

# Silencing Dissent?

## On Barriers to Freedom of Artistic Expressions

### *A Few Clarifications: Definitions, Instruments and Stakeholders*

by Andreas Wiesand

Originally, this exercise was supposed to shed light on „artistic freedom“, both as a human right and as a political promise. As a matter of fact, that term is often used to describe a right to unobstructed or uncensored creation or other artistic activity by individuals, especially professionals; in some interpretations, the right to the free performance, dissemination and enjoyment of all types of works of art is added and may include not only artists but larger sections of the public. As long as we consider only a single country, like the UK, and only use the term in the English language, these are indeed possible interpretations.

However, in the context of the Compendium of Cultural Policies & Trends we are dealing with over 40 countries as well as with many languages and different legal, political or cultural traditions. In that respect, the term „artistic freedom“ seems less convincing, not least because in some other languages a literal translation can lead to different meanings. For

example, in German this would be „künstlerische Freiheit“, for which the English language uses another, not so well-known term, namely „artistic license“. The latter means indeed something other than freedom of art(ists) from political or social constraints. It describes the, widely recognised, freedom of artists or writers to do something with artistic means that diverges from common contemporary practices, factual biographies or historical meanings; as well, it includes the freedom to create something that is not at all found in reality. But let's not forget: from the perspective of an individual artist, this „license“ can occasionally e.g., under conditions of censorship, make up for codified but unkept legal promises of freedoms one is not in a position to fully enjoy or even recognise (as shown, for example, in some movies of Jan Prohaska or Miloš Forman during the 1960s in Czechoslovakia or currently in Russia and Turkey).

We must also be aware of the fact that the term artistic freedom is sometimes used in an extended way, encompassing much more than cultural rights in the strict sense. For example, UNESCO – a main institutional stakeholder in this domain –

proposes an interpretation that is closely related to positions it has developed since the adoption, in 1980, of its [Recommendation concerning the Status of the Artist](#). Most of the following rights could possibly figure also under a heading like „proactive policies for professional artists“:

### **UNESCO 2019:**

Artistic freedom embodies the following bundle of rights protected under international law:

- the right to create without censorship or intimidation;
- the right to have artistic work supported, distributed, remunerated;
- the right to freedom of movement;
- the right to freedom of association;
- the right to protection of social and economic rights;
- the right to participate in cultural life.

Several of these rights, some of which advanced during the period of the COVID-19 pandemic, relate to the basic, all-encompassing principle

of human dignity – labelled frequently as a „mother right”, because other human rights can derive from it (Barak, 2015) – and some also to the more recent, development-oriented concept of human security (UNDP, 1994). Both national constitutions and international human rights documents often mention human dignity first when enumerating protected rights, including freedom of expression. In its jurisdiction, the European Court of Human Rights relies heavily on this concept; as well, human dignity is highlighted as one of the core values of the European Union in its Lisbon Treaty (Bárd, 2016).

However, one needs to be aware of the fact that we are still far from guaranteeing cultural and social or professional rights like those mentioned in the above UNESCO definition. Even in Europe, some of them are not met today while others were achieved only in recent times. In her foreword to UNESCO's 2005 [Convention for the Protection and Promotion of the Diversity of Cultural Expressions](#), the Director General underlines this broader approach, stating that policies aiming at (more) diversity will only be effective if they are „meaningful for civil society, for individual creators, for groups of cultural entrepreneurs and for citizens. Governments must help ensure 'space' for artistic creation and for freedom of expression and association.”

The [9th World Summit on Arts and Culture](#) will be held 2023 in Stockholm under the main theme „Safeguarding Artistic Freedom” by the International Federation of Arts Councils and Culture Agencies (IFACCA) and the Swedish Arts Council. In a preparatory discussion paper, the organisers of the event state that the above UNESCO definition „aligns with the four nodes of the cultural value chain – creation, presentation, distribution, and participation – all of which must be considered and recognised as interconnected if we wish to create and implement effective cultural policies.” However,

they also acknowledge „the different meanings and weights given to each [of these nodes] in various contexts around the world”. To overcome or harmonise such differences, they suggest the following basic definition:

**A**rtistic freedom is the ability to express oneself freely or to present an artistic vision without fear of persecution or for one's life; it is the ability to access resources and platforms that do not discriminate, whether based on gender, sexuality, ability, age, race, culture, belief or citizenship; and the ability to see oneself reflected in society and the public domain.

