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Does Cancel Culture call into Question the Protection of Artists' Rights of Expression? A Study in the Light of the Case-law of the European Court of Human Rights

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ABSTRACT

Cancel culture calls into question the relation between artistic productions and values which these productions revoke. While it is widely accepted that art should not bear any constraints which might lead to censorship, it is open the discussion whether art works from the past should be removed or amended in light to the current democratic values endorsed by the western community. This leads to a set of questions: will old art crafts find a place in our museums even if they depict scene of colonization or slavery openly in contrast with the democratic values and the modern concept of statehood? To what extend the artistic freedom should be taken into account when it comes to historical art manufactories which remind old-fashioned values? The paper is structured as it follows: the first section will give an overview of the cancel culture movement, its genesis and its more recent developments. A second section will focus on the protection of artistic freedom of expression and its current state of art in the context of International and European law. The third section will discuss the jurisprudence of the European Court of Human Rights concerning artistic freedom of expression, with particular regards to the concept of European Literature Heritage. The last section will conclude.

Keywords: art, cancel culture, ECHR, ICCPR, ICESCR

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*“The work of art may have
a moral effect,
but to demand moral
purpose from the artist is
to make him ruin his
work.”*

J. W. von Goethe

1. Introduction

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The paper is structured as it follows: the first section will give an overview of the cancel culture movement, its genesis and its more recent developments. A second section will focus on the protection of artistic freedom of expression and its current state of art in the context of International and European law. The third section will discuss the jurisprudence of the European Court of Human Rights concerning artistic freedom of expression, with particular regards to the concept of European Literature Heritage. The last section will conclude.

2. Cancel Culture: The How, the What and the Why

The term “cancel culture” is common and divisive. Although public discourse is peppered with it, its meaning, its implications and its scope are debated in and out the academic community. The term was chosen over several other new words added to the Macquarie dictionary of Australian English in 2019.¹

The dictionary's entry for cancel culture describes it as "the attitudes within a community which call for or bring about the withdrawal of support from a public figure".² However, scholars have not agreed on a common definition (Clark, 2020). Some has defined it as “collective strategies by activists using social pressures to achieve cultural ostracism of targets (someone or something) accused of offensive words or deeds” (Norris, 2023).

Others have described it as “phenomenon of publicly ostracizing someone (or something) who was accused of acting controversially and/or making questionable remarks” (Wong, 2022). What it can be agreed on is that the notion literally means removal and destruction of culture. The term itself has a contradiction that of erasing culture. In spite of the debate surrounding its definition, it is almost unanimous the consensus about the genesis of it which has arisen in the context of the Black Lives Matter movement breaking out in the US following the atrocious killing of a black man George Lyon (Romano, 2019). Initially the notion was used to cover the protests which aimed to tear down and stain historical monuments, in particular those monuments recalling people or events against to the abolishment of the slavery in US.

Lately the notion of cancel culture has been used to describe a wider type of protests which have been aiming to withdraw a vast majority of historical

¹ The Sydney Morning Herald, *Cancel culture is the Macquarie Dictionary's word of the year for 2019*, 2 December 2019, available at <https://www.smh.com.au/culture/books/cancel-culture-is-the-macquarie-dictionary-s-word-of-the-year-for-2019-20191202-p53fzy.html> (accessed 29 June 2023).

² Macquarie Dictionary, *The Committee's Choice and People's Choice Word of the Year 2019*, available at <https://www.macquariedictionary.com.au/resources/view/word/of/the/year/2019> (accessed 29 June 2023).

items, including statues, books, movies which contain expressions or notions representing even indirectly values set in contrast to the current democratic values.

A call for withdrawal of those mentioned historical items has touched cultural and historical figures from the far past to the most recent past. A couple of emblematic cases can be dared to be mentioned. The most recent case concerns the request of withdrawal of a Disney movie for being accused to evoke racial propaganda due to a racist depiction of one of its characters. Similarly, Roald Dahl's children book have undergone into an operation of rewriting due to the use of contentious words.³ The call for cancel culture has touched a number of artistic expressions, movies, books and last but not least paintings. In the context of climate change protests, cancel culture concerns have been the reasons why a group of climate activists have been throwing soup, mashed potatoes and cake at Andy Warhol's Campbell's Soup Cans at the National Gallery of Australia. The protestors have argued that the painting itself represents a symbol of wild capitalism which has been accounted as one of the causes of the climate crisis.⁴ All these cases have one element in common, that is to concern artistic items which has been produced way back in the past. *Sanctimony Literature* is the new label for those productions which result amended by envious values coming from the past (Rothfeld, 2021). The cancel culture calls into question the relation between art crafts and values which art revokes. The question is to what extend our current values can be projected into the past? Ultimately the question is whether the artist freedom of speech as used in the past can be limited because of the changing culture of today.

