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The "Right to Freedom of Artistic Expression" and Cultural Relativism

International Law Perspectives

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In an era marked by escalating geopolitical conflict and the backsliding of democratic values, the global landscape is witnessing a concerning surge in the suppression of artistic voices. While civil society and governments are awakening to the imperative of safeguarding the rights of artists to imagine and create freely, the movement to defend artistic freedoms finds itself at a crucial juncture. Two significant challenges confront this nascent movement: the under-discussion of "artistic freedom" within international legal forums and the underutilisation of international law's potential to defend and promote the rights of artists. This article endeavours to address these lacunae by exploring how artistic freedoms can be understood within established frameworks of international law.

At its core, restrictions on and interferences with artistic expression pose a fundamental question for the interpretation and application of international legal principles: how should the diverse cultural norms, traditions and values in states be reconciled with the universal imperative to protect artists' rights? This inquiry lies at the heart of our exploration, as we seek to unravel the complexities and offer pragmatic recommendations to civil society organisations (CSOs) operating in this sphere.

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1. Right to Freedom of "Artistic" Expression

Right to freedom of expression for artists. At the outset, we need to clarify: "freedoms" refer to the absence of constraints or impediments on an individual's actions or choices. This encompasses the freedom to pursue their interests, beliefs or preferences and freedom from undue interference from others or the state. Freedom of expression, therefore, relates to the ability to express one's opinions, thoughts, ideas, beliefs, and information without restraint. "Rights", on the other hand, are moral or legal entitlements which individuals possess. Typically, rights impose obligations on others to respect, protect or fulfil them.

When can states be said to have an obligation under international law in relation to a right?

States have obligations to respect, protect or fulfil certain rights under the international law framework. Under this framework, obligations flow to states through several mechanisms. For instance, if a state has signed and ratified an international treaty, it is obliged to ensure that its domestic legislations reflect the provisions of the treaty. Furthermore, judicial decisions by international courts are also sources of international law; for instance, decisions of the European Court on Human Rights are binding on the member states of the Council of Europe.

The right to freedom of expression allows individuals to express themselves without unlawful restraint, censorship or interference. Under international law, states have an obligation in relation to this right. This includes a negative obligation to not unlawfully interfere with the exercise of the right to freedom of expression as well as a positive obligation to secure the effective enjoyment of this right.

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) stipulates the right to freedom of expression, which includes the "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" [emphasis added]. The United Nations Human Rights Committee (CCPR) has also iterated that cultural and artistic expressions fall under the purview of Article 19 of the ICCPR (UNHRC 2004).

What did the United Nations Human Rights Committee opine on the freedom of artistic expression?

In 2004, the UN Human Rights Committee issued a decision in favour of South Korean artist Hak-Chul Shin, whose painting had been confiscated by the government of the Republic of Korea. Shin had been convicted under the National Security Law for creating a painting deemed to be an "enemy-benefiting expression". The Committee determined that the painting qualified for protection under Article 19 of the ICCPR as it conveyed an idea "in the form of art".

The Committee's decisions represent an authoritative interpretation of the ICCPR. They contain recommendations to the state party concerned. The Committee has developed procedures to monitor the implementation of its recommendations.

Additionally, several regional treaties refer to states' obligations in relation to artistic activity. For instance, Article 42 of the Arab Charter on Human Rights highlights the obligation of states to "respect the freedom of scientific research and creative activity" and Article 13(1) of the American Convention on Human Rights provides the right to freedom of expression,

mentioning artistic activity in the same way as mentioned under the ICCPR. In the European context, while Article 10 (Freedom of Expression) of the European Convention on Human Rights (ECHR) does not explicitly mention artists or artistic activity, the European Court on Human Rights (ECtHR) has interpreted Article 10 to include artistic expressions to fall under the definition of "expression".

Role of artists in democratic processes. Art not only confronts society with critical questions of the day but also tests the validity of established ideas, beliefs and practices in a community. Artists fearlessly challenge the social and political realities of our time and create space for public debate, essential in any democratic society. It is through their creative expression that artists amplify our concerns about violations of other fundamental rights. For this reason, artists are censored, harassed, persecuted, and prosecuted for their artwork, undermining the very foundations of democratic society.

Artistic freedoms. For an artist to be able to imagine and create freely, it is essential that they operate within a framework which is conducive to creative activity. International human rights norms oblige states to ensure such a framework. Alongside the right to freedom of expression for artists, states have to ensure the realisation of several other civil and political rights as well as social and economic rights.

