

ARTIGO 19

# ARTISTIC FREEDOM

FROM THE PERSPECTIVE  
OF INTERNATIONAL HUMAN  
RIGHTS LAW



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Learn more about the work of the artists:

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## PRESENTATION

Protecting freedom of artistic expression is a task to be undertaken in every democratic context. Art has the power to provoke society to rethink itself. It promotes complex debates based on diverse forms of expression, becoming a language with a unique force for the protection of human rights. That is precisely why it is a primary target when it challenges the status quo. Therefore, protecting artistic freedom is an even more urgent task as conservatism and authoritarianism advance.

Censorship of the arts in Brazil was one of the first signs of the authoritarian practices that were to come – even before Jair Bolsonaro was elected President in 2018. Back in 2017, the then mayor of Rio de Janeiro, Marcelo Crivella, banned “*Queermuseum: Cartographies of Difference in Brazilian Art*,” which explored the LGBTQIAPN+ topic at the Rio de Janeiro Museum of Art (Museu de Arte do Rio, MAR), accusing the exhibition of bestiality and pedophilia. In 2019 in Argentina, currently governed by extremist leader Javier Milei, the work *María Feminista*, a statuette of the Virgin Mary bearing the *pañuelo verde* or green scarf – a symbol of Argentine women’s struggle for the legalization of abortion – was removed from the exhibition “*Para todes, tode*”, following a complaint filed by a group of conservative lawyers. Across the Atlantic, in Russia, the punk rock band Pussy Riot performed a song criticizing Vladimir Putin, and its members were put behind bars even before they faced trial.

The political and social conservative force that is gaining ground all over the world bear a complex set of characteristics, but cases like these show us that one of its main goals is to eliminate diversity in public and private spheres and to interrupt structuring processes aimed at reducing economic and social inequalities. Gender, sexual orientation, race, ethnicity and other plural identities, alongside social struggles for justice and equality, are now seen as violating other rights – and, above all, ‘morality and good values.’ In fact, it is not uncommon for artists, their works and their speeches to be attacked in the name of freedom and often using supposedly legitimate bureaucratic means.

Thus, monitoring violations of artistic freedom has proven to be, on the one hand, an important source of analysis of the mechanisms mobilized to undermine democratic rule of law. On the other hand, conceptualizing this right as well as its constituent elements is important for its protection and promotion.

This publication arises precisely from this need: to map existing guarantees and gaps in the protection of the right to freedom of artistic expression in order to contribute to strengthen it. This is a task that ARTIGO 19 Brazil and South America has not undertaken alone but rather collectively.

In Brazil, the Brazilian Integrated Movement for Freedom of Artistic Expression (MOBILE) was founded in 2020 from collaboration – coordinated by Professor Guilherme Varella – between ARTIGO 19, 342 Artes, Movimento Artigo Quinto, Laut, Rede Liberdade, Mídia Ninja and Samambaia Filantropias. The platform made much of this work and reflection possible. The movement's main instrument – the Censorship Map – was an unprecedented initiative in which we are very proud to participate.

In the region, collaboration with Washington Brazil Office (WBO), ARTICLE 19 Oficina para México y Centroamérica, Alianza Regional por la Libre Expresión e Información, IFEX, PEN International, Artists at Risk Connection (ARC), PEN America and the Offices of Special Rapporteurs of the Inter-American Commission on Human Rights – on Freedom of Expression (SRFOE)/IACHR) and on Economic, Social, Cultural and Environmental Rights (REDESCA/IACHR) – in the efforts to plan the workshop on the creation of the “*Inter-American Principles on Freedom of Artistic Expression and the Rights of Artists and Cultural Professionals*”, was an essential source of exchange for the preparation of this report.

Therefore, with this publication, ARTICLE 19 takes a bird's-eye view of various national and regional contexts, especially regarding international human rights law, its parameters and related case law. The aim is to help ensure that censorship of the arts and authoritarian attacks on culture do not find fertile ground on which to spread. But it is important to go further and promote radical strengthening of democracies that ceases, once and for all, to silence voices that have historically fought to occupy their rightful place in public debate. This mission will not be achieved without the sensitive and challenging perspective of art.



## INTRODUCTION

Artistic and cultural freedom is one of the core pillars of free, equitable and plural societies, and the foundation of human diversity and dignity. While art and culture are different concepts, they coexist and are closely connected. Art is part of the culture of a given population in a given historical space and time; it confirms it and synthesizes its representations but also questions, challenges and transforms it. Together, art and culture are a vibrant expression of the very human condition, providing individuals with a platform to express themselves, connect to and understand each other, and make sense of the world around them. Art is essential for building collective memory and a powerful tool for reading ourselves.

Art and culture are powerful creators of empathy – a crucial ability for reassertion and progressive development of human rights. Art, in particular, can play a decisive role in producing and spreading critical thinking, deconstructing paradigms, exposing inequalities, denouncing the suppression of rights, and challenging pre-established social norms. It builds bridges between distinct subjectivities, encourages debates, disseminates ideas, and provokes deep reflections about our time.

In their different forms, censoring artists and cultural agents as well as dismantling artistic and cultural fields are attempts to silence these forms of expression. Silencing mechanisms range from legal and administrative restrictions to social norms that expose artists to moral scrutiny and limit their participation in community life. Some of the main mechanisms include restricting exhibition of works of art considered controversial or offensive, seizing means for artistic production, establishing disproportionate administrative procedures or bureaucratic expedients, and cutting funds for culture.

The artistic community is also the target of other forms of violence, facing threats, attacks, defamation campaigns, retaliation and intimidation. Furthermore, bureaucratic and stiff social structures force artists to recognize themselves as such, resulting in self-censorship, especially among women and LGBTQIAPN+ people. The challenges faced by artists and cultural agents are compounded by economic and professional barriers, since artistic work is, in many contexts, precarious and stigmatized.

In his novel *Fahrenheit 451*, Ray Bradbury uses a dystopian narrative to warn about the dangers of censoring artistic freedom, portraying a society in which books are banned and burned because they are considered dangerous as they challenge the status quo and encourage critical thinking.

In the work, whose title refers to the temperature at which book paper catches fire and burns, the main character begins to awaken to oppression and alienation in his society and joins a group of people devoted to memorizing literary works to preserving their content.

Similarly, in *1984*, George Orwell illustrates how lack of artistic freedom results in uniformization of culture, suppression of individuality, and establishment of a society devoid of authenticity. Both works had their core ideas conceived in the 1940s and 1950s, a historical time that coincides with the publication of the Universal Declaration of Human Rights. Since then, the topic of artistic freedom has not only been present in literature, music, theatre and other means of artistic production; it has also been provided for in the normative architecture of international human rights law.

After 80 years, however, the concerns raised by Orwell and Bradbury are still current, stressing the timeless relevance of artistic freedom in defending human rights and promoting cultural diversity. Artistic freedom has managed to be formally recognized in international and regional treaties but has been scarcely analysed and debated at human rights fora in different areas. Therefore, research and discussions are needed if we want to develop a legal framework that gives visibility to, consolidates and expands the legal recognition of freedom of artistic expression in order to reveal its specificities and the unique challenges it faces. As historical experience shows, defending art as a pillar of democracy is especially significant in circumstances of emerging authoritarian forces, which is why the topic is of great importance in today's context.

Therefore, based on this report, ARTICLE 19 will conduct an assessment of international parameters of freedom of artistic expression, since understanding the clear definition of the limits and conditions of a right is essential to ensure that it is effectively respected, protected and advanced. It also aims to encourage greater legal debate on the subject in Latin America in order to leverage the defence of artistic freedom on the human rights agenda and strengthen normative protection for artists and cultural agents.

To this end, the report is organized as follows: first, it points out some of the reasons why artistic freedom must be protected and defended; then it lists the international parameters that govern it as well as the restrictions and limitations it faces. Subsequently, it examines the importance of promoting the human rights of artists and cultural agents, reflecting on the risks and barriers they face and the need to establish robust public policies for their protection. In conclusion, the report makes a series of recommendations, indicating possible steps and priorities to reverse setbacks and safeguard the right to artistic freedom.

# 1

## ART AND CULTURE IN THE HISTORY OF HUMAN RIGHTS

The relationship between art, culture and human rights is one of reciprocal influence. Art and culture can be catalysts for social and political change, raise society's awareness of injustices, and inspire the progressive advancement of rights. Art not only reflects social issues and desires but also underpins the promotion and development of human rights. Some principles that are now considered fundamental were developed and promoted through artistic expressions such as literary works, theatrical performances and music.

