

The right to freedom of artistic expression and creativity

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Paul Henri Spaak Building, Room P5B001 from 11.30 to 14.30

Presentation by Farida Shaheed, Special rapporteur in the field of cultural rights

It gives me great pleasure to be here today to share my report on the right to freedom of artistic expression and creativity presented to the HRC this summer. I want to thank MEP Ms. Marie-Christine Vergiat of the Gauche Unitaire Europeen (GUE//NL) and the European Civil Society dialogue platform “Access to Culture”, *Arts, Human Rights and Social Justice* Working Group for organising this important and unique opportunity. Let me also say that the ARJ’s logo message “Access to Culture – A fundamental right of all” resonates deeply with my own perspective though personally I would have stopped at the ‘Justice for all’...

Let me start by saying that

Art constitutes an important vehicle for each person, individually and in community with others, as well as groups of people to develop and express their humanity and worldview and the meanings they assign to their existence and development. People in all societies create, make use of, or relate to artistic expressions and creations. It is therefore crucial to remember, as stressed in the UNESCO Convention on cultural diversity, that cultural goods and services, as vectors of identity, values and meaning must not be treated as mere commodities or consumer goods.

There is a **misplaced notion that artistic creativity and expression is a luxury**; nothing can be further from the truth; artistic creativity and expression are essential inherent components of how we express our humanity. Whenever we limit, try to control, restrict or remove artistic expressions from the public eye, we impoverish humanity. And, when we kill creativity, we kill a part of our humanity, and when this becomes extreme, we end up with the grey silence of the graveyard.

Healthy societies require a thriving cultural life which always entails contestations over meanings and revisiting culturally inherited ideas and concepts. Artists may entertain people, but they also contribute to social debates, sometimes bringing counter-discourses and potential counterweights to existing power centres as well. Democratic societies demand vibrant cultures, supportive of artistic creativity and expressions in all forms, presenting a plethora of views. It is not a coincidence that extremists seeking to appropriate power so frequently move to control, limit, or in extreme cases, simply eliminate this creative dimension of humanity. For example the Taliban in Afghanistan and now Pakistan systematically shut down all artistic expressions; we also see the viscous attack on artists in Mali who have contributed so enormously to music worldwide. We must not only be saddened by this; we must be disturbed enough to act....

My report was galvanized by the increasing number of reports I started receiving about the multi-faceted ways in which the right to freedom indispensable for artistic expression and creativity is being curtailed (Please note that this freedom is ‘indispensable’), and growing worldwide concern that artistic voices have been, or are being silenced by various means and in different ways.

My report does not propose a definition of art, nor do I suggest additional rights be recognized for artists. I do insist, however, that all those engaging in artistic expressions must enjoy the same rights and protection as everyone else. It is also important to bear in mind that artistic expressions and creations come under particular attack because they can convey specific messages and articulate symbolic values in a powerful way, or may be considered as doing so.

Asked what the purpose of art is, a young artist in Pakistan, from a small town immediately said “art is about sharing ideas. Aesthetics is simply a form of communication,”¹ hence this right is deeply tied to the freedom of expression. But in this form of communication, artists can be at particular risk because, like journalists, their work depends on visibly engaging people in the public domain. I want to emphasise that media attention to the cases of a few prominent artists tends to eclipse the reality lived by many people engaged in artistic activities around the world. Internationally renowned cases are only the tip of the iceberg.

All persons must enjoy the rights to freedom of expression and creativity, to participate in and contribute to cultural life and to enjoy the arts. Expressions, whether artistic or not, always remain protected under the right to freedom of expression. **The crucial task of universal human rights norms** is to prevent the arbitrary privileging of certain perspectives on account of their traditional authority, institutional or economic power, or demographic supremacy in society. This principle lies at the heart of every issue raised in the debate over the right to freedom of artistic expression and creativity and possible limitations to that right.

There is quite a robust legal framework for this right in international law, starting with Article 27 of the Universal Declaration of Human Rights (UDHR). The most explicit provisions protecting the freedom of artistic expression and creativity are to be found in article **15 (3) of ICESCR**, under which States “undertake to **respect the freedom indispensable** for...creative activity” and in article **19 (2) of ICCPR**, which states that the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds “in the form of art”; Articles 13 and 31 of the Convention on the Rights of the Child. Implicit provisions include article 10 of the European Convention for the Safeguard of Human Rights and Fundamental Freedoms.

