



PROTECTING ARTISTIC FREEDOM AS A EUROPEAN VALUE

Bringing arts, law and decision-making together

Creative and critical thinking contested

The world of arts and culture has become the battlefield of ideas and ideologies in an increasingly populist and polarised world. This is a global trend and Europe is unfortunately no exception. The term “culture wars” is already in use both in the European debate as well as in several member states.

What was unthinkable just a decade ago is now a solid reality. And it is not a local or national phenomena limited to a handful of regions or member states. It is happening all over the EU. Art is used as a means in political propoganda to discredit minorities (1), political nominations are used for ideological control of artistic spaces (2), commissioning public art with taxpayers’ money is subjected to ideological criteria (3) and publicly funded art institutions are forced into self-censorship (4) just to mention some examples.

In a recent report, our partner Freemuse provided for a number of well-documented examples of how artistic freedom is contested in a number of member states (5). It is striking how politically and ideologically motivated measures to limit the freedom of individual artists or artistic spaces are becoming a European reality. Just a decade ago some of these measures would normally be associated with countries with considerable deficit in rule of law and respect for human rights.

The most striking tendency in reported examples is the use of law in contesting artistic freedom. Artists risk facing criminal prosecution and fines or even imprisonment if their artistic work is perceived as unlawful in terms of legislation that is meant to regulate domains other than arts and freedom of expression. In other words, there seems to be a tendency of artistic work being evaluated in terms of exclusively non-artistic criteria. Political and ideological preferences seem to become the main criteria for what the world of arts is allowed or not allowed to do.

While we would expect the rule of law to protect the freedom of artistic expression, we see legal provisions becoming a tool for contesting that same artistic expression. There is little doubt, if any, that this tendency needs to be paid adequate and acute attention by the EU.

The need for action

Political and ideological attacks on the freedom of artistic expression are the undeniable proof that arts and culture are not merely creative hobbies. The amount of research and literature on the crucial role of arts and culture for socially and economically sustainable societies is enormous. Culture Action Europe has already published a collection of substantive and relevant evidence on the impact of arts and culture across a range of EU policy fields (6).

No freedom is absolute and this is true of artistic freedom equally. However, action is needed not to promote a Bohemian love for free arts. Being the most creative form of expression, artistic expression is one of the underlying components of the European project. Eroding artistic freedom risks eroding the European project itself. No action is therefore not an option and this is why:

1. The European project is value-based project

The European project is essentially a cultural project as it is founded on the notion of values. The sustainability and resilience of any value-based project is largely dependent on the protection of its founding values. The values of the European project are explicitly listed in Article 2 of TEU, they are: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Additionally these values are not limited to the EU on the institutional level, they are according to same article "common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (7). Protecting and sustaining all these values should then be a priority.

2. Our common values are our common concern

Values are at the intersection of democracy and the notion of culture with arts as its main component. Arts and culture are the creative way to critically reflect on the constant transformations of the world, to question and to learn. They are the motor of pluralism and therefore fundamental to constructing and reinforcing community life. Artistic expressions do not simply reflect the values of the community, but rather underpin their growth and development, expanding people's capacities to justify their positions, fortifying them against arguments contrary to those values (8). Defending any of the values listed in Article 2 TEU is therefore dependent on defending arts and culture. Artistic freedom is undoubtedly a central component of the resilience of the European project in the face of populism and simple answers to complex issues. It is therefore our common concern.

3. Our legal norms are the reflection of our common values

The values system of the European project is protected by a unique legal ecosystem - European law. Legal protection for artistic freedom is embedded in the protection for the freedom of expression. A member state is therefore compelled under European law to justify any interference that might limit artistic freedom (9). Unless these kinds of justifications are understood and applied in a consistent and uniform manner across the member states, the normative approach to defending the common values might be at risk. In other words, the lack of harmony in the way our common legal norms are interpreted and applied across the Union could lead to a lack of harmony in terms of our common values and vice versa.

