ARTISTIC EXPRESSION: FREEDOM OR CURSE? SOME THOUGHTS ON JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS FROM THE THEORETICAL PERSPECTIVE OF VISUAL AND PERFORMANCE ARTS AND RATIONALES BEHIND FREEDOM OF POLITICAL EXPRESSION

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Abstract: The purpose of this contribution is to evaluate the jurisprudence of the European Court of Human Rights (ECtHR) in freedom of artistic expression cases dealing with visual and performance arts. The reasons for this particular evaluation are salient to the fact that the ECtHR has consistently provided a lesser level of protection to artistic expression than to political expression. The aim of this article is to challenge the approach of the Court to the freedom of artistic expression in relation to visual and performance arts. The critical evaluation is based on two different but complementary grounds: contemporary theory of art critique of the ECtHR's understanding of art and critique based on the ECtHR's own political freedom of expression cases. The argument of the authors is that the ECtHR approach to visual and performance arts as an exercise in ethics and aesthetics is contradicted by contemporary art theory and practice which invariably assumes the societal role of art, its potential subversive and transformative function within a society at large, and, ultimately, its *lato sensu* political value. In addition, visual and performance arts are powerful yet fragile instruments for delivering the debate to society at large. Viewed from this perspective, artistic expression has the same beneficial effect on a democratic society as political expression *stricto sensu*. Therefore, the rationales underpinning protection of political expression are essentially the same as those of artistic expression, therefore the ECtHR should extend the same level of legal protection to arts and artists to keep valuable social dialogue alive.

Keywords: European Court of Human Rights, artistic expression, Article 10 of the European Convention on Human Rights, visual arts, performance arts, subversive art, theories of art

1. Introduction

A conversation between artists and lawyers is never an easy one. Once such discussion was conceived over the jurisprudence of the European Court of Human Rights

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and how it differentiates between political and artistic expressions, mostly on the ground that the former is essential for public debate and democratic society unlike the latter. To say that artists are baffled by this view is an understatement in the extreme. It was to be expected that artists would not only dislike the rationale of the Court but would simply be unable to grasp the reasoning of the said body. What a lawyer intuitively felt was wrong in the Court's take on artistic expression was easily articulated by the artist. As their tools and interests crossed, discussion ensued. So here we are.

2. Background

While the existence and relevance of freedom of expression as an international human right is by now beyond any doubt, its magnitude and content seem to be the matter of ever-evolving international jurisprudence. Freedom of expression jurisprudence is rich, versatile and above all closely monitored by different interested groups and individuals given the variety of contexts which can give rise to its application. In terms of what freedom of expression entails we may encounter different cultural and legal traditions, both in terms of national and international law. One of these traditions certainly is the one generated by the European Convention on Human Rights (hereinafter: ECHR or Convention) and case law of the European Court of Human Rights (hereinafter: ECtHR or Court).

Case law of the ECtHR on Article 10 of the ECHR (freedom of expression) is abundant. What the Court has distilled over the years are different types of expression considered eligible for the protection under this provision. The Court found that different categories of expression such as political, commercial, academic or artistic fall within the ambit of Article 10 despite the fact that this provision makes no difference as to the content of the expression nor does it place any limits on the application of this provision in terms of the context in which it may appear.

One of the consequences of this typology is a different protection afforded to different categories of expression (Janis, Kay, Bradley, 2008, 256-305). The Court seems to favour political expression over other recognized types of expression. In other words, the Court leaves a very limited margin of appreciation to member states for limiting political expression. Conversely, other types of expression have so far earned much less appreciation by the Court which has agreed to give member states a much wider margin of appreciation for censoring commercial, academic or artistic expression. As a matter of fact, the last in line seems to be the least favoured especially in relation to visual and performance arts.

The purpose of this article is to challenge the approach of the Court to freedom of artistic expression in relation to visual and performance arts. The reasons to opt for visual as opposed to all other forms and types of artistic expression are complex and range from practical reasons, such as manageability of research, to the reasons borne out of empirical research: visual and performance arts have had even less of an otherwise poor legal protection of art in comparison to other forms of art such as literature. Also, they communicate more directly and with much more vigour and effect, to a much larger audience than some other forms of art. Visual language is universal, thus transcending the

language barrier concomitant to other forms of art. According to Rudolf Arnheim, a famous art theorist and perceptual psychologist, visual images are one of the two principal means by which human beings express their experience (verbal language being the other one), hence visual and performance arts use these means of representation and communication artistically. Moreover, he claims:

> "Within the range covered by the visual field, the projection of that outer world seems to present itself completely and objectively. In practice, however, this primary presence of the world is immediately modified by the active processes deserving the name of perception. Instead of the mechanical recording of stimuli, vision consists of selecting and organizing, which are cognitive activities directly related to recognizing and understanding." (Arnheim, 1992, 45)

The twentieth century introduced a large variety of new media arts and disciplines that were the exact consequence of the new industrial age. Photography, film and digital media now took their rightful place as art methods. These new disciplines were the pure product of the new age and they also brought a new approach to assessment of an artwork. Since those new disciplines understood usage of new technology that presented (or represented) the actual, real surrounding as artistic material, the result was more direct and objective. Meaning: to observe the oil painting of a nude and a photography of the same subject, one can notice the difference in the straightforwardness of the visual presentation of the subject. As Amos Vogel claims:

> "The power of the image, our fear of it, the thrill that pulls us toward it, is real. [...] It is the powerful impact of these brightly-lit images moving in black space and artificial time, their affinity to trance and the subconscious, and their ability to influence masses and jump boundaries, that has forever made the cinema an appropriate target of the repressive forces in society -- censors, traditionalists, the state. While the result has often been its inability openly to project fundamental human experiences or insights, neither repression nor fear seem able to stem an accelerating, world-wide trend towards a more liberated cinema, one in which all previously forbidden subjects are boldly explored." (Vogel, 1974, 9)

In addition, as also will be shown, visual and performance arts, at least the one discussed by the Court, were manifestly socially engaged but were treated by the Court rather as aesthetics or ethics than as a factor of a social dialogue. The main argument of the authors is that art in and of itself, and visual and performance arts in particular, serve the same purpose as political expression recognized by the Court so the same magnitude of protection should be equally afforded to art as it is to politics.

This argument is based equally on the theories of art and on the theory of political expression as engineered by the Court. By drawing parallels between the two, in light of the contrasting jurisprudence on political and artistic expression, the authors will try to demonstrate the fallacy of the Court's reasoning in denying the protection to artistic

expression. The reasons behind such an approach of the Court to this issue could be manifold from a sheer misunderstanding of art in general, or visual and performing arts in particular, to some underlying rationale for balancing, as an exercise, between human rights and other arguably legitimate interests.

The article will begin with conceptualizing visual and performance arts from a theoretical point of view, its meaning, relevance and theoretical underpinnings in order to move to the international law framework of the right to visual artistic expression and the Court's take on it in contrast to political expression. The article will then provide an overview of the Court's cases on visual and performance arts, the majority of which ruled against artists. During this discussion the authors will equally contrast these findings with the rationales the Court used when assessing and upholding political expression, in order to demonstrate the genuine link between two different types of expression. This article will also engage in discussion with other critical commentaries of the Court's understanding of art. While we shall follow the footsteps of these persuasive critiques of the Court's jurisprudence to the extent that autonomy of art should be recognized as such, we still feel that there is space for building upon the existing critiques in several ways. We intend to focus on visual elements in arts viewed from the perspective of relevant theories of art in order to demonstrate that the existing jurisprudence on political expression can just as equally be used for artistic expression claims.

