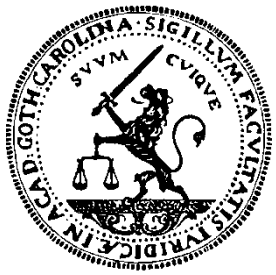

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FREEDOM OF ARTISTIC EXPRESSION – AN ANALYSIS OF PRACTICES BETWEEN ESTONIA AND FINLAND

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STATUTORY DECLARATION

I hereby declare in lieu of an oath that I have completed the present master's thesis entitled independently and without illegitimate assistance from third parties. I have used no other than the specified sources and aids. In case that the thesis is additionally submitted in an electronic format, I declare that the written and electronic versions are fully identical. The thesis has not been submitted to any examination body in this, or similar, form.

Lund, 15/06/2019

Kersti Ahlgren

States, and the governmental apparatus through which they operate, participate in the production and distribution of art within their borders. Legislatures and executives make laws, courts interpret them, and bureaucrats administer them. Artists, audiences, suppliers, distributors—all the varied personnel who cooperate in the production and consumption of works of art—act within the framework provided by those laws. Because states have a monopoly over making laws within their own borders (although not over the making of rules privately agreed to in smaller groups, so long as those rules do not violate any laws), the state always plays some role in the making of art works.

– Howard S. Becker, *Art Worlds* –
1982

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Abstract

Artistic freedom is recognised as a universal human right and a constitutional right in most national laws. Under the auspices of article 10 of the ECHR, the right to freedom of expression guarantees everyone a right to hold opinions and to receive and impart information and ideas without interference by public authority, subject to the limitation clauses outlined in Article 10(2). Whilst the text of the article makes no explicit reference to artistic expression, the ECtHR has, in its interpretations, recognized that artistic expression does indeed fall within the ambit of article 10's protection. In majority of decisions of the ECtHR, the Court has reiterated that freedom of expression "constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual." Yet, despite a number of eloquent statements about the importance of the freedom of expression in a modern democracy, in practice, art and artistic freedom are one of the least discussed liberties in law. Given the non-specified and non-differentiated articulation of the right to freedom of expression enounced in the text of the article 10 of the ECHR as well as national legislations, the case law that attempts to interpret the law, further creates uncertain outcomes. When the concretization of the abstract freedom is left unspecified in the legislative phase in hope, that it will be clarified through the case law, and considering, that there are not many judgements where the fundamental rights-sensitive approach to the restrictive legislation has been applied, the clarity is still not established. This has led to a situation, where the views taken by the courts, often tend to side with the party seeking to restrict art, which in turn is a cause for doctrinal concern. Thus, from the viewpoint of human rights, art, artist's rights and artistic freedom in general, the biggest concern is the legal uncertainty surrounding the interpretations of restrictive legislation on artistic expression and the ability to materialize it.

The aim of the presented thesis is to raise discussion concerning the legal status of the freedom of artistic expression at European level as well as at a national level and to explore the efficiency of its protection. The fundamental rights, the reference point of the analysis, are used to examine how artistic expression is protected and prohibited by legal regulations and its interpretations.

Keywords: freedom of expression, artistic freedom, literary freedom, margin of appreciation, article 10, European Convention on Human Rights, European Court of Human Rights

Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
UK	United Kingdom
UN	United Nations
U.S.	United States

I. Introduction

1.1 Background

The idea that our thoughts are free was expressed as early as in antiquity.[1] Indeed, thoughts, as mere flow of ideas, have no boundaries. Only after these thoughts are expressed in a tangible form, the question of boundaries arises. In the context of artistic expression, limiting creative work is not a recent one. For centuries, the limitations have concerned both the ones who create, and the ones that hold power – artists have been subjected to repressions, prohibitions and prosecutions when art, which reflect human value, clashes with the values of those who control the public sphere. Historically, most notable clashes took place during the Renaissance, when humanist ideas that emphasized the value of human beings, critical thinking, evidence and rationalism were valued over dogma and superstition. Those radical ideas threatened the status of the church which led to censorships and prohibitions of any depiction that the clergy considered to be inappropriate. Later, during the time of the Inquisition, a Spanish artist Goya was tried for his painting *Nude Maja*, for it to be "indecent and prejudicial to the public good," although the controversy of the painting was probably more related to the fact that it was in the private collection of an unpopular politician, and the trial driven by a political motive. In the second half of the 19th century, the use of new techniques was also used as a ground to limit art – impressionists, who had introduced a different approach to colours and light and portrayed parts of society, such as famine, executions, vulgarity, and showcased lower-class individuals, including prostitutes and peasants in a way the aristocracy did not want to see, were banned for example, from the exposition in the Salon de Paris. Among those rejected were Manet and Cezanne, some of the greatest names in art history, who would pave the way for the Modernist groups of the 20th century, one of the most radical cultural movements in art history; Cubism, Futurism, Post-Impressionism, Surrealism, Expressionism and Constructivism, just to mention a few.[2] Today, when discussing the limits of art, we again turn to controversial art and artists like Ai Weiwei, Banksy, Pyotr Pavlensky, the Guerrilla Girls and many others who address oppression, violence, injustice, and inequalities, and challenge the traditional hierarchies imposed by those in power. They continue testing today's concept of artistic freedom – a freedom to imagine, create and distribute diverse cultural expressions free of governmental censorship, political interference or the pressures of non-state actors, in practice.

[1] *Liberae sunt enim nostrae cogitations* – Cicero, 106-43 BC
[2] E. Robert, Can We Limit Art? 2018

1.2 Purpose

Freedom of expression, including artistic expression, is recognised as a universal human right in several international instruments,[3] and is guaranteed as constitutional right in most national laws. The core purpose of this right is to create the space for the exchange of ideas in the arts, literature, academia, politics, religion and science – the space, where the rights of artists to freely express themselves, and the right of others freely access these works, are guaranteed. Since art is created and consumed in the society – a sphere regulated by law, artistic expression can be restricted[4] if the expression is not in balance with the rights of others, such as the right to respect for private life, conscience and religion, national security, public health or morals.[5] When conflict between rights occur, it is the role of the courts to evaluate whether there are justifications for limitations of artistic expression when seeking the balance between the rights in question, in order to establish the pre-eminence of one right over the other – the balance of the conflicting interests, one of which is artistic freedom, takes into account the importance of other freedom. Thus, laws and interpretations of laws determine the balance between right to artistic expression and situations in which this right can be justifiably limited as is necessary and proportionate in a democratic society, so that these restrictions do not put the right itself in jeopardy.[6]

A key question that surrounds the balancing, however – the one that queries, how effective is the legal protection of artistic expression, the one that guarantees the space where artistic rights are freely expressed and accessed to – is the one that drives this thesis and seeks to respond to it from the following notion.

While the freedom of expression is recognised as fundamental human right and its significance to artistic freedom acknowledged, the inter-relationship of art and law remains inconsistent and imprecise, or as British lawyer Paul Kearns states, the way art is treated by law is "on the whole unsatisfactory".[7] Kearns sees that the concerns regarding the legal regulation of the arts

[3] UDHR (art. 19), ICCPR (art. 19), ECHR (art. 10)
[4] For example, libel, slander, obscenity, pornography, sedition, incitement, classified information, IP violations, the right to privacy, the right to be forgotten, public security among others
[5] For example, libel, slander, obscenity, pornography, sedition, incitement, classified information, IP violations, the right to privacy, the right to be forgotten, public security among others
[6] For example, Human Rights Committee has noted that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. "-General Comment 34 at para 21
[7] Paul Kearns, The legal concept of art, Oxford: Hart Publishing, 1998, p. 176

universally, doctrinally and theoretically are primarily derived from the fact that art and law are incompatible categories in terms of their basic ontologies.[8]

In practice, art attracts legal attention infrequently, but when it does, the legal measures that are applied to art depend heavily on context, objective, and the prevailing values – all of which, are constantly shifting. This is particularly so in situations where art, especially controversial art, is interpreted and measured in connection with legal matters that involve aspects of morality, conscience or national security. At a national level, while assessing artistic expression related cases, the contracting states of the ECHR are granted a certain margin of appreciation. The margin of appreciation is in fact wide when morality is in issue.[9] Through this broad discretion, authorities of the contracting states determine how domestic courts interpret and formulate legal rules regarding artistic freedom, which inevitably reflects local-moral standards. The practice is further bolstered in the European Court of Human Rights (referred to hereinafter as the ECtHR) where the court tends to protect moral concerns, political speech and other matters, that fall within the principle of subsidiarity, over artistic freedom. In fact, in all cases where the Court weighted artistic freedom against the morality laws of the relevant contracting state, artistic freedom has lost.[10] This arrangement is arguably a circumvention of responsibility by the ECtHR that undermines its important prerogative to decide through its own reasoning and its own interpretation of moral justice. Consequently, without principled guidelines for freedom of artistic expression with established supra-moral understanding, this system enables a situation where the case-law continues to be formed in a piecemeal fashion and inconsistently. From the human rights point of view, this is not insignificant. It is of utmost importance that artistic expression as a specific category, in need of defending against countervailing pressures, and as a fundamental human right, is *de facto* protected. Both at a national level and at European level.

Against this background, this thesis aims to take a closer look at this under-researched topic and examine the legal concept of art in the context where: first, the laws, regulating artistic expression, are often inconsistently understood both by practitioners and by those enforcing the law; secondly, the law itself can be ambiguous and contradictory, because the rights that underpin the laws are fraught with qualifications that can potentially undermine artistic free

[8] P. Kearns. Freedom of Artistic Expression. – Oxford/Portland: Hart Publishing 2013, p. 117
[9] States are granted a wider discretion when assessing morality-related matters within their own jurisdiction because those matters do not have an 'objective' character according to the ECtHR – P. Kearns
[10] P. Kearns, Freedom of Artistic Expression, 2013, p. 8

expression; and thirdly, how the principles of proportionality and necessity are applied in the jurisprudence of the ECtHR in relation to artistic expression with specific scrutiny of the national practices of Estonia and Finland – neighbouring countries with similar mindset but different legal systems and interpretational approaches.

Estonia, since the restoration of its independence in 1991 and having a strong historical, economic and cultural connection with its Nordic neighbours, aims to manifest itself as part of a Nordic country. Compared to the young country Estonia, Finland, on the other hand, who has shared a mutual history with Sweden for over 600 years, has had media freedom guaranteed already for 250 years since the Swedish parliament passed the world's first Freedom of the Press Act. The act abolished the censorship of printed publications, guaranteed access to official documents and the right to engage in political debate. In addition, the act has made a fundamental contribution to the development of the modern Nordic societies – the kind Estonia wants to be identified with. In both countries, the freedom of expression is safeguarded by the constitution. Yet, there are differences in interpretational approaches. This became particularly clear in 2016, when an Estonian writer Kaur Kender was formally charged with production of child pornography after publishing a short story, which depicts "graphic descriptions" of sexual violence against children by an unnamed protagonist. The novella, entitled "Untitled-12" was written in the US and published on an UK server. Kender was acquitted in 2017, but the prosecution of a well-known writer provoked an outrage not only among much of the Estonian and international[11] literary scene but sparked a debate also among legal scholars in and outside of Estonia where the views regarding the case were polarized. These polarized views indicate that a more comprehensive analysis of the legal concept of art and artistic freedom in these countries is justified. Thus, the purpose of this thesis is to analyse European, Estonian and Finnish national practices of artistic expression, and through that further address the lacuna in general principled guidelines for freedom of artistic expression.

1.3 Research question

How effectively is freedom of artistic expression protected under the current legal framework and existing case law, and how are the principles of proportionality and necessity applied in the jurisprudence of the ECtHR in relation to artistic freedom with specific scrutiny of the national practices of Estonia and Finland.

[11] https://news.err.ee/118569/finnish-pen-club-kender-s-u12-is-a-grotesque-thriller-not-child-porn (18.4.2019)

1.4 Definitions and delimitations

This thesis examines artist's rights and artistic expression from the human rights perspective. The thesis does not address the protection provided under intellectual property laws. Regarding the notion of art, which includes *inter alia* visual art, literature and films, the focus of this thesis is primarily on literary works, however, other forms of art are discussed when relevant. In addition, the case law analysis is limited to morality-related cases mainly in European context.

1.5 Structure

The thesis is divided into six chapters. The thesis begins, in chapter two by establishing the existing legal framework that structures the artistic expression at European level – under the European Convention of Human Rights (referred to hereinafter as Convention or ECHR). The first part of the chapter briefly explains the essence of the right afforded in article 10 as well as the concept of artistic freedom. The chapter then examines the limitations of the right with a special focus on the principles of margin of appreciation and proportionality. Chapter three is dedicated to the relevant case law of the ECtHR. Chapter four examines legal framework and practices of the two countries with a focus on how the legislation that regulates artistic freedom is implemented at a national level. The purpose of this analysis is to assess how efficient is the *de facto* protection of artistic freedom in Estonia and Finland, considering that the responsibility to enforce the text of the ECHR as developed by the ECtHR's jurisprudence lies with the contracting states. In connection with the case of Kender, also English and U.S jurisprudence will be discussed in order to provide an additional comparison to the concept of artistic freedom. Drawing from experiences of national practices and based on the findings, chapter six concludes the analysis by theoretically constructing the concept of artistic freedom, followed by suggestions on how to possibly rethink the concept so that artistic freedom, as a fundamental human right, is *de facto* protected – both at national and supra-national level.

1.6 Methodology

This thesis employs comparative and critical legal analysis. The sources used for this thesis are the relevant provisions of the ECHR and national legislations, international and domestic jurisprudence, statements of opinion, as well as relevant legal doctrines and legal literature.

II. Legal framework of the right to freedom of artistic expression

2.1. Conceptual issues relating to artistic freedom

In free and democratic societies, art, artist's rights and artistic expression are, in general terms, highly cherished for their intrinsic value: it is acknowledged that art and the freedom to artistic expression impact the economy, education, health and wellbeing of societies, and is a strategic national resource with a measurable economic and emotional value.[12] Artistic freedom is seen as a pillar of freedom of expression and a cornerstone of participatory democracy.[13] When these pillars are weakened, artistic freedom is usually one of the first one to be attacked. But also defended. Exactly how intensely artistic freedom is defended and *de facto* protected, shows the level and quality of freedom in the society – it is a litmus test, both for societies, and on a broader scale. Recent data shows that artistic expression is increasingly under threat[14] – a new global trend of silencing artists and censoring artistic expression concerns also traditionally democratic West, including Europe.[15] The reasons behind this alarming trend are manifold, mostly political, but the way art and artistic freedom is viewed in law continues being a relevant and timely concern.

As mentioned in the introduction, art meets law infrequently, but when it does, law itself and legal measures that are applied to it depend heavily on context, objective, and prevailing values – all of which are constantly shifting. In such circumstances, the courts of the contracting states must assess art and artistic freedom-related matters, particularly the kinds that are not just meritorious, through the lens of their local-moral standards, the provisions that are comparatively imprecise, and then seek balance between the contrasting interests through the categorizations that lack clearly defined parameters.[16] Moreover, while all parties have individual approaches to the issues that are sensitive and require specific and sophisticated knowledge about art, it might suggest that the approach with which these cases, especially the

[12] Arts Council England - https://www.artscouncil.org.uk/exploring-value-arts-and-culture/value-arts-and-culture-people-and-society (7.5.2019)
[13] UNESCO, World Press Freedom Day Declaration 2017
[14] Freemuse, The state of artistic freedom 2018
[15] The US (31 banned art works or artists in 2017), Poland (theatre is a prime target for violations as it became a platform for challenging current ideologies since the nationalist-Catholic Law and Justice Party took power in 2015) and Spain (13 imprisonments – nr. 1 country in violating the freedom of musical expression in 2017) - being among those countries that have exhibited alarming developments in how artists and their freedom of artistic expression has been treated. Freemuse, The state of artistic freedom 2018, p 52 (Poland), p 53 (USA), p 55 (Spain), https://freemuse.org/wp-content/uploads/2018/05/Freemuse-The-state-of-artistic-freedom-2018-online-version.pdf (7.5.2019)
[16] The kind that is present in copyright context where the ascertainment of artistic character in a given object is necessary.

ones involving controversial content, are decided on an *ad hoc*-basis, if not "I know it when I see it-basis"[17] which in turn might lead to unjust and subjective outcomes. Particularly when interests involved, have prior judicial preferences.

2.2. Article 10 of the ECHR

The right to freedom of expression is recognised and protected as a universal human right in several international human rights instruments.[18] In the European context, the right to freedom of expression is protected under article 10 of the ECHR[19] – arguably the most important source of artistic rights in the human rights field. The article is structured in two paragraphs: the first one defines the protected freedoms. The second one sets out the limitations on that freedom.

2.2.1. Article 10(1)

The first paragraph sets out, in comparatively general terms, the right of freedom of expression, and defines several components of said freedom, including the right to freely hold and express opinions, views, ideas and to seek, receive and impart information regardless of frontiers. The free expression 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.[20] In that sense, the freedom of expression as a whole has a significant broader relevance, which has been also repeatedly emphasised in the jurisprudence of the ECtHR.[21]

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[17] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that" - *Jacobellis v. Ohio*, *378 US 184* - Supreme Court 1964, Justice Stewart's opinion para. 197

[18] Supra n. 3

[19] Article 10 provides that

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[20] *Handyside v. the United Kingdom* 1976, para. 49; See also Council of Europe, Freedom of expression and information, Explanatory Memorandum

[21] *Handyside* is one of the most significant judgments on freedom of expression – a case that identified the scope of the freedom – "Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information and ideas' that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broad mindedness without which there is no 'democratic society'." – para 49, *Ibid*.

Out of the three forms of expression, the freedom to hold opinions is a fundamental freedom as it is a prior condition of other freedoms guaranteed by paragraph one. It enjoys an almost absolute protection, as the possible restrictions set forth in paragraph two are inapplicable.[22]

Freedom to impart information and ideas are the central forms of freedom for the political and democratic structure of a state – it allows *inter alia* the criticism of the government, guarantees the freedom of press as well as commercial speech which is also protected under Article 10.

2.2.1.1. Types of expression

The types of expression, protected under Article 10, include both spoken and written words, the display or dissemination of pictures,[23] images,[24] cultural heritage[25] or communicating political messages via action, whether by taking part in a demonstration, protest or just being present somewhere in order to exercise the right under article 10.[26] In addition to the content, article 10 also protects the form in which the information and ideas are expressed. Those are *inter alia*: printed documents,[27] TV and radio broadcasts,[28] paintings,[29] films,[30] poetry,[31] novels[32] and electronic information systems. It also extends to the distribution of leaflets,[33] banners,[34] the exhibition of paintings[35] and displaying of symbols[36] – all of which fall within the spectrum of forms of expression within the meaning of Article 10 of the Convention.

[22] D. Bychawska-Siniarska, Protecting the right to freedom of expression under the European Convention of human rights, A handbook for legal practitioners, Council of Europe, 2017, p. 13 (hereinafter Handbook)
[23] *Müller and Others v. Switzerland*, 1988
[24] *Chorherr v. Austria*, 1993
[25] *Khurshid Mustafa and Tarzibachi v. Sweden*, 2008 – The case concerned the eviction of the applicants, Swedish nationals of Iraqi origin, on account of their refusal to remove a satellite dish that enabled them to receive TV programmes in their native language. The ECtHR concluded that the interference with the applicants' right to freedom of information had not been "necessary in a democratic society" and that Sweden had failed in its positive obligation to protect the right of the applicants to receive information.
[26] *Steel and others v United Kingdom* 1998 - In *Steel and others v United Kingdom*, the high level of protection afforded to the press under Article 10 was extended also to small and informal campaign groups such as London Greenpeace who must be able to carry their activities effectively as it is necessary in a democratic society to enable such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.
[27] *Handyside v. the United Kingdom*, 1976
[28] *Groppera Radio AG and Others v. Switzerland*, 1990
[29] *Müller and Others v. Switzerland*, 1988
[30] *Otto-Preminger-Institut v. Austria*, 1994
[31] *Karataş v. Turkey*, 1999
[32] *Akdaş v. Turkey*, 2010
[33] *Chorherr v Austria*, 1993
[34] *X v Germany*, 1982– The case concerned anti-Semitic leaflets
[35] *Oberschlick v. Austria*, 1991, para. 57
[36] *Vajnai v. Hungary*, 2008 – The applicant's decision to wear a red star in public must be regarded as his way of expressing his political views. The display of testamentary symbols falls within the ambit of Article 10.

States' right to impose limited restrictions on freedom of expression to protect overriding interests under article 10 will be examined in detail later, however, in this context it should be noted that beyond this, there are some cases where speech does not warrant even *prima facie* protection under article 10. Namely, article 17 of the Convention states that any activity or act which is aimed at the destruction of the convention's rights and freedoms..." is clearly prohibited under article 17.[37] It follows, that the only content-based restrictions that the ECtHR has applied have concerned ideas promoting anti-democratic sentiment,[38] hate speech[39] such as racism[40], Nazi ideology, denial of the holocaust and the Armenian genocide, and incitement to hatred and racial discrimination.[41] Hence, expressive activity that falls within the scope of article 17 is not protected by article 10 and in such cases the Court does not need to analyse whether the limitation applied is justified.[42] The protection will be simply removed.

