

Ronan Ó Fathaigh* and Dirk Voorhoof**

Article 10 ECHR and Expressive Conduct

In:

Communications Law, The Journal of Computer, Media en Telecommunications Law

2019/2, Vol 24, 62-73 (Bloomsbury Professional, Oxford)

Introduction

In early 2018, Judge Ganna Yudkivska, President of the Fourth Section of the European Court of Human Rights, and judge elected in respect of Ukraine, joined a respectful, but strongly-worded dissenting opinion, criticising the majority's judgment in *Sinkova v Ukraine*.¹ The Court in *Sinkova*, by a majority of four votes to three, found that an activist's conviction, including a suspended three-year prison sentence, for staging a performance-art protest at a war memorial in central Kiev, did not violate the activist's freedom of expression under Article 10 of the European Convention on Human Rights.² The dissenting opinion ominously warned that

* Human Rights Centre, Ghent University; and Institute for Information Law, University of Amsterdam.

** Human Rights Centre, Ghent University; and Legal Human Academy.

¹ *Sinkova v Ukraine* (App no 39496) 27 February 2018.

² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 ('ECHR'). For a general introduction on the Court's case law on Article 10 ECHR, see Dirk Voorhoof, 'Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges,' Peter Molnár (ed.), *Free Speech and Censorship Around the Globe* (Central European University Press 2015), 59-104. For an authoritative analysis of the European Court's case law on the right to protest, see David Mead, *The New Law of Peaceful Protest* (Hart Publishing 2010); see also, Yaaser Vanderman, 'The Right

the majority's judgment gave rise to a 'real risk of eroding the right of individuals to voice their opinions and protest through peaceful, albeit controversial, means', pointing to 'inconsistency' with the Court's case law, and a disregard for the principle that criminal penalties are likely to have a 'chilling effect on satirical forms of expression relating to topical issues'.³

The finding of no violation of Article 10 by the *Sinkova* majority does indeed stand out, given that in the subsequent 12 months alone, the Court has delivered a series of judgments finding violations of Article 10 over convictions for engaging in expressive conduct, including: activists burning an effigy of the Spanish King,⁴ Pussy Riot performing from the altar of a Moscow cathedral,⁵ and an activist erecting large wooden genitalia outside a prosecutor's office.⁶ The purpose of this article is to discuss the Court's recent case law on expressive conduct under Article 10, and in particular to assess in what circumstances, if any, domestic courts may impose prison sentences, even if suspended, on activists engaging in peaceful, but provocative and offensive expression.

Mead has noted that historically, the European Court only afforded 'limited protection' to 'direct action or any form of protest that causes more than merely incidental obstruction'.⁷

to Protest and Direct Action' (2017) *Judicial Review* 338; and David Mead, 'A Seven (or so) Year Hitch: How has the Coalition's Pledge to Restore the Right to Non-Violent Protest Fared?' (2018) 29 *King's Law Journal* 242.

³ *Sinkova*, supra n 1 (Joint partly dissenting opinion of Judges Yudkivska, Motoc and Paczolay).

⁴ *Stern Taulats and Roura Capellera v Spain* (App nos 51168/15 and 51186/15) 13 March 2018.

⁵ *Mariya Alekhina and Others v Russia* (App no 38004/14) 17 July 2018. For a discussion of the domestic court trial, and a life-history interview with one of the applicants, see Alexander Kondakov, 'The Feminist Citizen-Subject: It's not About Choice, It's About Changing It All' (2017) 25 *Feminist Legal Studies* 47. See also Sofia Galani, 'Case Comment: Pussy Riot' (2018) *European Human Rights Law Review* 625.

⁶ *Mătăsaru v the Republic of Moldova* (App no 69714/16 and 71685/16) 15 January 2019.

⁷ David Mead, *The New Law of Peaceful Protest* (Hart Publishing 2010), 61. See, for example, *Chorherr v. Austria* (App no 13308/97) 25 August 1993 (no violation of Article 10 where applicant was arrested for wearing a rucksack

Similarly, the international human rights organisation Article 19 has also noted that the international and regional jurisprudence on peaceful direct action is ‘limited’.⁸ And yet, we live in an ‘age of protest’,⁹ and as Clooney and Webb have commented, many governments are using public order laws, such as hooliganism laws, to criminalise expression ‘that is insulting to the ruling authorities’.¹⁰ Indeed, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association recently reported that in several European countries, there is ‘politically motivated repression of activists’,¹¹ ‘repression of peaceful protestors in the context of occupation’,¹² and the use of ‘public order laws to suppress freedom of peaceful assembly’.¹³ This was also echoed in the 2019 report of the UN Special Rapporteur on freedom of religion

which hoisted a large banner half a meter above his head, reading ‘Austria does not need interceptor fighter planes’, at an official military ceremony). More recently, the Court has been taking a contrast approach: see, for example, *Açik v Turkey* (Appl.no. 31451/03) 13 January 2009 (violation of Article 10 where students were arrested for shouting slogans and raising banners at the opening ceremony of Istanbul University).

⁸ Article 19, *The Right to Protest Principles: Background Paper* (2016), 20 <<https://www.article19.org/data/files/medialibrary/38581/Protest-Background-paper-Final-April-2016.pdf>>

⁹ *Ibid*, 4.

¹⁰ Amal Clooney and Philippa Webb, ‘The Right to Insult in International Law’ (2017) 48 *Columbia Human Rights Law Review* 1, 10.

¹¹ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/38/34, 26 July 2018, [53] < <http://undocs.org/A/HRC/38/34>>. See also, Maina Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, *The right to freedom of peaceful assembly* (2017) <http://freeassembly.net/wp-content/uploads/2018/01/FOAA-Online-The-Right-to-Freedom-of-Peaceful-Assembly-update-Nov-2017.pdf>.

¹² *Ibid*, [43].

¹³ *Ibid*, [20].

or belief, that public order laws were being used to ‘restrict the freedom to express views deemed offensive to religious or belief communities’.¹⁴

In contrast, there has been considerable case law and scholarship in the US on expressive conduct under the First Amendment,¹⁵ where the Supreme Court has recognised a ‘wide array of conduct that can qualify as expressive’, including burning the American flag, wearing a military uniform, wearing a black armband, conducting a silent sit-in, and refusing to salute the American flag.¹⁶ In the case of *Snyder v Phelps et al*, the Supreme Court found that peaceful picketing near a military funeral with signs strongly opposing homosexuality was protected under the First Amendment, although the conduct of the protesters and the content of their signs was considered as being hurtful, outrageous and inflicting emotional distress amongst the participants of the funeral and the family of the deceased soldier.¹⁷ The Supreme Court reiterated that ‘[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and - as it did here - inflict great pain’, but ‘[a]s a Nation we have chosen

¹⁴ Report of the Special Rapporteur on freedom of religion or belief, A/HRC/40/58, 5 March 2019, [4] <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_58.docx>.