3. Theoretical Considerations of Visual and Performance Arts

Theories of art aim to define the structure of art and the process of the creation of an artwork by looking into the essence and purpose of art itself. These theories also hypothesize on the concept of art which directly implies the interaction with the recipient and is, therefore, more aimed towards the consumption of an artwork.

Each theory of art takes one specificity of art in order to define its existence and purpose. To name but a few: Historical theories of art define and categorize artwork in reference to elapsed time and other existing artworks that claim their rightful place as already established oeuvres.[3] Functional theories of art refer to aesthetic experience that art produces in the audience.[4] Formalist theories of art state that one should only take into consideration formal properties of art (line, colour, shape, rhythm, harmony, etc.) and not the contextual ones. Institutional theories of art consider that an artwork can only become art if it has its place in the institution that is defined in the *artworld*.[5] Aesthetic

[3] Philosopher Jerrold Levinson is primarily associated with this historical definition of Art (in 1979).

[4] Monroe Beardsley is associated with this notion of art. According to him, art has an intended aesthetic function, but not all artworks succeed in producing aesthetic experiences (Beardsley, 1982, 299). One can make the same parallel with nature: nature, for example, possesses aesthetic experience but does not possess *the function* of producing those experiences. For such a function, an intention is necessary.

[5] In 1964 Arthur Danto wrote the essay *The Artworld* (Danto, 1964) in which he defined this term that, later on, outlined the first Institutional Theory of Art. George Dickie subsequently formulated more explicitly institutional theory in his essays and books *Defining Art* (Dickie, 1969) and *Aesthetic: An Introduction* (Dickie, 1971) and *Art and the Aesthetic: An Institutional Analysis* (Dickie, 1974).

creation theories of art explain the process of artwork and are based on the artist as a creator (Zangwill, 1995). Anti-essentialist theories of art were presented as theories that will overcome all others and attempt to form new ground upon which the art would be defined. Or, according to Arthur Danto, who declared "the end of art" in 1984 (Danto, 1984), had in mind exactly the opposite - to underline the change in the Western narrative of art and to indicate that the contemporary age has brought a new way of making and interpreting art as an open concept.

Anti-essentialist theories of art put forward the idea of art as an "open concept"[6]. Morris Weitz explains that open concepts "call for some sort of decision on our part" (Weitz, 1956, 31) meaning that the participants (audience) can use the existing concept of an artwork or invent a new one.[7]

Following in those footsteps, in 2005 Berys Gaut proposed a set of criteria to define a piece of art[8] which include, *inter alia*, the following requirements: to be intellectually challenging; formally complex and coherent; to have a capacity to convey complex meanings, and to exhibit an individual point of view.

Therefore, an artist has the right to express or exhibit his or her individual point of view on a chosen topic. In reference to this claim, we must point out the fact that art has been valued and perceived differently throughout history. In Western culture, the understanding of art and its purpose was in a state of constant flux. In the middle of the nineteenth century, the purpose of art was to please, to evoke divine sensation with the spectator and even to try to manifest divine moral standards of Christian values. During the turbulent years at the beginning of the 20th century, the understanding of an artwork and its purpose dramatically changed. The turn of the century brought new ways of life and a sense of liberation from the old, outdated notions of art. After the turbulent 1920s, and the huge change in the artworld, the idea of "pretty" and "beautiful" was no longer dominant. Cubism, Dadaism, New Objectivity, Constructivism, Surrealism and other art movements threw up new conceptions of art that changed not only the art itself but the audience's perception as well. Constructivism, for example, offered actions that were aimed towards making a social impact. Furthermore, the Dada movement aimed at a wider audience by experimenting with a nihilistic type of artistic method that was

[6] Morris Weitz argues that the concept of 'art' is an "open concept" (Weitz, 1956).
[7] The question of whether a new artifact is art or not, "is not factual, but rather a decision problem, where the verdict turns on whether or not we enlarge our set of conditions for applying the concept" (Weitz, 1956, 32).
[8] "I defend a particular instance of the cluster account in its application to art. This involves ten criteria that count towards an object's being art: 1. possessing positive aesthetic qualities (I employ the notion of positive aesthetic qualities here in a narrow sense, comprising beauty and its subspecies); 2. being expressive of emotion; 3. being intellectually challenging; 4. being formally complex and coherent; 5. having a capacity to convey complex meanings; 6. exhibiting an individual point of view; 7. being an exercise of creative imagination; 8. being an artifact or performance that is the product of a high degree of skill; 9. belonging to an established artistic form; and 10. being the product of an intention to make a work of art." (Gaut, 2005, 274).

meant to go into the public sphere. The artists' choice was now imperative.[9] Later on, the *auteur*[10] brought up new standards in freedom of expression that the audience of the new age readily followed. From now on, philosophers and theorists (Danto, Croce, McLuhan, Brian Massumi, Jean-François Lyotard, André Malraux and others) reconsidered the notion of art regarding *the expression of an artist* and, later on, the *concept of an artwork*. In the second half of the twentieth century, art changed again and brought up the view of modern and postmodern art that implied the comprehension of an artwork as something that is not elite-based but is open to interpretation and judgement, implying that it is the reaction of the audience that is sought after. The appearance of artists such as Josef Beuys further expands the definition of art and its concept as the art now vitally depends on the audience. The art moves away from the object and thereby obscures or even totally removes the relevance of aesthetics in art.[11] This is particularly true for the performance art as a new artistic form, which can be defined as art which "does not comply with usual aesthetic parameters, but rather with a set of forces that collectively form an experience." (Regli, 2018, 10). Nowadays this approach is considered in the History of Art as revolutionary which only proves the thesis that art itself and its understanding is a matter of constant change.

In the contemporary age, art has been perceived as socially or even politically engaged either because it involved the audience and perceptions of others but also because it counted on the public sphere as its natural habitat. Moreover, the evolution of art and the audience has led to the contemporary art form known as Social Art which is, according to Martin Krenn, a dialogical practice:

> "... a specific political potential is embedded therein. When this potential is released, it facilitates aesthetic experience that contributes to the democratization of society and improvement of human coexistence.
>
> Politically engaged Social Art is a part of civil society, which is referred to as the "fourth pillar" of a democratic society. It is referred to as the fourth pillar because democracy is more than free elections and the separation

[9] Today, the widely accepted artwork *Fountain*, by Marcel Duchamp that was presented for the first time in 1917, is generally recognized as a milestone in the History of Art. Also, it is an artwork that made a huge change in the subject matter that the above mentioned questions relate to. Today, *Fountain* represents a change in the way we look at art today. From visual to a more conceptual way of artistic expression. This change brought up a question that is relevant to this day: what actually constitutes a work of art.

[10] The 1960s brought (in visual arts, especially in film) the notion of an *auteur* as an individual artist persona that is the sole authority that stands in front of the artwork.

[11] "Beginning with the readymade, the work of art had become the ultimate subject of a legal definition and the result of institutional validation. In the absence of any specifically visual qualities and due to the manifest lack of any (artistic) manual competence as a criterion of distinction, all the traditional criteria of aesthetic judgment— of taste and of connoisseurship— have been programmatically voided. The result of this is that the definition of the aesthetic becomes on the one hand a matter of linguistic convention and on the other the function of both a legal contract and an institutional discourse (a discourse of power rather than taste)." (Buchloh, 1990, 117-118).

