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Publication date

2012

Document Version

Final published version

Published in

KUR. Kunstrecht und Urheberrecht

[Link to publication](#)

Citation for published version (APA):

Nieuwenhuis, A. J. (2012). The protection of artistic expression under article 10 of the European Convention on Human Rights. *KUR. Kunstrecht und Urheberrecht*, 14(3/4), 110-115. http://kur-journal.de/index.php?action=ausgaben&ausgaben_id=58&issueName=3/4&teaser_id=218&dateExtension=12

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The protection of artistic expression under article 10 of the European Convention on Human Rights

Aernout J. Nieuwenhuis*

More than once, the European Court of Human Rights (hereafter: ECtHR) has attended to cases concerning novels, movies, paintings and other forms of artistic expression. The Court has tried to fit in artistic expression in its more general approach that often makes a decisive distinction between contributions to public debate and other publications. Recent cases however suggest that artistic expression as such deserves substantial protection. Therefore, the question arises what this protection might be. This article will try to answer that question by analyzing the case law of the European Court of Human Rights.

I. Introduction

■ Article 10 of the European Convention on Human Rights lays down the right to freedom of expression, including the freedom to hold opinions and the freedom to receive and impart information and ideas. Article 10 applies to artistic expression as well.¹ Case law regards many forms of artistic expression: film² and video³, theatre,⁴ novels,⁵ poetry,⁶ paintings,⁷ drawings,⁸ 'sculpture'⁹ and music.¹⁰

That does not imply that artistic expression is always given substantial protection by the Court. In the Müller case, for example, the seizure of a painting depicting sex between men and animals could be considered necessary in a democratic society, according to the Court. In the Preminger case the Court accepted the ban on the movie 'Das Liebeskonzil' based on a novel by Oskar Panizza and including satirical images of God, Christ and Mary.¹¹

A more recent case gives quite another impression of the protection of artistic expression by the Court. The case concerned a painting showing about thirty naked persons; most of them masturbating and ejaculating. Newspaper photographs of well-known persons (amongst others Mother Theresa, Jörg Haider and another prominent FPÖ politician, Meischberger)

were used for the faces. In Austria, Meischberger successfully sued for a ban on exhibiting the painting. But the ECtHR judged that this ban was a violation of art. 10 ECHR.¹²

In 2010, an even greater protection of at least 'recognized' works of art comes up in the case Akdaş c. Turkey. This case regarded the ban on the Turkish translation of Guillaume Apollinaire's erotic novel 'Les mille verges', in which sadomasochism, vampirism and pedophilia all play a role. According to the Court, the public should have access to the European heritage.¹³

These cases trigger the question of what protection artistic expression is actually granted in Strasbourg. To answer this question the article is set up as follows. First of all, a brief outline will be given of Article 10 of the Convention (II). Subsequently, it will be argued that the Court has tried to fit artistic expression into its more general approach that often makes a decisive distinction between contributions to public debate and other publications (III.). Yet, in several cases a publication's artistic nature as such has been taken into account. This artistic nature will be analysed (IV.). Moreover, the question will be asked of what the consequences would be if this approach were the standard in all artistic expression cases (V.). The article will be rounded off with a conclusion (VI.).

A complication might be that the Court never has defined 'artistic expression' in general. The same is true for the concept of 'artistic merit', which the Court sometimes uses. This article will not try to solve these problems.¹⁴ The starting point is that the novels, poetry, paintings, drawings, and movies in the relevant case law are forms of artistic expression.

