

*Give me the liberty to know, to utter, and to argue freely  
according to conscience, above all liberties.*

John Milton (in a 1644 protest against censorship)

*We like speaking truth to power. We say that the  
emperor is in his birthday suit, if he is without any  
clothes – because that is the truth, and people have  
the right to know.*

Salil Tripathi (Chair, Writers in Prison Committee,  
PEN International, 2021)

## 2.2. State Affairs: Overt and Covert Censorship

Re-reading chapter 2.1 of my compilation of positions and empirical findings on Freedom of Artistic Expression (FoAE), I'm wondering whether I paid too much attention to the current "war of words" in an agitated and highly fragile European environment (including in military terms). Did I possibly overstate authoritarian phantasies or conspiracy myths? Should we not try to also explore, from a sincere, European research perspective, more of the still existing common ground on this topic or try to search for potential bridges between antagonistic positions? On the other hand, could such a de-escalation strategy really be of value for those professionals in the arts and media whose works are facing barriers such as censorship or who are currently experiencing personal attacks?

At the start of my approach to different manifestations of censorship, a brief conceptual digression with terminological implications may again be useful. FoAE is often seen as part of a larger group of "**cultural rights**" within the human rights system – even the European Court of Human Rights did so in its [collection](#) of culture-related rulings (2011). This – of course legitimate – view has its merits, especially from a development perspective ([UCLG](#), 2023). As well, it supports a traditional argument: that of the "**autonomy of the arts**", especially from political interference. However, given the multiple dependencies that influence literary and artistic work, both in the past and today, this autonomy is now widely contested. Drawing, inter alia, on a [book](#) by Wolfgang Ullrich (2021), Austrian expert Michael Wimmer concludes that "the tendency to subjugate art to market events triumphs over current attempts to once again give art a special relevance in the course of new political struggles" and that "the emancipatory potential that may once have lain in the claim of an autonomy of the arts has (temporarily) come to an end". In case of doubt, he sees a need to consider "the context in which art takes place" ([educult.at](#), December 2022). In contrast to Ullrich, artist Angela Fette insists (in "[Kunst braucht Eigensinn](#)", *taz* 22 April 2023) that art should try to escape the pinch of capital interests and identity debates: "The new identity-political pseudo-avant-garde is the most reactionary and conservative phenomenon to be found in the current art scenes."

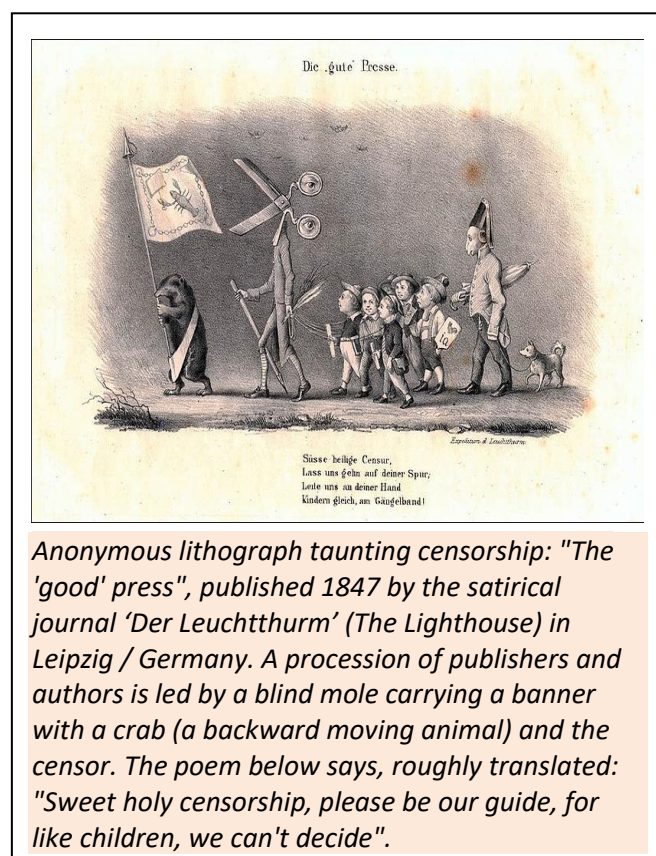
Let's face it: Differences in the degree of exposure of, and even discrepancies between, some culture-related rights cannot be excluded. We should be aware, for example, that while contemporary artistic (and political!) expression may be censored, suppressed or similarly impeded in a country or region, specific cultural rights, such as language rights or protected cultural traditions of ethnic minorities, may still exist, at least nominally or superficially. The same can be said for FoAE in relation to policies that support a "**right to culture**" in the sense of ample, often organised opportunities for larger sections of the population to attend artistic events or to participate in other – potentially less controversial – cultural activities. In other words: FoAE, and freedom of expression in general, tend to be at greater risk than, say, the right to cultural access and participation. Of course, the latter also faces problems here and there, but these are more related to political negligence and administrative or budgetary shortcomings and hardly comparable to the risk of personal threats or imprisonment.

