

Human Earrings, Human Rights and Public Decency

TOM LEWIS

This article argues that the use of the common law offence of outraging public decency to attack art and artists (as it was in R v. Gibson – the ‘foetus earrings’ case – in 1991) has effectively been rendered impossible by the Human Rights Act. This is the case despite the fact that the European Commission of Human Rights found there to be no breach of the article 10 right to freedom of expression in the case of Gibson itself. The HRA mandates reform of such common law provisions and will lead to more rigorous protection of the right to artistic expression by domestic courts than has hitherto been available at Strasbourg.

Introduction

In March 2001 Scotland Yard obscene publications unit raided the Saatchi Gallery in St John’s Wood, London, at which the *I am a Camera* exhibition had been running for eight weeks. The curator was warned that several pictures by the photographer Tierny Gearnon depicting her children in states of undress were indecent. They threatened to return with a warrant and seize the pictures and that criminal proceedings would be brought under the Protection of Children Act 1978 if the pictures were not removed. In the event the gallery stood its ground and the Crown Prosecution Service elected not to pursue the matter to the annoyance of the police. Nevertheless the affair raised anew the spectre of the artist being persecuted by the criminal law and sparked off a heated debate over the difficult-to-discern boundary between art and indecency.¹

The Saatchi affair was merely the latest chapter in a long-running saga going back at least to the nineteenth century,² in which a host of weapons in the state’s legal armoury have been used in attempts to curtail shocking artistic expression. One of the chief threats in the recent past has come not from the use of statute, as in the Saatchi case, but from the use of the much more nebulous common law offence of outraging public decency. It is this

Tom Lewis, BA(Oxon), Solicitor, is a Senior Lecturer of Law, Department of Academic Legal Studies, Nottingham Law School, Nottingham Trent University.

offence and the impact upon it of the Human Rights Act 1998 (HRA) that will form the main focus of this article.

At very first sight the 'incorporation' of the European Convention on Human Rights (ECHR) into UK law by the HRA would seem to provide for the increased protection of artists when they are exploring such sensitive and potentially controversial areas as sex, religion and taboo. Article 10 is one of the 'Convention rights' given effect by s.1 and set out in Schedule 1 of the HRA. It states that 'everyone has the right to freedom of expression'. Whilst it does not expressly protect artistic expression *per se*, the case law of the European Court and Commission of Human Rights has clearly indicated that artistic expression does fall within the ambit of article 10.³

However the extent to which the HRA will provide improved protection for artistic speech has been called into question by some commentators.⁴ This pessimism (or optimism – depending on one's viewpoint) seems due largely to the fact that cases in which artistic expression has been considered at Strasbourg have been decided on the basis that the state has a wide 'margin of appreciation' in deciding what measures are necessary to protect morality.⁵ The result at European level has been that only a very weak level of protection has been accorded to artistic expression.⁶

The purpose of this article is to demonstrate that, in one area at least, this pessimism/optimism is misplaced. It will be argued that the common law offence of outraging public decency, when applied to artistic expression, is redundant.

The Common Law Offence of Outraging Public Decency

The very existence of the general common law offence of conspiracy to outrage public decency was only confirmed by a bare majority of the House of Lords in *R v. Kneller* [1973] AC 435.⁷ Before this the common law had dealt with specific and disparate instances of indecency, such as indecent exposure,⁸ acts of sexual indecency in public,⁹ indecent words,¹⁰ disinterring a corpse,¹¹ exhibiting deformed children,¹² exhibiting a picture of sores¹³ and procuring a girl for the purposes of prostitution.¹⁴ In *Kneller*, however, the majority decided that these offences had a 'common element in that, in each, offence against public decency was alleged to be an ingredient of the crime ... that they were particular applications of a general rule whereby conduct which outrages public decency is a common law offence'.¹⁵ They were subsumed within a single offence of outraging public decency. Thus in applying the offence to facts which hitherto had not been brought within the ambit of the offence (the publication of written matter), the Lords claimed not to be creating a new offence but rather applying an existing offence to fit new facts. The offence is committed by anyone who says or does or exhibits in public anything that outrages public decency, whether or not it is obscene.¹⁶ The offence is most commonly used in cases of public sexual

behaviour.¹⁷ It is the use of this offence to punish *artistic expression* that is, it is submitted, open to challenge.¹⁸