¹⁵ See, eg, Chris Chung, ‘Baking a Cake: How to Draw the Line between Protected Expressive Conduct and Something You Do’ (2018) 32 *Notre Dame Journal of Law, Ethics & Public Policy* 377; Daniel J. Hay, ‘Baptizing O’Brien: Towards Intermediate Protection of Religiously Motivated Expressive Conduct’ (2015) 68 *Vanderbilt Law Review* 177; Kristie LaSalle, ‘The Other 99% of the Expressive Conduct Doctrine: The Occupy Wall Street Movement and the Importance of Recognizing the Contribution of Conduct to Speech’ (2012) *Texas Journal on Civil Liberties & Civil Rights* 1.

¹⁶ See *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Commission*, 584 US ____ (2018) (Thomas J, concurring, 4), and the case law cited therein.

¹⁷ *Snyder v. Phelps et al*, 562 US 443 (2011).

a different course - to protect even hurtful speech on public issues to ensure that we do not stifle public debate'.¹⁸

This article will analyse how the European Court of Human Rights, has recently¹⁹ been confronting similar issues, and how it is developing its expressive conduct jurisprudence under the right to freedom of expression as guaranteed by Article 10 ECHR.

Division within the Court's Fourth Section: *Sinkova v Ukraine*

We begin our discussion of expressive conduct with the Fourth Section's judgment in *Sinkova*,²⁰ which involved Anna Olegovna Sinkova, who was a member of the Kiev-based artistic group St. Luke Brotherhood.²¹ In December 2010, Sinkova and three other group members decided to protest 'against wasteful use of natural gas by the State while turning a blind eye to poor living standards of veterans',²² and staged an artistic performance at a war memorial in central Kyiv. The performance involved Sinkova frying eggs over the Eternal Flame at the Tomb of the Unknown Soldier, and a member of the group filmed the

¹⁸ Ibid, 459-460.

¹⁹ This analysis focusses on some recent judgments. Compare also with *Fratanoló v Hungary* (App no 29459/10) 3 November 2011; *Fáber v. Hungary* (App no 40721/08) 24 July 2012; and *Schwabe and MG v Germany* (App nos 8080/08 and 8577/08) 1 December 2011.

²⁰ Under Rule 25 of the Rules of Court, the Court is divided into five Sections (see Registry of the Court, *Rules of Court*, 1 August 2018 < www.echr.coe.int/Documents/Rules_Court_ENG.pdf>).

²¹ See Ronan Ó Fathaigh and Dirk Voorhoof, 'Conviction for performance-art protest at war memorial did not violate Article 10', *Strasbourg Observers*, 19 March 2018 < [conviction-for-performance-art-protest-at-war-memorial-did-not-violate-article-10](http://www.strasbourg-observers.com/articles/view/conviction-for-performance-art-protest-at-war-memorial-did-not-violate-article-10)>.

²² *Sinkova*, supra n 1, [87].

performance. Two police officers had approached the group and remarked that their behaviour was ‘inappropriate’, but they made no further interference.²³

Sinkova posted the video of her performance online as an act of protest, with the commentary that ‘precious natural gas has been being burned, pointlessly, at the Glory Memorial in Kyiv for fifty-three years now. This pleasure costs taxpayers about 300,000 hryvnias per month’.²⁴ Following the video’s publication, a number of complaints were made to the police. In late March 2011, Sinkova was arrested, and charged with ‘desecration of the Tomb of the Unknown Soldier’, which is an offence under Article 297 of Ukraine’s Criminal Code.²⁵ The District Court granted a request for Sinkova’s pre-trial detention, as she was accused of a ‘serious offence punishable by imprisonment from three to five years’.²⁶

Following three months in pre-trial detention, Sinkova was convicted of the offence. The District Court held that Sinkova’s argument that her performance had not been meant to desecrate the tomb ‘had no impact on the legal classification of her actions’, and the ‘deliberate acts’ showed ‘disrespect for the burial place of the Unknown Soldier’.²⁷ The District Court imposed a three-year prison sentence, which was suspended for two years. The conviction was upheld on appeal, with the Kyiv City Court of Appeal rejecting Sinkova’s argument that there had been a violation of her right to freedom of expression, ruling that her conviction was ‘in accordance with the law and pursued a legitimate aim’.²⁸

²³ Ibid, [7].

²⁴ Ibid.

²⁵ Ibid, [44].

²⁶ Ibid, [24].

²⁷ Ibid, [33].

²⁸ Ibid, [39].

Sinkova subsequently made an application to the European Court, claiming her pre-trial detention had violated her right to liberty under Article 5, and her conviction had violated her right to freedom of expression under Article 10 ECHR. On Article 5, the Fourth Section unanimously found three separate violations concerning her pre-trial detention.²⁹ However, on Article 10, the Fourth Section, divided four votes to three, finding that there had been no violation of Sinkova's freedom of expression.

The majority judgment noted that the interference with Sinkova's Article 10 right to freedom of expression was based on the sufficiently precise criminal code provision on 'desecration', and that the conviction pursued the legitimate aim of 'protecting morals and the rights of others'.³⁰ The main question was whether the conviction had been necessary in a democratic society. The majority held that Sinkova was prosecuted and convicted 'only' on account of frying eggs over the Eternal Flame.³¹ The majority pointed out that she had not been charged over the video, nor the content of the 'rather sarcastic and provocative text' in the video.³² Thus, the applicant was not convicted for 'expressing the views that she did', but rather her conviction 'was a narrow one in respect of particular conduct in a particular place', and based on a 'general prohibition of contempt for the Tomb of the Unknown Soldier forming part of ordinary criminal law'.³³

Although the Court admitted that the domestic courts 'paid little attention to the applicant's stated motives given their irrelevance for the legal classification of her actions', it noted that the courts 'did take into account the applicant's individual circumstances in deciding

²⁹ Ibid, [67].

³⁰ Ibid, [102]-[103].

³¹ Ibid, [107].

³² Ibid.

³³ Ibid, [108], citing *Maguire v UK* (App no 58060) 3 March 2015 (Admissibility decision).

on her sentence’.³⁴ The majority rejected Sinkova’s argument that her conduct could not be reasonably interpreted as contemptuous towards those the memorial honoured, with the Court noting that ‘eternal flames are a long-standing tradition in many cultures and religions most often aimed at commemorating a person or event of national significance’.³⁵ The majority held that there were many ‘suitable’ opportunities for Sinkova to express her views, or participate in ‘genuine’ protests, without breaking the criminal law, and without ‘insulting the memory of soldiers who perished and the feelings of veterans’.³⁶

Finally, the majority examined the nature and severity of the penalty, and noted the conclusion in *Murat Vural v Turkey*, that ‘peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence’.³⁷ However, the majority observed that in contrast to *Murat Vural*, where the applicant was imprisoned for over 13 years, Sinkova was ‘given a suspended sentence and did not serve a single day of it’.³⁸ The majority thus held there had been no violation of Article 10.