In the context of artistic freedom, it is a freedom that is not explicitly mentioned in the rubric of freedom of expression provision. The Convention and the components of the right to freedom of expression, set out in paragraph one, essentially protect freedom of speech in a very broad and undifferentiated way.[43] Essentially, artistic freedom falls into the broad category of freedom of expression and is the only implicitly recognised category of rights under the article 10 provision that regulates the protection of artistic freedom.[44]

Out of the types of artistic expression, satirical expression has been granted special protection by the ECtHR.[45] The court has stated, that satire[46] is "...a form of artistic expression and social

[37] Art. 17, ECHR
[38] *Purcell v Ireland*, 1991 – The case concerned an expression in support of terrorists
[39] *Glimmerveen And Hagenbeek v The Netherlands*, 1979
[40] In racist speech context, art. 17 is dominated by incidents involving Jews, see *Pavel Ivanov v. Russia*, 2007
[41] A. Sharland, Focus on Article 10 of the ECHR, 14 Jud. Rev. 59 (2009), page 60, para. 7
[42] T. Mendel, A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights, p. 10
[43] "Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas "in the form of art" - *Müller and Others v. Switzerland*, judgment, 1988, para 27
[44] P. Kearns, "Artistic Liberty and the European Court of Human Rights." Freedom of Artistic Expression: Essays on Culture and Legal Censure. London: Hart Publishing, 2013. 150–183, p. 162; See also *Müller and Others v. Switzerland*, *Ibid*., para 27- "Admittedly, Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression."
[45] *Eon v. France*, 2013; *Kuliś and Różycki v. Poland*, 2009; *Alves da Silva v. Portugal*, 2009
[46] Satire is a particular genre of literature and performing arts which entities provides a form for individuals to criticize individuals in power or government more broadly. In this type of production, the individual or entity's vices or shortcomings may be exaggerated for comedic relief and as a form of public shaming. When it is aimed at political issues, it can be construed as political speech which, for example in the U.S. context is the most protected form of speech under the First Amendment. (in HG.org: Freedom of Speech – Why Satire is Protected)

comment which, by exaggerating and distorting reality, was both intentionally provocative and political in nature. As such, restrictions on it should be examined with particular care."[47] It follows, that the means for the production and communication of information and ideas are also protected under Article 10. As a comparison, in the U.S., satirical statements are often used to tackle social and political issues. They are critical, offensive and even intentionally injurious. However, their ability to ridicule for the sake of expressing ideas qualifies them to be considered political speech. The latter, in turn, has been the most protected type of expression since the First Amendment was enacted in 1791.[48]

The ECtHR has introduced also another type of expression that enjoys protection under Article 10 – the concept of "European literary heritage" – introduced in the case of *Akdaş v. Turkey.*[49] This form of expression is particularly interesting from the perspective of this thesis since creative texts, particularly the ones that contain controversial material, as in the case of *Kender* are in the focus of this thesis and because both cases have similar elements. The case concerned an erotic novel, entitled *Les onze mille verges*, which was written by the French writer Guillaume Apollinaire and was first published in France in 1907. The applicant was convicted under the Criminal Code "for publishing obscene or immoral material liable to arouse and exploit sexual desire among the population" when he released a translation of the book, which contained graphic descriptions of sadomasochism, paedophilia, necrophilia and vampirism amongst others. The applicant argued that the book was fiction, that it used techniques such as exaggeration and metaphor, that it contained no violent overtones "and that the humorous and exaggerated nature of the text was more likely to extinguish sexual desire". The Turkish courts ordered the seizure and destruction of all copies. In addition, the publisher was given a fine that may be converted into imprisonment.[50] An appeal court later revoked the destruction order but upheld the conviction.

The ECtHR reiterated its well-established jurisprudence regarding margin of appreciation by stating that morals may vary according to time and place, even within the same State, however, the national institutions can best assess what is morally acceptable, thus, justifying why states are granted a wide margin of appreciation in moral-related matters. The Court acknowledged that there had been an interference, that the latter had been prescribed by law and that it had

[47] *Vereinigung Bildender Künstler v. Austria*, 2007
[48] L. K. Treiger, Protecting Satire against Libel Claims: A New Reading of the First Amendment's Opinion Privilege, The Yale Law Journal Vol. 98, No. 6, 1989, pp. 1215-1234
[49] *Akdaş v. Turkey*, 2010 (The judgment is available only in French)
[50] Literary Heritage Judgment - A Novel by Apollinaire, ECHR Blog

pursued a legitimate aim, namely the protection of morals. The Court stated that also those who promoted artistic works had "duties and responsibilities", the scope of which depended on the context, namely on the situation and the means used. The Court did not examine the content of the book or the reasonability of the measures taken by the national authorities in protecting morality. Instead, the Court introduced a new set of criteria for the granting of protection: the author's international reputation (globally renowned, although Apollinaire never claimed authorship, fearing prosecution under France's public obscenity statute); the date of the first publication (the book had been published in France almost a century ago, but was in fact banned in France until 1970); the novel had been published in a large number of countries and various languages; publication of the novel in book form and on the internet; and the novel had gained literary acclaim through publication in "La Pléiade" – a prestigious collection in France (even though "La Pléiade", which included classics of world literature, had an emphasis on works that were originally written in French.[51]). Based on these factors and acknowledging the cultural, historical and religious particularities of the Contracting States, namely the margin of appreciation, could not prevent the access of the public in a particular language, in this case Turkish, to a work belonging to the European literary heritage.[52] Consequently, the seizure of the novel and the conviction of the publisher "hindered public access to a work belonging to the European literary heritage" and the Court found that the applicant's freedom of expression had been violated. In creating a new form of expression in *Akdaş v. Turkey*, the Court did not specify what exactly is meant by Europe's common heritage and how the concept of Europe's common heritage relates to the cases, for example where the similar content is produced by a less known writer. A more detailed view on the matter would have brought much needed clarity to literary expression where, as shown later, the interpretation is highly fragmented.

2.2.1.2.Categories of expression

The ECtHR has informally distinguished three main categories of expression or freedoms of speech – political, artistic, and commercial.[53] Following the example of the U.S. law and jurisprudence, also at European level some freedoms are prioritised over others in a hierarchy

[51] M. Burbergs, What is the European literary heritage? Strasbourg Observers, 2010
[52] *Akdaş v. Turkey.* Supra n. 31, para. 30
[53] P. Kearns, A Hidden Minority: A Comparative Study of the Rights of Artists in England, France, and the USA, 2013, p. 260

of protection, favouring political expression[54], followed by artistic expression, and leaving commercial expression last.[55] In the U.S. Supreme Court[56] as well as in the House of Lords,[57] commercial speech enjoys less protection than other traditionally protected categories such as political or artistic expression.[58] However, even though categorisation can be justified for several reasons, as it will be proposed in the next passage, it should be acknowledged that any action or process of placing something, especially very context-dependent, into pre-determined form, can lead to an approach where a particular expression falls within more than one category. In these situations, too rigidly applied categorisation can have adverse effects.

In connection with artistic freedom, this thesis argues in support of Kearns' position[59], which substantively favours the recognition of art as a specific category and the judicial acknowledgment of the autonomy of art, as it would benefit artistic expression in defending itself against other conflicting rights from a more solid and definable stand. In other words, what would be important to achieve is a position where art is afforded legal treatment compatible with its essential characteristics. However, and keeping in mind that legal measures that are applied to art depend on context and other subjective factors, it should be also acknowledged, that operating through predetermined categorization mechanism carries certain risks that could outweigh the benefits of such categorization. For example, when free expression or speech conflicts with other contrasting interests and the case is analysed through the specific system of prior categorization and, in addition analysed without paying close attention to the precise context and other relevant factors in which the expression or speech appeared, then the expression in question could be interpreted either too generally, imprecisely or inaccurately. This in turn could potentially result in an approach where a form of expression is labelled incorrectly to be something that it is not and put into a category where it should not belong. This could affect negatively the level of protection that would otherwise be afforded to other

[54] Over the years the Strasbourg Court has placed enormous emphasis on the protection of political speech and on matters of public interest for enabling the public space available for free and open discussion integral to democracy. - Patrick Wachsmann, Participation, Communication, Pluralismi, 13 L'Actualite Juridique Droit Adminitratif (Special Issue 165), 1998; see also "There is little scope … for restrictions on political speech or debates on questions of public interest." - *Dichand and others v. Austria*, 2002, para. 38

[55] Colin Munro, 'The Value of Commercial Speech', Vol. 62, 2003 Cambridge Law Journal, pp. 134-158

[56] M. H. Redish, 'Commercial speech and the values of free expression', Policy Analysis, Cato Institute, June 2017; See also the statement of Justice Black in *Mills v. State of Alabama*: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."

[57] "Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts." - Lord Nicholls in *R v BBC*, 2003 UKHL 23, 2004, 1 AC 185 at 224

[58] The commercial speech doctrine has originally been developed under the First Amendment case law.

[59] Supra n. 31, p. 151

legitimate forms of expression. In practice, this most commonly happens in the context of artistic expression that has a political dimension. In these cases, art with political content has been given a stronger right to exist in Strasbourg's jurisprudence. This is problematic for several reasons, but from the perspective of this thesis, the most adverse outcome of this position is that it disfavours other, in this case non-political art, while the protection should be guaranteed for all art in itself, regardless of its dimensions or attached features which the Court's decides to favour.

In short, when applying this threefold classification, the care should be taken not to apply it too rigidly, because the expressions at issue may overlap and fall within more than one category. For example, in the case of *Hertel v Switzerland*[60], the ECtHR dealt with the application of the principle of the freedom of expression, the right to receive information on unfair competition and intellectual property law.[61] The Court eventually held that the expression was not purely commercial but because it was a matter of general public concern the use of the margin of appreciation was reduced.[62] The case illustrates how the Court reasons when several categories of expression are involved. In *Hertel*, expression on matters of general public concern is defined expansively, granting the general public concern-matters the protection of political expression, which the Court attaches the highest importance to and considers worthy of strong protection.[63] Article 10 thus, extends to cover commercial expression. In comparison with the U.S. Supreme Court's case law, which provides near absolute protection for truthful[64] and accurate

[60] *Hertel v. Switzerland*, 1998

[61] The applicant carried out a research on the effects of consumption of food prepared in microwave ovens with the assistance of Professor Blanc, a technical advisor to the Federal Institute for Technology of Lausanne. He sent the findings to the Journal Franz Weber, without consulting Blanc, indicating that microwave ovens were "more harmful than the Dachau gas chambers" and could pose a greater risk to health than food cooked by conventional means. On the cover of the issue containing Blanc and Hertel's report, an image of the Reaper holding out one hand towards a microwave oven appeared, with the caption, "The danger of microwaves: scientific proof." Soon Blanc distanced himself from the statements made by Hertel and interpretations made in the magazine. Following an application lodged by the Swiss Association of Manufacturers and Suppliers, the Commercial Court issued an injunction under the Unfair Competition Act, prohibiting the applicant from making public statements that food cooked in microwave ovens was a danger to health in that it was carcinogenic. Other courts confirmed the injunction. The Federal Court held that the applicant was prohibited only from making statements to the general public whereby dangerous effects of microwaved food were presented as scientifically proved without mention of current differences of opinion. It also prohibited the applicant from using in publications or public lectures any symbols of death. Hertel was not, however, prevented from taking part in the debate on the effects on health of the consumption of food cooked in microwave ovens and that he was free to express his views, provided that he did not do so in statements addressed to the general public in such a way as to convey the false impression that they reflected scientifically proved findings.

[62] A. Kamperman Sanders, Unfair Competition Law and the European Court of Human Rights: The Case of Hertel v. Switzerland and Beyond, 10 Fordham Intell. Prop. Media & Ent. L.J. 305, 1999

[63] A. Sharland, Supra n. 35

[64] *Ibid*, p. 65, „The jurisprudence of the United States, but not of the European Court, has accepted that one of the justifications for the protection of expression is the pursuit of truth (including truth as to the quality of various products or services)."

commercial speech, although some restrictions are permitted to services such as alcohol, tobacco and gambling, whereas at an European level, the grounds for restrictions have mainly concerned the promotion of market competition,[65] the regulation of advertising standards[66] and commercial statements that concern public health.[67]

As mentioned above, artistic expression has been afforded less protection in Strasbourg. As a rule, in such cases, but particularly in artistic expression related cases, a wider margin of appreciation is granted to the national courts, particularly to expressions which could potentially offend religious[68] or moral sensibilities. The notion that states will enjoy a wider margin of appreciation in relation to moral standards is explicitly mentioned in *Handyside.*[69] This is justified by the specificity of the moral standards at a national level or even different regions within the same country. Thus, artistic freedom can be restricted by obscenity and blasphemy laws. Out of the last two, blasphemy law has witnessed the resurrection of its domestic and European juridical profile in the recent years which affects the way artistic expression is viewed in law, particularly how the former restricts the latter.[70] The restrictions will be examined next.

2.2.2. Article 10(2)

The main responsibility to protect rights lies with the contracting states[71] who enforce the text of the ECHR as developed by the ECtHR's jurisprudence. In connection with article 10, the complexity inherent in the right to freedom of expression, and to artistic freedom is reflected in the text of the entire article, but especially in the second paragraph.

Before considering the restrictions within the exercise of the right to freedom in detail, it is important to note that article 10 does not only prevent states from imposing restrictions on freedom of expression but impose a positive obligation on the state to facilitate the exercise of

[65] *Jacubowski v Germany*, 1994
[66] *Casado Coca v Spain*, 1994. The Court held that a ban on advertising by lawyers, even when truthful and accurate, was permissible in order to maintain confidence in the proper administration of justice and the dignity of the legal profession, para. 46
[67] *R (British American Tobacco and others) v Secretary of State for Health*, 2016, UK Supreme Court
[68] *Otto-Preminger-Institut v Austria*, 1994. The case concerned the seizure and confiscation of a film which, in the view of the Austrian authorities, was likely to offend religious feelings even though the film was shown only in private to members of a film club who had been fully informed of its theme and content.
[69] *Handyside*, Supra n. 26, paragraph 48. The case concerned a ban on The Little Red Schoolbook in England and Wales even though this book was widely available throughout Continental Europe, (in A. Sharland, Supra n. 35)
[70] Kearns, The End of Blasphemy Law: A 2008 Perspective, Supra n. 31 p 102
[71] "Article 1 of the Convention provides that the Contracting States "shall secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention"- *VgT Verein Gegen Tierfabriken v. Switzerland*, 2001, para. 79; "...it is primarily the task of national authorities to apply and interpret domestic law" - for example, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, para. 17

that right.[72] The extent of that obligation, however, has not been specified by the ECtHR.[73] It follows, that "in determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent throughout the Convention".[74] Regarding the interest of the individual and the horizontal effect of the freedom of speech, the Court has concluded, for example in *Fuentes Bobo v Spain*, that the doctrine of the state's positive obligation, in certain circumstances, extends to the framework of individual relations and imposes the obligation to protect the freedom of expression against interferences coming from private individuals.[75] The Court concluded that the domestic legislative provisions which had failed to afford a remedy constituted an interference with his freedom of expression in itself, of which the state was responsible.[76] Thus, the obligation can be both material and procedural.[77]

2.2.2.1. Duties and responsibilities

Article 10 is one of the two provisions of the ECHR that explicitly provides for "duties and responsibilities".[78] Substantively it includes formalities, conditions, restrictions and penalties, associated with the exercise of the right. The phrase refers to a special significance that can be expected of public officials,[79] that they would show restraint in exercising their freedom of expression where the authority is likely to be called in question.[80] The phrase was added into

[72] "Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11, sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be..."- *Plattform "Artzefir das Leben" v Austria*, 1988, para 32 (Although the case concerned art. 11, it is equally applicable to art. 10 because when assessing the interference with the freedom of expression, the Court uses the three-part test, which also covers articles 8, 9 and 11 of the ECHR).

[73] "The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. However, this obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities"-*VgT Verein Gegen Tierfabriken v. Switzerland* para. 81 Supra n 63

[74] *Ibid*., para. 81

[75] The Spanish government argued that, as a state, it could not be considered guilty of improper interference with Fuentes Bobo's freedom of expression because TVE was a private company and therefore, Spain could not be held responsible for his dismissal.

[76] *Fuentes Bobo v Spain*, 2000 (The judgment is available in French)

[77] *Ozgiir GUndem v. Turkey*, 2000, para. 71 (State's failure to protect a newspaper and investigate criminal activity against it)

[78] The other one is the equality of the rights and responsibilities of spouses in marriage in Article 5 Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984)

[79] Judiciary or military

[80] *Engel and others v. the Netherlands*, 1976. The case concerned a ban on the publication and distribution by soldiers criticising certain senior officers. The Court had to assess the legitimacy of the ban and concluded that "In these circumstances the Supreme Military Court may have had well-founded reasons for considering that they had attempted to undermine military discipline and that it was necessary for the prevention of disorder to impose the penalty inflicted.", para. 101

the Convention for two reasons: to take account of the distinctive identity of the freedom of speech, and to prevent the irresponsible and dangerous use of democracy.[81]

The phrase "duties and responsibilities" has not been interpreted to automatically limit the expression of individuals who belong to certain professional category. Rather, "[a]lthough it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 ...".[82] In sum, such restrictions may not have a general character, they must be limited to cover particular categories of information and specific categories of civil servants or only to some individuals belonging to such categories, and they must be temporary. Apart from that, the Court has not assessed the legitimacy of these context based special restrictions, even though another group, who receives a special, privileged protection, exist. Namely, and most obviously the media but also others who report in the public interest. This is so because of the eminent role held by the press as "purveyor of information and public watchdog"[83] over democratic society and for its contribution toward open debate. As a result, the Court has granted a significant protection under Article 10 to media activities[84] and the restrictions directed against press and other public interest channels tend to be scrutinised very closely.[85] Media freedom, however, is not absolute. The condition attached to this special protection is that "they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism".[86] Substantively this means that media activity is highly protected as long as their main duty – to provide accurate and reliable information – is carried out in accordance with professional journalistic standards.

2.2.2.2. Permissible restrictions under article 10(2)

When examining freedom of expression-related matters, the Court, according to its own view, is faced "not with a choice between two conflicting principles, but with a principle of freedom

[81] C. Pdkozdy, Les effets de la deuxi~me guerre mondiale dans lajurisprudence de la Cour Europdenne des Droits de 1 'Homme sur la libert6 d'expression, in L'histoire en droit international 365 (in J.-F. Flauss, The European Court of Human Rights and the Freedom of Expression, Volume 84, 2009)
[82] *Vogt v. Germany*, 1995, paragraph 53
[83] *Lingens v. Austria*,1986
[84] " In cases concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued." - *Thoma v. Luxembourg*, 2001, para. 48
[85] "Where... measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for." - *Bergens Tidende v Norway*, 2001, para. 52
[86] *Bladet Tromsø and Stensaas v. Norway*, 1999, para. 65

of expression that is subject to a number of exceptions which must be narrowly interpreted. "[...] it is not sufficient that the interference belongs to that class of the exceptions listed in article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."[87]

Paragraph 2 stipulates the circumstances in which the contracting states of the Convention may legitimately interfere with the exercise of the freedom of expression. Any interferences by a public authority with the right to freedom of expression, however, must fulfil the following cumulative conditions, a three-part test: the interference (formality, condition, restriction or penalty) must be "prescribed by law", pursue "a legitimate aim" and be "necessary in a democratic society" to attain the aforesaid aim within the meaning of article 10 (2).

In *Sunday Times v UK*, the Court specified two requirements that flow from the expression "prescribed by law": first, "the law[88] must be adequately accessible[89] and secondly, a norm can be regarded as a "law" if it is formulated with sufficient precision to enable the citizen to regulate his conduct.[90] Thus, what is required in this context is that the disputed measures must have a legal basis in domestic law[91] for the restriction, and that the law must be accessible to the individual who is affected by the restriction, and sufficiently precise to enable the individual to understand its scope and reasonably foresee the consequences which a given action may entail. The Court has accepted only very few cases that common law rules or principles of

[87] *Sunday Times v United Kingdom*, 1979, para. 65

[88] The word "law" in this context is to be understood in its substantive sense, not its formal one: this qualification of the concept makes it clear that law for this purpose goes beyond the mere words of the statute: "..the Court has always understood the term "law" in its "substantive" sense, not its "formal" one. It has thus included both enactments of lower rank than statutes and unwritten law.... In sum, the "law" is the provision in force as the competent courts have interpreted it." *Kafkaris v Cyprus*, 2008, para. 139

[89] " The citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case ", para. 49

[90] *Ibid*," [...] he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. "

[91] The Court observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) and strike at the very roots of that State's legal system." (para. 47). Other cases where the Court has accepted the state to rely on domestically applicable rules of public international law in order to meet the requirement of "prescribed by law" were *Groppera Radio AG and Others v. Switzerland*, 1990 and *Autronic AG v. Switzerland*, 1990

international law constituted a legal basis for interference with the freedom of expression as was in the case of *Sunday Times* where the discussion concerned the word „law "and a claim, that in common law, the „law "was so "vague and uncertain and the principles enunciated by that decision so novel that the restraint imposed cannot be regarded as "prescribed by law".[92] The Court has reiterated these principles many times after *Sunday Times v UK*.[93] In sum, expression "prescribed by law" which stems from the principle of legality, requires laws to be clear, ascertainable and non-retrospective. In the freedom of expression context, the limitation must pass the strict test where the abovementioned principle is unambiguously established.

The phrase "a legitimate aim" refers to a list of legitimate purposes for limiting the right to freedom of expression within the text of the right in order to protect overriding interests. Considering article 10, this list[94] involves interferences that are aimed at protecting the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health or morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary. The existence of a legitimate aim alone, however, is not sufficient for an interference to be found compatible with the Convention. As the three-part test is cumulative and such restriction must, in addition, meet the requirement of other two. For example, and in the context of this thesis, the seizure of an obscene book could have the legitimate aim of protecting "morals" and have a legal basis in domestic law but might not be "necessary in a democratic society". In order to take a decision on the last requirement, national courts must apply the principle of proportionality and assess whether the means[95] used reach that aim.

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[92] *Sunday Times.* Supra n 86, paras 46-49

[93] *Winterwerp v The Netherlands*, (No 1), 1979, paras 58-59, *Silver v United Kingdom*, 1983, paras 85-90, *Gawęda v. Poland*, 2002, para. 39, *Liberty v United Kingdom*, 2008, para. 59, *Sorvisto v Finland*, 2009, para. 112.

[94] The list of the possible grounds is exhaustive and any ground that falls outside the list in paragraph 2 cannot be legitimately relied on by national authorities.

