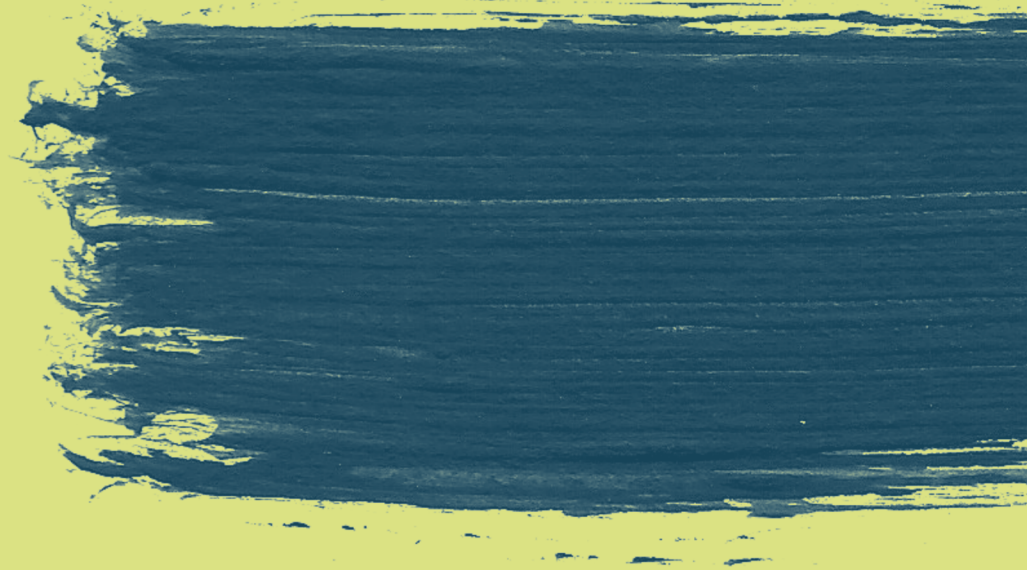


ARTS RIGHTS JUSTICE
OBSERVATORY STUDY II:
RIGHTS. LEGAL FRAME-
WORKS FOR ARTISTIC
FREEDOM



RIGHTS



Imprint

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United Nations
Educational, Scientific and
Cultural Organization



UNESCO Chair
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University of Hildesheim, Germany

PREFACE

Artistic creation, artistic freedom and the role of artists must be considered alongside human rights and freedoms in society. To this end, the ARTS RIGHTS JUSTICE Programme seeks to convey and professionalise skills, ensure the exchange of knowledge, make the most of multiplier effects, and build expertise on the subject. Therefore, the aim of the ARTS RIGHTS JUSTICE Programme is to strengthen and expand structures for the promotion and protection of artistic freedom. The Programme also seeks to question, from a research perspective, how 'protection' and 'promotion' in this field can be and need to be differentiated.

The Programme was developed together with about 30 international expert institutions and individual experts. The Programme includes an annual Academy at Hildesheim Kulturcampus, Germany, which invites about 30 young professionals, artists, cultural managers, lawyers and human rights defenders from different geographical origins. The Academy is accompanied by the ARTS RIGHTS JUSTICE Laboratories, which are satellite workshops in different regions of the world. The Programme also includes the ARTS RIGHTS JUSTICE Observatory, which seeks to ensure that knowledge in the field of freedom of artistic expression is produced, systematically collected and made accessible, in order to facilitate, support and professionalise relevant research, self-education and activism. Therefore, the ARTS RIGHTS

JUSTICE Library aims to collect, create access to and disseminate documents related to the promotion and protection of artistic freedom around the globe. We securely host and facilitate access to all kinds of documents related to this field in the database of the University of Hildesheim. This Library is online and open access: www.arj-library.de.

The ARTS RIGHTS JUSTICE Programme forms part of the UNESCO Chair Cultural Policy for the Arts in Development in the Department of Cultural Policy, at the University of Hildesheim in Germany. This allocation means that research on the subjects mentioned above becomes part of international cultural policy research. The ARTS RIGHTS JUSTICE Studies Series is Hildesheim's contribution to responding to the existing need for research that protects and promotes artistic freedom worldwide. We view the content and results of the ARTS RIGHTS JUSTICE Studies Series as a means of re-thinking policies and actions, and we aim to widen the international discourse in this way.

www.arts-rights-justice.de

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**RIGHTS. LEGAL
FRAMEWORKS FOR
ARTISTIC FREEDOM**

BY LAURENCE CUNY

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INTRODUCTION AND PRELIMINARY REMARKS

The year 2018 marked the 70th anniversary of the Universal Declaration on Human Rights (UDHR). This anniversary provided an opportunity to examine the challenges ahead at a time where universality is being questioned and needs to be strongly reaffirmed. *'The law is a source of important norms guaranteeing universal human rights, but also a terrain of struggle over these rights. International and national law and courts can and should be used to advance universal human rights norms over claims of relativism and particularism'* (UN Special Rapporteur, 2018, para. 27). This study will examine artistic expression and the enjoyment of the arts from a rights perspective. In doing so, we will first examine international law and its related mechanisms, and how they promote and protect artistic expression. We will also look at regional courts and their mechanisms,

and the role of civil society in promoting the legal protection of artistic freedom. Finally, we will examine national legislation and its application in six chosen countries. By doing this, we hope to identify which elements enable or limit artistic expression.

When considering freedom of artistic expression, the most important foundation is Article 27 of the UDHR, which reads as follows:

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

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (UDHR, 1948)

Artistic expression therefore first appeared in the realm of cultural rights as encompassing the right to enjoy the arts. Artistic expression is also covered by the right to freedom of expression and its legal limitations, which raises immediate questions about the level of protection that artistic expression should enjoy. But is artistic 'discourse' different from other forms of expression? **What weight should be given to the right of the audience to access and enjoy the arts when we need to balance conflicting rights? What is the effect of censorship of and self-censorship by artists who fear retaliation on the public's access to and enjoyment of the arts?** A previous study, which forms part of the research by the Arts Rights Justice programme, discussed the origin and definition of artistic freedom. This paper focuses on rights, and analyses the different legal mechanisms that protect freedom of artistic expression and the implementation of these mechanisms. This study adopts an approach that combines both civil and political rights (the freedom of expression approach) and cultural rights (the right to enjoy the arts). This combination of approaches is needed for a more effective and strategic defence and promotion of artistic freedom.

Twenty-two countries explicitly protect freedom of artistic and creative expression (UNESCO, 2017, p. 220). However, this information alone is not sufficient to establish whether

artistic freedom is respected or not. It is only one of the elements we can look at when examining artistic freedom at country level. Rights are permanently negotiated. For example, blasphemy laws exist in certain countries and not in others. The law of a state thus reflects the actual equilibrium between values, ideas, lobby groups, etc. An offended minority can be very proactive in taking cases to national courts, claiming its rights are being infringed (public morals, child protection, defamation or blasphemy for instance) and can obtain adverse decisions that will become part of the case law. Artistic freedom is not an absolute right, and must be balanced against other rights; judges ultimately decide which rights prevail, on a case-by-case basis. Our point of view is that, in almost all cases, in striking the balance, the courts should favour the defence of artistic expression because it contributes to much-needed debates in the particular context of shrinking democratic spaces.

This study therefore also addresses the importance of looking at national case law and the role of judges, lawyers and prosecutors. However, above all this, states have made commitments at both the regional and international levels and are bound by human rights obligations. The national decisions reflect this situation by referring to the regional courts (for example, the Inter-American Court of Human Rights or the European Court of Human Rights) and in fine to the United Nations system.

UNITED NATIONS MECHANISMS FOR THE PROTECTION OF ARTISTIC FREEDOM

II.1

UNITED NATIONS SPECIAL PROCEDURES

The Special Procedures of the Human Rights Council are independent human rights experts who have mandates to report and advise on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political and social. There are 44 thematic and 12 country mandates.¹

II.1.1 Special Rapporteur in the field of cultural rights

The mandate of the Special Rapporteur in the field of cultural rights was created in 2009.² In 2013, the Special Rapporteur Farida Shaheed presented her report on the right to freedom of artistic expression and creativity (UN Special Rapporteur, 2013), which was acknowledged by many observers as a ground-breaking and landmark report. Written in the aftermath of the Arab Spring, it allowed for the examination of the freedom indispensable for artistic

freedom and creativity, building on Article 15(3) of the International Covenant on Economic, Social and Cultural Rights to find the main relevant human rights elements. The report process involved several artists, such as Tania Bruguera, Larissa Sansour, Didier Awati and Nadia Plesner. A questionnaire was sent to all UN member states. Twenty-nine state responses were received, as well as responses from governmental and non-governmental organisations.³

The report has become a reference point for all actors working for the promotion and protection of artistic expression. The report has been further complemented by the Special Rapporteur's country visits,⁴ reports and communications. The Special Rapporteur works on different issues and not all of the work addresses artistic freedom, but in our opinion two other reports should be examined because they form part of the *corpus* on artistic freedom.

The 2014 report on memorialisation processes reiterates the right of each person to the freedom of artistic expression and creativity, in accordance with international standards (UN, 2014). The report also underlines the important role of artists in the process of memorialisation, in bringing together different narratives, particularly in public spaces, and in initiating discussion.

The report recommends that states and relevant stakeholders should *'[r]espect the right to freedom of artistic expression and creativity in addressing memorialization issues and collaborate with artists. States should ensure the availability of public spaces for a diversity of narratives conveyed in artistic expressions and multiply opportunities for such narratives to engage with each other'* (*ibid.*).

The 2018 report on socially engaged cultural and art-based initiatives addresses the *'transformative power of art and culture'* and *'how actions in the field of arts and culture can make significant contributions towards creating, developing and maintaining societies in which all human rights are increasingly realized'* (UN Special Rapporteur, 2018, para. 106). Karima Bennoune, the successor to Farida Shaheed as Special Rapporteur, also points out that:

In some contexts, including those characterized by violence and repression, extreme censorship, stigma regarding artistic expression or discrimination against some artists and cultural practitioners, such as women, merely engaging in artistic and cultural practice can have deep meaning for and an impact on human rights, regardless of the specific content or aims. (*ibid.*, para. 6)

Through this report, the Special Rapporteur highlights the social value of artistic expres-

sions: *'It is because cultural and artistic expressions are powerful that they are at risk of being targeted, manipulated or controlled by those in power or in search of power'* (ibid., para. 4).

The mandate celebrates ten years of existence in 2019. A report has been issued to mark this anniversary. This report reiterates the need to consider Article 15 of the International Covenant on Economic, Social and Cultural Rights when interpreting Article 19 of the International Covenant on Civil and Political Rights, and vice versa, calling for a holistic approach, which is *'a suggestion that still needs implementation in the field'* (UN Special Rapporteur, 2019, para. 23).

II.1.2 Other Special Procedures

Many communications sent by the Special Rapporteur in the field of cultural rights concerning artistic freedom are done jointly with other Special Procedures, usually the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and the protection of the freedom of expression and opinion.

SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS:

The mandate on the situation of human rights defenders was established in 2000 by the Commission on Human Rights (as a Special Procedure) to support the implementation of the 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.⁵ The Declaration does not mention artists.

There is no specific definition of who is or can be a human rights defender. The Declaration on human rights defenders ... refers to '*individuals, groups and associations ... contributing to ... the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals*' (fourth preambular paragraph). In accordance with this broad categorization, human rights defenders can be any person or group of persons working to promote human rights, ranging from intergovernmental organizations based in the world's largest cities to individuals working within their local communities. Defenders can be of any gender, of varying ages, from any part of the world and from all sorts of professional or other backgrounds. In particular, it is important to note that human rights defenders are not only found within NGOs and intergovernmental organizations but might also, in some instances, be government officials, civil servants or members of the private sector.⁶

From a rights perspective, artists cannot therefore be automatically equated with human rights defenders. At times and depending on the situation, artists who engage in work that denounces violations of human rights can be regarded as human rights defenders and may be entitled to specific protection. This nuance is an important one as there has been resistance in the past to the argument that artists should be protected per se and as a 'new' category of human rights defenders. In certain cases, focusing on the right to enjoy the arts rather on the rights of the artists might help to relieve some pressure and to ease relations with the authorities. In turn, **when artists are recognised as human rights defenders, this can facilitate their access to protection mechanisms, such as temporary relocation, and their access to support, for example, the attending and observing of trials, where appropriate** (EU Guidelines, 2016).⁸

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

This mandate was established in 1993 and includes '*as a matter of high priority*', violations '*against journalists or other professionals in the field of information*'.⁹ In recent years, in line with the evolution of artistic freedom, the Special Rapporteur has issued joint communications on artists and, during its country visits,

has added visits to artists and cultural centres. The Special Rapporteur has also considered preparing an addendum on artistic expression to its annual report.¹⁰

Other Special Rapporteurs

As mentioned above, there are 44 thematic mandates and 12 country mandates. Depending on the issue, the Rapporteurs will make joint statements, or a statement prepared by one Rapporteur will be endorsed by others.

This is what happened, for instance, in the case of musicians Mehdi Rajabian and Yousef Emadi, and filmmaker Hossein Rajabian. The statement 'Artistic expression is not a crime' was issued by the Special Rapporteur in the field of cultural rights and the Special Rapporteur on freedom of expression, and endorsed by the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: '*These three artists were sentenced for exercising their right to freedom of artistic expression and creativity, which in turn results in unjustifiable restrictions on the right of all persons in Iran to have access to and enjoy the arts*' (OHCHR, 2016).

This is an illustration of the approach based on Article 15(3) of the International Covenant on

Economic, Social and Cultural Rights. Both the freedom of expression of the artists and the right of the public to access and enjoy the arts have been violated.

II.2

UNITED NATIONS TREATY BODIES

The human rights treaty bodies are committees of independent experts that monitor the implementation of international human rights treaties. Each state party to a treaty has an obligation to take steps to ensure that everyone in the state can enjoy the rights set out in the treaty. Currently, there are nine human rights international treaties, and one optional protocol, from which nine treaty bodies have been established.¹¹ The treaty bodies are composed of independent experts of recognised competence in human rights, who are nominated and elected by state parties for fixed renewable terms of four years. Some treaty bodies have an individual complaints mechanism.

