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## And whosoever shall offend one of these little ones..? Is 'community standard' applicable to cases of freedom of artistic expression?

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### Abstract

This article considers the parameters that govern the categorisation, conceptualisation and judgement of "offense" in art, and so the limits of artistic freedom. Taking a legal and internationally informed perspective, the paper charts the establishment of conventional views on artistic expression and its assumed impact on the public or "community". It questions the conceptual accuracy of legal assumptions on the nature of art, as of the nature of expression and its impact. With reference to key cases and legal rulings, the article, while invested primarily in a forensic explication of the law and its phraseology, argues that all legal limitations on artistic expression embody assumptions that are paradoxical.

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*And whosoever shall offend one of these little ones that believe in me, it is better for him that a millstone were hanged about his neck, and he were cast into the sea*

Mark 9:42-50 King James Version (KJV)

Is it really the ‘common citizen’ who should dictate what is and what is not acceptable in the sophisticated field of art? Or should we rather teach the general public new art conventions and trends by challenging traditional taste and habits? After all, if we *really* and *seriously* treat the ‘community standard test’ as decisive, we may end up with the conclusion that we cannot go any further but keep on admiring Hogarth’s *The Graham Children* (1742) in London’s National Portrait Gallery.

In spite of that, courts from different jurisdictions (e.g. the USA, India, Romania, the Russian Federation or Japan) continue to apply the ‘community standard [or tolerance] test’ in order to delimitate the scope of freedom of artistic expression. In some other states, the applicability of this test in cases concerning freedom of artistic expression has been disqualified either explicitly (Canada) or implicitly (Colombia). This text focuses on whether the community standard test is applicable at all to cases where freedom of artistic expression is at stake.

### What is artistic expression?

Defining what is freedom of artistic expression (hereafter referred to as ‘FAE’) implies establishing, firstly, what is meant by ‘artistic expression’. Farida Shaheed, the first UN Special Rapporteur in the field of cultural rights, declared in her 2013 *Report on the right to freedom of artistic expression and creativity* that she had no intention ‘to propose a definition of art’<sup>1</sup>. Similarly, the German *Bundesverfassungsgericht* held in the now famous *Anachronistischer Zug* case decision, that construing the definition of art

<sup>1</sup> Report of the UN Special Rapporteur in the field of cultural rights, Farida Shaheed, *The right to freedom of artistic expression and creativity*, A/HRC/23/34, 14 March 2013, source: [http://www.cdd-cdd.org/IMG/pdf/The\\_right\\_to\\_freedom\\_of\\_artistic\\_expression\\_and\\_creativity.pdf](http://www.cdd-cdd.org/IMG/pdf/The_right_to_freedom_of_artistic_expression_and_creativity.pdf), see I.4.

[which is the notion employed in Article 5.3. of the German *Grundgesetz* – MG] cannot imply a reference to a general concept applicable to all manifestations of artistic activity and for all artistic genres (*läßt sich nicht durch einen für alle Äußerungsformen künstlerischer Betätigung und für alle Kunstgattungen gleichermaßen gültigen allgemeinen Begriff umschreiben*)<sup>2</sup>.

Therefore, in the majority of jurisdictions, courts abstain from defining the content of FAE. Some courts even criticize categorizing certain forms of expression as ‘artistic’ – like the South African Constitutional Court in *Case and other*<sup>3</sup>. Some other courts simply assume that lawyers do not possess proper qualifications to assess artistic merit of disputed works<sup>4</sup>. Indeed, if art is an autopoietic system<sup>5</sup>, it is unlikely to be categorized from the perspective of another autopoietic system, namely the legal one<sup>6</sup>.