II. A short outline of the meaning of article 10 ECHR

According to the ECtHR, 'freedom of expression constitutes one of the essential foundations of a democratic society. The right is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that 'offend, shock or disturb the State or any sector of the population.'¹⁵

Article 10 has a wide scope and does not apply solely to information or ideas or forms of expression of a political nature; 'it also encompasses artistic expression (...), information of a commercial nature (...) and even light music and commercials transmitted by cable (...)'.¹⁶

Freedom of expression under the Convention is not absolute. Restrictions are permitted when prescribed by law, necessary in a democratic society, and having a legitimate aim, such as protection of public safety, protection of morals or protection of the rights of others. The Court's argument often centres on the question of whether the interference can be considered necessary in a democratic society. The main criterion is whether the interference in the right to freedom of expression is proportionate to the interest served by the interference.¹⁷ There have to be relevant and sufficient reasons for a restriction, according to the Court.

In judging whether a government measure violates the Convention's provisions, the Court frequently leaves the national authorities a certain margin of appreciation.¹⁸ The reason for this is twofold. First, the protection of human rights should be realized on the national level. Secondly, on certain issues there has to be room for variety between member-states, especially when a European standard is lacking. Morals are an excellent example.

Within the wide scope of Article 10, 'political speech or debate on questions of public interest' is entitled to a special position.¹⁹ The interest of the public to receive such information is taken into account in the protection of this category of speech.²⁰ Therefore, restrictions will be judged in a strict manner by the Court. The margin of appreciation will be limited. The Court has stressed as well that 'the limits of acceptable criticism'

are 'wider as regards to a politician than as regards to a private individual'.²¹ This criticism may be divided into facts, of which the existence can be demonstrated, and value judgments, which are not susceptible to proof.²²

Article 10 of the Convention generally offers less protection to other categories of speech. The photographs of princess Caroline von Hannover doing some shopping were just amusement for the public.²³ The level of protection for commercial speech is also less than that accorded to the expression of 'political' ideas in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned.²⁴

Considering the wide scope of Article 10 of the Convention, the inclusion within that scope of artistic expression is nothing sensational, for that matter.²⁵ The Court states:²⁶ 'Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society'. Because of that, their freedom should not 'unduly' be restricted.²⁷ However, this explicit connection between art and democratic society does not prejudice the difference between the general exchange of ideas and information and the more specific category of 'political speech and debate on questions of public interest'.²⁸ Artistic expression might be at the same time political speech or a contribution to a debate on a matter of public interest, but that does not hold true for all artistic expression. The Court's artistic expression case law has been based, to a large extent on this distinction.

III. Two categories of artistic expression

1. Political artistic expression

The Court's case law includes several cases of 'political' artistic expression. In such cases, the regular considerations about the importance of 'political speech or debate on questions of public interest' are found.²⁹ If a cartoon's subject is a politician, the Court repeats that a politician has to bear more criticism. The

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1 See J. van de Lanotte & Y. Haec (red.) Handboek EVRM dl. 2.1, Antwerpen 2004, p. 907.

2 ECtHR 20/09/1994, Otto-Preminger-Institut v. Austria.

3 ECtHR 25/11/1996, Wingrove v. U.K.

4 ECtHR 3/05/2007, Kar e.a. c. Turkey; ECtHR 3/05/2007, Ulusoy e.a. v. Turkey.

5 ECtHR 29/03/2005, Alinak v. Turkey; ECtHR 22/10/2007, Lindon, Otchakovsky-Laurens en July c. France.

6 ECtHR (GC) 8/07/1999, Karatas v. Turkey.

7 ECtHR 24/05/1988, Müller v. Switzerland.

8 ECtHR 2/10/2008, Leroy c. France.

9 ECtHR 2/09/1991, S. and G. v. U.K (adm.).

10 ECtHR 28/03/1990, Groppera v. Switzerland.

11 ECtHR 20/09/1994, Otto-Preminger-Institut v. Austria.

12 ECtHR 25/01/2007, Vereinigung Bildender Künstler v. Austria.

13 ECtHR 16/02/2010, Akdaş c. Turkey.

14 For an overview of some problems and approaches, Hoppe Die Kunstfreiheit als EU-Grundrecht, Frankfurt/Man 2011, p. 78 ff.