Notably, three judges dissented. The dissent found a violation of Article 10, including the domestic courts’ failure to address the ‘purpose of the applicant’s performance’, and the disregard of the performance’s satirical nature.³⁹ The dissent also referred to the established principle in the Court’s case law that freedom of expression ‘is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that ‘offend, shock or disturb the State or any sector of the

³⁴ Ibid, [109].

³⁵ Ibid, [110].

³⁶ Ibid.

³⁷ Ibid, [111], citing *Murat Vural v Turkey* (App no 9540/07) 21 October 2014, [66].

³⁸ Ibid.

³⁹ Ibid, Joint partly dissenting opinion of Judges Yudkivska, Motoc and Paczolay.

population'.⁴⁰ Further, the dissent noted an 'inconsistency' in the majority's position and the Court's prior case law that a suspended prison sentence is 'likely to have a chilling effect on satirical forms of expression'.⁴¹ Given 'the lack of adequate assessment by the national authorities of the applicant's performance from the standpoint of Article 10 of the Convention', and the 'complete disregard of its satirical nature', in addition to the 'disproportionate nature of the sentence', the dissenting judges found that Article 10 was violated in the present case.⁴²

It must be reiterated at the outset that the Fourth Section unanimously found three separate violations of Article 5 over Sinkova's three-month detention before trial. However, this should not take away from the serious questions that arguably lie over the majority's conclusion that the prosecution, conviction and sentence did not violate Article 10. The first point concerns the majority's finding that Sinkova 'was not convicted for expressing the views that she did', nor for the 'distribution by her of the respective video', but was convicted 'only' on account of frying eggs over the memorial flame.⁴³ However, this idea of completely stripping the performance of all meaning and context does not seem consistent with the Court's case law. On this point, and most curiously, the majority fails to apply, or even cite, the unanimous 2012 judgment in *Tatár and Fáber v Hungary*, which is arguably directly relevant, and similarly concerned a 'provocative performance'.⁴⁴

In *Tatár and Fáber*, two protestors had been prosecuted for a regulatory offence for hanging dirty laundry on the fence of the Hungarian parliament, as a protest 'to hang out the

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid, [107].

⁴⁴ *Tatár and Fáber v Hungary* (App nos 26005/08 and 26160/08) 12 June 2012, [7].

nation's dirty laundry'.⁴⁵ Notably, the Court in *Tatár and Fábér* rejected the government's argument that the protestors had 'not been' sanctioned for 'expressing their political views',⁴⁶ but only for 'failure to respect' a notification rule.⁴⁷ The Court held that the performance was a form of 'artistic and political expression'.⁴⁸ Restrictions on such speech are subject to the Court's highest scrutiny, and must be 'convincingly established'.⁴⁹ Similar to the protest in *Sinkova*, the Court in *Tatár and Fábér* found it crucial that the 'political performance' in question was 'intended to send a message through the media'.⁵⁰ The Court unanimously found a violation of Article 10, concluding that even an administrative sanction, 'however mild', on the authors of such artistic and political expressions, can have 'an undesirable chilling effect on public speech'.⁵¹

It is difficult to see how the *Sinkova* majority's findings square with *Tatár and Fábér*, given that the performance was similarly *artistic and political* expression, concerned a matter of public interest, with the performance filmed *to send a message* through online media. Rather than apply *Tatár and Fábér*, and other relevant judgments,⁵² the *Sinkova* majority curiously

⁴⁵ Ibid, [6].

⁴⁶ Ibid, [23].

⁴⁷ Ibid, [27].

⁴⁸ Ibid, [41].

⁴⁹ Ibid, [33].

⁵⁰ Ibid, [39].

⁵¹ Ibid, [41].

⁵² See also, *Shvydka v Ukraine* (App no 17888/12) 30 October 2014; *Navalnyy and Yashin v Russia* (App no 76204/11) 4 December 2014; and *Novikova and others v Russia* (App nos 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13) 26 April 2016. See also, Daniel Simons and Dirk Voorhoof, 'One man banned: Russia's treatment of solo protests scrutinized in *Novikova v. Russia*', *Strasbourg Observers*, 9 May 2016

relied upon a single admissibility decision, namely *Maguire v UK*, as its sole authority.⁵³ However, it is quite difficult to see how the decision in *Maguire* is applicable, given that its facts are arguably so far removed from *Sinkova*, concerning an arrest for displaying the initials of a terrorist organisation on a sweater at a football match prone to ‘sectarian violence’.⁵⁴ Crucially, the Court in *Maguire* accepted that the sweater was likely ‘to give rise to a substantial risk of violence’,⁵⁵ and the purpose of the prosecution was the ‘prevention of disorder and crime’.⁵⁶ In contrast, there was no risk of public disorder in *Sinkova*, the police officers had not considered it necessary to interfere with the protest beyond a ‘remark’,⁵⁷ and the purpose of the prosecution had been the ‘protecting morals and the rights of others’.⁵⁸

The second point relates to the majority’s finding that it was acceptable under Article 10 that ‘the domestic courts paid little attention to the applicant’s stated motives given their irrelevance for the legal classification of her actions’.⁵⁹ However, it is highly questionable that such disregard for *Sinkova*’s intention is consistent with the Court’s case law. Indeed, on several occasions when finding a violation of Article 10, the Court explicitly took into

<https://strasbourgobservers.com/2016/05/09/one-man-banned-russias-treatment-of-solo-protests-scrutinised-in-novikova-v-russia>>.

⁵³ *Maguire*, supra n 33.

⁵⁴ *Ibid*, [47].

⁵⁵ *Ibid*, [53].

⁵⁶ *Ibid*, [47].

⁵⁷ *Sinkova*, supra n 1, [7].

⁵⁸ *Sinkova*, supra n 1, [103].