Nevertheless, certain supreme or constitutional courts attempt to propose definitions of artistic expression. The earliest effort undertaken to that effect was the *Mephisto* decision<sup>7</sup> of the German *Bundesverfassungsgericht* delivered in 1971 where the BvG held that:

...the life sphere of art is to be determined by the structural features,

<sup>2</sup> Judgment of the [German] Federal Constitutional Court of 17<sup>th</sup> July 1984, *Anachronistischer Zug*, BVerfG, Beschluß des Ersten Senats vom 17. Juli 1984, 1 BvR 816/82.

<sup>3</sup> Judgment of the Constitutional Court of South Africa of 9<sup>th</sup> May 1996, CCT 21/95 *Case and other v. The Minister of Safety and Security and others*, where the court held that ‘there is an inherent artificiality in categorising expression in principle as ‘political’ or not. Few forms of what we conventionally class as ‘artistic’ expression can be said to be devoid of ‘political’ implications. Conversely, history records many a rhetorically distinguished ‘political’ speech that could fairly be characterised as a form of dramatic art’.

<sup>4</sup> See e.g. Judgment of the US Supreme Court of 2<sup>nd</sup> February 1903, *Bleistein v Donaldson Lithographing Co.*, 188 US 239, 251 (1903), or a concurring passage made by sorely missed Justice Antonin Scalia in *Pope v. Illinois*, 481 U.S. 497 (delivered 4<sup>th</sup> May 1987): ‘I must note [...] that, in my view, it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can’.

<sup>5</sup> See: J. M. Bishop, M. M. Al-Rifaie, *Autopoiesis in Creativity and Art*, 2016 [in:] *Proceedings of the 3rd International Symposium on Movement and Computing*, Greece.

<sup>6</sup> See: G. Teubner, *Law as an Autopoietic System*, Oxford/Cambridge, Blackwell Publishers, 1993, European University Institute Series.

<sup>7</sup> Judgment of the [German] Federal Constitutional Court of 24<sup>th</sup> February 1971, *Mephisto*, BVerfG, Beschluß des Ersten Senats vom 24. Februar 1971, 1 BvR 435/68.

which are characterized by the essence of art, and are their only characteristic features. The interpretation of the concept of art in the Constitution must be based on them. The essence of artistic activity is free creative creation, in which impressions and experiences of the artist are brought to immediate perception through the medium of a certain formal idiom. All artistic activity is an intertwining of conscious and unconscious processes, which are not rationally resolvable. In artistic creation, intuition, imagination and artistic sense work together; it is primarily not communication, but expression, and the most direct expression of the individual personality of the artist. The guarantee of freedom of art likewise affects the scope of work (Werkbereich) and the sphere of influence (Wirkbereich) of artistic creation. Both areas form an indissoluble unity. Not only the artistic activity (Werkbereich), but also the performance and dissemination of the work of art are necessary for the encounter with the work as a likewise art-specific process<sup>8</sup>.

Quite similarly, the Colombian Constitutional Court defined artistic expression as ‘intimate way of turning into material reality that what previously existed only in artist’s imagination’<sup>9</sup>.

<sup>8</sup> In German: ‘der Lebensbereich Kunst ist durch die vom Wesen der Kunst geprägten, ihr allein eigenen Strukturmerkmale zu bestimmen on ihnen hat die Auslegung des Kunstbegriffs der Verfassung auszugehen. Das Wesentliche der künstlerischen Tätigkeit ist die freie schöpferische Gestaltung, in der Eindrücke, Erfahrungen, Erlebnisse des Künstlers durch das Medium einer bestimmten Formensprache zu unmittelbarer Anschauung gebracht werden. Alle künstlerische Tätigkeit ist ein Ineinander von bewußten und unbewußten Vorgängen, die rational nicht aufzulösen sind. Beim künstlerischen Schaffen wirken Intuition, Phantasie und Kunstverstand zusammen; es ist primär nicht Mitteilung, sondern Ausdruck und zwar unmittelbarster Ausdruck der individuellen Persönlichkeit des Künstlers. Die Kunstfreiheitsgarantie betrifft in gleicher Weise den Werkbereich und den Wirkbereich des künstlerischen Schaffens. Beide Bereiche bilden eine unlösbare Einheit. Nicht nur die künstlerische Betätigung (Werkbereich), sondern darüber hinaus auch die Darbietung und Verbreitung des Kunstwerks sind sachnotwendig für die Begegnung mit dem Werk als eines ebenfalls kunstspezifischen Vorganges’.