15 ECtHR 7/12/1976, Handyside v. U.K.; thereafter often repeated.

16 ECtHR 24/02/1995, Casado Coca v. Spain.

17 The principle of proportionality plays an important role in the whole Convention, see McBride Proportionality and the European Convention on Human Rights, in: Ellis The principle of proportionality in the laws of Europe, Oxford Hart Publishing 1999.

18 Takahashi The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR, Antwerpen Intersentia 2002.

19 Amongst others ECtHR 25/11/1999, Nilsen & Johnsson v. Norway; ECtHR 12/07/2001, Feldek v. Slovakia.

20 ECtHR 26/04/1979, Sunday Times v. U.K.

21 ECtHR 9/07/1986, Lingens v. Austria

22 idem.

23 ECtHR 24/06/2004, Von Hannover v. Germany.

24 EComHR 5/05/1979, X. and Church of Scientology v. Sweden.

25 The second sentence of the first paragraph of article 10 of the Convention even refers to cinemas.

26 ECtHR 24/05/1988, Müller v. Switzerland, par. 27.

27 ECtHR 24/05/1988, Müller v. Switzerland, par. 33; repeated in, amongst others ECtHR (GC) 8/07/1999, Karatas v. Turkey; ECtHR 22/10/2007, Lindon, Otchakovsky-Laurens en July c. France.

28 Harris/O'Boyle e.a. Law of the European Convention on Human Rights, Oxford University Press 2004, p. 458.

29 F.e. ECtHR (GC) 8/07/1999, Karatas v. Turkey, ECtHR 25/01/2007, Vereinigung Bildender Künstler v. Austria, ECtHR 22/10/2007, Lindon, Otchakovsky-Laurens en July c. France.

room for exaggerating or provocative cartoons might be compared to the room for exaggerating and provocative criticism on politicians in general.³⁰

The Court's rather strict judgment in cases concerning contributions to public debate and criticism regarding politicians still leaves some room for restrictions. The same holds true for political artistic expression. When for example a cartoon of a mayor is pointing unambiguously to bribes,³¹ and such an allegation lacks a factual basis, an interference may be proportionate. The Court's considerations are very similar to those in other cases concerning accusations of criminal offences in the media.³² The possible artistic nature of the cartoon seems to be not very relevant.³³

The same holds true if a cartoon is seen as a glorification of terrorism. In the Leroy case, according to the Court, the cartoon could be seen as an approval of a terrorist attack. In view of the time of publication and in view of the attacks occurring regularly in the Basque country, the conviction was considered to be necessary in a democratic society.³⁴ Although the Court referred to the artistic nature of the cartoon, the case resembles the Sürrek no. 1 case about political – non-artistic – speech glorifying violence.

2. Other artistic expression

Artistic expression, not being part of the category 'political speech and debate on questions of public interest', cannot rely on that category's high level of protection.

The Preminger case regarding the movie 'Das Liebeskonzil' has already been mentioned. The ECtHR judged that the seizure and forfeiture of the movie could be considered necessary in a democratic society. The Court stated as well that gratuitously offensive publications do not contribute to 'any form of public debate capable of furthering progress in human affairs'. Some years later, in the Wingrove case regarding a blasphemous video, the Court argued in a similar way: 'Whereas there is little scope under Article 10 para. 2 of the Convention (art. 10-2) for restrictions on political speech or on debate of questions of public interest (...) a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.'³⁵

The Wingrove case might be compared, to a certain extent, with, for example, the Hoare case about the distribution of obscene video cassettes to a limited circle of viewers. The Commission did find the interference proportionate to the legitimate aim pursued.³⁶ The Commission mentioned that no artistic merit was claimed for the works, implicating that such a merit might have made a difference. In the Court's judgment in the Wingrove case, however, the possible artistic nature of the video involved does not seem to be relevant at all.

If the case law is presented like this, the conclusion might be that artistic expression is not a special category at all. Political artistic expression is rather well protected like all forms of political speech. Other artistic expression might be seen as 'low value speech', especially when arousing religious outrage or meeting with morals.