Historian Lynn Hunt (2009) argues that reading novels in the 18<sup>th</sup> century, such as Jean-Jacques Rousseau's *Julia* and Samuel Richardson's *Pamela* and *Clarissa* contributed to awakening readers' ability for empathy. According to the author, this subjective change in society was key to further elaborate on the idea of equality that would be expressed in the 1789 Declaration of the Rights of Man and the Citizen. For her, the story of the birth of human rights is told through changes promoted by art.

Cultural and artistic expressions are also a means of protecting and advancing human rights. Throughout history, art has played a key role in 1) giving visibility to the rights of vulnerable communities; 2) denouncing rights violations in authoritarian societies; and 3) creating spaces for dialogue and conflict resolution.

Artistic expressions are crucial to process experiences, desires and frustrations of historically vulnerable people and groups, in addition to strengthening the public development of demands. Arts' unique or disconcerting characteristics help hearing these voices and shedding light on human rights violations, which are often overlooked in media coverage.

In the 1920s and 1930s, ballroom culture leveraged the development of fundamental freedoms for the LGBTQIAPN+ and Afro-Latinx communities in the United States. Through dance, fashion and performance, that art movement enabled the construction of support networks and safe spaces for the expression of gender identity and sexuality. Art gave visibility to those populations, mobilizing them to face the HIV/AIDS crisis, discrimination and violence. Many members of the movement became activists for LGBTQIAPN+ rights and civil rights. In 1960s and 1970s Argentina, Mercedes Sosa addressed themes related to social justice, poverty and human rights in her songs, reflecting the challenges faced by indigenous and peasant communities. Also known as 'the voice of the voiceless,' she used her music to articulate and amplify the demands of silenced populations.

Art also plays a role in denouncing authoritarian regimes, and it can promote social and political changes. Through symbolism, metaphors and calls to action, artists expose, protest and resist oppressive contexts. During dictatorships in Latin America, for example, music was an important vector for criticism and contributed to exposing human rights violations, inspiring reflection and bringing people together against repression.

In Chile, singer-songwriter Victor Jara was a harsh critic of the 1973 military coup, and his songs left a legacy that is widely recognized for its commitment to social justice and human rights. After he was murdered by agents of the dictatorship, his story became an international symbol in the fight against oppressive regimes. During Brazil's dictatorship, Chico Buarque's songs challenged the regime using puns, metaphors and ambiguity to circumvent censorship, while harshly criticizing the government. His songs *Cálice*, *Apesar de Você* and *Meu Caro Amigo* denounced the erosion of democracy in the country by playing on words, creating fictional characters, and telling everyday life stories.

Artistic expressions can also promote spaces for community dialogue, mediation and conflict resolution. As a locus of encounter and safekeeping, the art space contributes solutions among peers, whether they are dialogued or sublimated as works of art, both individual and collective. For example, the Theatre of the Oppressed created by Brazilian playwright Augusto Boal uses tools that enable participants to explore conflicts and oppression, enact their experiences of injustice, test solutions and foster dialogue within communities, thus allowing different perspectives to be heard and reconciled. By transforming spectators into active 'spect-actors,' the Theatre of the Oppressed helps participants find peaceful, collaborative solutions to collective problems and empowers them to recognize and combat human rights violations. In Colombia, the Special Jurisdiction for Peace (JEP, in its Spanish acronym) has been consolidating transitional justice processes through art. A significant example is the *Tejiendo Memorias* (Weaving memories) project, in which perpetrators and survivors of the conflict participated together in craftworks. During the process, the stories shared provided recognition, reparation and reconciliation, thus building bridges of healing and transformative understanding.

While these examples illustrate how art influences human rights, their promotion also favours the creation of an environment in which art can flourish freely. One of the main foundations of this relationship is the guarantee of artistic freedom, ensuring that artists can explore controversial topics by protecting them from attacks, persecution and discrimination. Furthermore, human rights encourage access to culture and the participation of the public – and its diverse voices and perspectives – in creative processes and contribute to an environment where art can not only survive but also thrive.

# 2

## PROTECTION OF ARTISTIC FREEDOM: GENERAL ASPECTS

### 2.1. THE UNIVERSAL HUMAN RIGHTS SYSTEM

In the universal human rights system, artistic freedom appears as a right protected by the 1948 Universal Declaration of Human Rights (UDHR) – a pioneering document to establish the foundations for safeguarding the right to freedom of expression. Even though the term ‘freedom of artistic expression’ was not explicitly included, the document protects it by guaranteeing the use of *any media* in seeking, receiving and imparting information and ideas. In the context of cultural rights, in turn, the UDHR incorporated a collective perspective, favouring the participatory dimension of individuals in cultural life, as seen below:

- 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
- 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (article 27)*

Delegations from Latin American countries played a key role in the negotiations of article 27. According to Professor Elsa Stamatopoulou (2007), the inclusion of the right to *freely enjoy the arts and cultural life* would have been the result of the Peruvian delegation’s initiatives. In a similar way, the delegations from Cuba, Mexico and Chile were decisive in including the protection of artists’ moral and material interests in Paragraph 2. The active participation of Latin American countries in writing this article shows that the region is a pioneer in promoting cultural rights. Therefore, it is essential to call on Latin America to recognize its role in this debate and keep the commitment to continue promoting advances in the artistic and cultural sphere.

The International Covenant on Civil and Political Rights (ICCPR) recognizes the right to freedom of expression in its article 19. Unlike the Declaration, which does not mention the means through which freedom of expression can be exercised, the ICCPR explicitly describes it “in the form of art”:

*[...] the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (article 19.2)*

The UN Human Rights Committee, in its General Comment No. 34 (2011), stressed that forms of cultural and artistic expression are recognized by the ICCPR, distinguishing it from other protected freedoms such as scientific, academic and journalistic. According to the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression (2020), this normative architecture – whose content and nuances will be detailed in the following sections – obligates States to ensure enabling environments for and protect the exercise of the right to freedom of expression.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also includes art under the protection of human rights from a cultural perspective. According to that treaty, States:

*1. Recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

*2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*

*3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*

*4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields. (article 15)*

Artistic freedom, therefore, is closely related to guarantees of participation in cultural life, which include the right “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,” as provided for in General Comment No. 21 (2009) of the UN Committee on Economic, Social and Cultural Rights. Moreover, culture as a foundation for other rights is recognized by the 2007 Fribourg Declaration on Cultural Rights, drawn up by experts and civil society organizations, whose preamble highlights that all human rights have a cultural dimension.

It should be noted, however, that in the economic, social, cultural and environmental rights agenda, cultural rights have been historically neglected – according to Stamatopoulou (2007), they have been considered by some as ‘luxury’, as something that comes after ‘bread and water’, as an item for societies at a certain stage of development. This perception prevents the recognition and appreciation of cultural diversity and artistic expression as a cornerstone of human development. In recent decades, there has been a certain recognition of these rights as well as some international efforts to make them visible, especially the creation, under the UN structure, of the Special Rapporteurship on Cultural Rights (2009) and, in the inter-American sphere, of the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (2017).

Although there is no explicit definition of *artistic freedom provided for in international treaties*, the concept has been used in UN documents, especially since the 1980s. Currently, according to the *Universal Human Rights Index* search tool created by the UN High Commissioner for Human Rights,

the terms *artist* and *artistic freedom* appear in 221 recommendations made by 22 mechanisms of the organization, including treaty bodies, special procedures, and the universal periodic review (UPR). Even so, the number of cases heard by treaty committees on the subject is still small. In *Shin v. Republic of Korea* (2004), the Human Rights Committee found that the Republic of Korea violated article 19 of the ICCPR by convicting a painter for a work considered to be contrary to the National Security Law. The Committee reaffirmed that the ICCPR protects the right to expression in any form, including artistic expression. In *Lapiro de Mbanga v. Cameroon* (2009), the Working Group on Arbitrary Detention found that the Cameroonian musician was arbitrarily detained for his song *Constipated Constitution* and accused of inciting riots. The Working Group determined that the song was in fact a political statement and did not incite violence, stressing the importance of distinguishing the work of art from society's use of it.

In addition to the close connection with the right to freedom of expression and participation in cultural life, protection of artistic freedom is related to other guarantees that include the right to peaceful assembly, privacy, freedom of thought, conscience, and religion and belief, the right to free association – allowing artists and creators to form and join unions, for example – in addition to the right to be protected in their moral and material interests related to artistic creations, freedom of movement, and leisure. Therefore, artistic freedom exists under a framework of interconnected guarantees, and protecting it requires an approach that considers this ecosystem of rights.