<sup>9</sup> Judgment of the Constitutional Court of Colombia of 27<sup>th</sup> March 1996, T-104/96 Castro Daza, with the following passage: ‘la libertad de expresión artística comporta dos aspectos claramente diferenciables: el derecho de las personas a crear o proyectar artísticamente su pensamiento, y el derecho a difundir y dar a conocer sus obras al público. El primero de ellos, dado su alcance

ECtHR Justice de Meyer in his separate opinion in *Müller*<sup>10</sup> also reached similar conclusions declaring that:

Whilst the right to freedom of expression ‘shall include’ or ‘includes’ the freedom to ‘seek’, to ‘receive’ and to ‘impart’ ‘information’ and ‘ideas’, it may also include other things. The *external manifestation of the human personality* may take very different forms which cannot all be made to fit into the categories mentioned above.

Finally, the Canadian Supreme Court held in *Sharpe*<sup>11</sup>:

What may reasonably be viewed as art is admittedly a difficult question – one that philosophers have pondered through the ages. [...] The question of whether a particular drawing, film or text is art must be left to the trial judge to determine on the basis of a variety of factors. The subjective intention of the creator will be relevant, although it is unlikely to be conclusive. The form and content of the work may provide evidence as to whether it is art. Its connections with artistic conventions, traditions or styles may also be a factor. The opinion of experts on the subject may be helpful. Other factors, like the mode of production, display and distribution, may shed light on whether the depiction or writing possesses artistic value. It may be, as the case law develops, that the factors to be considered will be refined’.

Without in fact entering into a judicial dialogue with each other, these authorities seem to have reached similar conclusions, namely that art (artistic expression) is a *medium for expression of inseparable combination of conscious and*

netamente íntimo, no admite restricción alguna, aparte de las limitaciones naturales que la técnica escogida le imponga al artista, y las fronteras de su propia capacidad para convertir en realidad material lo que previamente existe sólo en su imaginación’.

<sup>10</sup> Judgment of the ECtHR of 24<sup>th</sup> May 1998 *Müller and others v. Switzerland*, app. no. 10737/84.

<sup>11</sup> Judgment of the Supreme Court of Canada of 26<sup>th</sup> January 2001, *R. v. Sharpe*, [2001] 1 SCR 45.

*unconscious processes occurring in the intimate sphere of the artist (expression of one's personality and feelings he or she experienced). It can, but not necessarily does it have to, constitute means of communicating information or ideas.* Whether particular work constitutes art can be assessed by references to expert opinions, modes of distribution, artistic conventions, as well as content and form, however this list of assessment tools is not exhaustive.

Defining the content of term 'artistic expression' contributes towards more legal certainty for artists and other beneficiaries of FAE (those acting in the *Wirkbereich* or art). One must note that FAE (labeled sometimes as 'freedom of creation', 'freedom of artistic activity' or similar) is an explicit normative category of constitutional rank in many jurisdictions<sup>12</sup>.

A characteristic feature of the normative phenomenon of art is its transgressive nature. Art is ever-changing and it always challenges the *status quo* (be it artistic, political social etc.) thereby discovering the unknown. As Aristotle said, 'art completes what nature cannot bring to finish. The artist gives us knowledge of nature's unrealized ends'. Honore de Balzac added: 'what is art? Nature concentrated' and Emil Zola echoed 'a work of art is a corner of nature seen through a temperament'. Can one therefore be *offended* by so-defined art? Ruling certain works of art illegal would amount to finding certain manifestation of nature itself in breach of the law. We may be disappointed about nature (art) but it will remain nature (art).

