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Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights

Eleni Polymenopoulou*

ABSTRACT

In a series of cases decided over the last few years, the European Court of Human Rights has been increasingly vindicating artistic freedom. It has been expanding the meaning of 'satire' as a form of art; excluding the protection of religious sensibilities from the scope of Article 9; and gradually referring to the defence of 'fiction' in literary cases. Yet a more careful analysis of the Court's case law does not suggest that art holds a privileged status among other forms of expression. It rather suggests that the Court, albeit tacitly, operates a certain hierarchy of values: on the one hand, by privileging liberal—and secular—values and, on the other, by being mindful to preserve the States' margin of appreciation in issues touching upon public morality and public order. In this article I submit that the Court could substantially benefit from an explicit consideration of defences for artists and writers.

KEYWORDS: artistic freedom, literary freedom, freedom of expression, public morality, religious sensibilities, Article 9 and Article 10 European Convention on Human Rights

1. INTRODUCTION

Since its first judgment in 1959 or, more accurately, since the late 1990s when its case law started growing,[1] the European Court of Human Rights (ECtHR or 'the Court') has been confronted with a vast number of cases related to various human rights violations. From these cases, the ones that are primarily based on claims of violation of Article 10 of the European Convention of Human Rights[2] (ECHR or 'the

* Lecturer-in-Law, Brunel University (eleni.polymenopoulou@brunel.ac.uk). In this article all translations from French into English and *vice versa* are those of the Court unless otherwise indicated.

1 The majority of judgments have been issued from the 1990s and onwards, specifically because the Court became full-time after Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms restructuring the control machinery established thereby 1994, ETS 155.

2 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

Convention') represent only a small percentage;[3] and yet this small percentage reflects some of the most arduous challenges for democratic societies, including topics as fascinating as bribery and sex-scandals revelations;[4] defamation cases and the protection of 'whistle-blowers';[5] duties and responsibilities of investigatory journalism;[6] illegal torrent downloading;[7] minority language protection in political life;[8] racism[9] and homophobia;[10] the prohibition of revisionist speech;[11] and the condemnation of speech inciting to violence and hatred.[12]

A small part of this case law also encompasses expression in the arts. Despite their sporadic appearance, these 'artistic freedom' cases constitute a popular topic in scholarly discussions. Setting aside the obviously intriguing element of art being the object of a judicial dispute, this is the case for at least two more reasons. The first is the *sui generis* nature of artistic freedom as a human right. Art is a very 'subtle'—sometimes

3 The Court has now delivered approximately 19,000 judgments, of which less than 1,000 concern Article 10: see ECtHR, 'Statistics', available at: www.echr.coe.int/pages/home.aspx?p=reports&c= [last accessed 24 September 2015]; ECtHR, Annual Report 2014, available at: www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf [last accessed 24 September 2015]; and ECtHR, 'Violations by Article and by State 1959-2014', 29 January 2015, available at: www.echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf [last accessed 24 September 2015]. Note also that since the Court's new 'Priority policy' following the amended Rule 41 in 2009, Article 10 applications are not considered to be urgent. On Article 10 case law until December 2006, see Oetheimer, *Freedom of Expression in Europe: Case Law Concerning Article 10 of the European Convention on Human Rights* (2007).

4 See, for example, *Marcin Kacki v Poland* Application No 10947/11 (pending) (politicians' involvement in sex scandals); *Armellini and Others v Austria* Application No 14134 /07, Merits and Just Satisfaction, 16 April 2015 (footballer's involvement in bribery scandals); and *Vasile-Sorin Ozon and Ştefan Candea v Romania* Application No 38504/04, Admissibility, 15 April 2014 (alleged connections of Romanian politicians with the Mafia).

5 See, for example, *Guja v Moldova* Application No 14277/04, Merits and Just Satisfaction, 12 February 2008 (whistle-blower who leaked documents to the press).

6 See, for example, *Stoll v Switzerland* Application No 69698/01, Merits, 10 December 2007 (reporting on confidential papers on the compensation of Holocaust victims); *Steel and Morris v United Kingdom* Application No 68416/01, Merits and Just Satisfaction, 15 February 2005 (severe defamation of McDonald's); *Pedersen and Baadsgaard v Denmark* Application No 49017/99, Merits, 17 December 2004 (journalists interviewing witnesses of a murder case on television); and *Bladet Tromsø and Stensaas v Norway* Application No 21980/93, Merits and Just Satisfaction, 20 May 1999 (investigative journalism on illegal seal hunting).

7 See, for example, *Neij and Sunde Kolmisoppi v Sweden* Application No 40397/12, Admissibility, 19 February 2013 (closure of 'The Pirate Bay'); *Ahmet Yıldırım v Turkey* Application No 3111/10, Merits and Just Satisfaction, 18 December 2012 (closure of an individual user's website); and *Akdeniz v Turkey* Application No 20877/10, Admissibility, 11 March 2014 (right to access to 'myspace.com' and 'last.fm').

8 See, for example, *Şükran Aydın and Others v Turkey* Applications No 49197/06, Merits and Just Satisfaction, 22 January 2013.

9 See, for example, *Perinçek v Switzerland* Application No 27510/08, Merits and Just Satisfaction, 17 December 2013 (Armenian genocide denial as an act of racial discrimination, pending before the Grand Chamber); and *Aksu v Turkey* Applications Nos 4149/04 and 41029/04, Merits and Just Satisfaction, 15 March 2012 (anti-Roma sentiment in the book 'The Gypsies of Turkey'). See also infra text accompanying nn 140–1.

10 See, for example, *Vejdeland and Others v Sweden* Application No 1813/07, Merits and Just Satisfaction, 9 February 2012.

11 See, for example, *Lehideux and Isorni v France* Application No 24662/94, Merits and Just Satisfaction, 23 September 1998.

12 See, for example, *Gündüz v Turkey* Application No 35071/97, Merits and Just Satisfaction, 4 December 2003; and *Zana v Turkey* Application No 18954/91, Merits and Just Satisfaction, 25 November 1997 (pro-PKK speech in the Turkish Parliament). See also infra text accompanying nn 115–119.

Name of the plaintiff	Year decided	Respondent state	Main form of art	A	Main issue at stake	Outcome	Vote
1. *Alechina*	. . .	Russia	Music	10	Incitement to hatred	–	–
2. *Samodurov*	. . .	Russia	Visual arts/ sculpture	10	Incitement to hatred	–	–
3. *Jelševar*	2014	Slovenia	Literature	8	Personality rights	Inadmissible	–
4. *Kartunnen*	2011	Finland	Visual arts/ sculpture	10	Public morality	Inadmissible	–
5. *Ehrmann*	2011	France	Visual Arts/ Exhibition space	10	Public order	Inadmissible	–
6. *Akdaş*	2010	Turkey	Literature	10	Public morality	Violation	U
7. *Kuliś and Różycki*	2009	Poland	Illustration/ cartoons	10	Personality rights	Violation	U
8. *Leroy*	2008	France	Illustration/ cartoons	10	National security; Human dignity	No violation	U
9. *Ulusoy*	2007	Turkey	Theatre	10	National Integrity	Violation	U
10. *Kar*	2007	Turkey	Theatre	10	Incitement to hatred	Violation	U
11. *Bildender*	2007	Austria	Visual arts & sculpture	10	Personality rights; religious sensibilities	Violation	4 :3
12. *Lindon*	2007	Turkey	Literature	10	Personality rights	No violation	13 :4
13. *F.D. and V.G.*	2006	France	Cinema (film classification)	10	Public morality	Inadmissible	–
14. *Ben El Mahi*	2006	Denmark	Illustration/ cartoons	9	Religious sensibilities	Inadmissible	–
15. *İ.A.*	2005	Turkey	Literature	10	Religious sensibilities	No violation	4 :3
16. *Dağtekin*	2005	Turkey	Literature	10	National security; Peace (non-violence); Religious sensibilities	Violation	U
17. *Alınak*	2005	Turkey	Literature	10	National security	Violation	U
18. *Özkan*	2005	Turkey	Film (television)	10	Religious sensibilities	Inadmissible	–
19. *Erkanli*	2003	Turkey	Illustration/ cartoons	10		Friendly settlement	–

(*Continued*)

(continued)

Name of the plaintiff	Year decided	Respondent state	Main form of art	A	Main issue at stake	Outcome	Vote
					Insult of the nation & the Republic		
20. *Feldek*	2001	Slovakia	Poetry	10	Personality rights	Violation	5 :2
21. *Karataş*	1999	Turkey	Poetry	10	Incitement to hatred	Commission: no violation	26 :6
						Court (GC): violation	12 :5
22. *Dubowska et Skup*	1997	Poland	Illustration/ cartoons	9	Religious sensibilities	Inadmissible	–
23. *Wingrove*	1996	United Kingdom	Video art	10	Religious sensibilities	Commission: violation	14 :2
						Court: no violation	7 :2
24. *Otto-Preminger*	1994	Austria	Cinema (film classification)	10	Religious sensibilities & Public order	Commission: violation	13 :1
						Court: no violation (Article 10)	6 :3
25. *S. and G.*	1991	UK	Visual arts/ Sculpture	10	Public morality & Human Dignity	Inadmissible	–
26. *Choudhury*	1991	UK	Literature	9	Religious sensibilities	Inadmissible	–
27. *Müller*	1988	Switzerland	Visual arts/ Sculpture	10	Public morality	Commission: violation	11 :3
						Court : no violation	6 :1
28. *N.*	1983	Switzerland	Graffiti	10	Property rights	Inadmissible	–
29. *X. Ltd. and Y.*	1982	UK	Poetry	9	Religious sensibilities	Inadmissible	–

also symbolic—form of expression, suffering from definition problems more than any other form.[13] It is also, however, one that is historically and philosophically free of constraints:[14] this is precisely why many constitutional traditions distinguish it from other forms of expression, providing for separate, unqualified, protection.[15] Yet since art under the Convention[16]—like any other form of expression—is subject not only to restrictions,[17] but also to duties and responsibilities,[18] the question of possible 'defences' applicable to artistic expression remains somehow ambiguous. The second reason is the expertise required of the Court in relation to conflicts of rights in cases concerning artistic expression. In fact, the Court has developed case law on 'artistic controversies' far more extensively than any other mechanism of regional human rights protection. As an indication only, it may be noted that, as against the 29 cases that have reached the Court and the former Commission (and that are analysed in this article), only one such case has reached the Human Rights Committee,[19] one the Inter-American Court[20] and none the African Commission and Court or the Court of Justice of the European Union.[21] In the cases that do come before the Court, a particularly heavy burden falls upon the shoulders of the

13 As an example of the difficulty of defining the arts, see the extremely generic definition of the artist in the Recommendation concerning the Status of the Artist, adopted at the 21st session of the General Conference of the UNESCO, 27 October 1980, at para 1: '"Artist" is taken to mean any person who creates or gives creative expression to, or re-creates, works of art, who considers his artistic creation to be an essential part of his life, who contributes in this way to the development of art and culture and who is or asks to be recognized as an artist, whether or not he is bound by any relations of employment or association'.

14 See Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999) at 218; and Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (2007) at 12.

15 For constitutions in which the protection appears unqualified, see, for example, Article 5 German Constitution (Basic Law); Article 17a Austrian Constitution; Article 16 Federal Constitution of the Swiss Confederation; Section 12 Constitution of Finland; Article 33 Italian Constitution; Article 5 Greek Constitution; and Article 20(1) Spanish Constitution. Cf. Article 13 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, which provides that '[t]he arts and scientific research shall be free of constraint.'