[95] Besides civil or criminal limits on free speech, the interferences have involved also disciplinary sanctions (*Engel and others v. the Netherlands*, 1976; banning of books (*Handyside v. the United Kingdom*, 1976); a refusal to authorise videos for commercial release (*Wingrove v. the United Kingdom*, 1996); the imposition of injunctions on publication (*Sunday Times (No. 1) v. the United Kingdom*, 1979); the dismissal of an employee (*Vogt v. Germany*, 1995); the Head of State making a statement that he would not appoint an individual (*Wille v. Liechtenstein*, 1999); the expulsion of someone from a territory (*Piermont v. France*, 1995); a refusal to licence a broadcaster (*Informationsverein Lentia and others v. Austria*, 1993); to issue frequencies, once licensed (*Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012); a refusal to protect journalists' confidential sources (*Goodwin v. the United Kingdom*, 1996); a refusal conduct of a search which might lead to the identification of confidential sources (*Roemen and Schmit v. Luxembourg*, 2003); a refusal to grant nationality (*Petropavlovskis v. Latvia*, 2008); a refusal to allow a protest vessel into territorial waters (*Women on Waves and others v. Portugal*, 2009), preventing a journalist to gain access to Davos during the World Economic Forum (*Gsell v. Switzerland*, 2009) – in Mendel, Supra n. 39, pp. 32-33)

Lastly, any restriction on free expression must be "necessary in a democratic society". The adjective "necessary" implies the existence of a "pressing social need,"[96] a notion that derives from the principle of proportionality, the one that the governing of a democratic society is based on. It follows, that in order to assess the necessity of the interference, both national courts as well as the ECtHR must establish that the "pressing social need" exist, and that the means used are justified. For that purpose, the contracting states are granted a margin of appreciation which must be in line with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.[97] In practice, the third part of the three-part test is the one, on the basis of which, the vast majority of cases are decided in Strasbourg.

2.2.3. Margin of appreciation

Closely linked with the phrase "necessary in a democratic society", a margin of appreciation refers to the discretion allowed to the member states in their observance of the Convention.[98] A key rationale of the doctrine, which the Court has developed already in its early case law[99] is based on the notion that national authorities are in the best position in assessing what constitutes an appropriate response to speech deemed to be harmful in the light of values and other distinct factors of local laws and practices.[100] This involves especially matters that concern morals and other sensitive issues because "it is not possible to discern throughout Europe a uniform conception of the significance of religion in society; even within a single country such conceptions may vary. For that reason, it is not possible to arrive at a comprehensive definition

[96] *Barthold v. Germany*, 1986, para 55, *Observer and Guardian v. the United Kingdom*,1991, para. 59(c) *Janowski v. Poland*, 1999, para. 30(ii)
[97] *Lingens v. Austria*, 1986, para 39
[98] T. A. O'Donnell, The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights, 4 HUMAN RIGHTS QUARTERLY 474, 475 (1982)
[99] "...Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. "- *Handyside v. the United Kingdom*, 1976, para 48. The case concerned obscenity.
[100] "Today, as at the time of the *Handyside* judgment, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them." - *Müller and Others v. Switzerland*, 1988, para 50; See also more recent case: "In such cases, the national authorities are in principle, by reason of their direct and continuous contact with the vital forces of their countries, in a better position than the international judge to give an opinion on the "necessity" of a "restriction" or "penalty" intended to fulfil the legitimate aims pursued thereby." - *Mouvement raëlien suisse v. Switzerland*, 2012, para 63

of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others."[101]

2.2.3.1. Freedom of expression and public morals

In connection with morals, a wider margin is given because those concerns do not have an "objective" character, unlike for example the notion of the "authority" of the judiciary, which the Court considers to be "far more objective" because it has "a fairly substantial measure of common ground".[102] Where the definable common ground is lacking, however, such as the case in the context of morality, the doctrine recognises primarily different underlying values which justify differential treatment and takes into consideration different legal systems at an European level. It follows that national authorities, by using a broad discretion, are in a position to determine whether or not a pressing social need exists to impose restrictions on freedom within their jurisdiction and, if so, what measures should be taken to address it.[103] In Kearns' view, in the area of artistic freedom this in effect allows the national authorities virtual carte blanche to assess cases according to the prevailing local-moral sentiment within its jurisdiction and accommodate it accordingly[104] even though the authorities' margin is not unlimited. It is indeed subject to Strasbourg Court's review,[105] the extent of which varies depending on the case.[106] When states impose restrictions on freedom, *inter alia*, artistic freedom, which are counterpoised with complex and contentious concepts, several definitional and other problems can arise in the legal process – first at a national level, and later in Strasbourg if it proceeds there. The latter assesses a case through the same three-part test-formula, usually with the focus on the "necessary in a democratic society"-part and decides whether the restriction on expression in relation to the aim used, corresponds to a "pressing social need," namely, was the decision proportional. If found disproportional by the Court, the decision of a national court will probably not be deemed "necessary in a democratic society". Consequently, although

[101] *Otto-Preminger-Institut v. Austria*, 1994, para 50; *Ibid, Müller*
[102] "Precisely the same cannot be said of the far more objective notion of the "authority" of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6 (art. 6), which have no equivalent as far as "morals" are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation" - *Sunday Times (No. 1) v. the United Kingdom*, 1979, para 59
[103] Kearns, Supra n. 41, p 154
[104] *Ibid.*
[105] The Court is "empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision." - *Handyside v. the United Kingdom*, 1976, para 49
[106] "Again, the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 (2)." – *Ibid.*

various justifications are possible, there is one common element – proportionality, which, according to the ECtHR must exist between the aim pursued and the right guaranteed in article 10.[107] In fact, the Court has held that the requirement of proportionality is inherent in the Convention as a whole.[108] Yet, a closer analysis reveals that there is rather non-transparent and occasional use of terminology and a tendency of mixing distinct elements of judicial review.[109] The Court has not for example specified how the proportionality, a core requirement, relates to the test of a pressing social need[110] or even what principles determine the scope of the margin.[111]

The Court's supervision is not limited "to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention."[112] Substantively the Court's main challenge is to ensure that for the limitation to be justifiably applied domestically, the restrictions must also reach a qualitative threshold in Strasbourg, i.e. strike the right balance when reviewing a case in accordance with the Convention's foundational purposes and at the same time, maintain its role in ensuring that states carry out their obligations in line with the ECHR, while taking local considerations into account.

2.2.3.2. Freedom of artistic expression and public morals

In practice, the Court has decided relatively few cases on grounds of public morals. This does not mean, however, that there is no conflict between artistic freedom and laws that protect public morality, of which the obscenity and blasphemy are the two traditionally most prominent offences that encapsulate morality laws.[113] The reason why relatively few cases end up in

[107] Cf. M-A. Eissen, The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 125, 131 and 145, 1993
[108] "Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." *Soering v. UK*, 1989, para. 89
[109] "This is particularly apparent with respect to two distinct, quintessentially constitutional issues—the normative question of what a given Convention right means, including its relationship with other rights and with collective interests, and the institutional question of which institutions (judicial versus non-judicial and national versus European) should be responsible for providing the answer." - Steven Greer, What's Wrong with the European Convention on Human Rights? 30 HUM. RTS. Q., 2008, pp 696–697
[110] J. Gerards, How to improve the necessity test of the European Court of Human Rights, International Journal of Constitutional Law, Volume 11, Issue 2, April 2013, Pages 466–490
[111] „[t]he Court makes distinctions within Article 10 … when applying its doctrine on the States' margin of appreciation. Whereas, in some cases, the margin of appreciation applied is wide, in other cases it is more limited. However, it is difficult to ascertain what principles determine the scope of that margin of appreciation." - Dissenting opinion of Judge Löhmus, in *Wingrove v. the United Kingdom*, para 1
[112] *Sunday Times (No. 1) v. the United Kingdom*, 1979, para. 59
[113] P. Kearns, "When Art is Misunderstood: Obscene and Blasphemous Libel in 2000.", 2013, p. 47

Strasbourg can be explained by the fact that the Court has reserved the use of the margin of appreciation, involving complex and delicate issues like the inter-relationship of art and morale, for the national courts, where artistic expression is assessed "through narrower focus of moral vision and lower level of judicial expertise" which is revealed in Strasbourg if a case ever proceeds there.[114] This concerns particularly cases which involve inter-linked and subjective factors of art, obscenity, pornography and harm. For example, pornography, as opposed to art, is not regarded as a defensible form of expression, but rather as an ignoble commodity. Therefore, to apply classical scholastic arguments for the protection of freedom of expression to pornography is fundamentally problematic because of the lack of intrinsic value that is habitually found in it.[115] In terms of obscenity in a broader sense, it could be argued that a right to freedom of expression, including artistic expression, that includes morally shocking elements, can be justified in the interests of individuals and society in general. Yet, to expand the same justification only to pornography is problematic because it would be difficult to support the claim that the wider use of pornography in a society is epistemically beneficial.[116] Therefore, the position taken by the national courts as well as Strasbourg in the obscenity and blasphemy related cases, is rather dismissive in this field.

Such position was demonstrated in *Belfast City Council v Miss Behavin' Ltd*, which dealt with a local authority's refusal to licence a sex shop in a central city district. The discussion involved both the pornography and whether a refusal of a licence violated respondent's rights. They were reasoned as follows: pornography was placed "well below celebrity gossip in the hierarchy of speech which deserves the protection of the law".[117] In the context of a refusal to licence, it was stated that "if article 10 ...[is] engaged at all, they operate at a very low level..".[118] By dismissing

[114] Supra n. 97, p.154
[115] *Ibid*,
[116] R Dworkin, 'Is there a Right to Pornography?',1981 1 Oxford Journal of Legal Studies (in Kearns, *Ibid*.)
[117] *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 [2007] 1 WLR 1420, para 38 (Lady Hale)
[118] " If article 10 and article 1 of Protocol 1 are engaged at all, they operate at a very low level. The right to vend pornography is not the most important right of free expression in a democratic society and the licensing system does not prohibit anyone from exercising it. It only prevents him from using unlicensed premises for that purpose. Even if the Council considered that it was not appropriate to have a sex shop anywhere in Belfast, that would only have put its citizens in the same position as most of the rest of the country, in having to satisfy their demand for such products by internet or mail order or going to more liberally governed districts like Soho. This is an area of social control in which the Strasbourg court has always accorded a wide margin of appreciation to member States, which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights. That was not the case here and I would therefore allow the appeal and dismiss the application for judicial review." - Lord Hoffmann

morally disturbing, explicit, and usually sexually-related material seems justified in terms of protecting morale and decency in the society.

Yet, there are arguments that do not support this position. Namely, a justification could be found on the basis of the liberal argument related to the ascertainment of truth and free flow of ideas. According to Kearns, "what is advocated in that argument is the proposition that the prohibition of any explicit, implicit or associated free flow of ideas in pornography could prevent the acquisition of (possibly incidental) ideas that possess true value."[119] Indeed, without examining the specifics of pornography in detail any further, the idea that purely from the perspective of artistic freedom, this form of speech, even if its regarded conceptually meritless, could be a source for daring artistic expression or an inspiration for creditable thought. This is especially so in the present era where social awareness is increasingly used by artists to challenge accepted morality in their works in a critical-moral way where pornographic approaches are used to this end, as will be shown in chapter two in connection with national case law analysis.

2.4. Concluding remarks

With regards to the above mentioned, this thesis takes a position that even feasible, offensive or obscene works may possess valuable merit from a sociological and artistic viewpoint, which in turn supports the justification for this type of speech. It is further supported by a notion, that harm to society, allegedly caused by the circulation of morally dubious material, is not proven, at least to the extent that concerns adults. Especially when considering that the terminology used in moral-legal matters as well as underlying presumptions in relation with obscenity, indecency and pornography are defined inconclusively or are otherwise subjectively viewed, both at a national level and Strasbourg, which further complicates the legal regulation of art for moral reasons, at least with the precision that the legal certainty requires.[120] In this respect, the Court has consistently rejected to challenge domestic courts even in cases where the scope of the offence lacks clarity, or the nature of the offence is limited to insulting one religious' group which in itself is discriminatory. The next chapter will examine some of the most relevant artistic expression cases in detail.

[119] Supra n. 41, p. 154
[120] *Ibid*., p 155

III. European Court of Human Rights and freedom of artistic expression

3.1. Introduction

The purpose of this chapter is to provide a comprehensive overview of the seminal case law of the ECtHR on freedom of artistic expression, and to explore the context in which the Court affords or limits the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. The focus is particularly on the standard of interpretation of the limitation of artistic freedom. Examining the latter, enables to evaluate the scope and efficiency of the protection awarded to artistic expression in Strasbourg. Also, it sheds light on the Court's decision-making process in this field. In regard to the latter, the element of consistency is essential, because the established line of interpretation in relation to art-law cases could lead to a consistent doctrinal development of the legal standards and to a more principled approach relating to the protection of artistic freedom.[121] In this context it should be noted that there are only few cases on artistic freedom and even less concerning specifically literature. However, the following cases enable a principled discussion on the topic.

3.2. Defining artistic freedom

In *Wingrove v United Kingdom*,[122] the case concerned a refusal of British authorities to grant a distribution certificate for a videotape entitled 'Visions of Ecstasy', which portrayed the crucified Christ in acts of a sexual nature with a nun, which the authorities determined violated the criminal law of blasphemy. The law itself was limited to insulting mainstream Christian beliefs. The Court upheld the refusal, reasoning that the offence was prescribed by law. It also served a legitimate aim of protecting the rights of others, more specifically provided "protection against seriously offensive attacks on matters regarded as sacred by Christians"[123] from blasphemous expressions.

The Court found that the decision made by national authorities, which allowed the refusal of a video certificate permitting distribution, was carried out within a nation's margin of appreciation and did not constitute an infringement of the film distributors right of free speech.[124] The Court concluded that the English law of blasphemy is necessary in a democratic

[121] Kearns, Artistic Liberty and the European Court of Human Rights, Supra n. 7 p. 174
[122] *Wingrove v United Kingdom*, 1996
[123] *Ibid*., para 57
[124] *Ibid*., para 58

society and compatible with the ECHR, if there is a balance of proportionality between the manner in which the antireligious views are expressed and the state's penalties. The law in force at the time,[125] required that the speech or opinion of the Christian religion is expressed in "decent and temperate" language.[126] Since the extent of insult to religious feelings found were significant, the law of blasphemy contained sufficient safeguards against arbitrary interference with one's right to freedom of expression.[127] No violation of article 10 was found.

Another case which illustrates the inter-relationship between morals and freedom of artistic expression, and which has introduced new interpretations to the principle of proportionality, is the case of *Handyside.*[128] In this case an appellant had published and distributed a book, 'Little Red Schoolbook' which was directed at pupils of the age 12 and upwards and which discussed topics related to sex and drugs in very explicit terms and recommended the use of pornography. The appellant[129] claimed that the book was intended to teach school children about the topic. The British authorities disagreed. A book was viewed as obscene, the copies of the book were seized, and two summonses were issued against appellant for having obscene books in his possession that were meant for publication for gain. The publisher was convicted under the Obscene Publications Act.[130]

The Strasbourg Court held that the seizure and subsequent forfeiture of hundreds of copies constituted an "interferences by public authority". Such interference entails a violation of article 10 unless it falls within one of the exceptions under article 10(2). The "prescribed by law" requirement was met as the basis of the restriction was found in the UK legal system, in the Obscene Publications Acts 1959/1964.[131] As the national authorities are granted a wide margin to make the initial assessment of the pressing social need implied by the notion of "necessity", the domestic authorities were entitled to evaluate the effects on the morals of the readers, in this case, children. The information in the book was generally correct and probably even useful, but

[125] The common law offences of blasphemy and blasphemous libel were abolished in the Criminal Justice and Immigration Act in 2008 and introduced inciting religious hatred offence, which applies equally to all religions.
[126] "Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves." - Article 214 of the Criminal Law, 9th edition (1950)
[127] *Wingrove v United Kingdom,* para. 60
[128] Supra n. 17
[129] Handyside was a publisher who purchased the rights of the book, written by Søren Hansen and Jesper Jensen.
[130] In 2014, 45 years later, the uncensored version of The Little Red Schoolbook was republished in the UK.
[131] *Handyside*, para. 44

the content could have been interpreted as harmful for young people at a critical stage of their development or them even to commit certain criminal offences.[132] In these circumstances, the measures taken by the domestic authorities was the protection of the morals of the children, a legitimate aim under article 10. The Strasbourg Court concluded, by thirteen votes to one, that after using margin of appreciation by the national courts, the interference in appellant's freedom of expression was both defined by law, having a legitimate aim and was regarded necessary in a democratic society, thus no breach was found. A dissenting opinion, that belonged to judge H. Mosler, found that the interference was not necessary because of the clear lack of proportion.[133]

The case of *Handyside*, which has been treated as a landmark case, contains a famous phrase that has been used in other cases related to article 10 – "freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."[134]

Yet, by pronouncing that it was not possible to find a uniform European conception of morals in the domestic law of the contracting states and that due to the direct and continuous contact with the vital forces of their countries, state authorities are, in principle in a better position than the international judge to give an opinion on the exact content of these requirements. In other words, states were granted a wider margin of appreciation in relation to moral standards. With this statement, the Court virtually opened the floodgates for narrow standards to assess cases through the local-moral standards,[135] and as the case law that came after *Handyside* demonstrates, a wider margin of appreciation in relation to moral standards further restricted

[132] ".. to lay this before children as young as many of those who the court considered would read the book, without any injunction about restraint or unwisdom, was to produce a tendency to deprave and corrupt. ", *Ibid.*, para 32
[133] "There remains the question whether the application of the contested measures, which were inappropriate from an objective point of view, fell within the margin left to the domestic institutions to choose between different measures having a legitimate aim and to assess their potential effectualness. In my view, the reply must be negative because of the clear lack of proportion between that part of the impression subjected to the said measures and that part whose circulation was not impeded. Admittedly the result of the action taken was the punishment of Mr. Handyside in accordance with the law, but this result does not by itself justify measures that were not apt to protect the young against the consequences of reading the book. "– para. 2
[134] *Ibid*., para. 49
[135] P. Kearns, "Artistic Liberty and the European Court of Human Rights", Supra n. 41, p. 163

free expression through obscenity and blasphemy laws. This, in spite of the fact, that in some national constitutions[136] art is explicitly deemed to be free. The relevance of the *Handyside* is also in that the case was the first to address the protection of property rights in connection with the legality of the seizure of books for the protection of morals.[137]

The court has defended shocking language and free expression within the realm of artistic expression also in the case of *Vereinigung Bildender Künstler v. Austria*.[138] This case must be discussed together with an earlier landmark case of *Müller and Others v. Switzerland*[139] because these two cases reflect different ways of contextualizing religious sensibilities in the context of obscene expression by the Court. In *Müller* the case concerned a complaint of a group of artists who were convicted for publishing sexually explicit paintings at a contemporary art exhibition that had been widely advertised and was open to everyone without age limit or admission charges. In the exhibition, the accompanying catalogue containing photographs of the paintings were also available to all visitors. The public prosecutor, acting on information with regards to the violent reaction over the paintings on show, initiated proceedings against the artists arguing that the paintings were obscene and should be destroyed. The artists were fined.

