FREEDOM OF ARTISTIC EXPRESSION IN THE EUROPEAN UNION

An overview of the relevant normative and jurisprudential framework

Study commissioned by MEP Diana Riba i Giner

THE GREENS/EFA in the European Parliament

culture ACTION europe

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Freedom of artistic expression (FoAE) is a fundamental pillar of any democratic system and a key value of the European project. Rarely researched as an autonomous legal concept, FoAE has been often conflated with other rights or freedoms or treated as a part of a broader analysis of the general freedom of expression. This has resulted in a rather fragmented and superficial picture of what freedom of artistic expression is in a global context and, especially, at European level.

The present study offers a general overview of the global and European legislative framework and case-law, outlining further possible courses of action aiming at strengthening the legal protection of FoAE at a European level.

The first part of the study critically outlines the most important international human rights legal framework and international non-binding instruments. They span from the first universal guarantee of cultural rights with the Universal Declaration of Human Rights (UDHR) of 1948 to the conceptualisation of international instruments aiming to protect FoAE.

The second part, specifically focuses on the state of protection of freedom of artistic expression in Europe, taking into analysis also the jurisprudence of the European Court of Human Rights and those of the national jurisdictions of EU Member States. Although freedom of artistic expression is a fundamental freedom according to Article 13 of the Charter of Fundamental Rights of the EU, there appears to be no such concept as a self- standing competence of the EU in respect of FoAE. As a result, to date, FoAE represents the main goal of no single legally binding or secondary law act, leading to few case-law before the Court of Justice of the EU.

Due to its dynamic and ever-evolving nature, the attempts to construct a legal definition of artistic expression has followed the intuitive approach, on the one hand, and the normative-definitional approach, on the other. While the former dominates the attempts to construct a legal definition of artistic expression at a global level, the latter is present only in some jurisdictions. It seems to be more favorable to freedom of artistic expression, representing an important milestone in litigation concerning FoAE and its alleged abuses.

The third part of the study offers a preliminary reading of the negative and positive obligations of EU Member States in the field of FoAE. Among the negative obligations, political constraints, religious and public morality, reputation and dignity are the most present in case-law. Concerning the few positive obligations, the study brings forward immediate rethinking of the standard of the protection of

Photo by artistic name: Seoungsuk Ham

The third part of the study offers a preliminary reading of the negative and positive obligations of EU Member States in the field of FoAE. Among the negative obligations, political constraints, religious and public morality, reputation and dignity are the most present in case-law. Concerning the few positive obligations, the study brings forward immediate rethinking of the standard of the protection of freedom of artistic expression in horizontal relations as well as the problem of collateral censorship.

To conclude, the study underlines the need for artistic freedom to be relevantly and efficiently protected by a precise EU legal framework. Furthermore, it suggests that EU Member States, as parties of the European Convention on Human Rights, should abide by the international law instruments to protect FoAE. Furthermore, it suggests that a structured dialogue could be put in place at the EU level in order to bring the worlds of arts and the legal expertise together, in view to realise a handbook containing guidelines for a better protection of FoAE at the EU level, including general indicators to monitor the state of freedom of artistic expression across the Union.

PREFACE

In recent years Culture Action Europe (CAE) has been devoting more attention to the freedom of artistic expression. CAE was actively supporting the ARJ (Arts Rights Justice) EU Working Group from 2012-2017 and the topic has been one of the main strands of CAE's strategy for 2018-2021.

In 2019, CAE began a strategic partnership with Freemuse and organised a specific Working Group with CAE members and other partners aimed at jointly devising the next steps and strategies to promote artistic freedom in Europe, as well as to discuss tactical interventions including engagement with the European Commission (EC), the current Council Work Plan for Culture 2019-2022 and the planned EC workshop on artistic freedom.

On 21 January 2020, CAE, in partnership with Freemuse, organised a public debate and the launch of the latter's report on the State of Artistic Freedom in Europe at the European Parliament, an event co-hosted by MEP Domènec Ruiz Devesa and MEP Julie Ward. At the launch, CAE and Freemuse presented recommendations to the European institutions that safeguard the right to artistic expression and promote it across the EU.

In February 2020, CAE was also present and contributed to the "Intergovernmental Committee of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions" at the UNESCO headquarter in Paris.

One main conclusion from this process - and the work done by several other civil society organisations and institutions - is that there is an emergent need to focus on legal protection for artistic freedom. In April 2020, CAE published the position paper "Protecting artistic freedom as a European value", highlighting the need to develop a European handbook on the legal framework, relevant to all Member States. The paper proposed that this handbook should include general indicators that would enable the artistic community and cultural sector to monitor the state of artistic freedom across the EU in a meaningful way.

After engaging in a fruitful dialogue with the Greens/European Free Alliance Group at the European Parliament, CAE proposed a preliminary study for a better common understanding of the relevant legal framework.

The present study is a general overview of this framework and case-law. The ambition is not to present a ready-to-use map of a complicated landscape of difficult legal norms and interpretations; rather, the study aims at outlining further possible courses of action aiming at strengthening the legal protection of artistic freedom as a European value. The purpose of this study is to present a short overview identifying:

- Relevant literature of high quality
- Legal instruments and provisions under EU law and international human rights law, as well as soft law instruments that are relevant to all member states and the EU
- A preliminary reading of the balance between positive and negative obligations under the above-mentioned legal framework

About the authors

The legal overview has been performed by **Prof. Marcin Górski,** dr. habil. (Law), associate professor of the Department of European Constitutional Law, University of Łódź (Poland). He is also an attorney, a member of the Human Rights Committee of the Polish Bar of Attorneys and head of the Legal Department of the City of Łódź. Prof. Górski is author or co-author of some 170 books or articles on EU law, international law, constitutional law, human rights and comparative law. His area of expertise is human rights, EU law and comparative constitutional law. In 2019, he published the book Swoboda wypowiedzi artystycznej. Standardy międzynarodowe I krajowe (In English: Freedom of Artistic Expression. International and Domestic Standards, published by Wolters Kluwer).

From the legal overview of Prof. Górski, **Culture Action Europe together with Yamam Al-Zubaidi,** drew some conclusions presented at the end of the study.

Culture Action Europe (CAE) is the major European network of cultural networks, organisations, artists, activists, academics and policymakers. CAE is the first port of call for informed opinion and debate about arts and cultural policy in the EU. As the only intersectoral network, it brings together all practices in culture, from the performing arts to literature, the visual arts, design and cross-arts initiatives, to community centres and activist groups.

Yamam Al-Zubaidi, is an independent consultant and previously a member of the Executive Committee of Culture Action Europe. He worked at the Swedish Equality Ombudsman for 10 years and as the Equality and Diversity Manager at Sweden's National Touring Theatre for several years. He is the author of the first Swedish Equality Data report and has contributed to several international comparative reports on equality data, including the 'Analysis and comparative review of equality data collection practices in the European Union', commissioned by the European Commission.

EU: RELEVANT LEGAL FRAMEWORK AND CASE-LAW

The freedom of artistic expression is rarely researched as a separate legal concept with regard to its normative content. There is a tendency to conflate it with other rights or freedoms (for example, religious) or to treat it as part of a broader analysis of the general freedom of expression. Moreover, such analyses are usually focused on particular jurisdictions such as the USA, Germany or the European Convention on Human Rights (ECHR). This results in a rather fragmented and superficial picture of what freedom of artistic expression is in a global or European context (see Annex 1 for an overview of the relevant literature in this field).

Although this study is devoted to the protection of the freedom of artistic expression in the EU (which inevitably also includes analysis of the state of protection of this freedom under the ECHR and the national jurisdictions of the EU Member States), it seems useful to take into consideration certain universal human rights instruments, because they inspire the EU mechanism of protection of human rights[1].

1. International human rights law and international non-binding instruments

1.1. UDHR, ICCPR, ICESCR and other binding instruments

Universal Declaration of Human Rights (UDHR) proclaimed by the UN General Assembly on 10 December 1948 in Paris states in Article 27 (1) that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits";

1 See the references to UDHR or ICCPR in the Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17-35.

and in Article 19 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". Initially treated as a non-binding instrument as a declaration of the UN General Assembly, the UDHR has evolved into being viewed as a codification of customary international law or a reflection of the general principles of international law[2]

Photo by artistic name: Luxstorm

2 H. Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, Georgia Journal of International and Comparative Law 1995/95, vol. 25, pp. 287-397.

Article 27 UDHR was "the first universal guarantee of cultural rights"[3]. However, the cultural rights protected thereby have been described as "underdeveloped"[4]. Nonetheless, the interpretation of Article 19 UDHR, also encompassing freedom of artistic expression, seems to be consistent with that of Article 19 ICCPR[5].

The first explicit reference to freedom of artistic expression in international human rights law was included in Article 19 (2) ICCPR (International Covenant on Civil and Political Rights, 1966), which states that "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 print, in the form of art, or through any other media of his choice". The wording of that provision caused many controversies in the course of the ICCPR's travaux preparatoires[6]. Although General Comment 34[7] reaffirms the protection of the freedom of artistic expression as stemming from Article 19 ICCPR, the case-law of the HRC is rather limited: in Ballantyne[8] and Shin[9], the HRC confirmed (in the latter case somewhat en passant) that artistic expression is safeguarded by Article 19 (2) ICCPR and in Bakhytzhan Toregozhina1[0] the Committee disregarded the allegedly artistic nature of the disputed performance (a 'flash-mob').

Also, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides in Article 15 (3) that "the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity". The term 'indispensable' must not be interpreted as intending to restrict the freedom of creative activity in view of the travaux preparatoires regarding the provision. Some negotiating states (notably Czechoslovakia and other then 'Eastern bloc' countries) insisted on supplementing the provision with a reference to the goal of the protected freedom being the development of democracy and ensuring peace and co-operation

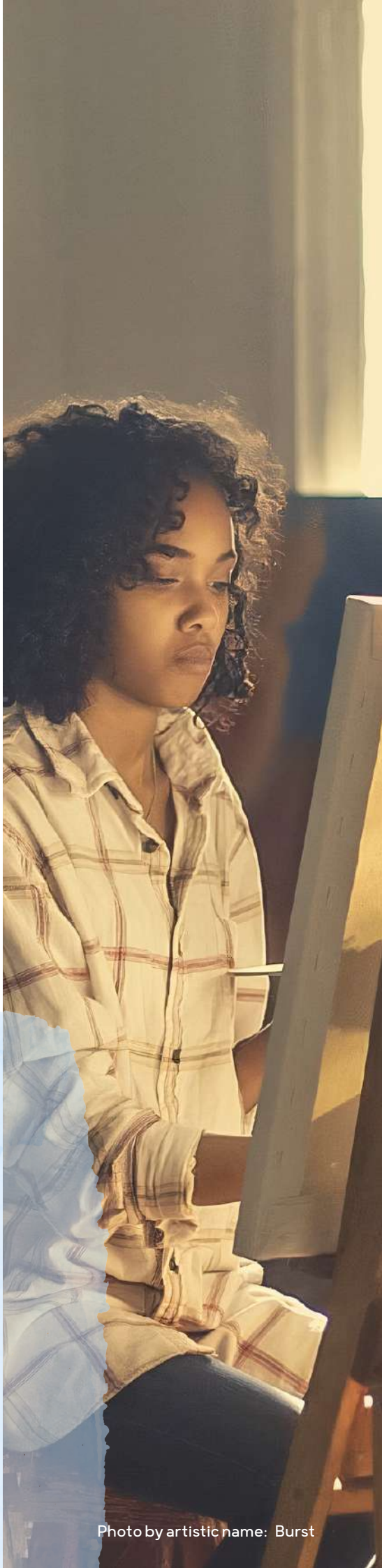

Photo by artistic name: Burst

3 K. Bennoune, *Keynote Speech. From Culture to Cultural Rights*, Kuala Lumpur 2019, p. 4.

4 J. Symonides, *Cultural rights: a neglected category of human rights*, International Social Science Journal 50 (158) 1998, p. 559.