The Relationship between Obscenity and Indecency

The concept of indecency inherent in the offence is distinct from that of obscenity. This is complicated by the fact that obscenity has (at least) two meanings in English law – the way that term is used in everyday speech in addition to a statutory meaning. In ordinary everyday speech, ‘obscenity’ connotes something like indecency only much more offensive. It is a stronger term. As Lord Sands said in *McGowan v. Langmuir*:

It is easier to illustrate than define, and I illustrate it thus. For a male bather to enter the water nude in the presence of ladies would be indecent, but it would not necessarily be obscene. But if he directed the attention of a lady to a certain member of his body his conduct would certainly be obscene.¹⁹

The same point was made by Lord Parker in *R v. Stanley*, when he implied that concepts of indecency and obscenity were at different points on a single spectrum: ‘The words “indecent or obscene” convey one idea, namely, offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale.’²⁰

The *statutory* definition of obscene for the purposes of the Obscene Publications Act 1959 (OPA) is rather different. By s.1(1) an article is deemed to be obscene if its ‘effect ... taken as a whole is such as to tend to *deprave and corrupt* persons who are likely to read, see or hear it’. Thus the statutory offence, on the face of it at least, is concerned to protect people from harm – to protect them from becoming depraved and corrupted – from being morally degraded. By contrast, the question in relation to indecency is whether a person’s *sense of decency* would be outraged. It is this sense of decency that the common law offence is designed to protect.²¹

Elements of the Offence

According to the House of Lords in *Knulier*, for the common law offence to be made out, the material must be so ‘lewd, disgusting and offensive’ that the ‘sense of decency of members of the public would be outraged’. ‘Outrage’ was held to be a ‘strong word’ going beyond offending the susceptibilities of or even shocking and disgusting reasonable people.²² However, mitigating the harshness of the rule, it was also stressed that what would outrage public decency would vary from one generation to the next,²³ and that the jury should be told to remember that they ‘live in a plural society, with a tradition of tolerance toward minorities and that this atmosphere of toleration is itself part of public decency’.²⁴

There was also held to be a requirement of a *public* dimension to the impugned activity. The principle underlying this is, according to Lord Simon, that 'reasonable people [should be able to] venture out in public without the risk of outrage to certain minimum accepted standards of decency'. Further, it does not 'necessarily negate the offence that the act or exhibit is superficially hid from view, if the public is expressly or impliedly invited to penetrate the cover'.²⁵

Outraging Public Decency and Art: The 'Foetus Earrings' Case

Kneller itself had concerned the small ads column of a progressive magazine in which gay men placed adverts for sexual partners. One of the issues was whether the offence could be extended to cover printed materials where the alleged indecency occurred *inside* the publication. It was decided that it did. Lord Reid however strongly dissented. He argued that, 'if this new generalised crime were held to exist', then if there were 'any book, new or old, a few pages ... or sentences of which any jury could find to be outrageously indecent those who took part in the publication and sale would risk conviction'. He had hoped that the days of 'Bowdlerising the classics' were long past but the introduction of this new crime might make publishers think twice. What is more – he predicted there would be no defence based on literary, artistic or scientific merit.²⁶

Lord Reid's fears that works of artists might be susceptible to the offence of outraging public decency were realised in the case of *R v. Gibson* [1991] 1 All ER 439. Richard Norman Gibson was an artist. He created a work entitled 'Human Earrings', consisting of a model's head adorned with a pair of earrings. Each earring was made out of a freeze-dried human foetus of three or four months' gestation, with a ring fitting tapped into its skull and attached at the other end to the model's earlobe. The earrings were displayed along with 40 other items at the Young Unknown's Gallery in The Cut, run by the second defendant Peter Sebastian Sylverie. The gallery was in a parade of shops and was open to the public without charge. Unbeknown to Sylverie, Gibson had advertised his exhibit with the result that the police and press were on the scene not long after the exhibition opened.