> of powers. A functioning democracy needs civil society just as much as it needs an elected legislature, an executive and judicial system. Without the social and political engagement of civil society, democracy would be reduced to the selection of parties in elections, obedience to executive power and submission to court rulings." (Krenn, 2019, 68)

Krenn's point is generally accepted, to the point where "in recent decades, public disagreements over artistic expression have emerged as a key feature of contemporary democratic culture … In the late twentieth and early twenty-first century, conflicts over the arts emerged as a central feature of contemporary public culture, posing fundamental questions about the definition of cultural democracy, the public good and freedom, not least for societies in the midst of intense change'." (Pluwak, 2020, 1)

It seems that the contemporary age has brought out to the surface a new recognition of social art due to the evolution of the art itself as well as the evolution of the comprehension and interpretation of the artwork. Many claim that socially engaged art has been present from its early days. Today art historians interpret famous artworks from the previous centuries and find latent subversive messages in them. According to Beverly Naidus:

> "The concept of art for social change has been around for many centuries. In my mind, it begins in the fifteenth century with the invention of the printing press. At that time, powerfully illustrated broadsheets were created and circulated to speak about the injustices experienced by peasants at the hands of the feudal lords and the Church establishment. The history of socially engaged art has taken many forms over the centuries; sometimes it has existed as the well-crafted lines of a song that eventually seared off the façade of a corrupt regime or as the wickedly fully satire that could break the public's trance." (Naidus, 2005, 169)

Nevertheless, socially engaged art seems to be more relevant today than ever before, because the public has developed a feeling of entitlement to express opinion on different matters in the public sphere. The right of the public to express itself goes hand in hand with the main purpose of social art. Art challenges established conventions by embracing experience in real time/space as artistic value and develops them further.

Contemporary theories of art recognize the social relevance of art.[12] Art has not only been an exercise in ethics or aesthetics. The political relevance of art, in terms of engaging immediate audiences or the public at large, has been gradually recognized, and reveals its challenging and subversive function. Its shocking or even seemingly offensive

[12] Also, the media influence is very present in the promotion of art. For example, famous Banksy's murals suddenly became "visible" after the media turned their attention to the fact that the author of many (for some) provocative murals is, actually, anonymous.

form of expression is just a shorthand for the call for transformation both on an individual and community/societal level.

This is where the notion and the understanding of arts controversies comes to the fore. Its most apparent characteristics that vary from aesthetic approach to the freedom of individual expression are the subject of constant change and have "since emerged as linked to social processes and rooted in collective concerns. The significance of arts controversy now goes beyond "scandalous" outrage and discussions of artistic autonomy; anxiety provoked by the arts is increasingly seen as being less about the works themselves than about deeper social struggles [...]" (Pluwak, 2020, 2)

So, if art controversy is a struggle in the realm of public opinion, and if we consider different theoretical approaches which claim that art controversy is:

> "rooted in a modernist perspective where controversy is primarily about the arts: it emanates from *within* the art world and is often a matter of artists being provocative and the audiences reacting to the provocations" (Pluwak, 2020, 3)

or:

> "controversy is rarely about art; rather, it is about a political, personal, financial, or other agenda, and the contested artwork acts as a catalyst or a focus for more diffuse frustration." (Pluwak, 2020, 3)

then we can (according to the examples provided within this article) draw the conclusion that art controversy *is* primarily about political, religious, financial or other agendas.

4. International Law, The European Court of Human Rights and Freedom of Expression

Freedom of expression has been firmly embedded in international human rights law and has been guaranteed in numerous international instruments. Although there is no overwhelming convergence regarding the substance of the right to artistic expression there is still strong understanding, expressed in black letter law or developed through jurisprudence of various courts and tribunals, that art has become a human right. According to Article 27(1) of the 1948 *Universal Declaration on Human Rights* "Everyone has the right … to enjoy the arts" while Article 19(2) of the 1966 *International Covenant on Civil and Political Rights* expressly provides freedom of artistic expression: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The *EU Charter on Fundamental Rights and Freedoms* guarantees in Article 13 (*Freedom of arts and science)*: "The arts and scientific research shall be free of constraint." A number of international human rights instruments link the freedom of expression and/or the right

to art with cultural rights thereby expanding its scope of application and reinforcing the societal importance of the art as such.[13] Finally, recent trends at the UN manifest the awareness that both artists and art mandate specific treatment and protection. In 2013 the Special Rapporteur in the field of cultural rights submitted the report "The right to freedom of artistic expression and creativity" to the Human Rights Council arguing, inter alia, for covering the broad range of issues in relation to artistic activity and calling for the special protection of artistic expression and artistic freedoms in general.[14] The 2018 Report on cultural rights linked the right of artistic expression to the right to culture and the right to creativity.[15]

Article 10 of the Convention provides for freedom of expression in general terms without singling out any particular type of expression. As we have already noted, it is the Court that has differentiated different types of expression within the meaning of Article 10 of the Convention. This provision, which is central to our discussion, reads as follows:

Article 10

Freedom of expression

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The main rationale of this particular freedom lies in the second sentence of the first paragraph: freedom of expression exists so that ideas and information can be freely exchanged within a society. What is not spelled out in Article 10, albeit it is a logical consequence of the whole provision, is that this exchange of ideas and information serves the higher purpose in and for democratic society:

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[13] Article 15(3) of the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Articles 13 and 31 of the 1989 *Convention on the Rights of the Child*, Article 13(1) of the 1969 *American Convention on Human Rights*, Article 36 of the 2004 *Arab Charter for Human Rights*.

[14] 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, 14 March 2013.

[15] Report of the Special Rapporteur in the field of cultural rights, A/HRC/37/55, 4 January 2018.

> "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[16]

This reasoning was the cornerstone of the Court's jurisprudence on a variety of forms of expression but mostly in relation to freedom of the press, as well as with respect to different forms of political expression. In an early freedom of the press case, *Lingens v. Austria*, the Court clarified why such imparting of information was essential for democratic society: "Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention."[17] This concept further led to expanding the freedom of the press vs. possibilities to limit the freedom of expression as envisaged in paragraph 2 of Article 10. In other words, a possibility to limit the freedom of the press for the sake of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary, was now substantially limited in favour of freedom of expression.

However, in first cases dealing with artistic expression the starting position of the Court seems to have been different. In the first case dealing with visual arts within freedom of expression the Court set the path that would be followed for a long time. It was the case of *Müller and Others v Switzerland*[18] where Josef Felix Müller and eight other applicants complained that their freedom of expression was breached by Swiss authorities who banned their exhibition and seized the paintings on the ground that these paintings were contrary to criminal obscenity legislation (the original charges of infringing freedom of religious belief and worship were dismissed). Three large paintings ("Three Nights, Three Pictures") seemed to have portrayed sexual activity of several persons and animals. The Swiss appellate court dismissed, despite the expert opinion on the artistic merit of the work, any artistic value to the proscribed paintings in the following terms:

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[16] *Hertel v. Switzerland*, ECtHR, App. no. 25181/94, Judgment of 25 August 1998, para. 46(i). This particular finding was repeated and rephrased in a number of cases. Here we shall mention only a few: *Steel and Morris v. United Kingdom*, App. no. 68416/01, Judgment of 15 February 2005, para. 87; *Mouvement raëlien suisse v. Switzerland*, ECtHR [GC], App. no. 16354/06, Judgment of 13 July 2012, para. 48; *Animal Defenders International v. United Kingdom*, ECtHR [GC], App. no. 48876/08, Judgment of 22 April 2013, para. 100, *Delfi v. Estonia*, ECtHR [GC], App. no. 64569/09, Judgment of 16 June 2015, para. 131(i).