5 M. O'Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34*, Human Rights Law Review 2012, vol. 12, p. 634.

6 See *Draft International Covenants on Human Rights. Annotation prepared by the Secretary-General*, dokument z 1.07.1955 r., United Nations General Assembly, A/2929, pp. 144-150.

7 Human Rights Committee, 102nd Session, Geneva 19-21 April 2011, General Comment No. 34 (CCPR/C/GC/ 34), 12.09.2011, § 11.

8 HRC Decision of 31.03.1993, Ballantyne *et al.* v. Canada, appl. Nos. 359, 385/89, see § 11.3 (fr. „le paragraphe 2 de l'article 19 doit être interprété comme s'appliquant à toute (...) nouvelle ou information, à toute expression ou affichage à caractère commercial, à toute oeuvre d'art, etc.; il ne devrait pas être considéré comme s'appliquant uniquement aux moyens d'expression politique, culturelle ou artistique").

9 HRC Decision of 25.04.2000, Shin v. Korea, appl. No. 926/2000.

10 HRC Decision of 21.10.2014, *Bakhytzhan Toregozhina v. Kazakhstan*, appl. No. 2137/2012.

Photo by Andrea Piacquadio

between nations, yet that proposal was robustly opposed by Western democracies. The opposition against the amendment proposed by communist states was consolidated by the Bulgarian delegation, which revealed that the intention behind it was to prevent possible "abuses" and invoked the blooming artistic freedom in the USSR[11].

According to some commentators, the freedom of creative activity (Article 15 (3) ICSECR) is part of the right to participate in cultural life (Article 15 (1) (a) ICSECR), and at the same time, its substantive scope overlaps with freedom of expression as protected by Article 19 (2) ICCPR[12].

Although the legal nature of the ICSECR is different from that of ICCPR, whereas Article2 (1) ICCPR imposes on states the obligation "to respect and to ensure" the rights provided for in this Covenant, Article 2 (1) ICSECR, the so-called "umbrella" provision, provides only for the obligation to "take steps ... with a view to achieving progressively the full realisation of the rights" recognised in the ICSECR[13], it should nonetheless be remembered that the State Parties intended to strengthen the mechanism of protection of the rights set out in the former Covenant, while ensuring the possibility of differently construing the meaning and scope of states' obligations with regard to the specific rights referred to in Article 2 (1) ICSECR. The umbrella provision of Article 2 (1) ICSECR should not be construed as precluding any form of judicial application of the ICSECR (including Article 15 (3) - and one should note in this respect that the Covenant is, indeed, judicially applied)[14] or State Parties' obligations, but instead as adversely affecting the possibility of treating the ICSECR as a set of self-executing norms.

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions, signed in Paris on 20 October 2005, currently has 148 countries (by way of acceptance, approval and ratification of accession) and the European Union as parties[15] and concerns the specific context of freedom of expression, including artistic.

---

11 B. Saul, *The International Covenant on Economic, Social and Cultural Rights. Travaux Préparatoires* 1948- 1966, vol. I, Oxford 2016, pp. 2102-2122.

12 B. Saul, D. Kinley, J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials*, Oxford 2014, p. 1192.

13 As for the intention of the parties regarding the legal effects of each of the Covenants see United Nations General Assembly, Third Committee, 575th Meeting, 5.11.1954, A/C.3/SR.575, pp. 165-166.

14 See the advisory opinion of the ICJ of 9.04.2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ Reports 2004, p. 136 and subsequent, or decision of the African Commission of Human Rights of 27.10.2001, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria,* 155/96, or judgments of the Polish Constitutional Court of 12.06.2006 r., case K 38/05, § III.4, and of 27.01.1999, case K 1/98, § III.7.

15 For background to the UNESCO Convention and the overview of the negotiation process, see Y. M. Donders, *Cultural rights in the Convention on the Diversity of Cultural Expressions: included or ignored* [in:] The UNESCO *Convention on the Diversity of Cultural Expressions: a tale of fragmentation of international law?*, Cambridge- Antwerp-Portland 2012, pp. 165-182.

The fundamental principles of the Convention include, in Article 2 (1), the obligation on the parties to respect the freedom of cultural expression. Unfortunately, Art. 7 of the Convention[16], concerning the freedom of cultural expression, does not seem to constitute a self-executing[17] regulation due to insufficiently precise wording. It is therefore relevant for the interpretation of national and international norms regarding freedom of artistic expression but is not formulated in a way that makes it directly applicable to individual states. Nonetheless, Article 5 of the UNESCO Convention provides that "the Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognised human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention". This provision should be understood as reaffirming the 'right' of the parties to "adopt measures to protect and promote the diversity of cultural expressions", although the application of this 'right' must be established "in conformity with internationally recognised human rights", one of which is the freedom of artistic expression reflected in Articles 19 and 27 UDHR, 19 ICCPR and 15 (3) ICSECR. As for the 'purposes' of the UNESCO Convention, they can be interpreted from both its Articles 1 (Objectives) and 2 (Guiding principles)[18] - which underline the protection and promotion of diversity of cultural expressions as the Convention's basic purpose and the respect of human rights as one of its guiding principles. Finally, pursuant to Article 5(2) of the UNESCO Convention, "when a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention".

It is hard to predict how the UNESCO Convention will be applied judicially, and its qualification as a set of legal obligations to protect freedom of inter alia artistic expression may be overenthusiastic1[9]. However, it certainly cannot be disregarded as an instrument to potentially strengthen the international mechanism of protection of the freedom of artistic expression. To date, not a single reference to the UNESCO Convention is traceable in the European Court of Human Rights (ECtHR) database. The Court of Justice of the European Union (CJEU) has to date referred to the UNESCO Convention only once - in C-222/07 Unión de Televisiones Comerciales Asociadas (UTECA) - but has not confirmed the self-executing nature of the UNESCO Convention[20].

16 "Article 7.1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups: (a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples; (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world. 2. Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions".

17 Self-execution of treaties is understood as the capacity to be judicially enforceable (as such) in domestic proceedings without the need of implementation through the adoption of domestic acts. See broader: J. H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 AJIL (1992) 310.*

18 The general scheme and purpose of treaties is, alongside their textual context, an indispensable element of interpretation, according to the general rule of interpretation of treaties as codified in Article 31 VCLT.

19 See e.g. S. Missling, B. M. Scherer [in:] S. von Schorlemer, T. Stoll [eds.], The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes,
DOI: 10.1007/978-3-642-25995-1, 2012, pp. 199-222.

20 CJ (EU), C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA) v. Administración General del Estado, 5th March 2009, ECLI:EU:C:2009:124.*

1.2. International non-binding instruments

Among the documents that are not legally binding but likely to influence the reasoning of courts (such as the ECtHR and CJEU) when they establish the interpretative consensus accompanying the international guarantees of freedom of artistic expression, UNESCO acquis seems to be the most important[21]. In 1980, the UNESCO General Conference adopted a recommendation concerning the Status of the Artist[22]. Pursuant to section III.3 thereof, "Member States, recognizing the essential role of art in the life and development of the individual and of society, accordingly have a duty to protect, defend and assist artists and their freedom of creation. For this purpose, they should take all necessary steps to stimulate artistic creativity and the flowering of talent, in particular by adopting measures to secure greater freedom for artists, without which they cannot fulfil their mission, and to improve their status by acknowledging their right to enjoy the fruits of their work.

Member States should endeavour by all appropriate means to secure increased participation by artists in decisions concerning the quality of life. By all means at their disposal, Member States should demonstrate and confirm that artistic activities have a part to play in the nations' global development effort to build a juster and more humane society and to live together in circumstances of peace and spiritual enrichment".

The UNESCO Universal Declaration on Cultural Diversity adopted by the UNESCO General Assembly on 2 November 2001, treats the freedom of artistic expression as the basis of cultural diversity. Article 6 of the Declaration reads that "while ensuring the free flow of ideas by word and image, care should be exercised so that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity".

Another document worth mentioning - although neither legally binding nor even emanating from subjects of international law - is the Fribourg declaration on cultural rights (La Déclaration de Fribourg sur les droits culturels) of 7 May 2007, which was adopted as an output of the conference of some eminent scientists, gathered under the patronage of UNESCO, the Organisation Internationale de la Francophonie and the Observatory of Diversity and Cultural Rights of the University of Fribourg. Among the rights and freedoms referred to in the Fribourg Declaration is freedom of artistic expression. Article 7 of the Fribourg Declaration provides that "within the general framework of the rights to freedom of expression, including artistic freedom, as well as freedom of opinion and information, and with respect for cultural diversity, everyone, alone or in community with others, has the right to free and pluralistic information that contributes to the full development of one's cultural identity". The importance of this Declaration lies in the fact that it shapes the interpretative context of legally binding instruments, despite its lack of legally binding force[23].

---

21 The case-law of both the CJEU and the ECtHR is quite heavily influenced by informal instruments ('soft law' documents) - see K. Dzehtsiarou, *What is Law for the European Court of Human Rights*, Georgetown Journal of International Law 2017, vo. 49, pp. 89-134, E. Kassoti, *The EU and the Challenge of Informal International Law- Making: The CJEU's Contribution to the Doctrine of International Law-Making*, Geneva Jean Monnet Working Papers 06/2017, source: https://www.ceje.ch/files/3615/1748/7746/kassoti_6-2017.pdf.

22 See http://portal.unesco.org/en/ev.php-URL_ID=13138&URL_DO=DO_TOPIC&URL_SECTION=201.html

23 See e.g. ECtHR (decision), 21.06.2016, *Zeynep Ahunbay and others v. Turkey, Austria and Germany*, appl. no. 6080/06, footnote 13.