⁵⁹ *Sinkova*, supra n 1, [109].

consideration the intention of the applicant, rather than the mere fact of the criminal offence.⁶⁰ Thus, in *Tatár and Fábér* the Court took into account that the political performance ‘was intended to send a message’.⁶¹ The Court was even more explicit in *Murat Vural v Turkey*, holding that ‘in light of its case-law’, assessment ‘*must* be made’ of the ‘purpose or the intention of the person performing the act or carrying out the conduct in question’.⁶²

Further, the majority’s framing of the issue that Sinkova broke ‘the criminal law’, leads in a problematic way to the justification of the interference with her freedom of expression rights under Article 10. In *Tatár and Fábér*, the Court reiterated that the performance’s ‘classification in national law has only relative value and constitutes no more than a starting-point’.⁶³ It is indeed up to the government to ‘convincingly establish’ the necessity for interfering with freedom of expression, and not simply point to a law, with the scrutiny ending there. The Court needs to assess the legitimate aim behind the prosecution, which in *Sinkova* was ‘protecting morals’, and more particularly, protecting against ‘insulting the memory of soldiers’ and the ‘feelings of veterans’.⁶⁴ However, it is highly questionable that the aim of protecting the memory of soldiers from insult, and the feelings of veterans, outweighs Sinkova’s freedom of expression, given that it (a) was a ‘political and artistic performance’, subject to the highest protection of Article 10, (b) concerned a matter of public interest (‘wasteful use of natural gas’ and ‘poor living standards of veterans’),⁶⁵ (c) did not involve

⁶⁰ See, for example, *Thorgeir Thorgeirson v Iceland* (App no 13778/88) 25 June 1992; *Jersild v Denmark* (App no 15890/89) 23 September 1994; *Morice v France* [GC] (App no 29369/10) 23 April 2015); and *Perinçek v Switzerland* [GC] (App no 27510/08) 15 October 2016.

⁶¹ *Supra* n 50.

⁶² *Murat Vural*, *supra* n 37, [54] (emphasis added).

⁶³ *Tatár and Fábér*, *supra* n 44, [38]

⁶⁴ *Supra* n 22.

⁶⁵ *Sinkova*, *supra* n 1, [107]

violence, and (d) had no intention to insult or hurt. On this latter point, the Grand Chamber in *Perinçek v Switzerland*, concerning insult to the memory of Armenians, held that the applicant ‘did not express contempt or hatred for the victims’, and did not use ‘abusive terms’.⁶⁶ In other cases, such as *Alekseyev v Russia*, and *Sergey Kuznetsov v Russia*, the Court found that any measures interfering with the freedom of assembly and expression ‘other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words may appear to the authorities - do a disservice to democracy and often even endanger it’.⁶⁷

Another point of concern relates to the majority’s holding that ‘there were many suitable opportunities for the applicant to express her views or participate in genuine protests’, without ‘breaking the criminal law’, and ‘insulting the memory of soldiers’ and ‘feelings of veterans’.⁶⁸ However, this approach arguably turns the logic of Article 10 upside down and reverses the burden of proof: it is not up to the individual to show that breaching the law was necessary, it is up to the State to justify that applying the criminal law was necessary in a democratic society. Considering that there were other means of expression available is no valid argument to end Article 10 scrutiny. As a matter of fact, there are always other forms or channels available to express an opinion or formulate a criticism. No authority was offered for this limiting principle by the *Sinkova* majority, and arguably offends the Court’s seminal

⁶⁶ *Perinçek*, supra n 46, [233]. See also Agata Fijalkowski, ‘The Criminalisation of Symbols of the Past: Expression, Law and Memory’ (2014) 10 *International Journal of Law in Context* 295, 301 (discussing how the Court in *Vajnai v Hungary* (App no 33629/06) 8 July 2008, concerning a prosecution for having worn a red star, recognised the ‘feelings of past victims and their families’, but ‘did not feel this was enough to justify such a limitation on expression’).

⁶⁷ *Alekseyev v Russia* (App nos 4916/07, 25924/08 and 14599/09) 21 October 2010, [80]; and *Sergey Kuznetsov v Russia* (App no 10877/04) 23 October 2008, [45].

⁶⁸ *Supra* n 36.

principle that Article 10 protects ‘not only the substance of the ideas and information expressed but also the form in which they were conveyed’.⁶⁹ Indeed, in *Women on Waves and Others v Portugal*, the Court held that for ‘symbolic protests’, the ‘mode of dissemination’ is of ‘such importance’ that restrictions may ‘substantially affect the substance of the ideas and information in question’.⁷⁰

Finally, the majority distinguish the principle from *Murat Vural* that ‘peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence’, because the applicant in *Sinkova* was only given a suspended sentence and ‘did not serve a single day of it’.⁷¹ However, *Murat Vural* was only applying an earlier principle, which had been established in two earlier cases of *Pekaslan and Others v Turkey*, and *Yılmaz Yıldız and Others v Turkey*, where it was held that a peaceful demonstration should not, in principle, be made subject to the threat of a ‘penal sanction’.⁷² Notably, in *Pekaslan* the protestors were prosecuted, and ‘subsequently acquitted’,⁷³ while in *Yılmaz Yıldız* the protestors only received ‘administrative fines’.⁷⁴ Moreover, in *Akgöl and Göl v Turkey*, the Court found that a suspended 15-month prison sentence violated Article 10, as a peaceful demonstration should not, in principle, be made subject to the threat of a ‘penal sanction’.⁷⁵ Thus, on the basis of *Pekaslan*, *Yılmaz Yıldız*, and *Akgöl and Göl*, it is difficult to see how the suspended three-year prison sentence in *Sinkova* is consistent with Article 10. Finally, the majority seems to completely

⁶⁹ *Murat Vural*, supra n 37, [44].

⁷⁰ *Women on Waves and Others v Portugal* (App no 31276/05) 3 February 2009, [39].

⁷¹ *Sinkova*, supra n 1, [111].

⁷² *Pekaslan and Others v Turkey* (App nos 4572/06 and 5684/06) 20 March 2012, [81]; and *Yılmaz Yıldız and Others v Turkey* (App no 4524/06) 14 October 2014, [46].

⁷³ *Pekaslan*, supra n 72, [81].

⁷⁴ *Yılmaz Yıldız*, supra n 72, [46].

⁷⁵ *Akgöl and Göl v Turkey* (App nos 28495/06 and 28516/06) 17 May 2011, [43].

neglect the fact the Sinkova spent three months in pre-trial detention, while in *Taranenko v Russia*, the Court, in considering a suspended three-year prison sentence, also took into account the ‘period of detention pending trial’ in finding a violation of Article 10.⁷⁶ The emphasis by the majority that Sinkova ‘did not serve a single day’ of the suspended prison sentence, disregards the fact that she spent effectively three months in prison.

Third Section takes a different path on expressive conduct

Two weeks after *Sinkova*, a different Section of the Court, the Third Section, delivered its own judgment on expressive conduct, and took a markedly different approach. The case was *Stern Taulats and Roura Capellera v Spain*,⁷⁷ and arose when the two applicants set fire to a large photograph of the Spanish royal couple, turned upside down, in Girona’s public square on the occasion of the Spanish King’s visit to the city in September 2007. The applicants were subsequently prosecuted under Article 490 of Spain’s Criminal Code for ‘insulting the Crown’.⁷⁸ Nearly a year later, the applicants were convicted, and each received a 15-month prison sentence, which were conditionally suspended on payment of 2,700-euro fines. The convictions were upheld by Spain’s Constitutional Court, finding that the ‘symbolic act’ was not covered by freedom of expression, and burning a person’s photograph in such a manner, ‘entails incitement to violence against the person and the institution he or she represents, encourages feelings of aggression against the person and expresses a threat’.⁷⁹

⁷⁶ *Taranenko v Russia* (App no 19554/05) 15 May 2014, [95].