Furthermore, protection of artistic freedom appears incidentally in other international human rights treaties, namely:

<b>INTERNACIONAL TREATY</b>	<b>PROTECTION RELATED TO ARTISTIC FREEDOM</b>
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	(Article 13.c) States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: [...] The right to participate in recreational activities, sports and all aspects of cultural life
Convention on the Rights of the Child (CRC)	(Article 31) States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.  States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.
Convention on the Rights of Persons with Disabilities (CRPD)	(Article 30.2) States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society

<p>United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)</p>	<p>(Article 31.1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures [...] literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions</p>
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Under the scope of UNESCO, the 2005 Convention for the Protection and Promotion of Cultural Expressions is the milestone for the topic of artistic freedom. Its article 7 establishes that States shall create an environment which encourages individuals and social groups to create, produce, disseminate and distribute their own cultural expressions. The document also calls on States to adopt regulatory measures aimed at fostering, advancing, funding and promoting, as broadly as possible, cultural diversity and the free circulation of ideas, including in the media. These measures must include support for the national arts chain, which involves artists – both formal and informal – and other sectors linked to art and culture.

States Parties to this Convention must submit periodic reports to UNESCO on the initiatives taken to protect and promote the diversity of cultural expressions, detailing the policies and actions implemented, as well as the challenges faced in their implementation. By July 2024, 21 countries had ratified this Convention in the Americas: Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, El Salvador, Grenada, Guatemala, Haiti, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Saint Kitts and Nevis, Saint Lucia, Trinidad and Tobago, and Uruguay.

While this Convention was a step towards progressive consolidation of cultural rights, Stamatopoulou (2007) points out that it was criticised by civil society, among other reasons, for the lack of participation of indigenous organizations in its preparation.

Also noteworthy is the 2002 Universal Declaration on Cultural Diversity, which recognizes the principle that cultural diversity must be accessible to all, and states that

*Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity. (article 6)*

## 2.2. REGIONAL HUMAN RIGHTS SYSTEMS

In contrast to treaties under the umbrella of the universal system, the European Convention on Human Rights (ECHR) does not mention artistic freedom. The ECHR does not deny it but fails to mention it explicitly; its article 10, dedicated to freedom of expression, does not specify the different types and forms of expression achieved. The ECHR also clearly does not provide for the protection of the right to participate in cultural life. However, precedent decisions of the European Court of Human Rights (ECtHR) clarify that article 10 covers freedom of artistic expression, thus gradually setting parameters for safeguarding it. Over the years, the ECtHR



has granted protection to art works, reflecting the importance given to this form of expression. Examples of these cases will be mentioned in the following sections of this report.

According to the African Charter on Human Rights and Peoples' Rights, every individual may freely take part in the cultural life of his community (article 17). However, it does not specifically mention artistic freedom – neither does the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission in 2002.

At the inter-American level, the American Declaration of the Rights and Duties of Man (ADRDM), approved in 1948, six months before the UDHR, expressly included culture and the arts in human rights dimensions. In its preamble, the Declaration states that “it is the duty of man to preserve, practice and foster culture by every means within his power [...] Since culture is the highest social and historical expression of that spiritual development[.]” Then, article XIII addresses the right to the benefits of culture:

*Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.*

It is worth mentioning that, regarding the right to rest, the ADRDM says that every person has the right to advantageously use of his free time to his spiritual, cultural and physical benefit (article XV).

The 1969 American Convention on Human Rights (ACHR) incorporates the right to freedom of expression, including its artistic form:

*Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. (article 13)*

The ACHR also contains a general provision on economic, social and cultural rights:

*The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards [...] to the extent of available resources, through legislation or other appropriate means. (article 26)*

This provision is complemented by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – Protocol of San Salvador – which establishes that States Parties recognize the right of everyone to take part in the cultural and artistic life of the community (article 14).

Artistic freedom has a two-dimensional nature, as recognized by the Inter-American Court of Human Rights (IHR Court) in *Olmedo Bustos et al. v. Chile* (2001). In that case, which analysed the ban on the screening of the film *The Last Temptation of Christ*, the Inter-

American Court stressed that artistic freedom is not limited to individual expression, also encompassing its collective dimension.

While the ruling addresses individuals' freedom to express and circulate their ideas, it also protects the collective right to access that content, providing the possibility of seeking, receiving and disseminating it. After more than two decades, this one ruling by the Inter-American Court directly related to artistic freedom can no longer cover the various social, cultural, environmental and technological dimensions of the arts or the contemporary mechanisms of indirect censorship and restriction of artistic freedom, such as practices aimed at dismantling the sector. The ruling, however, became paradigmatic. Given the importance of the decision of the Inter-American Court for consolidating interpretations and advancing rights, there is fertile ground for developing, for example, gender and ethnic approaches as well as aspects relating to the economic, social and cultural rights of artists and cultural agents.

The Inter-American Commission on Human Rights (IACHR) can also play an important role in further understanding artistic freedom in the Americas, for example, through thematic reports and general principles as was done for academic freedom. In the words of professor Cançado Trindade (2020), social changes encourage the Inter-American Human Rights System (IAHRS) to act "at its own pace and paying attention to the reality of its continent." The need to nurture this right and the commitment to prioritize it on the inter-American agenda has already been recognized.

Indeed, the topic of artistic freedom as a right has been gradually included on the IAHRS agenda, indicating its importance for cultural and social development. Recently, the Work Plan of the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights for 2024-2026 listed artistic freedom as one of its priorities. This signals a growing understanding that artistic freedom is essential to a vibrant democracy and reflects a commitment to defending and developing this right.

Furthermore, the IACHR has adopted measures to protect artistic freedom. In 2020, the Commission and its Special Rapporteurships for Freedom of Expression (SRFOE) and Economic, Social and Cultural Rights (REDESCA) issued a press release expressing concern about the criminalization and harassment of activists and artists in Cuba, stressing the Cuban State's duty to respect freedom of expression. The violent repression against the headquarters of the San Isidro Movement and the destruction of the works of Otero Alcántara are examples of intolerance towards artistic expressions that challenge the current political regime. The IACHR issued Resolution 14/2021, granting precautionary measures to protect members of the San Isidro Movement, allowing them to continue their activities "as human rights defenders." The decision establishing the precautionary measures, however, does not detail the importance of protecting the artistic freedom of the aforementioned movement.

Awareness-raising and engagement by the IAHRS are essential to leverage advances necessary for the permanent evolution of the right to artistic freedom. Commitment to this agenda must be based on organized action with civil society and artists' collectives in order to coordinate efforts and ensure that all voices are heard and respected. Therefore, the inter-American agenda must continue to monitor the realities and needs of its peoples.

## 2.3. PROTECTION OF ART AND THE CHALLENGES INHERENT TO ITS CONCEPT

The normative frameworks of the universal and regional systems set parameters for protecting artistic freedom, even though there is still a wide horizon of opportunities for its development. According to Matei (2018), court decisions involving this freedom can be particularly complex, as art and Law would use languages that are incompatible at first glance. While the latter is anchored in precise definitions characterized by limited plasticity and issues predictable decisions, the former rejects definitions and seeks to be ahead of its time. Coexistence between art and law is possible, but it is inevitably marked by permanent tension. In order to promote an environment conducive to creative freedom, the Law must remain flexible and willing to adapt.

Defining art intrinsically entails an effort to control what is considered acceptable as art in a given society and consequently involves restricting the dissemination of what is seen as 'not acceptable.' A non-restrictive view of art leaves enough room for artists to exercise their creative work. It is not up to the State to define the concept of 'art.' However, precedents and interpretative documents issued by international mechanisms have contributed to setting practical criteria for the application of laws that use this term.

The ICCPR mentions art among protected forms of expression but does not define it. This legal provision is broad and inclusive, and it may cover different aspects of artistic expression without the need for rigid categorizations, thus avoiding the debate about what can or cannot be considered art. It is accepted that art can take many forms, which may change over time and in different cultural contexts. However, what does 'artistic forms' mean?

Traditionally, artistic expression is conveyed through visual arts, music, digital art, architecture, cinema, sculpture, crafts, literature, fashion and photography. These examples, among many others, illustrate the diversity of ways in which art expresses itself and communicates its meanings. Doubts arise when it comes to including other possibilities of human representation and expression – such as video games, flash mobs and memes – under the protection given to artistic expressions. However, it is important to recognize that uncertainty about what is or is not protected by artistic freedom can have a chilling effect on artists and professionals of culture, stressing the importance of maintaining a broad view about protection of artistic freedom.

The spectrum of the broad freedom granted to art includes its freedom from the factual dimension, since it works at the level of imagination, of fiction and also of the subjective interpretation of acts and facts, which therefore allows it to transfigure itself or move away from strict reality. The fictional nature of a work of art was argued before the ECtHR in *Alinak v. Turkey* (2002), related to a novel based on real events about a massacre in a Kurdish village in Turkey. The Court decided for a privileged treatment of literary freedom precisely because it was a novel, a work that appeals to a relatively restricted audience, compared to mass media. It stated that "the book in issue is a fictional novel inspired by real events" and that "even though some of the passages from the book seem very hostile in tone [...] 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."