[17] *Lingens v. Austria*, ECtHR, App. no. 9815/82, Judgment of 8 July 1986, para. 42.

[18] *Müller and Others v Switzerland*, ECtHR, App. no. 10737/84, Judgment (Merits) of 24 May 1988.

> "Sexual activity is crudely and vulgarly portrayed for its own sake and not as a consequence of any idea informing the work. Lastly, it should be pointed out that the paintings are large ..., with the result that their crudeness and vulgarity are all the more offensive. The court is likewise unconvinced by the appellants' contention that the paintings are symbolic. What counts is their face value, their effect on the observer, not some abstraction utterly unconnected with the visible image or which glosses over it. Furthermore, the important thing is not the artist's meaning or purported meaning but the objective effect of the image on the observer."[19]

These findings were reaffirmed by a higher Swiss court which, *inter alia*, "scrutinised the paintings for a predominantly aesthetic element. …. it decided that the emphasis was on sexuality in its offensive forms and that this was the predominant, not to say sole, ingredient of the items in dispute. …. The overall impression created by Müller's paintings is such as to be morally offensive to a person of normal sensitivity."[20]

The European Court of Human Rights handled the application as one dealing with freedom of expression and specifically with artistic expression. It began with the basic rationale that Article 10 applies not only to "'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population…. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression."[21] However, the Court then diverted to "duties and responsibilities" enshrined in Article 10 and accepted the ground for criminal conviction, namely public morals, without much discussion, finding that moral is of local, national character without European consensus on the issue. This was in fact carte blanche to national authorities to limit freedom of expression invoking local morals. In sum, the Court did not find a breach of freedom of artistic expression in a criminal conviction of the artist for obscenity.

There is something positive and something negative in this early freedom of artistic expression case. The negative aspect certainly is in chaining art to its face value, with aesthetics and ethics, rather than engaging in multiple layers of art which also includes active social debate that "shocks and disturbs". The positive thing is that even obscenity in the form of art was accepted by the Court as a form of expression: a piece of art subject to scrutiny. It could easily have been dismissed much earlier as inadmissible due to a lack of artistic form or value that would consequently leave the issue outside the scope of Article 10, as was the case with *S. and G. v. UK*.[22] In this case, Mr. Gibson created and

[19] *Id*. at para. 16.
[20] *Id*. at para. 18.
[21] *Id*. at para. 33.
[22] *S. and G. v. United Kingdom*, Commission, App. no. 17634/91, Decision on inadmissibility of 2 September 1991.

exhibited sculptures in the form of earrings made out of a freeze-dried human foetus of three or four months' gestation. The exhibition was held in a small gallery with unlimited access and advertised by the artist. The exhibition was ultimately closed by authorities as a breach of common law offence of outraging public decency.[23] While arguably there were several explanations for the artistic idea behind this work (Lewis, 2002, 56), its underlying rationale was actually never tested, either before the UK courts or before the European Commission. Quite to the contrary, the claim was dismissed as manifestly ill-founded which implies that the European Commission was not persuaded that the exhibits fell within the scope of art and thus within the scope of artistic expression.[24]

In subsequent cases on visual arts the Court maintained the policy of minimalistic protection of artistic expression. In *Otto-Preminger-Institut v. Austria,*[25] the Court upheld the restriction of artistic expression on the grounds invoked by Austria, which was the protection of the religious sensibilities of believers. Austrian authorities prohibited distribution and ordered the seizure and forfeiture of *Das Liebeskonzil* ("Council in Heaven"), a film by Werner Schroeter, which was to have six showings in a cinema in Innsbruck run by the applicant, Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI), a private non-profit association established with the general aim of promoting creativity, communication and entertainment through the audiovisual media.[26] The film was made on the basis of the play of Oskar Panizza who himself was sentenced for blasphemy back in 1895. As a manifest homage to Panizza, the Schroeter film was advertised in the following manner:

> "Oskar Panizza's satirical tragedy set in Heaven was filmed by Schroeter from a performance by the Teatro Belli in Rome and set in the context of a reconstruction of the writer's trial and conviction in 1895 for blasphemy. Panizza starts from the assumption that syphilis was God's punishment for man's fornication and sinfulness at the time of the Renaissance, especially

[23] "Various legal scholars have pointed out that, had they instead been prosecuted under the Obscene Publications Act (which covers non-textual work), Gibson and Sylveire would have been able to offer a defence based on artistic expression. So, as the Sunday Times (5th February 1989) reported, the fact that they were charged with outraging public decency meant they could offer no evidence of their intentions in making and showing the piece, or relate it to artistic traditions. And because no individual needs to actually claim offence in order for a case to be brought, it was up to the jury to decide if an unidentified 'public' might be offended by the work." (Dow, 2017)

[24] "As regards the facts of the present case, the Commission notes that the second applicant's sculpture used two freeze-dried foetuses of three to four months' gestation as earrings. The sculpture was displayed in an exhibition which was open to, and sought to attract the public. In the circumstances, the Commission does not find unreasonable the view taken by the English courts that this work was an outrage to public decency. Having regard to the margin of appreciation left to them under Article 10 para. 2 (Art. 10-2) of the Convention, the domestic courts were entitled to consider it "necessary" for the protection of morals to impose a fine on the applicants for exhibiting the piece. It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention." - *S. and G. v. United Kingdom*, Commission, App. no. 17634/91, Decision on inadmissibility of 2 September 1991.

[25] *Otto-Preminger-Institut v. Austria,* ECtHR, App. no. 13470/87, Judgment (Merits) of 24 September 1994.

[26] *Id*. at para. 9.

> at the court of the Borgia Pope Alexander VI. In Schroeter's film, God's representatives on Earth carrying the insignia of worldly power closely resemble the heavenly protagonists. Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated."[27]

The local diocese of the Roman Catholic Church requested that the public prosecutor initiate criminal proceedings against the manager of the cinema. After a private showing of the film, in the presence of the local judge, the showings were cancelled, and the film´s public release at this venue was ultimately forbidden by the court's decision.[28]

The applicant's claim before the Court was that its right to artistic expression was breached by the seizure and forfeiture of the film, and that religious sentiments of others could not have been affected given the limited and informed audience that would have to pay to view the film and always had the option not to be engaged. Austria's defence was that the restriction was justifiable and proportional to the aim pursued: protection of religious beliefs of others and the morality of the majority of the population in the area.[29] Although the Court reiterated the existence of artistic expression,[30] relying on the *Müller* case, it nevertheless upheld the restriction that seems to be grounded on local morality and religious beliefs of the majority of the local population: "The Court cannot 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."[31] Unlike the *Müller* case that revolved solely around morality and obscenity, here it was morality together with rights of others, more precisely together with the perception that religious sentiments and rights of believers would be unjustifiably affected. A mere prospect of religious insult was

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[27] *Id*. at para. 10.