³ CNN, Roald Dahl book changes spark censorship spat, 21 February 2023, available at <https://edition.cnn.com/style/article/roald-dahl-censored-gbr-scli-intl/index.html> (accessed 29 June 2023).

⁴ The Guardian, *Climate activists target Andy Warhol's Campbell's soup cans at National Gallery of Australia*, 9 November 2022, available at <https://www.theguardian.com/culture/2022/nov/09/climate-activists-target-andy-warhols-campbells-soup-cans-at-australias-national-gallery> (accessed 29 June 2023).

3. International Law and Art

At a quick glance art and law appear as two distinctive subjects. One is often leads to think that law “meets” art when the latter becomes suitable of being published or sold. Questions of property and compensation have been dealt by copy right laws enacted at international and domestic levels. The relation between art and law has been object of a special study carried out by the European Union Agency for Fundamental Rights (FRA). The report has pointed out a deeper level of relation between art and law.⁵ According to the report, art shares with international law, specifically with human rights law a tight relation because “[B]oth are concerned with questions of what is (and what is not), humanity, identity, dignity, of communicating empathy, of the transformation of lives, of visions for the future and of the mission of mankind, of the full development of the person. Both are universally applicable”. In this view, art and law share a common path being mutually instrumental to a better understanding of humankind. Specifically, while art questions what is “to be”, human rights empower people to be who they are.⁶

On the same line of reasoning, the 2013 Report of the Special Rapporteur in the field of cultural rights and the right to freedom of artistic expression and creativity acknowledges art as “an important vehicle for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, worldview and meanings assigned to their existence and development. People in all societies create, make use of, or relate to, artistic expressions and creations.”⁷

It does not come therefore as a surprise the right to artistic expression has been traditionally seen as part of the right of freedom of expression: paintings,

⁵ European Union Agency for Fundamental Rights (FRA), *Exploring Connections between Arts and Human Rights*, Report of a High-level Expert Meeting on 29–30 May 2017, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017_arts-and-human-rights-report_may-2017_vienna.pdf (accessed 29 June 2023).

⁶ *Ibid.*

⁷ A/HRC/23/34, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, *The right to freedom of artistic expression and creativity*, 14 March 2013.

art crafts are nothing but “expressions of ideas imparted in form of art”.⁸ Human rights law interweaves with art at an earlier stage of the artistic process, namely in the moment of artistic creation.

The formulation of the right to artistic freedom came later along the journey to the approval of human rights law. Article 19 of the 1948 Universal Declaration of Human Rights (UNDHRs) states the right to freedom of expression without an explicit mention to the artists (Asbjorn, 1992). A reference to the artists' rights is in Article 27 which recognizes the right freely “to participate in the cultural life, to enjoy the arts together with the right to the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. The UNDHR has greatly informed the wording of subsequent human rights treaties (Asbjorn, 1992). States indeed declared their commitments to the principles of the Declaration when they signed the UN International Covenant on Civil and Political Rights (ICCPR),⁹ which includes under Article 19 the protection of freedom of expression (Novak, 2005; Joseph, Schultz and Castan, 2000, 3-4; Asbjorn, 1992). Article 19 (2) states that expression ‘in the form of art’ is protected. Human rights instruments are living instruments whose interpretation follows the rule of the Vienna Convention of the Law of the Treaties as well as the interpretation provided by human rights bodies. On a couple of occasions, the United Nations (UN) Human Rights Committee (HRC), the international body which monitors and supervises implementation of the ICCPR, together with the Committee on Economic, Social and Cultural Rights have been asked to clarify the limits and contents of the artistic freedom., The UNHRC, has specified in its General Comment 34 that ‘non-verbal expression’ includes ‘images and objects of art’.¹⁰ The ICCPR provides protection to the artistic freedom as a prolongation of freedom of

⁸ *Shin v Republic of Korea*, UN doc CCPR/C/80/D/926/2000, 16 March 2004.