Previously, such an exhibition might have been proceeded against by way one of a number of nineteenth-century statutes, such as the Vagrancy Acts of 1824 and 1838 and the Indecent Advertisements Act 1889.²⁷ The relevant parts of these Acts had however been repealed by s.5 of the Indecent Displays (Control) Act 1981. This Act could not be used in *Gibson* because displays in galleries and museums are specifically exempted.²⁸ It would seem that the only option the authorities had to suppress the exhibition was the common law.²⁹

Gibson and Sylverie were charged with and convicted of outraging public decency. They appealed on three grounds: One ground of appeal argued by counsel Geoffrey Robertson QC was that the Crown was required to prove *mens rea* by showing that the defendants had intended to outrage public decency or at least had been aware that there was a risk of doing so. This argument was rejected by Lord Lane, who cited with approval *R v. Hicklin* [1868] LR 3 QB 360 (obscene libel) and *R v. Lemon* [1979] AC 617 (blasphemy) to reach the conclusion that there was no requirement of *mens rea* – the offence is one of strict liability. He added that when one had a display of foetus earrings, and outrage is satisfied to the satisfaction of the jury, a defendant is unlikely to be believed if he says he was unaware of the risk of causing offence and outrage.³⁰

Another ground was that the jury had not been directed to consider the requisite element of publicity for the offence to be made out. This argument was given short shrift by Lord Lane. Gibson undoubtedly publicised his creation and Sylverie ‘was inviting the public to attend the gallery where there was a display of this object, as he well knew, for all who came onto the premises to see’. The judge’s direction was, in his view, correct.

Most interesting for the purposes of the present discussion was the remaining ground of appeal. This was that the prosecutions were barred by s.2(4) of the Obscene Publications Act 1959. This provides that a ‘person shall not be proceeded against for an offence at common law where it is the essence of the offence that the matter is obscene’. Thus, if the essence of the offence of outraging public decency was that the matter was obscene, the prosecution would be barred by s.2(4). The crucial question therefore was – what is meant by the term ‘obscene’ as used in s.2(4)? As noted above the term has two possible meanings. First, a broad meaning common in every day speech – ‘namely something which constitutes a serious breach of recognised standards of propriety on account of its tendency to corrupt morals *or* on account of its indecent appearance or its tendency to engender revulsion or disgust or outrage’ (emphasis added) – in short, offences which involve an outrage to public decency, whether or not public morals are involved.³¹ The second possible meaning of obscene is the ‘deprave and corrupt’ meaning that is to be found in s.1(1) of the OPA itself (see above).

If the *former* ordinary everyday meaning of the word ‘obscene’ were accepted as the correct meaning in s.2(4), then it was conceded by Crown counsel that the prosecution would be ‘plainly barred’. The section would bar the bringing of a prosecution for outraging public decency because its essence is this broad form.

If on the other hand the *latter* (s.1(1)) meaning were accepted as the true meaning of obscene in s.2(4), the prosecution would not be barred and the ground of appeal must fail. For this narrow meaning would restrict the use

of the common law offences only where their essence was the publication of matter which had a tendency to deprave and corrupt – in other words where the matter had a deleterious effect on morality. And in *Gibson* there was no suggestion that anyone was likely to be deprived or corrupted by the exhibition of the earrings.

The appellants argued that the Obscene Publications Act 1959 was the result of some powerful influences from the artistic and literary world.³² For the first time in English law the Act had provided a ‘public good’ defence. This provides that:

a person shall not be convicted of an offence against [s.2 of the OPA] ... if it is proved that the publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning or other objects of general concern.³³

The appellants argued that if the meaning of obscene in s.2(4) was confined to the narrow s.1(1) meaning (thus allowing a prosecution of artists under the common law for outraging public decency), this would mean that the liberalising effect of the 1959 Act would be circumvented – a result which must be contrary to the intention of Parliament.

Lord Lane was not persuaded by these arguments. He concluded that the Act was only intended to bar common law prosecutions for the ‘deprave and corrupt’ type of offence. Section 2(4) did not preclude prosecutions based on the offensive, disgusting or shocking nature of the article. In order to reach this conclusion he examined the wording of s.1(1). This states that an article is ‘deemed to be obscene’ if its effect is such as to tend to deprave and corrupt and so on. He interpreted this as indicating that the restricted meaning should apply to the 1959 Act whatever meanings might be applicable elsewhere.³⁴ Despite arguments to the contrary those plain words were ‘uncontrovertible’. The definition in s.1(1) must govern the meaning of obscene in s.2(4). Otherwise it would mean that in s.2, where the word obscene is used three times, on two of those occasions it would have the narrow s.1(1) meaning and on one (in s.2(4)) it would have the wider meaning. Lord Lane said: ‘We are unable to find any justification for such a radical departure from the ordinary canons of construction.’