The Court found that since there were a number of consistent decisions by the national authorities on the "publication" of "obscene" items, which were accessible because they had been published and followed by the lower courts, the requirement of the “prescribed by law” was met through these precedent holdings.[140] In regard to the legitimate aim, the Court accepted the view of the Swiss authorities that the aim of the interference was to protect morals and the rights of other, as laid down in Swiss Criminal Code. In the instant case national authorities had to respond to the reactions of some visitor who had reacted violently to the paintings on show.[141] In connection with the third, most relevant part, the Court reviewed whether such regulation was necessary in a democratic society. In this context the term obscene was debated at length as well as the symbolical meaning of the works of art. In the applicant’s view, “freedom of artistic expression was of such fundamental importance that banning a work or convicting the artist of an offence struck at the very essence of the right guaranteed in Article 10 and had

[136] For example, Germany, Austria
[137] *Ibid*., Separate opinion of judge Zekia. In a separate opinion, several approaches of interpreting the rules on the protection of property are discussed
[138] *Vereinigung Bildender Künstler v. Austria*, 2008
[139] *Müller and Others v. Switzerland*, judgment, 1988; The Court clarified that Article 10 of the Convention, which has no separate provision guaranteeing freedom of artistic expression, encompasses the arts. Para 27
[140] *Ibid*., para. 29
[141] *Ibid*., paras 12 and 30

damaging consequences for a democratic society."[142] In this respect, the Court further held that "artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph (2) of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, 'duties and responsibilities'; their scope will depend on his situation and the means he uses."[143] The Court recognized "that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity." Therefore, and having regard to the margin of appreciation, the national authorities "were entitled to consider it "necessary" for the protection of morals to impose a fine on the applicants for publishing obscene material." [144]

These cases, particularly *Handyside* and *Müller*, show that the European human rights case law is based on a fragile structure that attempts to balance the local moral standards and laws, which are couched in vague terms, and the doctrine of the states' margin, which do not consistently contribute to the standard of interpretation of the limitation clause in Article 10. Additionally, it has been argued that the inconsistencies in this field are also due to the two-fold system of adjudication functioning in Strasbourg, particularly prior 1998, where the Commission had a more progressive and consistent view throughout its existence, compared to the Court, which in turn has influenced the development of the artistic expression case law.[145]

For example, in *Müller*, the Commission clarified that "it does not fall upon [it] to issue a value judgment on the possible artistic quality of this or that work", while the Court took a more conservative position and agreed with the national court's view that the paintings were "morally offensive to a person of normal sensitivity"[146] In most blasphemy law cases, decided by the Commission, in which it had to assess religious sensibilities that fell within the scope of

[142] *Ibid*., para. 31" For similar reasons and irrespective of any assessment of artistic or symbolical merit, the Commission considered that the Swiss courts could reasonably hold that the paintings were obscene and were entitled to find the applicants guilty of an offence under Article 204 of the Criminal Code."
[143] *Ibid*., para 34
[144] *Ibid*., para 36
[145] E. Polymenopoulou, Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights, Human Rights Law Review, 2016, 16, 511–539, p. 520
[146] *Müller*, para 36, *Ibid*., p 522

protection of article 9 of the ECHR, the Commission took an art-positive view.[147] It showed consistency in stating that the "members of a religious community must tolerate and accept the denial by others of their religious beliefs."[148] This approach existed until the Commission merged with the Court in 1998. Indeed, when examining the reasoning of the cases with similar content, it becomes apparent that the approaches taken by the two Strasbourg bodies significantly differ from each other. Both in *Wingrove v United Kingdom* and in *Otto-Preminger-Institut v Austria*, the Court came to a different conclusion from that of the Commission. It emphasised that the "respect for the religious feelings of believers as guaranteed in Article 9 may be violated by "provocative portrayals of objects of religious veneration" that such violation can be regarded as a "malicious violation of the spirit of tolerance" and that "in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others".[149]

3.3. A new approach towards a more sophisticated analysis?

More recently, there are signs of shift of position in respect of artistic freedom towards narrower margin of appreciation, and towards the exclusion of the protection of sensibilities. This stand was first reflected in the case of *I.A. v. Turkey*,[150] where the publisher was convicted for publishing insults against "God, the Religion, the Prophet and the Holy Book". The ECtHR concluded that the Turkish authorities did not violate publisher's freedom of expression. Nevertheless, the case is interesting for its dissenting opinions where three dissenting judges jointly questioned the established case law of the Court regarding the wide margin of appreciation on blasphemy cases. The judges referred first to the case of *Handyside*, stating that the frequently reiterated quotation in the case law of the ECtHR, which states that freedom of expression is applicable also to those ideas that shock, offend or disturb, would be deprived of all effect in the present case where the publisher is charged and convicted for publishing a novel that criticise "all beliefs and all religions".[151]

Dissenting judges then referred to the cases of *Otto-Preminger-Institut v. Austria* and *Wingrove v. United Kingdom* and stated that the existing case law is admittedly consistent with the present

[147] Except the case of *Lemon and Gay News Ltd v Whitehouse*, 1979 where the Commission had to decide whether Christian beliefs were injured under blasphemy laws by a poem published in a gay magazine. The Commission ruled against the poet's artistic freedom, referring to the UK's leeway to define the offence of blasphemy in its domestic laws (*Ibid*., supra n. 136)
[148] *Dubowska and Skup v Poland*, 1997 (*Ibid*., supra n. 136)
[149] *Otto-Preminger-Institut v Austria*, para 47 (in Polymenopoulou, Supra n. 136, p. 523)
[150] *I.A. v. Turkey*, 2005
[151] *Ibid*., at Joint dissenting opinion of judges Costa, Cabral Barreto and Jungwiert, para 3

judgement, however, they are not persuaded by these precedents, referring to the European Commission of Human Rights who had found, at the time, that there was a violation of Article 10 in both cases. Lastly, dissenting judges invited the Court to "revisit" the case-law, which they found put "too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press."[152] In their dissenting opinion, statements like "...nobody is ever obliged to buy or read a novel, and those who do so are entitled to seek redress in the courts for anything they consider blasphemous and repugnant to their faith....But it is quite a different matter for the prosecuting authorities to institute criminal proceedings against a publisher of their own motion in the name of "God, the Religion, the Prophet and the Holy Book".... a democratic society is not a theocratic society" [153] implied that the shift in jurisprudence, which had a tendency to vindicate artistic freedom when clashing with religious sensibilities, was needed and that it was visible.[154]

This shift was concretely reflected in the judgement of *Vereinigung Bildender Künstler*, where the Court distanced itself considerably from the earlier approach it had adopted with regard to artistically obscene expressions. In this case, an association of artists, organised an exhibition which included, among other works, a painting depicting a number of public figures in sexual context. One of them, Mr. Meischberger, was a former general secretary of the Austrian Freedom Party and a member of parliament at the time of the events who was portrayed in interaction with three other prominent members of his party, amongst them Mr. Haider, who at that time was the party's leader.[155] Meischberger brought proceedings under the Austrian Copyright Act[156] claiming injury that had been caused to his legitimate interests. The Vienna Commercial Court dismissed these claims on the ground that the painting did not represent reality. However, the national court acknowledged that a painting showing the claimant in such an intimate position could, regardless of its relation to reality, still have a debasing effect on Meischberger. In the present case, however, the right of the applicant association to freedom of artistic expression outweighed Mr Meischberger's personal interests.[157] Especially after one enraged exhibition visitor damaged the painting so that the claimant's face was unrecognizable.

[152] *Ibid.,* para 8
[153] *Ibid.,* para 5
[154] In 2006, The Council of Europe Parliamentary Assembly adopted the Resolution 1510 Freedom of expression and respect for religious beliefs, which stated that "Freedom of expression ... should not be further restricted to meet increasing sensitivities of certain religious groups." para 12 (in Polymenopoulou Supra n. 138)
[155] *Vereinigung Bildender Künstler v. Austria,* para 32
[156] Section 78 of the Austrian Copyright Act provides a remedy against publication of a person's picture where this would violate the legitimate interests of the person concerned
[157] *Vereinigung Bildender Künstler v. Austria,* para 14

The Court of Appeal as well as the Supreme Court disagreed and supported the grant of an injunction to curb the alleged debasement of him and his political activities, prohibiting any further exhibition of the work. In their view, the impugned measure pursued the legitimate aim of "protection of the rights of others" and thus, painting fell outside the scope of article 10 constituting debasement of the claimant's political standing.[158]

The ECtHR did not accept the Austrian States' position that the interference pursued the legitimate aim of protecting public morals. It stated that "neither the wording of the above legislation, nor the terms in which the relevant court decisions were phrased, refer to the latter aim."[159] In the view of the Strasbourg Court, the painting, although outrageous, amounted to a caricature and was satirical, the inherent features of which is exaggeration and distortion of reality which aim to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.[160] In Court's view, the public exhibition of the painting contributed to a debate between the artist, the exhibitor and the public in which the painter's conception of the interrelation between power and sexuality was reflected. In this context, the Court reiterated that freedom of expression extended to offending, shocking or disturbing works of art. The Court rejected the argument that the injunction protected public morals and emphasised that the painting constituted a satirical counterattack against the Austrian Freedom Party, whose members had previously strongly criticised the painter's work. The Court added that the painting only affected Mr Meischberger's political standing, which was public, and not his private life. For these reasons, Mr Meischberger, in this capacity, had to display a wider tolerance in respect of criticism.[161] The Court found, having balanced Mr Meischberger's personal interests and taking account of the artistic and satirical nature of his portrayal, that the impact of the measure at issue on the applicant were disproportionate to the aim pursued and therefore not necessary in a democratic society. The decision, however, was reached by four votes to three, which suggests that the Court was divided in this case. Although it appears that the Court was explicitly upholding freedom of artistic expression, the more careful reading of the Court's rationale reveals that what was in fact protected in this decision was the political dimension of the art, more specifically free political comment, rather than artistic expression *per se*. The problem with this view is, that if artistic expression is protected only because of its political content, art will be equated with opinion which may create

[158] A. Melville-Brown, David Price Solicitors and Advocates, The right not to be offended, London
[159] *Vereinigung Bildender Künstler,* para 31
[160] *Ibid*., para. 33, See also Supra n. 43
[161] *Ibid*., para. 34

conceptual difficulties. The core aim of art is to use its role symbolically and obliquely, not directly or literally,[162] not simply present views or judgements about something, true or false.

In the new millennium and on a larger scale, the discussions particularly on whether or not religious feelings should be protected and, if so, to what extent, were ranging from the strong pro-freedom views that advocated stronger protection of freedom of expression over religion,[163] to those who pointed to the need to defend minority rights against incitement to hatred[164] or even to those blasphemy law advocates who relied on the Court's positions, taken in *Otto-Preminger-Institut v. Austria* and *Wingrove v. United Kingdom*, in which the Court accepted the legitimacy of state action to punish offence to religion, to campaign in favour of the prohibition of defamation of religions.[165] Also, the position taken in *Vereinigung Bildender Künstler* reflected opposing views. Majority of judges stated that article 10 protects all "[t]hose who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions" – in other words, suggesting that defining the scope of the protection of artistic expression should not be a matter for the state only. The opposing judges, on the other hand pointed out that the rights of others should prevail and that "nobody can rely on the fact that he is an artist or that a work is a painting in order to escape liability for insulting others."[166] Other two dissenting judges further argued, that "..an expression of what is known nowadays as "committed" art, does not deserve the unlimited protection of Article 10... In other words: "There are ... limits to excess: one cannot be excessively excessive."[167]

Since *I.A. v. Turkey* and *Vereinigung Bildender Künstler,* there have been no other cases concerning specifically artistic freedom and offence to religious sensibilities. Yet, there is one earlier case that differs from that of previous cases mentioned above but is worth taking a closer look due to its importance to artistic freedom, and more specifically to the literary and visual arts in connection with public morals. The case of *Karatas v Turkey* concerns the issue of sedition as opposed to morality.[168] The applicant, a Turk of Kurdish origin, published an anthology of poems entitled "The Song of a Rebellion". The Turkish National Security Court,

[162] Kearns, Artistic Liberty and the European Court of Human Rights, Supra n. 7 p. 168
[163] Kearns 'position is based on the notion that the Court has preferred religion over artistic freedom; therefore, he takes strong pro-freedom of expression view.
[164] For example, N. Nathwan, Religious cartoons and human rights—a critical legal analysis of the case law of the European Court of Human Rights on the protection of religious feelings and its implications in the Danish affair concerning cartoons of the Prophet Muhammad, 2008) 13 European Human Rights Law Review, p. 508
[165] L. Lorenz, The rise (and fall?) of defamation of religions, Yale Journal of International Law, 2010
[166] *Vereinigung Bildender Künstler*, at Dissening Opinion of Judge Loucaides.
[167] *Ibid*., at Dissenting Opinion of Judges Spielmann and Jebens
[168] *Karatas v Turkey*, 1999

composed of three judges, including a military judge, found the applicant guilty of disseminating separatist propaganda against the "indivisible unity of the State" and sentenced him to a term of imprisonment.[169] In addition, it also ordered confiscation of the publications concerned. The national authorities took a view that the poems in issue referred to a particular region of Turkey as "Kurdistan" and had glorified the insurrectionary movements in that region by identifying them with the Kurds' fight for national independence.[170]

The ECtHR examined whether there had been a legitimate restriction, which itself was not disputed,[171] of the applicant's right or whether Article 10 had been breached. It was found that interference with his right to freedom of expression was "prescribed by law". Having regard to the sensitivity of the security situation in south-east Turkey, the measures taken, could be said to have been in the furtherance of the protection of national security and territorial integrity and the prevention of disorder and crime. However, the applicant was a private individual who expressed his views through poetry, a form of artistic expression,[172] that appeals to only a minority of readers.[173] That fact limited the potential impact on national security, territorial integrity and public order to a substantial degree.[174] Since the poems had an obvious political dimension, the Court recalls that there is little scope under Article 10(2) for restrictions on political speech or on debate on matters of public interest.[175] Therefore, the Court found that the severity of the penalty imposed, was disproportionate to the aims pursued and, accordingly, not "necessary in a democratic society". Consequently, the Court concluded, that there had been a violation of article 10.

The case contains a relevant aspect from the artistic expression point of view. Namely, the poet claimed throughout the process that the poem "in no way reflected his own opinions."[176] He stressed that his work was an anthology of poems "in which he had expressed his thoughts, anger, feelings and joys through colourful language that contained some hyperbole. The book was therefore first and foremost a literary work and should be treated as such."[177] With this statement, the poet was referring to autonomy of art as a philosophical and cultural phenomenon

[169] *Ibid*., para. 12
[170] *Ibid*.
[171] *Ibid*., para. 36
[172] Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.
[173] *Ibid*., paras 49 and 52
[174] *Ibid*., para. 52
[175] *Ibid*., para 50
[176] *Ibid*., para. 11
[177] *Ibid*., para. 45

that has its own value and that it should be judged apart from any themes which it might touch upon. The national court, however, did not recognise the ontology of art and viewed the poem purely through its content, making interpretations as if it represented the poet's political views without artistic context and were, if read in context, "capable of creating among readers the impression that the applicant was encouraging, or even calling for, an armed struggle against the Turkish State and was supporting violence for separatist purposes."[178] This position was surprisingly taken by the Commission who propounded its own views prior to the Court's decision. Thus, the Commission supported the approach of the Turkish authorities and pointed out that the "duties and responsibilities" made it important for people "expressing an opinion" on sensitive political issues to ensure that they did not condone unlawful political violence.[179] Consequently, the Commission found that the Turkish authorities had been entitled to consider that the poems were harmful to national security and public safety, and, the penalty imposed on applicant could reasonably be regarded as answering a pressing social need, and therefore be necessary in a democratic society.[180]

The statement implies as if the artistic work can only reflect the artists own personal views and not artistic work without any other preoccupation. With regard to the simple awareness of art's *modus operandi*, Kearns rightly points out that Shakespeare wrote of murder but was not a murderer, even though some of the characters in his plays were murderers, and explains further that to not "recognise that protagonists in art have characters unlike those of their makers undermines the entire integrated culture known as fiction."[181] Indeed, art, including literary art, possesses its own internal principles of operation that signify its cultural and sociological independence which frequently goes unrecognised by the law.[182] In the present case, at no stage of the trial were the poems treated as artistic work.

The Court took a contrasting stance. It reiterated that article 10 protects even offending, shocking and disturbing ideas in accordance with the demands of the pluralism, tolerance and broadmindedness, without which there is no democratic society. It acknowledged that the work in issue contained poems which, through the frequent use of metaphors and pathos, was in part aggressive; but "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

[178] *Ibid*., para. 45
[179] *Ibid*., para. 45
[180] *Ibid*., para. 47
[181] Kearns, Artistic Liberty and the European Court of Human Rights, Supra n. 7 p. 168
[182] *Ibid*.

situation," it proved, was a legitimate aspect of poetic purpose.[183] The poems in this case had an obvious political dimension. With respect to that, the Court pointed out that there is little scope under Article 10(2) for restrictions on political speech or on debate on matters of public interest and continued by stating, that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician.[184] At the same time, the Court did take into account the concern of the Turkish authorities' and the broader background of the case, particularly the issues linked to the prevention of terrorism. Nevertheless, the Court supported the poet by assessing the case through the lens of artistic nature and unusual literary interpretation. The poet's conviction was held to be disproportionate to the aims pursued, and accordingly unnecessary in a democratic society.

3.2. Emerging defences

A brief analysis of the case of *Karatas* serves as a more general conclusion of the last two chapters which examined the freedom of artistic expression in the European context. First, the conclusion of the case *Karatas* is worth emphasising because of its seminal importance in the area of artistic freedom, particularly in the context of literary works.[185] From the perspective of the future art-related cases, should these arise again, the judgement of *Karatas* predicts well because the subject matter of the case was, at least to some extent, judicially and juridically recognised as a sub-category within freedom of expression. Yet, it is important to notice that in *Karatas* such decision was reached because the Court considered the poem to be political, which indicates that it is an advantage for controversial art to have a political dimension.[186] Secondly, what mattered to the Court in this case was a relatively narrow audience as compared to the mass media, which in turn suggests that the Court made its decision based on pragmatic approach, rather than concept-based one. In the area of freedom of artistic expression, however, it is vital to adopt a conceptual approach because a practical approach can be applied on *ad hoc*-basis to virtually any piece of work, and if that happens, art might not be distinguish on its own terms.[187] The latter is precisely what the regulation of art requires – the legal treatment of art that acknowledges its unique identity and ontology. The more consistent legal doctrine relating to the protection of artistic freedom would not only protect art but would create judicial certainty and consistency of the legal judgment of art and would establish more principled and

[183] Para. 52
[184] *Ibid*., para. 50
[185] Kearns, Artistic Liberty and the European Court of Human Rights, Supra n. 7 p. 171
[186] As was the case in *Vereinigung Bildender Künstler v. Austria*
[187] *Ibid*., p. 174

contextual line of reasoning when art is the object of legal regulation.[188] Yet, since *Karatas*, the ECtHR has rarely referred to the case while assessing other art-related cases, and even then, without emphasising the art connection between them.[189] In that way, the case of *Karatas* was a missed opportunity for the Court, because in spite of the novel approach taken in the judgment, where the artistic nature of the work was considered as a defence against the interference,[190] the Court did not utilise it as a thematic development that can be used in art-related cases even though such theme exists. According to Kearns, the latter could be explained by the fact that "there is no rule of precedent in Convention law, which could explain why there is no recognition of the established line of art-law cases that could lead to a consistent legal doctrine in Strasbourg relating to the protection of artistic freedom specifically".[191] This is a relevant and well-grounded point, however, it does not fully explain why the Court's jurisprudence is more precedent-like in other categories, particularly in political expression, where the Court's decision-making is more consistent and political speech is specifically protected through a more principled approach.

Nevertheless, the jurisprudence of the Court has increasingly started using more sophisticated analysis and methodological approaches in its recent decisions related to the artistic expression, particularly since the case of *Vereinigung Blidender Künstler* and *Karatas,* by specifically using the artistic nature of the work as a defence against the interference.[192] In connection with the latter, it must be noted that such defences are not explicitly provided by article 10. This method, along with the categorization between the types of expression and the three-part test, as examined in detail above,[193] are established and developed by the Court over time. With respect to the categorisation, for example, the Court has repeatedly ruled, that there is little scope for restrictions in political speech. This informally established approach by the Court where freedoms are prioritised in a hierarchy of protection, that favours political expression, followed by commercial and artistic speech, has been confirmed in several earlier cases,[194] and most recently in *Karatas.* The same applies to the three-part test, that the Court has been using since *Handyside.* Based on this rather vaguely formulated formula that contains broadly defined

[188] *Ibid*., p. 174
[189] *Alinak v Turkey*, 2005 (in Kearns, p. 175)
[190] *Karatas*, para. 52," ... 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."
[191] Kearns, Artistic Liberty and the European Court of Human Rights, Supra n. 7 p. 174
[192] Supra n 184
[193] Paragraphs 2.2.1.2. and 2.2.2.2.
[194] For example, *Lingens v Austria*, *Castells v Spain*, *Hertel v Switzerland*

principles,[195] the Court has established that article 10 protects also offending, shocking and disturbing[196] expression. In case of an interference, the Court then assesses whether an interference was necessary in democratic society and in accordance with the demands of the pluralism, tolerance and broadmindedness, without which there is no democratic society.[197] The fact that the Court has used more context-based analysis and methodological approach in recent art-related cases, although not systematically, has resulted in a situation where it could be argued that certain distinguishable defences are emerging, that are available to defendants in freedom of expression cases. One such defence, that has received protection for its specific nature is satire.[198] This defence, however, as mentioned above, is applied unsystematically. A closer look at the satire-related cases reveal that the Court's sense of humour does not expand to all sorts of humour equally. Unsurprisingly, the humour that has a political dimension is more accepted than the one, aimed at controversial and more complex issues, such as terrorism and extremism.[199] In *Karatas*, a repeatedly referred case in this paragraph, followed the same logic – the poem's artistic nature was used as a defence against the interference only because it had a political dimension.