⁹ International Covenant on Civil and Political Rights, 1966

¹⁰ UN Human Rights Committee, ‘General Comment 34’, UN doc CCPR/C/GC/34, 12 September 2011.

expression. An additional level of protection it granted to it from by reason of its integral part in cultural life. Indeed, the right to artistic expression falls as well into the traditionally known category of cultural rights, together with right to education, linguistics rights, access to culture. As acknowledged by the 2013 Report of the Special Rapporteur:

Artists may entertain people, but they also contribute to social debates, sometimes bringing counter-discourses and potential counterweights to existing power centres. The vitality of artistic creativity is necessary for the development of vibrant cultures and the functioning of democratic societies Artistic expressions and creations are an integral part of cultural life, which entails contesting meanings and revisiting culturally inherited ideas and concepts.¹¹

The UN International Covenant on Economic, Social and Cultural Rights (ICESCR)¹² recognizes the role of art in cultural development. Article 15 of ICESCR protects the rights to take part in cultural life and freedom of creative activity. In addition to that, Article 15 (3) calls Signatories States to adopt steps necessary for the conservation, the development and the diffusion of culture, which includes arts. On this specific the Committee on Economic, Social and Cultural Rights has stressed that the right to take part in cultural life encompasses the right of everyone “to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity.”¹³ The Committee has as well underlined the expression “cultural life” is an explicit reference to culture as “a living process, historical, dynamic and evolving, with a past, a present and a future.”¹⁴ The Committee shares the view that cultural life is a dynamic and inclusive concept both in terms of time and place.

¹¹ Report of the Special Rapporteur cited, par. 3.

¹² International Covenant on Economic, Social and Cultural Rights, 1966.

¹³ Economic and Social Committee, General Comment n. 21, E/C.12/GC/21.

¹⁴ *Ibid.*

Few decisions in the United Nations system relate to artistic freedom. Unfortunately, the lack of cases does not mirror the lack of actual threats to artistic expression. As it has been noted, this may be mostly due to the fact there is lack of knowledge about international human rights law by bodies involved in the arts (Joseph, 2020). In the scope of the present paper, a couple of cases are worthy to be mentioned. Both cases could contribute to shed a light on the understanding of the content and limits of Article 19 ICCPR. The HRC found that the Republic of Korea had violated article 19 of ICCPR by convicting a painter for a painting deemed to be contrary to the National Security Law. On the occasion, the HRC has reiterated that Article 19 ICCPR must be understood as protection to the right to expression in any form, including the artistic one. The case itself shows as well the complexity lying behind the interpretation of any artistic work. In the specifics, the artist Hak-Chul Shin claimed instead that the painting represented his utopian view of a unified Korea, influenced by his childhood memory of rural life. This case demonstrates how an artwork can carry different meanings to different people, and those meanings can differ from the one intended by the artist. It is therefore not by chance that the UN Special Rapporteur in the Field of Cultural Rights has warned that “Artistic expressions and creations do not always carry, and should not be reduced to carrying, a specific message or information.”¹⁵

The Working Group on Arbitrary Detention found that Lapiro de Mbanga, a Cameroonian musician and songwriter, had been arbitrarily detained.¹⁶ Lapiro was accused to have supported the local riots in different ways, including releasing a new song “Constipated Constitution”. The working group found a violation of Article 19 of the ICCPR concluding that the song “Constipated Constitution” was simply a political statement and did not incite

¹⁵ Report of the Special Rapporteur *cited*, par. 37.

¹⁶ A/HRC/WGAD/2011/32, Opinions adopted by the Working Group on Arbitrary Detention at its sixty-first session, 29 August–2 September 2011, No. 32/2011.

anyone to violence. This case demonstrates how important is to set a line between an artwork and the use that a community makes of it. In other words, the artwork and its meaning should be considered existing independently from the way the society has made use of it.

Both aforementioned Covenants have represented an important caveat for a number of international legal instruments encompassing the right to artistic freedom, including the UN Convention on the Rights of the Child (Article 13), UN Convention People with Disabilities (Article 30), the American Convention of Human Rights (Article 13) and its Protocol in the area of Economic, Social and Cultural Rights (Article 14). At regional level, the Arab Charter for Human Rights also contain such explicit provisions under Article 42, article 10 the European Convention for the Safeguard of Human Rights and Fundamental Freedoms under Article 10, the African Charter on Human and Peoples' Rights under Articles 9 and 17. All European states are signatories or have ratified both these covenants.