4. Proportionality and subsidiarity are not above our common values

The rule of law is another common value of the European project. EU law is built on the principles of proportionality and subsidiarity to ensure that EU functions in the best possible way for all citizens. However, subsidiarity should not and cannot be perceived or used as an excuse to disregard the common values of the Union. Bearing in mind the current development in Europe, turning away from the task to ensure that artistic freedom is respected across the Union might not only erode artistic freedom but it could also put other European values at risk, including the rule of law.

The world of arts is a space of innovation, experimental activity, creativity and critical thinking. It is an environment for lively self-realisation and therefore the core component in the resilience of the European project in a populist and polarised reality. Defending artistic freedom is therefore defending the common values of the European project. Considering the alarming reporting from different member states, a failure to act by the European Union is simply unjustifiable.

Protecting artistic freedom: what are the options?

So what course of action could the EU institutions adopt to ensure an adequate response to the current development?

Carefully considering reporting from different member states, we have identified some criteria for assessing different options. The best course of action would be:

- Efficient – having the greatest possible impact across the European Union for the least possible cost;
- Normative – based on the common legal norms available in European law including current case law from the CJEU and ECtHR;
- Inclusive – involving those who are affecting or affected by decisions made across the European Union;
- Legal – respecting the principle of subsidiarity

Below is a short assessment of those options that we have identified as realistic.

1. Monitoring developments in the member states

The EU could monitor the developments in the member states. This means mainly relying on national legislation and implies that critical monitoring could lead to changes in national legislation. Examples of positive developments, such as repealed archaic legislation do exist (10). However, in current reporting it is difficult to see any substantial difference between member states with legislation that explicitly protects artistic freedom and member states that lack such explicit protection. In other words, we don't see any indications that suggest that artistic freedom is more respected and protected due to explicit protection in national legislation.

The most efficient change is a shift in factual decision-making on the national, regional and local levels rather than monitoring case law. When a case is taken to court, the harm is already done, independently of the outcome of the case. Monitoring could be essential in keeping the issue on the agenda but does not seem to be a plausible option as a main course of action, as it is hardly efficient and does not involve those affected. Besides, depending on how monitoring is designed it could be perceived as putting aside the principle of subsidiarity. Monitoring may best be done by the professional organisations or the civil society after all.

2. Relying on national courts

National courts apply existing national legislation. Most member states have predominantly a dualist legal system, which means that relevant UN conventions are not incorporated in the national legislation. To which extent national courts take these international obligations into consideration is subject to different national legal traditions. As a result, national case law may differ considerably from the case law of ECtHR. Uniform application of common legal norms can thus be achieved only by referring cases to the ECtHR itself, a procedure that is both costly and lengthy. When EU law is involved, there seem to be considerable differences concerning when, how and to what extent national courts take the Charter of Fundamental Rights into consideration (11).

In any case, legal action is a risky business as it is costly and lengthy. Considering the current reporting, **what is needed in the first place is an efficient and inclusive mechanism to improve decision making at the national, regional and local levels** rather than waiting for uncertain court litigation.

3. Relying on artists to take action

Court litigation is normally an expensive and lengthy business. For individual artists and smaller artistic formations, taking legal action is not an option unless they have access to pro-bono legal services. For art institutions that are publicly funded, filing a lawsuit against their own funders is a tricky business, if possible at all. In fact, many decisions to limit artistic freedom are probably made with a certain degree of ease relying on the fact that artists cannot afford to take action.

Artists and their organisations could most probably contribute with monitoring and documenting cases on the national, regional or local levels. However, monitoring is only a part of a possible way forward, but hardly a meaningful primary course of action.

An efficient approach to stop or slow down the deterioration of artistic freedom implies impact on decision making in the first place. Artists can contribute to such an approach if relevant tools or mechanisms are provided. At the end of the day, artists should invest most of their time making art rather than dealing with jurisdictions and databases.

4. The way forward: creating a culture of informed dialogue

Based on current reporting, it is obvious that what needs to be influenced in the first place is decision making at the national, regional or local levels. Court litigation should be reserved for extreme and/or difficult cases. Better decision-making can effectively be achieved through an inclusive dialogue; court litigation and other confrontational actions should normally be a result of other possibilities being exhausted.

