

Freedom of Artistic Expression

Constitutional Lessons from Canada

I Introductory Remarks

Recent challenges to freedom of artistic expression in Hungary and Poland result in a growing need to refer to international and foreign case-law in order to make legal reasoning more profound and persuasive. While the Constitutional Court in Poland upheld the protection of ‘religious feelings’ as acceptable grounds for limiting freedom of expression¹ and the government of Hungary endorsed the media law, which apparently creates a threat to free speech,² lawyers from both states may learn from the Canadian constitutional experience. Although it is not immune to criticism regarding the protection of freedom of expression,³ the Canadian experience is indeed unique and grows in a specific soil, constituting the foundation of the Canadian constitutional system.⁴

Based on the Canadian Charter of Rights and Freedoms, the practice of the Canadian Supreme Court is inspiring; it includes some controversial cases, such as *R. v Butler*, *Little Sisters Book and Art Emporium v Canada*, *Sharpe*, *Zundel* and *Keegstra*. The Canadian constitutional case law is marked by a wise assumption that judicial practice must abstain from imposing ambiguous and moralising rules in law. As noted by Paul Kearns, ‘art’s freedom appears to be guarded most vigilantly not in the USA or in Strasbourg but, rather, in Canada’⁵.

This essay shall focus on exploring what constitutes ‘artistic expression’ in the view of the Canadian Supreme Court and what are the limits of exercising that freedom. The practice of

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¹ Judgment of the [Polish] Constitutional Tribunal of 6 October 2015 *on offence to religious feelings*, case SK 54/13.

² See: Mérték Media Monitor, ‘Hungarian Media Law’, Volume 1, Budapest 2015; see also: Venice Commission’s ‘Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19–20 June 2015); CDL-AD(2015)015.

³ See e.g. Jamie Cameron, Nathalie Des Rosiers, ‘The Right to Protest, Freedom of Expression, and Freedom of Association’ in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017, Oxford) 740–741.

⁴ See Ian Greene, *The Charter of Rights* (James Lorimer & Company Publishers 1989, Toronto) 8–17.

⁵ Paul Kearns, *Freedom of Artistic Expression. Essays on culture and legal censure* (Oxford University Press 2013, Oxford) 180.

Polish and Hungarian judiciary shall then be presented and assessed critically against this background.

As a starting point, one should note that the notion of artistic expression (although it is common ground in the jurisprudence that it enjoys a ‘privileged status’⁶) is normally employed in the case-law in a somewhat assumptive way – ambitions to define it are rare and tentative. In Farida Shaheed’s Report on *The right to freedom of artistic expression and creativity*,⁷ one reads that there is no intention to provide the definition of art. Commenting on Article 10 ECHR, Schabas confirms the protection of freedom of expression afforded by this provision; however, he abstains from defining the very concept.⁸ Nor did the US Supreme Court ever define the scope of protection guaranteed by the First Amendment to the creation and performance of art.⁹ It seems that the Canadian experience is quite inspiring in this respect.

II Canada

1 The Charter

The constitutional law of Canada is composed of written and unwritten documents, which reflects the traces of British constitutionalism.¹⁰ The Canadian Charter of Rights and Freedoms constitutes one of the elements of the Canadian constitutional law. Its Article 2 (b) reads that ‘everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication’. Article 1 constitutes a limitation clause, reading that ‘the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Unlike the constitutions of some other states (e.g. Austria, Bulgaria, Czech Republic, Germany, Hungary, Italy, Poland, Portugal, Romania, Russian Federation, Serbia, Spain, Sweden and Switzerland), the Canadian Charter does not include a specific provision dedicated to freedom of artistic expression.