Complementarily, in *Jelševar and Others v. Slovenia* (2014), involving a self-published book with characters similar to those in the private and family lives of other individuals, the ECtHR explained that, as the book in question was not written as a biography but as a work of fiction,

it would not be understood by most readers as portraying real people. In this case, notably, the Court declared that “artistic freedom enjoyed by, among others, authors of literary works is a value in itself, and thus attracts a high level of protection under the Convention.” In both *Alinak* and *Jelševar*, criteria relating to the artistic nature of the work, the impact it caused and the way it was interpreted by the majority of the public were decisive in resolving the case.

In *Almeida Leitão Bento Fernandes v. Portugal* (2015), the Court considered the artistic nature of a book as a work of fiction, as well as its restricted circulation. However, taking the right to private life in consideration for a balance, it decided that the author had exceeded the limits of artistic freedom. The decision followed the Portuguese court’s understanding that pointed to the existence of blatant similarities between the characters in the novel – which was about family dramas – and the applicant’s in-laws. However, it did not present arguments about how that balancing exercise was operated.

The ECtHR’s rulings have been refraining from theoretical discussions about the definition of art and referring to artistic freedom when the slightest hint of creativity appears, regardless – for example – of whether or not the applicant is a professional artist. This promotes broad protection of artistic freedom as it recognizes creative diversity, shows flexibility in interpreting cultural rights, and can serve as guidance for other courts.

Another important aspect for the protection of artistic freedom is that art does not need to have a purpose or convey a ‘significant message.’ The Human Rights Committee confirmed that this protection embraces even expressions that may be regarded as deeply offensive (General Comment No. 34), while the European Court of Human Rights, in *Handyside v. United Kingdom* (1976), stressed that artistic freedom does not end with conveying transmitting ideas that are inoffensive or as a matter of indifferent but also those that offend, shock or disturb – as demands of a plural and democratic society. The same logic was reaffirmed by the Inter-American Court of Human Rights in *Kimel v. Argentina* (2008). In many cases, it is precisely the element of provocation that allows the artist to draw attention to an issue of public interest.

When exercising their authority to impose limitations on artistic freedoms, decision-makers must consider the nature of creation (rather than its value or the personal opinion of state authorities) as well as the right of artists to express their beliefs and worldviews, in addition to disagreeing, using political, religious and economic symbols in opposition to the speeches of those in power structures. According to the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression (2020), artistic freedom must not depend on artistic merit, the quality of the work or its social impact. Rather, it must focus on guaranteeing the same right of protection to all forms of expression, regardless of their format.

In short, protection of artistic freedom is part of an ecosystem of interconnected rights and extends to a wide range of creative processes – from the initial stage of conception, creation and production of an artistic work or expression to its exhibition, distribution, circulation or consumption. It is also a collective right related to the possibilities of access to information, including seeking, receiving and disseminating it. Artistic expressions under the protection of this right can be promoted and disseminated through multiple symbolic and aesthetic languages, since the very definitions of art are comprehensive, also including those expressions considered provocative, shocking and even offensive.

# 3

## POSSIBILITIES FOR RESTRICTING ARTISTIC FREEDOM

### 3.1. PRELIMINARY CONSIDERATIONS

From Antiquity's marble sculptures to contemporary digital installations, the restrictions, limitations and censorship over artistic expression point to potential tensions between human creativity and social norms – while art and culture are essential for sustaining pluralism and democracy in societies, the right to artistic freedom is subject to restrictions as long as they are in accordance with the rules set by international human rights Law. In this sense, the ICCPR presents the following restrictions on the right to freedom of expression:

*The exercise of the rights [...] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order or of public health or morals. (article 19.3)*

These restrictions related to freedom of expression also apply to the right to artistic freedom, since the arts are one of the forms of expression expressly protected by article 19 of the ICCPR. The UN Human Rights Committee, in its General Comment No. 34, stated that restrictions on freedom of expression cannot be too broad: they must be provided by law as well as clear and accessible to the public; have a legitimate aim to protect the rights or reputation of others, national security or public order, or public health or morals; and be necessary and proportionate, representing the least restrictive means to achieve their goal.

Furthermore, the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression (2020) stated that laws restricting freedom of expression must be applied by independent bodies in a non-arbitrary and non-discriminatory manner. It is also essential that there are appropriate safeguards against abuse by these bodies, as well as the possibility of appealing and obtaining redress.

In the inter-American system, the ACHR included an overt prohibition on prior censorship, as follows:

*The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall*

*be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals [...] public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence [...]. (article 13.2)*

In *Francisco Martorell v. Chile* (1996), the Inter-American Commission on Human Rights recognized that the decision of a Chilean court banning the publication and circulation of a book violated freedom of expression. Even though the restriction on the book was aimed to protect a person's reputation, the IACHR found that article 13 of the ACHR, which prohibits prior censorship, had been violated. According to the IACHR, when States parties adopt internal measures to protect honour and dignity referred to in article 11 of the ACHR, they must respect the right to freedom of expression, particularly regarding the prohibition of prior censorship. In its analysis of the case, the IACHR also reaffirmed that freedom of expression includes both the right to express ideas and thoughts and the right to receive them. Therefore, when a person's individual right is restricted, the right of society as a whole to receive information is also affected.

Prohibition of prior censorship continued to be the focus of attention to the bodies of the inter-American system. In 2000, the IACHR published the *Declaration of Principles on Freedom of Expression*, according to which "prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law." The following year, in 2001, the Inter-American Court of Human Rights concluded that the ban on the screening of the film *The Last Temptation of Christ* in Chile was a form of censorship in violation of article 13 of the ACHR. The Court highlighted that the duty not to interfere with the enjoyment of the right to access information of all types includes the exhibition of artistic works.

The ban on *The Last Temptation of Christ* was originally based on a provision in the Chilean Constitution that established a censorship system for film exhibition. Currently, when many of the dictatorship's laws setting official censorship mechanisms are no longer in force, censorship has begun to present itself in new guises. Based on more than 250 cases of attacks on the arts that occurred in Brazil between 2019 and 2022 and analysed by [Mapa da Censura](#) (Censorship Map), new forms of censorship were found to be emerging, such as the dismantling of cultural institutions, their programmes and policies, the end of funding lines for culture, unilateral cancellations of projects or shows, abusive restrictions in contracts with artists, among others (Varela, Dora, Cetra, 2022). Furthermore, actors other than state agents can manage to erect barriers to artistic freedom. Among them, the media stand out by censoring or limiting artistic content through internal regulations or political pressure, as well as organized crime, which imposes violent and coercive restrictions on artists. Others, such as distribution companies, can dictate market trends that exclude less profitable arts, and sponsors – essential for the financial viability of artistic projects – can impose agendas that restrict the content to be disseminated.

As for speeches that are not protected under the international normative framework of freedom of expression, the ICCPR explains that: "1. Any propaganda for war shall be prohibited by law; 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" (article 20). The content and parameters of this provision are further elaborated upon in General Comment No. 34 of the Human Rights

Committee and in the Rabat Action Plan, adopted in 2012, which clarified the content of article 20.2 of the ICCPR and created a six-part test to analyse the forms of expression that should be criminalized. According to this test, one must consider (1) the context of the statements; (2) the position or status of the speaker; (3) intent; (4) content and form; (5) the extent of the speech act; and (6) the likelihood, including imminence, of the action announced by the speech act.

However, few cases in international law have looked into which speeches are not protected in artistic production. The ECtHR recognized that freedom of artistic expression does not extend to speech that incites hatred, violence or discrimination. In *M'Bala v. France* (2015), for example, the Court stated that the use of artistic expressions as vehicles for anti-Semitism could not be protected by the Convention, since hate speech is incompatible with the values advocated by the document.

Within the scope of the inter-American system, the ACHR establishes that the law must prohibit all propaganda in favour of war as well as any support for national, racial or religious hatred that constitutes incitement to discrimination, hostility, crime or violence (article 13.5). In the Inter-American Legal Framework regarding the Right to Freedom of Expression (2009), the SRFOE stresses that article 13.5 contains States' duties to limit freedom of expression and recalls that

*the imposition of sanctions for the abuse of freedom of expression under the charge of incitement to violence (understood as the incitement to commit crimes, the breaking of public order or national security) must be backed up by actual, truthful, objective and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair or disturbing), but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective.*

Even though international conventions set general parameters on restrictions to freedom of expression broadly understood, international law still lacks deeper considerations regarding the particularities of artistic freedom. Such insufficiencies contribute to the use of religious, moral or political motivations against works of art and content that challenge governments or the sensitivities of historically dominant groups.