IV. The relevance of the artistic nature of an expression

The last paragraph, however, does not give a completely accurate description of the case law. In certain cases, the Court has indeed taken into account the artistic nature of a publication. In this respect, a distinction can be made between two, maybe three, different, yet connected aspects: artistic expression is not to be taken literally, artistic publications have a limited edition, and the artistic merit has to be given a special weight.

1. Artistic, not literal

In some cases the Court has stressed the fact that artistic expression should not be taken literally. In this respect, Karatas is an important case about an anthology of poems decided by the Grand Chamber: '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 (...). Therefore, 'even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence', the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation. Otherwise said, the protection, as given by the publication's political character, might not have been decisive without its artistic nature.

The artistic nature of a publication might be relevant as well if a work of art portrays 'living persons'. The different outcome in the Lindon-Otchakovsky v. France case and the Vereinigung v. Austria case, both involving political artistic expression, is to be explained by answering the question whether the public would take the depiction literally. In the Vereinigung case, the Court stressed Meischberger's position as a politician, who has to tolerate more. In addition, the Court emphasized that Meisch-

berger is depicted in a 'somewhat outrageous manner, namely naked and involved in sexual activities (...) in interaction with three other prominent members of his party, amongst them Mr Jörg Haider'. However, photographs were used only for their heads and the bodies were painted in a not very realistic and exaggerated manner. Therefore, it is clear that the painting's purpose was not 'to reflect or even to suggest reality' according to the Court. The painting can hardly be understood as a detailed picture of Meischberger's private life. The restriction of the artist's freedom must be reviewed with special attention.³⁷

The Court's argument in the Lindon case is different. This case concerned the French novel 'Le Procès de Jean-Marie Le Pen'. This novel was partly based on real events and the blurb stated that the book pointed out how the political movement led by Le Pen should be effectively countered. In France, the writer and publisher were convicted of libel on the basis of three extracts depicting Le Pen as the head of a gang of murderers and a vampire feeding himself with spite and blood; and connecting his utterances with racism and history's most terrible abominations.

The Court characterizes the novel as a form of artistic expression falling within the scope of Art. 10 of the Convention. The Court continues with the general consideration that there is no need to distinguish between facts and value judgments as far as novels are concerned. However, that may change when a work is no pure fiction but introduces real persons and events. When a novel contains statements of facts as well, there are, most certainly, limitations to exaggeration and provocation. Four of the seventeen judges of the Grand Chamber wrote a dissenting opinion. They argue that a novel describing real persons and events is still different from a news report. Otherwise said, they put some more stress on the artistic nature of the novel: extracts should not be taken literally.

2. Smaller circulation

In some of the cases mentioned, the Court has taken into account that the artistic publication involved was not aimed at a large public or would not normally reach the public in general. In Lindon, the Court, for example, points to the rather small harm done to Le Pen's reputation by a novel that, in general,

appeals to a relatively small public.³⁸ The Alinak case concerning a novel about the Kurdish struggle and the government's response to it, is another example. The Court did consider it to be a contribution to the public debate. Moreover, the novel appealing to a relatively small public has a rather limited effect on public order, according to the Court.³⁹ The Court used similar arguments in the Karatas' case already mentioned. An anthology of poems would appeal to a minority of readers, and by that reason the possible impact would be relatively small.

In several other cases regarding artistic expression, the Court seems to consider the size of the public less relevant. I.A. v. Turkey concerned a book describing philosophical and theological ideas in a novel-like manner, including some extracts mocking the prophet Mohammed. Given the margin of appreciation, the Court considers the interference in the freedom of expression acceptable.⁴⁰ Considerations on small audiences or small impact play no prominent role. Only the three dissenting judges stress the relatively small edition of the book.