⁶ See e.g. BVerfG, Beschluss des Ersten Senats vom 13. Juni 2007 – 1 BvR 1783/05 – Rn. (1–151), in § 62, ruling of the US Supreme Court of 7 June 1971, 403 U.S. 15 *Cohen v California* (No. 299), ruling of the US Supreme Court, *Bleistein v Donaldson Lithographing Co.*, 188 US 239, 251 (1903), ruling of I/A Court H.R., *Case of ‘The Last Temptation of Christ’ (Olmedo-Bustos et al.) v Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73, or judgment of the ECtHR of 20 September 1994, *Otto-Preminger-Institut przeciwko Austrii*, appl. No. 13470/87.

⁷ *Report of the 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: <http://www.cdc-ccd.org/IMG/pdf/The_right_to_freedom_of_artistic_expression_and_creativity.pdf>, in § I.4, accessed 19 November 2017.

⁸ William A. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press 2015, Oxford) 463–464.

⁹ Robert M. O’Neil, ‘Artistic Freedom and Academic Freedom’ (1990) 53 (3) *Law and Contemporary Problems* 178.

¹⁰ Oliver, Macklem, Des Rosiers (n 3) 1–2.

2 Case-law

a) *R. v Butler*¹¹

Mr. Donald Victor Butler was accused of possessing, exposing, selling and renting hard core pornographic material in his shop which was contrary to Section 163 of the Criminal Code. Section 163(8) of the *Code* provides that ‘any publication, a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of (...) crime, horror, cruelty and violence, shall be deemed to be obscene’. The court concluded that the material in question was protected by freedom of expression and that only those materials which contained scenes involving violence or cruelty intermingled with sexual activity or depicted lack of consent to sexual contact or otherwise could be said to dehumanise men or women in a sexual context were legitimately proscribed. The accused was therefore convicted on eight counts relating to eight films and acquittals were entered on the remaining charges. The Crown appealed the acquittals. The Court of Appeal, in a majority decision, allowed the appeal and entered convictions with respect to all the counts. The majority concluded that the materials in question fell outside the protection of the Charter, since they constituted purely physical activity and involved the undue exploitation of sex and the degradation of human sexuality.

The Supreme Court held¹² that ‘the portrayal of sex must then be viewed in context to determine whether undue exploitation of sex is the main object of the work or whether the portrayal of sex is essential to a wider artistic, literary or other similar purpose. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole’ and stressed that ‘*any doubt in this regard must be resolved in favour of freedom of expression*’. It further held that ‘the overriding objective of Section 163 (of the Criminal Code) is not moral disapprobation but the avoidance of harm to society, and this is a sufficiently pressing and substantial concern to warrant a restriction on freedom of expression’. According to the Supreme Court, ‘*materials which have scientific, artistic or literary merit are not caught by the provision*’. Judges L’Heureux-Dubé and Gonthier put in their concurring remarks that ‘the avoidance of harm to society is but one instance of a fundamental conception of morality. In order to warrant an override of Charter rights the moral claims must be grounded; they must involve concrete problems such as life, harm and well-being, and *not merely differences of opinion or taste*’.

¹¹ Ruling of the Supreme Court of Canada of 27 February 1992, *R. v Butler* [1993] 1 SCR 452. All short descriptions of cases of the Canada’s Supreme Court include direct quotations from the rulings.

¹² The appeal was successful i.e. the Supreme Court confirmed that obscenity laws violated constitutionally guaranteed freedom of expression.

b) *R. v Zundel*¹³

The accused was charged with spreading false news contrary to s. 181 of the Criminal Code, which provides that '[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment...'. Although the prohibition against distributing false news was considered a 'reasonable limit' to freedom of expression, the consequence of the decision was that Section 181 of the Criminal Code was struck down. The charge arose out of the accused's publication of a pamphlet entitled *Did Six Million Really Die?* The accused had added a preface and afterword to an original document, which had previously been published by others in the United States and England. The pamphlet, part of a genre of literature known as 'revisionist history', suggests, *inter alia*, that it has not been established that six million Jews were killed before and during World War II and that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy. Although the 'artistic merit' defence was not invoked in this case, the Supreme Court held *inter alia* that '*an artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's Satanic Verses, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet. Zundel was one of a series of the Supreme Court of Canada's cases concerning hate speech.*'¹⁴

c) *Aubry v Éditions Vice-Versa inc.*¹⁵

The respondent in this case brought an action in civil liability against the appellants, a photographer and the publisher of a magazine, for taking and publishing, in a magazine dedicated to the arts, a photograph showing the respondent, then aged 17, sitting on the steps of a building. The photograph, which was taken in a public place, was published without the respondent's consent.