In our opinion the most efficient, inclusive way forward at this stage is to bring the world of arts, the world of legal expertise and the world of decision makers together for a structured dialogue based on our common legal norms and values.

The strength of such an approach lies in the strengthening of those same common values of the European project including the rule of law, access to rights as well as pluralism, non-discrimination, tolerance and justice. It is also the most cost-efficient approach.

The main obstacle for this course of action is that artists, jurists and decision makers have different approaches, speak different languages and have different understandings of the issues at stake. Guidelines are thus needed to make such a dialogue possible. In the following we outline the main characteristics of the guidelines needed.

A proposal: a handbook with guidelines for structuring the dialogue

The world of arts often challenges the common way legal rules are interpreted and applied. There are no simple answers to complex questions, but guidance can be found in the common principles of European law as well as available case law (12).

We see the EU as the part that has the legitimacy to present a handbook on guidelines for the protection for artistic freedom as a European value. We imagine a practical handbook that outlines in an accessible way the available protection for artistic expression as well as the lawfulness of possible limitations on artistic freedom.

Such a handbook has several added values such as:

- For the world of arts: strengthening access to rights and access to justice
- For the world of law: strengthening the understanding of artistic practice
- For the world of policy: strengthening awareness of the legality of the decisions made and the consequences for artists and audiences
- For the EU: strengthening the possibility to design a uniform monitoring across the EU with comparability needed for that

Attached is draft (annex 1) of a possible list of contents that we have worked out, inspired by the Handbook on European non-discrimination law produced by the European Union Agency for Fundamental Rights (13).

Another possible way to approach the issue is to start with a mapping study to understand the different national realities in the member states. Such a study could outline available explicit protection in the national legislations of the member states as well as a mapping of available national case law. This is essential as artistic expression is often not mentioned explicitly in national legislation, making the understanding of national reality difficult. Such a mapping study could also provide for a first step for monitoring by artist organisations on the national level with a possibility for some kind of comparability across the union. Attached is a draft (annex 2) of the possible list of contents for a mapping study.

Relevant legal protection

EU law

ECHR

UN conventions

SOURCES:

- (1) Source: <https://www.dw.com/en/as-the-far-right-culture-war-escalates-concerns-grow/a-48992958>
- (2) Source: <https://www.aljazeera.com/news/2020/01/culture-wars-art-world-reflects-polands-political-divide-200116085429825.html>
- (3) Source: <https://www.dw.com/en/inside-europe-swedes-resist-solvesborgs-culture-war/av-51080113>
- (4) Source: <https://news.artnet.com/art-world/viktor-orban-ludwig-museum-1544659>
- (5) Source: <https://freemuse.org/news/the-security-creativity-tolerance-and-their-co-existence-the-new-european-agenda-on-freedom-of-artistic-expression/>
- (6) Source: https://cultureactioneurope.org/files/2018/02/CAE_The-Value-and-Values-of-Culture_Full.pdf
- (7) Source: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF>
- (8) Source: Culture Action Europe (2018) The value and values of culture. <https://cultureactioneurope.org/knowledge/the-value-and-values-of-culture/>
- (9) Source: <https://edoc.coe.int/en/fundamental-freedoms/7425-protecting-the-right-to-freedom-of-expression-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners.html>
- (10) Source: Freemuse report, pp. 24ff.
- (11) Source: <https://op.europa.eu/en/publication-detail/-/publication/784b02a4-a1f2-11e9-9d01-01aa75ed71a1/language-en>
- (12) Source: <https://edoc.coe.int/en/fundamental-freedoms/7425-protecting-the-right-to-freedom-of-expression-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners.html>
- (13) Source: <https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition>

ABOUT CULTURE ACTION EUROPE:

Culture Action Europe (CAE) is the major European network of cultural networks, organisations, artists, activists, academics and policymakers. CAE is the first port of call for informed opinion and debate about arts and cultural policy in the EU. As the only intersectoral network, it brings together all practices in culture, from the performing arts to literature, the visual arts, design and cross-arts initiatives, to community centres and activist groups.

CAE believes in the value and values of culture and its contribution to the development of sustainable and inclusive societies.

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