In case law involving expositions and movies, one of the relevant aspects seems to be the accessibility. In Müller, the Court pointed to the fact that 'the general public had free access to the exhibition, as the organizers had not imposed any admission charge or any age-limit. Moreover the public was not warned as what kind of paintings to expect. Similar aspects played a part in the S.&G. v. UK case.⁴¹ The work of art in question consisted of a plastic head with earrings made of freeze-dried 3 to 4 months old fetuses.

One cannot simply turn around the argument of the Court. In the Preminger case, for example, there was an age limit and the audience could know beforehand what the movie was about. The Court, however, argued that the publicity was sufficiently 'public' to be able to hurt the feelings of others than those of who were present as well. Therefore, the interference was justified.⁴² In the Wingrove case, the Court did not accept the argument that an experimental video film would reach a smaller audience than, for example, a motion picture, so that there would be no big chance that Christians would be unexpectedly confronted with the material, especially since it would have been distributed by sex shops only.⁴³

3. Artistic merit

In the case law the term 'artistic merit' has played a certain role as well. Several times, the Court's finding that a publication lacked artistic merit resulted in a relatively small protection. The

30 F.e. ECtHR 23/05/1991, Oberschlick v. Austria and ECtHR 6/10/2009, Kulis and Roczycki v. Poland.

31 ECtHR (GC) 17/12/2004, Cumpănă en Mazăre v. Romania, par. 100.

32 F.e. ECtHR (GC) 17/12/2004, Pedersen & Baadsgaard v. Denmark.

33 Cf. ECtHR (GC) 12/09/2011, Palomo Sanchez c. Espagne.

34 ECtHR 2/10/2008, Leroy c. France.

35 ECtHR 25/11/1996, Wingrove v. U.K. par 58.

36 EComHR 2/07/1997, Hoare v. U.K.

37 The Alves case (ECtHR 20 October 2009, no. 41665/07, Alves da Silva c. Portugal) shows the same general considerations about artistic expression and satire. A citizen of Mortagua drove around with a dummy, representing the mayor of Mortagua. Meanwhile, he used a megaphone to make the following known: 'Croyez au développement culturel, récréatif, social et économique de la municipalité de Mortagua, [grâce aux] entreprises Set-Narba, celles qui ont le plus d'employés, payés par nous tous. Donne-moi ton vote, ton épouse aura un emploi, pas besoin de diplôme; ton fils aussi, il sera employé municipal'. The Court judged the libel conviction contrary to article 10 ECHR while repeating the considerations concerning satire set out in the Vereinigung case. Moreover, the context counts as well: the accusations were made during Mardi Gras.

38 ECtHR 22/10/2007, Lindon, Otchakovsky-Laurens et July c. France.

39 ECtHR 29/03/2005, Alinak v. Turkey.

40 ECtHR 13/09/2005, I.A. c. Turquie.

41 EComHR 2/09/1991, S.&G. v. U.K.

42 ECtHR 20/09/1994, Otto-Preminger-Institut v. Austria.

43 ECtHR 25/11/1996, Wingrove v. U.K.

Perrin case confirms that pornography without artistic value does not get much protection. The Court considered: 'the purpose of the present expression was purely commercial and there is no suggestion that it contributed to any public debate on a matter of public interest or that it was of any artistic merit'.⁴⁴

This consideration strongly suggests that a publication with artistic merit would have gotten a substantially higher level of protection. That is not to say that the case would have been automatically decided differently. For example, in the Perrin case, the court pointed, among other things, to the site's accessibility for children.

The only time the artistic merit of a non-political publication has been decisive, was in the Akdaş case. In that case the Court may not have explicitly referred to the novel's artistic merit, however, it would be strange if a novel without any artistic merit were to be included in the European heritage of literature. That, however, is no definite answer to the question what artistic merit and artistic expression actually are. Treatment under national law suggests that there are no simple answers and it is not to be expected that the Court will develop an extensive approach in this matter.