The most relevant treaty bodies for our study are the Human Rights Committee (HRC), which monitors the Implementation of the International Covenant on Civil and Political Rights (ICCPR), and the Committee on Economic, Social and Cultural Rights (CESC), which moni-

tors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESC) because they examine respectively the implementation of Article 19 on freedom of expression and Article 15 on the freedom indispensable for creative activity.

However, it should be noted from the outset, as stated by the Special Rapporteur in the 2013 report on artistic freedom, that *'few decisions in the United Nations system relate to artistic freedom'* (UN Special Rapporteur, 2013). There are several explanations for this. One of the main reasons is the amount of information received by the Special Procedures and treaty bodies and the limited time and resources available to process this information. Another reason is the lack of information received about these specific issues. Engaging with the United Nations can be perceived by civil society organisations as a long and complex exercise. Most national organisations do not have direct access to the UN mechanisms and rely on international organisations that have different priorities. There is no coalition of cultural rights organisations advocating for artistic freedom. Artistic freedom is one area among many others that still must find its way. **We believe that re-visiting the information already collected at the local, national and international levels and sending it to the appropriate mechanisms could allow for the greater visibility of artistic freedom and in turn for greater protection.**

II.2.1 Human Rights Committee

In its General Comment No. 34 on Article 19: Freedoms of opinion and expression, the Human Rights Committee explicitly refers to artistic freedom: *'the right to freedom of expression includes political discourse, commentary on one's own, and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse'* (HRC, 2011). Article 19 protects all forms of expression and the means of their dissemination: *'Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art'* (ibid., para. 12).

The Human Rights Committee referred to a 2004 case about a painter from the Republic of Korea who had been convicted for producing a painting deemed to be an *'enemy-benefiting expression'*, thus contravening Article 7 of the National Security Law (HRC, 2004). The Human Rights Committee found that the Republic of Korea had violated Article 19 of ICCPR, and thus provided an example of the application of Article 19 to a work of art.

Even if the confiscation of an artwork is based on legislation, the state must demonstrate that this is necessary for one of the purposes enumerated in Article 19(3). Such confiscation

must be necessary for the respect of the rights and reputations of others or for the protection of national security or public order or public health and morals (ibid., para. 7.2). In the absence of any justification for why the measures were necessary, the Committee found that the author's right to freedom of expression had been violated (ibid., para. 7.3).

To our knowledge there are few other references to artistic freedom in the work of the Human Rights Committee. We believe that this situation could change if civil society organisations at both the national and international levels engaged the Committee on this issue and regularly included references to artistic freedom in their reports and lobbying for inclusion in the state parties' periodic reports.

II.2.2 Committee on Economic, Social and Cultural Rights

In its General Comment No. 21 on the right of everyone to take part in cultural life, the Committee on Economic, Social and Cultural Rights noted that *'no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope'*, thus re-affirming the universality and interdependence of all human rights (CESCR, para. 18).

This was made possible by the prior submission of information on Lebanon by Freemuse, PEN International and PEN Lebanon. These organisations had sent the report prepared for the Universal Periodic Review (UPR) to the Committee for consideration (CESCR, 2016a).

The Committee referred to this General Comment when it discussed freedom of creative activity in its concluding observations on Lebanon in 2016.

This was made possible by the prior submission of information on Lebanon by Freemuse, PEN International and PEN Lebanon. These organisations had sent the report prepared for the Universal Periodic Review (UPR) to the Committee for consideration (CESCR, 2016a).

Freedom for creative activity

66. While noting the information provided by the delegation about freedom of expression and the support given to creative activities in the State party, the Committee is concerned at some restrictions imposed on cultural activities.

67. The Committee recommends that the State party respect the freedom indispensable for creative activity, including ensuring that it is not unduly limited by forms of censorship. The Committee draws the attention of the State party to paragraphs 17 to 20 of its general comment No. 21. (CESCR, 2016b)

In October 2018, the Committee on Economic, Social and Cultural Rights held a Day of General Discussion on a draft General Comment on Article 15. This General Comment will focus on the right to enjoy the benefits of scientific progress and its applications and on other provisions of Article 15 on the relationship between science and economic, social and cultural rights (CESCR, 2018). Civil society organisations should take this opportunity to engage with the Committee and to provide information on freedom of artistic and creative expression as well.

Another reference to artistic freedom is found in the work of the Working Group on Arbitrary Detention, which declared that a famous Cameroonian musician and composer, Lapiro de Mbanga, had been arbitrarily detained for legitimately exercising his right to freedom of expression. This was a direct result of the lobbying by civil society organisations that had brought the case before the Working Group (Working Group on Arbitrary Detention, 2011). Lapiro de Mbanga is described by the Working Group as a Cameroonian *artist, lawyer, human rights defender, activist* in the Social Democratic Front Party, which is an opposition party in Cameroon and as a composer of songs with political content (for example, '*Constipated Constitution*'). Mbanga's activism inspired many people to express their opposition to a constitutional amendment proposed by the Government (ibid., para 25).

An illustration of the moving boundaries of rights: Freedom of expression vs defamation of religion

Following the Human Rights Council's resolution on combating the defamation of religions in 2008, the High Commissioner for Human Rights was asked to submit a study that compiled the relevant existing legislation and the jurisprudence concerning defamation of and contempt for religions (HRC, 2008). One of the objectives of the promoters of this resolution was to create a new international obligation.

In this report, the High Commissioner points out that some countries have specific laws addressing the defamation of religion:

Of the countries that reported on such laws, there does not appear to be a common understanding of what is considered defamation of religion. The reported laws address somewhat different phenomena and apply various terms such as contempt, ridicule, outrage and disrespect to connote defamation. The responses do not provide enough information for an analysis of how these terms are understood or applied. The relationship between these concepts to the international human rights framework related to freedom of religion is also not explicitly addressed.¹²

The High Commissioner also refers to a 2008 joint report by two UN Special Rapporteurs that soundly rejects the premise that the rights of religious believers are violated by merely hearing statements that are critical of their faith: *'Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights'* (OHCHR, 2008).

Concerning the freedoms of opinion and expression, General Comment 34 makes it clear that *'[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.'* Therefore, countries who have blasphemy laws in any form and have signed the ICCPR are in breach of their obligations under the ICCPR.

In 2011, because the defamation of religion approach was losing support, the Organisation of Islamic States, which had been the main sponsor of the resolution, changed its approach and introduced a new resolution on *'Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief'*. This resolution received unanimous support. The attempt to create a new international obligation on the defamation of religions was therefore unsuccessful.¹³

II.3

UNIVERSAL PERIODIC REVIEW

The Universal Periodic Review was established when the Human Rights Council was created on 15 March 2006 (United Nations General Assembly, 2006). The Human Rights Council was mandated to *'undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States'*. The Human Rights Council periodically reviews each of the 193 United Nations member states' fulfillment of their human rights obligations and commitments. This is done through review cycles, each of which is a four-and-half year period. The working group convenes three two-week sessions per year, or 14 sessions over the course of an entire cycle. The third cycle covers 2017 to 2021.

A review of a state is based on: (a) a national report prepared by the state under review; (b) a compilation of UN information on the state under review prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR); and (c) a summary of

information submitted by other stakeholders (including civil society actors, national human rights institutions and regional organisations), also prepared by OHCHR.

The profile of artistic freedom has been raised by civil society reports, although until now it has rarely been mentioned in state reports, questions by other member states and UN compilations of information.¹⁴ However, there is a need to maintain focus on the issue and this should be one of the strategies of civil society organisations at both the national and international levels.

II.4

UNITED NATIONS EDUCATION, SCIENCE AND CULTURE ORGANISATION (UNESCO)

This study does not address the functioning of UNESCO mechanisms in detail as these have been examined in the study 'Arts: Understanding artistic freedom'.¹⁵ Rather, this section considers how UNESCO can be strategically used to promote artistic expression and how its approach is complementary to the approach of the Office of the High Commissioner on

Restrictions to artistic freedom and access to artistic expressions generate important cultural, social and economic losses, deprive artists of their means of expression and livelihood, and create an unsafe environment for all those engaged in the arts and their audiences.

UNESCO

Global report: Reshaping cultural policies, 2015

Human Rights, by providing space for training on national legislation both on the status of the artist and on artistic freedom and by providing useful monitoring information.

As recognized by UNESCO *'Restrictions to artistic freedom and access to artistic expressions generate important cultural, social and economic losses, deprive artists of their means of expression and livelihood, and create an unsafe environment for all those engaged in the arts and their audiences'* (UNESCO, 2015).

“Freedom of expression and communication is the essential prerequisite for all artistic activities“



UNESCO

Already, in 1980, the UNESCO member states adopted the Recommendation concerning the Status of the Artist, stipulating that *'freedom of expression and communication is the essential prerequisite for all artistic activities'*.¹⁶ The issues embraced and promoted by the Recommendation include the education of artists, labour and social rights – including the rights to establish independent unions and the

free international movement of artists, and the stimulation of public and private demand for the fruits of artists' activities.

A survey on the policies and measures taken to implement the 1980 Recommendation concerning the Status of the Artist was launched in 2014. One thematic area for the survey was human rights and fundamental freedoms (social and economic rights, artistic freedom and gender equality). A new survey was ongoing at the time of writing this study.¹⁷ The results of the survey will be interesting as they will provide an update on the current situation of the status of the artist. They will also provide an opportunity to keep artistic freedom on the agenda and to engage with states around adopting or amending legislation. Civil society organisations are encouraged to take up this work. Combining the discussion on the status of the artist with discussions and training on artistic freedom can be a very positive step at country level.

The Chapter on artistic freedom of the 2015 report noted that *'violations of artists' rights to freedom of expression have not been monitored, documented or addressed systematically – if at all – by intergovernmental organisations or major international human rights organisations. International reports on violations of human rights that give priority to the monitoring of freedom of expression focus almost entirely on media freedom, with*

no or limited reference to censorship and the persecution of artists and artistic productions (UNESCO, 2015).

Upon ratifying the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, states commit to submitting 'periodic reports' every four years on the policies and measures they have adopted, and the challenges they have encountered in implementing the Convention. These are called quadrennial periodic reports (QPRs). These reports are key instruments that civil society can use to engage with government officials in assessing progress made to protect and promote the diversity of cultural expressions.

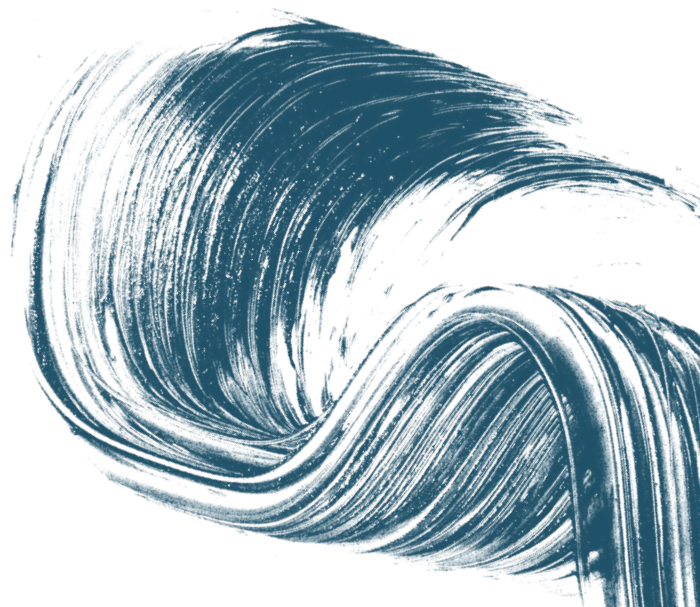
Until now the states' QPRs contained some information on artistic freedom, particularly on legislation. This information was then reflected in the policy monitoring platform, an excellent tool that is accessible to all actors.¹⁸ However, as there was no specific reporting obligation, this was not done in a systematic manner and even states that had taken positive steps on artistic freedom did not necessarily mention these steps in their reporting.

In 2019, following changes in the reporting form and obligations, parties to the 2005 Convention will be asked to report on artistic freedom. They will have to answer specific questions on whether their constitution and national legislation protects artistic freedom,

on the existence of a monitoring body, etc. Therefore, the next QPRs will contain even more valuable information on artistic freedom. This will provide an important data base for all interested actors.

Besides these efforts on frameworks and legislation, UNESCO is increasingly raising public awareness on artistic freedom. This has been done through the organisation of World Press Freedom Day, which was inaugurated in Helsinki (2016) and has continued in Jakarta (2017), Accra (2018) and Addis Ababa (2019). UNESCO also organises public events and panel discussions with artists parallel to the meetings of the Intergovernmental Committee or in the context of the 2030 Create Talks, as was done in Paris in December 2018 and in Bangkok in February 2019.¹⁹ The video '*A question on artistic freedom*' issued in December 2018 can be used by all actors to engage with states and other stakeholders.²⁰

Following developments at UNESCO is a strategic option for civil society to engage in legislative changes at national level and raise the profile of artistic freedom.



ARTISTIC FREEDOM IN REGIONAL MECHANISMS

III.1

EUROPEAN COURT OF HUMAN RIGHTS

Following the attacks on the office of the *Charlie Hebdo* magazine, on 7 January 2015, the Ministers of Culture of the 28 member states of the EU issued a joint statement about artistic freedom:

We, the ministers of culture of the European Union, do not accept terrorists' attempts to impose their own standards. Since time immemorial, the arts have been an inspiration for reflection giving rise to new ideas and fighting against intolerance and ignorance. It is the freedom of expression in a culturally diverse environment that brings these ideas into meaningful dialogue.

We, the ministers of culture of the European Union, stand in solidarity to defend the freedom of expression and vow to protect the rights of artists to create freely.²¹

Besides this kind of political message that can be further conveyed by civil society, particularly in the context of the upcoming European elections, references to artistic freedom can be found in the case law of the European Court of Human Rights, although the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950, does not contain any reference to artistic expression or enjoyment of the arts.²² The interpretation of Article 10 on Freedom of Expression has been developed by the European Court in order to apply to artistic expressions: *'Those who create, perform, distribute or exhibit works*

*of art contribute to the exchange of ideas which is essential for a democratic society.'*²³

And further: *'Artistic freedom enjoyed by, among others, authors of literary works is a value in itself, and thus attracts a high level of protection under the Convention'* (ECHR Research Division, 2011).