### What is the community standard test?

In some jurisdictions courts tend to delimitate the boundaries of FAE by referring to the so-called community standard test. Just to remind us of rudimentary constitutional information, let us state briefly that the US Supreme Court's

<sup>12</sup> E.g. in Europe in Germany, Russian Federation, Italy, Spain, Portugal, Poland, Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Serbia, Switzerland, Sweden, in Asia in South Korea, Kazakhstan, Mongolia, in Africa in Egypt, Morocco, Tunisia, Democratic Republic of Congo, Kenya, Republic of South Africa, Angola, Ethiopia, Chad, Algeria, Niger, Mali, Zimbabwe, Mozambique, in South America in Brazil, Chile, Venezuela, Colombia, Peru, Paraguay, Ecuador.

approach to the interpretation of the First Amendment is based on the assumption that certain categories of expression fall outside of the field of protection granted by the Constitution by virtue of their characteristics (in most European jurisdictions, exemplified by the ECtHR case-law, to the contrary, *all* expressions are in principle covered by freedom of expression, however this freedom is not unlimited). One of the characteristics causing that a given expression will be left unprotected is that according to the 'contemporary community standards' of a given State the work in question 'taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value'<sup>13</sup>.

What is then a 'contemporary community standard'? In fact, when introduced in the US Supreme Court's case law, it liberalised the previous approach influenced by English courts, according to which disputed material 'could be judged merely by the effect of an isolated excerpt upon particularly susceptible persons'<sup>14</sup>. As noted by the Supreme Court in *Roth*<sup>15</sup>,

...later decisions have rejected it and substituted this test: whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest<sup>16</sup>.

### The contemporary community standard test

<sup>13</sup> Judgment of the US Supreme Court of 21<sup>st</sup> June 1973, *Miller v. California*, 413 U.S. 15 (1973). See also: judgment of the US Supreme Court of 21<sup>st</sup> June 1973, *Kaplan v. California*, 413 U.S. 115 (1973).

<sup>14</sup> See: *Regina v. Martin Secker Warburg*, [1954] 2 All Eng. 683 (C.C.C.).

<sup>15</sup> Judgment of the US Supreme Court of 24<sup>th</sup> June 1957, *Roth v. United States*, 354 U.S. 476 (1957).

<sup>16</sup> See: e.g., *Walker v. Popenoe*, 80 U.S.App.D.C. 129, 149 F.2d 511; *Parmelee v. United States*, 72 App.D.C. 203, 113 F.2d 729; *United States v. Levine*, 83 F.2d 156; *United States v. Dennett*, 39 F.2d 564; *Khan v. Feist, Inc.*, 70 F.Supp. 450, *aff'd*, 165 F.2d 188; *United States v. One Book Called 'Ulysses'*, 5 F.Supp. 182, *aff'd*, 72 F.2d 705; *American Civil Liberties Union v. Chicago*, 3 Ill.2d 334, 121 N.E.2d 585; *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E.2d 840; *Missouri v. Becker*, 364 Mo. 1079, 272 S.W.2d 283; *Adams Theatre Co. v. Keenan*, 12 N.J. 267, 96 A.2d 519; *Bantam Books, Inc. v. Melko*, 25 N.J.Super. 292, 96 A.2d 47; *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa.Super. 120, 70 A.2d 389.

...in each case is the effect of the book, picture or publication considered as a whole *not upon any particular class, but upon all those whom it is likely to reach*. In other words, you determine its impact upon the *average person* in the community<sup>17</sup>.

