack with a slogan of a famous brand: “We have all dreamt of it... Hamas did it”.¹⁸⁹ The drawing was published two days after the attack. The applicant and his publisher were charged with “condoning terror-

¹⁸⁷ Kulis and Rozycki v. Poland, at para 37

¹⁸⁸ *ibid.*, at paras. 39-40.

¹⁸⁹ Leroy v. France, Application No 36109/03, 2 October 2008, Legal Summary, Facts.

ism and complicity” for reasons of “glamorizing the act of death”.¹⁹⁰ The interference was “prescribed by law” and pursued several legitimate aims such as public safety, the prevention of disorder and the prevention of crime.¹⁹¹ The Court stated that the events of 9/11 shocked the world and the debates about those contributed to the notion of general interest. However, the applicant’s drawings at the time of the publication with the text combined “could be seen not merely to criticize American imperialism, but to support and glorify its violent destruction”.¹⁹² The Court emphasized the fact that the form of expression chosen by the applicant was satire which aims to provoke and cause agitation and emphasized the duties and responsibilities of those exercising their freedom of expression.¹⁹³ Taking the timing into consideration that only increased the applicant’s responsibilities and political sensitivity of the region, the Court found the measures taken, namely a modest fine, not disproportionate to the aim pursued and stated there was no violation of Article 10.¹⁹⁴

In this case, the duties and responsibilities of the applicant were seen as more important and the defense of satire was not accepted. Nonetheless, satirical expressions on political topics of public interests, against public figures are still enjoying high level of protection by the Convention.

Eon v. France, 2013

¹⁹⁰ Leroy v. France.

¹⁹¹ *ibid.*, Article 10.

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

The applicant was arrested for displaying a small placard saying “Get lost, you sad prick” while “the President’s party was about to pass by”.¹⁹⁵ The wording was referring to the phrase that the President himself made publicly which was widely covered by the media and on the Internet.¹⁹⁶ He was arrested and later was found guilty of insulting the President and was given a warning.¹⁹⁷ After appealing the decision, the court gave him a fine. It was decided the applicant did not act in good faith. The Court of Cassation declined his appeal.¹⁹⁸

The Court found the interference to be “prescribed by law” and the legitimate aim was the “protection of the reputation of others”.¹⁹⁹ The Court found that the expression in the circumstances of the case was indeed a political expression which is given the highest level of protection. Apart from that, the Court recognized that the expression was made in a satirical form which is recognized by the Court as “artistic expression and social commentary” which by its nature aims to “provoke and agitate”.²⁰⁰ The Court found that the criminal measure could have created a chilling effect on others and therefore was not proportionate to the legitimate aim pursued.²⁰¹

Based on the case law discussed in this subchapter, it is evident that satirical expression enjoys somewhat higher level of protection within the concept of artistic expression. However, satire

¹⁹⁵ Eon v. France, Application no 26118/10, 14 March 2013, at para 6.

¹⁹⁶ *ibid.*, at para 7.

¹⁹⁷ *ibid.*, at para 8-9.

¹⁹⁸ *ibid.*, at paras 10-15.

¹⁹⁹ *ibid.*, at para 48-49.

²⁰⁰ *ibid.*, at para 59-60.

²⁰¹ *ibid.*, at paras 61-62.

does not extend to the touching events of terrorism, does not defend against the support of it. The “duties and responsibilities” as a concept is still applicable in the cases of satirical expression but those will be determined on a case-by-case basis, taking the timing and the events into consideration. Lastly, satirical expressions aimed at topics of public interest and/or mocking public figures is being protected not only as satirical form of speech but also as political.

3.3. Freedom of Artistic Expression against Reputations of Others

Artistic expression is often found in the cases where the Government's infringement was based on the aim of protection of reputation of others. Whereas respect for religion is usually used as the aim of protecting morals or rights of others, this category represents a different kind of situation. Most of the cases are argued to defame one's reputation - both private and public figures. It is the aim of this subchapter to find out the Court's reasoning in those cases and look for consistency in the judgements.

Vereinigung Bildender Künstler v. Austria, 2007

The case of *Bildender*, which has previously been discussed in connection to satire, also touches upon alleged violation of the reputation of others. The facts have been presented before but when assessing the alleged defamation of Mr. Meischberger, the Court stated that it is hard to imagine that the painting can be seen as a real depiction of Mr. Meischberger's private life. Additionally, it was noted by the Court that his figure was covered in red paint after the incident which made his figure somewhat unrecognizable. On top of that, the Court concluded that at the time of the exhibition Mr. Meischberger was one of the "less well known amongst all the people appearing on the painting and nowadays, having retired from politics, is hardly remembered by the public at all".²⁰² The most important part of the judgement for this particular research is the following:

...the Austrian courts' injunction was not limited either in time or in space. It therefore left the applicant association, which directs one of the best-known Austrian galleries specialising in contemporary art, with no possibility of exhibiting the painting irrespec-

²⁰² *Bildender Künstler v. Austria*, at para 35.

tive of whether Mr Meischberger was known, or was still known, at the place and time of a potential exhibition in the future.²⁰³

The Court found that the interference was disproportionate to the aim pursued; therefore, there was a violation of Article 10 of the Convention.