16 The European Convention has no separate provision guaranteeing freedom of artistic expression. In *Müller*, however, the Court clarified that Article 10 of the Convention encompasses the arts: see *Müller and Others v Switzerland* Application No 10737/84, Merits, 24 May 1988, at para 27.

17 See Article 10(2) ECHR.

18 Article 10 is one of the two provisions of the Convention that explicitly provides for 'duties and responsibilities' (the other 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, ETS 117): see Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 3rd edn (2014) at 687–91.

19 *Hak-Chul Shin v Republic of Korea* (926/2000), Views, CCPR/C/80/D/926/2000 (2004). See also Human Rights Committee, General Comment No 34: Freedoms of opinion and expression (art. 19), 12 September 2011, CCPR/C/GC/34, at para 11.

20 *Case of 'The Last Temptation of Christ' (Olmedo-Bustos et al.) v Chile* IACtHR Series C 73 (2001) (censorship of Scorsese's film 'The Last Temptation of Christ'). Following the case, Chile amended its constitutional provision on prior censorship. This case has precedents in a number of states, including Japan, Greece (Supreme Court GC 13/1999) and Israel (Israeli Supreme Court HC 806/88): see Cohen-Almagor, *The Scope of Tolerance: Studies on the Costs of Free Expression and Freedom of the Press* (2006) at 90–1.

21 In a famous judgment on the exportation of artworks, the CJEU ruled that the latter should be treated like any other product: C-7/68 *Commission v Italy* [1968] ECR 423.

Judges. On the one hand, they are compelled to decide on these thorny issues of public morals and religious convictions, for which a *consensus* is arguably impossible to be found, making recourse to the margin of appreciation inevitable.[22] On the other hand, they are confronted by larger dilemmas that go way beyond concerns of a purely legal nature, such as the resolution of conflicts between individual and group rights[23] and the accommodation of ethno-religious diversity.[24] These questions usually give rise to the particularly challenging exercise of balancing between competing rights and values, pertaining to questions ultimately ethical, if not also political.

The present article does not consider all cases touching upon the arts,[25] but confines itself to those cases that fall within the ambit of Article 10 and are directly related to artistic freedom. It argues that the case law of the Court, taken as a whole, does not support a conclusion that the arts hold a privileged status among other forms of expression, nor that there is now an articulate methodology to consider conflicts between artistic freedom and the rights of others. In fact, the position of the Court has not evolved in the sense of giving more weight to artistic freedom than to other values, except insofar the Court has excluded religious sensibilities from the protective scope of Article 9 when clashing with Article 10.[26] And yet certain trends in the case law of the Court, visible especially in judgments after 2005 and in dissenting opinions, support the suggestion that, in the context of European democratic societies, artists and writers could rely on defences specifically adapted to them. This article submits that the Court could substantially benefit from explicitly recognizing and categorizing these defences, particularly the emerging defence of 'fiction'. It further suggests that such recognition could, eventually, contribute to handling the relevant cases in a more coherent way.

22 Letsas, 'Is there a right not to be offended in one's religious beliefs?' in Zucca and Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (2012) 239 at fn 15; Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8 *German Law Journal* 711; and Palmer, 'Blasphemy and the Margin of Appreciation' (1997) 56 *Cambridge Law Journal* 469.

23 The alignment of the Court's views on freedom of expression with the protection of minority identities could find support in the development of the concept of pluralism and minority rights in the case law of the Court. See Ringelheim, *Diversité culturelle et droits de l'homme: La protection des minorités par la Convention européenne des droits de l'homme* (2006); and Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights' (2007) 3 *European Constitutional Law Review* 367 at 376, arguing that '[t]he state has a positive obligation to protect religious groupings against treatment that would make it impossible for them to profess their conviction without being threatened' (at 380).

24 Accepting that religious individuals or groups of individuals have the right to have their sensibilities accommodated raises the question of the place of religion in the democratic public sphere. See a first attempt for a legal framework: Article 19, 'The Camden Principles on Freedom of Expression and Equality', April 2009, available at: www.refworld.org/pdfid/4b5826fd2.pdf [last accessed 24 September 2015], see in particular 'Principle 5: A public policy framework for pluralism and equality'. See also Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in Zucca and Ungureanu (eds), supra n 22, 283 at 302.

25 For example, copyright and intellectual property cases; cases regarding the buying and selling of artworks and tangible cultural heritage; and artists' allowances and benefits.

26 See Section 3 infra.

2. THE COURT'S AND COMMISSON'S *DE MINIMIS* APPROACH TOWARDS ARTISTIC FREEDOM

The table above schematically presents the cases that the Court has decided since the time that the question was first posed in the early 1990s. It encompasses both decisions and judgments of the Court and some decisions of the former Commission.[27]

A. Schematic presentation of cases (1981–2014)

B. Preliminary Observations: Statistical Analysis of the Commission's and the Court's Case Law

(i) An extremely small number of cases

The former Commission and old Court had decided only eight artistic freedom cases by 1998: four cases against the UK (involving poetry, sculpture, literature and video art, respectively); two cases against Switzerland (graffiti and plastic arts); one case against Austria (film screening); and one case against Poland (cartoons). The number increased before the new Court to 29 cases in total. Apart from the 15 cases that have resulted in actual judgments of the Court, it also encompasses 11 cases that have not passed the admissibility stage; two pending cases; and one that has resulted in a friendly settlement.[28] This number is minimal compared to the enormous judicial output of the Court. It is equally minimal compared to the long list of blasphemous, transgressive, obscene, offensive and other scandalous artworks and novels that have been published.[29]

Additionally, the arguably two most famous controversies of the last decades concerning the limits of artistic expression were both missed opportunities for Strasbourg. The first is the case of the *Satanic Verses*: when the storm over this novel broke in 1989, Salman Rushdie became a headhunted author worth a one million dollars *fatwa*.[30] A Muslim applicant brought the case to Strasbourg as a case of blasphemy against the Islamic religion. The Commission examined the case only briefly before finding the complaint inadmissible *ratione materiae* for the reasons discussed in Section 3 of this article.[31] The second is the *Danish Cartoons* case, brought to the Court by a Moroccan national residing in Morocco and two Moroccan associations

27 It excludes, however, cases in which the link with artistic freedom is too indirect (for example, cases in which cartoons have a purely illustrative role) or cases where artistic freedom is invoked by the applicant unsuccessfully (for example, pornography cases).

28 *Erkanli v Turkey* Application No 37721/97, Strike Out, 13 February 2003 (publication of a cartoon in the Turkish newspaper *Özgür Ülke*).

29 See Barber and Boldrick, *Art under Attack: Histories of British Iconoclasm* (2013); Sherwood, *Biblical Blaspheming: Trials of the Sacred for a Secular Age* (2012); McClean (ed.), *The Trials of Art* (2007); Plate, *Blasphemy: Art That Offends* (2006); and Julius, *Transgressions: The Offences of Art* (2002). See also Claude, *Les grands scandales de l'Histoire de l'Art* (2008).

30 The bounty announced for Rushdie's head has increased since the Ayatollah Khomeini first declared Rushdie guilty of apostasy on 14 February 1989, while some *ulemas* such as Hasani Sanei from the Khordad Foundation have doubled the price for any relative killing the author. See indicatively MacDonogh, *The Rushdie Letters: Freedom to Speak, Freedom to Write* (1993); and Slaughter, 'The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech' (1993) 79 *Virginia Law Review* 153.

31 *Choudhury v United Kingdom* Application No 17439/90, Admissibility, 5 March 1991 (inadmissible). See infra text accompanying nn 61–63.

based there. The Court found no jurisdictional link between the applicants and the respondent State and again declared the case inadmissible (this time *ratione loci*).[32]

(ii) Diversity in the content of cases and a variety of respondent states

Certainly in many cases values at stake overlap, while the claims brought before the Court are not necessarily identical to the ones brought before the domestic courts. Yet a rough categorization reveals that the 'old' and the 'new' Court's case law are strikingly different not only in terms of number of applications lodged, but also in terms of the nature of the disputes.

Since the end of the 1990s, literature and political cartoons (that is, arts based on the medium of speech) have been gradually outweighing visual arts and films,[33] while cases related to personality rights, offence and incitement to hatred have been steadily gaining terrain.[34] At least three reasons can be identified for this shift. First, there is the fact that conflicts of rights involving personal interests, particularly concerning the 'rights of others', have multiplied in the last years. This development in human rights law, intrinsically linked to the expansion of the so-called 'third-effect party', has resulted in many infringements previously seen as state restrictions on the ground of 'public order' or 'public morality' being now brought to Strasbourg from the claimants' perspective—and therefore being tackled as conflicts of rights.[35] Secondly, there is the fact that hate speech offences have gradually emerged as challenges to multicultural Europe,[36] especially as part of the legal response to minority concerns and the accommodation of diversity.[37]

32 *Ben El Mahi and Others v Denmark* Application No 5853/06, Admissibility, 11 December 2006. See also text accompanying infra nn 81–84.

33 Out of the 29 cases: 10 involve literature and poetry; seven visual and plastic arts; five cartoons; four cinema and film; two theatre and only one music.

34 Namely, out of the 29 cases, nine involve primarily offence to religious convictions; eight incitement to hatred and national security issues; five personality rights; five public morality issues; and two public order or property rights.

35 Cf. Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49 *Harvard International Law Journal* 249 at 253, considering these controversies as 'deeper conflicts over competing conceptions of individual and collective goods'; and Bomhoff, '"The Rights and Freedoms of Others": The ECHR and its Peculiar Category of Conflicts between Individual Fundamental Rights' in Brems (ed.), *Conflicts Between Fundamental Rights* (2008) 619 at 630ff., arguing that the Convention's perspective is exclusively rights-based. See also De Schutter and Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution' in Brems (ed.), *Conflicts Between Fundamental Rights* (2008) 169 at 194–5.

36 For a study of these distinctions operated by the Court, see Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25 *Netherlands Quarterly of Human Rights* 641; and O'Donnell and McGoldrick, 'Hate-Speech Laws: Consistency with National and International Human Rights Law' [1998] *Legal Studies* 453. For a comparison with the UN Human Rights Committee, see O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12 *Human Rights Law Review* 627 at 633ff.

37 See the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, at para 45; Office of the United Nations High Commissioner for Human Rights (OHCHR), 'The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012; and Parmar, 'The Rabat Plan of Action: A global blueprint for combating "hate speech" ' [2014] *European Human Rights Law Review* 21.

Thirdly, the impact of the presence of Turkey in the Court's case law is relevant.[38] Turkey is one of the States Parties to the Convention that maintains some of the more stringent laws for the protection of its public interests[39]—laws that are regularly utilized to suppress debates on the Kurdish minority identity;[40] to minimize the debates on Islam and secularism;[41] and to censor artists and writers as prominent as Elif Shafak and Orhan Pamuk[42] and as well established as Guillaume Apollinaire.[43] Hence, since the end of 1990s, when applications against Turkey multiplied,[44] the case law of the Court on Article 10 seems slightly altered in terms of outcome, with extremely few cases against Turkey amounting to non-violations of Article 10 (usually on significant incitement to hatred issues) and this only after pronounced disagreements within the Court.[45]

The presence or absence of particular states among the list of 'violators' of Article 10 in artistic freedom cases, however, also suggests that the States Parties' records in censorship and artistic expression matters that is apparent from other sources is not necessarily reflected in the ECtHR's case law. In fact, apart from Turkey, all other States are represented with only one or two cases,[46] while some forms of art, such as music and comics, remain virtually absent from this jurisprudence—despite relevant

38 Until 2014, 248 out of 591 findings of violation of Article 10 ECHR were pronounced against Turkey: see ECtHR, 'Violations by Article and by State 1959-2014', supra n 3.