### **3.2. TENSIONS BETWEEN ARTISTIC FREEDOM AND PROTECTION OF RELIGIOUS VALUES**

According to the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression (2020), art plays an important role in several religions by conveying and perpetuating spiritual and moral values, using religious symbols and iconography to express devotion, narrate religious stories and promote ethical teachings. Religious convictions have deep, personal meaning for those who adopt them, shaping their identities, behaviours, and perceptions of social norms. Art, however, is not limited to exalting and reinforcing beliefs; it can also manifest itself to criticize and question religions. Both the IACHR (2023) and the UN Special Rapporteur on Freedom of Religion or Belief (2019) have already stated that protection of freedom of religion and belief should not be used as a pretext to prevent discussions about social phenomena, including religion itself. Freedom of expression is, therefore, a *sine qua non*, elementary condition, rather than an impediment, for tolerance.

The European Court of Human Rights, in contrast, has been taking on a more conservative, less protective stance towards freedom of expression, recognizing, in the context of religious opinions and beliefs, an obligation to avoid gratuitously offensive expressions. ECtHR rulings often emphasize the need for a margin of appreciation in this area, allowing States to balance freedom of expression with protection of religious sensitivities, as seen in *Otto-Preminger-Institut v. Austria* (1993).

In that case, in a stance criticized by experts and in disagreement with current human rights parameters, the Court stated 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. The decision that citizens had the right not to be insulted for their religious beliefs justified the seizure of a film with a provocative representation of God, the Virgin Mary and Jesus Christ, considered offensive to the general public. This case set a precedent for a broad use of the margin of appreciation in religious matters by the ECtHR.

The Court's hesitation to assert freedom of expression over religious sensitivities persists. Cases like *Mariya Alekhina and Others v. Russia* (2018), in which the punk rock band Pussy Riot performed a song critical of Vladimir Putin at the altar of a cathedral illustrate this hesitation. While the court's ruling condemned Russia for the extremely harsh treatment of the members of the band, the issue of offense to religious beliefs was not sufficiently explored, even though it was a core element of the lawsuit in that country.

Under the inter-American human rights system, the tension between artistic freedom and protection of religious values is seen in a different light. First, because there is a higher level of protection for freedom of expression in the Americas, resulting from the express prohibition of prior censorship provided for in the ACHR. Second, because the inter-American system does not have such a reverential stance towards national courts and does not shy away from recognizing human rights violations resulting from their decisions. This difference in stances appeared in the aforementioned case of *Olmedo Bustos and others v. Chile* (2001), in which the Inter-American Court did not see judicial censorship of a film as legitimate restriction on behalf of religion but rather as a violation of the ACHR.

The SRFOE also had the opportunity to comment on attempts to restrict freedom of artistic expression on the grounds of protecting religious values. In its 2019 annual report, the Rapporteur reinforced that the exercise of freedom of expression cannot be subject to prior censorship. The case concerned the transfer and removal of the work 'Maria Feminista,' a statuette of the Virgin Mary wearing the *pañuelo* scarf, a symbol of activists supporting legalization of abortion.

As for anti-blasphemy laws, which criminalize expressions that offend religious sentiment, the UN Human Rights Committee's General Comment No. 34 states that they are generally incompatible with international human rights standards and that they prevent dialogue and debate about religion. In general, anti-blasphemy laws appear to confuse protection of religious freedom with protection of religions and belief systems themselves, when in fact what international human rights law protects is individuals who hold or express those beliefs.

For the UN Special Rapporteur in the Field of Cultural Rights (2013), blasphemy laws have a suffocating impact on the exercise of freedom of religion or belief and prevent healthy dialogue and debate on the topic. The UN Special Rapporteurs on Freedom of Religion or Belief and on



Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (2006), in turn, called blasphemy laws *counterproductive*. In 2023, a joint statement by various UN special rapporteurs recalled that the use of anti-blasphemy and anti-apostasy laws makes religious or belief minorities vulnerable to discrimination and violence, in line with General Comment No. 34 of the Human Rights Committee, which states that criticism and commentary on religious doctrines and principles of faith should not be prevented or punished.

Reitov and Whyatt (2024) point out that there has been a trend towards revoking these norms in recent years. Notable examples include Ireland, which revoked its blasphemy laws in 2021, Greece, which followed suit in 2019, and Malta, which transitioned in 2016. These changes may reflect a broader movement towards protecting freedom of artistic expression and the recognition that these laws could be used to censor or suppress cultural and creative expressions that challenge established religious or social norms.

### **3.3. RESTRICTIONS ON ARTISTIC FREEDOM BASED ON THE ARGUMENT OF MORALITY**

Art tends to suffer severely from restrictions when – under the scrutiny of morality – it is labelled obscene. However, it is hard to define what is offensive to public morality. There are no indications in international human rights conventions about the outlines of a supposed ‘universal morality.’ International standards, therefore, grant certain discretion to States, given that both the ICCPR and the American and European Conventions on Human Rights allow restriction of artistic freedom under the legitimate objective of “protecting public morality” – as long as it also complies with the criteria of legality, necessity, adequacy and proportionality.

However, the Inter-American Legal Framework regarding the Right to Freedom of Expression (IACHR, 2009) clarifies that, even though protecting public morals justifies restricting freedom of expression, States are not free to interpret the content of the ACHR at their discretion to justify that restriction in specific cases. Previous Inter-American Court decisions have indicated that the goals pursued by States when restricting any right must refer to a democratic order, understood as the existence of structural conditions so that all people, without discrimination, can freely exercise their rights with vigour and without fear of being sanctioned for it. However, the inter-American system has made more progress in clarifying the content of public order as a justification for restricting freedom of expression than the concept of public morals.

The European system also struggles to identify legitimate limits to artistic freedom based on public morals. A paradigmatic case is *Müller and others v. Switzerland* (1986), which analysed the confiscation by Swiss authorities of three paintings depicting sex and bestiality. The petitioners argued before the then European Commission on Human Rights that obscenity cannot be defined by reference to the moral opinions of “a person of ordinary sensitivity” – as articulated by the Swiss Federal Court – as that notion is a legal fiction. Although the Commission’s decision did not address this argument, it considered that artistic freedom had been violated. At the European Court, on the other hand, the case followed a different path: the ruling legitimized the restriction by the Swiss authorities on the grounds that the works would be “morally offensive to a person of normal sensitivity” without, however, further elaborating upon the meaning of that “normality.” In cases related to public morality, the European Court of Human Rights usually

refers the issue to member states, using the margin of appreciation doctrine, which, as already mentioned, is not an interpretative criterion applied by the inter-American human rights system.

The challenges involved in deciding on the parameters and outlines of public morals are evident. However, defining morality based on the 'average person' tends to reflect historical discriminations, often ignoring or excluding the experiences of marginalized groups. This approach tends to encourage social conformity, silence diversity and promote a narrow view of morality. Instead, a pluralistic perspective that values and respects different sets of moral and cultural experiences is key to an inclusive society.

Art plays a vital role in expressing the human experience, including aspects that may be considered taboo or controversial, being crucial to problematizing, transgressing or provoking existing ideals of morality. Therefore, restricting artistic freedom based on public morality, even if expressly provided for in international treaties, seems hard to invoke in a manner compatible with the goals of equality, social justice and eradication of historical inequalities that characterize democratic societies.

Still in the moral sphere, the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression (2020) pointed to the allegation of "debauchery" as a typical trigger for restricting artistic freedom. While it is similar to public morality as a category, debauchery tends to involve restrictions related to practices that are supposedly indecent, overtly sexual or contrary to gender roles socially constructed under cisheteronormative standards. Thus, debauchery is usually used to restrict art produced by or representing women and LGBTQIAPN+ people.

Moral arguments used for restricting the arts also appear in the digital space. The popularization of social media networks has been catalysing debates about artistic freedom, since anyone can share content with a global audience. While social media provide unprecedented opportunities for the dissemination and appreciation of art, they also impose restrictions that impact the way art is perceived and consumed. For UNESCO (2023), the phenomenon of social media also raises concerns related to algorithmic censorship, regulation of technology companies and the impacts of artificial intelligence on the creative community of artists. These platforms have taken on the role of cultural gatekeepers, with power to decide which works of art are banned or relegated to the margins of the digital space through content moderation policies based on algorithms. These policies have been criticized for lack of transparency and for not properly reflecting regional cultural norms and artistic values. Furthermore, according to UNESCO (2022a), shortcomings of artificial intelligence make it difficult to recognize subtleties related to humour and colloquial forms of expression, which may result in undue restrictions on artistic freedom.