To recapitulate, the Court's conclusion – on whether an interference is disproportionate or not – can be influenced by the artistic nature of a publication. Artistic expression may be taken less literally than other kinds of expression and often is assumed to have a relatively small impact. These considerations sometimes seem to be crucial, mostly in cases about political artistic expression.

Two reasons make that rather strange. First of all, if more weight is given to freedom of expression because of its contribution to the debate about matters of public interest, as many people as possible should be able to receive those contributions.⁴⁵ Secondly, if the artistic nature is the cause of the smaller impact, this very impact should play a part in every artistic expression case. The audience's size might seem to be particularly important because a small audience is assumed to consist of art lovers, who understand the artistic nature of the work better.

V. What kind of protection?

Still, the considerations in Vereinigung – that artistic expression deserves a substantial protection by itself – must make sense. The very question then is: what could be the implications for all artistic expression, including expression not seen as a contribution to public debate?

It should not be argued that the protection of artistic expression is absolute. For example, banning art works, that include child pornography, is by all means considered acceptable, even when the artist wanted to bring the simple availability of child pornography up for discussion. The reasons for the restriction – morals and the protection of youth – were clearly sufficient.⁴⁶ Lindon shows that interferences may also be justified in case of a 'realistic' novel, in which recognizable persons play a role. Even in European countries where freedom of art is more explicitly protected in the constitution, such interferences are acceptable.⁴⁷

Some problems, however, do arise. The Court makes a settled distinction between matters of fact and value judgments. This may be a proper and effective distinction as far as normal contributions to the public debate are concerned; it does not simply apply to artistic expression. The difference between the Lindon and the Vereinigung cases is not really the difference between statements of fact and value judgments, but a difference in the meaning of artistic expression. The painting has at least a diffuse and ambiguous meaning. The novel, according to the Court, is more straightforward. The next problem will be how to handle this distinction. One may in particular point to contemporary forms of artistic expression as 'faction', which mix up reality elements and fiction.

Anyhow, substantial protection for artistic expression should have consequences for cases outside the domain of political artistic expression. If the Court takes its considerations about the small impact and the small audiences seriously, the relationship between freedom of expression and the protection of morals would change as well. It may be too rash a move to say that considerations involving morals may not play a part at all. Protection of youth and prevention of unexpected offence still may be legitimate aims. Therefore, the way an exhibition or the showing of a movie is organized may be decisive. In this line of thought a case, similar to Müller but for an age limit and warnings, should be decided differently.⁴⁸

The national authorities still would have a relatively wide margin of appreciation in assessing public morals' content; the substantial protection of artistic expression would come forward in reviewing rather strictly the proportionality of the interference in question. Otherwise said, as far as the specific measure's suitability is concerned, the margin of appreciation should be limited.⁴⁹ A complete ban on an artistic movie, even if it contains many violence and sex scenes, would soon be disproportionate. On the other hand, as in the case V.D. & C.G. c. France, the Court may still accept restrictions to protect the morals of the youth.⁵⁰

Morals and the rights of others are often connected in the case law of the Court. If the rights of others consist chiefly of the right not to be confronted with unwished-for and immoral pictures, possible restrictions of artistic expression should be aimed at that.

One may argue that the same holds true for artistic expression confronting religion. In the Preminger case, only paying adults, knowing what to expect, had access to the art cinema. Nevertheless, the Court deemed the showing of the film, because of the publicity involved, 'public' enough to justify the interference. Three of the seven judges dissenting in the Preminger case, however, argued that just a few cinema lovers would actually see the movie and they would know beforehand what they could expect.

Moreover, according to them, a decision whether a 'particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs" (...) cannot but be tainted by the authorities' idea of "progress". One might be inclined to add, again, that artistic expression does not simply fit in the scheme of contributions (either facts or value judgments) to public debate and other expression. Artistic expression's merit should be recognized, irrespectively of those categories.