An alternative conceptual view – with which this author does not hide his sympathy – sees FoAE more in the context of "**civil liberties**". These underpin human dignity, are inherent to all human beings and are a prerequisite for democracy, as they include freedom of thought and expression. Actually, civil liberties have become "**civil rights**", because they are protected by national or international legislation, such as the *International Covenant on Civil and Political Rights* ([ICCPR](#), 1966). In the context of this exercise, we need only acknowledge that civil rights are not a privilege granted to specific groups or professions: It is not only artists who want to be free to express themselves, to have equal opportunities and to be protected from harassment or persecution. Could this interpretation be detrimental to creative professionals and FoAE? In my opinion, on the contrary, because it circumvents the sometimes-tricky question of whether certain expressions are really artistic works or just agit-prop. Moreover, we should bear in mind that artists often attract media attention; many of them serve as role models for larger segments of the population. Therefore, their struggle for freedom of expression may even inspire others to communicative action - towards building bridges rather than fuelling divides...

Among the risks to FoAE, the study of **overt or covert censorship** has been of particular interest to many researchers (cf. an [overview of references](#), 2014). This is due to the long history of censorship – indeed dating back to ancient civilisations such as China or Greece – and involving not only rulers and their bureaucracies but also powerful religious actors such as the Catholic Church. One of the most prominent victims of censorship has been the Greek philosopher Socrates (339 BC).

As we will see in a moment, **defining censorship** is a somewhat ambiguous exercise. Traditional definitions describe censorship as "a system in which an authority limits the ideas that people are allowed to express and prevents books, films, works of art, documents, or other kinds of communication from being seen or made available to the public, because they include or support certain ideas" ([Cambridge Dictionary](#)). The motives for censoring such "ideas" can be political and security concerns, the protection of particular groups (e.g., children) or a response to alleged defamation, blasphemy, obscenity and other criminal charges. In the past, a distinction was made between *ex-ante* ('prior restraint') or *ex-post censorship* (after publication / performance). In the digital age, however, the often-simultaneous production and distribution of content on the Internet may call this distinction into question.

A more realistic distinction, also from a policy point of view, might be between **institutionalised overt censorship** e.g., by legally mandated state agencies, and different forms of **indirect or hidden censorship**, effectuated via e.g., laws in different areas, political conditionalities or societal content control (partly orchestrated by social or commercial actors and the media), as well as **pre-emptive or reactive "self-censorship"** (which is difficult to detect and monitor with empirical methods).



In their ARTS RIGHTS JUSTICE Study on [Protecting and Promoting Artistic Freedom](#) (2019), Sara Whyatt and Ole Reitov, the latter a long-time head of *Freemuse*, point out that while many still see censorship as a mainly state-orchestrated "straightforward manipulation of or ban on artistic expressions, it ultimately turns out to be a mixed bag", especially when hatred or violence orchestrated by certain social groups are involved which, by the way, can also provoke preventive action by state authorities. They conclude: "Although this may not be censorship in the traditional sense, such attacks have the same effect, in that the attacked artist (at least for some time) may be silenced, forced into exile or may simply stop producing out of fear".

50-60 years ago, works of European artists, writers and filmmakers were often censored or prosecuted on the grounds of "[obscenity](#)" or "[blasphemy](#)". Such accusations still play a role in a few countries and also on social platforms, but they can now be mixed with – or are succeeded by – restrictions and the persecution of artists whose **dissident political convictions or opposition to current rulers** influence their artistic work (including being suspected of such motives by the authorities).

In a European context where, according to most of the *Compendium* country profiles, at least official ex-ante censorship carried out by state institutions seems to have all but disappeared over the last five or six decades, it is obviously important to consider also related forms of restrictions. It should be remembered, however, that the dismantling of official, but often church-inspired, state censorship in Western Europe did not happen by accident: it was only because of pressure from international bodies such as UNESCO and the Council of Europe, the case law of the European Court of Human Rights (ECtHR) and because of protests and legal action by many dedicated NGOs and individuals. Chapter 2.2 of the *Compendium* profile on [Malta](#) provides a brief description of such efforts over the past decade (which have only recently been largely successful). A concrete example can be found in a timeline published by the [International Anthony Burgess Foundation](#): Since 1970, the renowned author (inter alia, *Clockwork Orange*) has battled censorship by Maltese authorities, who charged him with obscenity and other offences, destroyed parts of his library and made his working life on the island increasingly uncomfortable.