39 The controversial Article 301 on the protection of 'Turkishness' introduced in the Turkish Criminal Code has been repealed; however, a number of other offences remain: see in particular Article 175 on the 'incitement of the public to an armed uprising against the armed forces'; Article 216(3) prohibiting the 'denigration of the religious values held by a section of society'; and Articles 299–339 on general national security protection provisions: see Davis, 'Lessons from Turkey: Anti-terrorism legislation and the protection of free speech' [2005] *European Human Rights Law Review* 75.

40 See, for example, *Ulusoy and Others v Turkey* Application No 34797/03, Merits and Just Satisfaction, 3 May 2007 (prohibition to interpret in Kurdish a theatre play in a municipality hall); *Dağtekin v Turkey* Application No 36215/97, Merits and Just Satisfaction, 13 January 2005 (censorship of Riza Çolpan's novel 'Xide Naxirvan', which was published in Dersim and recounted the Dersim uprising and subsequent massacre); and *Karataş v Turkey* Application No 23168/94, Merits and Just Satisfaction, 8 July 1999, discussed below at Section 4A. Cf. a number of cases involving articles of the press, for example, *Şener v Turkey* Application No 26680/95, Merits and Just Satisfaction, 18 July 2000. Turkey ranked 154/179 worldwide in the *Press Freedom Index 2013*, available at: en.rsf.org/press-freedom-index-2013,1054.html [last accessed 24 September 2015].

41 See, for example, *Kar v Turkey* Application No 25257/05, Merits, 29 March 2011 (regarding the arrest and detention of and initiation of criminal proceedings against two actors who participated in a play set in an imaginary city that made reference to peoples' sacred right to fight against any government that disregards Islamic law); *İ.A. v Turkey* Application No 42571/98, Merits and Just Satisfaction, 13 September 2005 (concerning a novel that addressed philosophical and theological issues on Islam); and also other significant cases, for example, *Dink v Turkey* Applications No 2668/07 et al., Merits and Just Satisfaction, 14 September 2010 (regarding proceedings against the late prominent Armenian journalist Fırat (Hrant) Dink). [Note *Kar v Turkey* is in French only, as are several judgments cited above.]

42 See Amnesty International, 'Turkey: Article 301: How the law on "denigrating Turkishness" is an insult to free expression', EUR 44/003/20062 March 2006, at 5.

43 See *Akdaş v Turkey* Application No 41056/04, Merits and Just Satisfaction, 16 February 2010, discussed infra at Section 5(B).

44 Turkey deposited the declaration recognizing the right of individuals to petition the Court in 1987.

45 See, for instance, *Sürek v Turkey (No 1)* Application No 26682/95, Merits and Just Satisfaction, 8 July 1999 (no violation by 11 votes to six); and *Zana v Turkey*, supra n 12 (no violation by 12 votes to eight).

46 The figures are 10 cases against Turkey; three against Austria; three against France; two against the UK; two against Switzerland; two against Russia; two against Poland; one against Slovakia; one against Slovenia; one against Denmark; one against Spain; and one against Finland.

precedents of censorship in the States Parties concerned.[47] Moreover, France, Switzerland and the UK, which are amongst the highest ranked of Council of Europe Member States in terms of media freedom indices,[48] are present in the Court's case law, whereas other States Parties to the Convention not so well ranked (such as Greece[49] and Italy[50]) are entirely absent from the list of 'violators'. More surprisingly, Russia, the State that has perhaps the largest record of freedom of expression restrictions in the context of the Council of Europe[51] with attacks against dissident views a common phenomenon,[52] is only marginally represented in cases concerning artistic freedom, namely with two pending cases that will be discussed in Section 3(B) below.

3. RELIGIOUS OFFENCE AND PUBLIC MORALITY BEFORE THE COURT

The case law of the Court with respect to blasphemy laws, and in other contexts in which offence had been caused to sensibilities, was quite inconsistent until the late 1990s. This inconsistency remains difficult to comprehend without referring first to the two-fold system of adjudication functioning in Strasbourg prior 1998.

A. Disagreements Between the Court and the Commission until the Late 1990s

Throughout its existence, the Commission held a rather positive view of artistic freedom. In a landmark case, concerning three large canvases painted by the Swiss artist

47 See, as an indication, the reports from non-governmental organisations, ARTICLE 19, Freemuse or Index on Censorship. As an example, see Freemuse, 'BBC: "Britain's Most Dangerous Songs: Listen to the Banned", 14 July 2014, available at: freemuse.org/archives/8013 [last accessed 4 April 2016]. Cf. precedents of trials for offensive comics in some States Parties to the Convention, for example, Athens First Instance Court (Criminal) 882/26.2.2003 (banning of Haderer's comic book 'The Life of Christ'). In non-States Parties such incidents are more heavily present, including in national jurisdictions: see, for example, Israeli Supreme Court, 549/75 *Noah Films c. Censorship Council* PD 30(1) 757 (Wagner's symphonies scheduled to be played by the Israeli philharmonic orchestra) discussed in Cohen-Almagor, supra n 20 at 77ff.

48 See the *Press Freedom Index 2013*, supra n 40.

49 Greece has a considerable record in artistic freedom censorship: see, for example, Supreme Court 1298/2002 (blasphemous novel case 'MN'); and generally Ziogas, *Aspects of Censorship in Greece* (2008) (in Greek); and Tsakyrakis, *Art v Religion* (2005) (in Greek).

50 Italy is one of the States where free expression suffers from lack of media plurality and censorship: see, for example, Human Rights Committee, Concluding observations regarding Italy, 27 July 1994, CCPR/C/79/Add.37, at para 10. See also Index on Censorship, 'Italy's free expression hamstrung by lack of media plurality', 15 August 2013, available at: www.indexoncensorship.org/2013/08/italys-free-expression-hamstrung-by-lack-of-media-plurality/ [last accessed 4 April 2016].

51 See Human Rights Committee, Concluding observations regarding Russia, 4 November 2003, CCPR/CO/79/RUS; Council of Europe Parliamentary Assembly, Report: The state of media freedom in Europe, December 2012, Doc. 13078, at paras 64–71. See also Egupova, 'How Russia's anti-profanity law is affecting independent filmmakers', 22 September 2014, available at: artsfreedom.org/?p=8061 [last accessed 24 September 2015]; and 'Siberian bishop demands censorship of erotic Picassos', 18 April 2012, available at: artsfreedom.org/?p=445 [last accessed 4 April 2016]. See also, generally, ARTICLE 19, 'Art, religion and hatred: Religious intolerance in Russia and its effects on art', December 2005, available at: www.article19.org/pdfs/publications/russia-art-religion-and-hatred.pdf [last accessed 4 April 2016].

52 See indicatively, Smith, 'Europe to the Rescue: The Killing of Journalists in Russia and the European Court of Human Rights' (2011) 43 *George Washington International Law Review* 493.

Josef Felix Müller (representing, among other things, bestiophilia)[53] 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'.[54] In another Swiss case decided the year before the *Müller* case, concerning a well-known graffiti artist, Naegeli, who complained of not being able to create freely on the properties of others,[55] the Commission again held an 'art-positive' view. One of Naegeli's arguments was that the law on the protection of property against damage did not apply in his case, since the buildings that he had bombed-sprayed had not been damaged but, on the contrary, augmented in value.[56] Although the Commissioners did not go as far as to endorse Mr Naegeli's claim, they did consider the question of a potentially different treatment of the arts an 'open-ended' one;[57] a view that is quite progressive, given that until today the movement for the decriminalization of graffiti is a controversial one.[58]

It is only the first case decided by the Commission, in 1982, that appears truly problematic.[59] In this case, known as the *Gay News* case, it fell first to the Commissioners to decide whether Christian beliefs (protected against blasphemy until 2008 in the UK) were injured by an allegedly 'blasphemous' poem published in a gay magazine entitled 'The Love that Dares to Speak its Name'. Deciding that a claim under Article 10 was inadmissible, 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, provided that it respects the principle of proportionality.[60] After that, however, in all cases in which it was required to answer whether religious sensibilities fall within the scope of protection of Article 9 of the Convention, the Commission replied in the negative. Shortly after the *Gay News* case, the Commission decided the *Scientology* case, concerning an action against a theology professor who had called Scientology the 'cholera' of spiritual life. Although based on Article 9 of the Convention, the case presented an opportunity for the Commission to highlight that criticism of religious beliefs is legitimate, unless it reaches such a level 'that it might endanger freedom of religion and . . . tolerance of such behaviour by the authorities

53 *Müller v Switzerland* Application No 10737/84, Commission Report, 8 October 1986. The paintings were removed and confiscated on the opening day on the basis of the Swiss obscenity laws, which provided also for their physical destruction. The domestic proceedings resulted in the criminal conviction of the artist, along with the curator and the organizers of the exhibition (interestingly, the canton's Prosecutor invoked the law on the protection of religious beliefs for one of the paintings). The application with the Commission was lodged by ten persons, including also other artists, an art critic and an art teacher.

54 Ibid. at para 65 [translation by author].

55 See *N. v Switzerland* Application No 9870/82, Commission Report, 13 October 1983. Switzerland also claimed that another value at stake was the prevention of public disorder.

56 Ibid.

57 Ibid. *in fine*. Before the Court Switzerland claimed that the prevention of public disorder was also at stake.

58 See, indicatively, Roundtree, 'Graffiti Artists "Get Up" in Intellectual Property's Negative Space' (2013) 31 *Cardozo Arts and Entertainment Law Journal* 959; Edwards, 'Banksy's Graffiti: A Not-so-simple Case of Criminal Damage?' (2009) 73 *Journal of Criminal Law* 345; and Lerman, 'Protecting artistic vandalism: Graffiti and copyright law' (2013) 2 *New York University Journal of Intellectual Property and Entertainment Law* 295 at 312–3.

59 *X. Ltd and Y. v United Kingdom* Application No 8710/79, Commission Report, 7 May 1982, following the House of Lords decision in *Lemon and Gay News Ltd v Whitehouse* [1979] AC 617.

60 Palmer, supra n 22 at 469–71.

[engages] State responsibility'.[61] Consistent with its views in another Article 9 case, it equally dismissed the claim of a Muslim applicant, who brought blasphemy charges against Salman Rushdie.[62] The complaint this time was that English law failed to protect the religion of the applicant 'against abuse or scurrilous attacks'. Once more, the Commission showed an unwillingness to rule that Article 9 of the Convention required that laws should be extended so as to protect a religion from offence and rejected the complaint as incompatible *ratione materiae* with the Convention.[63] At that point, it would, presumably, have also found the UK blasphemy laws incompatible with protection of religious freedom: in fact, until its merging with the Court, the Commission showed consistency in excluding all religious sensibilities from the Convention, stating unequivocally that the 'members of a religious community must tolerate and accept the denial by others of their religious beliefs'.[64] In the much discussed case of *Otto-Preminger-Institut v Austria*, the Courts decided that the seizure of the blasphemous film was in breach of the Convention, and also highlighted that 'satirical texts or films can normally not be completely prohibited even if some restrictions concerning minors or people unaware of the contents may be possible',[65] while in *Wingrove*, in which the UK refused to grant a cinematographic visa to a short (18 minute) video entitled 'Visions of Ecstasy', it agreed with the video artist that his work had been unduly censored.[66]

At the same time, the case law of the Court was significantly more conservative. Firstly, in *Müller and Others v Switzerland*,[67] the Court agreed with the Swiss Federal Court that the paintings in question were 'morally offensive to a person of normal sensitivity'(sic),[68] while in the widely discussed *Otto-Preminger-Institut v Austria*[69]

61 In *Church of Scientology and 128 of its Members v Sweden* Application No 8282/78, Commission Report, 14 July 1980 (French translation).