Representations of nudity on social media are becoming more common. They are historically important and have been a core topic in several forms of artistic expression over the centuries. Furthermore, they are employed as a powerful way to explore beauty, vulnerability and the human condition. However, according to a report by Freemuse (2021), in the digital age, artists who incorporate nudity into their works often face content restrictions imposed by online platforms: restrictions are implemented through algorithms programmed to automatically detect and remove images or videos that contain nudity, regardless of artistic or cultural context and often without detailed human review.

The frontier between artistic nudes and pornography is a topic debated among art theorists and sociologists, whose dispute unfolds in the intricate and ambiguous terrains of culture (ECK,

2001). What is now being called algorithmic censorship of artistic nudity poses significant challenges to artists who depend on these platforms to promote their work (RICCIO, HOFMANN and OLIVER, 2024). Research has shown that this new form of censorship on social media has a disproportionate impact on feminist artists.

### 3.4. SILENCING DISSENTING VOICES

Art is crucial to balancing the exercise of public power and promotes – as a catalyst for public opinion – so-called ‘democratic control.’ And that is precisely why it has been a prime target of censorship when authoritarian political forces emerge. Driven by their attempt to impose hegemonic policies, authoritarian regimes have a profound impact on creative freedom and institutions linked to artistic creation, slowing down the circulation of ideas and leaving harmful legacies that reverberate over time. The role played by art and culture in controlling and monitoring the State’s actions and promoting social and political criticism is only effective in an environment in which freedom of expression is guaranteed. Art must, therefore, act freely to challenge the exercise of power and criticize public figures, including those in the most important political positions, in order to promote a space where ideas can be freely confronted and discussed.

In a report presented to the United Nations Human Rights Council, the UN Special Rapporteur on cultural rights (2013) reaffirmed the legitimacy of criticism of public figures, authorities and institutions. The Rapporteur expressed concern about laws on crimes of *lèse majesté*, desecration, disrespect for authority, disrespect for flags and symbols, defamation of the head of State and the protection of the honour of public officials. Works of art that criticize governments may be accused of “separatism” or “terrorism” or being “unpatriotic”.

Communication No. 926/2000 of 2004, one of the few to reach the Human Rights Committee on artistic issues, states that Korean painter Hak-Chul Shin was indicted in domestic courts for a work considered as “enemy-benefitting expression,” arguing that it violated the National Security Law. The Committee’s decision reaffirmed that article 19 of the ICCPR specifically refers to ideas conveyed “in the form of art” and pointed out that the Republic of Korea had violated it. The Committee, however, did not use the expression “artistic freedom” nor did it address the scope of its protection. The fact that Hak-Chul Shin is a professional artist or the possible framing of the work within some concept of “art” were not mentioned.

The same applies to the so-called aesthetic censorship of art, that is, the imposition of specific rules to promote a certain art style or discourage others. The UN Rapporteur on Freedom of Expression (2020) explains that a work of art cannot be deprived of protection by calling it, for example, propaganda. This type of censorship, as noted by the first UN Special Rapporteur in the field of Cultural Rights (2013) in her report on “creative freedom,” is now preeminent over “specific styles of music or visual arts [that] are deemed to be political, and/or considered to carry a foreign ideology.”

This type of censorship was seen in Brazil during the Jair Bolsonaro administration. In 2021, the President signed an executive order regulating the National Culture Support Programme (PRONAC). It focused on cultural activities of a religious, classical nature, preserving and restoring material historical heritage, and supporting activities related to Fine Arts. Since religious art, like any other expression of the visual arts, could already be supported by policies

aimed at promoting culture, these changes were seen as a symbolic movement to strengthen censorship of artistic expressions of political inclination and to affirm the preference for art associated with religion.

Political movements that favour several causes have been reflected in the artistic production of their times: art addressed the civil rights movement, anti-colonialism, workers' demands, and women's rights, as well as animal rights, the preservation of indigenous cultures, HIV/AIDS activism, the Black Lives Matter movement and climate justice.

In addition to the themes expressed in works of art, artists' political engagement is often used as a justification for restricting their rights. According to a Freemuse report (2022), globally, 51% of artists have been arrested for non-artistic activities such as staging and taking part in protests, insulting public officials, posting defamatory content online, inciting riots and disobedience towards authorities, inciting children to commit suicide, participating in pro-LGBTIQIAPN+ public gatherings, and making propaganda for a terrorist organization. In 2022, the Committee against Torture expressed its concern to the Cuban State about cases of harassment, attacks, arbitrary arrests, imprisonment and reprisals against artists, especially those considered political opponents. However, according to precedents in the inter-American human rights system, political speech must be granted special protection for its importance for the exercise of other human rights and for the consolidation, functioning and preservation of democracy (IACHR, 2009).

In Brazil, Varella, Dora and Cetra (2022) explore the relationship between the authoritarian policies of the Bolsonaro administration and the cultural segment, revealing the paralysis of specialized agencies as an indication of the dismantling of the artistic-cultural field carried out in that period. According to the [Mapa da Censura](#) (Censorship Map), around 62% of cases of censorship and attacks on female artists were motivated by political circumstances. Driven by that orientation, the Communication Secretariat of the Presidency (SECOM) called filmmaker Petra Costa an "anti-Brazil militant" due to the content conveyed in her film *The Edge of Democracy*, which earned an Academy Award nomination for Best Documentary Feature in 2020. Furthermore, Brazil's National Film Agency (ANCINE) lost administrative and investment capacity and the Ministry of Culture was dissolved. In this context, the situation of violations of freedom of artistic expression and cultural rights in Brazil was brought to the attention of the IACHR, during the only hearing about Brazil accepted at the 182<sup>nd</sup> session, which took place in December 2021.

Even though the Inter-American Court did not rule on the relation between politics and artistic freedom, it highlights the importance of public opinion and the control of state action by citizens in cases such as *Claude-Reyes et al. v. Chile* (2006), *Herrera Ulloa v. Costa Rica* (2004), *Kimel v. Argentina* (2008). As a driver of access to information, art has a deep connection with this supervisory facet of citizenry, given its potential to interpret and contextualize complex data in a creative manner, making it more accessible and understandable to the public.

With regard to cases related to political issues, the European Court of Human Rights has usually ruled more favourably to freedom of expression, especially when satire is used. As a form of artistic expression with a provocative tendency, satire is interpreted as a symbolic expression of dissatisfaction and protest. The ECtHR has consistently argued that artistic freedom encompasses satire and political humour, considering them to be significant forms of social commentary intended to provoke and encourage public discourse. It reasserted this protection in *Vereinigung*

*Bildender Künstler v. Austria* (2007), highlighting the vital role of satirical art in provoking critical reflection on sensitive topics.

In *Tatár and Fáber v. Hungary* (2012), the ECtHR considered that hanging dirty clothing around Parliament to symbolize the idea of “washing the nation’s dirty laundry” was a form of political expression, the restriction of which was not adequately justified by the authorities. In *Stern Taulats and Roura Capellera v. Spain* (2018), the same ECtHR considered that setting fire to a photo of the royal couple during a visit by the King was a permissible degree of provocation. It is worth noting that this balancing exercise led the Court to a different conclusion in *Sinkova v. Ukraine* (2018). Notably, in the latter case, the ruling upheld the conviction of an artist for frying eggs over the Eternal Flame at a war memorial, arguing that the protection of soldiers’ memory prevails over the artist’s freedom of expression.

Protection of graffiti and art in open and widely circulated spaces is a corollary of the positive obligation of States to facilitate participation in cultural life and access to the arts, according to article 15 of the ICESCR and article 27 of the UDHR. The aforementioned duty may be interpreted, for example, as an obligation of the State to provide opportunities for artists to present their works in public spaces. In line with this understanding, the UN Special Rapporteur in the field of Cultural Rights highlighted that “public authorities must promote the presence of the arts in public spaces as part of the right to access a wide variety of artistic expressions.” In *Murat Vural v. Turkey* (2014), for example, concerning an individual who, “equipped with a tin of paint, paint thinner and a ladder,” spilled paint on several statues of Atatürk located in a public space, the ECtHR saw his arrest as a violation of artistic freedom.

Furthermore, artists must have the opportunity to gather freely for public performances and exhibitions, without complicated formalities and excessive prior authorizations. In General Comment No. 37, the UN Human Rights Committee (2020) stressed the importance of freedom of peaceful assembly and the duty of States not to interfere with cultural gatherings, protected under article 21 of the ICCPR. From another perspective, the Convention on the Rights of the Child, in its article 31.1, points out the right to freely participate in cultural life and the arts as part of their physical, emotional and cultural development. The Children’s Rights Committee (2013) also recognizes the contribution of street art to creating a *culture of childhood*, a particularly important element for children’s physical, emotional, cultural and sentimental development.