1.3. The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The European Court of Human Rights broadly defines the substantive scope of the freedom of expression protected by Article 10 ECHR through its case-law, extensively interpreting the notions of "opinions, information and ideas" employed in Article 10 (1) ECHR. For examples of this position, one can refer to blowing a hunting horn distract hounds in protest against fox hunting[24], as well as spraying paint on unpopular monuments[25] or burning portraits of reigning royals[26] - as "expressing opinion" (the latter two being forms of symbolic speech). The protection afforded by Article 10 ECHR extends to both the content and form of the expression[27]. The freedom applies not only to information or ideas that are favourably received, regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb[28]. Article 10 ECHR does not explicitly refer to the freedom of artistic expression; nonetheless, the ECtHR has recognised the importance of artistic expression as a specific type of expression that deserves protection in that article. For example, in the Karataş case the Court noted that "l'article 10 englobe la liberté d'expression artistique - notamment dans la liberté de recevoir et communiquer des informations et des idées - qui permet de participer à l'échange public des informations et idées culturelles, politiques et sociales de toute sorte ... Ceux qui créent, interprètent, diffusent ou exposent une œuvre d'art contribuent à l'échange d'idées et d'opinions indispensable à une société démocratique"[29].

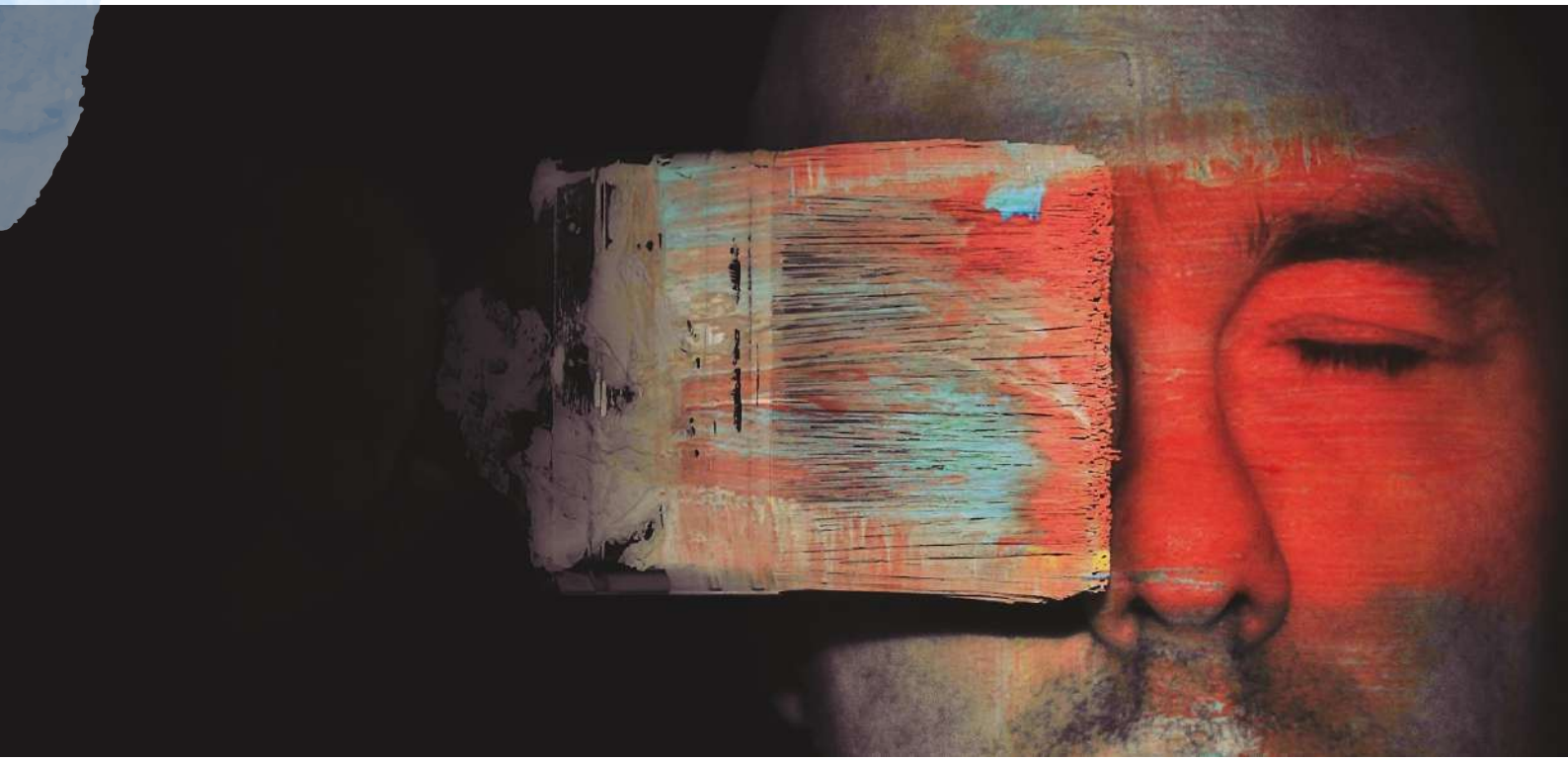

Photo by artistic name: TanteTati

23 See e.g. ECtHR (decision), 21.06.2016, Zeynep Ahunbay and others v. Turkey, Austria and Germany, appl. no. 6080/06, footnote 13.

24 ECtHR, 25.11.1999, Hashman and Harrup v. the United Kingdom, appl. No. 25594/94, § 28.
25 ECtHR, 21.10.2014, Murat Vural v. Turkey, appl. No. 9540/07.

26 ECtHR, 13.03.2018, Stern Taulats and Roura Capellera v. Spain, appl. No. 51168/15.

27 ECtHR, 28.10.2014, Gough v. the United Kingdom, appl. No. 49327/11, § 149; ECtHR, 26.04.2016, Novikova and others v. Russia, appl. Nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, § 150.

28 ECtHR, 21.01.1999, Fressoz and Roire v. France, appl. No. 29183/95, § 45.

29 ECtHR, Karataş v. Turkey, 8.07.1999, appl. no. 23168/94, § 49.

However, the body of Strasbourg case-law on freedom of artistic expression is astonishingly limited compared to other legal issues such as the freedom of political or press speech. It began as late as 1988 with Müller[30] and continued through such decisions as S. and G.[31], Otto-Preminger-Institut[32], Wingrove[33], Karataş[34], Alinak[35], Vereinigung Bildender Künstler[36], Nikowitz and Verlagsgruppe News GmbH[37], Kar[38], Lindon, Otchakovsky-Laurens and July[39], and Akdaş[40]. There are also rulings concerning satirical speech which is treated as a form of artistic expression: EON4[41], Institut Ekonomichnykh Reform TOV[42], Ziembiński (nr 2)[43], Sousa Goucha[44], Alves da Silva[45], Welsh and Silva Canha[46] and Leroy[47] (except for Sousa Goucha and Leroy, in all cases the Court found violations of Article 10 ECHR).

Apart from its modest volume, the ECtHR's case-law on freedom of artistic expression is rather superficial, as it does not provide for any concise definition of artistic expression and reveals a clear tendency to anchor the protection of disputed speech in its political nature more than in its artistic intent. That is not surprising, since Article 10 ECHR was thought to protect free political discourse as the foundation of democracy and other elements of the substantive scope of freedom of expression such as artistic, commercial, academic or religious speech appear less relevant against that historical background.

30 ECtHR, 24.05.1988, *Müller et al. v. Switzerland*, appl. No. 10737/84.

31 Decision of the European Commission of Human Rights, 2.09.1991, S. and G. v. the United Kingdom, appl. No. 17634/91.

32 ECtHR, 20.09.1994, *Otto-Preminger-Institut v. Austria*, appl. No. 13470/87.

33 ECtHR, 25.11.1996, *Wingrove v. the United Kingdom*, appl. No. 17419/90.

34 ECtHR (GC), 8.07.1999, *Karataş v. Turkey*, appl. No. 23168/94.

35 ECtHR, 29.03.2005, *Alinak v. Turkey*, appl. No. 40287/98.

36 ECtHR, 25.01.2007, *Vereinigung Bildender Künstler v. Austria*, appl. No. 68354/01.

37 ECtHR, 22.02.2007, *Nikowitz and Verlagsgruppe News GmbH v. Austria*, appl. No. 5266/03.

38 ECtHR, 3.05.2007, *Kar and others v. Turkey*, appl. No. 58756/00.

39 ECtHR (GC), 22.10.2007, *Lindon, Otchakovsky-Laurens and July v. France*, appl. Nos. 21279/02 and 36448/02.

40 ECtHR, 16.02.2010, *Akdaş v. Turkey*, appl. No. 41056/04.

41 ECtHR, 14.03.2013, *EON v. France*, appl. No. 26118/10.

42 ECtHR, 2.06.2016, *Instytut Ekonomichnykh Reform TOV v. Ukraine*, appl. No. 61561/08.

43 ECtHR, 5.07.2016, *Ziembiński v. Poland (nr 2)*, appl. No. 1799/07.

44 ECtHR, 22.03.2016, *Sousa Goucha v. Portugal*, appl. No. 70434/12.

45 ECtHR, 20.10.2009, *Alves da Silva v. Portugal*, appl. No. 42665/07.

46 ECtHR, 17.09.2013, *Welsh and Silva Canha v. Portugal*, appl. No. 16812/11.

47 ECtHR, 2.10.2008, *Leroy v. France*, appl. No. 36109/03.

2. EU legal framework on freedom of artistic expression (legally binding and non- binding instruments)

2.1. EU competence in the field of freedom of artistic expression

There appears to be no such concept as a self-standing competence of the EU in respect of freedom of artistic expression. Although the proactive approach of the EU in the area of fundamental rights protection is a matter of heated debate[48], it seems indisputable that, for the EU to legislate in respect of freedom of artistic expression, there must be a Treaty norm establishing its competence. Since freedom of artistic expression is a fundamental freedom according to Article 13 ChFR, the competence of the EU regarding that freedom concerning any regulation protecting freedom of artistic expression is limited by the general principle of conferral reflected in Articles 4 and 5 Treaty on European Union (TEU). Therefore, as matters stand, the EU may only legislate in the field of freedom of artistic expression when it uses the competence provided for in the Treaties.

2.2. The Charter of Fundamental Rights of the European Union (ChFR)

As defined in Article 6 (1) TEU, although "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties", the Charter "shall not extend in any way the competences of the Union as defined in the Treaties". While using its competence defined in the Treaties - for example, while establishing harmonisation measures pursuant to Article 114 TFEU to accomplish the internal market following Article 26 TFEU - the Union shall observe Article 13 ChFR.