The court has thus underlined the importance of artistic expression in the context of the right to freedom of expression. It has applied a high level of protection when dealing with artistic works. However, when striking a balance between conflicting rights (artistic freedom vs freedom of religion, artistic freedom vs defamation and the reputation of others, artistic freedom vs public morals), and despite recognising the contribution of artistic expressions, it has often ruled in favour of states.

For instance:

*[T]he Court accepted the reasoning of the Austrian courts, which did not consider that the merits of the film as a work of art or as a contribution to public debate outweighed those features which made it essentially offensive to the general public. Likewise, the Court considered in the case of *Wingrove v. United Kingdom* that a complete ban on a movie considered as blasphemous did not infringe Article 10 as the national authorities did not overstep their margin of appreciation. (ibid.)*

Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas which is essential for a democratic society.

Artistic freedom enjoyed by, among others, authors of literary works is a value in itself, and thus attracts a high level of protection under the Convention.

EUROPEAN COURT OF HUMAN RIGHTS RESEARCH DIVISION

Cultural rights in the case-law of the European Court of Human Rights, Council of Europe / European Court of Human Rights

This margin of appreciation left to states in the sphere of public morals and religion has prevented the European Court from ruling in favour of artistic expression. The court has justified interferences in freedom of expression and, in particular, artistic freedom in order to protect the right not to have one's religious feelings insulted.²⁴

Throughout its jurisprudence the court has found that visual arts, literary creation or satire may be considered as forms of artistic expression and are therefore protected by Article 10 of the Convention. In *Karataş v. Turkey* the court considered the offending poem, and stated: *'Taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers.'*²⁵

In a judgment concerning the seizure of the Turkish translation of a novel by French poet Guillaume Apollinaire and the condemnation of the editor, the court held that the conviction, justified because the novel allegedly offended public morals, hindered public access to a work belonging to the European literary heritage and unanimously found that Article 10 had been violated.²⁶

In the case of literature, the concept of the exception of fiction has been brought before the court.²⁷ In the case of a novel involving real characters the court did not uphold the argument of fiction, and stated that *'novelists – like other creators – and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities".'*²⁸

The court has been consistent in viewing artistic expression as protected by freedom of expression. However, the court has been inconsistent when balancing artistic freedom against other rights. It has been argued that the court's approach on artistic freedom is a de minimis approach (Polymenopoulou, 2016). The court has yet to decide whether artistic expression as such deserves special protection. **While European literary heritage has been protected, contemporary artistic expressions have not.**



INTER-AMERICAN HUMAN RIGHTS SYSTEM

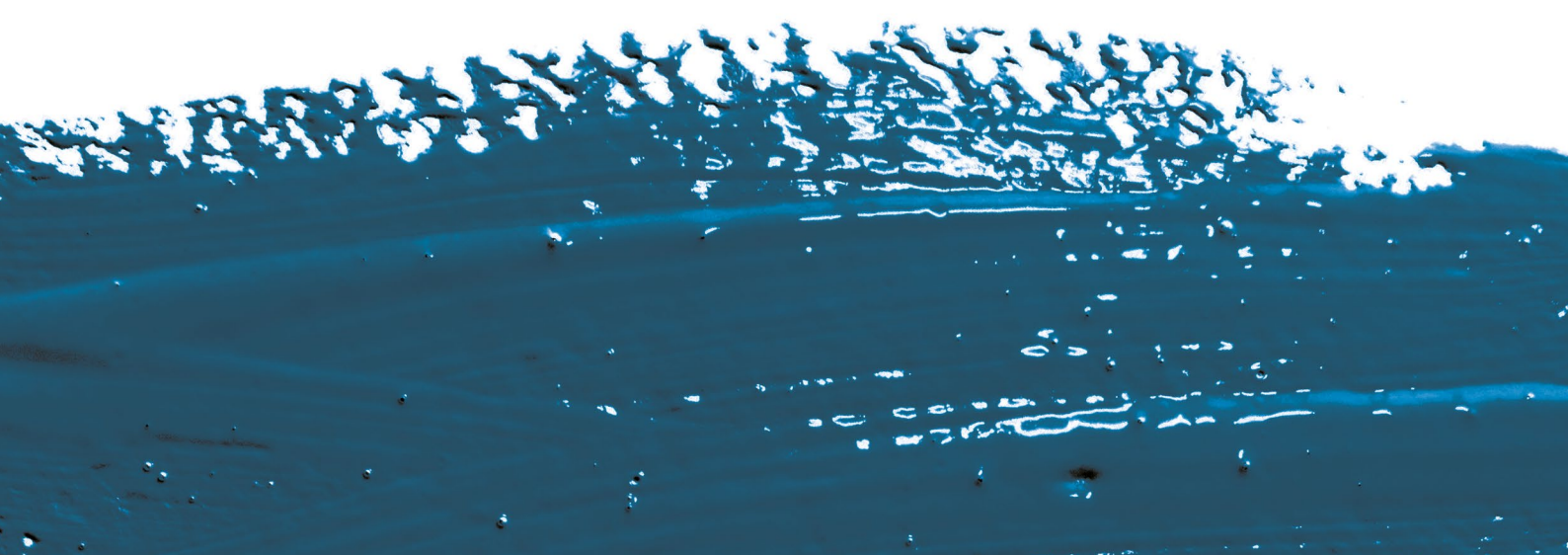
Article 13 of the American Convention on Human Rights explicitly mentions expression in the form of art by providing that:

„Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.“²⁹

Article 13 clearly prohibits prior censorship:³⁰

„[The exercise of freedom of expression] shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others;
- or b. the protection of national security, public order, or public health or morals.“³¹



The Office of the Special Rapporteur for Freedom of Expression was created in 1997.³² As part of its mandate the Office prepared the Declaration of Principles on Freedom of Expression adopted in October 2000.³³ The Declaration of Principles is progressive and also mentions artistic freedom in its Principle 5 on prior censorship.

Although most of the work of the Office relates to journalists, artists are also mentioned. For example, the press release on Cuba states: *'The Office of the Special Rapporteur warns about the increased criminalization of scholars, journalists, artists and activists, through the application of crimes that sanction criticism of public officials in Cuba'* (UN Special Rapporteur, 2018). However, information on artistic freedom is not requested in advance by the Office of the Special Rapporteur when visiting countries.³⁴ Civil society must ensure that the Special Rapporteur is informed about the situation of artists and meets with artists and cultural actors, particularly during visits. It is also a positive sign that the Inter-American Commission finally appointed the first Special Rapporteur on Economic, Social, Cultural and Environmental Rights (ESCER) in 2017 (UN Special Rapporteur, 2017) and one that should be used by all actors involved in the promotion and protection of artistic freedom.

The specific issue of desacato laws (contempt laws) vs freedom of expression

The Inter-American Commission on Human Rights analysed the compatibility of desacato laws with the American Convention on Human Rights in a 1995 report (IACHR, 1995). The Commission found that such laws were not compatible with the Convention because they lend themselves *'to abuse, as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions'* (ibid). The Commission found that there are other, less restrictive means besides criminal contempt laws that government officials can use to defend their reputations, such as replying through the media or bringing a civil action against individuals for libel or slander. Although many countries have repealed their desacato laws, Cuba, Venezuela, Brazil, the Dominican Republic and El Salvador are among those countries that still maintain them. These laws have an impact on self-censorship.

Case law on artistic freedom

The most important case concerning artistic freedom before the Inter-American Court of Human Rights was the film *'The Last*

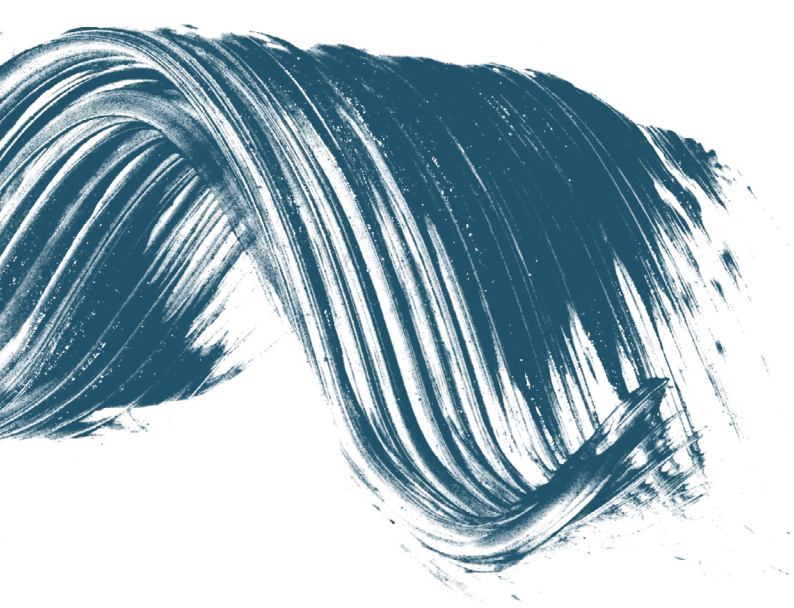
Temptation of Christ' in 2001. The court analysed the Supreme Court of Chile's decision to validate the ban on exhibiting the film. It concluded that prohibiting the exhibition of the film violated Article 13 of the Convention, because this Article provides that the exercise of freedom of thought and expression shall not be subject to prior censorship. The court further considered that *'the aim of this provision is to protect and encourage access to information, ideas and artistic expressions of all types and to strengthen pluralist democracy'*. For the court the *'obligation not to interfere in the enjoyment of the right of access to information of all types extends to the circulation of information and the exhibition of artistic works that may not be approved personally by those who represent the authority of the State at a certain moment'*.³⁵ Therefore, the jurisprudence of the Inter-American Court confirms that artistic expressions are clearly protected.

III.3

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples' Rights was adopted in 1981. There is no mention of artistic expression. Article 17 provides for every individual to freely take part in the cultural life of his community.³⁶ A protocol to the Charter was adopted in 1998 for the creation of an African Court on Human and Peoples' Rights, which came into force on 25 January 2005. In 2002, the African Commission adopted the Declaration of Principles on Freedom of Expression in Africa, which does not contain any specific reference to artistic freedom.³⁷

Although until now the African Commission has not been particularly active in the field of freedom of expression and artistic freedom, measures that support the economic and social rights of artists are increasingly appearing in national legislation (UNESCO, 2018, p. 16). The adoption of these measures, as well as the periodic reporting of state parties, should be taken as an opportunity by civil society organisations at the regional and national levels to engage on issues of artistic freedom.



ORGANISATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE)

As early as 1991, the Document of the Cracow Symposium on the Cultural Heritage of the Commission on Security and Cooperation in Europe (CSCE) examined the respect for freedom of expression and its exercise in the artistic and cultural fields (OSCE Representative, 2017):

(6.1) The publication of written works, the performance and broadcasting of musical, theatrical and audio-visual works, and the exhibition of pictorial or sculptural works will not be subject to restriction or interference by the State save such restrictions as are prescribed by domestic legislation and are fully consistent with international standards.

(6.2) They express their conviction that the existence, in the artistic and cultural fields, of a diversity of means of dissemination independent of the State, such as publishing houses, radio broadcasting, cinema and television enterprises, theatres and galleries, helps to ensure pluralism and the freedom of artistic and cultural expression. (ibid., p. 22)

Despite the recognition of artistic expression, there are few references to academic expression in OSCE's work. Research into the more than 100 press releases issued in 2018 by the OSCE Representative in Freedom of the Media, which observes media developments in all 57 OSCE participating states, shows one reference to a non-journalist, Oleg Stentov, '*a writer and film director from Crimea, Ukraine*' (OSCE Representative, 2018).

However, the issue is becoming more visible. In 2018, an Expert Conference on strengthening media freedom and pluralism in Ukraine during times of conflict in and around the country devoted a session to freedom of artistic expression.³⁸

OSCE has conducted out interesting work on the decriminalisation of defamation, including providing advice to countries on legislative changes (OSCE Representative, 2018). This has included commissioning a comparative study on defamation and insult laws in the OSCE region (Griffen, 2017). This comparative study provides a reference that can serve as good practice for other contexts as it explicitly mentions artistic work. In Croatia, for instance, '*[c]riminal liability for insult and shaming is excluded if the offending content was disseminated in the course of journalistic work or if these statements were disseminated in the public interest or for some other justifiable reason,*

including scientific, literary and artistic work' (ibid).³⁹

OSCE has also constantly called for the removal of blasphemy provisions and blasphemy laws. The media freedom representative has called *'on the 16 OSCE participating States where blasphemy remains a criminal offence to follow Ireland's example as these laws are incompatible with international standards on freedom of expression'* (OSCE Representative, 2018).

III.5

ARAB CHARTER ON HUMAN RIGHTS

The Arab Charter on Human Rights, adopted by the Council of the League of Arab States in 2004, entered into force in 2008. Its preamble recognises *'the close link that exists between human rights and international peace and security'* and reaffirms *'the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and having regard to the Cairo Declaration on Human Rights in Islam'*.

The text explicitly mentions creative activity and the implementation of artistic programmes. Article 42 reads as follows:

- 1 — Every person has the right to take part in cultural life and to enjoy the benefits of scientific progress and its application.**
- 2 — The States parties undertake to respect the freedom of scientific research and creative activity and to ensure the protection of moral and material interests resulting from scientific, literary and artistic production.**
- 3 — The state parties shall work together and enhance cooperation among them at all levels, with the full participation of intellectuals and inventors and their organizations, in order to develop and implement recreational, cultural, artistic and scientific programmes.**

The Constitution of Lebanon, for instance, makes direct reference to this text.⁴⁰

The Arab Human Rights Committee was established in 2009 to oversee member states' implementation of the Arab Charter on Human Rights by examining periodic reports. There are no independent human rights mechanisms, such as country or thematic special rapporteurs or working groups, and there is no individual complaints mechanism.

The compatibility of the Charter with international human rights instruments remains questionable, particularly with regard to the right to life for minors, discrimination against non-nationals, women's rights, and the protection of minorities (Hammami, 2013).

Since the 2011 Arab uprisings, civil society organisations have increasingly tried to engage the Arab League to express their concern about human rights violations (International Center for Not-for-Profit Law, 2018). There have been talks about amending the Charter in accordance with universally established international human rights standards and there are efforts to establish a regional human rights court for Arab League member states, operating within the framework of the Charter.