In addition to the two UN Covenants, protection of freedom of artistic expression lies within the Guiding Principles of the UNESCO 1980 Recommendation Concerning the Status of the Artist, which recommends member states to protect and to defend artists in their freedom to create, and that they be given the full protection of their rights as provided under human rights law. Freedom of expression is also referred to as a fundamental right within the UNESCO 2005 Convention on the Promotion and Protection of the Diversity of Cultural Expressions which counts 150 members plus the European Union. State signatories are required to report on their adherence to the UNESCO 2005 Convention every four years in what is known as the Quarterly Periodic Review process. In October 2021, the European Parliament passed a comprehensive resolution on the status of the artist that provides a framework for improving working conditions for artists.

Specifically, the resolution urges “all Member States to fulfil their responsibility and obligation to foster and defend artistic freedom in order to

uphold the fundamental right to freedom of expression and to ensure that EU citizens can freely enjoy artistic creations and participate in culture, and urges the Commission to sanction those Member States that fail to comply with their obligations; invites the Commission to carry out further research into the topic and prepare a roadmap for achieving better protection of freedom of artistic expression in Europe; calls on the Member States to jointly establish a structured dialogue among artists, legal experts and relevant stakeholders to determine common standards for freedom of artistic expression and develop and implement relevant guidelines.”

The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are the updated and amended versions of the previous treaties, the Treaty on European Union (or Maastricht Treaty of 1992, subsequently amended by the Treaty of Amsterdam 1997 and the Treaty of Nice 2001) and the Treaty on the European Community (TEC). The amendment took place through the Lisbon Treaty of 2007 which allowed, among other things, a better delineation and better division of the functions of the European Union and the Member States, eliminated any reference to an EU Constitution, while strengthening the protection of fundamental rights with the assumption of the Nice Charter. Therefore, the TEU and the TFEU become the treaties on which the European Union is founded and have the same legal value. With regard to culture and the defence of freedom of expression, reference may be made to Article 3.3 TEU (*ex* Article 2 TEU) and Article 167 TFEU (*ex* Article 151 TEC), freedom of expression and information (art.11), freedom of assembly and association (art.12), freedom of arts and sciences (art.13).

4. Right to Artistic Expression in Light of the ECHR's Jurisprudence

The European Convention of Human Rights does not explicitly protect cultural rights as such, unlike other international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights.

However, the European Court of Human Rights, through a dynamic interpretation of the different Articles of the Convention, has gradually recognized substantive rights which may fall under the notion of “cultural rights” in a broad sense.

The Court has underlined the importance of artistic expression in the context of the right to freedom of expression (Article 10 of the Convention). Article 10.2 of the Convention lists exceptions to freedom of expression, referring to restrictions prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights (ECHR) has addressed far more cases regarding art than any other international human rights body (Joseph, 2020). How has the ECHR's jurisprudence developed with regards to the freedom of artistic expression?

In general, the ECHR has applied a high level of protection when it has dealt with artistic works such as novels, poems, paintings in spite of the restrictions applicable to the freedom of expression in spite of the small number of cases held by the Court (Polymenopoulou, 2016).

In the case of *Müller and Others v. Switzerland* (24 May 1988, Series A no. 133), the Court pointed out that Article 10 covered freedom of artistic expression recognizing that “it afforded the opportunity to take part in the exchange of cultural, political and social information and ideas” (§ 27) and it concluded that this imposed on the State a particular obligation not to encroach on the freedom of expression of creative artists (§ 33). In the case of *Alinak v. Turkey* (no. 40287/98, 29 March 2005), the Court went even further on the obligation not to encroach concerned a novel about the torture of villagers that was based on real events. The Court noted as follows: “...

the book contains passages in which graphic details are given of fictional ill-treatment and atrocities committed against villagers, which no doubt creates in the mind of the reader a powerful hostility towards the injustice to which the villagers were subjected in the tale. Taken literally, certain passages might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was a novel, a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media” (§ 41). The Court pointed out that “the impugned book [was] a novel classified as fiction, albeit purportedly based on real events”. It further observed as follows: “... even though some of the passages from the book seem very hostile in tone, the Court considers that their artistic nature and limited impact reduced them to an expression of deep distress in the face of tragic events, rather than a call to violence” (§ 45). Following the Court’s line of reasoning, the artwork in question provides a fictional representation of a real event. Because of its fictional character, the artwork cannot be interpreted in the light of the historical events to which it is inspired.