As noted in the previous article in this series, a full empirical case and trend monitoring of FoAE and censorship is currently difficult to obtain. The latest *Freemuse* report explains that self-censorship is often the last resort for artists and writers trying to survive in a hostile environment. In its earlier [Report on FoAE in Europe](#) (2020), the watchdog collected and analysed 179 acts of censorship in 27

### 'Public order' in Belarus

*"Koly nastane den, zakinchytsya viyna..." [When the day comes, the war will be over], — young singer Meriem Herasimenka sang the song of the famous Ukrainian band Okean Elzy in the cozy yard of a popular bar in Minsk. Hundreds of people around sang along and lit up their phones. Next day, Herasimenka was detained by the police and has still not been released. Currently she is accused of organizing action that 'undermines public order'...*

Alesia Rudnik in: [Baltic Worlds](#) 3-4, 2022

### The Council of Europe on Blasphemy

*Blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, and between matters which belong to the public domain and those which belong to the private sphere.*

Parliamentary Assembly of the Council of Europe, Recommendation 1805 (2007)

### Monitoring bans: a difficult task ([Freemuse 2022](#))

*Threats to artistic freedom are frequently 'under the radar' and escape the attention of rights monitors. There are situations where there may be no direct bans but there exists a self-censorship reflex responding to fears of losing grants, nominations for awards, access to performance space, etc. Physical threat by non-government actors, media smears, and a social media backlash can also impact artist's capacity to continue their work, as they may have to think twice before dealing with topics that may bring a negative response.*

European countries, involving 809 artists or artworks. 39% concerned the domain of music, followed by the visual arts (22%), theatre (17%), film (13%), literature (7%) and dance (2%). Government authorities are reported to be responsible for 61% of these cases of censorship.

This last finding motivated me to focus this chapter on forms of, actual or potential, 'censorship' in the broadest sense, where the **state or public institutions** are in different ways involved, whether as direct actors, as legislators or as funders and venues. The next, and final, article will then conclude this exercise with some thoughts and examples on societal content control and the resulting threats to FoAE, including in the form of physical attacks.

About 20% of the articles in [Culture and Human Rights: The Wroclaw Commentaries](#) (2016) deal with freedom of expression and how it can be threatened by state (in)action. Based mainly on the findings of the international experts of this handbook, we could distinguish three main categories:

- *Punitive laws*, sometimes based on politico-moral fundamentalism or "official orthodoxies";
- *Protective provisions*, ranging from age classifications or language rights to some copyright rules;
- *Regulatory measures* with associated "conditionalities", especially with regard to arts funding.

There is not space here to cover all related issues, but some examples and well-publicised cases could possibly help to lay the ground for further debate, including on possible alternatives.

In that context, we must first consider the legal doctrine "[margin of appreciation](#)" developed by the ECtHR and now widely used in international human rights law. It intends to assess whether limitations to human rights, including freedom of expression, imposed by national authorities are justified (or not). In recent decades, several states have used this **margin of state discretion** to impose specific limits for FoE in order to defend, for example, national security and honour, 'social cohesion' or the protection of religious feelings and public morals. Sometimes these restrictions are inspired or supported by societal institutions and groups (cf. II.3).

Indirect measures of content and thought control include **administrative and financial restrictions** that have the potential to impede artistic work or limit its accessibility, including when state-funded arts institutions and funding bodies are administratively reshaped, films are removed from festivals on bureaucratic grounds (cf. cases reported by [Siyah Bant](#) in Turkey) or theatre plays and exhibitions have to be postponed or cancelled due to a lack of public funds. The silencing of independent and potentially dissenting voices in the arts and literature has a long tradition, whether through blanket cuts in public subsidies (in countries such as Hungary, Italy, The Netherlands or the UK that were governed by conservatives or technocrats a decade ago, with political undertones, as claimed in an article of *The New York Times* on 24 March 2012) or in the disguise of efficient management policies with the potential to discourage the production of "difficult" programmes (a hot topic, for example, in the 2008 struggle of the Czech initiative *Za Prahu kulturni* against a reform of municipal support for arts institutions based on their economic success in the previous year).

However, the results of a comprehensive FoAE analysis of developments in **Hungary** carried out by the US-based *Artistic Freedom Initiative* (see box next page), suggest that reshaping arts and cultural policy along ideological priorities of the FIDESZ party does not necessarily have to be enforced

#### "Naming rights" overrule FoAE

A satirical video of the artists' collective *Peng!* announcing alleged benefits for refugees has been published 2018 on YouTube. In January 2023, the Berlin District Court (Az: 15 O 140/21) judged the video an "*unauthorised performance of an official act*", because it included the logo of the Federal Ministry of the Interior. The Court ruled that the naming rights of the Ministry take precedence over artistic freedom.



through targeted budget cuts: Control of the cultural sector can also be gained through personnel and administrative changes that facilitate the redirection of funds towards the desired ends.

### **Hungary: A new management and funding strategy to silence potential artistic dissent**

*In Hungary, the past decade has seen a gradual escalation of government oversight and control of the arts and cultural sector. This heightened interference into cultural production has been accomplished through a FIDESZ-initiated three-part scheme:*

*(1) The creation of centralized management structures governing the arts and cultural sector;*

*(2) the strategic placement of government loyalists into seats of authority within those structures; and*

*(3) the realignment of funding towards FIDESZ-aligned artists and cultural institutions...*

*In the words of Hungarian art historian Edit András, where there is centralized government control of arts and cultural organizations, 'there is then no further need for official censorship, since this process automatically guarantees the proper ideological content.'* [[ARTMARGINS](#), 2013]...