III.6

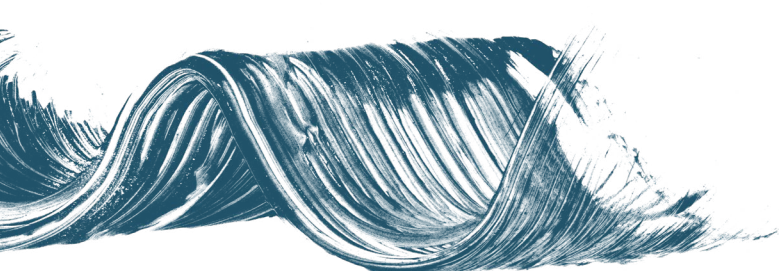
ASEAN HUMAN RIGHTS DECLARATION

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. In 2012 it adopted the ASEAN Human Rights Declaration.⁴¹ Article 32 refers to artistic freedom:

32. Every person has the right, individually or in association with others, to freely take part in cultural life, to enjoy the arts and the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or appropriate artistic production of which one is the author.

Although welcoming the commitment by ASEAN members to universal human rights norms, the UN High Commissioner expressed its concern that the declaration *'retains language that is not consistent with international standards'* and that there was a *'lack of inclusive and meaningful consultation with civil society in the region during its preparation'* (UN High Commissioner, 2012).

In the meantime, the international human rights mechanisms will continue to hold ASEAN member states to their international obligations.



THE ROLE OF CIVIL SOCIETY

What is the role of civil society in engaging with these mechanisms? The discussion of the international and regional mechanisms above shows that these mechanisms can be efficient only if civil society organisations use them, provide information, and amplify the recommendations made in the reports. Civil society organisations and artists are producing monitoring reports, appearing as amicus curiae before the courts, and engaging in trial observation, documentation, campaigns for legislative changes and alerts on individual cases. All this information can be channelled to the mechanisms in different formats to ensure the issue continues to receive the necessary attention.

In the Tenth anniversary report, the Special Rapporteur in the field of cultural rights calls for *'the creation of a civil society coalition for cultural rights at the United Nations, modelled on similar coalitions around, inter alia, freedom of religion or belief. Such a coalition could help spread awareness among artists, cultural practitioners, scientists and relevant organizations about how to work within the system'* (UN Special Rapporteur, 2019).

The importance of monitoring bodies at the national level needs to be emphasised. The existence of such bodies creates more visibility and allows for a better understanding of the issues. A survey carried out by Artists at Risk Connection (ARC) in 2018 showed that artists need local networks and information to remain safe.⁴²

As mentioned above, anti-terrorism and state security laws, and defamation and blasphemy laws are most often used by governments to curtail artistic expressions that challenge their authority or touch upon sensitive issues that they do not wish to debate. Although these laws are not designed to be used against artists, their effect is to encourage self-censorship as artists fear being charged, and they impede much-needed debates and dialogue on controversial issues.⁴³

Civil society groups at the national level should continue to strive for the repeal of blasphemy laws, and for an end to the application of defamation and anti-terrorism legislation to artistic expression, and must build on the tools provided in previous reports and model legislation.⁴⁴

In 1903, Justice Oliver Wendell Holmes of the US Supreme Court said *'[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.'*

In Europe, this is also the opinion of lawyers who train judges of the European Court of Justice on matters of art (Matei, 2018). Legal practitioners must have some sort of expertise in artistic freedom, in order to inform judges and prosecutors about the particularities of artistic expression, because otherwise ultimately the judges decide on grounds that do not necessarily take into account the value of artistic expression.

Informing artists about their rights also makes them less vulnerable. In 2017, ArtWatch Africa and the Institute for Human Rights and Development in Africa organised training workshops for East African and West African lawyers in Nairobi and Lagos, looking specifically at freedom of creative expression litigation and cultural rights cases.⁴⁶ This type of training is a very useful resource for lawyers.



NATIONAL LEGISLATION ON ARTISTIC FREEDOM: SIX CASE STUDIES

When we look at artistic freedom at the national level, we need to adapt our perspective to the specific context. In each country artists operate in a specific legal environment, the application of which is also subject to variations, depending on the political context. Upcoming elections, the history of the country, and tensions in a particular community are factors that have a direct impact on the scope of freedom of expression and that will affect artists as well.

When looking at artistic freedom at the national level, one of the first considerations is to look at the legal environment. The following questions can guide this approach:

When looking at artistic freedom at the national level, one of the first considerations is to look at the legal environment. The following questions can guide this approach:

- 1 – Is artistic freedom guaranteed by the Constitution?
- 2 – What international conventions has the country ratified?
- 3 – Have they been incorporated into the national law?
- 4 – Do they take precedence in the judges' jurisprudence?
- 5 – Is there a specific law covering artistic expression?
- 6 – Are there laws that may conflict with artistic freedom?
- 7 – Are there laws on blasphemy and national security?
- 8 – Are there anti-terrorism laws?
- 9 – What are the laws on libel and defamation?
- 10 – How is publishing on the internet regulated?
- 11 – Is there a mechanism for prior censorship?
- 12 – Is the status of the artist specifically protected? 47
- 13 – Is there case law involving artists' freedom of expression?
- 14 – Are there lawyers with knowledge of the international framework that can be involved in strategic litigation?
- 15 – Are there civil society organisations and artists' trade unions that can inform UN mechanisms and others of legislative changes affecting artistic freedom, and can monitor and document cases?
- 16 – What are their training needs?

Asking these questions will assist with mapping the legal framework and identifying the opportunities for the strategic promotion and defence of artistic freedom. If monitoring is carried out at the national level, any amendments to laws regarding freedom of association, the internet or security that will affect artistic freedom can be signalled at the international level. In addition, this course of action tends to put less pressure and attention on the individual artists and will benefit all potentially affected artists and audiences as well. Here again, an approach that connects Article 19 (artistic freedom) and Article 15 (the right to access and enjoy the arts) should be taken.

Below are some country cases that use this type of framework to assess the status of artistic freedom.

IV.1

FRANCE

The example of France brings together several of the elements that allow us to monitor artistic freedom. Since 2016 there has been specific legislation protecting artistic freedom, which is regarded as a model at international level. A monitoring body composed of lawyers, trade unions and individual members, including

artists, has been in existence since 2003. There is a public debate on issues around censorship, artistic freedom and the freedom to access works of art. There is also case law that focuses on issues of artistic expression. All these elements make for a dynamic interpretation of artistic expression and an interesting example for observers.

Legislative framework

In its leaflet on artistic freedom UNESCO highlights the legislation in France as an example:

At a time when artistic creation is undergoing profound changes and the role of culture is continuously being questioned, a pioneering French law on artistic freedom, architecture and heritage, was adopted in July 2016, proclaiming that 'artistic creation is free'. For the first time in international law, it establishes artistic expressions as public goods and further specifies that the 'dissemination of artistic creation is free' to ensure greater public access to artistic works. (UNESCO, 2018)

The law does not only provide protection to artists, but also considers the public. Violating artistic freedom may lead to a fine. This could apply for instance to a mob impeding the public's access to a theatre, or to a group of people vandalising artworks and thus preventing others from viewing them.⁴⁸ Both aspects of artistic freedom are thus protected.

Article 1:

Artistic creation is free.

Article 2:

Dissemination of artistic creation is free. It is conducted in compliance with the principles governing freedom of expression and in accordance with the first part of the Code of Intellectual Property.

FRENCH LAW ON ARTISTIC FREEDOM, ARCHITECTURE AND HERITAGE

Free and unauthorised translation by the author.

Article 431-1 of the Penal Code has been amended as follows: *'Restricting, in a concerted manner and by means of threats, the exercise of the freedom of artistic creation or the freedom of the dissemination of artistic creation is punishable by one year's imprisonment and a 15,000 euros fine.'*⁴⁹

This law is the result of a long-standing belief about the need to protect artistic freedom, which became even more important after the Charlie Hebdo attack in January 2016:

„To censor creation is to undermine the ability of everyone to enjoy the arts, to undermine debate and critical faculty. Respect for freedom of creation is essential for democracy“⁵⁰

During the discussions on the law, the Observatoire de la liberté de création and other groups submitted amendments because they believed that proclaiming artistic freedom would be insufficient to guarantee the display of artworks. The Special Rapporteur in the field of cultural rights was contacted and a

letter was sent to the French authorities with a recommendation that the freedom to present, exhibit and disseminate works of art should be included, and with a reminder about the right to participate in cultural life under Article 27 of the UDHR and Article 15 of the ICESCR, and the right to freedom of expression, including artistic expression, under Article 19 of the ICCPR.⁵¹

Monitoring artistic freedom: the Observatoire on the freedom to create

In March 2003, several artists and trade unions, created the *Observatoire de la liberté d'expression en matière de création* to respond to attacks on works of art by often reactionary associations, although in recent times calls for censorship have also come from anti-racist or feminist associations.⁵²

The *Observatoire* is composed of 14 trade unions (cinema, art galleries, literature and book fairs, film makers, producers, subsidised theatres, dance and concert halls, art and cinema critique, and artistic education) and individual members (artists and lawyers). This composition can vary over time as new groups and trade unions join. The *Observatoire* works on a case-by-case basis and takes action through press releases, public letters, mediation in public spaces, and lobbying for legislative change (Bologne, 2015).

The *Observatoire* has constantly asked the public authorities for the repeal of Article 14 of the 1881 Act (press freedom), Article 14 of the 1949 Act (publications directed to children), and the express exclusion of artworks from the scope of Article 24 of the Act of 1881 and 227-23 and 227-24 of the Penal Code. All these provisions allow either a prohibition by the Ministry of the Interior or a criminal penalty based on the content of the artwork.

Case law

The existence of a monitoring body also means that there is a public debate about issues of artistic freedom, and that artists and lawyers are informed about these issues. Several cases in past years have involved issues of artistic freedom: cases of protecting children from pornographic messages, defamation, and issues around women's rights.

One of the first cases concerned the exhibition 'Présumés innocents', which ended with a decision by the Cour de Cassation (Supreme Court).⁵³ At that time, artistic freedom was not protected by legislation, but it was argued that the works criticised were the expression of the sensibilities of known artists; that the artists participated in research and reflection and it was the role of a museum of contemporary art to make them known; that the alleged offences were based on a subjective

appreciation of what society considered to be pornographic or violent, which naturally fluctuated according to the times, cultures, continents ...; that, on the perception of the character of these photographs, drawings, paintings or representations, the exhibition had been seen by nearly 25,000 people; and that it had been the subject of 111 articles, reports or announcements in the written and audiovisual press in France.⁵⁴ The line of argument at the time was already the right of the public to access works of art, and it remained the same in the cases that followed.⁵⁵

In a response to the UNESCO questionnaire on challenges to the status of the artist in 2014, the *Syndicat français des artistes-interprètes* in France reported growing pressures from diverse lobbies, that were attempting to forbid certain exhibitions or performances for moral or religious reasons, and that these efforts were succeeding with some local authorities, which sometimes used subsidies as a tool of censorship (Neil, 2015). These lobbies have also been successful when bringing issues before tribunals or challenging the Film Classification Commission.

From the outset lawyers in the *Observatoire* have developed the concept of an exception for artistic freedom based on fiction, and have pleaded for the public to be free to access art without censorship imposed by others.

„The work of art, whether it works with words, sounds, or images, is always of the order of representation. It therefore imposes by nature a distancing that allows us to welcome it without confusing it with reality. This is why the artist is free to disturb, provoke or even scandalise. And this is why his work enjoys an exceptional status, and cannot, in legal terms, be the subject of the same treatment as the speech that argues, be it scientific, political or journalistic ...“



TRICOIRE, 2011

The case concerning the book *Jean Marie Le Pen* on trial, attacked on the grounds that it was defamatory, was also one of the most important cases that was later brought to the European Court of Justice. The case addressed the limits of artistic freedom. Before the Paris Court of Appeals, the author and the editor had based their appeal partly on Article 10 of the Convention, claiming that this provision precluded any conviction because a work of fiction was entitled to reflect on the moral responsibility borne by the National Front and its leader's ideas in the commission of racist crimes.⁵⁶

Judges must balance different rights: artistic expression and the protection of children, artistic expression and the right to reputation, artistic freedom and the defence of public morals. It is of the outmost importance that, in balancing those rights, judges and prosecutors continue to be informed of the importance of maintaining a broad conception of artistic freedom in the interests of enabling debate in a democracy.

IV.2

ARGENTINA

Argentina is one of the 29 UN member states that responded to the questionnaire on artistic freedom sent by the Special Rapporteur in the field of cultural rights in 2012.⁵⁷ In its response the government stated that, since the return of democracy in 1984, all censorship bodies that had operated during the military dictatorship had been removed.⁵⁸ Apart from some isolated cases, artistic expression is considered to be freely allowed in the country.⁵⁹ As in other parts of the world, the monitoring and documenting of artistic freedom has not been done at the national or regional level. What is interesting in the case of Argentina is that one of the long-standing human rights organisations in the country, the Centro de Estudios Legales (CELS), has a programme on arts and human rights, and held a workshop focusing on artistic freedom in 2018. Academic research has recently been conducted on the legal framework and the protection of artistic freedom

Legal research on artistic freedom

Recent academic research into artistic freedom in Argentina conducted by Ezequiel Andrés Valicenti is particularly relevant as he asks the following questions: **is freedom of artistic expression part of the catalogue**



of fundamental rights provided for in the Argentinian legal order? If so, how is it protected? (Valicenti, 2015)

Although Article 14 of the Argentinian Constitution refers to freedom of expression in a general manner, the author seeks to demonstrate that Article 14 is applicable to all forms of artistic expression and he lists the following: literature, music, dance, visual arts, cinema, theatre and architecture. He also regards the following as being forms of expression: the use of words, images, sounds, etc. He mentions a case in 1972 where cinema was regarded as falling under the free expression of ideas (ibid., p. 144).⁶⁰

Art is not beauty or novelty, art is effectiveness and disruption.⁶¹

“ **León Ferrari**

But the most famous case – because it affected the well-known artist León Ferrari – dates back to 2004. León Ferrari’s work dealt with issues of inequality and discrimination. *‘Art is not beauty or novelty, art is effectiveness and disruption’*⁶¹ he once said.