Reflecting on the terminological differences and the diversity of issues at stake, I propose to use another, a bit more precise wording for the topic of our exercise, namely: Freedom of Artistic Expressions (FoAE), and to focus especially on potential restrictions. In this overview and in later fact-finding efforts, that term will simplify cross-border comparisons, e.g., when assessing monitoring reports or the content of country profiles found in the Compendium.

Different from Artistic Freedom, FoAE has the advantage that it corresponds better to rights highlighted and protected by international legal and policy instruments, such as those of the United Nations, and here already 1948 by the [Universal Declaration of Human Rights](#) (UDHR) with its famous Article 19. Freedom of relevance for artistic work is also recognised in other human rights instruments, particularly in Article 15(3) of the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR, 1966) which asserts, though a bit vaguely, that the authorities of states „...undertake to respect the freedom indispensable for... creative activity”. In addition, strong links exist with article 19(2) of the [International Covenant on Civil and Political Rights](#) (ICCPR 1966), which mentions specifically works of art as forms of protected expressi-

ons.

### **ICCPR 1966:** Article 19(2)

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

It should be noted that this provision protects not only the originators of expressions „of all kinds” including artistic ones, but likewise the larger public as „receivers” or distributors of them – an early step into the direction of cultural democracy and participation. While some fear today that „the entire UN system went into decline” (Branko Milanovic, 2022) and cannot live up any more to its political promises, it is nevertheless true that, during the last eight decades, important standards have been set which national policies and legislation need to respect and for whose compliance authorities should be held accountable.

In the „Wroclaw Commentaries” (Culture and Human Rights, 2016), Annamari Laaksonen explains that freedom of expression is indeed a precondition for the democratic right of everyone to take part in cultural life, according to his or her own choice:

**F**reedom of expression is considered an elemental aspect of democratic societies and both a 'fundamental' and a 'foundational' human right. In particular, freedom of expression is necessary for the realisation of participatory, multi-stakeholder governance systems and essential for artistic creativity, investigative

journalism and other activities in the wider cultural domain.

In the same publication, Jordi Baltà Portolés sees FoAE as a precondition for cultural policies:

**F**reedom of artistic expression involves the right of artists to express beliefs and ideas in any creative form, free from private or public restriction. It is enshrined in international human rights law... and closely linked to several other human rights. Ultimately, respect for freedom of artistic expression is essential for the development of a sustainable cultural sector.

However, we should not overlook that UN treaties like the ICCPR also permit explicit or implicit restrictions of freedom of expression.

#### ICCPR 1966, Article 19(3)

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

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Should governments or parliaments still be in charge of „public morals“? No doubt, that such general provisions (which exist also in European treaties) can be – and sometimes are – used to influence, steer or curb the public discourse,

including to the detriment of media freedom and a free flow of artistic expressions.

Addressing this problem, Farida Shaheed (then UN Special Rapporteur in the field of Cultural Rights), delivered in 2013 a very comprehensive report entitled "[The right to freedom of artistic expression and creativity](#)". Inter alia, it highlighted specific challenges to freedom in the arts and the danger of excessive legal restrictions or even persecution. In particular, she urged States to consider „the specific nature of artistic expressions and creations“ because:

**A**rtists, like journalists and human rights defenders, are at particular risk as their work depends on visibly engaging people in the public domain. Through their expressions and creations, artists often question our lives, perceptions of ourselves and others, world visions, power relations, human nature and taboos, eliciting emotional as well as intellectual responses.

Artistic expression and creativity may entail the re-appropriation of symbols, whether national (flags, national anthems), religious (figures, symbols, venues) or social/economical (a certain brand for example), as part of a response to the narratives promoted by States, religious institutions or economic powers. States, religions, corporate companies and social groups also use art to propagate their ideas and promote their interests, including concepts of right and wrong to create homogeneity of belief and behaviour...

Artistic expressions and creations do not always carry, and should not be reduced to carrying, a specific message or information. In addition, the resort to fiction and the imaginary must be understood and respected as a crucial element of the freedom indispensable for creative activities

and artistic expressions: representations of the real must not be confused with the real, which means, for example, that what a character says in a novel cannot be equated with the author's personal views. Hence, artists should be able to explore the darker side of humanity, and to represent crimes or what some may consider as „immorality“, without being accused of promoting these.