This case is particularly interesting due to the fact that the Court rightly stated that the applicant's figure was barely visible after the incident with the paint, and of all the public figures on the painting he was one of the least known. The main idea here was that the penalty of the national Courts did not allow the art museum for displaying artworks due to this decision; Strasbourg Court did not find that penalty reasonable. As such, however, there is some consistency with the overall freedom of expression concept in this case due to the fact that the one claiming to be defamed was a public figure; therefore, ought to be more tolerant to mockery of his figure.

Feldek v. Slovakia, 2001

The Feldek case is not a case where artistic freedom has been infringed or even discussed by the Court. It is, nevertheless, an interesting case because the discussed statements made by the applicant included a form of a poem.

A poem written by the applicant had been published in various newspapers following the appointment of the new Minister of Culture and Education of Slovakia, allegedly referring in its verses to the newly appointed. Later on a statement made by the applicant was published in

²⁰³ Bildender Künstler v. Austria, at para 37.

which the applicant accused the new Minister of having a “fascist past”.²⁰⁴ The Minister sued for defamation and violation of his privacy; national courts found that the poem and statement made by the applicant were indeed defamatory and “value judgements”.²⁰⁵

The applicant submitted his application to the European Court of Human Rights claiming, among other things, that his rights under Article 10 had been violated. According to the Court, the interference was found to be “prescribed by law” and the legitimate aim was found to be “the reputation or rights of others”.²⁰⁶

Assessing the necessity of the infringement, the Court completely distanced itself from seeing any artistic value in the poem. Due to the fact that the contents of both the poem and the statement were obviously political, they were treated as political speech. The Court did find a violation of applicant’s rights under Article 10.²⁰⁷

The Court never even mentioned the word “poem” in its judgement. Obviously, it was a case about defamation of a public figure and not even the applicant claimed that partially the rights of his artistic expression had to be recognized. It is now that an inference that can be made: when the contents of an artistic form in question, supplied with a non-artistic statement, are clearly political without any doubts, the Court recognizes the above mentioned forms as political speech. Political speech is well-known for having the highest degree of protection under the Convention;

²⁰⁴ *Feldek v. Slovakia*, Application No 29032/95, 12 July 2001, at paras 9-15.

²⁰⁵ *ibid.*, at paras 16-41.

²⁰⁶ *ibid.*, at paras 35-38.

²⁰⁷ *ibid.*, at paras 53-90.

therefore, the case has a higher chance of being successful for the applicant. The Court found the violation of the applicant's freedom of expression.

The fact, as in *I.A. v Turkey*, that the Court did not consider this poem to be protected as artistic expression, might have been a factor why the case was decided in favour of the applicant. At the same time, if a poem or a novel does not attract wide audiences - could that justification been applied in this case? Most likely not, since the poem in question actually did attract a wider audience. The *Feldek* case was a clear example of political speech presented in artistic form and was protected as such. On the contrary, the cases of fictional works that touch upon real people, whether politicians or not, does represent a different kind of outcome for the Court's reasoning.

Lindon, Otchakovsky-Laurens and July v. France, 2007

Lindon, the author, and his publisher were both convicted and fined for publishing a novel that was based on a real story of two Arab youths killed by far-right militants. The book focuses on a real person named Le Pen. National courts found the book to be defamatory. A statement in a newspaper written in support of the book revealed the allegedly defamatory passages of the book. The author, the book publisher and the newspaper publisher were convicted and fined by the national courts.²⁰⁸

The first two applicants submitted to the Court that the law applied was not "foreseeable" enough. They also claimed that the conviction for publishing a fictional book was not necessary

²⁰⁸ *Lindon, Otchakovsky-Laurens and July v. France*, Application No 21279/02 36448/02, 22 October 2007, at paras 10-27.

in a democratic society.²⁰⁹ The third applicant submitted that his conviction was in breach of Article 10 of the Convention.²¹⁰ The Government argued that the case-law made the applicable law “foreseeable” and that there were sufficient reasons to protect “the reputation or rights of others”.²¹¹