62 *Choudhury v United Kingdom*, supra n 31.

63 Rehman, however, argues that the result of the decision has been implicitly discriminatory against Muslims: see Rehman, 'A "clash of civilisations" and a "conflict of cities"' in Loenen and Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (2007) 185 at 189.

64 *Dubowska and Skup v Poland* Applications Nos 33490/96 and 34055/96, Commission Report, 18 April 1997, at para 2 (law) (cartoon published in a national weekly magazine and showing Mary and Jesus wearing gas masks).

65 Application No 13470/87, Commission Report, 14 January 1993, at para 77. The Austrian authorities seized and forfeited Werner Schroeter's film *Das Liebeskonzil*, which would be scheduled six times in a small cinema hall in Innsbruck. The local diocese requested the prosecutor to stop the screenings and institute criminal proceedings against the company on the basis of a law prohibiting to 'disparage religious doctrines'.

66 *Wingrove v United Kingdom* Application No 17419/90, Commission Report, 10 January 1995, at para 67, noting at the outset that the fact that the incriminated artwork was a short film video, unlikely to be seen by 'seen by anyone who was unaware of the probable subject matter' was another reason not to restrict artistic freedom. Commissioner Loucaïdes in his concurring opinion interestingly also observed that censorship in this case was not necessary, given that the theme of the film 'refer[red] to the true story of Saint Therese who indeed had visions of erotic experiences with Christ'.

67 Supra n 16, also remarking (at para 35) that 'it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals'.

68 Ibid. at paras 18 and 36. As the Swiss Federal Court noted in another passage of its judgment, 'they [we]re liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity', while '[t]he artistic licence relied on by the appellant [could not have] in any way alter[ed] that conclusion in the instant case'.

69 Application No 13470/87, Merits and Just Satisfaction, 20 September 1994.

and *Wingrove v United Kingdom*[70] cases, it found no violation of the Convention. In both cases, the Court came to a diametrically different conclusion from that of the Commission, specifically noting 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';[71] that such violation can be regarded as a 'malicious violation of the spirit of tolerance';[72] 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'.[73]

B. A Change of Direction in the New Millennium?

In the new millennium, the Court seems to be attempting to contextualize cases of offence to religious sensibilities. The understanding of religious freedom seems to be somehow more 'qualitative', and there is an obvious shift towards the exclusion of the protection of sensibilities. The first time that this point was raised in the context of a dispute is by three dissenting Judges in *İ.A. v Turkey* (2005):[74] they not only addressed the fact that the incriminated passages were but 'a few sentences' of the whole book, but noted, in addition that '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' and that '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'.[75] One year later, the point was made explicit by the Court, in three cases concerning scientific and academic freedom (*Aydin Tatlav v Turkey*,[76] *Giniewski v France*[77] and *Klein v Slovakia*),[78] interestingly all decided shortly after the Danish Cartoons controversy and the adoption of the Council of Europe Parliamentary Assembly Resolution 1510 on religious freedom and freedom of expression, which highlighted that 'freedom of expression . . . should not be further restricted to meet increasing sensitivities of certain religious groups'.[79] Needless to say that the *Danish Cartoons* controversy had already provoked immense discussions as to whether religious feelings should be protected from offence or not, ranging from authors taking pro-freedom of

70 Application No 17419/90, Merits and Just Satisfaction, 25 November 1996, at paras 42 and 65.

71 *Otto-Preminger-Institut v Austria*, supra n 69 at para 47.

72 Ibid. at para 47.

73 Ibid. at para 49.

74 *İ.A. v Turkey*, supra n 41 at Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert, para 5.

75 Ibid.

76 Application No 50692/99, Merits and Just Satisfaction, 2 May 2006.

77 Application No 64016/00, Merits, 31 January 2006.

78 Application No 72208/01, Merits and Just Satisfaction, 31 October 2006. The case concerned the controversy that erupted after the exposure of the advertising poster for Miloš Forman's film *The People vs. Larry Flynt*—a film which, itself, had also created a huge controversy, both because of its content and advertising poster; Archbishop Sokol had appeared on Slovak television, suggesting that both the poster and the film should be banned.

79 Resolution 1510 (2006), Freedom of expression and respect for religious beliefs, 28 June 2006, at para 12.

expression views,[80] to others pointing to the international politics underlying the case of defamation of religions,[81] and those highlighting the need for minority rights protection against incitement to hatred.[82]

As a result of this shift in the jurisprudence of the Court, a tendency to vindicate artistic freedom when clashing with religious sensibilities has been visible—albeit not without hesitation—on the part of the Court. In *Vereinigung Bildender Künstler v Austria*,[83] a case involving Otto Mühl's painting 'Apocalypse' (in which some of the figures could be interpreted as representing Marie-Theresa, several saints, as well as Mr Meischberger and Jörg Haider, both leaders of the extreme right wing FPÖ), the Court had much difficulty in adopting a unanimous view.[84] While the four Judges in the majority noted with no hesitation that Article 10 protects all '[t]hose who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions' (therefore, implying that it does not fall upon the State to define which sort of art should be protected),[85] the three dissenting Judges accorded minimal importance to the political nature of the painting.[86] Judge Loucaïdes in particular highlighted in his dissenting opinion that the 'the rights of others' should prevail in the specific case, observing that '[n]obody can rely on the

80 Kearns, 'The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights' (2012) 1 *Irish Law Journal* 56 at 90, criticizing the Court for 'display[ing] a preference for protecting religion above the protection of art'; Letsas, supra n 22 at 239, advancing 'an understanding of democracy and liberal equality that shows why there is no right to be insulted in one's religious beliefs in public space'; and Trispiotis, 'The Duty to Respect Religious Feelings: Insights from European Human Rights Law' (2013) 19 *Columbia Journal of European Law* 499 at 551, arguing that 'individual rights and liberties should prevail over the protection of the State sanctioned orthodoxy'. Cf. Wachsmann, 'La religion contre la liberté d'expression: sur un arrêt regrettable de la Cour Européenne des Droits de l'Homme' (1994) 6 *Revue universelle des Droits de l'Homme* 441.

81 See, for example, Bennett, 'Defamation of Religions: The End Of Pluralism' (2009) 23 *Emory International Law Review* 69 at 73–5; Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law' (2008) 26 *Netherlands Quarterly of Human Rights* 517 at 530ff.; and Danchin, supra n 35 at 289–91, comparing domestic and international practice.

82 See Nathwani, '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* 488 at 504, arguing that 'the ECtHR has not dealt with a single case to date in which the possibility of limiting freedom of expression under the ECHR has been utilised to protect the religious feelings of religious minorities' and that '[m]inority religions, especially those religions that are associated with ethnic minorities, need protection much more than majority religions'; Nieuwenhuis, supra n 23 at 379, arguing that majorities cannot be exempt from criticism; Keane, 'Cartoon Violence and Freedom of Expression' (2008) 30 *Human Rights Quarterly* 845 at 875, taking a moderate view arguing that '[c]omplete support for religious defamation in Europe may be difficult to sustain,' but also that '[t]here is a need for a more concentrated debate on what our laws on freedom of expression are designed to achieve'; and Leigh, 'Damned if they do, Damned if they don't: The European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 *Res Publica* 55 at 73, arguing that the Court 'should apply the full rigour of Article 10 by requiring states to show how the rights of others are in peril and why limitation is a necessary response'.

83 Application No 68354/01, Merits and Just Satisfaction, 25 January 2007.

84 The domestic courts had considered that the painting was offending to these politicians' personality rights; whereas, before the Court, the respondent government claimed that the main issue at stake was public morality.

85 *Vereinigung Bildender Künstler v Austria*, supra n 83 at para 26.

86 Cf. ibid. at para 22.

fact that he is an artist or that a work is a painting in order to escape liability for insulting others,'[87] while the other two dissenting Judges went as far as arguing that 'committed' art (*art engagé*) should be limited when it 'interferes excessively with the rights of others'.[88]

The shift towards the exclusion of sensibilities from the protective scope of Article 9 is undoubtedly in line with the parallel international developments. Shortly after the 9/11 attacks, in 2005, the *Danish Cartoons* controversy caused shock on an unprecedented scale not only Denmark, but also the EU, the Council of Europe and the whole international community, to the point of a veritable 'global crisis'.[89] All of a sudden, the *Satanic verses* memories revived, and freedom of expression became a battleground in the international arena. On the one side, the advocates of extremist liberal views: those who, ignoring the reality of migration, and the multicultural composition of European capitals, would find in the 'right to freedom of expression' (and the subsequent setting aside of offence to religious beliefs) useful arguments to impose 'migrant unfriendly' views, or even, to circumvent anti-hate speech legislation.[90] On the other side, the advocates of extremist religious views and those who, equally unfairly, would find in the right to protect a religion a reason to oppose the West and show 'dislike' towards its liberal values.[91]

Amidst these international entanglements, the pressure from European states, human rights groups and UN experts increased:[92] to stop the 'defamation of

87 Ibid. at Dissenting Opinion of Judge Loucaides.

88 Ibid. at Joint Dissenting Opinion of Judges Spielmann and Jebens, para 7.

89 See supra nn 79–82. See also Favret-Saada, *Comment produire une crise mondiale avec douze petits dessins* (2007), discussing the international politics underlying the case; and Boyle, 'The Danish Cartoons' (2006) 24 *Netherlands Quarterly of Human Rights* 185.

90 For example, the views of the culture editor of Jyllands-Posten: see Rose, 'Why I Published Those Cartoons', *Washington Post*, 19 February 2006. See also Nathwani, supra n 82 at 506, arguing that negative propaganda about minority religions could be seen as a strategy to circumvent legislation which prohibits incitement to racism and xenophobia.

91 See, for example, Foster, 'Prophets, Cartoons, and Legal Norms: Rethinking The United Nations Defamation of Religion Provisions' (2009) 48 *Journal Of Catholic Legal Studies* 19 at 26–7, nn 30–31, regarding the violent protests animated by extremists; and Keane supra n 82 at 862, nn 129–130. See also the resolutions of the Organization of Islamic Conference ('OIC') during the period 1999–2010 associating the rise of Islamophobia in the West and the defamation of religions debate, in particular those taken at the 33rd Session of the Islamic Conference of Foreign Ministers held in Baku, Republic of Azerbaijan, 19–21 June 2005, OIC Resolution on 'Eliminating Hatred And Prejudice Against Islam' OIC Res No 26/33-DW, at paras 1–7; 34th session of the Islamic Conference of Foreign Ministers, Islamabad, Islamic Republic of Pakistan, OIC Resolutions on 'Combating Islamophobia And Eliminating Hatred and Prejudice against Islam', 15-17 May 2007, OIC Res No 33/34-ICFM/2007/POL/R.33 and OIC/34-ICFM/2007/POL/R.34.