# 4

## ARTISTS AND CULTURE AGENTS

### 4.1 OPPRESSION, VIOLENCE AND NEW FORMS OF CENSORSHIP

**A**rtists and professionals of culture operate productive networks. Their works not only promote entertainment and aesthetics but can also renew democratic debate, convey human rights messages and foster cultural diversity. For James Baldwin (1962),

*The artist is distinguished from all other responsible actors in society – the politicians, legislators, educators, and scientists - by the fact that he is his own test tube, his own laboratory, working according to very rigorous rules, however unstated these may be, and cannot allow any consideration to supersede his responsibility to reveal all that he can possibly discover concerning the mystery of the human being.*

Silencing artistic expressions affects not only their creators but also the cultural and intellectual dynamics of all citizens, depriving them of a vital flow of critical thinking. Physical attacks, arbitrary arrests, threats, judicial censorship, criminalization of artists based on allegations of condoning crime, defamatory and disinformation campaigns are some of the many ways in which the artistic community finds itself repressed. Therefore, it is important to implement robust policies of accountability, reparation and non-repetition through, for example, independent investigation mechanisms, with guaranteed impartial judicial processing of cases and the development of protection programmes for threatened artists, in addition to campaigns to sensitise and raise awareness about the importance of artistic freedom.

According to Varella, Dora and Cetra (2022), new forms of censorship that appear to be formal procedures and merely bureaucratic obstacles have emerged and include the exercise of so-called authoritarian infralegalism. That strategy implements authoritarian measures unsupported by the Legislature but using executive orders and other administrative measures to distort laws and change public policies without revoking them. In the case of culture in Bolsonaro's Brazil, expedients such as arbitrary rejection of financial statements and imposition of contracts with abusive clauses were used. In more subtle but equally harmful ways, censorship occurs by blocking access to funds and infrastructure, reducing budgets for art, and establishing austerity policies that do not take cultural rights into consideration. Furthermore, censorship mechanisms seize means of artistic expression and confiscate works of art, musical instruments and materials that are essential for artistic creation.

It should be noted that a quantitative analysis of the data contained in the [Mapa da Censura](#) (Censorship Map) produced by the Brazilian Integrated Movement for Freedom of Artistic Expression (MOBILE) stresses this argument. In Brazil, between 2019 and August 2022, the category of analysis ‘violating mechanism’ (*mecanismo violador*) indicates that restrictive institutional measures were the most often used tool to repress artistic freedom in the country (36%), followed by administrative censorship (32%) and discursive actions, intimidation and misinformation (18%). MOBILE documented, for example, restricted access to funds from the Culture Incentive Law by museums, which had to supplement their maintenance programmes, considerably reducing their revenues. At the time, the secretary of culture threatened to reject the financial statements of the renovation of the Ipiranga Museum in São Paulo due to conflicts with the state governor and cut funds for the Museum of the Portuguese Language due to the use of neutral language in posts on Ipiranga Museum’s social media.

Artists are also oppressed when their access to economic, social and cultural rights is restricted. In particular, the difficulty of guaranteeing their right to work means that many artists do not see themselves as workers, which reinforces their condition of vulnerability, with deleterious effects on the cultural rights of society as a whole. This occurs, among other reasons, because artistic practice in Latin America is still stigmatized, understood as an individual adventure rather than a collective social practice.

The ICESCR recognizes the right of individuals to “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” (article 15.1.3). The Committee on Economic, Social and Cultural Rights paid special attention to the vulnerability of authors – including a focus on indigenous people – in General Comment No. 17 (2005). In case of violation of their moral and material interests, it highlighted the duty of States to guarantee access to administrative and legal resources, particularly for authors belonging to historically vulnerable groups. That includes taking financial and other positive measures which facilitate the formation of professional and other associations representing these interests.

Therefore, it is essential to safeguard copyrights for the maintenance and survival of artists, in order to promote decent working conditions and ensure their social protection. Insufficient public policies that favour the rights of artists and cultural agents in Latin America exacerbate these challenges. It is important to recognize that guaranteeing artists’ economic, social, cultural and environmental rights is an obligation of States and must be implemented by including that group in policymaking, which is crucial for the sustainability of the arts sector.

The construction of public policies in this area must consider the sociocultural complexity of Latin America, pervaded by scenarios of poverty, racism, machismo, LGBTphobia and high crime rates, which influence artistic production in the region. On the other hand, its pluralism and cultural diversity emerge from a melting pot of traditions and influences – fused into unique artistic expressions. It is important to recognize the uniqueness of cultural experiences as well as the intersectionality of emerging voices in artistic creation – paying attention to the so-called “danger of a single story” as pointed out by writer Chimamanda Ngozi Adichie.

Despite the importance of defending artists and cultural agents, the international conventions mentioned in this report do not expressly prioritize their full protection. The Recommendation Concerning the Status of the Artist, adopted by the UNESCO General Conference in 1980, has been an important guideline. Although not legally binding, this instrument suggests concrete



measures to improve the status of artists and promote their active participation in cultural life. The Recommendation proposes measures to extend legal protection to artists, guaranteeing decent working conditions and access to social security and health insurance, also promoting the formation of trade unions and professional organizations. Their international mobility is also encouraged through agreements that facilitate cultural exchange. Finally, the recommendation highlights the importance of encouraging art and education for children and young people to ensure that future generations are able to enrich global cultural life.

At the European Council, the resolution on the European Union's work plan for culture 2023-2026 stands out. It proposes empowering the cultural and creative sector, creating an online platform that allows the continuous exchange of information and good practices on improving the working conditions of artists and creative professionals, encouraging the ecological transition in these sectors, and building a strategy to support the cultural and creative dimension of video games as a vanguard of new cultural practices in the digital environment.

## 4.2. FREEDOM FOR WHOM?

For the purposes of the Recommendation concerning the Status of the Artist, the term 'artist' refers to any individual who creates, expresses or recreates works of art and who is or wishes to be recognized as such. The UN Special Rapporteur on the promotion and protection of freedom of opinion and expression (2020) emphasized that artistic expression encompasses not only creators, but everyone who is part of the "ecosystem of art," such as those involved in the promotion, distribution, sales, funding and the several functions that enable the dissemination of art and culture, and guarantee that the public reach them. The ECtHR stressed this understanding in *Müller and Others v. Switzerland* (1986) and in *Lindon, Otchakovsky-Laurens and July v. France* (2007).

Being part of this ecosystem, however, entails a process of recognizing themselves as artists and requires overcoming self-censorship. This phenomenon is especially evident for women: the patriarchal condition, as a mechanism of systematic silencing, also affects this process, resulting in the emergence of feelings of not belonging. By and large, artists operate on the thin edge of collective self-censorship and are underrepresented in most cultural and creative industries. According to UNESCO (2022), female artists and producers received only about a third (33%) of awards for the main categories at 60 major film festivals around the world to in 2019. Less than a quarter (24%) of the awards for best director and best screenplay were given to women.

These challenges are compounded by economic and professional barriers, as women face structural disadvantages in accessing resources, funding and leadership opportunities within arts institutions. General Comment No. 23 to ICESCR (2016), on the right to equitable and satisfactory working conditions, addresses the working conditions of some groups, such as migrants and the elderly. The specificities of artistic work, however, were not included – even though some artists may be "self-employed" – a category covered by the document.

However, artistic freedom is not only recognized for artists. According to international treaties, this right covers "every person," without any type of discrimination based on race, colour, sex, language, religion, opinions of political nature or any other, national or social origin, economic status, birth or any other social condition. In *Eon v. France* (2013), the European Court of Human Rights analysed the expression of a protester who showed a sign with the message "get

lost, you sad prick” to then French president Sarkozy. Even though the expression was offensive in its literal sense, it reproduced a sentence that had been widely publicized by the President and widely commented on in the media in a humorous tone. This led the Court to recognize that the protester had uttered his criticism through “irreverent satire,” which is a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aimed to provoke and agitate. Thus, imposing criminal punishment on the protester’s conduct would have chilling effects on satirical forms of expression, which would be harmful in democratic societies, given the important role that satire can play in matters of public interest. Also in *Welsh and Silva Canha v. Portugal* (2013), the Court highlighted the satirical approach of the applicants (two journalists who had written a press article revealing financial scandals), noting that “it is necessary to examine very carefully any interference with the rights of an artist – or anyone who wishes express yourself in this way”.

To implement international standards and advance an artistic freedom agenda, a whole range of artists must be covered: street artists, digital artists, textile artists, opera singers, photographers, orchestra musicians, composers, theatre actors, ballet dancers, choreographers, poets, graffiti artists, fashion designers, potters, circus performers, DJs, mimes, puppeteers, storytellers, tattoo artists, and others. We must break the social imaginaries that link certain groups of people to specific artistic practices, resulting from stigmatization and stereotypes that limit individual expression and perpetuate prejudices, restricting the creative and cultural possibilities of various groups. The rights of artists and cultural agents are intrinsically related to the rights of the communities to which they belong. These realities are diverse and marked by elements such as race, ethnicity, social class, gender identity and sexual orientation.