Photo by artistic name: SplitShire

48 See E. Muir, Fundamental Rights: An Unsettling EU Competence, Human Rights Review 2014, vol. 15, pp. 25-37.

Photo by Vidal Balielo Jr.

Article 13 ChFR provides that "the arts and scientific research shall be free of constraint. Academic freedom shall be respected". The explanation concerning Article 13, which shall be "duly regarded" while interpreting the provision (Article 6(1) TEU)[49], is one of the most concise and reads that "this right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to Article 1 and may be subject to the limitations authorised by Article 10 of the ECHR"[50]. Demuro pointed out that the provision - which was a normative novelty - employed the word 'art' in pluralis (and this is indeed the case in the French, English and German versions of the Charter), as if one wanted to use a concept that includes the affirmation of a few arts, not only art or the world of high art. Therefore, it seems clear that the authors of the Charter wanted to protect every creative form[51].

Since the explanation accompanying Article 13 ChFR refers to freedom of expression, one should note that the case-law of the CJEU, as Woods pointed out, touches upon a rather narrow aspect of that freedom due to the substantive scope of EU law, and most often deals with freedom of commercial expression[52]. However, the inspiration of Article 13 ChFR does not flow from Article 10 ECHR only; the explanation defines Article 10 ChFR as a primary but not exclusive source of inspiration.

That is why the position presented by D. Sayers that Article 13 of the Charter merely strengthens a specific set of rights relating to freedom of expression without the intention of extending its scope beyond the case-law of the ECtHR on these freedoms[53], seems flawed as too restrictive.

---

49 According to K. Lenaerts even though the explanations are not legally binding, they constitute an interpretative instrument of a greater value than the *travaux préparatoires* (K. Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights,* European Constitutional Law Review 201, vol. 8, pp. 375-403). According to J.P. Jacqué, explanations are more than simply a commentary yet less than authentic interpretation (J.P. Jacqué, The *Explanations Relating to the Charter of Fundamental Rights of the European Union* [in:] *The EU Charter of Fundamental Rights. A Commentary,* S. Peers, T. Hervey, J. Kenner, A. Ward [eds.], Oxford 2014, p. 1724), whereas P. Vigni qualifies the explanations explicitly as authentic interpretation (P. Vigni, *The Right of EU Citizens to Diplomatic and Consular Protection: A Step Towards Recognition of EU Citizenship in Third Countries* [in:] *EU Citizenship and Federalism. The Role of Rights, D. Kochenov* [ed.], *Cambridge 2017, p. 596).*

50 Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, pp. 17-35.

51 G. Demuro, Article 13 - Freedom of the Arts and Sciences [in:] W.B.T. Mock, G. Demuro [eds.], *Human Rights in Europe. Commentary on the Charter of Fundamental Rights of the European Union,* Durham 2010, p. 86.

52 L. Woods [in:] S. Peers, T. Hervey, J. Kenner, A. Ward [eds.], *The EU Charter of Fundamental Rights. A Commentary,* Oxford 2014, p. 320, in § 11.24. However, even being confronted with questions of freedom of expression, the Court tends to escape from the problem - as exemplified by CJ (EU), 13.05.2014, C-131/12 *Google Spain SL i Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González.*

53 D. Sayers [in:] S. Peers, T. Hervey, J. Kenner, A. Ward [eds.], *The EU Charter of Fundamental Rights. A Commentary,* Oxford 2014, p. 380, § 13.02.

Moreover, it flows from the explanations to Article 13 ChFR that freedom of arts is to be exercized "having regard to Article 1" of the Charter ("Human dignity is inviolable. It must be respected and protected"). It is worth noting that explanations to the Charter in Article 13 stipulate that the exercise of a specific freedom or right is to be carried out "having regard to Article 1". At the same time, it seems obvious that Article 1 should be observed in the case of exercising the other rights and freedoms guaranteed by the ChFR, as it constitutes a sort of 'umbrella' provision[54]. Introducing a reference to respecting dignity in explanations to Article 13 of the Charter, while omitting the same in case of other provisions, does not seem to be simply explicable on the legal level; perhaps the answer should be given in a more political context. It may also be viable to consider a possible update of the explanation relating to Article 13 ChFR[55].

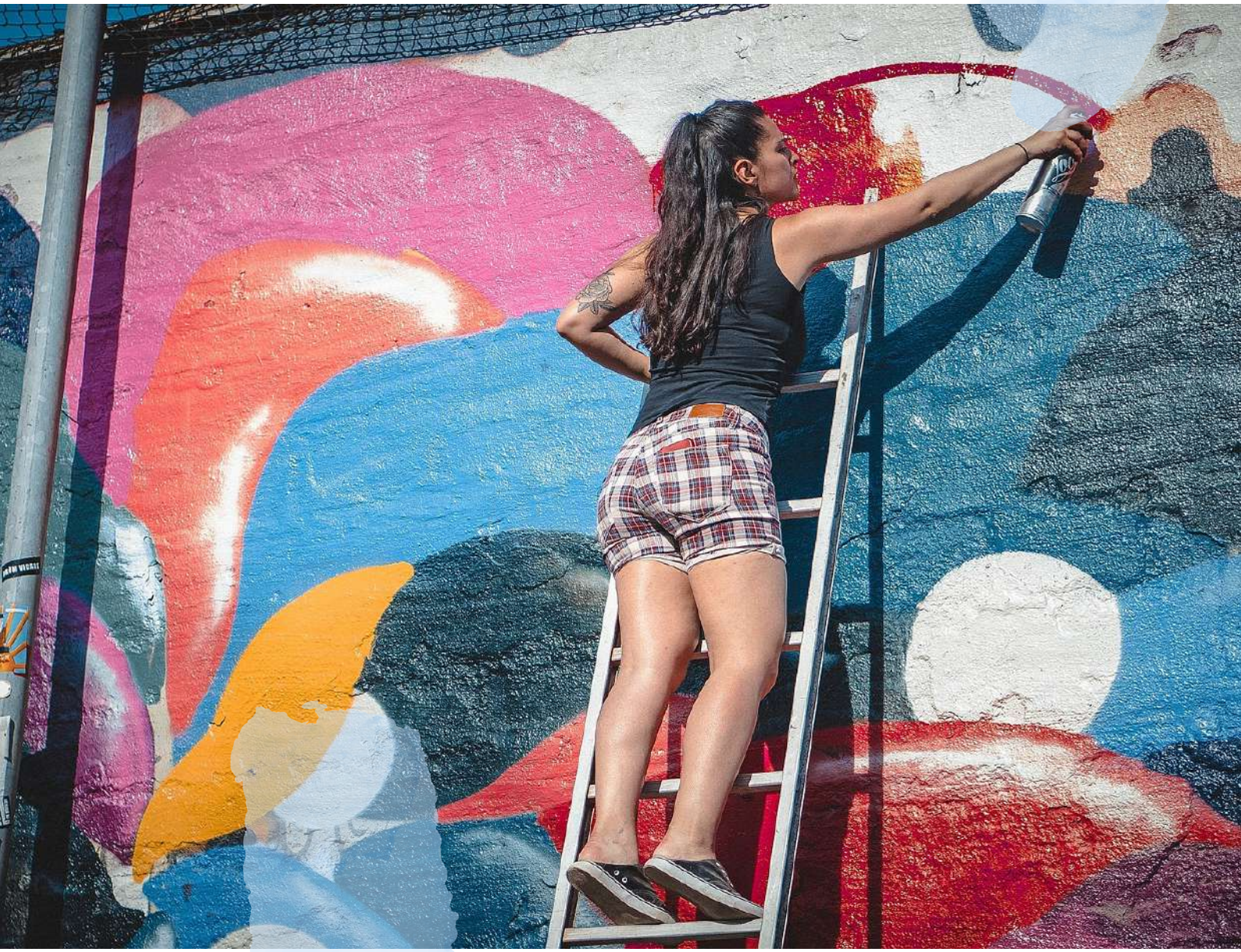

Photo by artistic name: qimono

54 See C. Dupré [in:] S. Peers, T. Hervey, J. Kenner, A. Ward [eds.], *The EU Charter of Fundamental Rights. A Commentary*, Oxford 2014, pp. 6 and 7, § 01.05.

55 The final sentence of the fifth recital of the ChFR's Preamble reads that "in this context, the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention" (in French: "Dans ce contexte, la Charte sera interprétée par les juridictions de l'Union et des États membres en prenant dûment en considération les explications établies sous l'autorité du praesidium de la Convention qui a élaboré la Charte et mises à jour sous la responsabilité du praesidium de la Convention européenne"); thus the possibility of further updates to the Charter does not seem to be excluded.

2.3. Secondary EU law

References to the freedom of arts are sometimes included in acts of secondary EU law but most often function as exceptions to general rules introduced by acts of secondary law[56]. The 'positive action' documents - provisions aimed at extending the scope of freedom of artistic expression instead of simply protecting that freedom from interference - are very infrequent[57].

Not a single legally binding, secondary law act, providing for the assurance of the freedom of artistic expression as one of its primary goals exists, even though Articles 114, 50 or 56 TFEU could arguably serve as legal basis.

2.4. Court of Justice of the European Union (CJEU) case-law

The case-law of the CJEU concerning freedom of artistic expression is very limited. In the opinion of Advocate General (AG) Cruz Villalón in the Art & Allposters case[58], an interesting attempt was made by the AG to define artistic expression while presenting the view on the understanding of the term 'adaptation' employed in Article 12 of the Berne Convention on the protection of literary and artistic works. In his opinion, "'adaptation' affects a 'work' insofar as it is the result of an artistic creation. A typical case would be a cinema adaptation of a literary work, a process whereby the artistic product of a great writer is turned into a product of cinematographic art; in otherwords, an artistic expression that recreates the subject matter of that work in its own language and conceptual and expressive universe, which differs from those in which it was originally conceived" (§ 57 of the opinion). In his opinion in the Johan Deckmyn case, AG Cruz Villalón referred to the concept of 'parody' within the meaning of Article 5 § 3 (k) of Directive 2001/29/EC and explained that from what he calls "a functional point of view", parody is a form of artistic expression and a manifestation of freedom of expression. It can be one thing as much as the other, and it can be both things at once. The important point for the present purposes is that the case before the referring court predominantly falls within the context of freedom of expression, so that that the image in question is designed to convey a particular political message with supposedly greater effectiveness" (§ 70 of the opinion)[59].