So, the community standard test is based on the assessment of the influence a work of art is likely to have in respect of average members of the community. Similar approach to that of the US Supreme Court can be traced in different jurisdictions all over the world. For instance, the Romanian Constitutional Court ruled in *Bala Istvan*<sup>18</sup> that a ban on distributing works compromising good morals (dating back to 1864) serves the maintaining a 'minimum morality of social life' (*minim de moralitate a vietii sociale*) and should be construed by reference to 'norms of social behaviour of an individual' (*normelor de comportare sociala a individului*). The latter concept is yet another label to what we call 'community standard test'. The Indian Supreme Court took identical approach in *Ghandi Mala Bhetala* case<sup>19</sup> ruling that 'the factum of obscenity has to be judged from the point of view of an average person'<sup>20</sup>. Similarly, the Japanese Supreme Court in *Matsue*<sup>21</sup> applied the 'social standard' test (*shakai tsūnen*) to designate the limits of artistic expression<sup>22</sup>. Finally, identical approach can be found in the (very limited) case law of the Russian Constitutional Court in the area of FAE: in *Alekhina*<sup>23</sup> (one of the 'Pussy Riot' cases)

<sup>17</sup> Roth, op. cit., page 354 U.S. 491. See also: judgment of the US Supreme Court of 21<sup>st</sup> March 1966, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) at p. 419.

<sup>18</sup> Judgment of the Constitutional Court of Romania of 2<sup>nd</sup> November 1995, 108/1995, *Bala Istvan*.

<sup>19</sup> Judgment of the Supreme Court of India of 14<sup>th</sup> May 2015, *Devidas Ramachandra Tuljapurkar vs. State of Maharashtra & Ors.*, Criminal Appeal No. 1179 of 2010.

<sup>20</sup> See also: judgment of the Supreme Court of India of 24<sup>th</sup> March 2015, *Shreya Singhal vs U.O.I.*, writ petition (criminal) no. 167 of 2012.

<sup>21</sup> Judgment of the Supreme Court of Japan of 12<sup>th</sup> December 1984, *Matsue v. Japan*, 38 Minshfi 1308 (Sup. Ct., G.B., Dec. 12, 1984).

<sup>22</sup> See also: Y. Shinoiri, *Art il-legally defined? A Legal and Historical Analysis of Akasegawa Genpei's Nodel Thousand-yen Note Incident* (w:) R. Hutchinson, *Negotiating Censorship in Modern Japan*, New York 2013, p. 202.

<sup>23</sup> Judgment of the Constitutional Court of the Russian Federation of 23<sup>rd</sup> October 2014 concerning the constitutional complaint of *Maria Alekhina*, 2521-O/2014. See also a twin judgment of the same court

it held that 'historical and cultural heritage of the Russian nation' must be taken into consideration while delimiting the scope of FAE as well as 'contemporary state of norms of social behaviour' (*исторического и культурного наследия народов России, складывающихся на современном этапе развития общества общепризнанных правил поведения*).

Community standard test is universally understood as the *assessment of the disputed work by reference to its perception by an average member of the community*. It is characteristic that no expert opinion is required in order to establish this perception. To put it short and tersely, 'contemporary community standard test' implies confronting the work of art with the judge's sensitivity, prejudices and sophistication.

### Is any community standard applicable to transgressive and ever-changing phenomenon of art?

Once we established what is 'artistic expression' and 'community standard test' we can now address the question of whether a 'community standard test' is applicable to 'artistic expression'. More precisely put, the question arises whether 'community standard' or 'community tolerance' may define boundaries of FAE at all. The answer proposed in this work is obviously: No. Let us explain why.

Before we present our standpoint, we will first defend our position by proving that we are not isolated in our approach. The Canadian Supreme Court dealt with the problem of 'community tolerance standard' in *Sharpe*<sup>24</sup>. One cannot but note that it was a very sensitive case where the defendant claimed that distribution of child pornography should be unpunished since he was under the protection of the *artistic merit defence*. One of the questions addressed by the Supreme Court was whether the *artistic merit defence* imports a requirement that material must comport with community standards in the sense

of 25<sup>th</sup> September 2014 on the constitutional complaint of *Nadiezhdha Tolokonnikova*, 1873-O/2014.