The artist had displayed statues of the Virgin Mary and Christ that were critical of Catholicism in the cultural centre Recoleta, in Buenos Aires. Archbishop Jorge Mario Bergoglio of Buenos Aires, now Pope Francis, called the exhibition blasphemous and demanded its closure. After public protests, which included violent attacks on the artworks, the exhibition was closed. The closure was later overturned by a judge on the grounds of freedom of expression, and the exhibition was reopened. In its response to the 2012 UN questionnaire on artistic freedom mentioned above, the Argentinian state explained the case as follows:



After strong opposition from broad social sectors, not only artists, and the relevant judicial defence, the Justice revoked the closure of the exhibition of the aforementioned artist and reopened the doors of the exhibition to the public, provided it complied with the instruction to place more signs warning visitors of the content of the exhibition.

The resolution of the Chamber on Administrative Litigation (*Cámara en lo Contencioso Administrativo*) includes well-founded arguments about what is lawful and unlawful, freedom of expression, the meaning of art and a constitutional analysis of the controversy. The ruling was divided: two judges voted in favour of the reopening and one against. 'Freedom of expression should protect critical art and if it is critical it will be annoying, irritating or provocative. It is in respecting the freedom of that form of art that society proves its genuine tolerance,' said judge Horacio Corti in his ruling.⁶²

See <https://www.ohchr.org/EN/Issues/CulturalRights/Pages/ResponsesArtisticFreedom.aspx>. Accessed 12 January 2019.

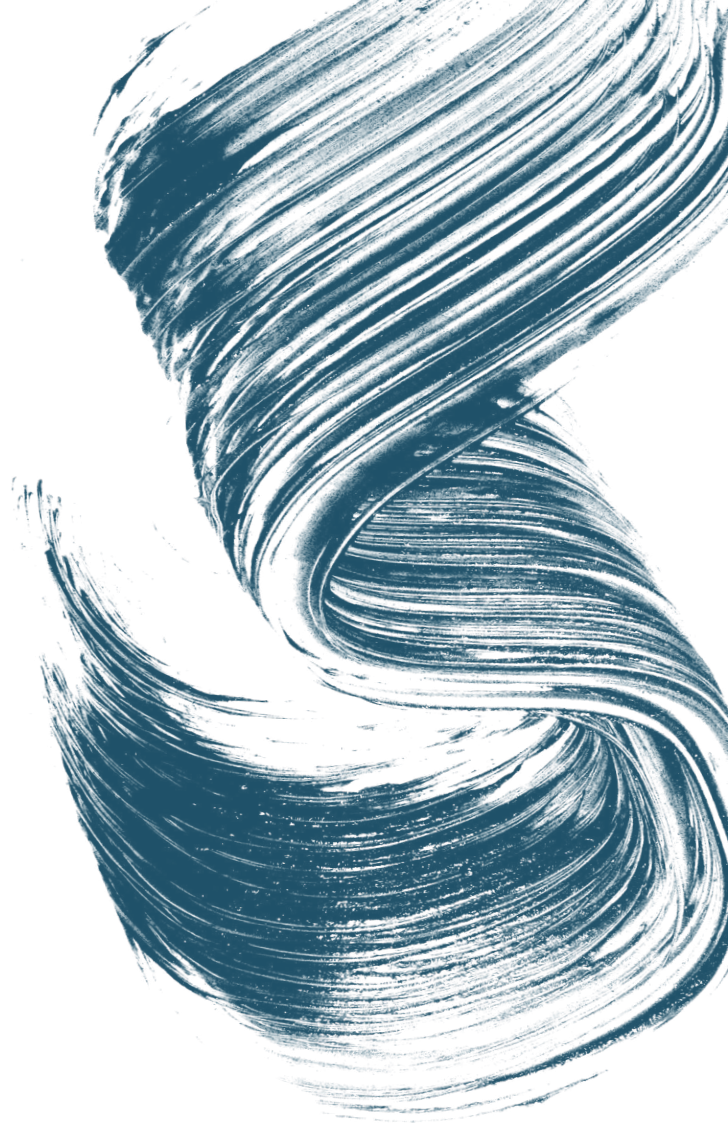
Translation from Spanish by the author.

For Valicenti, cases like this one have highlighted the need to reflect on the treatment to be given to the *'right to free expression of ideas'* for artists (Valicenti, 2010). It is an issue that generates increased controversy because of new conceptions of art and avant-garde artistic movements. He asks:

'If the national Constitution and international instruments widely recognise the generic right to express oneself freely without prior censorship, how does this right apply to artists?'

The general answer is to be found in the combination of the freedom of expression of artists, on the one hand, and the generic prohibition on infringing the rights of other people, among which are very personal rights such as honour, privacy, or freely belonging to a religious cult. What is progressive in Valicenti's analysis is that he suggests that *'when weighing the application of the principle of freedom of expression, when it comes to the case of an artistic piece, the very nature and importance that cultural productions have for the development of a society, directly impact on the weight of the said principle'* (ibid).

He therefore suggests legal practitioners should take into account the value of art as such when striking a balance with other principles or rights. This analysis is very close to the exception de fiction that is called for by the *Observatoire de la liberté de création* in France and that has been a line of defence in several cases. This analysis encourages us to think that there is a public interest beyond the protection of the artist and that there is a different threshold to be applied when an artistic expression is at stake because of its impact on society.⁶²



Valicenti goes on to say:

”

The constitutional guarantee that protects freedom of expression is not limited to that provided in arts. 14, 32 and 33 of the National Constitution, but covers the various forms in which it is translated, among which is the freedom of artistic creation, which constitutes one of the purest manifestations of the human spirit and foundation necessary for a fruitful evolution of art.

Therefore, the constitutional basis of artistic freedom is not only freedom of expression but also, more importantly, the duty of the state to promote cultural identity and plurality. According to this understanding, the right of the audience not to be deprived of its access to artworks also becomes an important element and one that civil society organisations working on cultural rights can call upon to protest against censorship.⁶³

In accordance with this argument, Valicenti cites a recent study that holds that the ‘cumbia villera’ - an argentinian musical style with lyrics that make reference to violence and sex - cannot involve the commission of pos-

sible criminal offences, such as an apology for the crime or the instigation to commit crimes because of its nature and the need to protect cultural diversity (Valicenti, 2015). Therefore, with regard to artists and the production of artistic expression the limits of freedom of expression should also be examined against the background of the progressive development of cultural policies.

Civil society and artistic freedom

The issue of artistic freedom has also recently been taken up by civil society in Argentina. In October 2018, the Centre for Legal and Social

Studies (CELS), in partnership with Artists at Risk Connection (ARC), organised a seminar on arts and human rights in Buenos Aires.⁶⁴ This seminar was the first of its kind, as it also included artists from other regions of Latin America, who were invited to share the challenges they face in their artistic work when promoting human rights. The seminar provided space for a first discussion on issues around artistic freedom within the framework of the United Nations mechanisms.

CELS is an Argentinian human rights organisation that was founded in 1979 during the military dictatorship. It promotes the protection of human rights and their effective exercise, justice, and social inclusion – both nationally and internationally. In 2016, CELS established a programme on arts and human rights as a way to more effectively defend and promote human rights. This new line of action was based on the finding that *'despite the fact that many artists are inspired by their concern over the same social problems that guide CELS's work, the potential for this strategic alliance remains little explored'* and that *'[l]iterature, film and video, theater, photography, visual arts, dance and other artistic forms have constituted a tool and provided support, context and the motive for diverse forms of memory, denouncement and reflection on human rights in Argentina.'*

The perspective of art has thus been added to traditional strategies, such as strategic litigation, research, public policy advocacy and training. Exploring the intersection between human rights activism and art is completely in line with the findings of the Special Rapporteur in the field of cultural rights:

„Because of the nature of aesthetic engagement, initiatives in the field of culture can make robust and distinctive contributions to creating, developing and maintaining more rights-respecting societies, especially in the aftermath of violence and in deeply divided societies. They provide crucial opportunities to build capacity for critical thinking and respect for cultural diversity, equality and the universality of human rights.“



**SPECIAL RAPPOREUR,
2018, PARA. 84**

Until now, CELS has not taken up specific action in the name of artistic freedom but its legal work on freedom of expression has led to it preparing *amicus curiae* briefs on related issues.⁶⁵ The objective of the *amicus curiae* is to use international human rights arguments to influence cases, in particular regarding the protection of freedom of expression in Argentina. The line of reasoning could also be applied to artistic freedom.

The *amicus curiae* approach recalls the obligation of the judicial power to perform a control of 'convencionalidad' between Argentinian laws and the American Convention on Human Rights. In this task, the judicial power must take into account not only the treaty itself, but also the Inter-American Court's interpretation of it, since the Inter-American Court is the ultimate interpreter of the American Convention.⁶⁶

According to the *amicus curiae*, this also extends to the implementation of the International Covenant on Economic, Social and Cultural Rights, and the Committee's interpretation thereof in its concluding observations and its General Observations.⁶⁷ This means that interpretations of artistic freedom at the level of the Inter-American Court also have an impact on national jurisprudence.

This study of Argentina shows that the combination of legal analysis, jurisprudence and an existing monitoring body enables civil society and artists to be ready if a censorship case arises or if legislation that violates artistic expression is adopted.

IV.3

LEBANON

Lebanon is an interesting case study because the country has a special place in the Middle East region. In 2015, following its country visit, the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, *'praised Lebanon's unique tradition of religious diversity, in particular in the Middle East region, and urged the Lebanese people to protect and preserve it'* (UN Special Rapporteur, 2015). However, it is precisely the preservation of religious diversity and a fragile equilibrium between communities that have affected artistic freedom in the past years. Artists are not free to address issues that are considered too sensitive. Civil society has been mobilised against censorship through different initiatives and the publication of several reports that help to understand the legal environment in which artists operate.

Legislative framework

Article 13 of the Constitution guarantees freedom of expression, freedom of assembly and freedom of the press, but does not explicitly mention freedom of artistic expression.⁶⁸ Lebanon has been a party to the ICCPR and the ICESCR since 1972. It has not yet ratified the UNESCO 2005 Convention. Lebanon extended a standing invitation to all UN special procedures in 2011. Lebanon was also among the countries that submitted a response to the questionnaire on artistic freedom sent to UN member states by the Special Rapporteur in the field of cultural rights in 2012. In its response it refers to Law No. 75 of 1999 on the Protection of Literary and Artistic Property and to Article 13 of the Constitution.⁶⁹ Article 2 of the Lebanese Civil Code recognises the supremacy of the provisions of international treaties in the event of conflict between a domestic law and an international law.

In 2015, the second Universal Periodic Review process regarding Lebanon took place at the Human Rights Council. In its compilation, the OHCHR did not refer to artistic freedom, nor did the state parties ask questions related to artistic freedom. The only reference that can be found in the UPR documents is in the contribution of UNESCO that encouraged Lebanon to facilitate participation by practitioners, cultural actors and non-governmental organisations from civil society and vulnerable groups in the

cultural life of communities, and to ensure that women and girls were given equal opportunities, in order to address gender disparities. UNESCO also encouraged Lebanon to ratify the 2005 Convention.⁷⁰

On the occasion of this review, PEN International, PEN Lebanon and Freemuse submitted a joint report examining the protection of artistic freedom in Lebanon (Freemuse et al, 2015). This report provided an analysis of the legal framework and showed that numerous articles in the Penal Code or other texts limited freedom of expression. For example, Articles 384, 385, 386 and 388 of the Penal Code criminalise contempt, libel and defamation against the president, other public officials and judges. The report also described mechanisms of prior censorship by the Directorate General of General Security, which has powers to censor television, film and theatre.⁷¹ Applications are made with no timeframes for the application process and no clear rules, which makes the procedure unpredictable. The report also highlighted the fact that privacy and reputation are regarded as more important than freedom of expression.

In 2016, the Court of Cassation ruled that speech promulgated on social media did not fall under the Publications Court but under the Penal Code. The authorities use the following provisions to prosecute online speech: article 317, which penalises those who incite

sectarianism or racial strife; articles 383 to 387, which criminalise the defamation of public officials and the insulting of national emblems; and articles 473 and 474, which concern blasphemy and religious rituals.

According to Freedom of the Net 2018, internet freedom declined in Lebanon in 2018 due to increasing arrests, prosecutions and violent attacks on individuals for online posts that criticised government officials (Freedom House, 2018).

Prior censorship on sensitive issues

The Special Rapporteur on freedom of religion explained how *'there seems to be a general reluctance to address the complicated history of violent conflicts in the war fought between 1975 and 1990 in Lebanon'* (Special Rapporteur, 2015, para. 49). He analysed the instability and repeated cycles of violence that *'may be due in part to a failure to address the complicated legacy of the past in a meaningful, responsible and sustainable way, necessary for the promotion and strengthening of trusting relationships between communities.'* This analysis is fully in line with the reports of the Special Rapporteur in the field of cultural rights on memorialisation processes and the role of artists in these processes, and the contribution of artistic and cultural initiatives to creating and developing rights-respecting societies (Special Rapporteur, 2014 and 2018).

The situation is similar with regard to religious sensibilities:

The frequent reference to inter-confessional balance or 'equilibrium' reflects a widespread willingness to take a cautious approach to religious sensibilities. Such an approach, which has many advantages, may also invite restrictive measures, including measures of prior censorship that seem strangely at odds with the generally prevalent spirit of open public discourse in Lebanon. Reportedly, religious leaders are actively consulted in censorship issues concerning religious sensitivities, and they may even take initiatives to prevent television or feature films deemed 'offensive' or 'provocative' by some ... This raises concerns for freedom of expression, as guaranteed by article 13 of the Constitution.

(Special Rapporteur, 2015, para. 49)

As explained by an observer, the General Security Directorate holds that creative works should not *'pose any danger or harm to Lebanon'*, nor touch on *'political or military sensitivities'* or incite *'sectarian or factional discord'*. While the emphasis is on public security and localised political correctness, the result is a climate in which directly confronting – or even accidentally alluding to – the nation's troubled past or lingering tensions has become off limits (Krischer, 2012).