The Court, addressing the “foreseeability” of the law stated that even though the case-law stated by the Government was perhaps outdated, the first two applicants “...being professionals in the field of publishing it was incumbent on them to apprise themselves of the relevant legal provisions and case-law in such matters, even if it meant taking specialized legal advice”.²¹² Hence, the Court found that the interference was “prescribed by law”.²¹³ The legitimate aim was found to be the protection of “the reputation and the rights of others”.²¹⁴

Assessing the necessity of the measure taken, the Court inferred, based on the facts of the case, content of the book and context it was referring to, that the book contributed to the notion of political public debate, which particularly limits the discretion of the State.²¹⁵ The Court also noted that “the penalty imposed on the applicants by the domestic court was not directed against the

²⁰⁹ *Lindon, Otchakovsky-Laurens and July v. France*, at para 32.

²¹⁰ *ibid.*, at para 33.

²¹¹ *ibid.*, at paras 35-36.

²¹² *ibid.*, at para 42.

²¹³ *ibid.*, at para 43.

²¹⁴ *ibid.*, at para 44.

²¹⁵ *ibid.*, at para 48.

arguments expounded in the impugned novel but only against the content of certain passages”.²¹⁶ The Court stated that the wording in the novel was too harsh and was not based on facts; therefore, no matter the political struggles, “the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention”.²¹⁷ The Court also found the penalty to be proportionate to the aim pursued.²¹⁸ With regards of the conviction of the third applicant, the Court found that in cases of a debate that falls far from being just academic, “there [is an] obligation to carry out a meaningful investigation before making particularly serious accusations such as incitement to commit murder, and to avoid offensive expressions”.²¹⁹ Due to the fact that the fine was moderately low, the Court found that the measure taken against the applicant was within the meaning of Article 10.²²⁰ The Court found no breach of the Convention in the particular case.

Joint partly dissenting opinion of Judges Rozakis, Bratza, Tulkens and Sikuta, made very interesting statements. Among other things, though confirming that artistic expression should not “be immune from all criticism and unbridled, but [...] this aspect should be given due consideration”.²²¹ Here, the Court did not take the form of the expression into consideration that perhaps led to such a conclusion.

²¹⁶ *Lindon, Otchakovsky-Laurens and July v. France*, at para 50.

²¹⁷ *ibid.*, at para 57.

²¹⁸ *ibid.*, at paras 59-60.

²¹⁹ *ibid.*, at para 64.

²²⁰ *ibid.*, at para 68.

²²¹ *ibid.*, Dissenting Opinion, at para 1.

The case of *Eon v France* that has been discussed in the previous subchapter that included satirical forms of expression was also a case of protecting the reputations of others, namely the President. However, as it was in *Kulis and Rozycki*, the Court's reasoning was based on the fact that the satirical form was not violating the reputation of others because it has been based on the same content produced by the person claiming for defamation. The Court also found in favour of the reputation of the organization, in which the applicants were working - the satire in this case was of no help as to the defense.

Palomo Sanchez and Others v. Spain, 2011

The applicants were salaried workers who brought proceedings against the company they worked in to be covered with social security. The coverage was confirmed by the national courts; however, the non-salaried workers testified against them. The applicants set up a trade union and published a newsletter. The cover of the newsletter contained a caricature cartoon depicting a Human Resources manager and other workers, including non-salaried workers. The newsletter included two articles with caricatures and was "distributed among the workers" and displayed on the company's premises. The applicants were dismissed for serious misconduct. They challenged the dismissal in court which found the punitive action to be justified. Constitutional Court stated the appeal was inadmissible.²²²

²²² Palomo Sanchez and Others v. Spain, Application Nos 28955/06, 28957/06, 28959/06 and 28964/06), 12 September 2011, at paras 11-18.

Citing several cases, the Court recognized that “the State has a positive obligation to protect the right to freedom of expression, even against interference by private persons”.²²³ Nevertheless, the Court found that the words used in the articles were more insulting than criticizing; therefore, agreed with the national courts’ decision.²²⁴ The Court also found that the measure taken was not disproportionate given the nature of labor relations and found no violation of Article 10.²²⁵

The dissenting opinion included this particularly interesting remark:

In other cases, the Court has recognised the satirical nature of an expression, publication or caricature. In refusing to take that nature into account in the present case, the judgment gives the curious impression of placing trade-union freedom of expression at a lower level than that of artistic freedom and of treating it more restrictively.²²⁶

As in the case of *Lindon*, the Court did not give proper consideration to the fact that the form used to express opinion was satire, which enjoys certain form of protection, perhaps enough to be protected by the Convention in these cases as well. However, the Court found that the context of labor relations was more defining in this case rather than the form of the expression used.