The majority opinion in this case held that 'the right to respect for one's private life comes into conflict here with the right to freedom of expression protected by s. 3 of the Quebec Charter. *Freedom of expression includes freedom of artistic expression, and it is unnecessary to create special categories of expression.*'¹⁶

¹³ Ruling of the Supreme Court of Canada of 27 August 1992, *R. v Zundel*, [2] SCR 731.

¹⁴ See also rulings of the Supreme Court of Canada: of 13 December 1990, *R. v Keegstra*, [1990] 3 S.C.R. 697 (concerning anti-Semitic hate speech) or of 24 February 2005, *R. v Krymkowski*, [2005] 1 SCR 101, 2005 SCC 7, 249 DLR (4th) 28, 193 CCC (3d) 129, 26 CR (6th) 207, 195 OAC 341 (concerning anti-Roma hate speech).

¹⁵ Ruling of the Supreme Court of Canada of 9 April 1998, *Aubry v Éditions Vice-Versa inc.* [1998] 1 SCR 591.

¹⁶ The Supreme Court's decision was that although a photographer is entitled to take photographs in public places (catching also private individuals) he or she must nevertheless not publish the photograph without prior permission from the individual depicted in the photograph.

d) *Little Sisters Book*¹⁷

Since its establishment in 1983, Little Sisters has imported 80 to 90 percent of its erotica from the United States. For the last 15 years it has been a reluctant participant in a running battle with Canada Customs. Its foreign suppliers typically insisted on payment within 30 days, yet administrative delays at Customs frequently held up shipments until months after they were paid for, and then, not infrequently, materials were seized or ordered returned to sender. In the usual course, the appellants were given no reason for the seizure or return. Some of the suppliers refused to make further shipments. The bookstore carried a specialized inventory catering to the gay and lesbian community, which consisted largely of books that included gay and lesbian literature, travel information, general interest periodicals, academic studies related to homosexuality, AIDS/HIV safe-sex advisory material and gay and lesbian erotica. The Supreme Court stressed that ‘freedom of expression is *central to our identity* as individuals and to our collective well-being as a society. *Doubt about justification should be resolved in its favour*’.

e) *R. v Sharpe*¹⁸

The accused in this case was charged with two counts of possession of child pornography under Section 163.1(4) of the Criminal Code and two counts of possession of child pornography for the purposes of distribution or sale under Section 163.1(3). ‘Child pornography’, as defined in s. 163.1(1) of the *Code*, includes visual representations that show a person who is or is depicted as under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years. ‘Child pornography’ also includes visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under the Code. The accused challenged the constitutionality of legislation on child pornography invoking *inter alia* the ‘artistic merit’ defence. Section 163.1(6)¹⁹ provides a defence for a representation or written material that constitutes child pornography if it has ‘artistic merit’. Chief Justice McLachlin presented the reasoning (§§ 61–67) starting with the assumption that three issues must be addressed regarding the ambit of the ‘artistic merit’ defence, namely the meaning of this notion, the question whether artistic works must conform to ‘community standards’ in order to gain the protection of the defence and the procedure for considering the defence. The initial assumption of Mme Chief Justice was that the defence must be construed broadly. As for the first question she proposed that ‘*artistic merit*’ should be interpreted as including any expression that may reasonably be viewed as art since ‘it would be discriminatory and irrational to permit a good artist to escape criminality, while

¹⁷ Ruling of the Supreme Court of Canada of 15 December 2000, *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120.

¹⁸ Ruling of the Supreme Court of Canada of 26 January 2001, *R. v Sharpe*, [2001] 1 SCR 45.