“Reportedly, religious leaders are actively consulted in censorship issues concerning religious sensitivities, and they may even take initiatives to prevent television or feature films deemed ‘offensive’ or ‘provocative’ by some ... This raises concerns for freedom of expression, as guaranteed by article 13 of the Constitution.”

**SPECIAL RAPPOREUR,
2015, PARA. 49**

Civil society mobilisation against censorship

Civil society has reacted by creating a lobby group of cultural organisations under the name *Marsad al-Raqaba* ('The Censorship Observatory' or 'The movement for reviewing censorship laws in Lebanon'), which is seeking a thorough review of censorship laws. A comprehensive study on the mechanisms of censorship in Lebanon was conducted (Saghieh et al, 2016).

An initiative supported by the SKeyes Centre for Media and Cultural Freedom has resulted in the launching of a web-series called 'Mamnou3!' ('Forbidden'), an internet comedy about the day-to-day inner workings of the country's censorship bureau. This initiative praises the work of non-governmental organisations defending authors, directors and other producers as they face censorship, by trying to reverse individual censorship rulings after they have been pronounced. The initiative believes that *'[t]his defensive approach has achieved mixed results'* and that *'[l]arge sections of the Lebanese population remain either apathetic or ignorant of the decisions being made on their behalf by the censorship supremos'*.⁷² As part of the civil society initiatives a virtual museum of censorship was created,⁷³ which calls on the public to report cases of censorship, both past and current.

This context shows that there is a possibility of change due to the level of information and the mobilisation of civil society. Several initiatives at the national and international levels have supported artistic freedom and kept up the momentum.⁷⁴ This makes it possible that recommendations made by civil society and the UN Special Rapporteurs to the effect that the state brings its practice of censorship fully into line with freedom of expression, as laid down in the Constitution and international human rights norms as well as its Penal Code, will be implemented.

INDONESIA

The Jakarta Declaration, which was made in May 2017 on the occasion of World Press Freedom Day, called on UNESCO to *'promote artistic freedom as a pillar of freedom of expression and as a cornerstone of participatory democracy, and [to] support artistic creation and ensure access to cultural life for all members of society.'* As one of the countries that ratified the UNESCO 2005 Convention and as the host of the World Press Freedom Day, the Indonesian government, represented by the Director-General of the Ministry of Education and Culture of Indonesia, reported on the adoption by the Indonesian Parliament of a major new law on *'The advancement of culture'*, inspired by the guiding principles of the 2005 Convention, with a special focus on the protection of artists' rights, covering issues of human rights, mobility, remuneration and copyright. He also said that *'[f]aced with the challenge of radicalism, our societies need the voice of vibrant civil societies, who can support critical thinking and inspire social change.'*⁷⁵

Despite Indonesia being regarded as one of the most progressive states in the region in respect of human rights, and despite being a relatively free environment for artists, challenges remain, particularly with regard to the law on blasphemy.

Legislative framework

Indonesia has ratified the ICCPR and the ICESCR and it acceded to the 2005 Convention in 2012. As explained in its 2016 report on the implementation of the UNESCO Convention, Law No. 33 of 2009 on Films and Law No. 32 of 2002 on Broadcasting have introduced the establishment of specific government agencies to ensure that film and broadcasting content conforms to national religious, ethical, moral, decency and cultural values. The Indonesian censorship agency, Lembaga Sensor Film (LSF), also determines viewership age groups and the criteria for censorship.⁷⁶ The Indonesian Broadcasting Commission, Komisi Penyiaran Indonesia (KPI), ensures that society receives decent and correct information and that a healthy competitive environment for broadcasting companies is maintained, and acts on public complaints on improper broadcasting practices.

These mechanisms show that control is exercised over content, particularly regarding religious values. Article 156(a) of Indonesia's Criminal Code targets those who deliberately, in public, express feelings of hostility, hatred, or contempt against religions with the purpose of preventing others from adhering to any religion, and targets those who disgrace a religion. Several calls to repeal Law Number 1 PNPS/1965 on the prevention of religious abuse and/or defamation, known as the

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[But with this success there has been an increase in the] censorship of works that challenge the dominant narrative in public spaces by certain civil society groups, such as the Islamic Defenders Front (FPI).

(DIRGANTORO, 2018)

blasphemy law, have been made by the UN and civil society organisations, who believe that the blasphemy law has no place in a tolerant nation like Indonesia.

Threats to artistic freedom

As one observer puts it, '*Indonesian artists have enjoyed unprecedented artistic freedom, as well as major commercial success in the regional and global art scenes*' (Dirgantoro, 2018). With this international success and artistic freedom, new challenges have arisen. Indonesian artists are able to explore sensitive issues but there has been an increase in the '*censorship of works that challenge the dominant narrative in public spaces by certain civil society groups, such as the Islamic Defenders Front (FPI)*' (ibid).

Another threat for artists comes from using social media, which is covered by Law 11/2008 on Electronic Information and Transaction.

CIVIL SOCIETY INITIATIVES

Several Indonesian artists participated in the video promoted by UNESCO, *‘What does artistic freedom mean to you?’*, released in December 2018. The artists depict a vibrant and informed artistic community that can monitor cases of attacks on artistic freedom. Making these attacks public can remain a challenge, but the documentation of cases means that other actors, who are less visible at the national level, for example, international organisations, can use this information, or it can be used at a later stage.

NIGERIA

As in other parts of the world, the situation of artistic freedom in Africa remains under-documented. The decision to focus on Nigeria is based on the availability of some reports, the importance of creative industries in its economy, and the existence of challenges that are common to other countries. **What is the duty of the state to uphold artistic freedom and defend artists when attacks come from non-state actors, private actors or bodies that do not recognise international law?**

Legal framework

Nigeria ratified the UNESCO 2005 Convention in 2008. The ICCPR and the ICESCR were ratified in 1993. However, as was underlined during the last Universal Periodic Review in November 2018, despite ratification of the ICESCR, the legal adaptations required to ensure that economic, social and cultural rights are regarded as individual and enforceable rights, with the same status as all other human rights, and not as mere state goals or aspirations, are not enforced.⁷⁷ If economic, social and cultural rights are not recognised, artists and lawyers will not be able to base a claim on Article 15(3) of the ICESCR and can only invoke freedom of expression under the ICCPR.⁷⁸

At the regional level, Nigeria is a party to the African Charter on Human and People's Rights (1983) and has endorsed the African Union Plan of Action on the cultural and creative industries, adopted in 1992, which establishes as a priority improving the working conditions of artists, creators and operators in Africa, and guaranteeing their freedom of expression. The Constitution does not recognise cultural rights or the right to artistic expression. The Cyber-crimes (Prohibition, Prevention, etc) Act that came into operation in May 2015 is regarded by observers as legislation that violates the rights to privacy and freedom of expression (Amnesty International, 2018).

Threats to artistic freedom

In 2017, for the first time, Nigeria had a national pavilion at the Venice Biennale. Lagos is regarded as an emerging contemporary art scene. Nigeria also has a flourishing music industry and a film industry, known as Nollywood that has been the recipient of most of the attacks on artistic freedom coming from private groups. Armed groups known as 'Area Boys' have been identified as attacking film crews and disrupting film shoots (Freemuse, 2018, p. 31).

Nigeria is among the 60 member states that answered the survey sent by UNESCO in October 2014 on the implementation on the 1980 Recommendation concerning the Status

of the Artist. This survey concentrated on the most significant contemporary issues that were also relevant to the 2005 Convention and included freedom of artistic expression (Neil, 2015). In Nigeria's Quadrennial Periodic Report on the implementation of the 2005 Convention, a report prepared in consultation with civil society, it mentions *'threats to certain forms of artistic expression'* as one of the challenges, but does not provide further details.⁷⁹ It is hoped that the new format for reporting that will become operational in 2019, with specific questions on artistic freedom, will allow for more information to be provided.

Prior censorship exists in the video and film industry and state magistrate's courts deal with censorship cases. The Arts Watch Africa report of 2013 cites several examples of actors and directors being arrested and sentenced for failing to comply with registration obligations and exhibiting material regarded as *'immoral'* (Arts Watch Africa, 2013, pp. 51–56). The 2018 Freemuse report explains that sharia law applies in 9 of the 36 states, and the Islamic legal code is used to curtail artistic expression, particularly singing to drums (Freemuse, 2018).

Case law

There are no known court decisions on artistic freedom. As mentioned, there is no specific

When developing policies which may touch on the circumstances of artists, Member States should collaborate with artists and their associations and relevant non-governmental organisations to help ensure their laws and policies are as supportive as possible for professional artists



G. Neil

Full analytic report on the implementation of the UNESCO 1980 Recommendation concerning the Status of the Artist

legislation in place, and the attacks mostly come from private non-state actors. In this context, there is little space for the development of jurisprudence. Perpetrators of acts of violence against artists are not prosecuted.

Although not directly connected to artistic freedom, the ECOWAS court ruling against Nigeria on 12 October 2017 is an interesting case that shows how women artists are poorly treated. The case involved four women; one of them, Dorothy Niemanze, is a popular actress

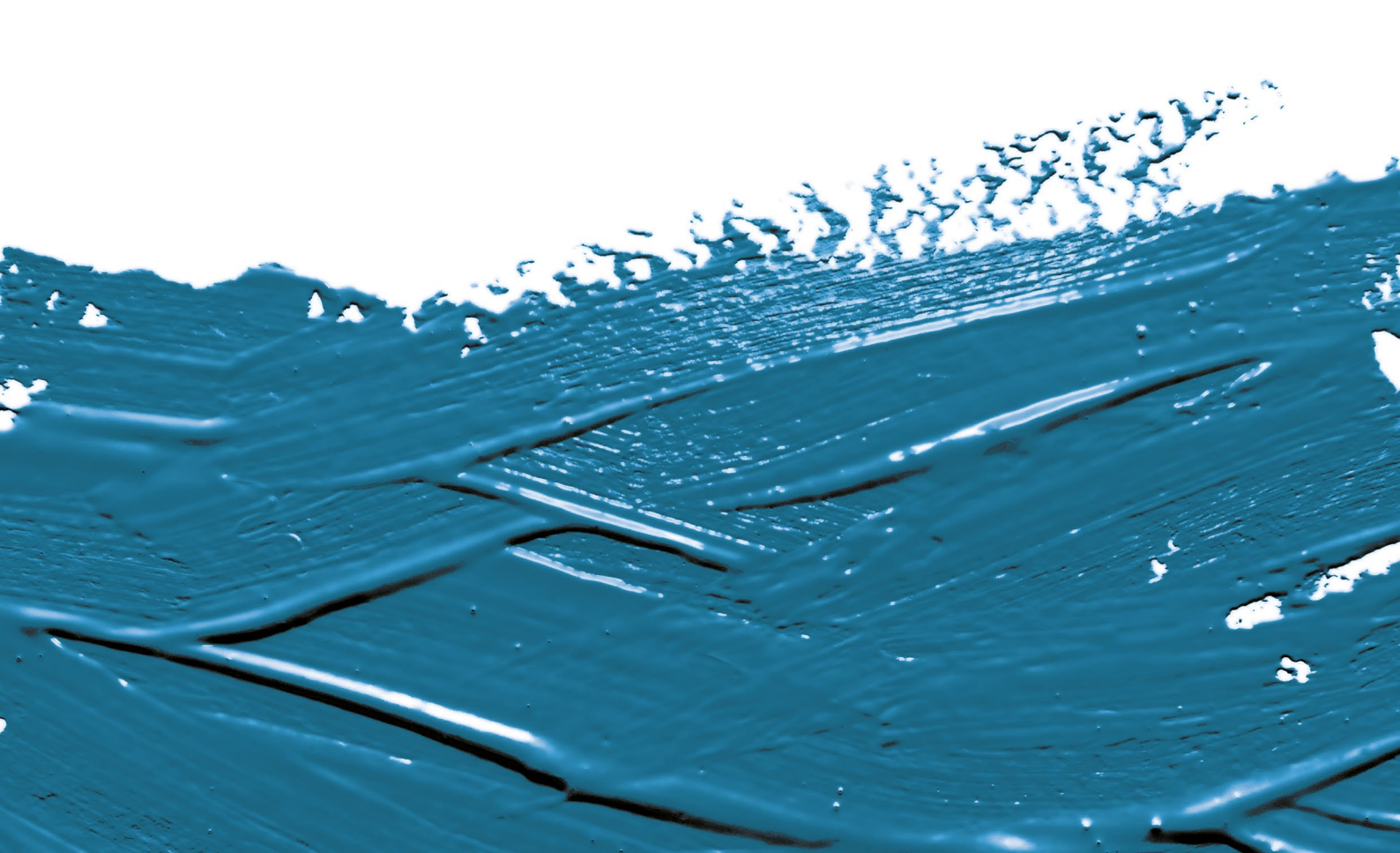
in the Nollywood industry. The women were arrested by state agents and were accused of being prostitutes. The court found that their dignity and liberty had been violated, as had their right not to be subjected to cruel, inhuman or degrading treatment. Their treatment also constituted gender-based discrimination.⁸⁰

This example and the fact that most violations are perpetrated by non-state actors show that Nigeria should provide better support to the artistic community by making statements favourable to their contribution to society:

'When developing policies which may touch on the circumstances of artists, Member States should collaborate with artists and their associations and relevant non-governmental organisations to help ensure their laws and policies are as supportive as possible for professional artists' (Neil, 2015, p. 3).

International cultural organisations such as the British Council, the Goethe Institut and the Alliance Française continue to support the capacity building of cultural producers and stakeholders and offer platforms for cultural expression (UNESCO, 2017). They could also play a role in defending and promoting artistic freedom by providing spaces for debate on these issues and by providing support to artists.

Civil society organisations have drawn attention to the possibility of a new law being passed, which would contain a code of ethics limiting artistic freedom as an annex (Freemuse, 2018, p. 75).⁸¹ This would reinforce self-censorship by the artistic sector and should be addressed in international fora.



TURKEY

The scale of violations of freedom of expression in Turkey is known to observers. The report on 'Arts: *Understanding Artistic Freedom*' discussed individual cases. This section will focus only on the legal aspects, as Turkey provides a typical example of a good legislative framework for artistic freedom that is in practice used to curtail this freedom.