The next case has quite similar reasoning to *Bildener*, except for the fact that the case was not touching upon the reputation of public figures but private. Regardless, the consistent reasoning

²²³ *Palomo Sanchez and Others v. Spain*, at para 59. See also *Fuentes Bobo v. Spain*, no. 39293/98, 29 February 2000, at para 38; and *Özgür Gündem v. Turkey*, no. 23144/93, at paras 42-46; and *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 133, 14 September 2010, at para 106.

²²⁴ *ibid.*, at para 67.

²²⁵ *ibid.*, at paras 76-79.

²²⁶ *Palomo Sanchez and Others v. Spain*, Application Nos 28955/06, 28957/06, 28959/06 and 28964/06), 12 September 2011, Dissenting Opinion, at para 11.

of the assumption that an average person would not take the story as a real depiction of someone's private life is prevailing over certain facts used to create this fictional novel.

Jelsevar and Others v. Slovenia, 2014

The applicants complained that their privacy rights were violated by a fictional novel that partially resembled the lives of the applicants and one of the applicant's deceased mother.²²⁷ The Court claimed that "artistic freedom enjoyed by, among others, authors of literary works is a value in itself, and thus attracts a high level of protection under the Convention".²²⁸ The Court agreed with the reasoning by the national courts that an average reader would not regard the book as real story about real people but as a work of fiction; the tone and expressions used in the book were not found to be offensive or derogatory.²²⁹ The Court found the application inadmissible.

For the category of protecting the reputations of others, there are several inferences to be drawn. In certain cases, the medium of form of artistic expression can avoid any discussion when deciding on merits. In certain cases the Court might recognize the artistic nature of the expression but would not treat it as such that would lead to a conclusion seen as negative towards artistic expression. In the cases where the Court does acknowledge the case concerning artistic expression and being able to state that certain facts would not be interpreted by the average reader as real descriptions of one's private life, the case would be decided in favour of the applicant. As evident

²²⁷ *Jelsevar and Others v. Slovenia*, Application No 47318/07, 11 March 2014, at para 24.

²²⁸ *ibid.*, at para 33.

²²⁹ *ibid.*, at paras 35-37.

from the Palomo Sanchez case, the context in which the speech occurs can define the whole outcome of the case as to specific nature of the relations will be given due consideration.

3.4. Freedom of Artistic Expression as Conduct

Several cases have been decided by the Court arguing that the Convention not only protects speech as such but also artistic forms of expression that can be better described as conduct. There is some consistency in the case law; however, the number of cases is not that big as compared to the cases when religion is involved. The first case in this category is a Hungarian one.

Tatar and Faber v. Hungary, 2012

The applicants displayed dirty clothing on a rope representing the “dirty laundry of a nation” in response to certain political events in the country and claimed it to be a “political performance”.²³⁰ It lasted for 13 minutes and only the applicants participated. The next day they were fined for abuse of the right to peaceful assembly.

Even though the Government claimed that the case constituted an infringement of assembly rights, the Court confirmed that the facts of the case constituted expression. The Court found that the interference was “prescribed by law” and the legitimate aim was the protection of “public safety”, “the rights of others” and “preventing disorder”. The Court claimed that there was no “pressing social need” for the interference in the circumstances of this case. Most importantly, it claimed that “administrative sanction, however mild, on the authors of such expressions which qualify as artistic and political at the same time can have an undesirable chilling effect on public speech”.²³¹ Therefore, there was a violation of Article 10 of the Convention.

²³⁰ Tatar and Faber v. Hungary, Application No 26005/08 and 26160/08, 12 June 2012, at para 6.

²³¹ *ibid.*, at paras 29-41.

As in many other freedom of expression and artistic expression cases, the Court took into consideration the possible chilling effect that the penalties of the Government could create when deciding on the case. The fine is perhaps very important too when considering the proportionality of the measure taken. Nevertheless, the case of *Tatar and Farber* created a precedent that helped the Court to deliver a judgement that was somewhat based on the consistency of the reasoning.

Murat Vural v Turkey, 2014

The applicant on several occasions in different places poured paint on statues of Atatürk to express his “lack of affection” for Atatürk. He was arrested and charged for Offences Against Atatürk; he was sentenced to imprisonment and was unable to vote for eleven years.²³²

The Strasbourg Court claimed “...that opinions, as well as being capable of being expressed through the media of artistic work and the wearing or displaying of symbols [...], can also be expressed through conduct”.²³³ The Court found that given the nature of the action by the applicant, it was grossly disproportionate to sentence the applicant to imprisonment. The Court found that the penalty imposed by the Government was in breach of the Convention.