Artistic freedoms are linked to the right to the freedoms of opinion, thought, conscience and religion, since art is also a means of expressing a belief and developing a world vision. They also relate to the right of peaceful assembly; the right to freedom of association including the right of artists and creators to form and join trade unions; the right to benefit from the protection of the moral and material interests resulting from any literary or artistic production of which a person is the author; and the right to leisure.

Positive obligations devolve on States. Under article 15 (2) of ICESCR and article 14 of the San Salvador Protocol, States must adopt steps necessary for the conservation, the development and the diffusion of culture, which includes arts. Article 30 of the Convention on the Rights of Persons with Disabilities is also relevant. Some court decisions have also been adopted at the regional level, particularly by the European Court of Human Rights.

¹ Imran Channa cited in Alina Husain, ‘Art as Communication’, *The Herald*, February 2013. p. 92

UNESCO's 1980 Recommendation Concerning the Status of the Artist stresses that artists shall benefit from the rights and protection provided for in international and national legislation relating to human rights, in particular in the area of freedom of expression and communication. (Articles III-6 and V 2) It stipulates States' duty to protect, defend and assist artists and their freedom of creation (article III-3); ensure artists' freedom to establish and be a member of trade unions and professional organizations, and enable organizations representing artists to participate in the formulation of cultural policies and employment policies (article III-4); the full participation of artists, individually or through associations or trade unions, in the life of the communities in which they practice their art, and be associated in the formulation of local and national cultural policies (article III- 7). It calls upon States to promote the free international movement of artists and not hinder their freedom to practice their art in the country of their choice (articles IV-1 j and k; and VI-8); stimulate public and private demand for the fruits of artistic activity in order to increase the opportunities of paid work for artists, inter alia by means of subsidies to art institutions, commissions to individual artists, or the organization of artistic events, and by establishing art funds (article VI-1 c).

The UNESCO 2005 Convention on the Protection and Promotion of Cultural Diversity, a crucial framework, points out that:

“Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed.” [Article 2]

Calls upon States to create an environment which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions as well as to diverse cultural expressions from within their territory as well as from other countries of the world; to recognize the important contribution of artists as well as all those involved in the creative process, and their central role in nurturing the diversity of cultural expressions. [Article 7]

I am therefore pleased to learn that this is a reference document for EU States and I hope my report can help to further frame an appropriate reference point.

In researching my report, I have been struck by the **wide range of actors – both state and non-State -- that may create obstacles or impose restrictions** to expression of artistic freedom. These include: mass media, broadcasting, telecommunications and production companies, educational institutions, armed extremists as well as organized crime, religious authorities, traditional leaders, corporations, distribution companies and retailers, sponsors, as well as civil society groups, such as parents' associations using a variety of means.

Restrictions can be imposed at various stages of the artistic creation, from the development of the idea, through to production, performance, publication and distribution. Restrictions on artistic freedom may result from oppressive law or regulations, but can also be the outcome of a fear of physical or economic coercions.

On my way here yesterday I was reading the newspapers and saw 3 small articles (2 x 2 inches each). The red subject line of one read 'Politics', the second 'Treatment', and the third 'Hate speech'. In fact the first was an item sharing the news that “An Oscar winning film maker has abandoned a planned

documentary film on Hillary Clinton, following an outcry from Republicans...”; the story of treatment concerned the hunger strike of one of the jailed Pussy Riot members; the hate speech was about measures being considered to target “racist speech as part of the crackdown on the far-right Golden Dawn party after the killing of an anti-fascist rapper.”² None of them was labeled ‘Artist in Danger’ and while the news carries further information on the nefarious activities of the Golden Dawn in Greece, I am not sure how many people know or remember the name of the rapper (Pavlos Fyssas), or what happened to his family.

Obstacles to artistic freedoms impact a wide range of people: not only artists themselves, whether professionals and amateurs, but all those participating in the creation, production, distribution and dissemination of artwork. They include authors, musicians and composers, dancers and other performers including street performers, comedians and play-writers, visual artists, authors, editors, film producers, publishers, distributors, directors and staff working in libraries, galleries, museums, cinemas or theatres, curators and organisers of cultural events. Audiences may also be targeted.