¹⁹ The legislative framework applicable to child pornography was later amended – see: ruling of the Supreme Court of Canada of 20 October 2011, *R. v Kagibak*, 2011 SCC 48.

criminalising less fashionable, less able or less conventional artists.’ Having said that, Mme Chief Justice proposed that:

What may reasonably be viewed as art is admittedly a difficult question – one that philosophers have pondered through the ages. Although it is generally accepted that ‘art’ includes the production, according to aesthetic principles, of works of the imagination, imitation or design (New Shorter Oxford English Dictionary on Historical Principles [1993], vol. 1, p. 120), 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.

As for the second issue, namely the applicability of the so-called ‘community standard’ (i.e. whether the defence incorporates a community tolerance standard²⁰), Mme Chief Justice suggested that ‘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.’ Finally, as regards the third problem i.e. the procedure leading to application of the ‘artistic merit’ defence she proposed that ‘the accused raises the defence by pointing to facts capable of supporting it (generally something more than a bare assertion that the creator subjectively intended to create art), at which point the Crown must disprove the defence beyond a reasonable doubt.’

The Chief Justice provided in fact for a list of factors to be taken into consideration while assessing whether a given work constitutes ‘art’; however, she stressed that the catalogue is an open one. The factors primarily to be taken into account are:

- 1) intention of the creator,
- 2) the form and content of the work,
- 3) connections with artistic conventions, traditions and styles,
- 4) opinion of experts,
- 5) mode of production, display and distribution,
- 6) other factors – depending on the circumstances of the case.

This list seems to be one of few definitions of ‘art’ in universal case-law.²¹

²⁰ Some supreme or constitutional courts assume that freedom of artistic expression is essentially limited by community tolerance standards – see e.g. ruling of the Supreme Court of India of 14 May 2015 *Devidas Ramachandra Tuljapurkar v State of Maharashtra & Ors.*, Criminal Appeal No. 1179 of 2010; rulings of the US Supreme Court of 21st June 1973, *Kaplan v California*, 413 U.S. 115; ruling of the Constitutional Court of the Russian Federation of 23 October 2014 r. on the *constitutional complaint of Maria Alekhina*, case 2521-O/2014; ruling of the Constitutional Court of Romania of 2 November 1995, *Bala Istvan* case 108/1995.

²¹ Alongside the *landmark case* of the German Federal Constitutional Court *Mephisto*, BVerfG, Beschluß des Ersten Senats vom 24. Februar 1971, 1 BvR 435/68.

III Standard of the European Convention

The ECtHR assumes that artistic expression falls within the scope of Article 10, in that it affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create or distribute a work, for example of a literary nature, contribute to the exchange of ideas and opinions, which is essential for a democratic society. The restrictions on the freedom of artistic expression are perceived to be allowed only to a relatively limited extent since this form of expression ‘appeals generally to a relatively narrow public’.²² However, the ECtHR *has not managed so far to develop a consistent case-law defining the notion of ‘artistic expression’* or to define coherently the standard of interpretation of the limitation clause provided for in Article 10 § 2 ECHR in ‘artistic expression’ cases. Simply put, there is not a single case in which the ECtHR would propose a definition of ‘artistic expression’. The ECtHR failed to develop this standard in spite of the relative variety of cases including *Müller*,²³ *Otto-Preminger-Institut*,²⁴ *Karataş*,²⁵ *Alinak*,²⁶ *Vereinigung Bildender Künstler*,²⁷ *Nikowitz*,²⁸ *Kar*,²⁹ *Lindon, Otchakovsky-Laurens and July*,³⁰ *EON*,³¹ *Institut Ekonomichnykh Reform TOV*,³² *Ziemiński (No. 2)*,³³ *Sousa Goucha*,³⁴ *Alves da Silva*,³⁵ *Welsh and Silva Canha*³⁶ and *Leroy*.³⁷ The number of cases concerning freedom of artistic expression in Strasbourg, albeit growing, is still rather limited.³⁸ The Convention forms part of normative framework in both Hungary and Poland.