This case does contribute to the notion of delivering consistent judgements; it also contributes to the idea of this category that has been discussed - such conduct was indeed under the notion of artistic and political speech protected by the European Convention. The following case repre-

²³² Murat Vural v. Turkey, Application No 9540/07, 21 October 2014, at paras 5-30.

²³³ *ibid.*, at para 47.

sents a different idea of the Court when it comes to the mix of conduct as artistic expression and political protest as such.

Sinkova v. Ukraine, 2018

Strasbourg Observers stated that this particular case “... highlighted “inconsistency” with the Court’s prior case law, and a disregard for the principle that criminal penalties are likely to have a “chilling effect on satirical forms of expression relating to topical issues”.”²³⁴

The applicant belongs to an artistic group and on one of the days together with three other members of the group made an “act of performance”.²³⁵ She went to the Memorial of Unknown Soldier that contains the Eternal Fire and the Tomb of the Unknown Soldier on the main square in Kyiv, broke some eggs on a frying pan and fried them. Two of her friends joined and fried sausages. The police made a remark on their behavior but did not intervene. Another member made a video and the statement of protest against inappropriate use of natural gas was made.²³⁶ The applicant was imprisoned but given a suspended sentence for desecration of a burial place.²³⁷

²³⁴ “Conviction for performance-art protest at war memorial did not violate Article 10”, Strasbourg Observers, accessed January 2019, <https://strasbourgobservers.com/2018/03/19/conviction-for-performance-art-protest-at-war-memorial-did-not-violate-article-10/>.

²³⁵ Sinkova v. Ukraine, Application No 39496/11, 27 February 2018, at para 7.

²³⁶ *ibid.*, at paras 5-7.

²³⁷ *ibid.*, at paras 35-37.

The Court found the interference to be “prescribed by law” pursuing the legitimate aim of protecting morals and rights of others.²³⁸ The Court stated that the actions of the applicant were “reasonably interpreted as contemptuous towards those in whose honor that memorial had been erected”.²³⁹ Assessing the penalty, citing *Murat Vural v. Turkey*, the Court stated that “peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence”.²⁴⁰ However, in the present case the applicant was “given a suspended sentence and did not serve a single day of it” and found that there was no violation of Article 10.²⁴¹ Strasbourg observers stated that,

...the majority’s finding that Sinkova “was not convicted for expressing the views that she did,” nor for the “distribution by her of the respective video,” but was convicted “only” on account of frying eggs over the memorial flame. However, this idea of completely stripping the performance of all meaning and context does not seem consistent with the Court’s case law. On this point, and most curiously, the majority fails to apply, or even cite, the unanimous 2012 judgment in *Tatár and Fáber v. Hungary*, which is arguably directly relevant, and similarly concerned a “provocative performance.”²⁴²

In this case the Court found that though there was a sanction, it did not consider the possibility of creating chilling effect. In *Tatar and Farber* the Court ruled that imposing a fine was disproportionate but a suspended sentence does not look that disproportionate for the Court. Strasbourg

²³⁸ Sinkova v. Ukraine, at paras 101-103.

²³⁹ *ibid.*, at para 110.

²⁴⁰ *ibid.*, at para 111. See also *Murat Vural v. Turkey*, Application No. 9540/07, 21 October 2014, at para 60.

²⁴¹ *ibid.*, at para 111-113.

²⁴² “Conviction for performance-art protest at war memorial did not violate Article 10”, StrassbourgObservers, accessed January 2019, <https://strasbourgobservers.com/2018/03/19/conviction-for-performance-art-protest-at-war-memorial-did-not-violate-article-10/>.

Observers concluded that “...it is difficult to see how the *Sinkova* majority’s findings square with *Tatár and Fáber*, given that the performance was similarly “artistic and political” expression, concerned a matter of public interest, with the performance filmed “to send a message” through online media”.²⁴³

²⁴³ “Conviction for performance-art protest at war memorial did not violate Article 10”, StrassbourgObservers, accessed January 2019, <https://strasbourgobservers.com/2018/03/19/conviction-for-performance-art-protest-at-war-memorial-did-not-violate-article-10/>.

3.5. Freedom of Artistic Expression and the Notion of Limited Potential to Impact

The Court has held a number of times that certain artistic forms are virtually unable to attract as many people as means of mass media. Such reasoning is perhaps the most consistent in the Court's judgements. Compared to the previous categories that were formed for the sake of this research in the previous subchapter; this category is based primarily on the Court explicitly stating that certain forms of artistic expression have limited potential to attract wider audiences. Perhaps to an art critic such a statement can be offensive.