The result of all this would seem to be that members of the public may lawfully be ‘depraved and corrupted’ – have their morals degraded – by art works, if the publication is in the public good; but they may not be shocked, disgusted or outraged (whether or not their morals will be degraded) no matter what benefit the work may be to the public. It is interesting to note the anomaly that, had the earrings been filmed and the film subsequently shown, the prosecution would have had to have taken place under the OPA

with its concomitant public good defence. This is due to the fact that s.2(4)(a) OPA bars prosecution for the common law offence in respect of a film exhibition where it is the essence of the offence that the exhibition is 'obscene, indecent, offensive, disgusting, or injurious to morality'.³⁵

And so in *Gibson*, the offence of outraging public decency was stretched to cover artistic expression for the first time, as predicted by Lord Reid in *Knuller*. This creates a potentially serious inhibition on artistic freedom, since the motive of the artist and exhibitor are irrelevant, and there is no public good defence. There is no room for consideration by the court of the message conveyed by the work. The possibility that the work in *Gibson* was a comment on the 'cheapness of life – used as a mere ornament in the cosmetic age of postmodernism',³⁶ or that it was 'a condemnation of a society in which women wear their abortions as lightly as their earrings',³⁷ were not possible. Whatever one may think of the merits of these arguments, it was not permissible for them even to be considered by the jury. Indeed Lord Lane stated that even if the public good defence had *potentially* been available 'in this type of case ... it was unlikely that the defence of the public good could possibly arise'.³⁸

In recent years disturbing and shocking art has been exhibited at the very heart of the establishment itself. The Royal Academy has staged two controversial exhibitions which have pushed the boundaries: *Sensations* in September 1997 and *Apocalypse* in September 2000. These included works depicting the Virgin Mary surrounded by explicit images from pornographic magazines, androgynous children with aroused genitals instead of faces, the face of Myra Hindley composed of children's hand prints and a video installation showing explicit sex and violence. Several of these works were only open to over-18s and warning signs to that effect were put up. This is certainly a distinguishing feature to the unrestricted access to the Young Unknowns Gallery in *Gibson*. Kearns comments, however, that:

it is instructive to compare the way the police handled the Sensation exhibition with their treatment of Gibson and Sylvérie. An ineluctable conclusion is that the difference in status of the exhibition's venues may have figured in police thinking; but perhaps for good reason. Police prosecution of personnel in the RA, the very core of the art establishment, and artists exhibited by it, might have inaugurated considerable protest at the lack of a guarantee of liberty of artistic expression ...³⁹

The Human Rights Act 1998

HRA came into force on 2 October 2000. The Act is intended to 'give further effect to the rights and freedoms guaranteed under the European

Convention on Human Rights'. The 'Convention rights' are set out in s.1 and Schedule 1. They include article 10 – 'everyone has the right to freedom of expression'. Under s.6 it is 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. This certainly includes the police and also, under subsection 3, courts and tribunals. Under s.7(1)(b), a person who claims that a public authority has acted in a way which is unlawful under s.6(1) will be able to rely on the Convention right in any proceedings against him – he will thus be able to use the Convention right as a defence in criminal proceedings. Under s.3, 'as far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention Rights'. Section 2(1) requires that a court must take into account Strasbourg case law so far as, in its opinion, it is relevant to the proceedings in question.

Impact of the HRA on the Offence of Outraging Public Decency

Article 10 provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health of morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights (the Court) has placed a high value on freedom of expression saying that it 'constitutes one of the essential foundations of a [democratic] society and for the development of every man'.⁴⁰ In the jurisprudence of the Court and the European Commission of Human Rights (the Commission), 'expression' has been given a wide meaning. It has been held to include utterances as diverse as polemical journalism⁴¹ and commercial advertising.⁴² It also covers artistic expression. The Court stated in *Muller* that its particular importance lies in the fact that it 'affords the opportunity to take part in the public exchange of cultural, political and social information'.⁴³ In the same case the Commission stated:

Through his creative work the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day.⁴⁴

It seems beyond doubt that the ‘human earrings’ would be ‘expression’ for the purposes of Article 10.⁴⁵

Is the Prosecution Legitimated by Article 10(2)?