²² *Lindon, Otchakovsky-Laurens and July v France*, nos. 21279/02 and 36448/02, § 47, 22 October 2007.

²³ *Müller et al. v Switzerland*, no. 10737/84, 24 May 1988.

²⁴ *Otto-Preminger-Institut v Austria*, no. 13470/87, 20 September 1994.

²⁵ *Karataş v Turkey*, no. 23168/94, 8 July 1999.

²⁶ *Alinak v Turkey*, no. 40287/98, 29 March 2005.

²⁷ *Vereinigung Bildender Künstler v Austria*, no. 68354/01, 25 January 2007.

²⁸ *Nikowitz and Verlagsgruppe News GmbH v Austria*, no. 5266/03, 22 February 2007.

²⁹ *Kar et al. v Turkey*, no. 58756/00, 3 May 2007.

³⁰ *Lindon, Otchakovsky-Laurens and July v France*, nos. 21279/02 and 36448/02, 22 October 2007.

³¹ *EON v France*, no. 26118/10, 14 March 2013.

³² *Institut Ekonomichnykh Reform TOV v Ukraine*, no. 61561/08, 2 June 2016.

³³ *Ziemiński v Poland (nr 2)*, no. 1799/07, 5 July 2016.

³⁴ *Sousa Goucha v Portugal*, no. 70434/12, 22 March 2016.

³⁵ *Alves da Silva v Portugal*, no. 42665/07, 20 October 2009.

³⁶ *Welsh and Silva Canha v Portugal*, no. 16812/11, 17 September 2013.

³⁷ *Leroy v France*, no. 36109/03, 2 October 2008.

³⁸ See: Eleni Polymenopoulou, ‘Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights’ (2016) 16 (3) Human Rights Law Review 512.

IV Situation in Poland and Hungary

1 Normative Framework

Article 73 of the Polish Constitution provides that ‘freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone’. This provision does not contain a limitation clause; however, Article 31 (3) of the Constitution reads that ‘any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights’.

In Hungary, Article X (1) of the Fundamental Law of 2011 reads that ‘Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge, and the freedom of teaching within the framework determined by law’. Article I (3) provides for a limitation clause (‘a fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of that fundamental right’).

2 Interpretation

There was not a single decision of the Polish Constitutional Court concerning freedom of artistic expression. It is worth noting though that there are variety of statutory provisions challenging the constitutional freedom of artistic expression, such as Article 196 of the Penal Code, penalising conduct ‘offending religious feelings of others’³⁹, Article 18 (2) of the 1992 Broadcasting Act, reading that “programmes and other transmissions shall respect the religious convictions of viewers and listeners, especially the Christian system of values’ or Article 200b of the Penal Code penalising ‘public popularisation or approving of conduct of a paedophilic nature’ – which could easily be applied to some re-editions of ancient Greek works.

The case-law of Polish common courts is not well-developed as regards the freedom of artistic expression. The landmark case in this respect was the decision concerning the famous

³⁹ However, the Constitutional Court delivered one judgment concerning this provision but it was focused on the issue of compatibility of that provision with Article 54 of the Constitution protecting freedom of expression (in general). The Constitutional Court found the provision to be compatible with Article 54 of the Constitution (see judgment of the Constitutional Court of Poland of 6 October 2015, case SK 54/13). The proceedings were commenced by Ms Dorota Rabczewska, a Polish pop singer, who declared in a press interview that she was more persuaded by scientific research than by ‘something written by somebody who was boozed with wine and stoned on some weed’ and clarified that the latter were ‘those who had written all these incredible stories’ [namely the Holy Bible]. She was prosecuted and found guilty of offending religious feelings of Roman Catholics. Dorota Rabczewska filed an application with the ECtHR and it was notified to the Polish Government on 7 September 2017.

artist Ms Dorota Nieznalska, who was accused of offending the religious feelings of others⁴⁰ (Article 196 of the Penal Code) and finally acquitted after 7 years of lawsuit.⁴¹ The charges concerned the public exhibition of the work 'Passion' comprising a picture of male genitals integrated in a shape of a crucifix hanging on an iron chain and a video showing an elderly man working out in a gym.