The environment may lead to self-censorship. Cultural institutions and artists may end up abstaining from presenting “controversial works” under high pressure from communities, including threats and violence. Kenan Malik “policy makers and arts administrators have come broadly to accept the argument that it is morally unacceptable to cause offence to other cultures.”³ It must be recalled that within any collective identity, there will always be differences and debates over meanings, definitions and concepts. It is vital to understand who speaks for which culture or community, and to ensure that predominance is not accorded to one voice over the other, often out of prejudice. The fear that some communities may protest should not be sufficient to decide that some artworks should not be displayed or performed; a certain level of contest and dispute is often inherent to contemporary art.

We should be clear that States, religious institutions, corporate companies and social groups all use art to propagate their ideas and promote their interests, including concepts of right and wrong, and to create homogeneity of belief and behaviour. Artistic expression and creativity may entail the re-appropriation of symbols, whether national (flags, national anthems), religious (figures, symbols, venues) or social/economical (a certain brand for example), as part of a response to the narratives promoted by States, religious institutions or economic powers. In most cases, restrictions on artistic freedoms reflect a desire to promote a world vision or narrative “while simultaneously blocking all others”. The suppression of political dissent, the quest for nation-building and pursuit of hegemonic policies have always been prominent reasons for art censorship.

I am concerned that many artists have been disproportionately sentenced under criminal codes for offences such as ‘extremism’ ‘terrorism’ or ‘hooliganism.’

Artwork differs from non-fictional statements, as it provides a far wider scope for assigning multiple meanings: assumptions about the message carried by an artwork are therefore extremely difficult to prove, and interpretations given to an artwork do not necessarily coincide with the author’s intended

² *Gulf Times*, 1 October 2013

³ Kenan Malik, “Arts for who’s sake”, in Index on Censorship, Beyond belief, theatre, freedom of expression and public order – a case study, p. 3-6.

meaning. Indeed for some artists enabling a continuing development of interpretation is crucial. Hence 80-year old Ibrahim El salahi of South Sudan says he leaves much of his work untitled now because “In many ways they [paintings] are like children, you give them names and then they grow up and their names no longer suit them...I gave up naming them because to do that in some ways dictates what paintings should mean to people who see. The most important thing I feel is the meaning people bring to them not the one I want to impose.”⁴

Artistic expressions and creations do not always carry, and should not be reduced to carrying, a specific message or information. In addition, the resort to fiction and the imaginary must be understood and respected as a crucial element of the freedom indispensable for creative activities and artistic expressions: representations of the real must not be confused with the real, which means, for example, that what a character says in a novel cannot be equated with the author’s personal views. Hence, artists should be able to explore the darker side of humanity, and to represent crimes or what some may consider as “immorality”, without being accused of promoting these.

Limitations to artistic freedoms

Under article 19 of ICCPR, the right to freedom of expression, including in the form of art, may be subject to certain restrictions that are provided by law and are necessary

- (a) for the respect of the rights or reputations of others; or
- (b) for the protection of national security or of public order, or of public health or morals.

The meaning of articles 19 and 20 of the ICCPR has been further clarified, in particular through General Comment 34 (2011) of the Human Rights Committee on article 19 of ICCPR, and the report of the Special Rapporteur on freedom of opinion and expression on the challenge to reconcile the need to protect and promote the right to freedom of opinion and expression and to combat discrimination and incitement to hatred (A/67/357).¹⁰ The Office of the High Commissioner for Human Rights conducted activities focused on the relationship between freedom of expression and hate speech, especially in relation to religious issues. The process culminated with the “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” It is important to clearly distinguish between

- (a) expression that constitutes a criminal offence;
- (b) expression that is not criminally punishable but may justify a civil suit or administrative sanctions; and
- (c) expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others.

Criminal sanctions should be the very last resort measures only, to be applied in strictly justifiable situations. The Rabat Plan also suggests a very useful six-part threshold test for those expressions that are criminally prohibited, implying an analysis of the context, speaker, content or form, extent of the speech and likelihood, including imminence. Art education, and teaching children how to interpret and

⁴ *New Africa*, October 2013, p. 102

critique media and entertainment messages may be a far better and more effective solution than censorship.