92 See, for example, Joint Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, on incitement to racial and religious hatred and the promotion of tolerance, 20 September 2006, A/HRC/2/3, at paras 49–50; Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information on Defamation of Religions, 9 December 2008, at 49–52; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr Frank La Rue, 20 April 2010, A/HRC/14/23, at paras 85 and 116.

religions' campaigns at the United Nations level and to confirm that groups and individuals should be protected only against hatred and incitement to violence and discrimination according to the current interpretation of the international human rights standards.[93] It would have been practically impossible for the Court to maintain views such as those expressed in *Wingrove* and *Otto-Preminger accepting the legitimacy of state action to punish offence to religion*, especially since it is precisely these two judgements that have been exploited by blasphemy law advocates to campaign in favour of the prohibition of 'defamation of religions'.[94]

Since *İ.A.* and *Bildender* there have been no other judgments of the Court concerning specifically artistic freedom and offence to religious sensibilities. Further, some cases that could have eventually shed more light to these questions have been considered inadmissible in accordance with Article 27 of the Convention.[95] The Court, however, will have to face the question of 'conflict' between arts and religions in the two pending cases against Russia: *Samodurov and Vasilovskaya*[96] and *Alekhina and Others*.[97] Although religious sensibilities are not addressed explicitly in these cases,[98] it may be legitimately presumed that the Court will show little willingness to accept that offences against religious prescripts are justified on the basis of the Russian 'incitement to hatred' laws. First, because of the obvious breach of the proportionality test[99] and the precedents set by *Tatlav*, *Giniewksi* and *Klein*, in which the Court fully developed its views on the distinction between criticism of

93 See Ghanea, 'Expert seminar on the links between Articles 19 and 20 of the International Covenant on Civil and Political Rights', 2–3 October 2008, A/HRC/10/31/Add.3, at 119–20; Patrick Thornberry, Conference paper, ibid. at 40–1.

94 On the 'defamation of religions' debate, see generally Langer, 'The Rise (and Fall?) of Defamation of Religions' (2010) 35 *Yale Journal of International Law* 257; Graham, 'Defamation of Religions: The End of Pluralism?' (2009) 23 *Emory International Law Review* 69; Parmar, 'The Challenge of "Defamation of Religions" to Freedom of Expression and the International Human Rights System' [2009] *European Human Rights Law Review* 353 at 370 and n 95; and Temperman, supra n 81 at 530. See also Jordaan, 'South Africa and the United Nations Human Rights Council' [2014] *Human Rights Quarterly* 114–6; Polymenopoulou, 'A Thousand Ways to Kiss the Earth: Artistic Freedom, Cultural Heritage and Islamic Extremism' [2015] Fall *Rutgers Journal of Law and Religion* at nn 177–182 and accompanying text.

95 See, for example, *Özkan v Turkey* Application No 23886/94, Admissibility, 5 April 1995. The Turkish national television station (TRT) had been scheduled to broadcast René Clément's film *Forbidden Games*; however, after receiving threatening phone calls, accusing the film of Christian propaganda, TRT stopped the broadcast a few minutes before the end, leaving the viewers unsatisfied. When one of them, Mr Özkan, took the matter to Strasbourg, complaining about an unjustified interference to his right to receive information, the Court considered the application inadmissible, considering that he had other ways to see the film—for instance, by renting a video copy from his local video club.

96 Application No 3007/06, Admissibility, 15 December 2009, involving religiously extremist, nationalist attacks on the Sakharov Museum on the occasion of the 'Caution, religion!' exhibition.

97 Application No 38004/12, lodged on 19 June 2012, concerning the proceedings initiated by the female group 'Pussy Riot'. See also Luhn, 'Pussy Riot members take Kremlin to European Court of Human Rights', 28 July 2014, available at: www.theguardian.com/music/2014/jul/28/pussy-riot-kremlin-european-court-human-rights [last accessed 24 September 2015].

98 Since, formally, the proceedings against the applicants were initiated on the basis of Articles 232 and 282 of the Russian Criminal Code on incitement to hatred (and not blasphemy laws).

99 There is an obvious breach of proportionality since in the *Samodurov and Vasilovskaya* case, the organizers of the exhibition have been criminally prosecuted and punished under Article 282 of the Russian Criminal Code by 100,000 Russian roubles each, while in the *Alekhina* case, the members of the group have been also imprisoned.

religions and gratuitously offensive expression.[100] Secondly, because, as explained above, the Court generally seems to be privileging a rather secular understanding of European 'democratic societies', until now, the margin of appreciation doctrine has been used in such a way as not to accommodate minority religious beliefs.[101] Thirdly, because the Court is not a regional organ that functions in a sphere of isolation: it is a dynamic judicial organ, interpreting the Convention as a 'living instrument', and committed to taking into account more general trends in international law—especially those arising within the Council of Europe. Unlike some other international instruments, however, the European Convention has no specific provision on hate speech cultural rights[102] or, *a fortiori*, on minority rights: questions related to minority sensibilities and cultural matters are therefore only implicitly tackled in the Convention. And yet since the Court is considered to be the leading human rights 'standard-setting' organ in Europe, its case law is highly influential. As pointed by the dissenting Judges in *Vallianatos*, albeit in a different context, judgments should be 'in tune' with such general trends, especially the most recent relevant regional instruments.[103] The trend to interpret the laws on incitement to hatred in a way that excludes the protection of sensibilities, however, has been visible not only at a United Nations level,[104] but first and foremost within the EU and the Council of Europe.[105]

100 It was in *Otto-Preminger-Institut v Austria*, supra n 69 at para 47, and *Wingrove v United Kingdom*, supra n 70 at para 52, that the Court first asserted that '[t]hose who choose to exercise the freedom to manifest their religion . . . cannot reasonably expect to be exempt from all criticism'. Yet it was only ten years later that the Court gave teeth to this postulate. See analysis by Harris et al., supra n 18 at 671; Leigh, supra n 82 at 57–8; Letsas, supra n 22; Trispiotis, supra n 80 at 532ff.; Flauss, 'The European Court of Human Rights and the Freedom of Expression' (2009) 84 *Indiana Law Journal* 809 at 844; and Temperman, supra n 81 at 542–3.

101 See Ringelheim, supra n 24 at 230, arguing that for the Court such principles 'resonate with the classic tenets of liberal thought regarding state-religion relationships'. See also Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77 *Modern Law Review* 223; and, more generally, Lerner, *Religion, Secular Beliefs and Human Rights: 25 Years After the 1981 Declaration* (2006).

102 The efforts of the Council of Europe's Ad Hoc Committee for the Protection of National Minorities (CAHMIN) to include a separate protocol for the protection of (individual) cultural rights complementing the European Convention have failed, from its first meeting in 1994 following the Vienna Conference and throughout its existence: see CAHMIN, CDDH (91) 46; (94) 22; (94) 23; and (95) 1.

103 *Vallianatos and Others v Greece* Applications Nos 29381/09 and 32684/09, Merits and Just Satisfaction, 7 November 2013, at Joint Concurring Opinion of Judges Casadevall, Ziemele, Jočienė and Sicilianos, para 5. See generally Harris et al., supra n 18 at 10–1.

104 The situation at the UN improved only in 2010 when the Human Rights Council's composition changed and the Council adopted without a vote Resolution 16/18, Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, 24 March 2011. See however, Langer supra n 94 at 262–3; Polymenopoulou, supra 94 at nn 217–220.

105 See, in particular, Christians et al., Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, Venice Commission, 17–18 October 2008, CDL-AD(2008)026, following Resolution 1510 (2006), supra n 79. Cf. ARTICLE 19, 'The Camden Principles on Freedom of Expression and Equality', supra n 24 (Principle 12: Incitement to hatred) at paras 12.1 and 12.3.

4. EXISTING DEFENCES

Article 10 of the Convention does not provide explicitly for any 'defences'—as is the case in some constitutional traditions.[106] Nor does it make any categorization between the different types and forms of expression protected. It is the Court that has established different levels of protection for different categories of speech (such as political, commercial or artistic speech),[107] and it is also the Court that has developed a specific toolkit to interpret the—quite vaguely formulated—restrictions contained in Article 10 paragraph 2, in order to assess whether an interference is 'necessary in a democratic society'. Hence, as part of the so-called 'three-part test', the Court generally uses the—rather broad—*Handyside* formula[108] and general principles such as the need for 'pluralism, tolerance and broadmindedness'.[109] Nevertheless, its methodological approach in freedom of expression cases has significantly evolved over time. In fact, to decide the limits of permissible 'offence' in freedom of speech cases, the Court is now increasingly taking into account the context of the particular case,[110] including a thorough consideration of civil and criminal law defences available to defendants in freedom of expression cases.[111] This said, it may be possible to discern certain defences, which could be, or have already been, applied in artistic freedom cases.

A. Political Arts and the Contribution to the Public Debate

In one of the first cases that came to the attention of the Court after its merging with the Commission, *Karataş v Turkey* (1999), the Court found a violation concerning a pro-Kurdish anthology of poems that had been censored by the Turkish

106 This is the case of Sweden. Article 13(2) Swedish Constitution (2004) states: 'In judging what restrictions may be made . . . particular regard shall be paid to the importance of the widest possible freedom of expression and freedom of information in political, religious, professional, scientific and cultural matters'.

107 Like any other form of political expression. The Court in fact generally admits that in political speech there is little scope for restrictions: see Harris et al., supra n 18 at 630–2; and *Sürek v Turkey (No 1)*, supra n 45 at para 61. See also generally, *Lingens v Austria* Application No 9815/82, Merits and Just Satisfaction, 8 July 1986, at para 42; *Castells v Spain* Application No 11798/85, Merits and Just Satisfaction, 23 April 1992, at paras 47–48; *Hertel v Switzerland* Application No 25181/94, Merits and Just Satisfaction, 25 August 1998, at para 47; and *Mouvement Raëlien Suisse v Switzerland* Application No 16354/06, Merits and Just Satisfaction, 13 July 2012.

108 *Handyside v United Kingdom* Application No 5493/72, Merits, 7 December 1976, at para 49 (freedom of expression covers ideas that 'offend, shock or disturb').

109 Ibid. at para 49. Cf. *Vereinigung Bildender Künstler v Austria*, supra n 83 at para 26; *Klein v Slovakia*, supra n 78 at para 35; *İ.A. v Turkey*, supra n 41 at para 28; *Kuliś and Różycki v Poland* Application No 27209/03, Merits and Just Satisfaction, 6 October 2009, at para 28; and *Otto-Preminger-Institut v Austria*, supra n 69 at para 49.