Another defence that is emerging in the Court's jurisprudence is fiction. In *Alinak vTurkey*,[200] the case concerned a fictional novel that was inspired by real events. The plot described the atrocities to which the habitants of a village were subjected at the hands of Turkish security forces in a way, that "...no doubt creates in the mind of the reader a powerful hostility towards the injustice to which the villagers were subjected in the tale. Taken literally, certain passages

[195] "Pluralism, tolerance and broadmindedness" – used routinely in freedom of expression judgements
[196] *Handyside*, para. 49
[197] Routinely used in freedom of expression judgements, see for example in *Karatas*, para. 48
[198] "...a form of artistic expression and social comment which, by exaggerating and distorting reality, was both intentionally provocative and political in nature. As such, restrictions on it should be examined with particular care." *Vereinigung Blidender Künstler v. Austria*, para 33, See at the Types of expression, paragraph 2.2.1.1
[199] In Leroy v France, 2008, the case concerned a French cartoonist Denis Leroy who had made a drawing representing the attack on the twin towers of the World Trade Centre, with a caption which parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it". In the next issue of the magazine he explained that he did not consider the human suffering caused by the attacks while making the cartoon. He stated that his aim was to illustrate the decline of the US-symbols and reflect anti-Americanism through a satirical image. He also said that cartoonists illustrating actual events do not have much time for distanced reflection. The Court refused to apply Article 17 (prohibition of abuse of rights) in this case, although the French government invoked this article arguing that the cartoon, by glorifying terrorism, should be considered as an act aimed at the destruction of the rights and freedoms guaranteed by the ECHR Thus, the cartoonist was entitled to Article 10 protection. The ECtHR ruled that since the cartoon had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order in the region, the modest nature of the fine and the context in which the impugned drawing had been published did not violate the cartoonists freedom of expression. Para 43
[200] *Alinak v Turkey*, 2005, Supra n 183, The case concerned a novel, using fictional characters, which criticised the hostility by Turkish security forces against residents of an actual village. The Turkish security forces seized the book. The Strasbourg Court held that this action was unlawful because it was a disproportionate reaction to the book. The legal context was again sedition related.

might be construed as inciting readers to hatred, revolt and the use of violence. The national authorities requested the seizure of copies of the book, entitled "The Heat of Şiro" because in their view the content of the book "attribut[ed] extremely disgusting acts to the security forces, identified with names and rank, incited people to hatred and hostility by making distinctions between Turkish citizens based on grounds of their ethnic or regional identity."[201] In deciding whether this in fact did, the Court put the fictional novel in the centre of its assessment and explicitly recognised a literary work as a distinctive form of artistic expression by stating, that "in this regard, the Court repeats that the impugned book is a novel classified as fiction, albeit purportedly based on real events."[202] The same approach was taken also in *Jelsevar and Others v Slovenia*,[203] where the Court explicitly referred to literature as fiction.[204] Yet, there are cases in which the literary work in a more complex context has been not defence and the Court has dismissed any reference to fiction contrary to its own initial findings. For example, in *Lindon, Otchakovsky-Laurens and July v France*, the case concerned a novel which was inspired by real events with fictional elements.[205] Yet, the Court dismissed any reference to fiction, and held that as the novel had a basis in real events, the applicants were required to show that the defamatory value judgments made had a "sufficient factual basis" and were properly verified.[206] The dissenting judges pointed out several relevant points. First, they noted that the Court had not sufficiently taken into account the nature of the work in question.[207] They further explained, that to assess the text "regardless of its literary genre," as was done in the present case, was "a clear departure from our case-law, which has laid emphasis on the role of artistic creation in political debate."[208] Against this background, in the area of literary creation – as in the present case, the dissenting judges, referring to *Karatas*, *Alinak* and *Vereinigung Bildender Künstler*, stated, that when the conflict between rights occurs, the Court must weigh the various interests against each other in order to ascertain whether a fair balance has been struck between the competing rights and interests. In the present case, the national courts did not engage in such an analysis. And neither did the Strasbourg Court. Instead, "by endorsing - or even paraphrasing

[201] *Ibid*., paras 10, 11, 40, 41
[202] *Ibid*., para. 43, However, it should be noted that the legal context was sedition related, similarly to *Karatas*.
[203] *Jelsevar and Others v Slovenia,* 2014
[204] "…. the book at issue was written not as a biography but as a work of fiction..." *Jelsevar and Others v Slovenia*, 2014, para 38, (The application was unanimously declared inadmissible)
[205] The novel, entitled "Jean-Marie Le Pen on Trial," was based on two real-life murders committed by Front National militants and raises the question of Mr Le Pen's responsibility. M. Le Pen succeeded in a defamation action brought against two of the applicants. Appeals were dismissed. The Court found no violation of article 10.
[206] *Ibid*., para. 55
[207] "The book containing the two passages finally regarded as defamatory is not a news report but a novel" at Joint Partly Dissenting Opinion of Judges Rozakis, Bratza, Tulkens and Sikuta, para. 1
[208] *Ibid*., para. 2

the reasoning given by the domestic courts, adhering to the logic they themselves adopted, the Court in its judgment has quite simply refrained from carrying out its own review. The result is that European supervision is lacking, or is at best considerably limited, and this represents a significant departure from our case-law in matters of criticism of politicians."[209]

3.3. Concluding remarks

Artistic expression has gained small victories in recent years in Strasbourg, after the Court took a positive stance towards the arts, and particularly in fiction, in a handful of judgments. Since then, certain defences have been available for creative writers and authors of literary works.[210] In 2014, the Court referred explicitly to fiction as a defence,[211] which is a particularly noteworthy development in the field of artistic freedom. However, the Court has not applied the same rationale in other similar cases that concerned fiction. In the light of this, it certainly is too early to say whether these developments predict a permanent shift in the Court's approach. As has been shown in the last two chapters, artistic expression is only implicitly protected freedom under article 10. Neither has it recognised as a specific category of expression, despite some recent art-positive developments. Acknowledging, that artistic freedom is a widely recognised liberty, the importance of artistic expression and art in general, must be considered accordingly also judicially. In a handful of art-related judgements, given by the Strasbourg Court, especially those where art and morality have conflicted, the Court has over-protected morals at the expenses of artistic freedom. And even those cases, where artistic nature of the work was considered, were cases which were assessed through other legal context than art.[212] The conclusion that can be drawn, is that the jurisprudence of the Strasbourg Court on artistic freedom continues to be inconsistent and indifferent towards art, particularly controversial art that carries a significant critical-moral role in society which the Court tends to overlook.[213] Through the wide margin of appreciation, the Court's established approach to artistic freedom and art in general is, in the view of this thesis, too dependent on a prior national authority's decision which reflect the accepted morality standards of a particular state. The way artistic freedom is protected at a national level will be examined in the next two chapters.

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[209] *Ibid*., para 3, Particularly, "the question whether words or expressions attributed to fictional characters are to be regarded as defamatory is made to depend on whether the author is to be seen as having sufficiently distanced himself in the novel from the words spoken. This seems to us to be a very fragile foundation on which to conclude that an author is guilty of defamation."

[210] Since 2008, satire (in *Vereinigung Blidender Künstler*), precautions in exhibitions, film screenings, etc.

[211] *Jelsevar and Others v Slovenia*, 2014

[212] *Alinak vTurkey, Karatas v Turkey*

[213] Kearns, Artistic Liberty and the European Court of Human Rights, Supra n. 7 p. 181

IV. The freedom of artistic expression in Estonia

4.1. Legal framework and its interpretation

In addition to the general clause of the freedom of expression, the right to artistic freedom is explicitly guaranteed under the Estonian Constitution. As laid down in article 38 of the Constitution, it reads, that: "Science and art and their teachings are free."[214] The wording of the clause contains three fundamental rights, among which is artistic freedom.[215] The right encompasses also the right to produce, possess and distribute artistic works. Thus, by explicitly recognising artistic freedom as a fundamental freedom, the Estonian Constitution affords a more specific protection than article 10 of the ECHR, in which it is not explicitly mentioned.

In connection with artistic freedom, it is assumed, that the clause in which the freedom is afforded, primarily protects the author's freedom to choose what to create and publish, and further, that the state cannot arbitrarily intervene in this process.[216] Artistic freedom in Estonia is, as in most states, a negative liberty, because it is permissible to freely engage in artistic expression, in which the state cannot impose unjustified external limits or interfere otherwise through bans or coercion. The state has, however, an obligation to ensure the "preservation of the Estonian people, the Estonian language and the Estonian culture through the ages" – an obligation that is derived from the requirement laid down in the preamble of the Constitution.[217] It requires to financially support the development of the creative activities, as specified in the Cultural Endowment of Estonia Act.[218] For that purpose, a specific legal entity under public law, the Cultural Endowment, is established,[219] whose main objective is to support culture in general.

As elaborated above, freedom of expression is one of the most important means of assuring individual self-fulfilment.[220] Artistic expression, in turn, is one of the most important forms of self-fulfilment. Thus, both rights are connected, interdependent and, as can be concluded by

[214] The Constitution of the Republic of Estonia, entry into force 03.07.1992, art. 38(1)
[215] The Constitution of the Republic of Estonia, Commented edition, 2017 https://www.pohiseadus.ee/index.php?sid=1&ptid=43&p=38 (29.4.2019, in Estonian)
[216] *Ibid*.
[217] Supra n. 208, The Preamble
[218] "…the activities of which is to support the arts, folk culture, physical fitness and sport and the construction and renovation of cultural buildings by the purposeful accumulation of funds and distribution thereof for specific purposes." article 1
[219] Originally established in 1919 and restored in the newly independent Republic of Estonia by passing the Cultural Endowment of Estonia Act on 1 June 1994, https://www.kulka.ee/en (29.4.2019)
[220] Thomas Emerson, The System of Freedom of Expression, 1970

analysing the text of the Constitution, partially overlapping. The text can be read so, that there is an expression that is not artistic expression, but there cannot be artistic expression that is not an expression. The wording of the article 45 of the Constitution[221] does not specify what can be considered as an expression based on its content or form, leaving the list of protected rights in both categories open. It follows that the prerequisite for the protection, afforded under freedom of expression is not limited to expression which has a certain type of content, for example informative, or require that it is expressed in a particular form. Thus, freedom of expression, as laid down in the article 45, also protects content that is not necessarily informative or expressed in word, print or image format.[222] Artistic expression, on the other hand, can reflect current social and political processes, including informative material, but can be regarded as artistic, if it includes a personal interpretation or comment. Thus, more general clause of freedom of expression essentially protects several different types of expression, while artistic expression, in line with the jurisprudence of the ECtHR, "affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds."[223]

In Estonian legal practice, it is noticeable that, when the question of the limitation of artistic freedom arises, in most cases no reference to article 38, an explicit artistic freedom clause, is not made. Instead, the matter is examined through a more general clause, laid down in article 45 of the Constitution. Although both rights are connected – freedom of expression is a prerequisite for artistic freedom – a legal scholar, Rober Alexy, who has thoroughly studied the Estonian Constitution has stated, that artistic freedom, regulated in the article 38, is a separate fundamental right, not a repetition of rights that are listed and protected under article 45.[224]

Since in practice there is a confusion which provision should be applied to artistic freedom when it conflicts with another constitutional right, it is worth examining both provisions in order to find out through which provision can artistic freedom seek better protection. First, the wording of the article 38 – science and art and their teachings are free – is a clause without a statutory reservation, and thus, can be legitimately restricted only if it conflicts with other

[221] Supra n. 208, article 45 - Everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be circumscribed by law to protect public order, public morality, and the rights and freedoms, health, honour and good name of others. This right may also be circumscribed by law in respect of public servants employed by the national government and local authorities, or in order to protect a state secret, trade secret or information received in confidence which has become known to the public servant by reason of his or her office, and to protect the family and private life of others, as well as in the interests of the administration of justice.
[222] Supra n. 209, R. Maruste. Põhiseaduse article 45 kommentaar, p 5
[223] *Karatas v Turkey*, para 49, Supra n. 162
[224] R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica 2001, pp 90-91

constitutional values that protects the rights of others and collective rights, which the state is obliged to protect.[225] With respect to the article 45, a fundamental right which guarantees the right to freedom of expression in a more general terms provides, however, a qualified reservation by allowing restrictions to freedom of expression in order to protect *inter alia* others' honour and good name, the family and private life of others.[226] As mentioned above, the clause which does not contain *expressis verbis* restrictions, does not mean that artistic freedom is absolute. Nevertheless, restricting a freedom that has unwritten implicit reservation compared to a freedom with qualified reservation should be more strict,[227] which is also supported by the text of the Constitution, which aimed to guarantee some fundamental rights more comprehensively than others.[228] Consequently, by comparing the provisions that guarantee protection to artistic freedom, it can be concluded that, at least in theory, the constitutional protection of artistic freedom is stronger because in case of a conflict, the possible restrictions can arise only in the context of other constitutional norms or basic values of the same level.[229]

In restricting freedom of expression, the state has the right to limit the freedom when the works have been made available to the public. In this context, it is interesting to note, that in an Estonian Constitutional law textbook there has been proposed, that a distinction should be made between published and unpublished artistic works, so that unpublished works could be restricted more broadly than the published works.[230] Essentially what is being said in here is that, published artistic expression should be protected through a more general mechanism of freedom of expression (article 45), not the one specifically designed for artistic expression (article 38). Consequently, also the restrictions should be sought from the realm of freedom of expression. As the freedom of expression is regulated in general terms compared to artistic freedom, consequently the protection under the former is weaker in comparison to the latter. In other words, this position seems to suggest, that the constitutional guarantee applies only to unpublished works. If put into practice, whose rights unpublished works could infringe, or protect, and why should the state regulate, protect or limit something unpublished that is created

[225] Rights and freedoms may only be circumscribed in accordance with the Constitution. Such circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed. article 11
[226] Supra n 215, 3rd sentence
[227] R. Alexy, Supra n 218, p 47
[228] M. Ernits, Põhiseaduse II peatüki sissejuhatav kommentaar, 2012, p 8
[229] Preamble, See also R. Narits, The Republic of Estonia Constitution on the concept and value of law, para 3
[230] T. Annus. Riigiõigus. Tallinn: Juura 2006, p 368

for personal use and is held in a private sphere, given that it is not illegal material[231]? In practice, one field that often conflicts with artistic expression, is defamation. The Estonian Constitution states that "no one's honour, or good name may be defamed."[232] The prerequisite for the act to be qualified as a defamation, however, is that the infringing material or activity must reach the person whose honour or good name has been violated.[233] Thus, it is unlikely that the position, mentioned above, would be feasible in practice. Currently, the prevailing position is that artistic freedom protects all artistic works, published and unpublished works.[234]

When artistic expression violates the rights of another individual, and there is a need to restrict artistic freedom, the legitimacy of the restriction is being assessed through the three-step test, so that the main focus is particularly on the last step of the test. Hence, the test used at a national level, follows the same methodology as in Strasbourg Court. The last step of the test enables to assess whether an interference and measures taken had the "pressing social need" and were thus necessary in democratic society. If the pressing social need exist and is identified, then the means that were used could be justified. In Estonian context, when conflict between rights occurs, and in a situation where the artistic freedom clause lacks *expressis verbis* restrictions it means that in practice preferred approach to assess the matter is primarily through an *ad hoc*-basis.[235] When evaluating artistic freedom through the proportionality test, it is important to acknowledge that artistic freedom, as a fundamental right which is guaranteed without reservation, must be understood as *lex specialis*. Therefore, any restriction on artistic expression must be applied strictly and the weight given to the objective which would justify it, must be particularly strong. This is especially important, because, as elaborated above, in Estonian practice artistic freedom is often assessed through a more general clause article 45. In the view of this thesis, this practice is not justified, especially when exist an explicit artistic freedom clause through which artistic freedom should be first and foremost assessed.

In Estonia, there are only few cases where the artistic freedom has been assessed through article 38. The discussion is therefore mainly theoretical. In this context, reference is usually made to German Constitution because the artistic freedom clause in Estonian Constitution is nearly

[231] For example, child pornography, special restrictions for prisoners to hold certain items even if they are their own creations, etc.
[232] Supra n 208, article 17
[233] R. Maruste. Põhiseaduse § 17 kommentaar, p 3
[234] With unpublished works is meant the mere process or wish to engage in a creative process.
[235] K. Möller. The Global Model of Constitutional Rights. – Oxford: Oxford University Press 2012, p 180

identical with the corresponding provision of the German one.[236] The legal scholar Hannes Rösler, who has researched the German Constitutional Court's jurisprudence, has stated that the German Constitution, similarly to Estonian one, does not provide unlimited artistic freedom, however, in their constitution artistic freedom has a special constitutional status in comparison with a more general freedom of expression. Therefore, according to Rösler, artistic freedom, as *lex specialis,* deserves in practice higher level of protection when the conflict with other constitutional values occurs,[237] a position, that should be a more firmly established guideline in the Estonian legal practice concerning artistic freedom-related matters.

4.2. Artistic freedom case law

4.2.1. Artistic freedom in the context of Estonian civil law

Should in Estonia, where the case law specifically on artistic expression is lacking, the legal system is built to a great extent on German model and the artistic freedom norm is nearly identical with the German one, the German interpretation also be applied? Yes, and it was also done in a most striking example of Estonian case law, where the courts were able to assess the balance between artistic freedom and the rights of others for the first time. In that case, artistic freedom was examined and, in the end, restricted in a civil law context under the violation of a personality right of the victim.[238] In its decision, a first instance court referred specifically to German jurisprudence by stating, that "a dispute that took place in similar circumstances in a similar legal system close to us, the [German] Federal Constitutional Court, has found..."[239]

The case concerned a feature film that was banned from public screenings until the end of the year 2025 in Estonia and worldwide.[240] The film was inspired by real-life people which depicted the twists and turns of a young man's life, including through his family relationships, which allegedly revealed delicate facts of his and his family's life. In the end, both in the real life and in a film, the main character committed a suicide. A plaintiff, a mother of the person alleged to be the subject of the film, claimed that the film violated her privacy. The Supreme court agreed.

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[236] After the regaining of independence, Estonia rapidly restructured the entire law system and adopted the legal system in which the biggest influencer was the Germanic family of law as the main model for the drafting of new laws, particularly private laws. See further, P. Varul, The Creation of New Estonian Private Law. – European Review of Private Law (ERPL) 2008/1, pp. 104–118

[237] H. Rosler, Caricatures and satires in art law: the German approach in comparison with the United States, England and the Human Convention on Human Rights. – European Human Rights Law Review 2008/4, p 468

[238] Law of Obligations Act, entry into force 01.07.2002, § 1045 para 1 (4) - Unlawfulness of causing of damage

[239] The Appeal Court of Tallinn 27.04.2010, 2-07-10586 Translated by the author of this thesis (extracts of the court's reasoning that have been made public)

[240] https://news.err.ee/98974/banned-film-director-vows-to-fight-on

The case was held behind closed doors, and it was found that the film constituted invasion of the privacy of a person alleged to be the subject of the film. The only publicly available document is a partially published judgement of the Supreme Court.[241] Therefore, very little is known about the substantive aspects of the case.[242] Few extracts of the judgement, however, are known through media, which offer a possibility to look into the case in more detail.

In one of the court's extracts reads: "In this case, there is a conflict of fundamental rights, in which different fundamental rights must be considered. The spheres of personal rights can be divided into an individual sphere, a private sphere and an intimate sphere. Delicate personal data belongs to the intimate sphere of a person. Showing them in a way that enables their identification is a particularly serious violation of general personal rights. Certainly, serious violations of personal rights do not fall under the scope of artistic freedom."[243] The court found that applicants, (a mother and sisters of a person alleged to be the subject of the film) were recognizable through the characters and thus, attributable to the real people, who were then depicted in a way that was negative and degrading to their dignity. The court stated, that "the work of art must not undermine human dignity.... All parties of the film were shown in a degrading way, depicting them in a distorted way, degrading their personal image."[244]

In the court's view,[245] only the fact that artistic expression was in a form of a feature film, does not automatically rule out that the characters could not be associated with real person. For establishing the link between real people and the disclosure of their personal data, it is sufficient, according to the court, if the characters are recognizable in the circle of family and acquaintances.[246] In the present case, such identifying factors were the gestures, movements and speech styles of the characters that resembled with the real people. The court had ruled in connection with the use of characters in artist's creative expression that "the more the characters have distinguishable artistic elements, the more can be artistic freedom protected when

[241] Supreme Court of Estonia, Case nr. 3-2-1-104-09 https://www.riigikohus.ee/et/lahendid/?asjaNr=3-2-1-104-09
[242] It was found, that the film violated the applicant's rights under the articles 10 and 19(1) of the Constitution which guarantees the everyone's right to free self-realisation, in this case to portray himself to the public and privacy of the family as set out in article 26, as far as the protection of this provision is concerned.
include the protection of its identity and personal data
[243] Supra n. 225, see further, T. Jõgeda. Miks kohus keelas "Magnuse" näitamise? – Eesti Ekspress 15.05.2008 (in Estonian)
[244] *Ibid*.
[245] To the extent of what is known about the court's reasoning
[246] "For the identification of a person, transmitting even some parts of the information, would be sufficient for some audience to identify the person or easily conclude it." Supra n 225

balanced against the rights of others."[247] In other words, the protection of artistic freedom depends on how artistically the characters are presented.

In this case, the court applied the scale of spheres of personal rights established by German legal scholars, which has been examined in detail in Estonian legal literature by a Circuit Court judge Ele Liiv. According to the scale of the sphere of protection of personal rights, which is divided into individual, private and intimate sphere, the latter should be protected most and remain intact.[248] Based on this reasoning, the court concluded that interfering in person's intimate sphere cannot be justified by artistic freedom. It stated that "severe violations of personal rights are not covered by artistic freedom."[249] Thus, considering the definition of intimate sphere, given by Eve Liiv, it can be concluded that in the context of artistic expression, any use of confidential letters, diary entries, situations and incidents which the person considers as secrets, details regarding sex life, health status, faith and beliefs,[250] must be prohibited without the permission of the depicted person.

With respect to the third step of the proportionality test of the case, the court stated that even in the context of artistic expression, the interference in person's private life must have a "clear societal need". Although pointing this out and highlighting this aspect is in accordance with the jurisprudence of the ECtHR which requires that the interference has a "pressing social need," in the present case it was not examined in detail.

In the light of this case, assessed in civil law context, it can be concluded, that there are five decisive aspects that should be taken into consideration in the context of artistic expression: there must be clear societal need for using personal data of a portrayed person; the interference should leave their intimate sphere intact; the way people are depicted must respect their dignity; when using fictional characters, the more artistically they are presented, the more permissible their use is; and finally, the form of genre of the artistic works does not exclude the possibility of being regarded as an infringement of personal rights. Pursuant to article 19(2), "when exercising his or her rights and freedoms and fulfilling his or her duties, everyone must respect and observe the rights and freedoms of others..." This means that the duty to respect the rights and freedoms of others is applicable also in the horizontal legal relations, which provides the

[247] Supra n. 225
[248] E. Liiv. Väljendusvabaduse ja üldiste isikuõiguste konflikt veebipäevikute ja -foorumite näitel. – Juridica 2008/7, pp 477–478
[249] Supra n 234
[250] Supra n 242

ability for private individuals to protect their constitutional rights also in civil law context. An artist or a writer has an obligation to refrain from infringing the rights of others through their creative works and the state has an obligation to assess possible interferences and protect the person whose rights have been infringed. Additionally, the person has the right to demand that his or her fundamental rights are respected also by other private individuals. Thus, the obligation is not only on state to guarantee that the constitutional rights are applied in the civil law context. Thus, the Estonian legal system applies the identical German third party effect-concept, known in German legal system as *Drittwirkung.* The legal doctrine refers to effects of constitutional rights of one private party for another private party.