[28] Description of the proscribed text as given by the European Court is as follows: "The play portrays God the Father as old, infirm and ineffective, Jesus Christ as a "mummy's boy" of low intelligence and the Virgin Mary, who is obviously in charge, as an unprincipled wanton. Together they decide that mankind must be punished for its immorality. They reject the possibility of outright destruction in favour of a form of punishment which will leave it both "in need of salvation" and "capable of redemption". Being unable to think of such a punishment by themselves, they decide to call on the Devil for help. The Devil suggests the idea of a sexually transmitted affliction, so that men and women will infect one another without realising it; he procreates with Salome to produce a daughter who will spread it among mankind. The symptoms as described by the Devil are those of syphilis." - *Id*. at para. 21.

[29] This seems to relate only to Tyrol, not the whole of Austria. The play was performed subsequently in theatres in Vienna and even in Innsbruck without any restrictive measures (ibid., para. 19). Also, Austria made its case based on the percentage of Roman Catholics in Tyrol (*Id*. para. 52).

[30] Interestingly, Article 17a of the Austrian Basic Law provides specific protection to artistic expression. Austrian courts did engage in an analysis of this provision but decided it has "come as second" to protection of religious freedoms.

[31] *Otto-Preminger-Institut v. Austria,* ECtHR, App. no. 13470/87, Judgment (Merits) of 24 September 1994, para. 56.

sufficient to outweigh the artistic expression. Even the minimalistic ambition of applicants failed: they did not challenge the prohibition of cinema shows but solely the seizure and forfeiture of the film which made film showings banned forever in Austria. Despite all these circumstances the Court upheld the restriction without entering into any discussion of the artistic value of the work or of the underlying ethical rationale of the film - here the art was again restricted to ethics, this time to religious and local ethics.

In a similar vein the Court upheld the blasphemy restrictions on artistic expression in *Wingrove v. United Kingdom*.[32] Nigel Wingrowe directed a short film "Visions of Ecstasy" based on the life of St. Teresa of Avila who lived as a nun in the XVI century. The film, which solely contains moving images and music, portrayed the erotic fantasies of Saint Teresa over the wounded body of Christ on the cross. The British Board of Film Classification refused to issue a classification certificate on the grounds of blasphemy, which amounted to an outright ban on film distribution. The case reached the European Court of Human Rights as Article 10 case of artistic expression. The ECtHR upheld the ban. As to the concept of artistic expression, here in the context of visual arts, the Court interestingly did not take a firm stand because the concept of "artistic expression" was not even mentioned. The Court was satisfied that "it was common ground between the participants in the proceedings" that refusal to issue classification certificate "amounted to an interference by a public authority with the applicant's right to impart ideas." In other words, the Court refused to engage in classification of the ideas that were to be imparted. However, within the description of the banned video work, the Court was manifestly aware of the artistic aspirations behind the film: "Apart from the cast list which appears on the screen for a few seconds, the viewer has no means of knowing from the film itself that the person dressed as a nun in the video is intended to be St Teresa or that the other woman who appears is intended to be her psyche. No attempt is made in the video to explain its historical background."[33]

Elsewhere, the Court indirectly gave its opinion on the (lack of) artistic merit of the film:

> "Visions of Ecstasy portrays, inter alia, a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature (see paragraph 9 above). The national authorities, using powers that are not themselves incompatible with the Convention (see paragraph 57 above), considered that the manner in which such imagery was treated placed the focus of the work "less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography" (see paragraph 15 above). They further held that since no attempt was made in the film to explore the meaning of the imagery beyond engaging the viewer in a "voyeuristic erotic experience", the public distribution of such a video could outrage and insult the feelings of believing Christians

[32] *Wingrove v. United Kingdom*, ECtHR, App. no. 17419/90, Judgment (Merits) of 25 November 1996.
[33] *Id*. at para. 10.

> and constitute the criminal offence of blasphemy.(...) Furthermore, having viewed the film for itself, the Court is satisfied that the decisions by the national authorities cannot be said to be arbitrary or excessive."[34]

Despite going around the concept of artistic expression, the Court indirectly made its own assessment of the artistic value of the banned video art. Blasphemy laws (although protecting only Christian religion) were perceived as a legitimate aim of protecting "interests of others". Therefore, it was the assumed ethics and beliefs of others that prevailed over the actual beliefs and ideas of artists.

The UK repealed its blasphemy laws in 2008 and the film was finally cleared for release in 2012.[35] Indeed, the trend of confronting religious freedoms with freedom of artistic expression seems to have lost its grip around the time the UK, and some other countries began to repeal their blasphemy laws. The renaissance of artistic expression is evidenced by the Council of Europe Parliamentary Assembly adoption of the resolution "Freedom of expression and respect for religious beliefs" in 2006.[36] With respect to art the resolution states as follows:

> "The Assembly also recalls that the culture of critical dispute and artistic freedom has a long tradition in Europe and is considered as positive and even necessary for individual and social progress. Only totalitarian systems of power fear them. Critical dispute, satire, humour and artistic expression should, therefore, enjoy a wider degree of freedom of expression and recourse to exaggeration should not be seen as provocation."[37]

Despite the trend of removing religious beliefs from the analysis of artistic freedom, and despite the trend of upholding the social relevance of freedom of artistic expression, it was still a long way to go for the Court to provide artistic expression with full membership in the freedom of expression club as can be demonstrated with several visual arts cases resulting in early dismissals. In *Ehrmann and SCI VHI v. France*,[38] the applicants were punished with criminal and civil sanctions for the art project "Demeure du Chaos / l'Esprit de la Salamandre" which consisted of large paintings and murals on the outer walls of the artist's property, also a well-known art venue. The mayor of the city of Lyon successfully challenged the propriety of the paintings (consisting, *inter alia*, of large images of skulls and salamanders) as contrary to the planning regulations which required that, by their appearance, any new constructions and old buildings had to be in harmony with existing neighbouring constructions, with the character of the sites and with the

[34] *Id*. at para. 61.
[35] News on the release of the film available at: https://www.theguardian.com/film/2012/jan/31/visions-of-ecstasy-film-18-certificate. [Accessed on 6 September 2021].
[36] *Freedom of expression and respect for religious beliefs*, Council of Europe Parliamentary Assembly, Resolution 1510 (2006) adopted on 28 June 2006.
[37] *Id*. at para. 9.
[38] *Ehrmann and SCI VHI v. France,* ECtHR (Chamber), App. no. 2777/10, Decision (Inadmissibility) of 7 June 2011.

landscapes in which they were situated. It was also mentioned that the property "Domaine de la Source" was in a position of joint visibility with the church of Saint-Romain au Mont d'Or and the manor-house of La Bessée, both of which were enumerated on the secondary list of historic buildings, and that operations capable of altering the appearance of the property were subject to prior authorisation. The Court dismissed the freedom of artistic expression claim as manifestly ill-founded - the quality of the environment was a legitimate aim for restriction of the freedom. From another perspective one could argue that different aesthetics collided but the Court again deferred to national concepts as legitimate restrictions.

In *Karttunen v. Finland*,[39] the preliminary issue was whether the closing down the exhibition entitled "the Virgin-Whore Church" in a public art gallery, and seizure of photographs of young women in sexual poses and acts by the order of a public prosecutor, were to be discussed within the context of freedom of expression. The idea for the exhibition was to demonstrate how pornographic material involving children was easily accessible because all the photographs used were downloaded from free Internet pages. However, it was the artist who was charged with possessing and distributing obscene material. Although she was not convicted the photographs were confiscated. The application expressly relied on the freedom of artistic expression with arguments: "that her right as an artist to freedom of expression had been violated. She had incorporated the pornographic pictures in her work in an attempt to encourage discussion and raise awareness of how wide-spread and easily accessible child pornography was. Porn actors wanted to have as much publicity as possible, and therefore the need to protect their reputation or private life was of less importance than her right to freedom of expression."[40] The Court dismissed the application as inadmissible, having found that protection of morals and interests of minors was a legitimate aim sufficiently balanced with the impugned measure. The fact that it was manifestly perceived as an artistic concept displayed in a public art gallery did not persuade the Court to open the discussion on freedom of artistic expression.[41] Mere reference to sexual morality generally prompts the Court to defer to national judgments as long as the formal conditions, in terms that there exist lawfulness and domestic assessment of different considerations, are met.