Karatas v. Turkey, 1999

Huseyin Karatas was a Turk of Kurdish origin, who wrote an anthology of poems that included rebellious sentiments that were found to have “separatist propaganda that was detrimental”²⁴⁴ to the Turkish nation and its territory. National Courts had his poem confiscated, he was fined and sentenced to one year and eight months which later was reduced but the fine was increased.²⁴⁵

The applicant applied to the Commission claiming violations of the Articles 6 (1), 9 and 10.²⁴⁶ In the report of 11 December 1997, the Commission found that there had been no violation of articles 10 and 9 but Article 6(1) had been breached.²⁴⁷

²⁴⁴ Karatas v. Turkey, Application No 23168/94, 8 July 1999, at para 12.

²⁴⁵ *ibid.*, at paras 8-9, 12, 14.

²⁴⁶ The main focus of this case summary will be on Article 10.

²⁴⁷ *ibid.*, at paras 30-31.

The court, in its turn, found the interference as “prescribed by law”²⁴⁸; the legitimate aim sought by the Government was found to be “the protection of national security and territorial integrity and the prevention of disorder and crime”.²⁴⁹ The applicant claimed that the anthology of poems was “a literary work and should be treated as such”²⁵⁰. The Commission did consider the special feature that the work was expressed in form of poetry. However, assessing the content of the poem, it came to the conclusion that there were sentiments supporting the separatist movement and sentiments that could have been regarded by the viewers as inciting to action. These sentiments justified the “pressing social need” criteria for the Commission.²⁵¹

The Court stated that it “must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made”²⁵². The Court agreed that some of the parts of the poem were “particularly aggressive”²⁵³ but it is an interesting feature of this particular form of expression, artistic expression, that is protected based on the ECHR case law²⁵⁴ - poetry, in the eyes of the Court, is “a form of artistic expression that appeals to only a minority of readers”²⁵⁵. The Court found that the contents of the poetry in question had a political connotation. Scrutinizing the government is a type of speech protected under

²⁴⁸ Karatas v. Turkey, at para 40.

²⁴⁹ *ibid.*, at para 44.

²⁵⁰ *ibid.*, at para. 45.

²⁵¹ *ibid.*, at para 47.

²⁵² *ibid.*, at para 48 (iii).

²⁵³ *ibid.*, at para 49.

²⁵⁴ See Muller and Others v. Switzerland.

²⁵⁵ Karatas v. Turkey, at para 49.

Article 10. The Court spoke about the fine and imprisonment of the applicant and found such measures disproportionate; therefore, there was a violation of Article 10 of the Convention.

It must be noted that the Court held the same view in a number of other cases that did or did not help to infer the violation of the rights.

For example, in the case of *Alinak* that has been discussed previously, the Court considered that “the medium used by the applicant was a novel, a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media”.²⁵⁶ This statement helped the Court infer that the measure taken by the Government was disproportionate to the aim pursued and found a violation of the applicant’s right to freedom of artistic expression.

On the other hand, the case of *I.A. v. Turkey* represented a slightly different outcome. The case was quite similar to the ones discussed before and was also about a literary work, again in Turkey. However, the Court did not speak about the medium of the work in question here and the small number it could attract and found that there was no breach of the Convention.²⁵⁷ However, the case that followed after it had a quite consistent outcome.

Kar and Others v. Turkey, 2007

The applicants are actors that took part in a play that was staged eight times in different towns in Turkey.²⁵⁸ The applicants were convicted for inciting an uprising against the armed forces

²⁵⁶ *Alinak v Turkey*., at para 41.

²⁵⁷ *I.A. v. Turkey*, at paras 25-31.

²⁵⁸ *Kar and Others v. Turkey*, Application No 58756/00, 3 May 2007, at para 5.

through the play and were imprisoned and fined. They claimed that the play should be treated as “artistic events” and the place where the action took part was an imagined country. The appeal has been rejected.²⁵⁹

The Court found that the interference was “prescribed by law” and the legitimate aim was considered to be “the prevention of disorder or crime”.²⁶⁰ Citing *Karatas*, the Court noted that the play that has been staged only eight times and hence had a very limited potential to impact the population of the country.²⁶¹ The Court claimed that even though certain phrases could have been found to be offensive for some members of the community, the rights set forth in the Convention and based on the case-law of the Court are meant to apply “not only to “information” or “ideas” which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb the State or any sector of the population”.²⁶² The measures taken against the applicants, the imprisonment, was disproportionate to the aim pursued and not necessary in a democratic society. Therefore, the Court found there was indeed a violation of Article 10.²⁶³

It is quite safe to assume that when the Court does consider the medium of the work and states its conclusion that those forms of artworks do not appeal to a sufficient amount of people to ban it for some particular legitimate aim that the state is trying to pursue, then the court usually finds in

²⁵⁹ *Kar and Others v. Turkey*, at paras 5-25.