In Pelham v. Hütter[60] (another case concerning the interpretation of Directive 2001/29), AG M. Szpunar devoted some attention to the interpretation of Article 13 ChFR in the context of a dispute concerning the copyright protection of a musical piece that was considered the exclusive copyright of phonogram producers) challenged by the technique of sampling used by a certain hip-hop artist. A German court referred to a preliminary ruling following the decision of the Federal Constitutional Court of Germany insisting on the reconsideration of the case given the need of balancing the copyrights of the phonogram producer and the freedom of artistic expression to which the sampling artist was entitled. AG Szpunar noted that even though this "question raises the issue of the possible primacy of

56 See recital 70 of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (O.J. L 130, 2019), which read that "the steps taken by online content-sharing service providers in cooperation with rightsholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory to ensure that users receive uniform protection across the Union"; see also Article 85 (1) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation; O.J. L 119, 2016) reading that "Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression".

57 See the informal instrument Commission notice: *Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds ('ESI Funds')*, 2016/C 269/01 (O.J. C 269, 2016), which stipulates the documentation compliance of a Member State, with freedom of the arts as one of the assessment criteria.

58 Opinion of AG Cruz Villalón, 11.09.2014, C-419/13 *Art & Allposters International BV v. Stichting Pictoright*, ECLI:EU:C:2014:2214.

59 Opinion of AG Cruz Villalón, 22.05.2014, C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen et al.* (ECLI:EU:C:2014:458).

60 CJ (EU), C-476/17 Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben, judgment of 29.07.2019 (ECLI:EU:C:2019:624), opinion of AG M. Szpunar of 12.12.2018 (ECLI:EU:C:2018:1002).

the freedom of the arts over the exclusive right of reproduction of phonogram producers" (§ 82), in fact "the dispute in the main proceedings is not simply between an artist and a phonogram producer because those two functions are found on both sides. All of these different interests must therefore be taken into account when striking a balance between respective fundamental rights" (§ 85). While defining the normative nature of freedom of artistic expression, AG Szpunar held that "the freedom of the arts, referred to in the first sentence of Article 13 of the Charter, is a form of freedom of expression, set out in Article 11 of the Charter" (§ 91).

Furthermore, he held that "the requirement of obtaining a license for such use does not restrict, in my opinion, the freedom of the arts to a degree that extends beyond normal market constraints, especially since those new works often generate significant revenue for their authors and producers. So far as concerns the argument that, in certain cases, obtaining a license may prove impossible, for example, if the rightsholders refuse, I take the view that the freedom of the arts cannot guarantee the possibility of free use of whatever is wanted for creative purposes" (§ 96) and concluded that "the exclusive right of phonogram producers under Article 2(c) of Directive 2001/29 to authorise or prohibit reproduction, in part, of their phonogram in the event of its use for sampling purposes is not contrary to the freedom of the arts as enshrined in Article 13 of the Charter" (§ 99). This approach was essentially followed by the Justices, holding that "Article 2(c) of Directive 2001/29 must, in the light of the Charter, be interpreted as meaning that the phonogram producer's exclusive right under that provision to reproduce and distribute his or her phonogram allows him or her to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognisable to the ear" (§ 39).

The basic assumption of both the AG's opinion and the ruling of the Court was that the freedom of the arts (Article 13 ChFR) is simply a form of freedom of expression (Article 11 ChFR) distinguished only by the type of expression. Following strictly the wording of Article 10 ECHR, the Court amalgamated two freedoms distinguished by the Charter, failing to analyse the reasons why they were formulated separately by the drafters of the Charter or the distinctive definitions of freedom of the arts.

3. Definitional attempts and contaminating elements

There are two tendencies in the case-law of international or domestic judicial bodies concerning freedom of artistic expression when it comes to identifying the normative content of that freedom. They can be labeled either as a normative-definitional approach when courts attempt to define what is artistic expression as a legally protected normative category or an intuitive approach, when courts abstain from formulating any generally applicable definition of art or artistic expression and instead decide a casu ad casum whether a given form of expression deserves protection as a work of art).

3.1. The predominantly intuitive approach

In global legal scholarship and jurisprudence, it is the intuitive approach that dominates attempts to construct a legal definition of artistic expression. Normally, where legal documents, legal scholars or judicial bodies refer to artistic expression, they refrain from proposing definitions of it and focus on permissible limitations to that freedom,while declaring a "lack of ambition [in] defining what art is"61. This can be explained by two types of reasoning: firstly, artistic expression, which, due to its dynamic and ever- evolving nature, is hardly definable; and, secondly, judicial reflections on freedom of artistic expression, which are not provoked by the freedom itself but by its alleged abuses compromising other legally significant interests.

As already noted, applying this intuitive approach ends up by formulating often random and implausible remarks on the very content of freedom of artistic expression, such as the question of what is art and what is not. Ultimately, intuitive adjudication on freedom of artistic expression often compromises the effectiveness of its normative safeguards.

Another approach that could be called a 'normative-definitional approach' is present in some jurisdictions. This approach seems to be more favourable to freedom of artistic expression, as it is based on the assumption that a freedom of certain normative content exists which deserves protection, and that there are inherent limitations resulting from the definition of artistic freedom. Consequently, instead of balancing some unknown and barely understandable (and, thus, hardly protectable and, perhaps rather suspicious) interests of an artist with other 'hard', well defined and concrete rights or freedoms, the outcome of which would be quite predictable, two equally valued and legally significant legal values can be weighed up. Introducing the definition of artistic expression is a game-changer in litigation concerning that freedom and its alleged abuses.

Even though the ECtHR has not, to date, attempted to define what the notion of artistic expression legally means, we will take one of the dissenting opinions of the ECtHR's Justices as a starting point in the presentation of the normative-definitional approach in the global case-law. The first-ever Strasbourg judgment that focused on freedom of artistic expression was Müller v. Switzerland[62]. In his dissenting opinion, Justice de Meyer held, that "the external manifestation of the human personality may take very different forms which cannot all be made to fit into the categories mentioned above" (namely information or ideas, whose freedom to receive or impart is proclaimed by Article 10 § 1 ECHR). In other words, artistic expression constitutes an expression of the 'personal dimension' of an individual[63].

In Justice de Meyer's view, artistic expression constitutes a (substantive or performative) carrier transmitting human personality. This building block of the judicial definition of artistic expression reflects both a 'divine element' which is hardly explicable but which makes art out of human works, and an inseparable bond between art and mankind. As far as we know, only humans are capable of creating art as a "transcendent vision reflecting the diversity of … mankind"[64].

Having started from de Meyer's remark, one can proceed to another judicial milestone in defining artistic expression: namely, to the German Federal Constitutional Court's Mephisto case[65] , which held that "the essence of artistic activity is free, creative design, in which the artist's impressions and experiences are brought to immediate view"66 and that the aim of artistic expression is to "transmit the artist's individuality"[67].

While establishing whether a disputed performance or object is a form of artistic expression, it is essential to contextualize it within artistic trends or conventions; this is also important when it comes to legal evaluation of alleged abuses, requiring the embedding of the disputed work in the context of a given artistic style[68].

---

61 See the statement of Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. The right to freedom of artistic expression and creativity,* A/HRC/23/34, Geneva 14.03.2013 r., https:// digitallibrary.un.org/record/755488?ln=en (see § I.4).
62 ECtHR, 24.05.1988, Müller et al. v. Switzerland, appl. No. 10737/84.

62 ECtHR, 24.05.1988, *Müller et al. v. Switzerland,* appl. No. 10737/84.

63 See also: judgment of the Constitutional Court of Columbia, 27.03.1996, T-104/96 Castro Daza, where it was held: "La libertad de expresión artística comporta dos aspectos claramente diferenciables: el derecho de las personas a crear o proyectar artísticamente su pensamiento, y el derecho a difundir y dar a conocer sus obras al público. El primero de ellos, dado su alcance netamente íntimo, no admite restricción alguna, aparte de las limitaciones naturales que la técnica escogida le imponga al artista, y las fronteras de su propia capacidad para convertir en realidad material lo que previamente existe sólo en su imaginación".

64 Italian Corte Suprema di Cassazione, 1.10.2009 r., 10495/2009: „L'opera artistica se ne differenzia per l'essenziale connotato della creazione, ossia di quella particolare capacità dell'artista di manipolare materiali, cose, fatti e persone per offrirli al fruitore in una visione trascendente gli stessi, tesa all'affermazione di ideali e di valori che possano trovare riscontro in una molteplicità di persone".

65 German *Bundesverfassungsgericht,* 24.02.1971, Mephisto, 1 BvR 435/68.

66 Idem: „Das Wesentliche der künstlerischen tätigung ist die freie schöpferische Gestaltung, in der Eindrücke, Erfahrungen, Erlebnisse des Künstlers durch das Medium einer bestimmten Formensprache zu unmittelbarer Anschauung gebracht werden".

67 Idem: „Beim künstlerischen Schaffen wirken Intuition, Phantasie und Kunstverstand zusammen; es ist primär nicht Mitteilung, sondern Ausdruck und zwar unmittelbarster Ausdruck der individuellen Persönlichkeit des Künstlers".

68 The Appelate Court in Versailles, France, 18.02.2016 r. case 15/02687 *Aurélien Pascal X*: "ce régime de liberté renforcé doit tenir compte du style de création artistique en cause, le rap pouvant être ressenti par certains comme étant un mode d'expression par nature brutal, provocateur, vulgaire voire violent puisqu'il se veut le reflet d'une génération désabusée et révoltée".

The definitional attempts presented above assume that artistic expression does not have to constitute a holding of opinion or imparting of information or ideas. As Justice de Meyer rightly pointed out, "there is no need at all to try to see it was a vehicle for communicating information or ideas: it may be that but it is doubtful whether it is necessarily so. Whilst the right to freedom of expression 'shall include' or 'includes' the freedom to 'seek', to 'receive' and to 'impart' 'information' and 'ideas', it may also include other things. The external manifestation of the human personality may take very different forms which cannot all be made to fit into the categories mentioned above"[69].

One should add that artistic expression can be seldom understood as having a single, indisputable meaning. Just like the law with its frequent ambiguity and openness to interpretation, art is predominantly open to various, often contradictory, interpretations. Any object can become art, depending on the circumstances; this is perfectly illustrated by Marcel Duchamp's Fountain (a urinal with the signature of the artist). A work of art is always subordinated to the intellectual processes occurring in the 'eye of the beholder' and they can be often undetermined by the intentions of the artist[70].

Photo by David Mark

69 Separate opinion of Justice de Meyer in: ECtHR, 24.05.1988, *Müller et al. v. Switzerland*, appl. No. 10737/84, in § I.

70 See R. Barthes, *The Death of the Autor*, „Aspen" 1967/5-6.

3.2. The problem of contaminating elements

While applying the definition of artistic expression (as a distinct normative category), particular problems of judicial appraisal may arise when a given work contains both artistic qualifications and political or commercial elements. In the case of such 'mixed statements', it seems recommendable to follow the reasoning of the American Supreme Court presented in Virginia State Board[71] or the German BvG in Benetton7[2] and to grant the highest possible level of protection - that is, one that applies to the most legally protected elements present in a given work. One should note though, that the ECtHR seems to apply a different approach based on finding the most characteristic element (whether commercial, religious or artistic) of a given expression and consequently applying the appropriate standard of protection to that element[73].