⁷⁷ *Stern Taulats*, supra n 4.

⁷⁸ *Ibid*, [6].

⁷⁹ *Ibid*, [14].

The applicants made an application to the European Court over their convictions, and in March 2018, the Court's Third Section unanimously found a violation of Article 10. The Court rejected the domestic courts' view that the act was not covered by freedom of expression, with the Court instead holding that the 'staged event' was a form of political expression fully protected by Article 10, consisting of 'symbolic expression' on a matter of public interest, namely the institution of the monarchy.⁸⁰ The Court reiterated that there is 'little scope' under Article 10 for restrictions on such political expression, and any restriction must be 'established convincingly'.⁸¹ The Court noted that the act was a 'provocative' event, staged to attract media attention, and 'merely used a certain permissible degree of provocation' to 'transmit a critical message' in the context of freedom of expression.⁸²

The Court reviewed the domestic courts' reasoning, with the Court unanimously rejecting the domestic courts' view that the expressive conduct could be regarded as incitement to hatred or violence. The Court emphasised that there was no evidence of violent conduct or disturbances to public order,⁸³ there had been no intention on the part of the applicants to incite anyone to commit acts of violence against the King, and it was 'clear and obvious' that the conduct was 'symbolic expression of dissatisfaction and protest' on a matter of public interest.⁸⁴ Finally, the Court examined the criminal penalty imposed, noting that it consisted of the 'imposition of a term of imprisonment to be enforced in the event of non-payment of the fine'.⁸⁵ The Court applied the principle that prison sentences for an 'offence in the area of

⁸⁰ Ibid, [36].

⁸¹ Ibid, [32].

⁸² Ibid, [38].

⁸³ Ibid, [40].

⁸⁴ Ibid, [39].

⁸⁵ Ibid, [42].

political speech’ will be compatible with Article 10 only in ‘exceptional circumstances’, such as for hate speech or incitement to violence.⁸⁶ But no such circumstances existed here, and the Court unanimously held that interference with freedom of expression was not ‘necessary in a democratic society’, and therefore in violation of Article 10.⁸⁷

Thus, in contrast to *Sinkova*, the Third Section in *Stern Taulats* took into account (a) the purpose of the expressive conduct, classifying it as political expression on a matter of public interest, and subject to the Court’s highest standard of scrutiny; (b) the applicants’ intention not to provoke violence or hatred; and (c) its staging to attract media attention and transmit a message. The Third Section also paid little heed to the prison sentence being suspended, and applied the Court’s case law that prison sentences, even if suspended, are rarely justifiable for political expression. Crucially, the Third Section nowhere mentioned, nor even cited, the *Sinkova* judgment.

At this point, it must be noted that the applicant in *Sinkova* had requested that the case be referred to the Court’s 17-judge Grand Chamber; and given the dissenting opinion’s warning, the request was supported by over 22 organisations involved in free expression and peaceful assembly.⁸⁸ However, a five-judge Panel of the Grand Chamber rejected the request in early July 2018.⁸⁹ But this was not the end of the story, as two weeks later in mid-July 2018, the Third Section would again deliver another judgment on expressive conduct, involving the internationally-known protest group Pussy Riot.

⁸⁶ Ibid, [34], citing *Otegi Mondragon v Spain* (App no 2034/07) 15 March 2011, [60].

⁸⁷ Ibid, [42].

⁸⁸ See Dirk Voorhoof, ‘Support for performing artist in *Sinkova v. Ukraine*’, *Legal Human Academy*, 14 June 2018 <<http://legalhumanacademy.org/support-for-performing-artist-in-sinkova-v-ukraine/>>.

⁸⁹ Grand Chamber Panel’s decisions - July 2018 (2018) ECHR 246 <<http://hudoc.echr.coe.int/eng-press?i=003-6134952-7928800>>.

The case was *Mariya Alekhina and Others v Russia*,⁹⁰ where the three applicants were members of Pussy Riot, and concerned their convictions and imprisonment for attempting to perform one of their protest songs (‘Punk Prayer – Virgin Mary, Drive Putin Away’) in a Moscow cathedral in January 2012. The performance in the cathedral was meant to express disapproval of the political situation in Russia at the time and of Patriarch Kirill, leader of the Russian Orthodox Church, who had strongly criticised the large-scale street protests across the country against the recently held parliamentary elections and the approaching presidential election. No service was taking place, but some people were inside the cathedral, including journalists invited by the band for publicity. The performance only lasted slightly over a minute, as cathedral guards quickly forced the band out. The band uploaded the video footage of their attempted performance to their website and to YouTube.

The three applicants were arrested shortly after the performance for ‘hooliganism motivated by religious hatred’,⁹¹ and were held in custody and pre-trial detention for just over five months, before being convicted as charged. The trial court found that Pussy Riot’s actions had been offensive and insulting, referring to their ‘brightly coloured clothes’ and balaclavas, and ‘brusque movements with their heads, arms and legs, accompanying them with obscene language’.⁹² The court rejected Pussy Riot’s arguments that their performance had been politically and not religiously motivated; and they were sentenced to one year and eleven months imprisonment for hooliganism motivated by religious hatred and enmity, committed in a group acting with premeditation and in concert, under Article 213 § 2 of the Criminal Code.⁹³ All appeals against this decision failed. The domestic courts also ruled that the performance

⁹⁰ *Mariya Alekhina*, supra n 5.

⁹¹ *Ibid*, [20].

⁹² *Ibid*, [52].

⁹³ *Ibid*.

had been offensive and banned access to the ‘extremist’ video recordings Pussy Riot had subsequently uploaded onto the Internet.⁹⁴ The first and second applicants served approximately one year and nine months in prison before being amnestied, while the third applicant served approximately seven months imprisonment before her sentence was suspended.

The applicants made an application to the European Court over various aspects of their arrest, pre-trial detention, and the conduct of the trial, with the Court’s Third Section unanimously finding violations of Article 3, Article 5 and Article 6. For present purposes, the focus is on the Third Section finding a violation of Article 10 over the applicants’ convictions.⁹⁵

The Court first addressed whether the applicants’ conduct in the cathedral was protected by Article 10. The Court reiterated that opinions or artistic works, apart from being capable of being expressed through the media, can also be ‘expressed through conduct’.⁹⁶ The Court pointed to *Tatár and Fáber*, where the public display of several items of dirty clothing near the Hungarian Parliament, representing the ‘dirty laundry of the nation’, had been qualified as a form of protected political expression,⁹⁷ and *Murat Vural*, where pouring paint on statues of Atatürk has been considered as an expressive act performed as a protest against the Turkish political regime.⁹⁸ In the present case, the Court considered that the applicants had attempted

⁹⁴ Ibid, [76].