In its 25 January 2007 judgment in *Vereinigung Bildender Künstler v. Austria* (no. 68354/01, 25 January 2007) concerning an injunction against the exhibition of a painting considered to be indecent (a painting which had been produced for the occasion by the Austrian painter Otto Mühl, showing a collage of various public figures, such as Mother Teresa and the former head of the Austrian Freedom Party (FPÖ) Mr Jörg Haider, in sexual positions), the Court based its findings on the same principles as those that previously illustrated. The Court observes that “artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10” (§ 26). However, the Court declares in paragraph 33 of that judgment:

[...] that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.

The Court seems to opt for a case-by-case judgment whether instances of limitations emerge.

In its Grand Chamber judgment *Lindon-Otchakovsky-Laurens and July v. France* ([GC], nos. 21279/02 and 36448/02, ECHR 2007-IV), the Court had to examine whether the conviction of the author and publisher of a novel (introducing real characters and facts) for defamation of an extreme right-wing party and its president (Mr. Le Pen) amounted to a violation of Article 10. The Court referred to its case-law on artistic creation (§ 47), it stated that “novelists – like other creators - and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, ‘duties and responsibilities’” (§ 51). The Court does not contest the conviction for defamation declared by the French courts. According to the Court, there was no need to make a distinction between fiction and real facts in this specific case because the impugned work was not one of fiction but introduced real characters or facts (§ 55).

In the judgment *Akdaş v. Turkey* (no. 41056/04, 16 February 2010), the Court developed its case-law on freedom of artistic expression and the protection of morals. This case may be considered one of the most relevant to the scope of the present analysis. The case concerned the conviction of a publisher with a heavy fine for the publication in Turkish of an erotic novel by Guillaume Apollinaire (dating from 1907) and the subsequent decision to seize of all the copies of the book. The Court considered that the view taken

by the States of the requirements of morality “frequently requires [them] to take into consideration the existence, within a single State, of various cultural, religious, civil or philosophical communities”. Building on its past jurisprudence on this issue, the Court launched the concept of a “European literary heritage” and set out in this regard various criteria: the author’s international reputation; the date of the first publication; a large number of countries and languages in which publication had taken place; publication in book form and on the Internet; and publication in a prestigious collection in the author’s home country (La Pléiade, in France). What is interesting from the point of view of the right of artistic freedom is that the Court concluded that the public of a given language, in this case Turkish, could not be prevented from having access to a work that is part of the European heritage (§ 30). The Court not only appears to fully embrace its original line of reasoning according to which artworks should not be read in light of the events which have inspired them but it also stretches its own jurisprudence to the point to endorse the concept of “European literary heritage”.

When assessing the character of some of the expressions contained in the artistic work which might justify the limitations set by the State, the Court has taken into account a set of criteria: the first one being, the limited impact of the form of artistic expression at stake (especially novels or poems, compared to films), which generally appeals to a relatively narrow public compared to, for example, the mass media; the second one being the artistic nature of the work in object which the Court uses to define in terms of “fiction” with due exclusions to those work who contains a full representation of real facts and circumstance; third one being accounted as part of the European literary heritage which echoes the UN definition of culture in as to culture as “a living process, historical, dynamic and evolving, with a past, a

present and a future.”¹⁷ The Court appears to suggest that the past cannot be erased as being itself an integral part of a changing cultural process.

5. Conclusions

The present article has been questioning about the potential clashes between the artistic freedom of expression and the instances claimed by the cancel culture movement. After a brief introduction to the cancel culture' main instances, it retraced the journey of the artistic freedom of expression in the field of international law, specifically in the context of human rights. It followed a detailed presentation of a significant number of international and regional legal instruments which are primarily meant to provide protection to artistic creation in broad sense. From there this work has explored a set of contentious case brought before the UN international dispute settlement mechanisms as well as before the ECHR. In spite of the small number of cases so far held by judicial and non –judicial bodies, it emerges a consistent jurisprudence which applies a high protection to the artistic freedom of expression by virtue of its inner fictional nature and its vital role in the ongoing process of building up our cultural life.

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¹⁷ Economic and Social Committee, General Comment n. 21, E/C.12/GC/21

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