There are only two cases dealing with images and performances where the European Court of Human Rights seemingly upheld freedom of artistic expression as

[39] *Karttunen v. Finland*, ECtHR (Chamber), App. no. 1685/10, Decision (Inadmissibility) of 10 May 2011.
[40] *Id*. at para. 15.
[41] Ironically, in 2019 the European Court of Human Rights upheld the freedom of expression claim raised by the producer of erotic films (with around 95% erotic scenes) who was granted the license for distribution but not the license for reproduction of these films on the ground that there was a pending investigation regarding the criminal offense of illegal production and distribution of pornography, and that this could negatively affect minors. Due to the contradictory decisions of local authorities the producer remained deprived of the license even after the investigation and other proceedings were dropped. The Court found that such deprivation was disproportionate to the legitimate aim pursued. This case, which ultimately upheld erotic films claims, thus capitalised more on artistic expression than Karttunen who criticised such practice. - See, *Pryanishnikov v. Russia*, ECtHR, App. no. 25047/05, Judgment (Merits) of 10 September 2019.

opposed to imposed restrictions. While the Court did not challenge that it was the art that was subject to restrictions, taking a closer look it seems that the Court valued the art at its political face value rather than on its intrinsic and autonomous value, or its artistic, subversive and critical societal role. In the first case, *Vereinigung Bildender Künstler v. Austria*,[42] the issue was whether the judicial injunction prohibiting the Otto Mühl's painting "Apocalypse" displayed in the gallery of the applicant in Vienna, within the exhibition "The century of artistic freedom" ("Das Jahrhundert künstlerischer Freiheit"), was in breach of Article 10 of the Convention. The large collage portrayed 33 various public figures, such as Mother Teresa, the Austrian cardinal Hermann Groer and the former head of the Austrian Freedom Party (FPÖ) Mr Jörg Haider, in sexual positions. Walter Meischberger, a former secretary general of the FPÖ and member of the parliament, was also portrayed in the Apocalypse, which led to his private lawsuit against the gallery on the ground that his reputation was damaged. As he ultimately succeeded, the artistic association turned to the Court. Here artistic freedom of expression was at the heart of the matter. Having made the observation that freedom of expression also protects information and ideas which offend, shock or disturb the state or any sector of the population, the Court then opined: "Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society."[43] However, this is where the recognition of art as a protected expression ends. The Court did provide protection but to the political expression, since the Court centred its attention on the particular public figure, Walter Meischberger, to whom the criticism was addressed. The rationale of the Court's finding was not the value of art but its downright political content "(i)n the present case, the Court considers that the painting … related to Mr Meischberger's public standing as a politician from the FPÖ. The Court notes that in this capacity Mr Meischberger has to display a wider tolerance in respect of criticism."[44] The authority invoked by the Court was *Lingens v. Austria*, the landmark case on political expression.[45] The protection provided was in essence political not artistic, and not because of the possible indirect political implications of art but rather because of its political reading by the Court.

The similar take on political art was undertaken by the Court in the *Mariya Alekhina and Others v. Russia (Pussy Riot case)*.[46] Members of a female punk band, known for impromptu performances and political activism were convicted of hooliganism motivated by religious hatred for an attempt to stage a performance of their song "Punk Prayer – Virgin Mary, Drive Putin Away" in the altar of the Russian Orthodox Church in Moscow. The sentence of two years in prison was shortened for a couple of months due to an amnesty. In addition, the video material made during the performance was banned and removed from the internet as "extremist". In assessing freedom of expression as part of the claim, the Court decided to pair artistic with political expression as it found that

[42] *Vereinigung Bildender Künstler v. Austria*, ECtHR, App. no. 68354/01, Judgment (Merits) of 25 January 2007.
[43] *Id*. at para. 26.
[44] *Id*. at para. 34.
[45] *Id*.
[46] *Mariya Alekhina and Others v. Russia*, ECtHR, App. no. 38004/12, Judgment (Merits) of 17 July 2018.

"that action, described by the applicants as a 'performance', constitutes a mix of conduct and verbal expression and amounts to a form of artistic and political expression covered by Article 10."[47] Manifestly the Court here was uncertain how to qualify this particular incident, which echoes doctrinal dilemmas in how to categorize any expression in the first place: is it the subject matter of the speech or the medium of communication: "The identity of the subject matter of the speech, and the medium of the communication, for example, may be crucial, and defy the scheme of prior categorisation by their singularity or complexity." (Kearns, 2013, 151) The Court notably did not engage in an assessment of the artistic value of the performance. It does not seem to have been needed because the rest of the Court's reasoning rests solely on the political expression methodology, including the fact that the reason for the performance and content of the performed song were aimed at political dialogue within society. Given that the imposed sanctions were harsh the Court found a breach of Article 10 but the issue here is whether the artistic part of the claim was only incidental and possibly irrelevant. In reality, it was the political rather than artistic expression that was vindicated in this case. It further demonstrates the Court's unwillingness to appreciate the autonomous and independent role of art in a society but instead treats art as relevant only if it carries a direct political message which per se is suitable for traditional political expression methodology. This is in line with the general trend of the Court's jurisprudence in relation to political expression and political art: "It is evident from the majority judgment (in Karata v. Turkey) in particular that it is an advantage for controversial art before the Court to have a political dimension. This is compatible with the Court's informal but definitive decision to prize political expression as the expression most in need of protecting, a commitment that has infiltrated its case law *ab initio*." (Kearns, 2013, 173)[48]

That the Court appreciates art only due to its face political value with messages directed against political figures is well illustrated by yet another case also involving performance art that was decided around the same time as the *Pussy Riot* case. Unlike the latter, in *Sinkova v. Ukraine*[49] the performance art staged at the Eternal Glory Monument in Kiev was not addressed to any particular political figure - Sinkova and two other artists staged a performance of frying eggs in a pan on the eternal flame placed within the monument devoted to 32 soldiers and an Unknown Soldier who were killed in the Second World War. Sinkova was sentenced to two years in prison, suspended for three years, for the criminal offence of desecration of tombs. The artist's argument was that she did not have any intention in desecrating tombs or to ridicule the heroism of soldiers but that "she had protested against wasteful use of natural gas and had tried to attract public attention to that issue. In her opinion, the funds used for maintaining eternal flames throughout the country would better serve their purpose if used to improve the living standards of war veterans."[50] While the Court accepted that this was a case of freedom

[47] *Id*. at para. 206.
[48] *Karata v. Turkey* was the case about the prohibition of poems and punishment of Karata on the basis of disseminating separatist propaganda. *Karataş v. Turkey,* ECtHR (GC), App. no. 23168/94, Judgment of 8 July 1999.
[49] *Sinkova v. Ukraine*, ECtHR, App. no. 39496/11, Judgment (Merits) of 27 February 2018.
[50] *Id*. at para. 87.