⁹⁵ The Court also found a violation of Article 10 over declaring that the applicants’ video materials uploaded to YouTube as ‘extremist’, and the ban on access to them (see, *ibid*, [231]- [269]). See Dirk Voorhoof, ‘Pussy Riot, the right to protest and to criticize the President, and the Patriarch’, *Strasbourg Observers*, 11 September 2018 <<https://strasbourgobservers.com/2018/09/11/pussy-riot-the-right-to-protest-and-to-criticise-the-president-and-the-patriarch-mariya-alekhina-and-others-v-russia>>.

⁹⁶ Ibid, [204].

⁹⁷ *Tatár and Fáber*, *supra* n 44.

⁹⁸ *Murat Vural*, *supra* n 37.

to perform their song as a ‘response to the ongoing political process in Russia’, and invited journalists and the media to the performance to gain publicity.⁹⁹ The Court held that such action constituted a ‘mix of conduct and verbal expression’ and amounted to a form of ‘artistic and political expression’ covered by Article 10.¹⁰⁰

The main question for the Court was then whether the interference with freedom of expression had been necessary in a democratic society. The Court first emphasised that the applicants’ actions ‘contributed to the debate about the political situation in Russia and the exercise of parliamentary and presidential powers’.¹⁰¹ The Court reiterated that there is little scope under Article 10 for restrictions on political speech or debates on questions of public interest, and very strong reasons are required for justifying such restrictions.¹⁰²

The Court then reviewed the domestic courts’ reasoning, and first noted that the applicants were convicted of hooliganism motivated by religious hatred ‘on account of the clothes and balaclavas they wore, their bodily movements and strong language’.¹⁰³ The Court admitted that as the conduct took place in a cathedral, it ‘could have been found offensive by a number of people, which might include churchgoers’.¹⁰⁴ However, the Court held that it was unable to discern ‘any element’ in the Russian courts’ analysis which would allow a description of the applicants’ conduct as incitement to religious hatred, including (a) no examination of whether the actions could be interpreted as a call for violence or as a justification of violence,

⁹⁹ *Mariya Alekhina*, supra n 5, [205]- [206].

¹⁰⁰ *Mariya Alekhina*, supra n 5, [205]-[206]

¹⁰¹ *Ibid*, [212].

¹⁰² *Ibid*.

¹⁰³ *Ibid*, [225].

¹⁰⁴ *Ibid*.

hatred or intolerance, (b) no analysis of the context of the performance, and (c) no examination of whether the conduct could have led to harmful consequences.¹⁰⁵

In contrast, the European Court held that the performance (a) did not contain any elements of violence; (b) did not stir up or justify violence, hatred or intolerance of believers;¹⁰⁶ (c) did not disrupt any religious services, and (d) did not cause any injuries to people inside the cathedral or any damage to church property.¹⁰⁷ The Court then turned to the sanctions imposed, noting the ‘exceptional seriousness’ of the sanctions.¹⁰⁸ Importantly, the Court reiterated that ‘in principle’ peaceful forms of expression should not be made subject to the threat of imposition of a custodial sentence, as criminal sanctions may have a ‘chilling effect’ on the exercise of freedom of expression.¹⁰⁹ Applying this principle, the Court held that ‘certain reactions’ to the applicants’ actions ‘might have been warranted’ on account of the breach of the rules of conduct in a religious institution; however, the domestic courts failed to adduce ‘relevant and sufficient’ reasons to justify the criminal conviction and prison sentence imposed on the applicants.¹¹⁰ The Court concluded that the interference with freedom of expression was not necessary in a democratic society, and thus in violation of Article 10.¹¹¹

The Third Section in *Mariya Alekhina* continued its approach from *Stern Taulats* of having regard to (a) the purpose of the expressive conduct, classifying it as ‘artistic and political expression’, and subject to the Court’s highest standard of scrutiny; and (b) the applicants’

¹⁰⁵ Ibid, [225].

¹⁰⁶ Ibid, [227].

¹⁰⁷ Ibid, [215].

¹⁰⁸ Ibid, [229].

¹⁰⁹ Ibid, [227].

¹¹⁰ Ibid, [228].

¹¹¹ Ibid, [229].

intention not to provoke violence or hatred; but rather wishing to contribute to the public debate on ‘topics of public interest’. Most importantly, the Third Section in *Mariya Alekhina* confirmed that under ‘international standards for the protection of freedom of expression,’ restrictions in the form of criminal sanctions on non-violent expression ‘are only acceptable in cases of incitement to hatred’.¹¹² The Third Section reiterated that, ‘in principle’, ‘peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence’.¹¹³ And again, the Third Section nowhere mentioned, nor even cited, the *Sinkova* judgment; and instead applied the Court’s earlier case law on the right to peaceful protest.¹¹⁴

Second Section further questions *Sinkova* in *Mătășaru v the Republic of Moldova*

Both *Stern Taulats* and *Mariya Alekhina* omitted any mention of *Sinkova*, and further question marks over *Sinkova* arose again in early 2019 when the Court’s Second Section also considered a conviction for expressive conduct in the form of an ‘obscene’ demonstration outside a Moldovan prosecutor’s office. And similar to the Third Section, the Second Section would choose not to follow, nor even cite, *Sinkova*.

The case was *Mătășaru v the Republic of Moldova*,¹¹⁵ where the applicant was Anatol Mătășaru, a 49-year-old resident of the Moldovan capital Chișinău. The case began in late

¹¹² Ibid, [223].

¹¹³ Ibid, [227].

¹¹⁴ See, eg, *Taranenko v Russia* (App no 19554/05) 15 May 2014; *Primov and Others v Russia* (App no 17391/06) 12 June 2014; *Nemtsov v Russia* (App no 1774/11) 31 July 2014; and *Frumkin v Russia* (App no 74568/12) 5 January 2016.

¹¹⁵ *Mătășaru*, supra n 6.

January 2013, when Mătășaru demonstrated outside the Prosecutor General's Office in Chișinău to protest against the 'corruption and the control exercised by politicians over the Prosecutor General's Office'. The protest involved erecting two large wooden sculptures on the stairs of the Prosecutor General's Office, the first being a large penis with a picture of a public official attached to its head; while the second was a large vulva with pictures of several officials from the prosecutor's office in the middle. The protest lasted an hour before police officers intervened, arresting Mătășaru and seizing the sculptures.