First, artistic voices are often silenced through prosecution and incarceration. In such cases, the fundamental **right to fair trial** (ICCPR 1966, Art. 14) becomes paramount in ensuring that artists can express themselves freely. This has also been affirmed by the United Nations Working Group on arbitrary detention, which has issued opinions stating that failure to ensure fair trial guarantees unjustifiably restricts freedom of expression (UN Working Group on Arbitrary Detention 2017).

Second, artists find themselves targeted through acts of discrimination based on their race, ethnicity, national origin, religious or political beliefs, gender identity or sexual orientation. Illustratively, artists from diverse sexual orientations and gender identities and expressions (SOGIE) are often disproportionately impacted through national laws which discriminate against them. Persecution of such artists leads to censorship and self-censorship, severely impeding their ability to express themselves in an authentic and meaningful way. Artists have an unequivocal **right to non-discrimination** and equality before the law (ICCPR 1966, Art. 26). Only an intersectional approach which acknowledges the specific challenges which artists from marginalised groups face is the way forward for the development of an international law framework for artists' rights.

Third, artists are often targeted for expressing themselves in a manner which incorporates their religion or belief. Additionally, they are often not free to use their creative expression to criticise religious practices and beliefs, fearing reprisal from state and non-state actors. The ICCPR recognises the **right to freedom of thought, conscience and religion,** which includes the freedom to manifest one's religion or belief publicly in worship, observance, practice, and teaching (ICCPR 1966, Art. 17). Artists, particularly artists from religious or belief minorities, must be free to weave religious or belief elements into their creative work.

Finally, other rights such as the right to have artistic work supported, distributed and remunerated, the right to freedom of movement, the right to freedom of association, the right to the protection of social and economic rights and the right to participate in cultural life are

all crucial for an artist to be able to express themselves freely. UNESCO, in an effort to curate a more robust understanding of artistic freedom, has commendably recognised this bundle of rights which would constitute artistic freedom (UNESCO 2018). However, to effectively realise the freedom of artists to imagine and create freely, it is imperative to also address the aforementioned challenges relating to the identity-based discrimination faced by artists as well as important principles of due process and fair trial guarantees for artists facing prosecution and incarceration.

Are UNESCO reports and reports by the UN Special Rapporteurs (UNSR) binding on states?

UNESCO is a specialised agency of the United Nations tasked with promoting international collaboration in education, science, culture, and communication. UNESCO's actions and documents do not possess the legally binding force of treaties or conventions which are considered sources of international law. However, its declarations and recommendations can serve as the basis for states to negotiate binding agreements or help shape international norms and standards. UNESCO's work can also contribute to the creation of soft law, which refers to non-binding principles which carry normative weight and can influence state behaviour over time.

The UNSRs are appointed by the United Nations to investigate, monitor and report on specific human rights issues or thematic areas. Similar to UNESCO's actions and documents, the reports by the UNSRs do not have legally binding status but carry significant weight and influence in shaping international norms and policies.

Right to access artistic expression. An important shift in the discourse on artistic freedoms is the inclusion of the right of the audience to have access to artists' creative expressions. This can be seen in the manner in which the right to freedom of expression is articulated in international legal instruments such as the ICCPR and the ECHR. Article 19 of the ICCPR and Article 10 of the ECHR provide that the right shall "include freedom to hold opinions and to **receive and impart information and ideas** without interference by public authority and regardless of frontiers" [emphasis added]. Further, Article 15 of the International Covenant on Social, Economic and Cultural Rights provides the right of everyone to "take part in cultural life" as does the Universal Declaration of Human Rights [Article 27]. The right to participate in cultural life includes the availability of cultural goods including art in all its forms as well as accessibility to these goods (CESCR 2009: pp 4,5).

Diversity of cultural expressions. International law instruments have also underscored the importance of cultural diversity and pluralism. The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 Convention) affirms that "cultural diversity is a defining characteristic of humanity" (UNESCO 2005, Preamble). The United Nations Human Rights Committee has also noted that "the protection of [the cultural rights of minorities] is directed towards ensuring the survival and continued development of the cultural religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole" (CCPR 1994, § 9).

In this sense, states are obliged to adopt measures to protect and promote the diversity of cultural expressions. Notably, the definition of "cultural diversity" includes artistic creation, production, dissemination, distribution, and enjoyment. Further, according to the 2005 Convention, "cultural diversity can be protected and promoted only if human rights and

fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed".

How does the 2005 Convention define "cultural diversity"?

"Cultural diversity" refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.
Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution, and enjoyment, whatever the means and technologies used.