of artistic expression it did not find the freedom to have been breached by the criminal conviction. It went on to argue that there had indeed been desecration of the tomb: "The Court cannot agree with the applicant's submission that her conduct at the memorial could not be reasonably interpreted as contemptuous towards those in whose honour that memorial had been erected. According to her logic, the only thing that mattered about the Eternal Flame was the natural gas required to keep it burning."[51] Therefore, the Court did not make any meaningful attempt to appreciate the social critique espoused by the artist. As noted by Andra Matei: "the applicant's intention is removed in its entirety from the analysis of her actions; the artistic and satirical nature of her performance are blatantly ignored." (Matei, 2018, 9) Notably, the judgment was adopted by a thin majority where three out of seven judges dissented precisely on the ground of appreciating the arts' engagement with social contexts, which inevitably resulted in a different reading of the impugned act:

> "Their performance, as she explained, was aimed at drawing public attention to the incompatibility of the official pathos when it came to remembrance of the Second World War with the miserable situation of surviving war veterans. Together with other participants, she sought to highlight what they perceived as the superfluous nature of an eternal flame which, whilst honouring the sacrifices of those who fell in the service of their country, did little to support war veterans who desperately needed the State's limited resources. (...) This satirical performance necessarily included filming the process of frying eggs to be later put on the Internet with the relevant commentary. By filming and subsequently disseminating the video, supplemented by the song and text, the applicant and other participants chose to express their criticism through a rude and irreverent satire."[52]

The most valuable part of the judgment lies in the joint dissenting opinion which illustrates how judges are actually able to understand the concept of art but usually opt to turn the blind eye - conflicting views of art stand next to each other in one judgment. Appreciation of art by minority dissenters will hopefully become the mainstream in Court's jurisprudence on artistic expression:

> "The applicant's satire had done exactly what this art frequently does: it transferred the viewer's attention from an object to its social context. An artistic gesture might demonstrate the conditionality of established value boundaries, but it does not reject them."[53]

The *Sinkova* case mandates commentary and criticism. While similarities with its contemporary case *Pussy Riot* abound, in terms of critical attitude displayed in sacred

[51] *Id*. at para. 110.
[52] *Sinkova v. Ukraine*, ECtHR, App. no. 39496/11, Judgment (Merits) of 27 February 2018, Joint partly dissenting opinion of Judges Yudkivska, Motoc and Paczolay, pp. 23-24.
[53] *Id*. at 24.

places, and in criminal sanctions for the staged performance, differences in outcome of these two cases is startling. There are two possible explanations but none of them serves the purpose of promoting freedom of artistic expression. The first is that the criminal sanction in *Sinkova* was more lenient given that this was a suspended prison sentence (which still does not change the fact that a criminal record with a number of negative consequences remains in place, or that there was a variety of other less intrusive measures that could have served the same purpose), and second, as argued here in this article, is the fact that the critique was not addressed to any particular political figure which removed "political" value from the performance. Indeed, the Court makes no mention of "political expression" in its judgment. Had it been any different, it could have attracted the Court's affections for promoting the freedom of expression. One might indeed raise the question in relation to *Sinkova v. Ukraine*: What happened to the protection of information and ideas that offend, shock or disturb the State or any sector of the population?

5. Cross-Examining The European Court of Human Rights

The relationship between law and art is notoriously difficult. In relation to visual arts "the law continues to struggle with images and its deep ambivalence toward images remains intact." (Douzinas, Nade, 1999, 9) The usual consequence is dismissal of artistic arguments and rationales in the court of law.[54] As pointed by Paul Kearns "(a)rtistic freedom is the Cinderella of liberties, seldom in the spotlight, and never in the limelight." (Kearns, 2013, 150) The European Court of Human Rights has only nominally recognized visual and performance arts as a form of protected expression but effectively withheld international protection.

Potentially there are several reasons for such a sombre outcome for visual and performance arts. It can be argued, as Eleni Polymenopoulou does, that artistic freedom as a human right has a *sui generis* nature while art as such easily escapes definitions. (Polymenopoulou, 2016, 514-515) The one is evident in the Court's (dubious) differentiation between different types of expression. The Court indeed draws a line between political, commercial, artistic, academic, symbolic and other forms of speech which nearly automatically defines the tolerable margin of appreciation of states and thus protection to be given to a particular type of expression.[55] The case law of the Court confirms that protection of art is only incidental and only if it is substantially political. The Court is willing to uphold the freedom only if the expression has manifest and an open political message in relation to particular public figures despite the Court's own vow that Article 10 applies not only to "'ideas' that are favourably received or regarded

[54] There are those who naturally disagree and find that law and arts do make allies in many different respects, and that they are mutually supportive and comparable (Merryman, Urice, Elsen. 2007, xxv-xxvi).

[55] "The Strasbourg Court's recalcitrant use of the margin of appreciation doctrine, which surrenders the regulatory initiative to the legal mechanisms of the Contracting States, means that art that is considered in some way morally delinquent will be at the mercy of the often arbitrary, and perhaps unduly oppressive, moral consensus of a particular state, or worse, one or more of the state's even more morally-restrictive provincial regions." - Kearns, 2013, 160.

as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or *any section of the population*."[56]

Another reason could be the simple misunderstanding of the concept of art. The Court's take on art is manifestly superficial and nearly without any genuine interest in understanding the multiple layers of an artistic work: "The lack of demonstrable, necessary and sophisticated knowledge on the part of the relevant courts leads, ultimately, to injustice being done to art and its associated processes through a surprising degree of apparent judicial ignorance of art's unique ontology and method of operating, and its key valued role as a critical-moral counterbalance to established morality."(Kearns, 2013, 152) The Court perceives art in its classical forms not only judging it solely on the basis of its ethics and aesthetics but also by downgrading the ethical and esthetical tests to parochial and local standards.

The statement of Arthur Danto (in his book *What Art Is* - referring to the question people usually ask: "But is it art?") is appropriate here:

> "At this point I have to say that there is a difference between being art and knowing whether something is art. Ontology is the study of what it means to be something. But knowing whether something is art belongs to epistemology—the theory of knowledge—though in the study of art it is called connoisseurship." (Danto, 2013, 5)

Danto firmly and argumentatively claims that one needs to grasp the knowledge of the History of Art and the character of art and artistic theories. His comprehensive approach follows the development of Art history as a linear progression of styles and social responses to arts.

The Court did admit that defining art is a difficult task but the question is whether this justifies the failure of the Court to appreciate the contribution of artistic ideas, as offensive and shocking as they can be, for the exchange of ideas within the society at large, as it ultimately will have effect in any *stricto sensu* political discussion. Contemporary art is per definition socially engaged, it is always political *lato sensu*. It is not uncommon that artists suffer consequences concomitant to sanctions imposed on political activists.