On a broader level, one aspect of the present case is particularly interesting in connection with artistic expression. Namely, a debate[251] about whether an artwork could defame. When fictional characters are used in an artistic works – film or novel – that are based on real-life models and through their characters depravity of mind or wicked behaviour is portrayed, to what degree can this be of legal relevance to the real-life individuals if they are identified and a link between characters and real-life persons is made. In an Estonian case this link was established, as was in a similar case of *Lindon, Otchakovsky-Laurens and July v France*, where a novel was inspired by real events with fictional elements and assessed in the context of defamation.[252] In the latter, the domestic courts pointed out, that "whilst the author chose to write a 'novel' ... he portrays, along with a number of fictional characters, an actual and living political figure.." Accordingly, although it is a novel, and although the offending remarks are only made by fictional characters, it can nevertheless be observed that the work seeks to impart clearly expressed ideas and to communicate a certain image of [....] the text, regardless of its literary genre, is capable of harming the honour and reputation of the civil parties and it is appropriate to examine each of the offending extracts to establish their meaning and significance and to determine whether, for the charge of defamation to be made out, they are precise enough for the issue of proof to be addressed."[253] As mentioned above, the Strasbourg Court agreed with the view, taken by the national courts. Consequently, and from the perspective of fiction writers, whose source material is mainly real life and who often draw in their texts on real-life characters

[251] This debate that is most prevalent in the US (in Kearns, "The Contemporary Rights of Artists in England, France and the USA", 2013, p 123, Supra n. 7)
[252] The novel, entitled "Jean-Marie Le Pen on Trial," was based on two real-life murders committed by Front National militants and raises the question of Mr Le Pen's responsibility. M. Le Pen succeeded in a defamation action brought against two of the applicants. The applicants' appeals were dismissed, and the Court found their freedom of expression was not violated.
[253] *Ibid*., para 14

for artistic inspiration, it can be concluded, that in circumstances where fictional characters defame in fiction through defamatory dialogue or other defamatory details actual people and fictional characters are identified and understood to be their living models, could bring actions against the novelist for defamation.[254] Thus, a writer can be sued for fiction, even when the text is based on imagination, which could create a chilling effect on free expression in the future.[255]

In the US, this matter is known as a doctrine of "defamation by fiction". It has been used in several libel by fiction-related lawsuits, in which this doctrine has been examined in detail. Similarly, to the reasoning used by the Estonian court, also in the US, one of the most central requirements in interpreting defamation in the context of fiction, is that the fictional character and the actual person must be very close in description. In *Carter-Clark v. Random House, Inc*., the court stated, that: "For a fictional character to constitute actionable defamation, the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two. Superficial similarities are insufficient."[256]

It has been suggested in the legal literature that since the use of actual people in fiction is quite common, this factual question, that in the US context is resolved in their defamation law by the use of a "defamation by fiction " – doctrine, should be governed by the concept of malice.[257] In practice, this would mean that in order to use a literary genre as a defence, and thus justify the use of defamatory details, it must be established that the novelist intended to harm the depicted person by such a depiction. In other words, the plaintiff must demonstrate that the author "bore ill will towards him in so unpleasantly fictionally characterising him in his novel."[258] There are also other approaches that aim to judicially construct a reasonable solution for this highly conceptually complicated field of libel, however, there is always a possibility that a novel or film could harm the depicted person even without established intent. If a writer and a portrayed person do not know each other, it would be difficult to prove that a novelist intended to harm a real-life model. At the same time, a good writer could, without directly or personally knowing a real-life person depict him or her through fictional character that is very close in description,

[254] Kearns, Supra n. 234, See also D. L. Hudson Jr., A. Gargano, Libel in fiction, Freedom Forum Institute, 2017
[255] In addition to writers, also "publishers may think twice about certain projects": Attorney Debbie Berman, Also, Chris Finan, The American Booksellers Foundation for Free Expression: "Unless there are very careful rules, there is a danger of a chilling effect that publishers will not feel free to publish works in which characters bear even the remotest similarity to real-life people." *Ibid*.
[256] *Carter-Clark v. Random House, Inc*., Supreme Court, New York County, 2003
[257] Kearns, Supra n. 249
[258] *Ibid*.

which could, at least in theory, result in liability for defamation. There is also a little irony in defamation by fiction-claims, namely the claim that the plaintiff is simultaneously very similar and very different from the fictional characters.[259]

One topic, that the approach does not cover, is the question of artistic value of the creative work. Since the "defamation by fiction"- debate is most prevalent in the USA, also this must be seen primarily through the US lens where, with respect with freedom of expression, the adopted legal stance is formalistic – obscene art falls outside the protection of the First Amendment, which protects freedom of expression, unless it has a "serious artistic value".[260] In the next paragraph, more about the value of art, the laws and jurisprudence of US and UK will be discussed in connection with the Estonian criminal law and a high-profile case where the subject matter was sexual morals in literature, which in addition, involve all aforementioned legal systems.

4.2.2. Artistic freedom in the context of Estonian criminal law

Although limiting freedom of expression through criminal law is not very common in democratic societies, there are certain expressions that could violate other people's fundamental rights or human dignity. Therefore, limiting freedom of expression is permittable and not in conflict with the prohibition of censorship. In Estonia, there are only few limits on freedom of expression. Those, that are laid down in the Penal Code of Estonia and which do not conflict with the prohibition of censorship, provided in article 45(2) of the Constitution,[261] include activities which publicly incite to hatred, violence, or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status if this results in danger to the life, health, or property of a person is punishable under the Penal Code.[262] The provision is based on the article 12(2) of the Constitution which prohibits and punishes the aforementioned activities.

From the artistic expression point of view, this means that expression, even if presented through art, cannot incite hatred on the above-mentioned basis. The extent of the restrictions on fundamental rights and freedoms that the state imposes through penal law, depends on how

[259] In in the Terry McMillan novel Disappearing Acts, the court ruled in dismissing a libel-in-fiction claim based on writings: "Further complicating any consideration of a libel-in-fiction claim is the paradox produced by the plaintiff asserting an identification with the fictional character yet denying that significant aspects of such character are true.", Also, In Welch v. Penguin Books USA, Inc., the court explained that the "plaintiff's case thus becomes 'It's me, but it couldn't be me.'"(in D. L. Hudson Jr., A. Gargano, Libel in fiction, Freedom Forum Institute, 2017)
[260] Kearns, Supra n. 249
[261] "There is no censorship. "§ 45(2) Supra n. 208
[262] Article 151, The Penal Code of Estonia, Entry into force 01.09.2002

intense legal protection a state wants to attribute to competing legal interests. The latter is depending and is connected to the value system, which the overall legal policy of the state is built on. Although the state has an obligation to protect various individual and collective rights and punish when they are violated, it should be borne in mind that to tackle those violations through criminal law is a very intense measure. Therefore, the protection of core values and overall legal order of a state through criminal law measures must be limited. Certainly, the punitive system cannot go beyond the constitutional system and dictate or narrow down the core constitutional principles. In this context particularly the principle of *ultima ratio* should be applied, according to which the repressive nature of the criminal justice system should be the last resort of the legislator. In Estonian context, the same principle is summarized well by Ene Laurits who says: "The criminal law, that operates on the basis of *ultima ratio* principle, intervenes only, and only to the extent necessary to protect the most important legal interests for the most serious infringements."[263]

In the context of artistic freedom, two main types of cases can be distinguished that may have relevance from the criminal law perspective. First, there are criminal law norms, that can be triggered by simply creating something which contains material that is prohibited in the Penal Code. For example, creating something which qualifies as an incitement of hatred, mentioned above, or a manufacture of works involving child pornography.[264] Secondly, there are activities which involve the distribution of artistic works that contain prohibited content. For example, the distributing of child pornography[265] or exhibiting cruelty to minors,[266] an act which is applicable also in the context of artistic expression,[267] are prohibited in Estonia. In connection with exhibiting cruelty, in the US, for example the animal cruelty as well as depictions of animal cruelty are federal crimes. However, the exceptions are made if depictions have "serious

[263] E. Laurits. Virtuaalse isiku kujutamise probleemid karistusseadustiku § 178 kontekstis. – Juridica 2014/5, p 402 (translated by the author of this thesis)
[264] § 178, Supra n. 257
[265] Ibid., § 178(1)-"Manufacture, acquisition or storing, handing over, displaying or making available to another person in any other manner of pictures, writings or other works or reproductions of works depicting a person of less than eighteen years of age in a pornographic situation, or a person of less than fourteen years of age in a pornographic or erotic situation, is punishable by a pecuniary punishment or up to three years' imprisonment."
[266] § 180(2) -"Handing over, displaying or knowing making available of works or reproductions of works promoting cruelty in another manner to a person of less than eighteen years of age, killing or torturing of an animal in the presence of such person without due cause or knowing exhibiting of cruelty to him or her in another manner is punishable..."
[267] There are several cases that touch upon this topic. For most recent one see M.A. Travis, Art or animal cruelty? Guggenheim pulls display of live reptiles fighting for survival. The Washington Post, 2017; Artists like Damien Hirst, Adel Abdessemed, Tinkebell and Guillermo Habacuc Vargas have used animals in their artworks in extreme ways.

political, educational, religious, journalistic, historical, scientific, or artistic value."[268] As a side note, the reference to the US animal cruelty-topic in this context is related to artistic expression through the notion, that the ongoing debate in the US concerns a question whether animal cruelty could be regarded as obscene. If yes, it could be used in the same way as it has been used in connection with art, and through the legal term that was established in *Miller v. California* – once the speech is deemed obscene, it falls outside the protections of the First Amendment.[269] In Estonian context, in trying to distinguish the situations in which criminal law might respond to artistic expression is relevant from the perspective of establishing which activity is purely fictional and which do not have an effect in real life (describing a murder in a book), and those which qualify as a crime already based on description (describing child pornography in a book).

4.2.2.1. Writer on trial – case Kaur Kender

Whether a mere text, despite its highly "graphic descriptions" of sexual content, involving children, and violence against them can constitute a crime, was a question that arose in Estonia in 2014, after the Estonian writer and activist Kaur Kender was formally charged with production of child pornography for publishing a novella that featured the abovementioned content. A novella, entitled "Untitled-12",[270] was banned, an investigation by the Internal Security Service initiated, and Kender subsequently charged with the creation and distribution of child pornography under the article 178 of the Estonian Penal Code.[271] Kender himself consistently claimed that a novella was a "grotesque satirical picture" of Estonian society, written in a transgressive literary genre. His claim was identical with the one made in *Karatas*, where the poet claimed throughout the process that the poem "in no way reflected his own

[268] 18 U.S.C. § 48 (2000), Pursuant to the law which regulates this matter, selling, creating, or possessing "a depiction of animal cruelty with the intent of placing it into interstate or foreign commerce for commercial gain can be imprisoned for no more than five years and/or fined." In relation to the criminalization of the creation and sale of some depictions of animal cruelty, in 2010, the Supreme Court found the provision to be unconstitutional under the First Amendment (*U.S. v. Stevens*). The Supreme Court struck down a federal statute that banned depictions of animal cruelty because the Court determined that the statute was substantially overbroad.

[269] More about the animal crush videos-debate in K. A. Ruane, Banning Crush Videos: Legislative Response to the Supreme Court's Ruling in U.S. v. Stevens and Lingering First Amendment Questions, Congressional Research Service, 2010

[270] "Untitled-12" describes the moral corruption of an unknown protagonist, whose wealth and sexual addiction lead him into darker and more violent fantasies, from pornography, to abusing child prostitutes, to domestic violence and, finally, to torture, rape and murder. In its gratuitous depictions of sex, drug abuse and violence..." - J. Robertson, Transgression as ends and means: The trial of Kaur Kender

[271] Supra n. 257, § 178(1) - Manufacture, acquisition or storing, handing over, displaying or making available to another person in any other manner of pictures, writings or other works or reproductions of works depicting a person of less than eighteen years of age in a pornographic situation, or a person of less than fourteen years of age in a pornographic or erotic situation, is punishable by a pecuniary punishment or up to three years' imprisonment.

opinions."[272] In *Karatas*, the poet particularly pointed out that his work was an anthology of poems "in which he had expressed his thoughts, anger, feelings and joys through colourful language that contained hyperbole. The book was therefore first and foremost a literary work and should be treated as such."[273] In Kender's situation, the social critique was expressed in a form of, as he himself called, anti-pornography. He had made his work available online. The book is available on Amazon both in English and in Estonian.[274]

The central question of the case is, whether Kender's novella can be seen as child pornography, and whether a writer can be held criminally responsible for its production and distribution. The provision in question, article 178, according to the commented edition of the Penal Code, is "not to protect the sexual morals of the society but the emotional and sexual development of children."[275] As mentioned, Kender repeatedly pointed out that the graphic descriptions of the violent sexual scenes in the text were not written with a purpose to arouse a reader, on the contrary, he wanted to draw attention to a horrible phenomenon in the society.[276] The Finnish PEN, in its statement, confirms this view and points out that "Kender's story 'Untitled-12' is a grotesque thriller about the psychological decay of a sexual maniac and serial killer. It becomes a pornographic parody where it quotes bible verses and takes exaggeration to the absurd and borrows its ending from the Marquis de Sade's '120 Days of Sodom'."[277] This view was further confirmed by literature experts when questioned in the national court. According to the expert opinions, they found that Kender's text lacks the features of pornography and qualifies as transgressive literature which have literary and artistic value.[278]

The prosecutor, however, pointed out that the Estonian Penal Code, and specifically the child pornography provision does not require that the material in question has a pornographic

[272] *Karatas*, para 11 Supra n. 162
[273] *Ibid*., para 45
[274] https://www.amazon.com/Untitled-12-english-Kaur-Kender/dp/1530841658
[275] M. Kurm. Karistusseadustiku § 178 kommentaar, 4 vlj. Tallinn, 2015, p. 1
[276] In court Kender explained:" I've taken away from the reader the comfortable spot where he could go and be excited by the text. I put this text in front of the eyes of the reader, so he/she would have no hiding places."
[277] The Finnish PEN provided a variety of examples from the Western literary history and pointed out that in Kender's book for example the thinking patterns of the main character were similar to the work of American writer Philip Roth. Also, the subject matter of sexual morals in literature is not new, it dates back to the time of the ancient Greeks and Romans ... "writers whose work was seen as pornographic at the time it was first published" include James Joyce, Norman Mailer, D. H. Lawrence, Henry Miller, Jean Genet, and many others. There is a whole line of books that are still considered at least scandalous, including "Lolita" by Vladimir Nabokov, the works of the Marquis de Sade, and so on." Therefore, "to see the subject of such literary reduction in "Untitled-12" as child pornography is absurd." – https://news.err.ee/118569/finnish-pen-club-kender-s-u12-is-a-grotesque-thriller-not-child-porn (8.5.2019)
[278] Tiit Kuuskmäe Semiootika ekspertiis: kriminaalasi 1-15-11024 (14230113326), 20.3.2017 (copy in the author's possession)

function or aim, and therefore, there is no need to evaluate whether the material has artistic value. According to the prosecutor, the only relevant aspect is the existence of the pornographic content, which can be found in this case, as the text describes sexual acts with children "in a vulgar and intrusive manner and other human relations are disregarded or relegated to the background".[279] In other words, any depiction of a child in a pornographic situation was illegal and the artistic nature of the work has no significance under the article 178. Thus, the question of the literary value was regarded as irrelevant.

In Kender defender's view, in this case, on the contrary, the purpose and subjective aspect of a novel is particularly important, as article 178 of the Penal Code is a blanket clause that leaves the concept of pornography undefined. That requires, that a mandatory reference to another law which stipulate the obligations or prohibitions must be made.[280] Therefore, article 178 of the Penal Code, in conjunction with article 1(2) of the Pornography Act, does not provide a definition, based on which the prohibited activities can be derived. Neither does it provide an objective criterion of pornography, but only refers to subjective features (obscenity, vulgarity), thereby violating articles 3, 4, 10, 13 and 23 of the Constitution.[281] The prosecutor did not provide any evidence that Kender's intention was to create pornography. The defence stated, that "the fact that the prosecutor ignores the evidence that the decision is based on and considers the novel to be vulgar and intrusive, does not make it a crime. The prosecutor listed the works of world literature that are freely sold and available in the libraries in Estonia, where minors have been described in the sexual activities, which the prosecutor may regard as vulgar and intrusive, but which are not understood so by those who understand the literature."[282]

The central argument of the defence was that the act, based on which Kender was accused and was allegedly violating the law, must be specific and unambiguous. In the view of the defence, the prosecutor attempted to expand the scope of article 178 of the Penal Code and the grounds for criminal liability to involve also minors who are fictional, although "every reasonable person understands that the law concerns the depiction of an actually existing child". Therefore, the accusations had no basis in law,[283] as required in article 2 of the Penal Code,[284] in article 23

[279] Article 1(3) Act to Regulate Dissemination of Works which Contain Pornography or promote Violence or Cruelty, Entry into force 01.05.1998 (hereinafter Pornography Act)
[280] Defence's appeal to the Tallinn District Court, 29.06.2017(copy in the author's possession) para. 16
[281] Article 23. No one may be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed.
[282] Para 17, Supra n. 278
[283] *Ibid*., para 11
[284] "No one shall be convicted or punished for an act which was not an offence pursuant to the law applicable at the time of the commission of the act."

of the Estonian Constitution,[285] as well as in article 7 of the ECHR.[286] Indeed, the Supreme Court of Estonia has underlined in several rulings the importance of the principle of *nullum crimen sine lege*, according to which a criminal offense is punishable only if it is prescribed by law.[287] In connection with the latter, the Supreme Court has pointed out that in accordance with the principle of foreseeability, provided by the ECtHR,[288] that an individual must know from the wording of the relevant provision "what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission."[289] Consequently, defence took a view, that "since the article 178 of the Penal Code violates artistic and scientific freedom, a fundamental right, laid down in article 38 of the Constitution – a clause without a statutory reservation – it is clear that interference can only be constitutional if it is intended to protect the fundamental right of another person. In the instant case, a person whose fundamental rights need protection does not exist, has never existed and will never exist."[290]

With regard to the applicability of the penal law outside the territory of Estonia, the defence pointed out that, just as the prosecutor had not provided any evidence regarding the alleged obscenity and intrusiveness or that these elements were present in Kender's book, neither was substantiated that the "obscene material" in Kender's novella met the criteria of "obscenity" in England and Wales (place of making the book available) and in the US (place of production), and was thus punishable in these common law countries. If, as the prosecutor claimed, Kender's text was indeed obscene, no reasonable explanation was presented why is Kender not accused in those countries for these acts. The fact that this had not happened in these countries in itself confirm that they are not considered as a crime under their jurisdiction. Pursuant to article 7 of the Penal Code, "the penal law of Estonia applies to an act committed outside the territory of Estonia if such act constitutes a criminal offence pursuant to the penal law of Estonia and is punishable at the place of commission of the act...",[291] the Supreme Court has taken a view in its earlier ruling, that if an identical norm exist in the countries in question, then its existence must be established prior to the establishment of the constituent part of the offence.[292] In the US as well as in England and Wales, such norm as article 178 of the Estonian Penal Code, does

[285] "No one may be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed."
[286] Art 7 of the ECHR: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."
[287] For example, the judgement of 3-1-1-74-15 (para 7.2 and 12) and 3-1-1-75-15 (para 10) of the Supreme Court
[288] *Gillow vs. The United Kingdom*, 1986
[289] Guide on Article 7 of the European Convention on Human Rights, 2018, p. 12
[290] Para. 13, Supra n 277
[291] Article 7(1) of the Penal Code
[292] 3-1-1-35-07, p. 10, Supra n 284

not exist. In the Anglo-American legal system, only works that lack scientific, political or artistic value, are considered unlawful and punishable. The prosecutor Lea Pähkel, however, had repeatedly expressed her personal view that Kender's work has no artistic value.[293] The First-tier court and the Tallinn Circuit Court acquitted Kender based on the fact that the writer had committed the act of which he was accused, in a foreign country and not in Estonia, as he was in the U.S. state of Michigan at the time the work was published on the website Nihilist.fm, the servers of which are located in the U.K. It was not proven that Kender had produced any part of his work within Estonia's territorial jurisdiction. In order to punish an act committed abroad, it is the task of the prosecutor to prove that the act was punishable also in those countries where it was committed. The prosecutor failed to prove that. Furthermore, it had to be established whether Kender's novella had literary value. Based on the expert's statements who testified at the court and the semiotic assessment, the Circuit Court concluded that the novella had indeed a literary value. Consequently, Kender's texts was not punishable under the U.S. or English law, and therefore the Republic of Estonia has no jurisdiction over the matter.[294]

Thus, the main conclusions that can be drawn from this case is that Kender was acquitted only because he wrote and published his work outside Estonia. In terms of the national law, particularly the child pornography provision, the following was found: article 38 of the Constitution states that science and art and their teachings are free. Pursuant to the article 11 of the Constitution, these "rights and freedoms may only be circumscribed in accordance with the Constitution. Such circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed." In the instant case, article 178 of the Penal Code restricts the fundamental freedom, laid down in article 38, a clause without a statutory reservation. A such infringement can be constitutional only if it is intended to protect another person's constitutional rights. In the present case, there is no such person – a fictional character cannot be regarded as a person with legal capacity who has fundamental rights and the freedom, that is guaranteed in article 38. Moreover, this fundamental right cannot be restricted based on the presumed or speculative threat. Therefore, article 178 of the Penal Code infringes the freedom of art, as provided in the article 38 of the Constitution, disproportionately and thus, is unconstitutional.[295]

[293] Para. 24, Supra n 277
[294] The judgement of the Circuit Court, https://upload.wikimedia.org/wikipedia/et/0/06/1-15-11024_TLN_RK.pdf (in Estonian); Summary in English - https://news.err.ee/635786/kender-s-acquittal-upheld-by-circuit-court (10.5.2019)
[295] *Ibid*., para 4.10

This position is also in line with relevant international instruments, such as Convention on the Rights of the Child, the Optional Protocol of the Convention as well as the European Parliament and the Council of the European Union directive 2011/92/EU, which requires state parties to criminalize all forms of sexual exploitation and sexual abuse of a child. These instruments, however, do not require criminalizing the depicting of fictional children in literary works or texts in general. The Convention on the Rights of the Child defines a child as "...every human being..." whose use in pornographic performances and materials must be prevented.[296] Thus, in the context of sexual exploitation and sexual abuse, the Convention deals with actual human beings and their use in pornographic materials. According to the definition of the Convention, it does not cover fictional characters in literary works. The same definition is followed by the Optional Protocol, which aims to further "achieve the purposes of the Convention" and accordingly, criminalize activities that involve real children.[297] Additionally, a handbook on the implementation of the Protocol, issued by UNICEF, explains *inter alia* the terms used in the Protocol and specifies that a child is any person under the age of 18 years.[298] Literary characters, regardless of their age, are not covered by the Convention, nor are they protected by the Optional Protocol because they are not human beings. It follows, that depicting children in sexual context in fiction is not child pornography within the meaning of the Convention and the Protocol. Neither can be claimed that the member states at European level, including Estonia, are not required to criminalize the description of fictitious "children" in pornographic texts in their national criminal law. In fact, quite opposite is required. The directive 2011/92/EU provides guidance only for the criminalization of visual child pornography.[299] This is explicitly stated in the preamble of the directive as well as in the article 2 (c) (1) and (4). The words used in these articles are *image* and *visual*. Thus, the directive excludes texts in the context of child pornography. A detailed analysis of the aforementioned instruments show that Estonia is only obliged to criminalize the use of real children in the production, storage or distribution of pornographic material which are represented visually, leaving the text, which depicts child pornography in fiction, outside the scope of these instruments.