2. International Law and the Diversity of Cultural Norms

Restrictions on the right to freedom of artistic expression. The right to freedom of expression, despite it being a universally recognised core human right with a well-established body of case law all over the world, is not absolute, and states may impose restrictions on the exercise of this right insofar as the restrictions are compatible with international law. These restrictions are laid out in the text of international treaties and require states to balance freedom of expression with competing rights or interests which embody important notions, including human dignity, public order and morals. In order to determine if an interference with the right to freedom of expression is lawful, it must be provided by law and be necessary in a democratic society (ICCPR 1966, Art.19).

How does the ICCPR envisage restrictions on the right to freedom of expression?

Under Article 20, the ICCPR prohibits propaganda for war as well as advocacy of national, racial or religious hatred which constitutes an incitement to discrimination, hostility or violence.

Article 19 of the ICCPR provides that states may impose restrictions which are provided by law and necessary for the respect of the rights or reputations of others and for the protection of national security, public order ("ordre public"), public health or morals.

While international legal instruments lay out the grounds on which freedom of expression may be restricted, they do not explicitly address the fact that these grounds may have or acquire different meanings across states. There is no universal conception of terms such as "morality" or "racial or religious hatred" among states with different cultural norms and values. Even when balancing the right to freedom of expression with other competing interests such as national security or public health, a state will be driven by the level of importance which values such as freedom of expression find in its cultural, social and political fabric.

Cultural norms and legal principles. Cultural norms are standards or patterns of behaviour which are typical within a particular culture or society. They encompass various aspects of social life, including customs, traditions, values, beliefs, and practices. Cultural norms guide individual and collective behaviour and shape interactions and social roles within a community.

The vast diversity of cultural norms which exist across the world has given rise to legal principles from which we have much to learn. "Ubuntu", a Nguni Bantu term meaning "humanity" or "I am because we are" and which emphasises the interconnectedness of individuals and the importance of compassion, empathy and mutual respect, has been used as an argument to abolish the death penalty in South Africa (Constitutional Court of South Africa 1995). In Ecuador, the 2008 Constitution became the first in the world to recognise the rights of nature, inspired by indigenous principles and the concept of "Pachamama", which is central to Andean cosmology (Surma 2021). Even in India, two rivers considered sacred in the Hindu religion were granted "legal personality" with the appointment of guardians who would protect and conserve their environmental integrity (Safi 2017).

However, cultural norms and mores have often been used by states to implement laws which disproportionately impact and persecute vulnerable populations. For instance, the government of the Islamic Republic of Pakistan has often invoked the importance of "protecting religious sentiments" held by the majority Muslim population of the country as a basis for the existence of blasphemy laws in the country. However, the law has, in practice, been employed to suppress dissent and persecute religious minorities in the country, undermining the right to freedom of expression and contributing to a climate of religious discrimination, thereby directly impacting artists' rights in the country (Amnesty International 1994). This has also been seen in the context of Afghanistan where, following the Taliban occupation, music was declared to be in opposition to Sharia Law and musicians were incessantly targeted, persecuted and, in some cases, killed by the authorities (Saber 2017).

Interpretation of international law. How much leverage should individual states be given in interpreting international law according to their cultural norms and customising acceptable restrictions on the right to freedom of expression? This question strikes at the root of the understanding of international law and to what degree specific norms can overpower universal rights or principles. The answer to this question is important for artists across the world and will determine rights vis-a-vis their respective states. There are two international legal doctrines which provide us with the tools to potentially resolve this tension.

Universalism. The first approach is "universalism", which requires the application of a uniform standard in the interpretation of rights and obligations across states. Specifically, in the context of human rights, universalism asserts that certain rights are inherent to all individuals, regardless of cultural differences, by virtue of their very humanity. Legal positivism is a framework which provides justification for this principle. According to it, the very signing and ratification of international treaties is enough to impose states with obligations which transcend cultural variations (Brennan 1989).

Cultural Relativism. Cultural relativists, however, provide an alternative framework for the application of international law. Cultural relativism recognises the fact that diverse societies possess unique traditions, values and norms which shape their perspectives and that the interpretation and realisation of human rights may vary across sociocultural contexts (Tilley 2000: 501). Proponents of cultural relativism have long argued that the very framing of "international law" arises from particular historical contexts steeped in colonisation and power differentials between states, which failed to acknowledge this diversity of cultural values and created a hierarchy of norms across the world (Binder 1999: 211).