While policies designed to attract wider audiences to art should be encouraged, this should not exclude controversial works because unprepared audiences may be put in contact with them. Rather, it is imperative to enhance arts education, which can be seen as a strong and efficient alternative to censorship. (HRC, 2013. p. 8/9)

Indeed, artists and intellectuals can, and often do, play a crucial role in times of political unrest and as promoters of societal change, as could recently be seen e.g., in Belarus or Turkey and earlier during the process of German re-unification. Frequently artists and intellectuals are role models for human rights defenders, as underlined in the 2020 UNESCO report [Freedom and creativity: defending art, defending diversity](#). However, this can have consequences, when protests do not succeed or are crushed by the authorities. In a statement for this report, human rights expert Kalliopi Chainoglou clarifies that, in a contemporary view of human rights, artists could be considered as a „sui generis vulnerable group: they become marginalized because of their profession, i.e. when art is provoking governmental policies or oligarchs, when art is alarming citizens about human rights violations, etc.“ As well, „the impact of restricting artists' expressions is to the detriment of other persons, groups or communities: their right to participate in cultural life is violated.“ (2022).

Turning to our European environment we can note that the

Council of Europe has recently reinforced its activity in this domain, including with a [Manifesto of Freedom of Expression on Arts and Culture in the Digital Era](#) (2020) and with a forthcoming report on the freedom of expression of the arts and culture (expected in late 2022). As well, the emphasis on free cultural expressions in the above and other international compulsory legal instruments made it easier for the European Court of Human Rights (ECtHR, Strasbourg) to highlight, via case-law, how important it is for democratic societies to specifically safeguard also FoAE – and this despite the fact that the [Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe](#) (ECHR, 1950) protects only freedom of expression in general (Article 10),

while cultural rights or freedoms are not explicitly mentioned; efforts to correct this deficit have so far been futile.

In the European Union, freedom of expression is protected by the [Charter of Fundamental Rights](#) both as regards freedom of speech (Article 11) and of the arts and science (Article 13), the latter of which states: „The arts and scientific research shall be free of constraint“. In 2017, the EU Agency for Fundamental Rights (FRA) organised a high-level expert meeting („Exploring the connections between arts and human rights“), which included also representatives of civil society organisations focusing on FoAE. The proposals of this conference could be relevant in later debates.

expressions, to conduct research and to participate in different forms of creation as well as to benefit from these;

Article 7. Within the general framework of the rights to freedom of expression, including artistic freedom, as well as freedom of opinion and information, and with respect for cultural diversity, everyone, alone or in community with others, has the right to free and pluralistic information that contributes to the full development of one's cultural identity.

### Case 1: European Court of Human Rights, 2007

Among the many ECtHR cases concerning freedom of expression has been that of the [Vereinigung Bildender Künstler vs. Austria](#). It dealt with rulings of Austrian courts against the public exhibition of a painting that depicted a politician of the Austrian Freedom Party FPÖ in an unfavourable manner.

The ECtHR decided, that such a prohibition (actually an ex-post censorship) was „disproportionate to the aim it pursued and therefore not necessary in a democratic society within the meaning of Article 10 § 2 of the Convention“; it also reminded the national authorities that satirical works „naturally aim to provoke and agitate“, to which bans may not be the proper answer.

Among the stakeholders for FoAE one should not forget scientists working in universities or other research institutions. A number of them are based in the Nordic countries, but this topic is increasingly taken up in other European countries, including in Central and Eastern Europe. For example, the University of Hildesheim launched, in 2017, the „Arts Rights Justice Program“, which intends to understand, protect and defend freedom of artistic expression and artists at risk. Another example: Research at the University of Fribourg (Switzerland) intended to make „cultural rights“ more explicitly part and parcel of the universal human rights protection system – which, admittedly, had long been neglected. In particular, the 2007 [Fribourg Declaration on Cultural Rights](#) became very influential in European and international policy circles. Based on the concept of human dignity, it addresses also FoAE:

#### Fribourg Declaration on Cultural Rights 2007

Article 5.b ...The freedom to develop and share knowledge and cultural

These and other statements suggest wider and more enforceable concepts of human rights and human dignity, which should comprise social and cultural dimensions, in addition to physical integrity.