²⁶⁰ *ibid.*, at para 40.

²⁶¹ *ibid.*, at para 46.

²⁶² *ibid.*, at para 47. See also *Handyside v. The United Kingdom*, Application No 5293/72, 7 December 1976, at para 49.

²⁶³ *ibid.*, at paras 48-49.

favour of the artist. On the other hand, in cases when the Court does not include such inferences in its reasoning, the case has less probability to be successful for the applicant. In any case, this category is perhaps the most consistent among all of those discussed in this research.

4. Conclusion

European Convention of Human Rights Article 10 protects freedom of expression. Based on the drafters' intent discussed before and the Court's case law, freedom of artistic expression in particular is also a type of protected speech. However, it hierarchically enjoys less protection as such when compared to pure political expression.

By looking at the drafters' intent through the preparatory work, it has been observed that even prior to the declaration made by the Commission that artistic expression is indeed included in the free speech protection of Article 10 in *Muller and Others v. Switzerland*, artistic expression has been intended by the drafters.

Other regional instruments provide for freedom of expression in the text but just like the European Convention of Human Rights either do not explicitly include the recognition of art as speech or do so very rarely or under cultural rather than a political set of rights.

Throughout this research a number of cases delivered by the Court have been analyzed. Among those - cases involving clashes between freedom of religion and speech, involving satire, infringing on reputation of others, cases implying artistic expression as conduct and cases involving literature that the Court found as being less appealing to larger masses of population. The Strasbourg Court had a number of cases to look at, to decide on and perhaps to be consistent in its judgments.

After all the research conduct, it occurs to me that while there are some consistencies to be found in the Court's judgments - it is not seen throughout all the cases. Obviously, there should not be some magic formula to apply when the Court is dealing with the artistic expression. However, it is true that a number of cases are indeed similar but treated quite differently.

The cases that involve religion vary greatly - from poetry to movies and art performances at churches. The judgements of those cases are the most inconsistent so far. Due to developing attitudes toward matters of religious sensitivity the Court attempts to develop its case law accordingly. The Court allows for discretion of the states perhaps too often and based on the case law, out of eight cases discussed in this paper with regard to artistic expression and religious feelings, four cases were decided in favour of the Government, three of the applicant.²⁶⁴ Such statistics indicates that the Court does not have a properly defined understanding of how to approach religious cases. Nonetheless, the latest cases show that the attitude of the Court is changing in favouring freedom of expression over religious sensitivity.

Cases involving satire vary greatly too; however, there is an interesting situation with satire - the Court can and cannot mention or use satire as defense for certain expression. There is not much consistency with judgement of satirical expression in arts; however, it is still an interesting idea to discuss. According to the Court, satire is recognized as a form of artistic expression as well as "social commentary". Nonetheless, out of four cases discussed for the sake of this research, three were found to be in breach of the Convention. This helps to conclude that satire does enjoy a recognizably higher level of protection by the Court.

²⁶⁴ An inadmissible case was discussed in the paper as well but only as an illustration to the point.

When the cases involving reputation of others are involved, the Court is quite inconsistent with its judgments. In some cases the Court stated that applicants do have a right to infringe on the reputations of others, especially of politicians. However, at the same time the Court put the labor market relationships higher than freedom of artistic expression of the applicants in one of the cases. Out of six cases discussed in this paper, three contained no violation of Article 10 and two cases did.²⁶⁵ It can be inferred that the Court is still on its way to define its standing on the matters of clashes of artistic expression and reputations of others.

Cases involving artistic expression in the form of conduct do appear as quite consistent cases with expected outcomes but the sample is quite small to explicitly conclude that. Out of three cases discussed in this paper, only one was found to be justified by the Court. Interestingly enough, the case that was found to not be in breach of the Convention was one that touched upon a very sensitive topic of the memories of the soldiers killed in the Second World War. The memory and respect for those was found to be more important than the applicant's freedom of expression. This is something one can be sympathetic to; however, when speaking of artistic expression such judgment makes raise eyebrows on whether the Court is actually in a position to make such decisions.

The notion of art being of limited capacity to attract larger numbers of people is an interesting concept that did help the Court decide in favour of the applicants in a number of cases. For example, out of four cases discussed in this paper in this category, there were three violations found due to the art's limited capacity to attract. Such reasoning is indeed an interesting approach to the

²⁶⁵ An inadmissible case was discussed in the paper as well but only as an illustration to the point.

problem; however, the Court does not always touch upon it. In a number of cases also involving poetry or novels, the Court would not even mention that the artworks in question would not have been capable of appealing to too many people as opposed to mass media. Regardless, in the cases when Court does mention such limited capacity, in the majority of cases the Court finds in favour of the applicant.