Legislative framework

Turkey is a party to all major international instruments, including the ICCPR, the ICESCR, and recently the 2005 Convention (ratified in 2017). It is also a party to the European Convention for the Protection of Rights and Fundamental Freedoms. Turkey accepted the right to individual application to the European Court in 1987, and regards ECHR law to be above national law, in terms of a constitutional reform passed in 2004.

In its study on comparative legislation, the French Senate found Turkey to be an example of a country providing specific protection for artistic freedom.⁸²

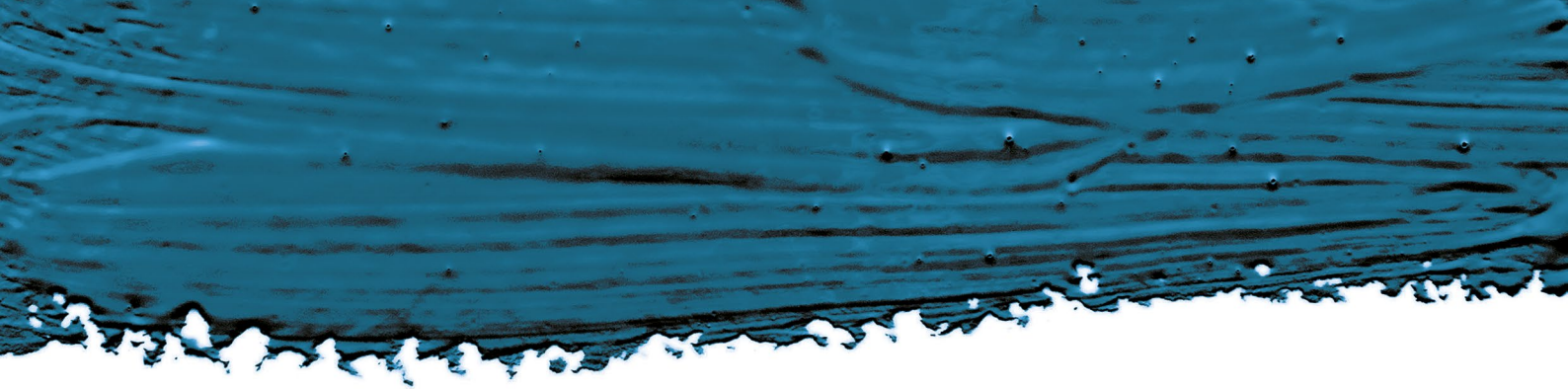
IX. Freedom of science and the arts; Article 27:

Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely.

XII. Protection of arts and artists; Article 64:

The State shall protect artistic activities and artists. The State shall take the necessary measures to protect, promote and support works of art and artists, and encourage the spread of appreciation for the arts.⁸³

THE TURKISH CONSTITUTION



Reading this article and examining the actual situation of artists, one can identify the gap that exists between the law and its application.⁸⁴

The state of emergency was lifted on 19 July 2018, only to be replaced by a new anti-terrorism bill passed by Parliament on 25 July 2018. Anti-terrorism laws have also been used to criminalise artistic expressions, without proving that the artist belongs to a terrorist organisation and without distinguishing between civilian demonstrators and armed combatants.⁸⁵

The text that has been most used to criminalise artistic expressions is the Penal Code (Law 5237) that entered into force in 2005, in particular Articles 216 (provoking the public to hatred, hostility or defamation), 299 (insulting the president), 301 (defaming the Turkish nation, the state of the Republic of Turkey, or the organs and institutions of the state) and 314 (establishment, command or membership of an armed organisation).⁸⁶ New regulations have also been used to *'reduce questions of artistic freedom to technical issues and administrative discourses'* (Günel, 2016), for instance, concerning film registration.

Case law

Increased executive control of the governing institutions of the judiciary and the prosecution service, and the arrest, dismissal and arbitrary transfer of judges and prosecutors have all been features of the judicial system in Turkey for the past few years, as a result of the battle with the Gülen movement (ICJ, 2016). This has resulted in a purge of the judiciary and recurring instances of violence and threats against lawyers (OHCHR, 2018). In this context, and despite isolated cases where the higher courts have ruled in favour of freedom of expression,⁸⁷ the possibility of approaching the judiciary becomes limited. The judiciary is being used to eliminate all critical voices. Civil society organisations and foreign embassies can only continue to observe trials in order to monitor and exert some political pressure on individual cases.

The European Court has dealt with several cases concerning freedom of expression in Turkey.⁸⁸ Many cases were brought about the measures taken after the attempted coup d'état on 15 July 2016. Many cases have concerned journalists, due to the level of media repression (Reporters without Borders, 2018).⁸⁹

International and national monitoring

If we consider the three reports of the UN Special Rapporteur in the field of cultural rights analysed in section I of this study, in Turkey we find all the ingredients of violations of artistic freedom: a legal framework is misused to prevent critical voices, only artists that do not engage with political issues can continue to operate, and all other voices are silenced, depriving the audience of the right to access and enjoy their works. In this context we can argue that artists have become human rights defenders and should be given the same protection.

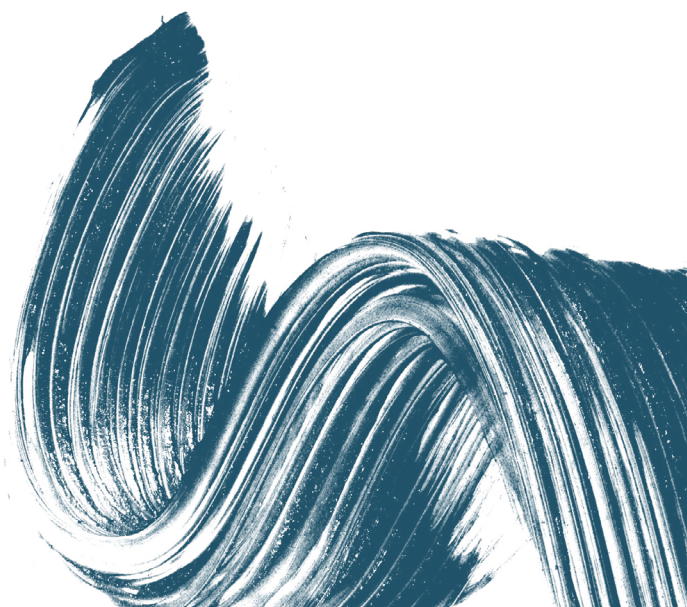
„[The State Party] should ensure that human rights defenders and journalists can pursue their profession without fear of being subject to prosecution or libel suits“

HUMAN RIGHTS COMMITTEE

The Human Rights Committee's recommendation in 2012 that the State Party 'should ensure that human rights defenders and journalists can pursue their profession without fear of

being subject to prosecution or libel suits' is still applicable (HRC, Concluding Observations, 2012).

Civil society organisations and artists has been very active in documenting, alerting and mobilising on the situation (Freemuse et al, 2014). All this work has allowed for greater visibility. For instance, when the UN Special Rapporteur on freedom of opinion and expression visited Turkey he also met with artists and cultural centres, and this is reflected in his report.⁹⁰ In its 2013 report, the arts censorship monitor Siyah Bant showed that censorship was not only the banning of artistic expression through legal means, but included delegitimation, threats, pressure, targeting and hate speech directed at artists and arts institutions, which limit or prevent the presentation and circulation of artworks.⁹¹ In a joint submission to the UN Human Rights Council Universal Periodic Review in 2014, Freemuse, Siyah Bant and the Initiative for Freedom of Expression made a series of recommendations that remain very relevant today and should be used by those working on advancing artistic expression in Turkey (ibid).



CONCLUSION AND WAY FORWARD

Artistic freedom is receiving increased attention. The role of artists in transforming societies, in post-conflict reconciliation, and in building rights-respecting societies is now being recognised. For artists to take up this role, which is only one possibility that is open to them, the environment needs to be conducive. This means that there needs to be an understanding that audiences must be able to access different artistic expressions, even those that may question the structures of power or may address issues that are viewed as sensitive. It is this connection between artistic expression and the right to access artworks that needs to be preserved. Whenever this space is available, societies are open to dialogue and diversity. **What can be done to maintain this space, which exists at different levels?**

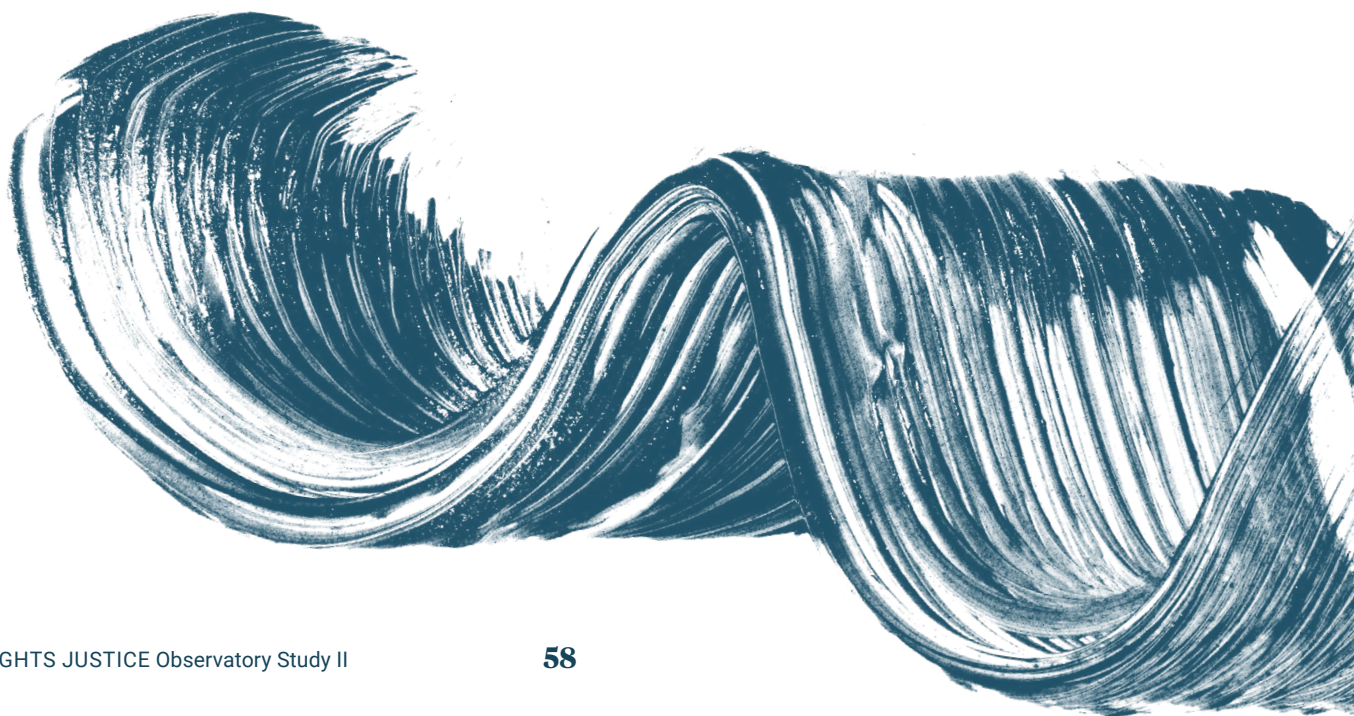
The space needs to be preserved in international and regional fora. There, civil society organisations and states that are committed to artistic freedom should continue to advocate for artistic freedom. This can take the form of the submission of information to the United Nations mechanisms: the Universal Periodic Review, the Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the Special Rapporteurs. This includes being informed about forthcoming country visits by these mechanisms to make sure that, during their visits, the Special Rapporteurs address the issues of artistic freedom and access to artworks. This also includes high quality reporting by states on their obligations under the relevant human rights treaties as well the UNESCO 2005 Convention.

They should provide information on the relevant laws and policies, and civil society organisations, including universities and research bodies, should make sure they are made accountable on the basis of this reporting. They should also organise meetings and campaigns that give visibility to the issue.

The space also needs to be preserved or opened up at the regional level. Until now a lot of work has been carried out at the international level, under the lead of the Special Rapporteur, the Secretariat of the UNESCO Convention, and committed civil society organisations. This work needs to be constantly maintained. Regional fora examined in this study are adequate because they often regroup countries with similar issues and legal frameworks. Civil society should engage these mechanisms further to maintain discussions on artistic freedom and protection of access to the arts.

At the same time, there needs to be more work conducted at the national level. There are now more tools and knowledge available than there were some years ago. These tools can be used and adapted to different countries with exchanges at regional level. In some contexts it is extremely difficult for artists to operate if their work touches upon sensitive issues or is perceived as doing so, and programmes for protection or relocation are the priority. In other contexts, it might be a better use of resources and more strategic to work on the underlying framework and legislation rather than concentrating on individual cases, because, in the long term, this work will improve the situation of all artists.

The creation of national monitoring bodies on censorship, the development of case law through the training of legal practitioners, the reinforcement of the status of the artist through legislation, and increased visibility are all factors that can in the longer term improve the protection and promotion of artistic freedom.



GUIDING QUESTIONS

The following questions can guide the work at country level:

- 1 – What is the legal framework?
- 2 – What are the state's obligations under international treaties?
- 3 – What are the rules and legislation that are obstacles to artistic freedom? Are there national civil society organisations that can advocate for the repeal or amendment of such legislation at all levels (internationally through periodic reporting to UN treaty bodies, regionally, etc)?
- 4 – Are artists organised in unions if possible? Do they have the capacity to monitor cases? Can they be trained to do so?
- 5 – Are there lawyers that can litigate cases of artistic freedom? Is there any case law?
- 6 – Are there academics working on these issues?
- 7 – Are there other countries in the region that can serve as models?
- 8 – Are there foreign cultural centres or institutes that can support this work?