Mătășaru was charged with hooliganism under Article 287 of the Moldovan Criminal Code, defined as 'deliberate actions grossly violating public order, involving violence or threats of violence or resistance to authorities' representatives or to other persons who suppress such actions as well as actions that by their content are distinguished by an excessive cynicism or impudence'.¹¹⁶ Two years later, Mătășaru was convicted of hooliganism by the Râșcani District Court, and received a two-year prison sentence, suspended for three years. The District Court held that Mătășaru's actions had been 'immoral' and exposed 'obscene' sculptures in a public place where 'they could be seen by anyone, including by children'.¹¹⁷ The District Court also held 'assimilating public officials with genitals went beyond the acceptable limits of criticism', and was 'not an act protected under Article 10 [ECHR]'.¹¹⁸ Mătășaru's conviction and sentence were upheld by both the Chișinău Court of Appeal and Moldova's Supreme Court of Justice.

Mătășaru made an application to the European Court, claiming his conviction was a violation of his right to freedom of expression under Article 10. He submitted that his conviction was not 'prescribed by law', arguing the Criminal Code's Article 287 on the offence

¹¹⁶ Ibid [15].

¹¹⁷ Ibid, [10].

¹¹⁸ Ibid.

of hooliganism was ‘not applicable to the particular circumstances of his case’.¹¹⁹ However, the Court, while noting the Moldovan courts had ‘failed to explain in a satisfactory manner why they opted for the criminal sanction provided for by Article 287’, held it was ‘unnecessary’ to decide the issue given the Court’s later findings.¹²⁰ Thus, the main question for the European Court was whether the conviction had been necessary in a democratic society.

The Court first reiterated that Article 10 protects opinions ‘expressed through conduct’, including expressive conduct which offends, shocks or disturbs the State or ‘any section of the population’.¹²¹ It referred to its previous case law on expressive conduct where it had found: displaying dirty laundry near the Hungarian parliament was a form of ‘political expression’;¹²² pouring paint on statues of Atatürk was an ‘expressive act’ performed as a protest against the political regime;¹²³ detaching a ribbon from a wreath laid by the Ukrainian President at a monument was a form of ‘political expression’;¹²⁴ and the Pussy Riot punk band attempting to perform from the altar of a Moscow cathedral was a form of ‘artistic and political expression’.¹²⁵

The Court then examined Mătăsar’s protest, and noted that he had been found guilty of hooliganism because during his protest he had exposed public sculptures of an obscene nature and because he had attached to them pictures of a politician and several senior prosecutors, thus ‘offending [the politician and senior prosecutors] and infringing their right to

¹¹⁹ Ibid, [32].

¹²⁰ Ibid.

¹²¹ Ibid, [28]-[29].

¹²² *Tatár and Fáber*, supra n 44.

¹²³ *Murat Vural*, supra n 37, [54].

¹²⁴ *Shvydka*, supra n 52, [38].

¹²⁵ *Mariya Alekhina*, supra n 5, [206].

dignity’.¹²⁶ Applying its Article 10 principles, the Court held that it ‘cannot agree’ with the Moldovan courts’ ruling that Article 10 was ‘inapplicable to the applicant’s conduct’.¹²⁷ The Court noted that the Moldovan courts did not conduct a ‘proper balancing exercise’ under Article 10 of the different interests involved, and imposed a ‘very heavy sanction’ on the applicant in the form of a suspended prison sentence.¹²⁸ The Court then applied its unanimous Grand Chamber judgment in *Cumpănă and Mazăre v Romania*, holding that the circumstances of Mătășaru’s protest ‘present no justification whatsoever for the imposition of a prison sentence’.¹²⁹ This was because a prison sentence, even if suspended, by its very nature, not only has negative repercussions on the applicant, but may also have a ‘serious chilling effect’ on other persons and discourage them from exercising their freedom of expression.¹³⁰

The Court concluded that although the interference with freedom of expression ‘may have been justified by the concern to restore the balance between the various competing interests at stake’, the criminal sanction imposed was ‘manifestly disproportionate in its nature and severity to the legitimate aim pursued by the domestic authorities’.¹³¹ Thus, the Court unanimously held that the Moldovan courts went beyond what would have amounted to a ‘necessary’ restriction on the applicant’s freedom of expression, therefore in violation of Article 10.¹³²

¹²⁶ Ibid, [34].

¹²⁷ Ibid, [35].

¹²⁸ Ibid.

¹²⁹ Ibid, citing *Cumpănă and Mazăre v Romania* [GC] (App no 33348/96) 17 December 2004, [116].

¹³⁰ Ibid.

¹³¹ Ibid, [36].

¹³² Ibid.

The unanimous judgment in *Mätäsaru* is a strong reaffirmation that domestic courts may not impose prison sentences, even if suspended, on peaceful protestors engaging in expressive conduct (including artistic and satirical expression) on matters of public interest. The Court was categorical on this point, holding that there was *no justification whatsoever* for a suspended prison sentence. This amplifies the Court’s case law that a peaceful demonstration should not, ‘in principle’, be made subject to the ‘threat of a penal sanction’.¹³³

Of note, the Court in *Mätäsaru* nowhere mentioned, nor even cited, the *Sinkova* judgment. Indeed, *Sinkova* has not been applied in a Court judgment to date, and the *Mätäsaru* judgment suggests *Sinkova* is becoming a disapproved and lone aberration in the case law on the imposition of suspended prison sentences for peaceful protest and participation in matters of public debate. Further, the Court in *Mätäsaru* nowhere adopted the type of reasoning evident in *Sinkova* of emphasising the ‘many suitable opportunities for the applicant to express her views or participate in *genuine* protests’, without ‘breaking the criminal law’.¹³⁴ As mentioned earlier, this type of reasoning turns Article 10 upside down, and could easily have been applied in *Mätäsaru* by emphasising the many other suitable opportunities for the applicant to express his views without breaking the criminal law and engaging in obscene expression. But correctly, the Court did not adopt such reasoning for justifying the interference complained of.

While *Mätäsaru* is a welcome judgment, one point needs to be teased out relating to the Court’s statement in the second-last paragraph: that the interference with freedom of expression ‘may have been justified by the concern to restore the balance between the various

¹³³ See, eg, *Pekaslan and Others v Turkey* (App nos 4572/06 and 5684/06) 20 March 2012; *Taranenko v Russia* (App no 19554/05) 15 May 2014; *Primov v Russia* (App no 17391/06) 12 June 2014; *Nemtsov v Russia* (App no 1774/11) 31 July 2014; *Frumkin v Russia* (App no 74568/12) 5 January 2016; and *Yılmaz Yıldız and Others v Turkey* (App no 4524/06) 14 September 2014.

¹³⁴ *Supra* n 36 (emphasis added).

competing interests at stake'.¹³⁵ The Court seemed to be leaving open the suggestion that there existed certain interests which outweighed the applicant's freedom of expression. But while the Court did not explore the point fully, a brief mention of the relevant case law would have been relevant and informative.