Another common feature of cases dealing with artistic freedom in relation to visual and performance arts is that, while they nominally recognize the relevance of art for the exchange of ideas and information which *per se* is relevant for democracy, they still restricted them to the benchmark of public morals, the morality of the society at large (Schabas, 2015, 472), or to the morals of certain groups (religious rights as rights and interests of others). This implies that the Court's scrutiny is based on ethical and aesthetical considerations. The Court has obviously had trouble, or has been simply unwilling to

[56] *Müller and Others v Switzerland*, ECtHR, App. no. 10737/84, Judgment (Merits) of 24 May 1988, para. 33 (emphasis added).

appreciate and understand the complexity of art, fiction, symbolic language, hyperbole, imagination, fine language of creative techniques, and arts subversive critical power. Instead, the Court has been more willing to treat the language of visual and performance arts literally, limiting it, sometimes superficially, to its face value. The language of art is not opinion in itself, it is just a medium, where the opinion expressed through this language is practically never assessed by the Court. Therefore, "the Strasbourg Court is quite unaware that art which seems to gratuitously contravene standards of accepted morality actually does so for a reason, which is to test the continuing validity of that morality." (Kearns, 2013, 181)

While political expression, almost without exception, carries with it direct and plain meaning and is to be understood on its face, it is almost never the case with artistic expression – no matter how vulgar, excessive, direct or shocking the expression is, such expression is never an end in and of itself but rather a trajectory to another message or point that wants to be made. The UN Special Rapporteur argued in favour of this subtle and simultaneously subversive constitutive element of art:

> "Artistic expressions and creations do not always carry, and should not be reduced to carrying, a specific message or information. In addition, the resort to fiction and the imaginary must be understood and respected as a crucial element of the freedom indispensable for creative activities and artistic expressions: representations of the real must not be confused with the real."[57]

As the authors of the art organization *Creative Time* declared in their Introduction to the *Living as Form - Socially Engaged Art from 1911-2011*: "To be fair, this kind of work [social art] does not hang well in a museum, and it isn't commercially viable." (Pasternak, 2012, 8) What they do have in common is the audience to which they refer because it is always society at large. So this indirect, subtle and underlying message in artistic work is to be found sometimes through quite different mediums that on its face could be held as inappropriate, at least.

Such an unfavourable status of art in the jurisprudence of the Court has not remained unnoticed and some scholars have made suggestions on how to improve the protection of artistic expression or how to overcome impediments imposed by the Court itself. Scholars argue that it is art as such which should be granted standing in human rights discourse. For example, Andra Matei suggests setting up the European standard on morality as an important step towards a better protection of artistic freedoms.[58] Eleni Polymenopoulou

[57] 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, 14 March 2013, para. 37.

[58] "While setting a European standard on morality based on the opinion of the majority might seem absurd and incompatible with the definition of a declaration of rights such as the Convention, dissipating the uncertainty that surrounds the boundaries of the public morals clause by describing its scope and meaning in the Court's case-law could be an important step towards a better protection of artistic freedom, a freedom constantly limited by the "legitimate aim" of protecting morals." - Matei, 2018, 10.

suggests that it is the specificity of arts that should be treated as a free-standing defence in Article 10 cases (Polymenopoulou, 2016, 535). Paul Kearns advocates the recognition of the autonomy of art (Kearns, 2013, 151). These arguments resonate the rationale of the U.S. Supreme Court and its take on protection of art within the First Amendment freedom of speech even though artistic speech may not necessarily be "communicative" or "discernible" (Greene, 2004-2005, 366-367). However, the proposition put forward in this article is that the visual and performance arts, with their specific communication tools, should be appreciated and protected in the same manner as political expression due to its intrinsic social engagement, because artists "more often than not perform a similar role: they highlight our prejudices, our taboos, our unspoken repressions and conventionality and seem to have no fear in challenging the social and political realities of our time." (Matei, 2018, 9) Therefore, it is not only political art but visual and performance arts generally, outside their particular political context, that needs judicial recognition for the very same reasons the Court has used in dismissing limitations of political expression. Such understanding of art, as a means of expression and creativity, has been well described by the UN Special Rapporteur:

> "Humanity dignifies, restores and reimagines itself through creating, performing, preserving and revising its cultural and artistic life (....) Cultural heritage, cultural practices and the arts are resources for marshalling attention to urgent concerns, addressing conflicts, reconciling former enemies, resisting oppression, memorializing the past, and imagining and giving substance to a more rights-friendly future."[59]

These features contribute to the public debate to the same extent as a political speech, so the same level of protection should be provided to enable the exchange of ideas and information. Even more so, since today the public is no longer meant to take and consume art passively but to get engaged with art and thereby get involved with the social (political, religious or other) dimension of the artwork. The evolution of art inevitably led to the evolution of the spectators as well. It engages the audience, unlike art that was practiced in previous times. This brings us to another loophole in the Court's jurisprudence: the audience. Freedom of expression is not only about artists and their right to express themselves, but it is equally the right of the audience to receive ideas: "Being part of the audience, receiving and witnessing cultural and artistic actions should therefore also be considered an important part of taking part in cultural life. This too is a core part of freedom of artistic expression."[60] If the modern concept of artwork that depends on its audience is not enough for such assessment, then the wording of Article 10 should suffice. The Court did seemingly engage in protecting the audience but that was restricted to the particular segment of the public that was perceived to be adversely affected by the art. However, the obligation to protect the right of the general public to receive information in the form of art seems to have been absent from the Court's assessments.

[59] Report of the Special Rapporteur in the field of cultural rights, A/HRC/37/55, 4 January 2018, para. 2.
[60] *Id*. at para. 75.

When referring to the judicial assessment of an artwork, it seems that it all comes down to the question of difference between "equality and quality, between participation and spectatorship, and between art and real life." (Bishop, 2012, 38) However, this seems to be an outdated approach to art. Martin Krenn claims:

> "Art takes a stand against censorship, poses (new) aesthetic questions and resists, depending on its political pretenses and surroundings, reigning power structures." (Krenn, 2019, 69)

In other words, if the purpose of art is to pose questions to the audience to reconsider the world that we live in, then art and artists have every right to practice their art according to their own sensibilities and aesthetics values:

> "Art is critical to all societies; it ensures longevity and interprets our belief systems. Cultural, religious, political, and philosophical norms are expressed, preserved, explored, and evaluated through the arts." (Wexler, Sabbaghi, 2019, 10)

Therefore, art can and *should* be used to encourage reassessment and change as well as tolerance and heterogeneity. It also can and *should* be a critical tool for creative growth of humanity and magnanimity of human achievements.

6. Conclusion

We hope that the time will come to bless the Cinderella of all liberties with a happy end. Valuing the visual and performance arts exclusively as an exercise in ethics and aesthetics has been abandoned for a long time and it seems that contemporary theory and practice invariably assumes the societal role of art, its potential subversive and transformative function within a society at large, and, ultimately, its *lato sensu* political value. This is why the approach of the European Court of Human Rights, sometimes too rigid and often too artificial when categorizing expressions, almost inevitably leads to dismissing artistic freedoms in the realm of visual and performance arts. Artistic expression does have the same beneficial potential for a democratic society as political expression *stricto sens*u and therefore, the former could be equally protected as the latter.

There also seems to be another weakness in the Court's approach to artistic expression as the Court too easily assumes that political speech is available and unhindered, so the Court comfortably relegates artistic speech to spheres of aesthetics and amusement. Make this assumption fail or just assume that limitations of political speech have evolved and become refined over the time and you will find the arena for political debate suddenly closed – in the midst of proclaimed liberal democracies. This is why it is important to reclaim art's right to speak as it can powerfully challenge political truths and lies, sometimes even more on fundamental societal issues and stereotypes for which political speech cannot provide remedy. By deliberately staying on the artificial surface of speech characterization, judging by who speaks rather than what the message is, the Court contributes little to the "debate" that seems so central in the Court's analysis of expressions.

Visual and performance arts are a powerful yet fragile instrument for delivering the debate to society at large, to the very same society to which political speech owes its supremacy.

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