It is true: obstructions of FoAE rarely reach the level where court decisions, parliamentary interventions or decisions of governments and other authorities could lead to direct remedies. Therefore, professional unions and associations as well as (inter)national civil society organisations and autonomous arts councils can be considered, together with watchful media and Internet platforms, to be particularly well-suited to publicize and potentially address related conflicts. Stakeholder organisations like Freemuse, PEN International and the Artists at Risk Connection deserve special mention, in that respect, since they regularly publish reports or „stories“ about FoAE violations which we will discuss at a later stage of this exercise.

Freemuse has been, together with Fritt Ord, the organiser of the ground-breaking conference on artistic freedom of expression „All that is Banned is Desired“, held October 2012 in Oslo. Culture Action

Europe (CAE) tries to raise attention for FoAE on the level of the European Union. From 2012–2017, CAE contributed to the ARJ (Arts Rights Justice) EU Working Group and in 2021 it partnered with the Greens/European Free Alliance Group at the European Parliament, in order to publish „a preliminary study for a better common understanding of the relevant legal framework“: [Freedom of Artistic Expression in the European Union](#). Inter alia, this study proposed guidelines for a better protection of FoAE at the EU level, including general indicators to monitor the state of freedom of artistic expression. Clearly, the standards set by international legal instruments are important for these types of interventions and one should not forget that several European and UN human rights treaties, such as CESCR, provide access to individual or civil society complaints mechanisms, some of which are not yet adequately known or used.

Finally, we can identify national differences in the interpretation of FoAE across Europe. For example, during the last 25 years this topic has played a major role in official cultural policies of the Nordic countries. Legislative efforts going beyond international conventions or more general provisions for the freedom of the arts in national constitutions have been made in other countries.

### Case 2: France, Law on the freedom of artistic creation, 2016

A specific law has been passed by the French Parliament in July 2016: [LOI n° 2016-925 relative à la liberté de la création, à l'architecture et au patrimoine](#). It aims to support, inter alia, artistic creation („en particulier la création d'œuvres d'expression originale française“) and new talents, to guarantee artistic di-

versity, especially in public arts and media services, and to promote the free choice of cultural practices and forms of artistic expression (art. 3). Provisions of this law address, above all, public arts and heritage institutions and intend to shape their work according to ecological, participatory, anti-discriminatory and health policy objectives. However, such State-imposed conditionalities have also met with criticism because of their potential impact on artistic content (Saez, 2022).

As we will see later, the repeal of outdated laws e.g., on blasphemy or defamation, can be considered another instrument to free FoAE from obsolete restrictions. Iceland and some of the Baltic countries have tried to take up specific new challenges on freedom of expression e.g., those posed by new technologies, in particular as regards the Internet and social media as well as connected commercial or political interests (some of this may currently be qualified facing the Russian war against Ukraine).

Evidence of these and other national and European FoAE developments can also be found in the Compendium, where issues around the status of artists have gained some importance after the turn of the century (Wiesand, 2018). However, a fully-fledged trend analysis covering the last 25 years of this platform cannot be presented here, because the Compendium grid underwent meaningful changes four years ago: Since then, national experts are asked more explicitly to consider issues of artistic freedom in their country profiles.

### References

- Baltà Portolés, J. (2016): Artists' Freedom of Expression, in: Wiesand, A.J., Chainoglou, K., Śledzińska-Simon, A. with Y. Donders: Culture and Human Rights – The Wrocław Commentaries. Berlin/Cologne
- Barak, A. (2015): Human Dignity: The Constitutional Value and the Constitutional Right. Cambridge:
- Bárd, P. (2016): Human Dignity in: Culture and Human Rights ibid.
- Human Rights Council (2013): The right to freedom of artistic expression and creativity. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. New York
- Laaksonen, A. (2016): Freedom of Expression in the Arts and Media in: Culture and Human Rights ibid.
- Milanovic, B. (2022): Does the United Nations still exist? in: Social Europe, 3 October 2022
- Saez, G. (2022): Une gouvernance par la conditionnalité. Un virage des politiques culturelles? in: l'Observatoire No 59
- UNDP (1994): Human Development Report. New Dimensions of Human Security. New York
- Wiesand, A.J. (2018): Trends in Public Cultural Policy Objectives and Funding – European Comparisons. Bucharest (2018 ENCATC Congress)