The Court has already dealt with the distinct issue of public officials seeking to prohibit their depiction in an 'obscene' manner. The leading judgment is *Vereinigung Bildender Künstler v Austria*, concerning an injunction preventing further depiction of a politician where a photo of his face was placed on a painted naked body, 'gripping the ejaculating penis' of another public official, while 'being touched by two other' public officials and 'ejaculating on Mother Teresa'.¹³⁶ The Court found a violation of Article 10, as the politician's 'personal interests' did not outweigh the right to engage in satirical expression on a matter of public interest, and targeting a public official.¹³⁷ The Court applied the principle that satire is a form of 'artistic expression and social commentary',¹³⁸ and by its 'inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate'.¹³⁹ Further, the expression at issue could not be 'understood to address details' of the politician's private life, but rather his 'public standing as a politician', and public officials must 'display a wider tolerance in respect

¹³⁵ *Supra* n 131.

¹³⁶ *Vereinigung Bildender Künstler v Austria* (App no 68354/01) 25 January 2007, [8].

¹³⁷ *Ibid*, [38].

¹³⁸ On artistic expression and satire in the ECtHR's case law, see Eleni Polymenopoulou, 'Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights' (2016) 16 *Human Rights Law Review* 511.

¹³⁹ *Ibid*, [38].

of criticism’.¹⁴⁰ Of course, it must be recognised that the Court takes a different approach to ‘obscene’ expression relating to non-public officials,¹⁴¹ and religion.¹⁴²

But the expressive conduct in *Mătășaru* was political expression targeting an elected official, and a number of public officials, in their official capacity, and on a matter of public interest. Indeed, on the public interest element, the Court has confirmed in other judgments concerning Moldova and anti-corruption policy, the ‘strong public interest’ on the issue of ‘separation of powers’ and ‘improper conduct’ by high-ranking politicians and involving the Prosecutor General’s Office.¹⁴³ In this regard, the Court has long held that there is ‘little scope’ for restrictions on expression on matters of public interest, and domestic authorities have a ‘particularly narrow’ margin of appreciation.¹⁴⁴ It must be remembered that *Mătășaru* involved criminal proceedings for hooliganism, and not administrative proceedings, nor civil proceedings by the public officials targeted. This would be difficult to square with the Court’s principle that the ‘dominant position which those in power occupy’ makes it ‘necessary for them to display restraint in resorting to criminal proceedings’, and only in ‘certain grave cases

¹⁴⁰ Ibid, [34].

¹⁴¹ *Palomo Sánchez and Others v Spain* (App no 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011.

¹⁴² See, eg, *Otto-Preminger-Institut v Austria* (App no 13470/87) 20 September 1994; *Wingrove v UK* (App no 17419/90) 25 November 1996; *İA v Turkey* (App no 42571/98) 13 September 2005; *E.S. v Austria* (App no 38450/12) 25 October 2018; to some extent, *contra* in *Aydın Tatlav v Turkey* (App no 50692/99) 2 May 2006; and see also *Akdaş v Turkey* (App no 41056/04) 16 February 2010.

¹⁴³ See *Guja v Moldova* [GC] (App no 14277/04) 12 February 2008, [72]; and *Guja v the Republic of Moldova (No 2)* (App no 1085/10) 27 February 2018, [47].

¹⁴⁴ *Morice v France* [GC] (App no 29369/10) 23 April 2015, [125].

- for instance in the case of speech inciting to violence'.¹⁴⁵ There was no suggestion that the expressive conduct in *Mătășaru* was anything other than entirely peaceful.

Conclusion

In 2003, something similar to *Sinkova* happened: a divided seven-judge Chamber of the Court, by four-votes-to-three, held in *Cumpănă and Mazăre v Romania* that suspended prison sentences imposed on two journalists for defamation were admittedly 'harsh', but as the journalists 'did not serve their custodial sentences',¹⁴⁶ there had been no violation of Article 10. Unlike *Sinkova*, however, the Grand Chamber's panel accepted a request for referral, and in a unanimous judgment, the 17-judge Grand Chamber set aside the Chamber judgment, and held in no uncertain terms, that a prison sentence, 'by its very nature, will inevitably have a chilling effect' on freedom of expression, and crucially, 'the fact that the applicants did not serve their prison sentence does not alter that conclusion'.¹⁴⁷ While the Grand Chamber has not stepped in to cure the aberration *Sinkova* arguably represented, this article has argued that the Court itself, at Chamber level, and through its subsequent case law, has been side-lining *Sinkova*.¹⁴⁸ Indeed, in *Mătășaru*, the Court applied the Grand Chamber's chilling effect

¹⁴⁵ Ibid, [127].

¹⁴⁶ *Cumpănă and Mazăre v Romania* (App no 33348/96) 10 June 2003, [59].

¹⁴⁷ *Cumpănă and Mazăre v Romania* [GC] (App no 33348/96) 17 December 2004, [116].

¹⁴⁸ In a February 2019 poll, readers of the *Strasbourg Observers* blog voted *Sinkova* as the 'worst judgment' of 2018 ('The Best and Worst ECtHR judgments of 2018 are...', *Strasbourg Observers*, 25 February 2019 <<https://strasbourgobservers.com/2019/02/25/the-best-and-worst-ecthr-judgments-of-2018-are>>).

principle from *Cumpănă and Mazăre* in finding that there was no justification whatsoever for the imposition of a suspended prison sentence.¹⁴⁹

Notably, where activists have been detained or imprisoned for engaging in ‘expressive conduct’ which was ‘peaceful and non-disruptive’, the Court is now applying the simplified procedure under Article 28 ECHR,¹⁵⁰ with three-judge Committees ruling on both admissibility and merits of these cases at the same time, and near-automatically finding that detention or imprisonment for such expressive conduct violates Article 10.¹⁵¹ It is expected that the Court will continue to afford expressive conduct on matters of public interest the full protection of Article 10. It is up to the Court to continue to signal to national police forces, prosecutors, and courts, that restrictions on such protests are compatible with Article 10 only in ‘exceptional circumstances’, and that peaceful demonstration should not, in principle, be made subject to the threat of a ‘penal sanction’.¹⁵²

¹⁴⁹ *Mătăsaru*, supra n 6, [35].

¹⁵⁰ Under Article 28(1)(b) ECHR, three-judge Committees may, by a unanimous vote, declare an application ‘admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of *well-established case-law* of the Court’) (emphasis added).

¹⁵¹ See, *Muchnik and Mordovin v Russia* (App nos 23814/15 and 2707/16) 12 February 2019, [45]; and also, *Grigoryev and Igamberdiyeva v Russia* (App no 10970/12) 12 February 2019; *Belan and Sviderskaya v Russia* (App nos 42294/13 and 42585/13) 12 February 2019; *Nikolayev v Russia* (App no 61443/13) 12 February 2019; and *Ryklin and Sharov v Russia* (App nos 37513/15 and 37528/15) 12 February 2019.

¹⁵² *Pekaslan and Others v Turkey* (App nos 4572/06 and 5684/06) 20 March 2012, [81].