ENDNOTES

- 1— See <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx>. Accessed March 2019. The figure given was applicable from 1 January 2017.
- 2— See https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_23.pdf. The responses to the questionnaire are available at <https://www.ohchr.org/EN/Issues/Cultural-Rights/Pages/ResponsesArtisticFreedom.aspx>. Accessed March 2019.
- 3— The following states responded : Argentina, Azerbaijan, Bulgaria, Cambodia, Cameroon, Colombia, Cuba, the Czech Republic, Denmark, Estonia, Fiji, Georgia, Germany, Ireland, Japan, Lebanon, Mauritania, Monaco, Mongolia, Montenegro, Norway, Romania, Serbia, Seychelles, Slovenia, Spain, Syria, Ukraine and the United States of America.
- 4— The Special Rapporteur has visited Austria, Morocco, the Russian Federation, Saint Vincent and the Grenadines, Bosnia and Herzegovina, Vietnam, Botswana, Cyprus, Serbia, Kosovo, Malaysia and Poland. See also A/HRC/25/49/Add.1,3 March 2014, Mission to Bosnia and Herzegovina (13 to 24 May 2013), paras. 1, 33, 69, 72, 99, 103, 109.
- 5— A/RES/53/144, 8 March 1999.
- 6— See <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>. Accessed March 2019.
- 7— See the portal established by the European Union, <https://www.protectdefenders.eu/en/index.html>. Accessed March 2019.
- 8— See https://eeas.europa.eu/sites/eeas/files/eu_guidelines_hrd_en.pdf. Accessed March 2019.
- 9— See <https://www.ohchr.org/en/issues/freedomopinion/pages/opinionindex.aspx>. Accessed March 2019.
- 10— Interview with the assistant to the mandate, 15 March 2016.
- 11— See <https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>. Accessed March 2019.
- 12— A/HRC/9/7, Report of the United Nations High Commissioner for human rights on the implementation of human rights on the implementation of Council resolution 7/19 entitled 'Combating defamation of religions', 12 September 2008. The High Commissioner also quotes a decision of the European Court

ENDNOTES

of Human Rights in the case *Otto-Preminger-Institut v. Austria*, Judgement by the European Court of Human Rights, Application No. 13470/87 of 20 September 1994, in which it was held that ‘those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.’

13 — For more information, see the analysis by Freedom House at <https://freedomhouse.org/article/un-sets-dangerous-precedent-defamation-religions-resolutions>. Accessed March 2019.

14 — For example, reports by Freemuse, often in collaboration with national organisations in Egypt, Turkey, the United States of America, Belarus, Zimbabwe, Bangladesh, Morocco, Tunisia and Pakistan.

15 — See the study by Sara Whyatt and Ole Reitov. Ole Reitov was the author of the chapter ‘Challenges of artistic freedom’ in 2015 and Sara Whyatt authored the chapter ‘Promoting the freedom to imagine and create’ in 2018.

16 — See <https://en.unesco.org/creativity/governance/status-artist>. Accessed March 2019.

17 — Ibid.

18 — This platform currently displays 2,065 policies and measures from the periodic reports of 102 countries submitted between 2012 and 2018. See <https://en.unesco.org/creativity/policy-monitoring-platform>. Accessed March 2019.

19 — See, for instance, UNESCO’s *Create / 2030 Talks: What is artistic freedom to you*, 13 December 2018. See <https://en.unesco.org/creativity/events/create-2030>. Accessed January 2019. See also <https://bangkok.unesco.org/content/press-advisory-strengthening-creative-industries-bangkok-hosts-expert-meeting-art-and>. Accessed March 2019.

20 — <https://en.unesco.org/creativity/>. Accessed March 2019. The video was issued in 2018 and its duration is 15’37 minutes.

21 — See <https://eu2015.lv/news/media-releases/234-eu-ministers-of-culture-issue-joint-statement-on-freedom-of-expression>. Accessed January 2019.

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- 22** — See https://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed March 2019.
- 23** — See, for instance, *Müller and Others v. Switzerland* ECHR judgment of 24 May 1988, Series A no. 133, p. 19, § 27.
- 24** — See *Otto Preminger Institut vs. Austria*, no 134170/87, 24 September 1994.
- 25** — ECHR, Grand Chamber, *Karataş v. Turkey*, Application no 23168/94, 8 July 1999, para 49.
- 26** — Press release issued by the Registrar in *Akdas v. Turkey* Application no 41056/04.
- 27** — See the section on France for the description of the exemption of fiction by the Observatoire.
- 28** — ECHR, Grand Chamber, *Lindon, Otchakovsky-Laurens and July v. France*, Application n° 21279/02 and 36448/02, Judgement 22.10.2007, para 51.
- 29** — American Convention on Human Rights, adopted at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969. See <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>. Accessed March 2019.
- 30** — Except for the sole purpose of regulating access to public entertainment for the moral protection of childhood and adolescence, as provided for in Article 13(4).
- 31** — See Article 13(2).
- 32** — See <http://www.oas.org/en/iachr/expression/index.asp>. Accessed March 2019.
- 33** — See <https://www.cidh.oas.org/declaration.htm>. Accessed March 2019.
- 34** — See <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1112&IID=1>. Accessed March 2019.
- 35** — Inter-American Court of Human Rights, *The Last Temptation of Christ (Olmedo, Bustos et al.) v. Chile* Judgment 5 February 2001 (Merits, reparations and costs), para. 61. (b) and (c).
- 36** — For the text of the Charter, see https://au.int/sites/default/files/treaties/7770-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf. Accessed January 2019.

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- 37** — ACHPR /Res.62(XXXII)02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002).
- 38** — OSCE Expert Conference ‘Strengthening media freedom and pluralism in Ukraine during times of conflict in and around the country’ 26 June 2018, annotated agenda. The session was presented as follows: ‘Respect for freedom of expression for the OSCE participating States includes freedom in the artistic and cultural fields’.
- 39** — Art. 148a, mentioned in Griffen, 2017.
- 40** — See the section on Lebanon.
- 41** — ASEAN Secretariat, Asean Human Rights Declaration and the Phnom Penh Statement on the adoption of the Asean Human Rights Declaration (AHRD), February 2013.
- 42** — See <https://artistsatriskconnection.org/>. Accessed March 2019. In 2018 the organisation conducted a survey to analyse the needs of artists and to inform its strategy based on their responses.
- 43** — In the UNESCO Global Report 2018, Sara Whyatt refers to PEN International’s case list, which records that a third of writers on trial globally were facing charges under anti-terror laws (p. 215).
- 44** — According to Whyatt, ‘[i]nsult to religion and blasphemy as well as perceived transgressions of traditional and conservative values accounted for over a third of court cases against artists worldwide in 2016’ (p. 215).
- 45** — *Bleistein v Donaldson Lithographing Co.*, 188 US 239, 251 (1903), quoted by O’Neil, 1990, p. 178.
- 46** — See, for example, the information on training that is available on Arterial Network’s website : <http://www.arterialnetwork.org/artwatch/description>. Accessed March 2019.
- 47** — Index on Censorship has conducted this very important work. In 2016 it issued Guides to the law on free expression and the arts in England and Wales, which address issues such as Race and the Law, Obscene Publications, Public Order, Counter Terrorism and Child Protection. These are very valuable resources for any organisation engaging in the legal aspects of artistic freedom. See <https://www.indexoncensorship.org/campaigns/artistic-freedom/art-and-the-law/>. Accessed March 2019.

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- 48** — For more information on the law, see the study by Senate on comparative legislation, République française, Janvier 2016 – LÉGISLATION COMPARÉE – see Dossier de presse; LA LIBERTÉ DE CRÉATION ARTISTIQUE AU SENS DE LA LOI DU 7 JUILLET 2016, Article par Philippe Mouron, RDLF 2017, chron. n°30; Les avis du conseil économique, social et environnemental. Projet de loi relatif à la liberté de création, architecture et patrimoine, Claire Gibault, Claude Michel avec l'appui d'Annaïg Lucas, Juin 2015.
- 49** — Translation by the author.
- 50** — See Discours de Fleur Pellerin, Ministry of culture and communication before the Senate on 9 February 2016.
- 51** — Special Rapporteur in the field of cultural rights, A/HRC/31/79, 19 February 2016; Letter to France FRA 5/2015 of 28 September 2015.
- 52** — See the First Manifesto of the Observatoire published on 28 February 2003 and press releases on <https://www.ldh-france.org/sujet/observatoire-de-la-liberte-de-creation/>. Accessed March 2019.
- 53** — Cour de cassation, chambre criminelle Audience publique du mercredi 2 mars 2011. No de pourvoi: 10-82250.
- 54** — Cour de Cassation, 2011, free translation by the author.
- 55** — See, for instance, the case on the Eric Pougeaud exhibition at FRAC Lorraine, and the complaint by AGRIF, Association against racism and for the respect of French and Christian identity. Cour de cassation, Première chambre civile, Arrêt 867 FS-P+B, 26 septembre 2018.
- 56** — Cour criminelle de Paris, 11 Octobre 1999, Cour d'appel de Paris, 13 septembre 2000 et Cour européenne des droits de l'Homme, Grande Chambre, Arrêt Lindon, Otchakovsky-Laurens et July c. France, 22 octobre 2007.
- 57** — See <https://www.ohchr.org/EN/Issues/CulturalRights/Pages/ResponsesArtisticFreedom.aspx>. Accessed March 2019.
- 58** — For a history of censorship in Argentina, see Jens Lohmann 'A survey of censorship and restrictions on music in Spanish America' (Freemuse, Copenhagen, 2002).
- 59** — See Freemuse, Argentina: Filmmakers claim government censorship over Falklands film 1 November 2016; Argentina: City mayor suspends all electronic music festivals, 24 February 2017; Argentina: German electronic band's concert re-instated after appeal, 12 December 2016.

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- 60**— This is a reference to the case of Mallo.
- 61**— See <http://www.artnet.com/artists/leon-ferrari/4>. Accessed March 2019 'Asociación Cristo Sacerdote y otros c/ Gobierno de la Ciudad Autónoma de Buenos Aires s/ Amparo' en trámite ante el Juzg. En lo Contencioso Administrativo y Tributario de la Ciudad Autónoma de Bs.As. (en Microjuris.com, MJJU- E-12713-AR) mentioned by Valicenti.
- 62**— See the section on France.
- 63**— Article 75, inciso 19 of the national Constitution established that Congress should 'enact laws protecting the cultural identity and plurality, the free creation and circulation of artistic works of authors, the artistic heritage and places devoted to cultural and audiovisual activities.' See Wipolex at <https://wipolex.wipo.int/en/text/282508>. Accessed 14 December 2018.
- 64**— See <https://www.cels.org.ar/web/2018/10/encuentro-arte-activismo-y-derechos-humanos/>. Accessed 18 December 2018.
- 65**— For example, Amicus curiae brief, CELS. PANDO de MERCADO, María Cecilia c/GENTE GROSSA SRL s/daños y perjuicios, Expediente. CIV 063667/2012/CS001, 19 April 2018.
- 66**— Inter-American Court of Human Rights, Case of Almonacid-Arellano et al v. Chile, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs) para. 124.
- 67**— Amicus curiae brief, CELS. PANDO de MERCADO, María Cecilia c/GENTE GROSSA SRL s/daños y perjuicios, Expediente. CIV 063667/2012/CS001, 19 April 2018.
- 68**— For the text, see <https://www.wipo.int/edocs/lexdocs/laws/en/lb/lb018en.pdf>. Accessed 12 January 2019.
- 69**— Mission permanente du Liban auprès de l'Office des Nations Unies à Genève, N/Réf, 15/1/28-310/2012, OHCHR Registry, 18 December 2012.
- 70**— See National report, compilation of UN information, compilation of stakeholders' information and questions submission in advance, OHCHR, UPR Lebanon at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/LBIndex.aspx>. Accessed March 2019.
- 71**— Legislative decree No 2873 of 1959 and Legislative decree No 2 of 1977.
- 72**— See <http://mamnou3.com/about/>. Accessed March 2019.

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- 73** — See <http://censorshiplebanon.org>. Accessed March 2019.
- 74** — See, for instance, the seminar on artistic freedom organised by the Goethe Institut in October 2018.
- 75** — <https://en.unesco.org/world-press-freedom-day-2017>. Accessed March 2019.
- 76** — <https://en.unesco.org/creativity/monitoring-reporting/periodic-reports/available-reports-30>. Accessed March 2019.
- 77** — UPR Info, Nigeria recommendations. See https://www.upr-info.org/database/index.php?limit=0&f_SUR=127&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=300&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly. Accessed 12 January 2019.
- 78** — Article 15(3) has a larger scope as '[t]he States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.'
- 79** — <https://en.unesco.org/creativity/governance/periodic-reports/2018/nigeria>. Accessed March 2019.
- 80** — Dorothy Njemanze and others v. Federal Republic of Nigeria ECW/CCJ/APP/17/14; Judgment ECW/CCJ/JUD/08/17.
- 81** — See also the information on the two-year ban imposed on actress Ramaha Sadau by the Motion Pictures Practitioners Association in Nigeria (MOPPAN).
- 82** — République française, *Législation comparée, La liberté de création artistique*, janvier 2016.
- 83** — See https://global.tbmm.gov.tr/docs/constitution_en.pdf. Accessed 12 January 2019.
- 84** — Turkey was also one of the 57 UN member states that in September 2015 signed a joint statement 'Reaffirming the Right to Freedom of Expression, including the Right to Artistic Expression'.
- 85** — National legislation on defamation and countering terrorism ought to be brought into line with international standards. Offences such as 'encouragement of terrorism' and 'extremist activity' and offences of 'praising', 'glorifying' or 'justifying' terrorism should

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be clearly defined to ensure that they do not continue to lead to unnecessary or disproportionate interference with freedom of expression.

86 — See CDL-AD(2016)002-e, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, adopted by the Venice Commission at its 106th plenary session (Venice, 11–12 March 2016).

87 — See, for instance, Judgment of the Constitutional Court, no 2014/1251; 5 June 2015, Official gazette of 1 July 2015.

88 — In 2017, the ECHR dealt with 31,053 applications concerning Turkey, of which 30,063 were declared inadmissible or struck out. The court delivered 116 judgments (concerning 990 applications), 99 of which found at least one violation of the European Convention on Human Rights.

89 — Turkey is the world's biggest prison for professional journalists.

90 — A/HRC/35/22/Add.3, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, 21 June 2017.

91 — Siyah Bant is a research platform that documents censorship of the arts across Turkey. Documentation is conducted by a group of arts managers, arts writers, and academics working on freedom of expression. The organisation investigates, documents, and analyses cases of artistic censorship on its site and conducts more extensive research on selected cases. See <http://www.siyahbant.org>. Accessed March 2019.

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