<sup>24</sup> See: footnote 12.

of not posing a risk of harm to children<sup>25</sup> (one should note a very specific, narrow understanding of the community tolerance standard). Chief Justice McLachlin who drafted the majority opinion held:

I am not persuaded that we should read a community standards qualification into the defence. To do so would involve reading in a qualification that Parliament has not stated. Further, reading in the qualification of conformity with community standards would run counter to the logic of the defence, namely that artistic merit outweighs any harm that might result from the sexual representations of children in the work. Most material caught by the definition of child pornography could pose a potential risk of harm to children. To restrict the artistic merit defence to material posing no risk of harm to children would defeat the purpose of the defence. Parliament clearly intended that some pornographic and possibly harmful works would escape prosecution on the basis of this defence; otherwise there is no need for it.

In other words, the Canadian Supreme Court actually accepted that artistic work encompassing pictures of child pornography *is allowed* to pose risk of harm to the most vulnerable members of the community (children) but nevertheless still be protected under the *artistic merit defense*. It means that in their view artistic value of the disputed work is capable of outweighing possible harm to the community simply because it presents a greater value of itself.

A similar (or maybe even stricter) approach was proposed by the Colombian Constitutional Court in *Castro Daza*<sup>26</sup> where the Court simply held that assessing art must be left for individual viewers who, however, cannot expect the state to prohibit the distribution of a certain work of art and that is because of the pluralism on which the

constitutional protection of freedom of artistic creation is based<sup>27</sup>.

But the question remains if we can apply ‘community standard’ to artistic works at all?

The ‘*community standard*’ approach assumes that freedom to create and distribute works of art can be opposed by tastes and feelings of *average persons*. This assumption seems illogical because it implies that *average person* actually confront themselves with art (and when we say ‘art’ we do not mean pictures decorating pages of *The Sun*). In reality, according to the UK Department of Digital Culture Media and Sport<sup>28</sup>, in November 2017 only some 400,000 visitors exposed themselves to challenging nudity of Modigliani in Tate Modern and a similar number of imprudent innocent citizens visited British Museum to see e.g. politically stirring works of contemporary Arab artists. Both numbers include crowds of tourists (including the author). So, if we talk about *average person*, he does not normally bother himself with art. Consequently, art is unable to shock or disturb *average persons* since the latter simply do not see it.

Obviously, it is not only art specialists who visit art galleries, museums, theatres or independent cinemas (e.g. sometimes specialists invite some friends). So, *average persons* may happen to be accidentally exposed to the ‘wickedness’ of art. But if they are, are they really *average members of community*? Certainly not the *community* of those associating themselves with art, because in such a group the proportions of those sophisticated art consumers and *average persons* are inversed if compared to the whole society. It brings us to the conclusion that since *average*

<sup>25</sup> This approach was previously adopted in *Ontario (Attorney General) v. Langer* (1995), 123 D.L.R. (4th) 289 (Ont. Ct. (Gen. Div.)).

<sup>26</sup> See: footnote 10.

<sup>27</sup> Cit. ‘*Son las personas quienes han de decidir, libremente y sin imposición de las autoridades, si se detienen o no en la contemplación de lo expuesto. Por ende, no se puede válidamente prohibir o recortar la exposición, con el pretexto de proteger un supuesto interés de terceros a no ser ofendidos por el contenido de las obras. El pluralismo existente en nuestra sociedad, además reconocido y amparado por la Constitución, comporta un deber de tolerancia que les es exigible a quienes, ejerciendo su derecho a elegir libremente, rechazan una determinada exhibición. Ellos son libres de manifestar su inconformidad, pero sin impedir que el artista ejerza su derecho a la libre expresión y que el resto del público aprecie la obra.*’

<sup>28</sup> See: <https://www.gov.uk/government/statistical-data-sets/museums-and-galleries-monthly-visits>, uploaded 21<sup>st</sup> January 2018.