110 Rainey et al., *Jacobs, White and Ovey: The European Convention on Human Rights*, 6th edn (2014) at 436.

111 For instance, truth, good faith, public interest or privilege, as well as the emerging 'reasonable care' defence (in the case of investigatory journalism) have been gradually visible in the Court's jurisprudence on Article 10, marking increasing similarities with the common law systems (particularly the UK and Australian). On types of defences available for those charged with criminal defamation (especially journalists), see International Press Institute, 'Out of Balance: Defamation Law in the European Union and its Effect on Press Freedom: A provisional overview for journalists, civil society, and policymakers', July 2014, available at: www.freemedia.at/fileadmin/uploads/pics/Out_of_Balance_OnDefamation_IPIJuly2014.pdf [last accessed 4 April 2016].

authorities Turkey for disseminating separatist propaganda.[112] The Court recognized that the artistic nature of the work in question, which 'addressed, in addition, only a minority of readers who are sensitive',[113] was a defence against the interference,[114] and this despite the opposite finding of the Commission.[115] Hence, in contrast to other cases decided on the same day,[116] the Court ruled in favour of Mr Karataş's poems (by 12 votes to five),[117] and noted in particular their 'obvious political dimension' and their 'colourful imagery' which 'expressed deep-rooted discontent with the lot of the population of Kurdish origin in Turkey'.[118] Similarly, in *Arslan v Turkey*[119] and *Başkaya and Okçuoğlu v Turkey*,[120] the Court decided on the same day that the confiscation of historical and academic books respectively under Turkish anti-terrorism law constituted violations of Article 10. As the Court observed in *Arslan v Turkey*, public expression of views through literary works, such as books, 'rather than the mass media' may indicate the absence of a need by the State to suppress their content.[121]

B. Precautions Taken in Artistic and Cultural Events

The second defence which, albeit unsystematically, has been present since the early case law of the Court, seems to be the precautions taken on the occasion of artistic and cultural events. In fact, in most decisions and judgments, the Court has already made clear that 'offence to one's beliefs that may result in a breach of the Convention cannot occur against individuals who have willingly submitted themselves to reading or visualizing an offensive work'—therefore implying that a prohibition should aim at protecting only those who do not want to expose themselves to the incriminated artistic creation or literature work. It may be deduced that for the Court it is of crucial importance whether precautions are taken, so that vulnerable individuals—most notably, minors, or generally speaking a young audience—are protected from being exposed to what one might consider offensive. The element of precaution was put forward by the Court in *Müller*[122] and in the dissenting opinion in the case of

112 The anthology was entitled 'The Song of a Rebellion Dersim' and 'glorified the insurrectionary movement in a particular region of Turkey': see *Karataş v Turkey*, supra n 40 at paras 12 and 52.

113 Ibid. at para 49.

114 Ibid. at para 52. This opinion, however, was not shared by the five dissenting Judges, four of whom expressed the view that '[t]he fact that the poems may use metaphors and other stylistic devices does not suffice, in the instant case, to make this collection any less likely to incite to hatred or armed struggle': see ibid. at Joint Partly Dissenting Opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka.

115 Ibid. at paras 47, referring to the Commission's decision, and 52, where the Court considers the artistic nature of the work in question.

116 For example, *Sürek v Turkey (No 1)*, supra n 45.

117 *Karataş v Turkey*, supra n 40 at paras 51–54 and operative para 1.

118 Ibid. at para 50.

119 Application No 23462/94, Merits and Just Satisfaction, 8 July 1999 (the book was published in the form of 'literary historical narrative' and was confiscated on the ground that it conveyed 'separatist propaganda').

120 Applications Nos 23536/94 and 24408/94, Merits and Just Satisfaction, 8 July 1999 (the book considered a 'critique of the official ideology').

121 *Arslan v Turkey*, supra n 119 at para 48. See generally Davis, supra n 39 at 82.

122 *Müller and Others v Switzerland*, supra n 16 at paras 21 and 43.

Otto-Preminger,[123] as well as in virtually all obscenity cases, including *V.D. and C.G. v France* (2006),[124] concerning the classification of the French film '*Baise-moi*'.

The Commission's view was the same in a case involving an experimental form of art, the so-called 'cadaver' art,[125] in which the sculpture in question consisted of frozen human foetuses, exhibited hanging and entitled 'Human Earings'.[126] The work, made by Rick Gibson, was removed on the grounds of the common law offence of outraging public decency, precisely because the exhibition was in the context of a show open to the general public and attracting a large number of spectators.

5. EMERGING DEFENCES

Despite the lack of any systematic use, it may be legitimately argued that the defence of 'fiction' is emerging in the Court's jurisprudence. Other defences, such as humour and satire, hold an equally important role, but as yet are used rather inconsistently.

A. Humour, Satire and Parody

The Court has ruled without any hesitation that artistic freedom embraces satire and political humour. Satire in the eyes of the Strasbourg Judges has the largest possible meaning since it is not only 'a form of artistic expression', but also 'a social commentary ... which, naturally aims to provoke and agitate'.[127] Political humour and humour that contributes to the public debate hold a privileged status,[128] especially in the light of values as important as the protection of minors.[129] In *Kuliś and Różycki* (2009),[130] for instance, a case involving cartoons mocking the Star Foods chain for

123 Supra n 69 at Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk, taking into account the time and place of the screening (10 pm in a closed room).

124 Application No 68238/01, Admissibility, 22 June 2006 (inadmissible). The Court, with no hesitation, agreed with the French Film Classification Board, which had defined the film as 'cinematography' rather than 'pornography', finding however that it should be made unavailable to minors under 16-years-old as a precautionary measure, emphasizing (at para 19) that 'the confrontation with violent scenes and violent universe could be detrimental to a young audience' [author's translation]. Cf. similar controversies surrounding the French–Japanese film *The Empire of the Senses*: see Alexander, 'Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's *In the Realm of the Senses*' (2003) 4 *Asian-Pacific Law and Policy Journal* 148.

125 To this day, this is a highly debated issue even among art critics and scholars, raising questions going far beyond the sphere of law. On recent 'artistic' works that are creating similar legal problems, yet are minimally discussed, see: Cheng, 'Violent Capital: Zhu Yu on Fire' (2005) 49 *Drama Review* 58 (discussing the works of the experimentalist Zhu Yu).

126 *S. and G. v United Kingdom* Application No 17634/91, Commission Report, 2 September 1991 (inadmissible).

127 *Vereinigung Bildender Künstler v Austria*, supra n 83 at para 33.

128 See supra n 107.

129 In the context of freedom of expression, see, for example, *Société de conception de presse et d'édition and Ponson v France* Application No 26935/05, Merits, 5 March 2009, concerning a series of satirical photomontages in a magazine (one photomontage represented two packets of Marlboro cigarettes carved in a way to resemble two human figures practising sodomy and captioned: 'Warning ... Smoking causes anus cancer'), in which the Court found (at para 60) that the prohibition on cigarette advertising in Belgium did not infringe the Convention, even though the photomontages were of a satirical nature, precisely because 'the public of this particular magazine consist[ed] of a young, and therefore more vulnerable, public' [author's translation].

130 *Kuliś and Różycki v Poland*, supra n 109. The cartoon depicted a small dog named 'Reksio' known in Poland as a TV character.

the poor quality of their crisps, the Court agreed with the applicants that their freedom of expression had been unduly infringed, given that Star Foods' campaign 'used slogans referring . . . to sexual and cultural behaviour, in a manner scarcely appropriate for children' and found that 'the style of the applicants' expression was motivated by 'the type of slogans to which they were reacting'.[131]

This observation does not necessarily require that the Court appreciate all sorts of humour equally, not even political cartoons.[132] Hence, on the one hand, humour that is aimed at political personas and public officials is virtually always welcome by the Court.[133] On the other hand, humour destined to mock complex or controversial situations and events, such as the rise of extremism, terrorism and extreme-right wing speech, is a much more problematic form of expression. The first case indicating that humour and satire is not a crystallized defence is the case of *Leroy v France*.[134] The case concerned a small cartoon mocking of the 9/11 attacks accompanied by a caption paraphrasing Nike's advertising slogan: '*We have all dreamt of it . . . Hamas did it*', published in a weekly newspaper in the Basque country only two days after the attacks. Unlike the domestic courts, which considered the drawing a threat to France's national security because of its support for terrorism ('*apologie du terrorisme*'),[135] the Court attempted to assess whether a fair balance had been observed between the individual right to freedom of expression and the interest of public order, as well as 'the legitimate right of a democratic society to protect itself against the actions of terrorist organizations'.[136] Albeit reiterating the importance of satire and observing that the 'inherent language of cartoons is a form of artistic expression . . . by definition provocative',[137] the Court focused on the wording of the cartoon caption which, in the view of the Court, indicated that the applicant expressed his moral solidarity with the perpetrators of the 9/11 attacks, therefore 'judging favourably the violence against millions of civilians'.[138]

Likewise, in the case of *Féret v Belgium* (2009),[139] the applicant, who was the president of the Belgian extreme-right wing party, had the purportedly 'humorous' idea to

131 Ibid. at paras 37-39.

132 In cases where cartoons appear to be merely 'accompanying' press aticles, the Court considers cartoons somewhat 'adjunct' to journalistic freedom: see *Băcanu v Romania* Application No 4411/04, Merits and Just Satisfaction, 3 March 2009; *Cumpănă and Mazăre v Romania* Application No.oSatisfaction, 3rt,so coincided the jurisprudence of the Court Application No 33348/96, Merits and Just Satisfaction, 17 December 2004; *Freiheitliche Landesgruppe Burgenland v Austria* Application No 34320/96, Strike Out, 18 July 2002; and *Aguilera Jiménez and Others v Spain* Applications Nos 28389/06 et al., Merits and Just Satisfaction, 8 December 2009.

133 See infra nn 165–71.

134 Application No 36109/03, Merits and Just Satisfaction, 2 October 2008.

135 The French authorities penalised the illustrator and the journal with a fine of 1500 euros for having committed the offence of incitement to terror (*apologie du terrorisme*) under Article 24, paragraph 6 of the Act of 29 July 1881 (the French 'Law of the press').

136 *Leroy v France*, supra n 134 at para 36. The Court does not maintain the Government's argument (at para 24) that this form of expression negates the values of the Convention under Article 17, neither that it constitute incitement to hatred or Islamophobia (at 27).

137 Ibid. at para 39 (author's translation). On this, see Voorhoof, 'European Court of Human Rights: Where is the "chilling effect"?' (2008), available at: www.coe.int/t/dghl/standardsetting/media/ConfAntiTerrorism/ECHR_en.pdf [last accessed 4 April 2016].

138 Ibid. at para 43 [author's translation].

139 Application No 15615/07, Merits, 16 July 2009, at paras 77–78.

distribute for his election campaign leaflets and posters with captions such as '*US attacks: it's the couscous clan*'. The Court agreed with the Belgian authorities that the language employed by the applicant incited discrimination and hatred and was wilfully degrading, finding that the reasons adduced by the national authorities to justify the interference in this case were relevant and sufficient, 'given the pressing social need to protect public order and the rights of others, i.e. the immigrant community'.[140]

B. Fiction in the Case of Literature and Poetry

Fiction seems to be an emerging defence increasingly discussed within the Court. In fact, the Court has never explicitly discussed fiction as a 'defence' for writers and poets, but has preferred to base its judgments on the traditional distinction between 'assertion of facts' and 'value judgements'.[141] The distinct function of the artwork as a product of fiction is taken into account for the first time only in 2005 in *Alınak v Turkey*.[142] The incriminated novel, entitled 'The Heat of Şiro', described the massacre that took place in a village close to Sırnak, a Kurdish province in south-eastern Turkey near to the Iraqi-Syrian borders. Shortly after its publication in 1997 copies of the novel were seized, since, according to the State Security Court which ordered the seizure, it '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'.[143] Although the facts described in the book were based on real facts, the Court recognized that there should be a privileged treatment of freedom of literature precisely because of the 'fiction defence', observing that, although the book contained passages that '[t]aken literally . . . might be construed as inciting readers to hatred, revolt and the use of violence, . . . the medium used by the applicant was a novel, a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media.'[144] The Court explicitly recognized, unanimously, that 'the impugned book is a novel classified as fiction, albeit purportedly based on real events'.[145]

The Court's position is reiterated in *Jelševar and Others v Slovenia*.[146] The applicants, considering that a self-published book available to the public contained depictions of personalities resembling their private and family life, lodged a complaint with the Court under Article 8 of the Convention for violation of their personality rights. The Court did not confine itself to the usual balancing exercise: it explicitly referred to literature as 'fiction', noting that 'the book at issue was written not as a biography but as a work of fiction and, as such, would not be understood by most readers as portraying real

140 Ibid. at para 78 [author's translation].

141 See, for example, *Karataş v Turkey*, supra n 40; and *Feldek v Slovakia* Application No 29032/95, Merits and Just Satisfaction, 12 July 2001, at para 75. On this distinction, see *Lingens v Austria*, supra n 107 at para 46; *Prager and Oberschlick v Austria* Application No 15974/90, Merits and Just Satisfaction, 26 April 1995, at para 36. See generally Flauss, supra n 100 at 816ff.