*In 2010, Hungary also centralized control over the National Culture Fund (NCF), a hitherto independent institution, funded through a tax on the national lottery. ... The FIDESZ party effectively possesses majority control over disbursements from the Culture Fund, which provides considerable budgetary support to cultural institutions nationwide...*

*The Culture Bill, passed in 2019, expanded federal control over the arts and cultural sector, largely through the creation of the National Cultural Council (NCC). This bill transfers considerable managerial control of theaters to the federal government...*

*Upon consolidating administrative control of the arts and cultural sector, the FIDESZ government has set out to remake Hungary's cultural institutions and artistic spaces along political lines, employing two strategies towards this end: the placement of government loyalists into seats of authority within arts and cultural institutions and the reorienting of funding towards FIDESZ-aligned programs, artworks, or artists.*

Excerpts from [Artistic Freedom Monitor: Hungary – Systematic Suppression](#) (2021)

**Laws on 'Foreign Agents'** such as those in Russia and Hungary have been used, generally with success, to silence dissenting civil society organisations, including those in the arts, that receive international funding. A similar law was planned in Georgia, but had to be withdrawn after massive public protests. The Estonian paper *Postimees* (8 March 2023) noted the similarity with the Russian law of 2012, which "marked the beginning of the total suppression of free thought and the final downfall of Russia". If nothing else, this and similar laws proved to be important steps on the road to authoritarianism.

### **Georgia: Impacts of a planned "Foreign Agents" law**

*Numerous NGOs and independent media receive funds from Western foundations and live off grants - this guarantees freedom of expression. The Georgian authorities will see this as espionage and as foreign agent activity. Yet this state could also see itself as a foreign agent since Georgia receives huge financial support from the EU and the US. Undoubtedly, the bill will make it possible to launch a witch hunt in Georgia to restrict rights and freedoms... a deliberate break with the EU.* (Jekaterina Kodrikadse, *Dozhd*, 8 March 2023)

With regard to **anti-terrorism laws**, a handy pretext for state repression including censorship, the new report [Free to Create: Artistic Freedom in Europe](#), written by Sara Whyatt and published by the Council of Europe in February 2023, addresses the problem of "ambiguous and sometimes fluid definitions of terrorism" when applied to artistic expression. In this context, it reveals a correspondence between the Council of Europe Commissioner for Human Rights, Dunja Mijatović, and the Spanish Minister of Justice from March 2021.

The Commissioner questioned criminal convictions based on Spanish terrorism and **insulting the crown laws**, using so-called "catch-all labels". According to her, they particularly endanger "non-consensual, shocking or politically embarrassing" lyrics and performances by artists, even if they cannot really be considered as apologies for terrorism or incitement to violence (cf. box next page).

Mijatović therefore called on the Spanish legislature to revise such laws in line with Article 10 of the European Convention on Human Rights. In its response, the Spanish government acknowledged that "the regulation of certain offences related to the freedom of expression continues to pose difficulty, not least because of the imprecision with which some forms of criminal conduct are defined" and announced a review of the legislation.

#### **The CoE Commissioner for Human Rights to the Spanish Minister of Justice (2021)**

*The offence of glorification or justification of terrorism as defined in Article 578 of the [Spanish] Criminal Code appears to be problematic from the point of view of legal certainty because of its ambiguous and imprecise wording. The lack of a clear definition of some of the notions enshrined in it has generated diverging – sometimes contradictory – interpretations of [these] provisions by Spanish courts, some of them at odds with international standards on freedom of expression.*

Age ratings and other **regulations aimed at protecting children/young people** from content deemed to be offensive in films, books, games and other media exist in almost every country of the world. Sometimes they can have a spill-over effect on adult content. With regard to such classification procedures, the UN Special Rapporteur in the field of cultural rights ([A/HRC/23/34, 2013](#)) had called on States to ensure (a) the independence of classification bodies; (b) the participation of evaluators from the arts field; (c) transparent terms of reference, rules of procedure and activities; and (d) effective appeal mechanisms – desiderata that are not fully met in different countries. In contrast to measures that seek to control or suppress political views or religious beliefs, the above task can also be achieved with some success by replacing former state control mechanisms with binding industry standards such as age ratings for consumers. An example is the [Pan European Game Information \(PEGI\)](#) content rating system that is now used in 38 countries and was supported by the European Commission. For example, of the 1,741 games rated in 2020, 63% had a "violence" content descriptor and for 31% "bad language" was reported. Interesting and worth checking: No cases were found for the "discrimination" descriptor.