The District Court for Gdańsk-South in Gdańsk found the defendant not guilty⁴² and held that the defendant had no intention (in the form of *dolus directus*) of offending religious feelings of others and therefore her conduct lay outside of the scope of application of Article 196 of the Penal Code.⁴³ The court did not however consider a more fundamental issue, namely whether the Penal Code's section 196 was actually consistent with the constitutionally guaranteed freedom of artistic expression especially, since it undoubtedly has, as a corollary, a chilling effect on the freedom of artistic expression.

Another artistic expression case in Poland which was both interesting and publicly debated concerned a civil dispute between Mr. Adam Darski, a famous black metal singer and Mr. Ryszard Nowak, a Catholic activist known for frequent notifications of crimes penalised by Article 196 of the Penal Code. Mr. Nowak gave an interview accusing Mr. Darski of committing the a crime of offending the religious feelings of others by publicly tearing-up the Holy Bible during a musical concert and calling it 'shit'. Mr. Darski felt defamed by Mr. Nowak's allegations and requested the court to order apologies in a newspaper and some minor amount of just satisfaction. The court dismissed the claims of Mr. Darski and ruled that

[...] one cannot assume that the illegality of the plaintiff's conduct was excluded by the fact that it was a part of an artistic activity and the concert was a 'closed' event dedicated to adult persons acquainted with this type of art and prepared for the controversial behaviour of the musical group's members, especially of its leader. Invoking the defence based on the so-called 'counter-type of art' cannot be effective due to the extremely offensive conduct of the plaintiff. The 'artistic expression' defence is not, in this case, sufficient to exclude the offensive character of the plaintiff's behaviour because of its form [...] It is accepted by the legal scholarship that artistic expression cannot be, without justified reasons, offensive to others, since it does not then contribute to any public debate.⁴⁴

⁴⁰ We deliberately do not employ the term 'blasphemy' as it concerns an act of insulting or showing contempt or lack of reverence to a certain deity, whereas Article 196 of the Penal Code protects the 'feelings' of others and not any deity as such.

⁴¹ To be precise, the defendant was initially found guilty but later the judgment was set aside by the appellate court and she was ultimately acquitted.

⁴² Judgment of the District Court for Gdańsk-South of 4th June 2009, case II K 290/05. See also A. Płoszka, 'Wolność artystyczna vs swoboda sumienia i wyznania. O sądowym wazeniu wartości konstytucyjnych na przykładzie sprawy Doroty Nieznalskiej' in D. Bychawska-Siniarska, D. Głowacka (eds), *Swoboda wypowiedzi w działalności artystycznej* (Helsinki Fundacja Praw Człowieka 2014, Warsaw) 113–124.

⁴³ Interestingly enough, three years later the Supreme Court adopted the resolution interpreting Article 196 of the Penal Code, in which it ruled that the crime penalised by Article 196 can be committed both in the form of *dolus directus* and in the form of *dolus eventualis* (resolution of the Supreme Court of 29 October 2012, case I KZP 12/12).

⁴⁴ Judgment of the Regional Court in Gdańsk of 22 December 2015, case I C 279/12.

,Once again the opportunity to actually define what is protected under the realm of Article 73 of the Constitution (the ‘artistic expression’ clause) was missed.

Hungarian scholars’ views and the case-law in Hungary seem to be similar to the Polish experience. According to Cseporán, the notion of ‘artistic creation’ referred to in Article X.1. of the Hungarian Fundamental Law is difficult to construe, since ‘art covers the subjective side of human creativity as it seeks to capture the *beauty*’⁴⁵. Koltay argues that artistic expression, although undoubtedly free, nevertheless does not require a specifically dedicated fundamental rights protection.⁴⁶ Török, to the contrary, argues that the distinction between freedom of expression *sensu largo* and freedom of artistic expression plays an important theoretical role⁴⁷.