4. Negative and positive obligations of EU Member States in the field of freedom of artistic expression

Obligations regarding the protection of freedom of artistic expression can be viewed, according to traditional categorisations, as negative or positive. The former refer to the duty of a state to abstain from interfering with the fundamental rights or freedoms, while the latter entail affirmative action to assure the effective exercise of rights or freedoms7[4]. The concept of positive and negative obligations applies also to freedom of expression[75], although positive obligations arise in Article 10 ECHR to a very limited extend[76].

4.1. Negative obligations

Negative obligations arise from limitation clauses such as Article 10 § 2 ECHR or Article 52 § 1 ChFR and are not pre-defined, since they refer to the different types of constraints usually introduced by state authorities. Most commonly, freedom of artistic expression is challenged on grounds of competing legally protected interests such as freedom of religion, dignity and reputation of others or protection of public order. In the latter case a limitation is normally unlikely to survive a strict scrutiny test applied by the ECtHR, unless the expression in question is qualified as a hate speech. State authorities and international courts performing their supervisory duties must balance these competing interests.The most common constraints on freedom of artistic expression that appear in case-law are briefly summarised below.

---

71 US Supreme Court, 24.05.1976, *Virginia State Board v. Virginia Consumer Council.*

72 [German] Federal Constitutional Court, 12.2000, Benetton, 1 BvR 1762/95 i 1 BvR 1787/95.

73 See e.g. ECtHR [GC], 12.07.2012, *Mouvement raëlien suisse v. Switzerland*, appl. No. 16354/06.

74 See e.g. ECtHR, 22.06.2004, *Broniowski v. Poland*, appl. No. 31443/96.

75 See e.g. ECtHR [GC], 12.09.2011, *Palomo Sanchez and others v. Spain*, appl. Nos. 28955/06, 28957/06, 28959/06 and 28964/06, where the Court held that "this is also the case for freedom of expression, of which the genuine and effective exercise does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In certain cases, the State has a positive obligation to protect the right to freedom of expression, even against interference by private persons" (§ 59).

76 As exemplified in rather extreme circumstances of the *Özgür Gündem case (ECtHR, 16.03.2000, Özgür Gündem v. Turkey*, appl. No. 23144/93, see in particular §§ 42-46), where the newspaper *Özgür Gündem* was forced to cease publication due to the campaign of attacks (from private individuals seemingly supported by the state) on journalists and others associated with the newspaper and due to the legal steps taken against the newspaper and its staff. The ECtHR stressed that "the authorities were aware that *Özgür Gündem*, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered" and held that "the Government have failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression". In *Appleby (ECtHR, 6.05.2003, Appleby and Others v. the United Kingdom*, appl. No. 44306/98, § 48) the Court found no violation of Article 10 ECHR where the national authorities gave priority to property rights of private mall owners over the freedom of expression which protesters attempted to exercise (intending to organize picketing inside a shopping mall) and held that the applicants were able "otherwise to exercise their freedom of expression in a meaningful manner".

Political constraints

Freedom of artistic expression may be challenged by political constraints, as exemplified in Karataş[77], Alinak[78] or Kar[79]. Generally, the ECtHR tends to apply strict scrutiny in cases concerning politically driven restrictions on freedom of artistic expression and it is extremely difficult for a state to justify this type of interference. What is striking is that, when confronted with restrictions imposed on freedom of artistic expression motivated by political considerations, the Court tends to qualify artistic expression as a political speech, deserving the most meticulous scrutiny, as well as to qualify art as a form of expression having by definition a "limited impact". This happened in the aforementioned Karataş ruling, holding that "the applicant is a private individual who expressed his views through poetry - which by definition is addressed to a very small audience - rather than through the mass media, a fact which limited their potential impact on "national security", "[public] order" and "territorial integrity" to a substantial degree. Thus, even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation"[80]). This approach was rightly criticised by Justices Wildhaber, Pastor Ridruejo, Costa and Baka in their joint partly dissenting opinion, where they held that "the majority of the Court says that poetry is a form of artistic expression that 'appeals only to a minority of readers' and is 'of limited impact' (paragraphs 49 and 52 of the judgment). We disagree with this assessment. It seems to us that the Court saw the poetic form as being more important than the substance - that is to say, the tone and content. We consider that the Court should be wary of adopting an ivory-tower approach. One only has to think of words of the 'Marseillaise' as an example of a poetic call to arms".

Photo by Rudy and Peter Skitterians

77 ECtHR, Karataş v. Turkey, 8.07.1999, appl. no. 23168/94.

78 ECtHR, 29.03.2005, Alinak v. Turkey, appl. No. 40287/98

79 ECtHR, 3.05.2007, Kar and others v. Turkey, appl. No. 58756/00.

80 ECtHR, Karataş v. Turkey, op. cit., § 52.

Religious and public morality constraints

For a long time, art was related to magic[81] and served to express transcendental experience. In modern times, artistic works have often been viewed as provocative, either by experimenting with religious tropes or directly criticising religious dogma, while infuriating, or at least distressing, believers. Characteristically, both artistic and religious expressions are non-rational; they are rooted in human sensitivity rather than logical reasoning. Aware of these historical developments, one can view the relationship between religion and art as like a parent and a rebellious child, where law plays the role of mediator in a family conflict.

The approach of the ECtHR to that interplay between religion and art is not consistent. On one hand, in Otto-Preminger-Institut the Court held that the national authorities "had due regard to the freedom of artistic expression" and they "did not consider that [a wok's] merit ... or contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction", adding that "the trial courts, after viewing the film, noted the provocative portrayal of God the Father, the Virgin Mary and Jesus Christ". The Court concluded that it could not "disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner"[82].

The same approach seemed to be applied in Wingrove, where the Court held that "it was not unreasonable for the national authorities, bearing in mind the development of the video industry in the United Kingdom ..., to consider that the film [in question] could have reached a public to whom it would have caused offense"[83], or in S. and G. where the Commission accepted the public morality justification produced by British authorities outraged by an exhibition of a sculpture made of an artificial human head and mummified real human fetuses[84].

On the other hand, in Sekmadienis, the Court held that religious believers confronted with a speech combining elements of commercial and artistic expression "must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith"[85].

Photo by artistic name: AhmadArdity

81 M. Ujma, *Sztuki wizualne*, Warszawa-Bielsko-Biała 2011, p. 10.

82 ECtHR, 20.09.1994, *Otto-Preminger-Institut v. Austria*, appl. No. 13470/87, § 56.

83 ECtHR, 25.11.1996, *Wingrove v. the United Kingdom*, appl. No. 17419/90, § 63.

84 Decision of the European Commission on Human Rights, 2.09.1991, S. and G. v. *the United Kingdom*, appl. No. 17634/91

85 ECtHR, 30.01.2018, *Sekmadienis Ltd. v. Lithuania*, appl. No. 69317/14, § 81.

Reputation and dignity constraints

In Vereinigung Bildender Künstler, the ECtHR found a violation of Article 10 ECHR, holding that national authorities failed to strike a balance between the protection of the reputation of a former politician Mr. Meischberger and the freedom of artistic (in this case satirical) expression of the applicant society when presenting a collage during an art exhibition, depicting the politician ejaculating on Mother Teresa and being ejaculated on by his party's leader, Mr. Heider. The Court stressed that "the painting could hardly be understood to address details of Mr. Meischberger's private life, but rather related to Mr. Meischberger's public standing as a politician from the FPÖ (Freedom Party of Austria)"[86]. A similarly protective approach to freedom of artistic expression was applied by the Court in Sousa Goucha, where the applicant claimed his dignity and personal integrity had been infringed by national authorities that rejected his claims concerning a TV show in which he had been characterised - in a satirical manner - as "the best Portuguese female TV host" (the applicant was gay). The ECtHR held that "the domestic courts did convincingly establish the need for placing the protection of the defendants' freedom of expression above the applicant's right to protection of reputation. It notes, in particular, that they took into account the defendants' lack of intent to attack the applicant's reputation and assessed how a reasonable spectator of the comedy show in question would have perceived the impugned joke, rather than just considering what the applicant felt or thought towards the joke. A limitation on freedom of expression for the sake of the applicant's reputation would therefore have been disproportionate under Article 10 of the Convention"[87].

One can conclude that, depending on the circumstances and overall context of the case, the ECtHR would normally be quite favourable towards the protection of freedom of artistic expression when balanced with reputation and dignity constraints.