Other issues related to both rights protection and to claims of censorship concern the state-regulated **area of authors' rights**. Authors, artists and designers – especially those who contribute to audiovisual works – often cannot rely on their creative expressions being recognised or remaining unchanged. In the Anglo-American doctrine of "copyright" they could fall into the category of "work for hire" and would then be at the mercy of commercial users of their works. More recently, conflicts over the ownership of digital works, such as [NFTs in the visual arts](#), are increasing due to a lack of regulation. Digital artists also have to be careful that their "[artistic IP](#)", their style and patterns, do not turn into a prey for new, VAC-like **AI tools** designed to imitate and commercialise their work. In general, there is a growing sense that "individual creativity is substituted by economic investment" and that our current copyright system "only marginally assists authors and artists and, instead, mainly benefits holders of exploitation rights to creative works" ([Suzanne Capiu](#) in: *Culture and Human Rights – The Wroclaw Commentaries*, 2016).

So-called "**moral rights**" – particularly established in the [continental European legal tradition](#) – aim to secure authorship and defend the creator's work against derogatory actions or falsifications. While useful in principle, they can become counterproductive after his or her death when the heirs and licensed marketers take over and are then entitled to make content-related decisions for the next 70 years of extended legal protection. This unrestricted inclusion of successors, who are not necessarily loyal or experienced, in legal provisions supposed to protect the creator's personality can indeed be questioned, as censorship lurks around the corner. To better understand the potential conflicts better, we need to distinguish between two scenarios: On the one hand, there are creative *works of art or literature*, where mainly the authenticity and integrity may be at stake, as in the case of the

collected works of the politically engaged intellectual and poet Kurt Tucholsky (1890-1935), published in 1975 and co-edited by his widow, where some of the beautiful texts and poems he wrote for his girlfriends while in his Swedish exile were missing. On the other hand, there are works in the *performing arts and music*, for which a, more or less extensive, interpretation by other artists is required. With regard to the latter, some heirs and estates of deceased playwrights consider themselves entitled to suppress such new artistic interpretations, as in the case of Bertolt Brecht's heirs, who often rejected stage directors and actors whom they considered unfit to interpret and perform Brecht's plays on stage. If such an understanding of the 'right of disclosure', now part of moral rights, had been rigidly enforced over the centuries, it would have had serious "consequences for the audience and for culture more generally", writes Peter Baldwin in *The Copyright Wars* (2014, p.31, see box). Of course, artists and writers often change their existing works (and their minds) or have new ideas about how to promote them, but what is perfectly legitimate for a living creator seems much less convincing when it is done by heirs, and especially by descendants of heirs, or by third parties, most of whom have never had the opportunity to engage personally with the creator on artistic matters. Fortunately, contemporary case law now seems to be more inclined to emphasise the need to strike a balance between conflicting rights, often in favour of the freedom of new artistic expression.

**P. Baldwin on results of 'eternal' or excessive "Moral Rights" (2014)**

*...we would have lost Virgil's Aeneid, possibly Ovid's Metharmophoses, most of Kafka, all of Foucault's posthumous works, some of Philip Larkin, Sainte-Beuve, T.S. Eliot, Anatole France, George Sand... Emily Dickinson's poems would be known only in her family's heavily edited version.*

Other issues related to FoAE and copyright concern the **distribution of digital content** and have kept European and international legal bodies busy. For example, the Court of Justice of the European Union (in SCARLETT EXTENDED SA vs. SABAM, [CJEU C-70/10](#)) rejected the demands of a copyright collecting society to install an Internet content filtering system, because this "would involve a systematic analysis of all content and the collection and identification of users' IP addresses", which "could potentially undermine freedom of information". Similarly, in 2016, the UN Human Rights Council ([A/HRC/32/L.20](#)) reaffirmed its position that human rights enjoyed offline are also protected online and rejected measures to prevent or disrupt access to the Internet or specific platforms, while recognising the importance of access to information and online privacy for the realisation of the right to freedom of expression and opinion without interference.

**Economic and contractual insecurity** due to lack of or insufficient revenue or government action can increase the risk of self-censorship. According to a [survey](#) conducted in 2023 among the members of the International Network for Contemporary Performing Arts (IETM), "laws allowing better working conditions and the creation of a basic income for artists, as well as unemployment and retirement schemes for freelancers" ranked high among proposals for changing working conditions. Insiders confirm that an insecure working environment for artists, characterised inter alia by short or fixed-term contracts for performers, typical in South-Eastern Europe as well as in Austria, France, Germany and Switzerland, limits the opportunities for free artistic development.

Europe is known for its linguistic diversity and the – more or less free – **use of a language or idiom of expression** is important not only for professionals in literature and journalism, but also for those working on stage, in popular music and, increasingly, in Internet communication. Depending on national or regional laws and other regulations governing the use or protection of language(s), this can lead to uncertainty or complications, and in some multilingual countries, such as Belgium, Moldova, Spain, Turkey or Ukraine, to conflict. Authors and artists who have grown up as part of a linguistic or ethnic minority, as well as refugees, often (have to) make the difficult choice of whether or not to communicate primarily in the dominant language. It is not possible in this chapter to cover

all the critical issues involved, but there is a large body of literature including e.g., Will Kymlicka and Alan Patton (eds., 2003): [Language Rights and Political Theory](#).