An analysis of international advocacy efforts for the realisation of the right to freedom of artistic expression provides interesting insights into the drawbacks behind the universalist approach to the right to freedom of artistic expression. At Avant-Garde Lawyers (AGL), an international legal organisation working to ensure artistic freedoms across the world, we have observed the following key trends concerning the same:

- **Failure to address the cultural contexts where artists view themselves to be inextricably linked to their families and communities.** Artists in conflict areas are often unable to freely express themselves because of excessive persecution and threats to their lives and safety. In this case, artists seek relocation to safe havens in order to continue to create freely. While certain conceptions of artist assistance focus on support for individual artists, AGL has strived to ensure that assistance for artists who are deeply embedded in their families and communities accounts for their relational bonds and need for community.

- **Utilisation of language which fails to acknowledge specific norms and cultural practices of different jurisdictional contexts.** International human rights law finds epistemological roots in Western philosophical cultures, and stakeholders often use language which reflects the same. This language may be perceived as alienating in non-Western cultures. For instance, AGL-supported artists often come from contexts where it is not values such as "autonomy" and "liberty", but those such as "fraternity" and "community" which find resonance with authorities and states.

- **Tensions between "individual rights" and "collective rights".** A critique of the existing framework, particularly in the context of freedom of expression, is the tension between individual rights and community rights. The former is often seen as reflective of Western philosophical traditions which place premiums on individual autonomy and agency. In particular, this tension can be seen in contemporary debates on cultural appropriation. Cultural appropriation involves a power dynamic where elements of a marginalised culture are commodified or exploited, often without regard for their significance or context. For instance, this is often viewed in debates on the right to freedom of expression of big commercial brands which, without authorisation, exploit cultural symbols and expressions of indigenous tribes, whose collective rights over their symbols and expressions are not recognised under intellectual property rights laws (Sundar 2020).

3. International Human Rights Mechanisms' Response to Cultural Relativism

European Court of Human Rights. In Europe, the doctrine of "margin of appreciation" is a well-established principle within the jurisprudence of the ECtHR. Put simply, it allows states a certain degree of discretion when applying the provisions of the European Convention, including those related to the right to freedom of expression. In cases concerning the restriction of the right to freedom of expression on the grounds of morality, the ECtHR has given states a wide margin of appreciation while acknowledging the absence of any "European" consensus on the protection of morals and the diversity of cultural, historical and social contexts which exist within member states of the Council of Europe (ECHR 2014).

The ECtHR has also applied the doctrine of margin of appreciation in cases concerning the restriction of freedom of expression where such expression is directed against the religious feelings of others. It has recognised that it is not possible to "discern throughout Europe a uniform conception of the significance of religion in society". Illustratively, in Otto-Preminger-Institut v. Austria (ECHR 1994), a case was brought before the ECtHR concerning the seizure and forfeiture of a film which satirically portrayed the Roman Catholic Church and was deemed offensive to the religious feelings of the general public. Finding no violation of the right to freedom of expression, the ECtHR emphasised the margin of appreciation afforded to states in cases involving expressions directed against the religious feelings of others. In this particular case, it found that it had not been overstepped.

This approach by the ECtHR aligns with the principle of subsidiarity, whereby it acknowledges that state authorities are the best placed to deal with alleged violations of the Convention in a particular case. For this reason, the ECtHR is only seen as a court of "last resort" once all domestic remedies have been exhausted (ECHR 1976).

Other international mechanisms. Similar principles of a certain degree of deference to state authorities in interpreting and implementing human rights standards can be seen in the United Nations Human Rights Committee. In Hertzberg v. Finland (Hertzberg et al.1979) before the HRC, the complainants had appeared in television or radio programmes related to homosexuality, which the Finnish Broadcasting Company censored. In its opinion, the HRC noted that "public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities".

The principle is less commonly applied in other international courts such as the Inter-American Court of Human Rights (Inter-American Court). The Inter-American Court has been reluctant to defer to the wisdom of domestic laws and national authorities and there is no comprehensive body of case law which has developed on the issue (Gruszczynski/Werner 2014).

However, deference to individual states' interpretations of human rights standards may inevitably lead to a carte blanche for states as to how they implement laws restricting the rights of artists. It is a fine balance which needs to be drawn and the UNSR in the field of cultural rights, Alexandra Xanthaki, has indeed affirmed that "both universality and cultural diversity are at the core of human rights, and doing justice to both requires a nuanced, multi-layered and multidisciplinary response" (Xanthaki 2019: 701).