Even though the term ‘artist’ covers different genres, it has been historically synonymous with male narratives. Despite the challenges faced, women are at the forefront of the promotion of gender equality, cultural rights and artistic freedom in Latin America. In the report *Arte en la Tormenta* (2022), the organizations Artists at Risk Connection (ARC), of PEN America, Amnesty International and Labo Ciudadano point to strong gender components in the mechanisms of oppression towards freedom of expression in the region. Similarly, the UN Special Rapporteur on cultural rights (2013) warned of the tendency to call “loose” or “prostitutes” women working in the cultural world or those who want to have artistic careers, especially in cinema, theatre, dance and music.

In Brazil, the [Mapa da Censura](#) (Censorship Map) found these patterns in several examples, such as the insults by the president of Palmares Foundation to singer Alcione (2020) and the brutal action by Paraná state police, which interrupted a rehearsal of Maracatu group Baque Mulher (2020). In the cases mentioned, there is evident use of violent and derogatory terms that reinforce gender stereotypes, suggesting that women do not have a legitimate right to express their opinions or feelings assertively without being labelled as emotionally uncontrolled, aggressive or excessive. Furthermore, they contribute to a controlling narrative that suppresses expression, perpetuating a culture that belittles and attacks women’s sexual freedom.

### **4.3 ARTISTS AND HUMAN RIGHTS DEFENDERS: SIMILARITIES AND DIFFERENCES**

In the public imaginary, human rights defenders and artists belong to symbolically distinct spaces, divided between those who operate in political and legal spheres and are focused on issues such as justice and equality, and those who work in the domain of creativity and subjective action,

with individual expression and aesthetics. Activist artists often fail to recognize themselves as holding guarantees granted to human rights defenders or linked to artistic freedom. One of the possible barriers is the lack of a common language between artists and the legal world, which limits the activation of international human rights mechanisms and results in a small number of cases that reach regional human rights systems, are submitted to special rapporteurs and included in communications to UN treaty bodies. Advocacy actions before these systems must be intensified, with a view to boosting the artistic freedom agenda, highlighting protection gaps and identifying windows of opportunity for normative and political change.

Civil society organizations that are active in protecting human rights defenders, which work by giving visibility to cases, building capacity in self-protection and collective protection, and providing emergency financial support and legal assistance, tend not to include artists and cultural agents in their programmes and activities. Important initiatives aimed at defenders at risk with potential to benefit artists include those that allocate funds for relocation and emergency visas as well as those that create safe environments and opportunities for work and integration in exile. These organizations have valuable knowledge capable of being multiplied in artist collectives. They must be strengthened by expanding the compilation of data and monitoring artists' human rights situation, in a widespread network that reaches all territories.

In the *Método Cuba* report by *Artists at Risk Connexion* (2023), PEN Internacional highlighted that seven out of the 17 artists interviewed made it clear that they only “accepted” exile to escape permanent harassment and repression by the State. Some of them, such as Tania Bruguera, claim that the Cuban authorities even negotiated their exile with them, showing that it was the government’s intention all along.

Although the concept of human rights defender is broad, encompassing individuals, groups and associations that contribute to the effective elimination of all human rights violations, not every artist fits this definition. The 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms does not explicitly mention them either. The UN Special Rapporteur on the situation of human rights defenders (2017) called on those who express themselves through artistic means to devise innovative ways of reporting on the situation of human rights defenders. Furthermore, the Rapporteur (2022) recognized the contribution of artists to the protection of human rights, highlighting their commitment to promote the work of defenders. In this context, there is an opportunity for the IACHR Rapporteurship on Human Rights Defenders and Justice Operators to also join forces to include this issue on its agenda.

Artists who use their works to raise awareness about human rights issues and mobilize social movements may meet the definition of human rights defenders and be entitled to specific protection. According to the UN Special Rapporteur on cultural rights (2013), artists, as well as journalists and human rights defenders, are at particular risk, as their work depends on visibly engaging people in the public domain. In Latin America, this risk is evident: according to the Freemuse report (2022), 52% of the murders of artists documented around the world occurred in the region – 11 in Colombia, 8 in Mexico and 2 in Brazil.



## FINAL CONSIDERATIONS

Since 1948, international standards protecting artistic freedom have been gaining new elements and advances in response to social changes and citizens' demands. Linked to the right to freedom of expression and strongly supported by the framework of cultural rights, guarantees of artistic freedom – through gradually developed parameters and concepts – gain ground in the international arena. Today, they are part of an ecosystem of rights that comprises not only the main universal human rights treaties but also the normative architecture of regional human rights systems.

At the universal level, the General Comments issued by treaty bodies and the reports of UN Special Rapporteurs set important milestones for the interpretation of this right, its protection outlines and applicable restrictions. Declarations and recommendations shed light on the rights of artists and culture makers in their inherent uniqueness. Regional systems, vivifying the law and adapting it to the concrete reality of their territories, took important steps in recognizing the importance of art and culture. In Latin America, the inter-American system has built a repertoire of robust parameters to face freedom of expression challenges, attentive to the protection of journalists and human rights defenders. Artistic freedom, in turn, remains incipient. However, it has been gradually gaining ground on the IACHR's agenda, which, through its reports, has already expressed concern regarding the guarantee of artistic freedom and the protection of artists.

The international repertoire illustrating the specificities of artistic freedom is still scarce, and few cases have been filed before regional courts. There is a lack of data and mechanisms for monitoring violations of artists' human rights, and it is necessary to strengthen the capacities of civil society organizations and artists' collectives as well as to facilitate discussions on the topic in the public sphere. Raising awareness and engaging a wide range of actors is essential to leverage the advances necessary to strengthen the right to artistic freedom.

Normative advances must be translated into public policies that recognize the region's complexity and constant changes, considering not only the protection of artistic freedom but also their reverberating effects on the enjoyment of an interdependent range of human rights. To this end, active work is necessary to create conditions for exercising artistic freedom by strengthening the cultural scene, so that this freedom can flourish. Cultural policies must be part of the strategies of States and not just governments. They have to be built through collaborative processes with different actors, including civil society organizations, artists and cultural agents and movements,

in order to guarantee their scope, effectiveness and sustainability over time. Failure to guarantee the right to culture is one of the main symptoms of a country's democratic weakening. Therefore, the inclusion of robust and comprehensive public policies for artists is essential not only for culture, but also for a nation's democratic health.

While art questions what it means 'to be,' human rights must enable people to be who they are. Not only do new forms of art challenge, question and provoke, but censorship also changes and manifests itself through new versions and formats, engendered as control and subjection to the boldness of art. By its nature, artistic creation questions, confronts and often bothers. In this scenario, the artistic community's livelihoods are targeted by violence, stigmatization and precariousness. In order to protect them, we must ensure that those guarantees that support the human rights umbrella accommodate new, collective subjects, recognizing the essential role of artists and cultural agents in renewing social fabrics and promoting the right to art and culture for all.

## **RECOMMENDATIONS TO STATES AND HUMAN RIGHTS PROTECTION SYSTEMS**

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- 1.** Strengthening and expanding the normative frameworks that govern protection of artistic freedom, in line with international human rights parameters;
- 2.** Guaranteeing artists' right to express their own beliefs, political opinions and worldviews;
- 3.** Fostering an environment that encourages individuals and social groups to create, produce, disseminate and distribute their own cultural expressions;
- 4.** Promoting the necessary legislative changes to harmonize restrictive norms for the artistic community and artistic expressions in accordance with article 13 of the ACHR;
- 5.** Ensuring that any forms of violence against artists or cultural agents are quickly, impartially and effectively investigated under the parameters set by international human rights law;
- 6.** Not criminalizing artistic expressions;
- 7.** Developing and implementing public policies to combat the stigmatization of artistic activity and discrimination against artists and cultural agents from vulnerable groups;
- 8.** Adopting and implementing regulations to ensure that artistic freedom on digital platforms is guided by the standards of international human rights law;
- 9.** Adopting public policies aimed at the broad protection, promotion, funding and advancement of cultural diversity and the free circulation of ideas, including support for the artistic community and sectors linked to art and culture;
- 10.** Facilitating participation in cultural life and access to the arts, favouring opportunities for artists to freely gather for performances and public exhibitions;
- 11.** Developing and implementing public policies to protect and improve working conditions of artists and cultural agents;
- 12.** Strengthening institutions and organizations in the arts and culture field, promoting the conditions so that they can act with independence and transparency;
- 13.** Expanding monitoring and documentation of restrictions on artistic freedom and the cultural sector, as well as human rights violations of artists and cultural agents.





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