In the absence of global legal instruments to protect linguistic rights and diversity – even UNESCO's *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005) on the issue only marginally – NGOs such as PEN International played a leading role in developing the non-binding *Universal Declaration of Linguistic Rights* (1996) and the more explicit [Girona Manifesto for Linguistic Rights](#) (2011). On our continent, the [European Charter for Regional or Minority Languages](#) (1998) of the Council of Europe was an important step towards the recognition of the languages of traditional autochthone and national minorities. Some member states of the CoE (and the EU) such as Belgium, Bulgaria, France, Italy or Latvia, have not ratified this Convention for various reasons, indicating deficits in what we called "**cohesive diversity**" in a [2005 project](#). Whether the CoE treaty should be extended to the – much larger – group of "new minorities" or to what extent it also benefits contemporary authors and artists, is controversial and deserves further investigation. A quick and dirty test of one of the Convention's monitoring reports, here exemplified by the one for Norway ([ECRML \(2001\) 6](#), 36 pages), reveals that "writer(s)" or "author(s)" are not mentioned once, compared to over 90 mentions of the term "authorities" – which can, of course, be explained by the somewhat ceremonial style of language used in such official reports.

There is clearly a difference between the right to use a language, official restrictions on that use – which may fall under a specific category of censorship in the wider sense – and individual decisions to use it or not. As far as FoAE issues are concerned, we should be aware that laws and professional efforts alone can hardly compensate for the crucial **imbalance between large and smaller linguistic areas in Europe** and beyond. For authors from small countries, or for those who grew up in areas with minority languages, this may suggest taking a detour by using a dominant lingo in their writing in order to improve their chances of being published – which some could deplore as a loss of substance and 'identity' or of regional cultural experiences. On the other hand, a world famous playwright like Yasmina Reza ([God of Carnage](#)) confesses that the decision of her parents, both with a refugee background, to assimilate and adopt the French language actually had a lot to do with her chances to start a career as an author ([ttt](#), 26 March 2023). No doubt, we can hardly call this "self-censorship"...

A related issue involving public authorities concerns **media content regulations**. Despite or in addition to harmonised [rules of the European Union](#), some countries have found alternative, language-based solutions to protect their national cultural industries. For example, France circumvents an EU quota for films on public TV by adding a specification to the 60% quota of European productions, namely that 40% must be of [original French language content](#); similar rules exist for radio broadcasts regarding "chansons d'expression française"; additional quotas are prescribed for programme investment as well as for pay-TV or digital platforms. In Portugal, 60% of the music in radio programmes must be composed / sung in the Portuguese language. And Spain justifies its film quota with cultural policy arguments, namely with the goal to promote "cultural identity and diversity", a potentially understandable argument given the dominant marketing power of global media conglomerates. On the other hand, it could be argued that content quota systems function as a kind of "pre-ex ante censorship", since they potentially limit the market access of artists and SME producers from other countries in a supposed "European cultural space".

The just outlined dilemma – understandable intentions vs. undesirable side-effects – is of course a general problem of all policy-making efforts, but it can be aggravated as soon as freedom of artistic creation comes into play. This is basically the message of the French cultural policy expert Guy Saez, former director of the *Observatoire des politiques culturelles* in Grenoble, who notes in a [YouTube](#)



lecture (2022) that the work of cultural institutions, producers and artists is increasingly affected by **political conditionality**. Some of them (have to) adopt such norms, which are usually not specific to culture, in order to secure public funding; others do so voluntarily in order to keep up with desired changes in society. Conditionality can be linked to issues such as non-discrimination and gender equality; environmental sustainability; decolonisation efforts; participation of disadvantaged groups; health norms etc. Some conditionality may be the result of specific laws or contracts, while others may be based more on currently popular goals and campaigns. Saez fears that the core mission of arts institutions may be qualified and artistic freedom subordinated to, undoubtedly important, political goals to which the arts can contribute only in a limited way. In his view, a mediation process involving state and non-governmental stakeholders could be helpful.

In most parts of Europe, 'neutral' beliefs are less associated with, or required of, individual artists and their work. Let's face it, many artists and writers are considered to be, above average, stubborn and egotistical when it comes to their work, emotionally not very restrained or, due to often precarious working conditions, often envious of their more successful colleagues and quick to lash out at obnoxious critics, impresarios, the whole world... However, since **demands for non-controversial or "balanced" (political) positions** – or even for the support of governmental priorities – are often directed at public media (the [BBC](#) is a good example) and, in some countries, also at state or local arts institutions, this can of course have a negative impact on artists' chances of expressing themselves freely or presenting their work without fear.