4. Integrating the Relativist and Universalist Approaches to the Application of the Right to Freedom of Artistic Expression

> *"Cultural diversity is still wrongly understood as being in opposition to universality, including by some Governments and other actors who misuse it as an excuse for violations of the very universal human rights within which its enjoyment is explicitly embedded, and by others who oppose the concept altogether."*
> Karima Bennoune, former UNSR in the field of cultural rights (2018a)

Bennoune has been a vocal advocate for the critical examination of cultural practices, stressing the necessity to distinguish between the legitimate protection of cultural diversity and the misuse of cultural relativism to rationalise human rights violations. This is particularly pertinent when considering the impact on vulnerable groups such as women and minority communities (Bennoune 2018b). She has underscored the importance of subjecting cultural practices to scrutiny, especially when they contribute to discrimination, violence or human rights abuses. This approach finds support under the 2005 Convention, which clearly states that "no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope" (UNESCO 2005, Art. 2).

Thus, we need an approach which identifies commonalities among cultures and uses them as a tool to arrive at the minimum rights which all humans must have, which would necessitate human functioning and ensure human dignity. What makes this approach an exercise which requires constant revisiting and evolution is the fact that arriving conclusively at an understanding of basic human dignity may also have to be understood from the lens of different cultural norms across the world, and the more colloquial understanding of the term may require unpacking.

5. Recommendations for CSOs in the Domain of Artistic Freedom

Stakeholders in the artistic freedom field, including CSOs, especially those based in the Global North, must adopt this lens as they advocate for the rights of artists across the world to be able to express themselves freely. Further, governmental bodies, inter-governmental organisations and private foundations taking an interest in promoting artists' rights must also account for the aforementioned challenges discussed. We recommend the following steps which CSOs can take to adopt a more culturally sensitive approach towards working on artistic freedom.

1. **Adapt Advocacy Strategies.** Stakeholders should tailor advocacy strategies to specific cultural contexts. It is crucial to recognise that the framing and messaging of the right to freedom of expression may need to vary based on local values and sensibilities. The language of state "obligations" may not resonate with particular state authorities rooted in different cultural traditions. In such cases, instead of using language which reprimands state authorities for violating international law, an

approach which appeals to specific cultural values in that context may prove to be more beneficial for the artist in question. For instance, while working on the case of an Egyptian artist imprisoned for over five years for having written a book of poetry, AGL provided legal support in a manner different from other organisations working in the domain. As opposed to antagonising relevant state actors and highlighting their obligations under international law, AGL focused on the need of the artist to spend time with the community and the values of mercy and pardon which often characterise state actions in Egypt.

2. **Strengthen the Capacity of Local Stakeholders.** Especially in non-Western societies, an articulation of international law may be seen as reminiscent of colonial imposition. The creation and development of international law were largely shaped by Western states and their legal traditions and it is argued that the principles and norms reflect the perspectives and interests of these powerful states, marginalising the voices from and concerns of the Global South. It is important to assess whether incremental change may be promoted through the strengthening of internal grassroots movements, with local voices advocating for change. Initiatives aimed, therefore, at empowering lawyers, artists and CSOs at the grassroots level are of utmost importance. Through its capacity building in the domain of artistic freedom, a first initiative in this sense, AGL has sought to support local CSOs, lawyers, artists, and cultural rights defenders and to empower them with the necessary tools and skills to help build local and grassroots movements focusing on the defence of artists' rights. Differently, while working on a case concerning penal action faced by a South Korean graffiti artist, AGL was careful to curate an intervention team which comprised actors from South Korea, including grassroots professionals, to ensure that the artist's defence was contextualised by their experience and knowledge. This collaborative exercise has also served these stakeholders to continue to build and develop a local movement for the rights of artists in the country.

3. **Focus on Shared Values.** There is a plethora of justifications which exist for promoting the right to freedom of artistic expression. Undoubtedly, artistic freedom plays a crucial role in helping sustain healthy and liberal democracies, but these may not be ideals which resonate with the entire world. Instead, it is important to find ideals and values which would align with the cultural ethos of the particular state. For instance, in countries where values of community and fraternity are considered to be very important, the role of art and artists in building social cohesion would be a better starting point for initiating a conversation on artistic freedom. Similarly, instead of focusing on whether "religion" should play a role in determining state action (or inaction), find interpretations which provide a starting point for generating a public discussion or discourse.

4. **Cultural Competence Training.** It is important that stakeholders in the field are trained to navigate cultural differences. CSOs should make sure they understand cultural nuances, communication styles and the historical and cultural context of a particular case which is being worked on. If CSOs are to effectively contribute to an expansion of the freedom of artistic expression, they must be sensitive to the differences in how they operate. For instance, Germany's historical and political context surrounding the holocaust and the Second World War often determines the manner in which debates on censorship of artistic expression deemed antisemitic take

place. Advocacy and litigation efforts towards the recognition and protection of the rights of artists must account for this specificity in order to bear fruit and expand the space for artistic freedom in the country.

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