[296] Articles 1, 34, UN General Assembly, Convention on the Rights of the Child, 20 November 1959
[297] Preamble, articles 2 and 3(1)(c) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, A/RES/54/263, 18 January 2002
[298] UNICEF, Innocenti Research Centre, Handbook on the Optional Protocol on the sale of children, child prostitution and child pornography, pp 5 and 12 - https://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf (11.5.2019)
[299] The European Parliament and the Council of the European Union directive 2011/92/EU On combating the sexual abuse and sexual exploitation of children and child pornography13 December 2011, 2004/68/JHA

During the Kender process, 13 members of the Estonian Parliament initiated an amendment to the Penal Code, which sought to add a paragraph 3 to the article 178 (1) with the wording: "This section does not apply, if the work mentioned in subsection (1) has significant artistic, scientific, historical or political value." The explanatory memorandum explained that this exception was derived from the need to protect the fundamental freedom, prescribed in article 38 of the Constitution, as the current interpretation is disproportionally limiting. The motion, however, was not supported by the Legal Affairs Committee.[300] In sum, a fictional character who has never been "born" is not a person within the meaning of article 178 of the Estonian Penal Code, and such a "person" cannot be created on paper. The opposite would mean disregarding the principles enshrined in article 23 of the Estonian Constitution, article 7 of the ECHR[301] as well as the principles of accessibility and foreseeability, making the accusation on this ground contrary to the principles of *nullum crimen nulla poena sine lege certae* and *lex scripta*.

Since the significant part of the case related to United States (place of creation) and English and Wales (place of making the book available) laws and jurisprudence, both systems will be briefly examined next from the perspective and to the extent that related to Kender case.

4.2.2.2. The case of Kender through the lens of United States law

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech, or of the press..."[302] This provision means that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[303] The U.S. Supreme Court has determined, however, that certain categories of expressions do not qualify as protected speech, such as defamation, fraud, incitement, and speech integral to criminal conduct,[304] as well as obscenity[305] and child pornography.[306] To prevent disproportionate encroachment on protected speech, however, these terms are strictly defined.[307] As a result, it

[300] Parliament of Estonia, press release 05.06.2017)
[301] No punishment without law
[302] U.S. Constitution amendment I, cl. 2
[303] *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002)
[304] *United States v. Stevens*, 559 U.S. 460, 468 (2010)
[305] *Roth v. United States*, 354 U.S. 476 (1957) - "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."
[306] *New York v. Ferber*, 458 U.S. 747 (1982) – "Recognising and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."
[307] *Reno v. American Civil Liberties Union* 521 U.S. 844 (1997) "[i]t is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population…to…only what is fit for children. Regardless of the strengths of the government's interest in protecting children, the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."

is an established principle under the U.S. Constitution that mere "sexual expression which is indecent but not obscene is protected by the First Amendment."[308] It follows, that as the U.S. Supreme Court made clear in *New York v. Ferber*, the First Amendment does not permit criminalization of purely textual works merely because they depict sexual conduct by minors.[309] This position was reconfirmed in *Ashcroft v. Free Speech Coalition* when the Supreme Court held that provisions of the Child Pornography Prevention Act 1996 prohibiting "virtual child pornography" to be unconstitutional under the First Amendment. Thus, consistent with this jurisprudence, both the U.S. federal and Michigan state[310] (place of creation) statutory regimes criminalizing the creation or distribution of child pornography exclude from their scope purely textual depictions of minors engaged in sexual conduct. Nevertheless, persons may be held liable for dissemination of a written work describing sexual conduct between an adult and a minor if these works satisfy the Constitutional test for "obscenity" as set forth in *Miller v. California*:

a) whether the average person, applying contemporary "community standards" would find that the work, taken as a whole, appeals to the prurient interest;
b) whether the work depicts or describes, in an offensive way, sexual conduct or excretory functions, as specifically defined by applicable state law; and
c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[311]

These defences are independent of one another and a defendant may choose to invoke only one of them or all of them, a choice that is at his or her discretion. With respect to the first element, "prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest of sex."[312] The second part of the test, narrows the material that may be held to be obscene for two reasons. First, it requires laws prohibiting obscenity to define with specificity *precisely* the sexual depictions that are prohibited. Statutes

[308] *Sable Communications of California v. FCC*, 492 U.S. 115 (1989); Carey v. Population Services International, 431 U.S. 678 (1977) "...where obscenity is not involved it had "consistently held that the fact that protected speech may be offensive to some does not justify its suppression."; FCC v. Pacifica Foundation, 438 U.S. 726 (1978) "..the fact that society may find speech offensive is not sufficient reason for supressing it."
[309] "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment…Here the nature of the harm to be combated *requires that the state offence be limited to works that visually depict sexual conduct by children* below a specific age.", Supra n. 303, para 764 (emphasis added)
[310] Michigan's Penal Code § 750.145c
[311] *Miller v. California*, 413 U.S. 15 (1973), para 24
[312] *Brockett v. Spokane Arcades Inc*., 472 U.S. 491 5-4 (1985)

that describe prohibited acts unclearly are unconstitutionally vague and overbroad.[313] Second, under *Miller*, obscene material must be more than simply about sex; it makes illegal only materials that depict patently "offensive" sexual acts.[314] The third element of the test is the least discussed element of the obscenity test. Here a very steep burden of proof is on a prosecutor who must demonstrate beyond a reasonable doubt that the literary work is obscene pursuant to Miller. In *Pope v. Illinois*, the Court stated that, although the first two elements of the test may be demonstrated by proof that a subjective "average viewer" applying "local community standards" would find that the work appeals to the prurient interest and is patently offensive, the third element requires more, in recognition that the First Amendment protects also works that the government and/or the majority of people find highly objectionable. [315] In the U.S. context, Kender's strongest defence would have been the fact, that textual works, even if they consist depicting sexual acts with minors, is not a crime unless the prosecution demonstrates that such a work is obscene pursuant to *Miller* beyond a reasonable doubt. Pursuant to *Pope*, if any reasonable person could find a serious literary value in the work, it is not considered obscene. In Kender's case there were six literary experts who testified that his work had serious literary value.

4.2.2.3.The case of Kender through the lens of English law

Before 1959, the publications which contained obscene material, were not allowed in England. This legal state of affairs had the effect of inhibiting the publication in England of literary works, such as for example James Joyce's *Ulysses.* The commonly used way to circumvent the ban on literary works which contained morally degenerate content was to publish these types of works in Paris and import them to England. This device of publication was deployed for example in the publication of Nabokov's *Lolita* in 1959, a year the Parliament passed the Obscene Publications Act 1959.[316] Thus, if Kender would have been charged in England before 1959, his offence would have been the common law offence of obscene libel since the law did

[313] For example, *Reno v. American Civil Liberties Union,* Supra n 304
[314] The term is specified in *Brockett*, Supra n. 309, paras 504-505
[315] *Pope v. Illinois*, 481 U.S. 497 (1987) paras 500-501 " The proper inquiry is not whether an ordinary member of any given community would find serious value in the allegedly obscene material, but whether *a reasonable person* would find such value in the material, taken as a whole. "(emphasis added)
[316] More in D. Birch, M. Drabble, The Oxford Companion to English Literature, 7th Edition, Oxford University Press, 2009, p 206

not "allow any obscene publication."[317] The Act sought to reverse this legal state of affairs[318] and, although it did not entirely remove all elements of controversy in the law, it certainly introduced a defence of literary merit that lifted the threat of prosecution of publishers of literary works which contained elements which could be considered obscene.[319]

The "obscene" article[320] is described in the Act as the one that tends to deprave and corrupt persons likely to read, see or hear the matter contained or embodied in it.[321] In cases such as Lady Chatterley's Lover[322] and the prosecution of the publishers of Last Exit to Brooklyn,[323] the court has defined the term "deprave" as to make morally bad, to debase, to pervert, or corrupt morally, and the term "corrupt" as meaning to render morally unsound or rotten, to destroy moral purity or chastity, to pervert or ruin a good quality, and to debase or defile.[324]

The 1959 Act sets out the legal test for obscenity and creates certain offences[325] and defences. Section 4(1) of the Act, entitled *Defence of public good*, provides that "..a person shall not be convicted of an offence ... if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern." The essence of this section is elaborated in the case of *Jordan*.[326] Section 4(2) further provides that "it is hereby declared that the opinion of

[317] *Regina v. Hicklin* (1868) L.R. 3 Q.B 360" We have it therefore, that publication itself is a breach of the law. But then, it is said for the appellant, "Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional." Be it so. The question then presents itself in this simple form: May you commit an offense against the law in order that you may effect some ulterior object which you have in view, which may be an honest or even laudable one? My answer is emphatically, no"

[318] In DPP v Whyte (1972) AC 849, Lord Simon explained the purpose of the Act as follows (at p. 867): "The intention of this Act was rather, as it strikes me, on the one hand to enable serious literary, artistic, scientific or scholarly work to draw on the amplitude of human experience without fear of allegation that it could conceivably have a harmful effect on persons other than those to whom it was in truth directed, and on the other to enable effective action to be taken against the commercial exploitation of "hard pornography" – obscene articles without presentation to any literary, artistic or scholarly value."

[319] The Act's sub-title reads: "An Act to amend to law relating to the publication of obscene matter; to provide for the protection of literature; and so to strengthen the law relating to pornography"

[320] An item covered by the Act is referred to as an "article" which includes works that can be read or looked at (Section 1(2)

[321] Section 1(1) of the Obscene Publications Act 1959

[322] *R. v Penguin Books Ltd* (1961)

[323] *R. v Calder and Boyars Ltd* (1969)

[324] Index on Censorship, Obscene Publications, Guide, 2016

[325] Section 2(1) "...any person who, whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain (whether gain to himself or gain to another)] shall be liable..."

[326] *Director of Public Prosecutions v. Jordan,* (1977) AC 699, Lord Wilberforce at p. 718G "[Section 4] introduces a new type of equation – possibly between incommensurables – between immediate and direct effect on peoples' conduct or character and inherent impersonal values of a less transient character assumed, optimistically perhaps, to be of general concern...must be in order to show that publication should be permitted in spite of obscenity – not to negative obscenity."

experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground."[327]

An offence under the Act therefore falls into two "halves": a) whether a person published an obscene material (section 2(1)), and if he did, then nevertheless, b) whether publication of that obscene material was justified in the public good as a result of the article's literary, artistic, scientific or similar merits (section 4(1)). If neither of two "halves" is established, or both are, there is no offense. It is only, if the first "half" alone is established that an offence has been committed under section 2(1). Thus, the issue of obscenity is purely a matter for the jury's common sense, reflecting a democratic society's views, and no expert evidence is permitted on that issue. By contrast, the issue of literary merit or similar, is a determination of "inherent impersonal values", as pointed out in *Jordan*, so expert evidence on literary or other merits is permitted under Section 4(2) of the Act.

In the context of English law, when the work tends to corrupt and deprave more than a negligible amount of its actual and likely readers, then a defendant may rely on the defence of public good, and only then a jury must consider whether publication is justified on grounds of literary merits. The latter is not to be decided by reference to the effect on the readers, as obscenity is. It is to be determined in the abstract, with the benefit, where appropriate, of expert evidence. In practice, the essence of the defence, including Kender's defence, had it taken place in England, will be: even if the work depraves and corrupts more than a negligible amount of its actual and likely readers so that the works has a detrimental effect on the fabric of society, that detrimental effect is nevertheless outweighed by its value to society that it has as literature.[328]

[327] Section 4(1) and (2) of the Obscene Publications Act 1959

[328] Expert evidence of Richard Samuel on the English Obscene Publications Act 1959 (copy in the author's possession)

V. The freedom of artistic expression in Finland

5.1. Legal framework and its interpretation

In Finland, artistic freedom is a constitutionally guaranteed fundamental right under the article 16.3 of the Constitution, which states that:" The freedom of science, art and higher education is guaranteed."[329] The article is semantically very similar to the article 38 of the Constitution of Estonia, which states that "Science and art and their teachings are free."[330] In turn, as the Estonian legal system is influenced by German laws, the artistic freedom clause in Germany is also similar – article 5(3) of the Federal Constitution of Germany states that: "Art and scholarship, research, and teaching shall be free....".[331] Yet, the context of these articles is slightly different. In Estonian context, artistic freedom is placed under the *Fundamental Rights, Freedoms and Duties*-chapter where both articles, the ones that regulate the freedom of expression and artistic freedom, are laid out. And although these rights are written in separate articles, the view taken by the legal scholar Hannes Rösler, as was elaborated above, is that in the German Constitution, similarly to Estonian one, artistic freedom has a special constitutional status in comparison with a more general freedom of expression and therefore, artistic freedom, as *lex specialis*, deserves higher level of protection when the conflict with other constitutional values occurs.[332] Thus, the interrelationship and hierarchy of these two separate rights are, at least in theory, acknowledged.

In Germany, artistic freedom is written under the *Basic Rights*-chapter and under the article which specifically deals with the freedom of expression, arts and sciences. This indicates, and is also confirmed in Estonian context, that in both Constitutions, the freedom of artistic expression is seen as *lex specialis* – a clause that overrides a more general freedom of expression-provision, and based on its semantic formulation, is purely freedom-oriented.[333] Whereas in Finland, the general freedom of expression-clause can be found in article 12 of the Finnish Constitution and, as mentioned above, the freedom of artistic expression in article 16.3., which deals with the right to education and culture.[334] This indicates, that in the Finnish doctrine, artistic freedom can be seen, in addition to the negative freedom, as one that derives

[329] Chapter 2 - Basic rights and liberties, Section 16 - Educational rights, The Constitution of Finland, 11 June 1999
[330] Supra n 211
[331] Freedom of expression, arts and sciences - Article 5(3) of the Basic Law for the Federal Republic of Germany
[332] Supra n. 234
[333] "Kunst – – sind frei. – –" Article 5(3), Supra n. 328
[334] The article was added, together with several totally new fundamental rights to the Finnish Constitution during the Finnish constitutional reform in 1995.

from the idea of a positive freedom, a freedom as an ability to conduct a certain act.[335] In comparison with Estonian or German doctrine, where the freedom is primarily seen as a negative liberty, which permits freely engage in artistic expression, and in which the state cannot impose unjustified external limits or interfere otherwise through bans or coercion, the Finnish approach, based on its semantic formulation, takes a more welfare-orientated position where the freedom to artistic expression is seen as a tool to increase the level of cultivation of people and through that their welfare more generally, by describing artistic freedom as the one to be secured.[336] Thus, in Finland, the artistic freedom is, in addition to being part of the more general freedom of expression, also as a freedom which is intertwined with educational and other economic, social and cultural rights that are typical to the welfare state.[337] In practice, this manifests itself through the states' constitutional obligation for positive action, namely, the freedom of artistic expression obligates the state to support art and artists in different forms, although this scheme of support does not require the state to establish a subjective right for grants.[338] In Estonia, for example, a positive state action manifested itself through the special legal entity, the Cultural Endowment, whose main purpose was to support Estonian culture also through various supporting measures.[339]

In terms of negative liberty, the central idea of the classical freedom of expression concept is a notion that the state does not interfere in artistic freedom, especially if it is approached from a fundamental and human rights perspective. In practice this means, that the fundamental right imposes an obligation on the public authorities not to intervene in artistic expression through censorship or other governmental interferences, namely limiting legislators' authority to enact legislation that would regulate the form, the style and the content of the artistic expression, with an exception for restricting expression that is needed for the protection for the rights of others.[340] In this context, the principle of legality must be taken into account, which specifies the requirements of the provision - the wording of the criminal law provision must be in line with the principle of foreseeability which enables the person, causing the violation, to reasonably foresee the general consequences that would result from his acts and/or omissions.[341] In

[335] P. Rautiainen, The legal status of a professional visual artist, Tampere University Press, Tampere 2012, p. 40
[336] *Ibid*.
[337] *Ibid*.
[338] *Ibid.*
[339] Supra n. 216
[340] *Ibid.*
[341] *Gillow vs. The United Kingdom*, 1986, Supra n 285-286

Finland, this principle is stated in article 7 of the Finnish Constitution.[342] Thus, in order to consider a particular act a crime, it must be clearly written in law and it must be punishable.

In addition, when applying restricting legislation on artistic freedom, it requires that the nature of the freedom of artistic expression and its special nature is taken into account contextually and in a way that is necessary in democratic society where conventionality can be challenged, and new ideas experimented.[343] Any restrictive legislation which involves artistic freedom, whether it was the prohibition of the dissemination of child pornography or copyright-related limitation, must seek justification from fundamental rights and freedoms-level provisions where the restricting provisions must outweigh the fundamental freedom of artistic expression. These principles have a basis in international human rights instruments and the European Union legal system, with which the Finnish national fundamental right system is connected. Therefore, these fundamental principles, that were discussed at a European level and at a national level, are also applicable in Finnish context. It follows, that when assessing a particular fundamental and human rights-related matter in Finland, in this case artistic freedom, various international human rights obligations and interpretations must be taken into account in addition to national fundamental rights standards. The interaction between the pluralized dynamic legal systems, however, is not based on predetermined norm hierarchy system where one norm from one system would override the other norm from another system. Rather, when solving a particular legal issue, the combined effect of the norms of different systems is determined by the context.

In the present-day Finnish context, the most problematic question in connection with the restrictions on artistic freedom, is the legal uncertainty. During the drafting phase of the Finnish constitutional reform in 1995, no legal reasoning and clarification was provided by the Constitutional Law Committee on how the fundamental right to artistic expression is weighted against other fundamental rights, what is the "value" of artistic freedom within the Finnish legal system and how this constitutional right corresponds with other fundamental rights or with aspects which are criminalized. This question was ignored and referred to be concretised in the case law.[344] In the government's proposal explanation, the following was said in the context of freedom of science, art and higher education: "through the freedom of science, the arts and

[342] Article 7 - The principle of legality in criminal cases
No one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an Act at the time of its commission. The penalty imposed for an offence shall not be more severe than that provided by an Act at the time of commission of the offence.
[343] P. Rautiainen, Taiteilijan ilmaisuvapaus oikeudellisessa taidemaailmassa, 2012, p 68
[344] *Ibid*.

higher education, the conditions for cultural development are created. The provision is strongly linked with article 10 of the ECHR, which provides the right to freedom of expression. Freedom of science provides the right to the person who carries out a research, to choose his/her research subject and method freely.... Also, in art, the expression and the methods of the expression must be free, which in turn contribute and diversifies social dialog. The constitutional provision, guaranteeing the freedom of artistic expression ensures that the state does not intervene in art."[345] The Education and Culture Committee of the Finnish Parliament made the following statement to the Constitutional Law Committee who was drafting a report for the government bill regarding the freedom of science, the arts and higher education: "According to the proposed subsection of article 13(3) of the government proposal,[346] the freedom of science, the arts and higher education is guaranteed. The provision can be seen as a right that includes both the freedom and educational right and is closely linked with article 10 of the ECHR, which guarantees freedom of expression. The committee holds, that this provision creates significant conditions for cultural development. The provision includes, *inter alia*, the scientist's right to choose their research topics and methods. With regard to the freedom of art, the government's proposal states, that the freedom includes, among other things, the expression and methods of the expression."[347] Thus, the Constitutional Law Committee and the Education and Culture Committee did not specify, hardly even covered, artistic freedom in their report during the constitutional reform. In these texts, the only concrete element that is linked to the freedom is welfare state-related educational function, but what, in effect, constitutes the freedom of artistic expression, is left unclarified. The constitutional freedom that involves the right to "expression and the methods of the expression" is as such already protected under the freedom of speech-clause[348] as the provision is considered to be content and method-neutral freedom. Yet, the drafting documents do not specify what rights can be derived from the Constitution that concern artistic freedom and that fall outside the protection under the more general provision of the freedom of expression, although the drafting documents explicitly mention that artistic freedom has an independent and, from the freedom of expression, non-dependant dimension. Unfortunately, a more specific guidelines cannot be found through the case law which concerns the application of the restricting legislation on the artistic freedom either, because such case

[345] HE 309/1993, p 64-65 - https://www.finlex.fi/fi/esitykset/he/1993/19930309 (17.5.2019)
[346] Article 13(3) *Ibid*.
[347] The statement of the Education and Culture Committee, 1994, p. 3 - https://www.eduskunta.fi/FI/vaski/Lausunto/Documents/sivl_3+1994.pdf (in Finnish)
[348] Section 12 - Freedom of expression and right of access to information of the Finnish Constitution

law practically does not exist, except for one case that will be examined next. Hence, the legal status of the artistic freedom and the boundaries of art in Finland are currently unspecified.