142 Application No 40287/98, Merits and Just Satisfaction, 29 March 2005.

143 Ibid. at para 12. In contrast, the Strasbourg Court found (at para 40) no names or ranks mentioned in the book.

144 Ibid. at para 41.

145 Ibid. at para 43. On auxiliary grounds, the Court equally recognized the contribution of artistic expression to the public debate, adding (at para 42) that 'those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society'.

146 Application No 47318/07, Admissibility, 11 March 2014 (inadmissible).

people'.[147] Interestingly, the Court's view in *Jelševar* is similar to that of the German Federal Constitutional Court in the cases of *Mephisto* and *Esra*—both well known for the impressive findings on the importance of artistic and literary freedom.[148]

Yet there are no indications that these 'art-positive' findings will be repeated in future cases involving artistic freedom. First, in more challenging cases, the Court seems to be considerably more reluctant to repeat its own findings. In *Lindon v France*,[149] the majority of the Grand Chamber did not show the same sensibility to fiction.[150] The case concerned the publication of a novel entitled *The Trial of Jean-Marie Le Pen*, which was based on the hypothetical trial of the leader of the French party *Front National* (Ronald Blistier). In the novel, Blistier commits a racist crime influenced by Le Pen's extreme right-wing ideas and, interestingly, the story, albeit fictitious, is inspired by similar events. After publication the book was not seized; the writer, however, along with the book's publisher and the director of the French newspaper 'Liberation'—which had reproduced passages from the book along with a petition signed by 97 writers in favour of Lindon—were all prosecuted for defamation. The Court admits that the novel 'was inspired by real events but adds fictional elements'.[151] However, instead of reiterating its findings in *Alinak*, it preferred to maintain its previous views on distinguishing between facts and value judgments. Hence, despite its initial finding with respect to the 'defence' of the contribution to the public debate and the explicit affirmation that 'the limits of acceptable criticism are wider as regards a politician',[152] the Judges took the novel to the letter, dismissing any reference to fiction.[153]

Likewise in *Erhmann and SCI VHI v France*[154] the Court's views were once more disappointing. In this case, the authorities required the restoration of the property of an artist in the French countryside (close to the city of Lyon), known as '*le Demeure*

147 Ibid. at para 38.

148 See *Mephisto* BVerfGE 30, 173 (1971) at paras 173–191; and *Esra* 1 BvR 1783/05 (2007). In the latter the Constitutional Court additionally found that the banning of a novel was a particularly serious breach of artistic freedom and that the latter covered 'the right to use characters based on real-life models'. See Venice Commission, *Bulletin* (2007) at 377, available at: www.venice.coe.int/files/Bulletin/B2007-3-e.pdf [last accessed 4 April 2016].

149 *Lindon, Otchakovsky-Laurens and July v France* Applications Nos 21279/02 and 36448/02, Merits and Just Satisfaction, 22 October 2007. See Wachsmann, 'Vers un affaiblissement de la protection de la liberté d'expression par la Cour européenne des droits de l'Homme?' (2009) 78 *Revue Trimestrielle des Droits de l'Homme* 491.

150 See, for example, ibid. at para 55: '[T]he impugned work is not one of pure fiction but introduces real characters or facts.' Only the dissenting Judges recognized the political function of the offending book, attributing equal significance to the fact that the target of the book was a far-right politician who 'should accept an even higher degree of tolerance precisely because he is a politician who is known for the virulence of his discourse': ibid. at Joint Partly Dissenting Opinion of Judges Rozakis, Bratza, Tulkens and Šikuta, para 4.

151 Ibid. at para 48.

152 Ibid. at para 46.

153 Judge Loucaides in particular pointed that 'the principle established by the jurisprudence that there is more latitude in the exercise of freedom of expression in the area of political speech or debate, or in matters of public interest, or in cases of criticism of politicians, as in the present case, should not be interpreted as allowing the publication of any unverified defamatory statements' and that 'reputation is a value sacred for every person including politicians': ibid. at Concurring Opinion of Judge Loucaides.

154 Application No 2777/10, Admissibility, 7 June 2011 (inadmissible). The reason for the restoration order put forward by the French authorities was the preservation of the public space and public order for the

du Chaos'. The property was used by various artists as an exhibition space for collective art projects and was characterized by the local artistic community as a 'contemporary art museum', receiving thousands of visitors every year. More than three thousand paintings and construction works were part of it, including drawings of 'skulls and salamanders' on the external walls of the *Demeure*. Following a largely mediatized controversy, the French courts found the artist criminally liable for breaching the provisions of the French Planning Code (*Code de l'urbanisme*) and requested the restoration of the premises to 'their previous state'. Without examining the eventual contribution of the *Demeure* to the artistic and cultural life of the community, the domestic courts considered that whether the premises 'should be characterised as a work of art was not for the criminal court to decide'. The Court agreed, with no further discussion. Finding that the planning regulations in question 'constituted measures that were necessary in a democratic society for the prevention of disorder, which meant ensuring the protection of the common good and respect for the collective intent as expressed in planning choices', it rejected the applicant's Article 10 complaint.[155]

Furthermore, in *Kartunnen*, concerning a Finish artist (and University lecturer) who, in a gallery opening entitled 'Virgin-Whore Church', exhibited web-porn material directly downloaded from the Internet to 'to encourage discussion and raise awareness of how widespread and easily accessible child pornography was',[156] the Court did not even find the artistic freedom claim relevant. In the *cas d'espèce*, the domestic authorities seized Kartunnen's photographs and closed down the exhibition on the grounds of the domestic anti-obscenity criminal law, that criminalizes, *inter alia*, the manufacturing and distribution of sexually obscene pictures or visual recordings depicting children, violence or bestiality.[157] Admitting that 'conceptions of sexual morality have changed in recent years', and noting that the domestic courts had 'acknowledged the applicant's good intentions',[158] the Court did not go as far as affirming that the specific works in question were protected as a form of artistic expression, as the applicant claimed.[159] Yet in *Müller*, decided 30 years earlier, a case in which the bestiality in the representations in the paintings had been incriminated under the—somewhat similar, if not more rigid—Swiss criminal law,[160] the Court, albeit finding the restriction legitimate, did not object to the nature of the disputed

reason that the property was in a position of joint visibility with edifices in the French secondary list of historical buildings (a church and a manor house).

155 Ibid. The Demeure was also in breach of the Heritage code, as well as those of the local land-use plan, that stipulated that 'constructions . . . must blend into the surrounding landscape'.

156 *Karttunen v Finland* Application No 1685/10, Admissibility, 10 May 2011 (inadmissible). See also Kartunnen, 'The Work of Art in the Age of Digital Reproduction and Mediated Reality: Ethics and Aesthetics in the dream and cream world of every-extending publicity' (2011) at 491–2, available at: www.um.es/vmca/proceedings/docs/42.Ulla-Karttunen.pdf [last accessed 4 April 2016].

157 Act No 39/1889, as amended by Act No 650/2004, cited in *Karttunen v France*, ibid. at para 13.

158 Ibid. at paras 23–24.

159 In her submissions the applicant argued (at para 15) that 'her right as an artist to freedom of expression had been violated'.

160 *Müller and Others v Switzerland*, supra n 16 at para 20, citing Article 204 of the Swiss Criminal Code that equally prohibited obscene material, including the representation of pornography and bestiophilia, and, additionally, provided for its destruction.

paintings as 'artworks', and considered the case admissible, allowing at least for the balancing exercise to take place.[161]

In light of the above, other judgments of the Court, such as *Akdaş*,[162] which, for some authors, marked the beginning of a new era in the protection of artistic freedom,[163] should be interpreted more cautiously. Indeed, one can only rejoice at the recognition of a violation of Article 10 vindicating the freedom of the arts over the seizure and destruction of the novel by the Turkish authorities. Yet the censored work was not one of a marginal artist (as in *Wingrove* for instance), nor even of a politically 'engaged' one (as in *Bildender-Kunstler*). Despite its undisputable scandalous content (with explicit scenes of sexual intercourse and sadomasochism) when first published a century ago, the 'Eleven Hundred Virgins' was written by Apollinaire—a classic author whose work is now considered part of the European literary heritage to which the Council of Europe attributes major importance.[164] It is, therefore, fairly evident that the Court could not have possibly envisaged the option to 'prevent public access to a particular language . . . to a work contained in the European literary heritage'[165]—not even to protect the so cherished margin of appreciation of the respondent State.

6. THE SPECIFICITY OF THE ARTS

The Court *could* potentially take into account the distinct nature of the arts as a separate defence. The reason is certainly neither that art is an 'unlimited freedom', nor that artists are excluded from duties and responsibilities. It is rather that the Court should remain consistent with its own findings. At least two types of findings support the view that the Court is already taking into account the specificity of the arts as a defence.

The first is the *largo sensu* perception of what constitutes 'art'. In fact, the Court has never engaged in philosophical discussions on the definition of 'art'[166] or taken into

161 Ibid. at paras 21 and 43.

162 Supra n 43.

163 See, for example, Marguénaud and Dauchez, 'Les onze milles vierges fondatrices du patrimoine littéraire européen' (2010) 17 *Le Dalloz* 1051 at 1052, arguing that this judgment 'apparaîtra comme un véritable retournement de tendance en faveur de la liberté d'expression artistique' ('seems to be a veritable U-turn in the tendency to favour the freedom of artistic expression'). Cf. Ruand, 'L'expression artistique au regard de l'article 10 de la Convention européenne des droits de l'homme : analyse de la jurisprudence' (2010) 84 *Revue Trimestrielle des Droits de l'Homme* 917; and Latil, 'La Cour européenne des droits de l'homme renforce la liberté de création artistique face à la protection de la morale' (2010) 83 *Revue Trimestrielle des Droits de l'Homme* 769. See also Kearns, supra n 80 at 75, n 60, arguing, much more prudently, that 'there is no assurance given by the Court that the decision has any more general implications for contemporary literary works'.

164 *Akdaş v Turkey*, supra n 43 at paras 29–30.