This research confirms that there is not so much consistency in the case law of the European Court of Human Rights in regard with freedom of artistic expression under Article 10 of the Convention. In many ways the questions that arise before the Court appear very problematic. It seems that with the latest judgments the Court tends to favour the applicant's freedom of expression; however, that is not always the case. It is evident that the Court is indeed struggling to properly define and revise its attitudes towards many issues. Nevertheless, it seems like recent years showed significant progress.

5. Recommendations to the Relevant Actors

Despite the improvements needed to ensure consistency in the judgements of the European Court of Human Rights, there are recommendations coming from several international documents and bodies to the member states of Council of Europe as well as the countries outside CoE jurisdiction as well as regional organizations and non-governmental organizations to improve and increase the level of protection for artistic expression.

The UN Special Rapporteur in the field of cultural rights, Farida Shaheed, in her report of 14 March 2013 on the freedom of artistic expression and creativity recommended:

1. All people should have a right to enjoy freedom of artistic expression, create such expressions and disseminate them in the forms of their choice when it does not violate the Convention.²⁶⁶
2. Revisit legislation restricting artistic expression, when necessary, to conform with the standards of international human rights law and in cooperation with relevant human rights organisations and associations.²⁶⁷
3. The laws restricting artistic expression should be clear and foreseeable.²⁶⁸

²⁶⁶ Farida Shaheed, The right to freedom of artistic expression and creativity, at para 85.

²⁶⁷ *ibid.*, at para 88.

²⁶⁸ *ibid.*, at para 89 (a).

4. Prior-censorship shall be abolished and only allowed when in cases of necessity provided in the Convention.²⁶⁹

5. Decision makers, including judges, when resorting to possible limitations to artistic freedoms, should take into consideration the nature of artistic creativity (as opposed to its value or merit), as well as the right of artists to dissent, to use political, religious and economic symbols as a counter-discourse to dominant powers, and to express their own belief and world vision. The use of the imaginary and fiction must be understood and respected as a crucial element of the freedom indispensable for creative activities.²⁷⁰

6. States should protect the artists in cases of violence and regulate the public displacement of art in conformity with the Convention and without discriminating “arbitrarily against specific artists or content”.²⁷¹

7. “Fully implement the UNESCO Recommendation Concerning the Status of the Artist”.²⁷²

All the above recommendations will ensure better protection of artistic expression in the member states and around the globe. As such, it is necessary to mention the provisions and recommendations from the UNESCO’s above mentioned document.

²⁶⁹ Farida Shaheed, The right to freedom of artistic expression and creativity, at para 89 (b).

²⁷⁰ *ibid.*, at para 89 (d).

²⁷¹ *ibid.*, at paras 89 (e), (f).

²⁷² *ibid.*, at para 89 (i).

The Recommendation, among other things, recommends that states “define a policy for providing assistance and material and moral support for artists and should ensure that public opinion is informed of the justification and the need for such a policy”.²⁷³

The 2005 Convention on the Protection and Promotion of Diversity of Cultural Expressions specified several measures by the member states to promote and protect cultural expressions, ensure transparency of the measures taken, ensuring education and public awareness, participation of civil society and many others.²⁷⁴

Furthermore, the Council of European Union in 2014 established the EU Human Rights Guidelines on Freedom of Expression Online and Offline. In the document, the EU promised to condemn any state for censorship in violation of human rights²⁷⁵, amend or repeal the laws that “penalise individuals or organisations for exercising their right to express opinions or disseminate information, both bilaterally and in multilateral and regional human rights fora”.²⁷⁶

All these already existing recommendations have to be ensured and fulfilled by the member states of Council of Europe to ensure better protection of artistic expression. Besides that, non-governmental organisations, artists and all interested parties should not only work on increasing awareness of the challenges for artistic expression that are set out in the introductory part of this

²⁷³ Recommendation concerning the Status of the Artist, UNESCO Records of the General Conference, Twenty-first Session, 1980, p. 149

²⁷⁴ Convention on the Protection and Promotion of Diversity of Cultural Expressions, UNESCO, 2005.

²⁷⁵ EU Human Rights Guidelines on Freedom of Expression Online and Offline, Council of the European Union, May 2014, at para 31(b).

²⁷⁶ *ibid.*, at para 31 (c).

paper but also ensure that relevant mechanisms are in place and accessible to artists and other involved parties. For the overall improvement of cases where artistic expression is illegitimately restricted, the aforementioned organisations should keep producing reports and make the community aware of those issues.

Lastly, non-governmental organisations should provide legal training for artists to introduce them to relevant domestic and international legislation, examples coming from case-law and procedures and mechanisms of protection available to them.

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