I am deeply concerned that artists in many parts of the world feel threatened or have been attacked by aggressive audiences. Violence includes assassinations, death threats, beating, burning of theatres and cinemas, blowing up of DVD/CD stores, and destruction of artworks or musical instruments. Artists have been accused of, and prosecuted for, incitement to violence when, in fact, aggressive individuals, groups or crowds, were doing the inciting. Reactions to controversial artwork can be expressed through the exercise of the rights to freedom of expression and peaceful assembly, but must never take the form of violence.

Several questions relate to the use of public space: what is “public space” and to whom does it belong; who should decide what is allowed, when, where and for how long? To what degree should the public have a say, in particular locals who may be subjected to sounds and images that they dislike in their daily environment? **Why should artistic expression be given less space than, for example, advertising?**

There is also the lack of clarity of approval systems, and rules constraining the freedom indispensable for artistic creativity.

Less spoken about is that corporate interests may also play an important role in art restrictions. Underlying motivations include the desire to silence criticism from artists regarding corporate activities, or to protect a specific logo or brand. Sponsors have also played a direct role in having artwork considered too controversial or not fitting their own interests to be removed from artistic competitions, television shows or magazines.

Of perhaps particular importance in Europe are restrictions on travel and **the issuance of visas**, which impact artists’ options to perform and audiences’ possibilities to access artistic expressions and creations. Many tour, concert and festival organisers, agents, management companies, cultural organisations and others, when organising concerts and tours of foreign artists in Europe and North America in particular, face non-transparent, time-consuming and costly application procedures to obtain a visa. Some festivals have stopped inviting artists from particular countries owing to the unpredictable nature of their visa application procedures.

A precarious economic and social situation is the main impediments artists encounter in their work relate to their precarious. The current financial crisis has led to severe cuts in public spending resulting in great unemployment amongst artists, the closure of art institutions, and a shift towards private sponsorship. Some stakeholders have stressed the absence of, or a reduced market in their country. One challenge for artists is to enjoy freedom including from their sponsors, whether State or private.

Artists’ autonomy can only be guaranteed through diversity in funding and a good balance between public and private sponsorship, both of which may open space for artistic creation. States should not monopolize funding of the arts but cannot leave sponsorship entirely to corporations that may have little interest in funding alternative cultural spaces or institutions and prioritize funding high-profile programs such as blockbuster exhibitions.

Market censorship: Private art institutions may enable critical, 'avant garde', non-conventional, controversial and new art works to be displayed or performed but the adverse consequences of the increasing weight of corporate sponsorship need to be assessed.

Of concern is de-facto monopolistic control of corporations that own whole chains of production of artworks, in particular in the area of music and movies, from creation to distribution. Companies may have control over bookstores, concert halls, and cinemas houses.

One way of silencing artists may be to impede their livelihood options as professionals in a career devoted to artistic creations. Concern has been expressed about **coercive contracts** that function as a primary obstacle to fair remuneration. Artists may not always be the best negotiators in the business world and may end up signing away all their rights to their creation, **losing control over their creation, which can be used in contradiction to their own vision. As stressed by the Committee on Economic, Social and Cultural Rights in its General Comment 17, the protection of these interests is not to be equated with legal entitlements recognized in intellectual property systems.**

Let me conclude by relating a story from my country which touched me. In an area taken over by the Taliban, there was a man who ran a rickshaw (Tuk Tuk) for fro his bread and butter but was actually a musician. His 1.5 year old son was so traumatised by the bombs and violence that he stopped speaking. For several years, music was banned anyway. Then one day his very weary father took out his instrument from its hiding place and started to sing. And when he did his now 3-year old son, started singing with him – finding his voice through music. And that is the power of artistic expression: it allows us all to find our voice.

And finally, where can you find senior diplomats and refugees dancing together? Well the day before yesterday this happened when the 24 year old Palestinian who became the Arab Idol, Mohamed Assef, sang in Europe for the first time. He said "I'd like to reach out to the world. May be there are different audiences, or the techniques are different in Europe and the Middle East and in Europe and America, but what I know is music is something that when people first hear, they love."⁵

Thank you

⁵ "Gaza's 'Arab Idol' wins Europe Hearts", *Gulf News*, 3 October 2013