165 Ibid. at para 30 [author's translation].

166 Cf. the decision of the German Constitutional Court in *Strauß-Karikatur*, BVerfGE 75, 369 (involving a cartoon published in the newspapers and portraying the then Bavarian minister as a pig copulating with another pig dressed in judicial robes). In this judgment, despite finding the balance (*in casu* in favour of human dignity), the German Court emphasized that an approach for assessing the value of art is unconstitutional: 'What is allowed and necessary is simply a distinction between art and non-art; any standard, in the sense of distinguishing between "higher" or "lower" art and good or bad art (and therefore distinguishing also between art less or more worthy to protect), leads to controling its content, something that is constitutionally prohibited' (at C –I, para 2). See also *Mephisto*, supra n 148 at para 2, in which the German Constitutional Court explains that, due to the special nature of the arts, there is no need for a definition.

consideration any qualifying conditions for this freedom to be invoked.[167] Over the last few years, however, this already broad perception seems to be expanding dramatically, with the Court referring to 'artistic freedom' even when the slightest hint of creative expression appears in the facts of the case. For instance, in *Alves da Silva v Portugal*, concerning a Portuguese journalist who had made a puppet to lampoon the attitude of the mayor of his native village, the Court explicitly affirmed that the applicant was covered by the protection of the freedom of satire as a form of art, since the applicant wished to express himself in a way 'quite clearly satirical in nature'.[168] Similarly, in *Tatár and Fáber v Hungary*, it accepted that expressions such as exposing dirty clothing on the fence surrounding the Hungarian parliament 'qualif[ied] as artistic and political', since the purpose was to complain about the political crisis in the country.[169] Also, in *Welsh and Silva Canha v* Portugal,[170] with respect to the condemnation of two journalists for having written a press article revealing money scandals, the Court stressed the claimants satirical approach, and noted that there was a breach of their 'artistic freedom'—remarkably noting that 'one needs to examine very carefully any interference with the rights of an artist – or any person who wishes to express themselves in this way'.[171] In the case of *Eon v France*, also decided in 2013,[172] and concerning an individual who raised a small placard reading 'get lost, you sad prick' when the French President Sarkozy passed nearby, once more the Court made allusion to satire, noting, as in *Welsh and Silva Canha*, that 'any interference with the right of an artist – or anyone else – to use this means of expression should be examined with particular care'.[173] The same findings were repeated in *Murat Vural v Turkey* in 2014, concerning an individual who, 'equipped with a tin of paint, paint thinner and a ladder',[174] poured paint on several statutes of Atatürk situated in the public space.[175]

167 Such as whether the applicant is a professional artist, or whether the artwork can be qualified as an 'original creation'—as would be the case, for instance, in intellectual property law.

168 Application No 41665/07, Merits and Just Satisfaction, 20 October 2009, at para 27 [author's translation]. During the local carnival, Mr Da Silva drove his van around the village exhibiting a puppet resembling the mayor and broadcasting satirical messages against him, implying that he had been making 'black money'.

169 Applications Nos 26005/08 and 26160/08, Merits and Just Satisfaction, 12 June 2012, at para 41.

170 Application No 16812/11, Merits and Just Satisfaction, 17 September 2013.

171 Ibid. at para 29 (author's translation).

172 Application No 26118/10, Merits and Just Satisfaction, 14 March 2013.

173 Ibid. at para 60.

174 Application No 9540/07, Merits and Just Satisfaction, 21 October 2014, at para 10.

175 Ibid. at para 47. Atatürk was the founder of the modern Turkish republic. The applicant painted all statues of Atatürk that he found until he was arrested, prosecuted under the Turkish Law on Offences Committed Against Atatürk and imprisoned. Atatürk was the founder of the modern Turkish republic. The Court found (at para 68) a violation of the Convention because this restriction was 'grossly disproportionate' (at para 68), on the basis that the applicant was sentenced to 13 years of imprisonment and deprived of his right to vote for most of this time. To reach its conclusion, the Court referred (at para 45) to cases on the display of religious symbols and artistic freedom cases, and reiterated that 'Article 10 of the Convention does not specify that freedom of artistic expression comes within its ambit; but neither ... does it distinguish between the various forms of expression' (at para 45). Interestingly, the Hungarian Judge, András Sajó, was extremely critical of the methodology of the Court and suggested alternative methods as more appropriate in deciding conflicts in freedom of expression cases: see ibid. at Partly Concurring and Partly Dissenting Opinion of Judge Sajó.

The second finding is the defensive function of the arts when discussing pornography cases. In fact, the Court has never explicitly clarified where exactly is situated the line between pornography and 'obscene art'.[176] When the opportunity arose in the *V.D. and C.G.* case, it preferred to remain silent, merely implying that the film had some artistic merit[177] before observing that it 'essentially constituted explicit scenes of violence and sex'.[178] Yet, in pornography cases in which the applicants claimed an infringement of their 'artistic freedom' the Court dismissed the relevant claims for the simple reason that 'this is not art'. For instance, in *Perrin*,[179] the applicant was convicted and sentenced by the UK courts to 30 months imprisonment for maintaining a pornographic website accessible only to subscribers. The Court found the prison sentence 'clearly proportionate', since, first, the applicant did not manage to take any precautions on accessibility with respect to age limit, leaving the page 'freely available to anyone surfing the Internet',[180] and, secondly, 'the purpose of the present expression was purely commercial and there [was] no suggestion that it contributed to any public debate on a matter of public interest or that it was of any artistic merit'.[181]

In fact, negating the quality of an artwork as such has been an exception throughout the case law of the Court. To our knowledge, it has happened only once, when Judge Loucaïdes argued that Otto Muhl's disputed painting in *Bildender* 'was not art' but rather 'a senseless, disgusting combination of lewd images whose only effect is to debase, insult and ridicule each and every person portrayed'.[182] Even in this case, which split the Court, the other two dissenting judges, Spielmann and Jebens, showed some understanding of the role of the arts in a society, noting that 'the painting was not intended to portray reality' and that it is not the task of a Court to

176 This is a particularly fine one. The question has arisen in several domestic jurisdictions. In a famous quote, a US Supreme Court Judge pointed to the difference by saying: 'I know it when I see it': see *Jacobellis v Ohio* 378 U.S. 184 (1964). On the contrary, the Japanese Supreme Court was more precise than the US Supreme Court, ruling in *Koyama v Japan* (1957) that 'a work could be judged "obscene" . . . if it aroused and stimulated sexual desire, offended a common sense of modesty or shame, and violated "proper concepts of sexual morality"': see Alexander, supra n 124 at 155. The Japanese Supreme Court recently accepted 'artistic value' as a defence: see *Asai v Japan* 62(2) 2008, reported by Obata, 'Public welfare, artistic values, and the state ideology: The analysis of the 2008 Japanese Supreme Court obscenity decision on Robert Mapplethorpe' (2010) 19 *Pacific Rim Law and Policy Journal* 519 at 519. See also controversies surrounding Andre Serrano's *Piss Christ* and Mapplethorpe's 'obscene' photographs in the much-discussed case *National Endowment for the Arts v Finley* 524 U.S. 569 (1998). For an overview of the debates in the US, see generally Atkins and Mintcheva, *Censoring Culture: Contemporary Threats to Free Expression* (2006).

177 *V.D. and C.G. v France*, supra n 124 at section B(1)(b). In its reasoning the Court referred to *Müller and Others v Switzerland*, supra n 16, and also observed that 'the artist and those who promote their works shall not escape the possibility of limitation provided in Article 10 paragraph 2' [author's translation].

178 Ibid. [author's translation].

179 *Perrin v United Kingdom* Application No 5446/03, Admissibility, 18 October 2005 (inadmissible). See also *Pay v United Kingdom* Application No 32792/05, Admissibility, 16 September 2008 (inadmissible), with respect to advertising of sadomasochist activities ('BDSM') on the Internet, in which the applicant also submitted that 'it is well-established that artistic expression, including that of an erotic nature, fell within the scope of Article 10'.

180 *Perrin v United Kingdom*, ibid. at section D(1). Cf. Harris et al., supra n 18 at 657.

181 Ibid. at section D(2).

182 *Vereinigung Bildender Künstler v Austria*, supra n 83 at Dissenting Opinion of Judge Loucaides.

perform quality controls 'or to differentiate between "superior" and "inferior" or "good" and "bad"'.[183]

7. CONCLUSION

The Court has given only a handful of judgments on artistic freedom. Certainly no general conclusions can be drawn, since matters pertaining to self censorship and the socio-economic conditions of the arts go far beyond the scope of this study. The minimal number of cases before the Court, however, suggests that arts either suffer from State interference relatively less frequently than other forms of expression or that the highest courts of the States Parties generally maintain human rights standards.

Nevertheless, some comments may be made. On its face, it seems that after 2005 the Court has taken a positive stance towards the arts. Undoubtedly, in the few cases it has decided, the Court has come up with remarkably 'art positive' findings, including expanding its perception of what constitutes 'art', although abstaining from giving any formal definition of the concept; finding Article 10 violations in all artistic freedom cases involving Turkey; tending to outweigh offence to religious sensibilities for the sake of artistic expression; and hailing the value of the European cultural heritage. In addition, at least since 2008, the Court has implied that writers and poets may rely on certain defences—such as the satirical nature of the artwork in question; precautions in the case of exhibitions, film screenings and other artistic events; and also, arguably, fiction, in the case of literary works. Most noteworthy, the Court has explicitly referred to fiction as a defence for the author in *Jelševar* (2014). The rationale in this admissibility decision is exceptional, reminding us of the 'art-protective' phraseology of the German Constitutional Court's rulings in *Mephisto* and *Esra*.

At the same time, however, there are at least two grounds for criticism of the Court's methodology. First, the Court remains hesitant to repeat its positive findings, especially in more challenging cases. The fact that in *Leroy* (2008), *Erhmann* (2011) and *Kartunnen* (2011) the Court has held 'art-negative' views, both in terms of *rationale* and outcome, weighs in this sense more heavily than the finding of Article 10 violations in cases against Turkey, such as *Akdaş*. Secondly, the fact that the aforementioned defences (satire, precautions and fiction) have never been explicitly formulated, with the Court still showing its preference towards the rather contextual defence of the 'contribution to the public debate'.

Three steps ought to be taken. First, to ensure that freedom of artistic expression, as any other form of expression, will continue to be respected in situations of severe censorship in those States Parties to the Convention that are repeatedly repressing the freedom of expression of dissident and minority views. The Court should continue maintaining human rights standards, dismissing States' arguments aiming at minimizing pluralism. Secondly, to categorize existing and emerging Article 10 defences as part of a methodology of balancing between competing interests. The instigation of a more operational approach could be efficient for the Court in cases related to freedom of expression, particularly when the latter conflicts with

183 Ibid. at Joint Dissenting Opinion of Judges Spielmann and Jebens, para 3, citing (at para 10) the German Constitutional Court's decision in *Strauß-Karikatur*, supra n 165.

personality rights and incitement to hatred—or in cases in which a lack of *consensus* unavoidably leads the Court to apply a wide margin of appreciation. Thirdly, by progressively developing a theory on positive obligations stemming from the right to artistic freedom, so as to empower the right of the public to access culture, including minority cultures. In questions pertaining to hate speech and incitement to hatred, the Court could also take into account, contemporary *soft law* developments as well as instruments such as the Camden Principles[184] and the Rabat Plan of Action.[185] In this way, it would ascertain its authority as a mechanism of protection not only for human rights, but also for cultural human rights.

184 Supra n 24.
185 Supra n 36.