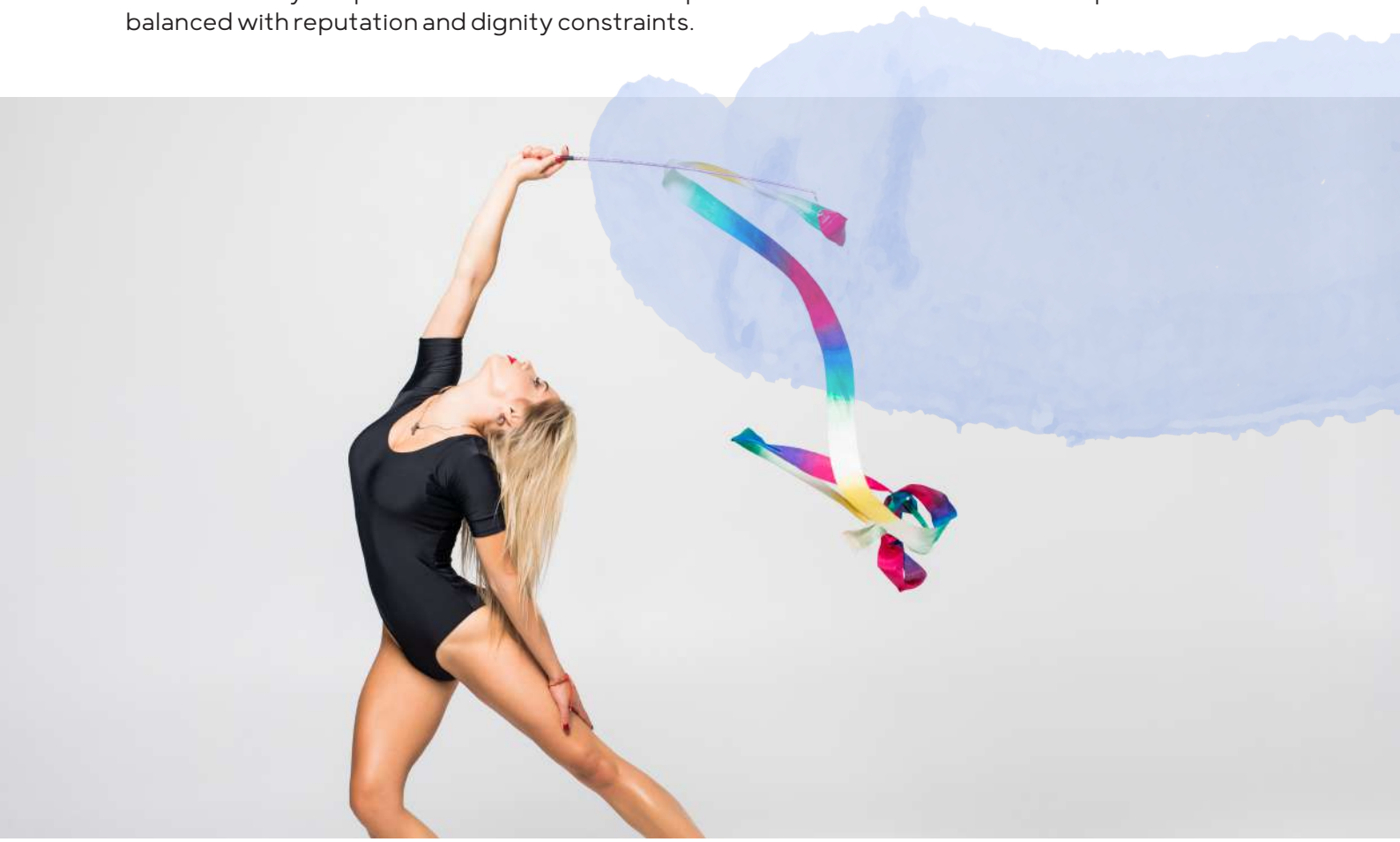

Photo by artistic name: diana.grytsku

86 ECtHR, 25.01.2007, *Vereinigung Bildender Künstler v. Austria*, appl. No. 68354/01, § 34.

87 ECtHR, 22.03.2016, *Sousa Goucha v. Portugal*, appl. No. 70434/12, § 55.

Other constraints

Additional reasons invoked to justify restrictions on freedom of artistic expression may concern such considerations as freedom of establishment or property law[88], preventing or combating incitement to hatred or violence[89], including anti-semitic expressions of allegedly artistic value[90], or preventing or combating cruelty employed in the process of production of art[91]. It has become a well-settled case-law of the ECtHR that "speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention ... The decisive point when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17, is whether the statements are directed against the Convention's underlying values, for example by stirring up hatred or violence, and whether by making the statement, the author attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it"[92].

4.2. Positive obligations

Currently, positive obligations arising from Article 10 ECHR in respect of freedom of artistic expression are limited to imposing a duty on a state to take positive action where an individual would otherwise be deprived of exercising freedom of expression in any meaningful manner. The same approach should be applied in the case of Article 13 ChFR93.

In the present state of development of the ECHR's interpretation (and, in parallel, the ChFR's interpretation), one can neither exclude nor confirm more extensive positive obligations of states in relation to freedom of artistic expression. This issue is of key importance. Except for rather exotic problems artists and those active in the Wirkbereich area may be faced with due to constraints relating to the exercise of state power in some Eastern European states, major challenges to the freedom of artistic expression appear to result from actions of private individuals such as media owners (including, in particular, electronic media operators) or the landlords of art exhibition premises. This consideration calls for immediate rethinking of the standard of the protection of freedom of artistic expression in horizontal relations (and, consequently, the concept of positive obligations of states in the same respect).

One must also note that "the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition but the applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts, regard must be given to striking a fair balance between the competing interests at stake"94 - a statement which also holds true in the case of freedom of (artistic) expression95.

---

88 See French cases of the anti-nicotine campaign (Cour de cassation, 21.02.1995, 92-13.688) or Demeure du Chaos (Cour de cassation z 15.12.2009, 09-80.709), as well as a Dutch judgment concerning a dispute between a company ordering a commercial performance for children and performing artists (judgment of the court in Groningen, 17.10.2007, 325896 CV EXPL 07-5278, ECLI:NL:RBGRO:2007:BB7405).

89 See judgment of the Court of Appeal in Versailles (France), 18.02.2016, 15/02687, *Aurélien Pascal X* (Orelsan).

90 Decision of the ECtHR, 20.10.2015, *M'Bala M.Bala v. France*, appl. No. 25239/13.

91 See R.M. Share, *Killing for Art: The Council of Europe and the Need for a Ban on the Slaughter of Animals for Artistic Expression*, The George Washington International Law Review, 2010/2, pp. 4-7-441.

92 Decision of the ECtHR, 17.04.2018, *Roj TV A/S v. Denmark*, appl. No. 24683/14, § 31.

93 That is because of Article 52 (3) ChFR, which states that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". Although the Union may provide for more extensive protection of freedom of artistic expression, it must nevertheless be mindful of balancing that right with other rights and freedoms protected under the Charter which correspond to rights or freedoms guaranteed parallelly under the Convention.

94 ECtHR [GC], 30.06.2009, Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2), appl. No. 32772/02, § 82.

95 ECtHR [GC], 12.07.2012, Mouvement raëlien suisse v. Switzerland, appl. No. 16354/06, § 50.

As explained above, freedom of expression (including artistic expression) has a predominantly negative dimension. From the perspective of the audience, it "prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him"96, whereas from the perspective of the imparter of expression it entails the prohibition (in principle) of direct or indirect censorship by state authorities97.

4.3. Positive obligations and the problem of collateral (private) censorship

As already discussed, positive obligations arising from Article 10 ECHR in respect of freedom of artistic expression are limited to imposing on a state the duty to take positive action where an individual would otherwise be deprived of exercising their freedom of expression in any meaningful manne The issue which deserves addressing, though, and which will probably be addressed to a greater extent in the future, is the question of the positive obligations of States to protect freedom of artistic expression against private censorship. There are at least two reasons for this prediction: firstly, the growing importance of digital media results in the creation of 'private e-states' controlled by private companies applying specific rules, often uncertain and so far not subjected (at least to a notable extend) to judicial review; secondly, the COVID-19 pandemic, resulting in economic crises whose first victim is art: States largely stopped subsiding artistic activities, forgetting the late Sir Winston Churchill's saying that "the arts are essential to any complete national life. The State owes it to itself to sustain and encourage them". Artists have been exposed to a significant extent to free-market operations. Whereas the free market is certainly a blessing (unreservedly confirmed by those from Eastern Europe who experienced its absence), artistic value is not exactly its primary consideration.

The problem of collateral or private censorship (or regulation of speech) has been discussed in the legal literature98 but has not so far been subject to extensive judicial considerations either in the ECtHR or CJEU. Taking into account the growing tension between market forces, on the one hand, and the freedom of artistic expression increasingly exercised in privately-owned digital media, the problem of collateral censorship should be duly considered by the EU legislature.

Photo by Quang Nguyen Vinh

96 ECtHR, 26.03.1987, *Leander v. Sweden*, appl. No. 9248/81, § 74.

97 ECtHR [GC], 10.05.2001, *Cyprus v. Greece*, appl. No. 25781/94, §§ 248-254.

98 Instead of many others, see J. Balkin, *Old School/New School Speech Regulation*, Harvard Law Review, 2014, vol. 127, pp. 2296-2342.

CONCLUSIONS AND THE WAY FORWARD

Overall conclusions

Artistic freedom is a fundamental pillar of any democratic system and restrictions to it endanger human rights protection. At the EU level, it is paramount to shape an updated, relevant and effective protection scheme for one of the key values of the European project, thus further legislative action is needed to create explicit safeguards for artistic freedom under EU Law.

Adding to this, for any legal action to be meaningful, proportionate and efficient, it has to be based on the factual realities of the artistic community. Therefore, a structured dialogue that brings the worlds of arts and legal expertise together is needed to discuss international and domestic standards of FoAE in the EU, alongside the key features for the protection of FoAE. This process could result in a handbook containing guidelines for better protection of the freedom of artistic expression at EU level,. including general indicators to monitor the state of FoAE across the EU.

EU law and artistic Freedom

There appears to be no such concept as a self-standing competence of the EU in respect of freedom of artistic expression. The competence of the EU in this respect is limited by the general principle of conferral reflected in Articles 4 and 5 Treaty on European Union (TEU). Therefore, as matters stand, the EU may only legislate in the field of freedom of artistic expression when it uses the competence provided for in the Treaties. Still, freedom of artistic expression is a fundamental freedom according to Article 13 ChFR. However, according to the explanations to Article 13 ChFR that freedom is to be exercised "having regard to Article 1" of the Charter ("Human dignity is inviolable"). This reference is not provided for any other other provision of the Charter. This does not seem to be simply explicable on the legal level; perhaps the answer should be given in a more political context. An update of the explanation relating to Article 13 ChFR is possible though.

Not a single legally binding, secondary law act, providing for the assurance of the freedom of artistic expression as one of its goals exists, even though Articles 114, 50 or 56 TFEU could arguably serve as legal basis.

Member states' obligations according to international law

All member states have obligations according to UN-adopted international law instruments such as UDHR, ICCPR, ICESCR and UNESCO legal instruments. All member states are parties to the ECHR.

UN-adopted international human rights instruments outline a number of principles. UN Treaty Bodies monitor all states that are parties to the relevant convention and issue concluding observations. The enforcement of any recommendations in the concluding observation is normally subject to the willingness of the member state in question to co-operate with the relevant Treaty Body.

However, these instruments as well as all materials produced by relevant UN Treaty Bodies such general comments, guidelines and concluding observations constitute an inspiration for CJEU and ECtHR.

The European Convention on Human Rights

Article 10 ECHR does not explicitly refer to the freedom of artistic expression; nonetheless, the ECtHR has recognised the importance of artistic expression as a specific type of expression that deserves protection in that article.

Cases can be brought in front of the ECtHR only when all domestic remedies have been exhausted. Consequently, the body of ECtHR case-law reflects only part of the actual implications of those limitations of artistic freedom that might take place in the member states.

Case-law concerning artistic freedom

The body of CJEU case-law on freedom of artistic expression is very limited. Most case- law relevant for the member states comes from the ECtHR.

ECtHR's case-law on freedom of artistic expression is rather superficial, as it does not provide for any concise definition of artistic expression and reveals a clear tendency to anchor the protection of disputed speech in its political nature more than in its artistic intent and substance. That is not surprising, since Article 10 ECHR was thought to protect free political discourse as the foundation of democracy. Subsequently, other elements of the substantive scope of freedom of expression such as artistic, commercial, academic or religious speech appear less relevant against that historical background.