It has been argued that the Court already has changed its course in this respect.⁵¹ The Klein case concerned a publication mocking a bishop who was brought up for discussion about the possible corruption of morals. However, the Court expressly states that the publication is to be seen as satire in the public debate. Because⁵² the publication is a contribution to the public debate, the protection of the bishop's reputation is not a good reason for a restriction. Otherwise said, the case is not about the position of artistic expression outside the political domain.

So, the future still has to prove what consequences the consideration about a substantial protection of artistic expression will have. Akdaş is too exceptional a case to make sure that all artistic expression will be considered 'high value' speech.

Some problems may be expected here. Is everything presented as artistic expression to be considered as such? Can pornography at the same time be artistic expression or not?⁵³ These questions, however, cannot be avoided anymore, if artistic expression as such may not be unduly restricted. The Preminger case, for that matter, was not a really hard case, in this respect. The movie was inspired by a novel of a well-known author, written about hundred years ago. The director was a well-known artist as well.

VI. Conclusion

Artistic expression falls within the scope of Article 10 of the Convention. However, the protection of artistic expression differs. Research on the case law points out that up till now, the actual protection is chiefly dependent on two interconnected factors.

When artistic expression is part of the political debate or the debate on matters of public concern, freedom of expression carries a relatively heavy weight. Moreover, the margin of appreciation is relatively small, especially in case of a restriction on behalf of a politician's reputation. When the Court assesses whether a contribution to political debate may be considered advocacy or glorification of violence, the margin is not wide either. Artistic expression, not being part of the political debate, has been substantially less protected. Besides the fact that such publications do not concern a contribution to the political debate, they often run up against law provisions meant to protect religious feelings or public morals.

Yet, the artistic character of a publication has not been left out of the picture completely. First, artistic expression cannot easily be considered as matters of fact. Secondly, the Court points to the relatively small impact of artistic expression. However, these factors were first and foremost significant in cases of political artistic expression. Apart from this category, one may find in the case law some considerations on the special nature and relatively small impact of artistic expression, but these considerations rarely, if ever, result in the conclusion of a violation of Art. 10 of the Convention.

More recent cases as Vereinigung and Akdaş suggest that artistic expression as such deserves substantial protection. Although Vereinigung was a case of political artistic expression, the considerations about the importance of artistic freedom have a more general thrust. In Akdaş, the undisputable artistic merit of the novel was the deciding factor. The protection of morals had to yield.

In the last part of this article, an attempt has been made to imagine what a substantial protection of artistic protection by the Court might be. Absolute protection is out of the question, as has been showed. If, however, the Court takes its considerations about the nature of artistic expression and its relatively small impact seriously, it should not leave much room for a complete ban on an artistic publication to protect public morals or religious sensibilities. Restrictions to protect youngsters or to prevent unwanted confrontations could be proportionate as far as a small art-loving audience may still see or read the artistic expression involved.

Such an approach may counter various new problems. That alone is not a good reason to shrink from the consequences. The usual approach fitting artistic expression into the dichotomy between contributions to public debate and other expression has problematic aspects as well, as has been showed. ■

46 ECtHR 10/05/2011, Karttunen v. Finland (admiss.).

47 BVerfG 24/2/1971, BVerfGE 30, 173; BVerfG 13/6/2007, BvR 1783/05.

48 Cf. Harris/O'Boyle 2004, p. 460.

49 Cf. Hoppe, o.c. p. 224.

50 ECtHR 22/06/2006, V.D. & C.G. c. France (recev.)

44 ECtHR 18/10/2005, Perrin v. U.K. A similar consideration is found in EComHR 2/07/1997, Hoare v. U.K.

45 Cf. Harris/O'Boyle 2004, p. 459.

51 See however Temperman Blasphemy, Defamation of Religion and Human Rights Law, NHRQ 2008, p. 517-545, p. 524.

52 ECtHR 31/10/2006, Klein v. Slowakia.

53 Cf. BVerfG 27/11/1990, BVerfGE 83, 130.