One of the controversial issues in current public debates is whether or not the authorities should be allowed, or even obliged, to suppress opinions and expressions that challenge what is considered to be **'historical truth'**. In 17 European countries, for example, the law prohibits Holocaust denial, in some of them also the denial or trivialisation of the crime of genocide in general. The German Parliament only added the latter interpretation in 2022, extending Article 130 of the Penal Code to include the denial of all genocides and punishes with up to three years in prison anyone who "approves, denies or grossly trivialises" such crimes in a way that "disrupts the public peace". Like other experts, Elisa Hoven, a professor of criminal law, was not convinced by this reform, since the courts would have to prove the guilt of a defendant with regard to more or less well documented incidents all over the world: "It is a mystery to me how a German district court is supposed to cope with this task." (Die Welt, 22 October 2022). What's more, the question of how to deal with cases in which artistic and literary works depict characters who adhere to such denials or generally reject "official orthodoxies" ([A. Gliszczynska-Grabias](#), 2016) remains open at present. The [2015 European Court of Human Rights](#) (ECtHR) acquittal of a Turkish defendant convicted in Switzerland for denying a "genocide" of Armenians in Turkey 100 years ago (application no. 27510/08, see extract in box) cannot rule out future conflicts, but was a major step towards clarifying the ECtHR's criteria for tolerance of dissonant or extreme views and expressions.

#### **ECtHR 2015 on criminalising free speech**

*Taking into account that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction - the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case.*

The above case may be considered unsavoury by some readers of the judgement. In this article, however, I'm not discussing one opinion or another in terms of "truth" or empirical facts. Instead, I try to should explore the extent to which freedom of expression is guaranteed, or at least tolerated, in democratic societies, and where there may be limits, especially with regard to FoAE. This also applies to **unresolved issues** such as whether Russian artists, even those currently in exile following the attack on Ukraine, can be denied access to public venues. Or whether city officials are entitled to issue stage bans on former Pink Floyd hero Roger Waters, who is currently torn between [pro](#) and [con](#) campaigns over alleged anti-Semitism.

In his 2006 article [Beyond Tolerance and the Intolerable](#) for INDEX on CENSORSHIP, British-Indian author Kenan Malik dismantles common beliefs about **tolerable and intolerable views and expressions**, the latter being a potential target for censorship or repression from the perspective of insecure societies or authoritarian governments. For him, "censoring ugly ideas will not make them go away. It is simply a means of abrogating our responsibility for dealing with them" by expressing disagreement or challenging unfounded positions and myths. In his provocative article (extracts in box), Malik insists on the legal distinction between words and actions, and rejects the idea that people will react like "robots" to racist or other forms of discriminatory expressions. His solution: only proven incitement to violence should be prosecuted.

#### **Kenan Malik on how to deal with "Hate speech"**

*Banning hate speech is actually to take the easy way out. Putting on the censor's hat suggests a striking lack of confidence in one's ability to persuade an audience of an alternative viewpoint, not to mention a certain contempt for people's capacity to consider the evidence rationally...*

*Hatred, of course, exists not just in speech. Hatred has physical consequences. Racism can lead to racist attacks, homophobia to anti-gay violence... Isn't it important, then, to limit the fomenting of hatred to protect the lives of those who may be attacked? Simply by asking this question, we are revealing the distinction between speech and action: saying something is not the same as doing it. But in these post-ideological, post-modern times, it has become very unfashionable to insist on such a distinction...*

*Racists are, of course, influenced by racist talk. But it is they who bear responsibility for translating racist talk into racist action. Ironically, for all the talk of using free speech responsibly, the real consequence of the demand for censorship is to moderate the responsibility of individuals for their actual actions.*

*Having said that, there are circumstances where there is a direct connection between speech and action, where someone's words have directly led to someone else taking action. Such incitement should be illegal... Incitement to violence in the context of hate speech should be as tightly defined as in ordinary criminal cases.*

In recent years, Malik has often reiterated his radical stance on the primacy of freedom of expression, stating that this principle has historically been "at the heart of the fight for social justice" and against colonialism ([The Observer](#), 30 January 2022). It should not be forgotten, he says, "that the victims of censorship are more often than not minorities and those fighting for social change. From Indian [climate change activists](#) being charged with 'promoting enmity between communities' to British police [charging feminists with 'hate crimes'](#), censorship in the name of 'preventing hatred' is widely used to target social activists."

However, can language and other expressions, often transformed by ideological propaganda, not transform our minds for the worst (cf. Victor Klemperer's examination of the growing impact of Nazi-language: [LTI – Die Sprache des Dritten Reichs](#), 1947)? Is Malik's apparent confidence in the resilience of populations against anti-democratic movements really well-founded? Have not history and recent conflicts provided numerous examples of popular tides inspired by totalitarian rhetoric?

On the other hand, is a "no rules" (or "liberal") position on freedom of expression not the perfect motto for a FoAE campaign, especially with regard to **Internet communication**? No, says Alexandra

Borchardt, Professor of Leadership and Digitisation at the *Munich Technical University*, because this technological environment should not be mistaken for an open, 'uncensored' forum that promotes the free flow – or battle – of individual expressions. According to her and many other critics, the Net platforms are shaped by the commercial (or political!) interests of the providers and therefore need rules and control. But is this not again another form of censorship? And who should be responsible for enforcing the "rules" she suggests for digital communication: Courts, national governments, perhaps the European Union?