*members of society* are a minority in the group of those actually being up-to-date with contemporary art, the rationale for their protection seems particularly weak. If the US Supreme Court accepts in *Roth* that ‘average persons are not any particular class, but all those whom [art] is *likely* to reach’ we realise that *average person* means something different when it comes to consorting with art.

This problem was noticed by the ECtHR who seems to perceive art as elitist and niche experience, starting already from *Müller*<sup>29</sup> where the Court held (in § 36) that the disputed paintings

were painted on the spot – in accordance with the aims of the exhibition, which was meant to be spontaneous – and the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to – and sought to attract – the public at large.

The same view of the elitist nature of art was later expressed in *Karataş*<sup>30</sup>, *Alinak*<sup>31</sup> or *Lindon, Otchakovsky-Laurens and July*<sup>32</sup>, in each of them holding that artistic expressions ‘*appeal generally to a relatively narrow public*’, which must be reflected in the test of ‘necessity in a democratic society’. However, never did the ECtHR explicitly state that it applied a sort of *community standard test à rebours* – by which we mean that proportions of individuals less and more tolerant towards the challenging nature of art, its transgression and ever-changing character, are different in the group of those actually confronting themselves with art than in the society as a whole.

But there is another argument against juxtaposing FAE with assumed feelings and reactions of – *excusez le mot* – the common (citizens). We

<sup>29</sup> See: footnote 11.

<sup>30</sup> Judgment of the ECtHR of 8<sup>th</sup> July 1999, *Karataş v. Turkey*, app. no. 23168/94.

<sup>31</sup> Judgment of the ECtHR of 29<sup>th</sup> March 2005, *Alinak v. Turkey*, app. no. 40287/98.

<sup>32</sup> Judgment of the ECtHR of 22<sup>nd</sup> October 2007, *Lindon, Otchakovsky-Laurens and July v. France*, app. no. 21279/02 i 36448/02

proposed the definition of artistic expression, based on the case law from different jurisdictions, as a medium for expression of inseparable combination of conscious and unconscious processes occurring in the intimate sphere of the artist (expression of one’s personality and feelings he or she experienced). Therefore, another doubt must arise immediately: can something as intimate as art, by definition, be challenged by the reactions of *average persons*? Arguably, no one else but the artist (creator of work) him or herself can understand and explain the feelings (inseparable unconscious element of art) expressed by their work. Malevich said that his *Black square* was not just an empty square but ‘the experience of superfluous’<sup>33</sup>. And finally, if modern art is challenging *today* by proposing *tomorrow*, can we – at all – confront it with the perception of the *contemporary* general public? It does not seem plausible.

## Conclusions

Searching for definitions of *artistic expression* exposes a lawyer to criticism from those assuming that art, as an autopoietic system and a constantly transgressing phenomenon, does not subject itself to normative classifications. Nevertheless, certain judicial authorities – characteristically from jurisdictions attached to FAE – endeavor to develop their definitions. Although they do not engage in judicial dialogue, their propositions are quite similar in that they suggest that art is an inseparable combination of conscious and unconscious elements of manifestation of human personality in its most intimate dimension.

In cases concerning FAE references to *community standards* (or *community tolerance*) test are universally widespread reaching from Japan and Russia via Romania to the United States. This test is based on the assumed (perceived by a judge) reaction of *average person* to the work of art.

This approach can be criticized for three reasons. Firstly, the *average art consumer* is not always the same as *average person*. Art is very often an elitist and niche experience. Secondly, by its intimate

<sup>33</sup> K. Malevich [in:] R. Goldwater, M. Treves [eds.], *Artists on Art: from the 14th-20th centuries*, London 1972.

character, art cannot be juxtaposed with the perception of the common viewer because only the creator himself (if any) can understand fully the message (emotional burden) carried by the work of art. And thirdly, the transgressive nature of art which challenges the *status quo* makes it impossible to assess it by reference to the reactions of the *contemporary* general public.