As for the ECtHR case-law in Hungarian cases concerning freedom of artistic expression, the record seems to be limited to one case only, namely *Tatár and Fáber*⁴⁸. This case concerned the imposition of an administrative penalty for the abuse of the right to peaceful assembly by two Hungarian nationals who organised a ‘political performance’ close to the Parliament, during which they publically wore some dirty pieces of clothing (to ‘hang out the nation’s dirty laundry’) and answered some questions from journalists. The ECtHR ruled that ‘the imposition of an administrative sanction, however mild, on the authors of such expressions which qualify as artistic and political at the same time can have an undesirable chilling effect on public speech’ (§ 41).

V Conclusions

The Canadian case-law made the attempt to define the normative content of the term ‘artistic merit,’ which is essential to determine the boundaries of freedom of artistic expression. The definitional criteria or ‘artistic merit’ provided in *R. v Sharpe* seem to be very useful if one attempts to apply the constitutional clauses securing freedom of art. Let us assume for a moment that the Gdańsk District Court applied the *Sharpe* doctrine to the *Nieznalska* case.

It is undisputable that Ms Nieznalska, being a renowned visual artist and sculptor, had a subjective intention of creating art and expressing her sphere of personal feelings. The work in question was exhibited in an art gallery specialising in modern art (as a part of an exhibition entitled ‘New Works’). Before presenting the disputed work, Nieznalska created a number of works focused on the issues of, on one hand, spirituality and religion and, on the other hand, male domination, masculinity and machismo. The form and content of the disputed work, comprising a video and an installation, fall into the strand of visual arts. The word ‘passion’

⁴⁵ Cseporán Zsolt, ‘A művészet szabadságának mozgásteret az Alaptörvény keretei között’ (2014) 1 *Scriptura* 156.

⁴⁶ Koltay András, ‘A művészet szabadsága: a nem létező alapjog’, (2016) Pázmány Law Working Papers 4, 1–25.

⁴⁷ Török Bernát, ‘A közügyek vitájának körvonalai a véleményszabadság magyar doktrínájában’ in Koltay András, Török Bernát (eds), *Sajtószabadság és médiajog a 21. század elején* (Complex 2014, Budapest) 440–445.

⁴⁸ *Tatár and Fáber v Hungary*, nos. 26005/08 and 26160/08, 12 June 2012.

in the Polish language has two meanings: it refers to a certain affection, inclination or predilection, but also to the Passion of Jesus Christ. The interconnections and interfusions between the spheres of *sacrum* and *profanum* are traditionally addressed by artists. One should stress that not only was Ms Nieznalska present in the art gallery during the display of her installation but she was also – somewhat unusually – explaining the significance of the work to the public. According to experts on visual arts, the work had a significant artistic value, provoking discussions on the romanticising of the symbols of masculinity,⁴⁹ the sanctification of the temples of consumerism⁵⁰ and the feminist approach to the oppressive impact of culture on femininity.⁵¹

Viewed through the lenses of the *Sharpe* doctrine of *artistic merit defence*, the work of Dorota Nieznalska perfectly fitted what one should view as ‘art’. Harnessing the *Sharpe* criteria leads to a much more convincing and persuasive outcome than the reasoning of the Polish courts, which concentrated on the issue of whether the artist had the intention of offending the religious feelings of others.

⁴⁹ Piotr Piotrowski, *Sztuka według polityki: od Melancholii do Pasji* (Universitas 2007, Cracow) 234.

⁵⁰ Izabela Kowalczyk, *Matki-Polki, Chłopcy i Cyborgi...: sztuka i feminizm w Polsce* (Galeria Miejska Arsenal 2010, Poznań) 124.

⁵¹ See M. Romanska, ‘The Anatomy of Blasphemy: Passion and the Trial of Dorota Nieznalska’ (2007) 51 (2) *The Drama Review* 179.