5.2. Artistic freedom case law

The opportunity to shed light on the boundaries and what is permitted or prohibited in art could have been significantly clearer if the Supreme Court of Finland would have granted a leave to appeal to the case concerning a Finnish artist Ulla Karttunen who exhibited her work, entitled "the Virgin-Whore Church" in an art gallery in Helsinki in 2008. The work included images of child pornography that were freely downloaded from the Internet, some of them extremely violent or degrading, and the artist's explanatory texts in which children's erotization was criticized and which aimed "to encourage discussion and raise awareness of how widespread and easily accessible child pornography was".[349] A day after the opening, a visitor made a complaint to police, after which the police seized the pictures, as well as Karttunen's computer and the exhibition was closed down. The prosecutor pressed charges against the artist on the grounds of the domestic criminal law, that criminalizes, *inter alia*, the manufacturing and distribution "of sexually obscene pictures or visual recordings depicting children, violence or bestiality."[350]

Karttunen was eventually convicted of possessing and distributing sexually obscene pictures depicting children in the Helsinki District Court.[351] In its reasoning, the District Court stated, that by referring, *inter alia*, to article 10 of the ECHR, "everybody had the right to freedom of expression as well as to freedom of the arts unless the exercise of these rights constituted a crime...the applicant guilty was justified for the protection of morals. Even though the applicant's intention had not been to commit a criminal act but, on the contrary, to criticise easy access to child pornography, possessing and distributing sexually obscene pictures depicting children were still criminal acts. Their criminalisation was based on the need to protect children against sexual abuse...As to the sanctions...the applicant had intended to provoke general discussion about child pornography. Considering the circumstances, *inter alia*, that the crimes were minor and excusable, the court did not impose any sanctions on the applicant. Instead, the court ordered all the pictures to be confiscated."[352] As the Supreme Court refused the applicant

[349] *Karttunen v. Finland*, No 1685/10, Admissibility, 10 May 2011 (inadmissible), paras 15 and 24
[350] Chapter 17, section 18-19, of the Penal Code
[351] Court of Appeal, HO 6.3.2009, 533, R 08/1888; Helsinki District Court 21.5.2008, 4619, R 08/2628
[352] *Ibid*., para 6

leave to appeal, Karttunen complained in Strasbourg under Article 10 of the Convention based on the claim that her right as an artist to freedom of expression had been violated.[353]

The ECtHR established, that the artist's conviction, even if no sanction was imposed on her, constituted an interference with her right to freedom of expression. The interference was found also to be prescribed by law and pursued the legitimate aim of protecting morals as well as the reputation or rights of others.[354] With regard to the interference in the artist's freedom of artistic expression and whether it was necessary in a democratic society, the Court found, that the domestic courts had adequately balanced artist's freedom of expression with morals and reputation and rights of others...and found that "the applicant's freedom of expression did not justify the possession and public display of child pornography."[355] Although the Court admitted that "conceptions of sexual morality have changed in recent years" and noted that the domestic courts had acknowledged "the applicant's good intentions" by not imposing sanctions, the aspect of "morals" involved and the margin of appreciation afforded to the state particularly in this area, the Court found that the interference was proportionate to the legitimate aim pursued. Thus, the Court concluded that "it does not follow from the applicant's claim that her conviction did not, in all the circumstances of the case, respond to a genuine social need."[356]

At no point did the Court assess Karttunen's work through the lens of artistic expression, the way it did, for example in *Müller* 30 years earlier, where the Court assessed the nature of the work in question. The disputed visual art works contained also then prohibited obscene material and had other similar elements as in Karttunen's works. The Court then allowed the balancing through the three-step test and affirmed the work as artwork, while in the case of Karttunen, the artistic freedom claim was ignored despite the fact that Karttunen emphasised throughout the process that her work had artistic purpose.[357] What might have been the decisive element between these cases, however, is that in *Müller*, the paintings did not contain recognizable persons and did not involve minors, although his paintings were considered highly classified as obscene. It is difficult to draw more detailed conclusions, because Karttunen's works are declared secret until 2033 and thus, cannot be analysed based on its content or artistic elements. Therefore, it is also pure speculation to suggest what could have been the outcome if Karttunen would have brought the discourse related to child exploitation and pornography to the public

[353] *Ibid*., Para 15
[354] Depicted children in the pictures were recognisable and their right to private life had to be protected
[355] Para 23
[356] Para 24
[357] Para 15

eye by means other than the very criminal acts she was protesting. If that would have been the case, then evaluating this question would have opened another legal question: how to balance freedom of expression and a child's dignity. This is a question the courts refused to engage with and assessed Karttunen's case through freedom of expression and criminal law perspective. Consequently, principles relating to the balancing and assessing hierarchies of these types of freedoms are not yet established. Given the fact that the state is not supposed to interfere, in principle, in artistic freedom, the Finnish courts would have needed strong arguments in support of having been able to define in what format and aesthetic means the artist should have chosen in order to be able to express her views. In *Müller,* the Strasbourg Court stated that the importance of the freedom of expression lies in the fact that it "affords the opportunity to take part in the public exchange of cultural, political and social information."[358] "Through the creative work, the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day."[359] Since the examination of Karttunen's case has its limitations, it is interesting to compare it with another, similar and much-discussed case,[360] which dealt with an installation, entitled "Human earrings" by artist Richard Gibson, which was exhibited at the gallery in London, open to the public. The artist exhibited two, legally obtained[361] freeze-dried human foetuses of three to four months' gestation with a ring fitting tapped into its skull and attached at the other end to the model's earlobe and attached them to a model's ear lobes.[362] The case was brought against the artist and the gallery owner under the common law offence of outraging public decency under which they were also convicted. Outraging public decency is a common law offence in England and Wales and it regulates behaviour that is deemed obscene, lewd or shocking in public. Had they been prosecuted under the Obscene Publications Act 1959, which covers non-textual work, they could have been able to rely on the "public good"- defence that was introduced to provide protection to artists who had been subjected to prosecutions under the common law of obscene libel prior the said Act. Thus, by charging them with outraging public decency, they could not offer evidence of their intentions or claim artistic aspect of the work and its display. The common law rules were most likely applied because the Indecent Displays Act 1981, that was

[358] *Müller and Others v. Switzerland,* Supra n 136, para 27
[359] Report of the Commission, adopted on 8 October 1986, Series A, No.133, at 37, para.95
[360] For example, T. Lewis, Human Earrings, Human Rights and Public Decency, 2002; Kearns, 1998
[361] Artist obtained the foetuses, which had been stored in formaldehyde for 20 years, from a British anatomy professor (in T, Lewis, Human Remains as 'Artistic Expression' and the Common Law Offence of Outraging Public Decency: 'Human Earrings', Human Rights and *R. v. Gibson* Revisited, 2015
[362] *Ibid*., p 86

previously applied on indecent matters specifically exempted displays in galleries and the only option to suppress exhibition was the common law.[363]

The European Commission of Human Rights declared the application to be manifestly ill-founded. It did find, however, that the restriction on expression was sufficiently prescribed by law; that it pursued a legitimate aim – in this case the protection of morality; and that it was necessary in a democratic society. On this last point, a reference to the wide margin of appreciation that was afforded to states where the protection of morals is concerned, was made. The "Human earrings"- decision has been criticized in the international[364] as well as in Finnish legal literature,[365] for similar reasons – in both decisions the fundamental rights aspect was not considered. In Karttunen's case, the shortcomings were first shown in Helsinki District Court's judgement, where the court completely distanced itself from applying fundamental rights and constitutional rights-oriented approach in applying criminal law. It just stated that freedom of expression or artistic freedom cannot displace the prohibitions contained in the Penal Code. It can be concluded, that in the view of the national courts, the fundamental rights relating to freedom of expression could be concretized through the justification criteria expressly recorded in the Penal Code, although the Court of Appeal gave the fundamental right a little more importance by stating that in the present case the question is about the balancing the freedom of artistic expression and the protection of the privacy of the children. Yet, although recognizing this, the Court of Appeal did not go as far as to actually exercising this *pro et contra* balancing. Instead, it presented a conclusion by announcing as an established and self-evident fact that: "The protection of the privacy of children outweighs the freedom of expression and artistic freedom."[366] According to Eric Brandt, the "Human earrings"- case is a typical case, which should have been approached through artistic expression and the assessment of its defence. In the case, the ECtHR should have established first, the artistic nature of the work and second, since the work was displayed at the gallery, assessed it in that context.[367] Thus, although "Human earrings"- case has no direct connection with Finnish law, the discussions around these cases at a national level and beyond illustrate that the most accepted view, at least in legal literature, is to approach these cases from the artistic expression perspective from the beginning so that it follows the principle where the state primarily refrains from interfering, and if it does

[363] *Ibid*. p 87
[364] E. Barendt, Freedom of Speech, Second Edition, 2005, p. 385
[365] P. Rautiainen, Taiteellinen alibi: Ilmaisurikoksentaiteellinen luonne sen rangaistavuuden poistavana tekijänä, Oikeus 2010 (40); 2: 244–253, p 252
[366] Supra n 348
[367] Supra n 361

interfere and restrict, then with restraints. Unfortunately, the decisions of these type of cases illustrate that the outcomes are only rarely constructed on these principles and grounds.

5.3. Characteristics of Finnish artistic freedom

In Finland, art and artistic expression encounter law only rarely. In present-day Finland, the imposition of restrictive legislation on art and actual artistic expression by public authorities is not a topical issue – there is no direct interference in artistic activity and at most the restrictive legislation affects artists' artistic activities only occasionally. Pauli Rautiainen[368] has researched Finnish art politics and the materialization of relevant fundamental and human rights in Finland. In his comprehensive and thorough study, in which he studied specifically the legal status of a professional visual artist,[369] it can be seen that the overall research material has been scarce, which in itself is telling. The fundamental freedom that guarantees and protects artistic expression is hardly ever referred to in Finnish case law, government texts or public debate. Thus, the "freedom of science, art and higher education is guaranteed" – clause of the Finnish Constitution has remained a forgotten provision, as Rautianen suggests in his study.[370] He raises a number of cases on Finnish history that have shaped the Finnish artistic expression sentiment. In 1956, for example, the Finnish Parliament demanded the government to limit or even ban the distribution of comic books due to the fact that it was regarded that these publications had indecent content. The committee was set up in 1961 and its function was to examine comics that were published in Finland and evaluate their compatibility with laws. Although the comic discussions later slowed down, (mostly because the imported comics were rather harmless) and the committee concluded that no legislative or legal action on comics was not needed, however, it was recommended to enhance the level of comics through positive and encouraging measures,[371] these discussions continued reflecting general attitude towards domestic as well as foreign art in Finland. Another famous example of Finnish artistic freedom related history that Rautiainen points out is a writer Hannu Salama-case. Salama's book "Juhannustanssit" was published in 1964. In 1966 the book was censored, and the author was convicted for blasphemy. Salama was finally pardoned by the Finnish president Kekkonen in 1968. The book was published in its original form only in 1990.

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[368] http://www.uta.fi/jkk/yhteystiedot/hallintotiede/rautiainen.html (21.5.2019)
[369] P. Rautiainen, Kuvataiteilijan oikeudellinen asema, Ammattimaista taiteellista toimintaa rajoittava ja edistävä oikeussääntely. Tampere University Press: Tampere. (Diss.)
[370] *Ibid*., p 147
[371] Ralf Kauranen: Seriedebatt i 1950-talets Finland - En studie i barndom, media och reglering. Åbo Akademis förlag 2008.

5.4. Concluding remarks

The restrictive legislation imposed by public authorities on art and actual artistic expression which affects artists' activities occurs only occasionally in Finland. Rautiainen, who is one of the very few scholars in this field in Finland, confirms in his study that the number of encounters where art and law have met over, not even years but decades, is very small and can be counted on the fingers of two hand, even though there are moments in the history of Finnish art when several scandalous art-related situations appeared in clusters in the turn of the 1960s and 1970s.[372] Rautiainen makes frequently a reference to self-censorship in his study and suggests that this can be explained by the findings of an art anthropologist Nathalie Heinich, who proposes that due to the fact that legal boundaries, imposed by the restrictive legislation that determine the line between permitted and prohibited are so well integrated by artists that the "rules of the game" have become invisible.[373] Indeed, based on the findings of this thesis, it can be concluded that in Finland, artistic freedom is not restricted through the actual legal regulation mechanisms. Rather, when art reflects aspects which the society might consider problematic or undesirable, they are dealt with through different forms of self-regulation and self-censorship, instead of an application of actual legislation, which in turn explains why there are only so much case law in this area. Hence, when artistic works causes or may cause negative reactions, the attitude towards displaying it can be rather cautious, even though the display of the work does not directly violate any public morals-protecting legal provision. At the core of these non-legal mechanisms of self-regulation or self-censorship are not prohibition norms derived from the law, but rather these restrictions rely on the power of the art industry's own rules and their position to execute the right to decide what type of art will be displayed and what is not. The obligation not to interfere in artistic expression, the one the state has, does not mean, however, that the artist has a right to have his or her art displayed in a particular platform.[374] Thus, from the perspective of artistic freedom, it is important to bear in mind that this obligation is not extended and attributed to these non-state parties, which further means that they can apply *de facto* restrictions on artistic freedom outside the legal framework. It follows, that the *de facto* materialization and protection of artist's rights in Finland requires the acknowledgment of the impact of the economic and market mechanisms to art, in addition to law and its interpretations.

[372] Supra n. 340 p 69
[373] Heinich, N. The Sociology of Contemporary Art: Questions of Method. (in Schaeffer, J., Think Art. Theory and Practice in the Art of Today. Witte de With, Rotterdam 1998, pp 65-69 (in Rautiainen, Supra n 369, p 69; Supra n 366, p 234)
[374] Deputy Chancellor of Justice decision dnro. 256/1/06 (14.12.2006)

VI. Conclusion

Art, particularly controversial art, has been a challenging phenomenon for thousands of years. Already around 380 B.C., Plato discussed the problem associated with poets. In "Republic" he described them as imitators of the world who are far from the truth,[375] who corrupt youth and incite the passions instead of the means of reason. Plato concluded that poetry must be banished from the hypothetical, ideal society; however, if poetry makes "a defence for herself in lyrical or some other meter, she may be allowed to return from exile."[376] In modern world, art attracts legal attention only infrequently, but when it does, it continues challenging the law, the existing perceptions and the underlying sentiments of the different societies. In the present-day conditions when art meets law, the discussion is most commonly related to the right to free expression, through which it is assessed whether a work in question is art, and if it is, whether the expression is permissible under the laws of a particular state. In general, the existing laws are favourable towards art – the freedom of expression, including artistic freedom, is recognised as a fundamental human right and its significance of the said freedom is acknowledged. Laws protect art and guarantee artistic freedom on a constitutional level also in most countries. The challenges arise, when these laws are applied to art in practice. Namely, the legal measures, that are applied to art depend heavily on the prevailing values through which the issue is viewed. This is particularly so when art clashes with morality – an area where the contracting states of the ECHR are granted a wide margin of appreciation, through which states can interpret art and its permissibility primarily from the perspective of national local-moral standards. These views, taken at a national level, are often further reinforced in Strasbourg, where the Court interprets art and fundamental right to artistic freedom based on the Convention which lacks a generic definition of art and a detailed concern for culture as a specific entity. Moreover, when dealing with moral concerns, which fall within the principle of subsidiarity, artistic freedom is only a loose theme without a firmly fixed position in Strasbourg case law, rather than a persistently recognised separate category of specific concern, as it should be in the view of this thesis.

In the centre of this thesis has been the inter-relationship of art and law and the challenges thereof. At this point, it is pertinent to summarise the findings of the research by navigating through the main ideas of the previous chapters and suggest some approaches.

[375] "The tragic poet is an imitator, and therefore, like all other imitators, he is thrice removed from the king and from the truth." Book III of the *Republic* 381 BC (in Poetry Foundation, Essay on Poetic Theory from the *Republic*)
[376] *Ibid*. Book X

The main conclusions and suggestions of this thesis are primarily related to the interpretation of laws and the sentiments that play a decisive role in determining what value is given to art – an undefined entity – and artistic expression in a given contexts. With respect to the latter, it became apparent, based on the cases that were examined in this thesis, that when the concept of art and artistic value are brought into the legal system, whether it happens in Strasbourg or at a national level, artistic value of a work is assessed and solved according to the legal system's own conditions. This has been a challenging task – both to the ECtHR and to the national courts. Particularly morality-related cases are decided, both at a national level as well as in Strasbourg, based on multiple undefined or otherwise subjective elements, such as the meaning of harm to society, as well as the terms like obscenity, indecency and pornography which are all defined inconclusively, allowing certain degree of subjectivity, when applied. This has led to an inconsistent and imprecise case law. Art and artistic expression, on the other hand, must demonstrate to law, that also feasible, offensive or obscene works may possess valuable artistic merit, which in turn is essential for art to seek protection. Thus, a defence against interference and the justification for this type of expression, depends on several imprecise factors.

The main findings of chapter two, which examined the legal framework of the right to freedom of artistic expression at European level, confirmed that the greatest challenges in this context are related to the definitional problems which include the actual text of article 10 as well as several related principles, such as the principle of proportionality – considered inherent in the Convention as a whole, the application of the three-step formula – a test based on which the legitimacy of the interference with the exercise of the freedom of expression is established, the margin of appreciation – a central doctrine which grants national authorities the right to assess on what constitutes an appropriate response to various matters with distinct factors of local laws and practices, and other inter-related contentious concepts. Particularly the principles of margin of appreciation together with the principle of proportionality have a decisive function and is crucial from the perspective of the *de facto* protection of artistic freedom. Yet, in practice, the use of these principles is occasional and their inter-relationship, i.e. how the proportionality relates to the test of a pressing social need or what principles determine the scope of the margin, is non-transparent and inconsistent. These findings were further confirmed in chapter three, which examined artistic freedom case law of the ECtHR in detail. The application of the above-stated principles in practice showed that the jurisprudence of the ECtHR regarding artistic freedom is indeed inconsistent and the protection of the said freedom uncertain based on the handful of judgements on artistic freedom, given by the Court.

The Court has taken some positive stance towards the arts in recent years by introducing certain new "defences" which could be seen as a victory for the arts. These include *inter alia*, the "European cultural heritage", introduced in *Akdaş* in 2010, and the leading case of *Karata*, in which the artistic nature of the work was recognized as a defence against interference. The most recent case that predicts well for the future is *Jelsevar* from 2014, where the Court explicitly referred to fiction as a defence. Additionally, the Court has implied that creative writers may rely on certain defences, such as satire. These examples of positive development have a seminal importance in the area of artistic freedom, particularly in the context of literary works. Nevertheless, these cases and the positive aspects thereof do not outweigh the Court's rather art-negative views in terms of rationale and outcome that the Court has "returned" to apply in other cases with similar content after its art-positive findings. One such case was Karttunen. Considering that the interests of contemporary artistic freedom have been defeated in every morality-oriented case under the Convention,[377] the positive developments in the handful of judgements do not outweigh the general views taken by the Court.

This is also where the main criticism of this thesis lies – in the Court's methodology and the fact that the Court does not repeat its positive findings consistently. As a result, the protection of artistic freedom at European level continues being formed in a piecemeal fashion. More importantly, artistic expression is not recognized as a specific category and is not protected on its own terms, as it should be. In that sense the leading case *Karatas* is very illustrative – the Court accepted the work's artistic nature as a defence only because it had a political dimension. Indeed, *Karatas* seems to reflect the more general attitude towards art and the Court's position in this context – the judgement shows simultaneously signs of chance and implies that for the artistic expression to succeed in Strasbourg and receive stronger protection, it must have an additional aspect, preferably demonstrably political. At a national level, both in Estonia and in Finland, one common conclusion, that can be drawn is that artistic freedom, a constitutionally guaranteed right, is one of the least applied provisions in the Constitution of both countries and the discussion regarding it has been mainly theoretical. In Estonian context, the central findings were closely related to *Kender* case, through which the national laws and jurisprudence were examined. In Estonia, artistic works, including textual works, which contain allegedly obscene content or any depiction of a child in a pornographic situation, is considered illegal under the Estonian Penal Code. The concept of defence or artistic value of the work, the way it is known and established in other jurisdictions, namely in the U.S., England and to some extent in the

[377] Kearns, Supra n 43, p 180

ECtHR jurisprudence, as was mentioned above, does not exist and is not applied in Estonia. In the context of the U.S., the essence of the concept of defence is that, textual works, even if they consist depicting sexual acts with minors, is not a crime unless it is demonstrated that such a work is obscene pursuant to *Miller* test beyond a reasonable doubt. Moreover, pursuant to *Pope*, if any reasonable person could find a serious literary value in the work, it is not considered obscene. In England, the essence of the concept of defence is based on the idea that if a work depraves and corrupts more than a negligible amount of its actual and likely readers – so that the works has a detrimental effect on the fabric of society – that detrimental effect is nevertheless outweighed by its value to society that it has as literature. The *Kender* proceedings illustrated that in Estonia, despite its Constitutional level guarantee, artistic freedom, and more specifically literary texts, are disproportionately restricted due to the fact that literary or more general artistic value is not taken into account. It follows, that restrictions imposed on artistic freedom are in this respect unconstitutional and textual literary works are not protected to the extent that the national Constitution, at least in theory, enables. The fact that a writer was acquitted in Estonia was only because he wrote and published his work outside Estonia. In Finland, the restrictive legislation imposed by public authorities on art and actual artistic expression which affects artists' activities occurs only occasionally. The findings suggest that in Finnish context a more decisive role is not so much on actual legal regulation mechanisms, but rather restrictions on artistic freedom originate mainly from non-state parties, i.e. art industry and its own mechanisms which can impose *de facto* restrictions on art through self-regulation or self-censorship and other socio-economic conditions. Those were not, however, analysed in the present thesis because they go far beyond the scope of this study. Consequently, the main conclusion that can be drawn, is that the *de facto* protection of artist's rights in Finland requires that the impact of the economic and market mechanisms to art, is recognized in addition to law. With respect to the restrictions that could occur in the context of criminal law, such was in the case of *Karttunen*, and to compare it with *Kender* case, it could be concluded, that even though the Finnish Penal Code does not prohibit textual works as does the Estonian Penal Code, and only the sexually obscene pictures or visual recordings depicting children are criminalized under the domestic criminal law, the fact that the national courts ultimately assessed the case through criminal law without giving the artistic nature of the work much attention, demonstrates that also in Finland, the protection of artistic freedom, a constitutionally guaranteed right, remains mainly theoretical.

The proposed hypotheses, posited in the introduction, were consequently confirmed.

The starting point for the suggestions is, that from the human rights point of view, it is of utmost importance that artistic freedom, as s fundamental human right, receives *de facto* protection. To ensure that, the Strasbourg Court must maintain human rights standards related to this topic by first, judicially recognizing that art possesses its own cultural system, and secondly, by taking a more methodological and contextual approach in protecting it from the viewpoint that art is a specific category of expression. This requires, *inter alia*, re-evaluating or even dismissing states' arguments, which are aimed at minimizing pluralism or curbing expressions that are allegedly harmful from the states' point of view, be it then an expression that goes against accepted morality standards or an expression regarded as dissident views which the national authorities can repress through censorship based on the wide margin of appreciation.

Additionally, it would be crucial to categorize existing and emerging defences in order to reach a more balanced and methodologically coherent outcomes in which the courts could approach art and the issues before them when art confronts countervailing pressures. Ultimately, it falls upon the Court in Strasbourg as well as national courts to operationalise the principles espoused in the ECHR and national Constitutions and realise this endeavour – the protection of the legitimate interests of artists and the fundamental right to artistic expression.

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