#### **Borchardt: Freedom needs rules**

*The Silicon Valley Internet giants translate freedom in the Net with: 'Everybody can say what he or she wants'. As a consequence, the loudest and most brutal actors gain, with the friendly support of algorithms, very much attention while soft voices and differentiated positions get much less attention. In a way, this uncontrolled freedom leads into the nowhere. Freedom needs rules... In a communication environment that is technically managed, technical means of control and sanctions are likewise required... We urgently need ethical standards as well as the law and also more digital education.*

(Kölner Stadt-Anzeiger, 24 November 2022)

Indeed: on 16 November 2022, the EU's new [Digital Services Act \(DSA\)](#) entered into force; it appears to address some of Borchardt's concerns, leaving member states in charge of smaller providers and has been welcomed by human rights organisations such as [Amnesty International](#). Freedom of expression as a right to be protected is mentioned 18 times in the act. However, a much-discussed [media exemption](#), which is important also for cultural content, was not adopted and politicians from member states, such as Hamburg's Senator for Culture, Carsten Brosda, warned that the Act could establish a "quasi-governmental media regulator at the European Commission". He goes on: If "we try to check what is true and what is right by means of supervision before publication, then we are declaring the public debate superfluous" (Süddeutsche Zeitung, 4 May 2022).

Clearly, these positions and possible alternatives deserve further examination, for example in *Compendium* debates currently being planned, and I will take up again issues of censorship and other restrictions e.g., on social media platforms in the next article in this series.

At the end of this piece, let's consider a recent, hotly contested example that illustrates the ambivalence of some cases – or claims – of censorship, namely that of the state-sponsored world art exhibition **documenta fifteen (D15)** that has been staged 2022 in Kassel. In this context, it may be useful to first reiterate again the difference between the *human right to cultural access and participation*, with its citizen- or user-oriented approach and the *human right to freedom of expression*, with its professional and artistic connotations.

In terms of the former, D15 could be considered a success, not only because of the 738,000 visitors who sought and found inspiration at the event, but also because of its community arts concept, which invited visitors to discuss the exhibits and participate in many related activities together with artists and artistic collectives (most of which based in the 'global south').

In terms of the latter and FoAE, D15 could be considered at least ambivalent because of the conflicts surrounding a few works critical of Israel, some of which were considered anti-Semitic. According to an [open letter](#) by *documenta fifteen*



Part of a large poster of the artistic collective *Taring Padi* with controversial content that was removed from D15.

participants and the curatorial team *Ruangrupa* (Indonesia) published at the end of the event on 10 September 2022, D15 came even close to a failure, because of "censorship" as well as "smearing attacks, humiliations, vandalism, and threats in major media outlets, as well as in the streets and in our spaces."

A correct interpretation of Human Rights, including FoAE, requires an open, communicative approach and, in cases of conflict, openness to mediation processes ([TYPOLOGIES – Les droits culturels en action](#), 2022). However, in the case of D15, mediation efforts were broken off or failed altogether.

In a more distant perspective, we may find that this was less a conflict over censorship and also no "clash of civilisations", but rather a "**clash of art perceptions**": works by individual artists vs. fluid artistic processes and manifestations, often with political undertones, presented by groups or collectives – the latter not very attractive to traditional Western art markets. This ambivalence, adding to the Israel/Palestine and perceived anti-Semitism issues, makes artists such as the Romanian D15 participant Dan Perjovci wonder: "Freedom of expression or responsibility of expression?" (*ttt*, 19 June 2022).

#### **Möllers on the *documenta fifteen*: "It's fatal to put art under supervision".**

As a consequence of the *documenta fifteen* conflicts, the renowned legal scholar Christoph Möllers has been commissioned with an [expert opinion](#) by the Federal Minister of State for Culture. His task was to clarify how far artistic freedom extends and where the state must and can intervene. In an interview with *Süddeutsche Zeitung*, 10 January 2023, he explains his position:

*Every liberal constitution also protects expressions of opinion that seem horrible or obscene to us. Freedom of expression and artistic freedom can only be restricted to the extent that they violate other rights. The fact that one is allowed to make anti-Semitic or racist statements seems like a scandal against the backdrop of German history, but it is the scandal of a liberal order that does not legally sanction everything it condemns politically... The Federal Constitutional Court says: merely expressing a belief is not sufficient to punish someone or to ban the expression... Artistic responsibility works similarly to political responsibility. You give someone a creative opportunity, and then he is observed and judged. If he messes up, he can't be legally prosecuted for it, but he can be criticised, lose his fans, meet with contempt. The people of Ruangrupa didn't quite understand that...*

In the context of a more detailed analysis of the D15, we might possibly detect a lack of both empathy and knowledge of varying artistic, cultural and political experiences among all the parties involved in the controversy: artists, critics, politicians, etc. Or in the more diplomatic words of Max Jorge Hinderer Cruz, former Artistic Director of the *Academy of the Arts of the World*: "There exists a specific German perspective [on history], for which people coming from different contexts are occasionally not properly prepared. Likewise, there are Germans who find it difficult to face deviant perspectives." (*Kölner Stadt-Anzeiger*, 22 October 2022)