In this respect, it is worth mentioning that case-law of certain national courts (notably the German Federal Constitutional Court) allows to develop a definition of artistic expression as a protected value. However, most courts (including ECtHR) tend to

adjudicate in relation to the freedom of artistic expression and its alleged abuses in an intuitive and case-by-case manner. This results in legal uncertainty. Artists and those who work with dissemination of artistic creations, cannot be sure whether a given work will actually be assessed as art in the first place.

The way forward

The European Union has continuously emphasised the importance of artistic freedom. Current developments suggest that action is needed to defend a fundamental right that is also at the heart of European values.[99]

On the other hand, the legal overview in this study indicates that the legal protection for artistic freedom in the EU and its Member States comes predominantly from international human rights law or the ECHR. In fact, it is not unfair to say that a certain discrepancy seems to exist between the ambitions of the EU and the available protection in EU law where artistic freedom is concerned. The immediate reaction to such an interpretation is that further legislative action is needed to create explicit protection for artistic freedom specifically in EU Law.

However, the legal overview also suggests that such legal action amounts to a harmonisation measure and is possible only when the EU uses its competence (provided for in the Treaties). Needless to say, it is a question of long and complicated legislative processes. Nevertheless, the complexity of these processes does not disqualify the value of a more explicit legal protection for artistic freedom in EU Law, per se. A more elegant protection that would praise the value of artistic freedom and free it from what Prof. Górski rightfully calls "contaminating elements" is undoubtedly an appealing idea.

Such an approach requires not only elegant and progressive legal reasoning, but also a deep understanding of artistic activity as a practice and process, involving the participation of the artistic community.

As CAE, along with some other expert networks,[100] pointed out, the current socio-economic system in which artists function is the source of huge impediment to free expression in the arts sector. Being caught up in various 'survival solutions', artists do not have time to freely express what they want and potentially could. Consequently, for any legal action to be meaningful, proportionate and efficient, it needs to be based on the factual realities of the artistic community.

99 See Freemuse report The New European Agenda on Freedom of Artistic Expression as well as CAE's position paper Protecting artistic freedom as a European value

100 See European Expert Network on Culture and Audiovisual (2020). The status and working conditions of artists and cultural and creative professionals.

Furthermore, including the artistic community in the process provides for an added- value. It will allow for a better understanding of the constitutional traditions of the member states and how freedom of artistic expression is protected and handled in these traditions. This is crucial to any possible future policy action or legal action on the Union level, especially as only few cases of alleged constrains on the freedom of artistic freedom are presented for scrutiny in front of the UN Treaty Bodies or the ECtHR.

This brings us back to CAE's previous proposal to initiate a structured dialogue that would bring the worlds of arts, legal expertise and decision-makers together for a better understanding of how a contemporary and relevant protection for artistic freedom can be shaped. This can be done through a process of monitoring based on a handbook enhanced by indicators. Such an approach would also allow for the more specific research that is needed, as indicated by Prof. Górski.

In other words, a learning process through such a European handbook and legal action are not mutually exclusive alternatives. In fact, these are complementary components that would allow the EU to shape an updated, relevant and efficient protection for one of the key values of the European project.

Photo by Brett Sayles

Annex: Relevant literature

It seems rather surprising that global legal scholarship has not developed an extensive body of analytical work regarding freedom of artistic expression. Scholarly works devoted to different aspects of the freedom of art or artistic expression normally abstain from defining such terms and use them in an intuitive manner, instead. Let us quote two examples here. When Amy Adler vividly criticises leftists' attempts to suppress freedom or (artistic) speech under the guise of combating abuse of women in pornography, she starts with pointing out at the impossibility of "coherently defining terms such as 'pornography' or 'art' or 'hate speech'" and adds that she believes "that such words defy definition" - which is an underlying thesis of her article[101]. When Paul Kearns presents the evolutionary approach of English-speaking judiciaries to the challenges to freedom of art arising from 'indecent' or 'blasphemous' works, he explains that his proposed understanding of art is "broad" and "includes, inter alia, visual art, creative writing and film"[102].

However, it is precisely the definition that makes legal provisions foreseeable, which is a condition for the effective protection of any right or freedom.

There are monographic books analyzing the history of litigations concerning freedom of art from a legal viewpoint (for example, D. McClean [ed.], *The Trials of Art*, London 2007; M. Heins, *Sex, Sin and Blasphemy: A Guide to America's Censorship Wars*, New York 1993; P. Kearns, *Freedom of artistic expression. Essays on Culture and Legal Censure,* Oxford 2013; U. Hoppe, *Die Kunstfreiheit als EU-Grundrecht,* Frankfurt am Main 2011) or generally contextualizing freedom of artistic expression from more analytical perspectives (such as S.C. Dubin, *Arresting Images: Impolitic Art and Uncivil Actions, Oxon 1992; W. Schneider, D. Gad [eds.], Good Governance for Cultural Policy. An African-European Research about Arts and Development,* Frankfurt am Main 2014). Artistic freedom is sometimes discussed as an element of the freedom of creativity (see I. Pignard, La liberté de création, Nice 2013; A. Tricoire, *Petit traité de la liberté de création*, Paris 2011), of freedom of expression (J. Skrzydło, *Wolność słowa w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych i Europejskiego Trybunału Praw Człowieka, Toruń 2013; I. C. Kamiński, Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna,* Warsaw 2010; K. András, T. Bernát, *Sajtószabadság és médiajog a 21. század elején 4*, Budapeszt 2017) or of cultural rights (G. Famiglietti, *Diritti culturali e diritto della cultura. La voce «cultura» dal campo delle tutele a quello della tutela,* Torino 2010). Commonly, these works are concentrated on the experience of a given jurisdiction (for example, American - see R. P. Bezanson, Art and Freedom of Speech, Chicago 2009; French: I. Pignard, *La liberté de création,* Nice 2013; ECtHR: D. Bychawska-Siniarska, D. Głowacka [eds.], *Swoboda wypowiedzi w działalności artystycznej,* Warszawa 2014; other English-speaking states: P. Kearns, *Freedom of artistic expression. Essays on Culture and Legal Censure,* Oxford 2013; Japan: R. Hutchinson [ed.], *Negotiating Censorship in Modern* Japan, New York 2013). In addition, there are books presenting the interplay between freedom of artistic expression and other legally protected values (including J. Temperman, A. Koltay [eds.], *Blasphemy and Freedom of Expression. Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre,* Cambridge 2017; M.M. Bieczyński, *Prawne granice wolności twórczości artystycznej w zakresie sztuk audiowizualnych,* Warszawa 2011). Finally, there are also works useful for legal analysis of the concept of artistic expression, which nonetheless take non-legal perspectives on defining art (for example, A. Danto, *What Art Is*, New Haven 2014; S. Davies, *Definitions of Art*, Ithaca 1991; A. Julius, *Transgressions: The Offences of Art*, Chicago 2002). Incidentally, only the legal scholarship focuses on the concept of freedom of artistic expression in a universal perspective (see M. *Górski, Swoboda wypowiedzi artystycznej. Standardy międzynarodowe I krajowe,* Warsaw 2019).

101 A. Adler, What's Left? Hate Speech, Pornography, and the Problem of Artistic Expression, „California Law Review", 1996, vol. 84, No. 6, pp. 1499-1572, p. 1506.

102 P. Kearns, Freedom of Artistic Expression. Essays on Culture and Legal Censure, Oxford 2013, p. 1.

Freedom of artistic expression has been also discussed in numerous articles or book chapters. Again, they either concentrate on particular jurisdictions (for instance, American: J.M. Balkin, *Cultural Democracy and the First Amendment,* Northwestern University Law Review 2016/110; S.H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment,* "Wisconsin Law Review" 1987; M.W. Walker, *Artistic Freedom v. Censorship: The Aftermath of the NEA's New Funding Restrictions,* "Washington University Law Review" 1993/3; French: M. Kraïem Dridi, La liberté de création culturelle, "Annuaire International de Justice Constitutionnelle" 2013/ XXIX, Aix-en-Provence 2014; P. Mouron, *La liberté de création au sens de la loi du 7 juillet 2016*, "Revue des Droits et Libertés Fondamentaux" 2017/30; Canadian: K. Roach, D. Schneiderman, *Freedom of Expression in Canada* [w:] *Canadian Charter of Rights and Freedoms*, red. E. Mendes, S. Beaulac, Markham 2013; British: D. Watkins, *Freedom of Artistic Expression and the Human Rights Act 1998*, „Art Antiquity and Law" 2005/2; German: R. Maroz, *The Freedom of Artistic Expression in the Jurisprudence of the United States Supreme Court and the Federal Constitutional Court of Germany: a comparative analysis*, „Cardozo Arts & Entertainment Law Journal" 2017/2; Russian: D. Kuznetsov, Freedom Collide: *Freedom of Expression and Freedom of Religion in Russia in comparative perspective*, "Russian Law Journal" 2014/2; Hungarian: Z. Cseporán, *A művészet szabadságának mozgástere az Alaptörvény keretei között*, "Scriptura" 2014/1; K. András, A művészet szabadsága: a nem létező alapjog, "Pázmány Law Working Papers" 2016/4; ECtHR: E. Polymenopoulou, *Does One Swallow Make a Spring? Artistic*

and Literary Freedom at the European Court of Human Rights, "Human Rights Law Review" 2016/3; comparative - multi-jurisdictional: P. Kearns, A Hidden Minority: *A Comparative Analysis of the Rights of Artists in England, France and the USA*, "Art Antiquity and Law" 2013/3) or particular aspects of the freedom of artistic expression (e.g. E. Łętowska, K. Pawłowski, *What is Allowed in the Opera: Law as the Borderline of Artistic Experiment [in:] Law and Opera*, F. Annunziata, G. F. Colombo [eds.], Cham 2018).

Finally, there are commentaries on the major international legal instruments protecting inter *alia freedom* of artistic expression (EU ChFR: S. Peers, T. Hervey, J. Kenner, A. Ward [eds.], *The EU Charter of Fundamental Rights. A Commentary,* Oxford 2014, W.B.T. Mock, G. Demuro [eds.], *Human Rights in Europe. Commentary on the Charter of Fundamental Rights of the European Union*, Durham 2010; ECHR: W. Schabas, *The European Convention on Human Rights: A Commentary,* Oxford 2015; ICCPR: S. Joseph, J. Schultz, M. Castan eds.], *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary,* Oxford 2004; ICESCR: B. Saul, D. Kinley, J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials,* Oxford 2014) or on their drafting (e.g. B. Saul, *The International Covenant on Economic, Social and Cultural Rights. Travaux Préparatoires 1948-1966,* vol. I, Oxford 2016; B. Saul, *The International Covenant on Economic, Social and Cultural Rights. Travaux Préparatoires 1948-1966*, vol. II, Oxford 2016).

Study commissioned by MEP Diana Riba i Giner

THE GREENS/EFA in the European Parliament

culture ACTION europe

Photo by Yogendra Singh