As with articles 8, 9 and 11, article 10 has a second paragraph which sets out circumstances and conditions under which the *individual’s* right can be restricted by the State for the *common* good. These restrictions and penalties are justified in the terms of the article by the fact that the exercise of the freedom carries with it ‘duties and responsibilities’ which implicitly must not be abused.

In any *Gibson* type prosecution for outraging public decency the prosecutor would have to show that the restriction was ‘prescribed by law’; that the penalty or restriction was in pursuit of one of the ‘legitimate aims’ set out in paragraph 2; and that it was ‘necessary in a democratic society’.⁴⁶ Convention case law has established that these paragraph 2 limitations must be narrowly interpreted.⁴⁷

After their conviction Gibson and Sylverie applied to Strasbourg, claiming a breach of their right to freedom of expression.⁴⁸ The Commission declared their application to be manifestly ill-founded: it found that the restriction on expression was sufficiently ‘prescribed by law’ (the common law offence of outraging public decency was sufficiently certain to meet this requirement); that it pursued a ‘legitimate aim’ (the protection of morality); and that it was ‘necessary in a democratic society’. On this last point the Commission noted the wide margin of appreciation afforded to states where the protection of morals is concerned. It will be argued below however that the Commission’s decision is seriously questionable and that, in any event, it should be by no means fatal to the prospects of using article 10 as a defence in any such future prosecution.

Is the Interference Prescribed by Law?

Any interference with the right to freedom of expression must be prescribed by law. This is the ‘rule of law’ requirement and is a fundamental thread running right through the Convention.⁴⁹ The Court has held first that, to meet this requirement, the law must be adequately *accessible*: the citizen must have an indication, that is adequate in the circumstances, of the legal rules applicable to a given case. Second, it carries with it a requirement of

precision: 'the norm', in order for it to qualify as law, must be formulated with sufficient precision to enable the citizen to be able reasonably to foresee the consequences that his actions might entail.⁵⁰ There is not a requirement of absolute certainty – this is in any event unattainable. In the *Sunday Times v. UK* [1979] 2 EHRR 245, it was held that the common law does potentially fulfil the 'prescribed by law' requirement even though in many cases it is necessarily retrospective in nature.

It is far from inevitable that the requirement will be satisfied however. In *Hashman and Harrup v. UK* [1999] 30 EHRR 241, the use by magistrates of powers under common law and statute to bind over not to act *contra bonos mores* were not precise enough to meet the foreseeability requirement inherent in the words 'prescribed by law'. The case concerned bind over orders in respect of hunt saboteurs who had distracted the hounds of the Portman hunt. The Court considered the definition of *contra bonos mores*: 'conduct which has the property of being wrong rather than right in the judgement of the vast majority of contemporary fellow citizens'.⁵¹ The government had argued that this 'definition' carried an objective element: that it related to 'conduct likely to cause annoyance'. The Court disagreed. This latter definition described behaviour by reference to consequences, that is, annoyance. The Court considered that the former, actual, definition however (conduct which is wrong rather than right in the judgment of the majority of contemporary citizens) was 'conduct which was not described at all, but merely expressed to be wrong in the opinion of a majority of citizens'.⁵² The Court found that it could not have been evident to the applicants what was required of them to abstain from for the period of their binding over. It therefore was not 'prescribed by law'. The Court also noted the fact that the Law Commission had recommended abolition of the bind over power on the grounds of its vagueness.⁵³

It is submitted that the common law of outraging public decency could well fall foul of the 'prescribed by law' requirement. It is at least as vague as the bind over power in *Hashman*. The Law Commission has stated that 'the offence ... is so uncertain in its scope that ... it should not survive a codification of the law in this area'.⁵⁴ The *actus reus* is uncertain. For example, in *Gibson*, what was the cause of the alleged outrage? Was it the fact that the earrings were made of human foetuses? Would the offence have been made out if the earrings had merely looked like foetuses but had been modelled out of clay, or if animal foetuses had been used and the public had been *told* they were real human foetuses?⁵⁵ As Feldman points out, 'if it is correct that the essence of the offence lies in the outraging of people's sense of decency, what people are led to believe about an exhibit would seem to be at least as important as what it really is'.

Nevertheless, in *S and G v. UK* the Commission stated that the 'common law offence of outraging public decency has been clear and accessible since the *Kneller* case in 1973, if not since the *Mayerling* [sic] case in 1963'. The applicants had contended that they could not have predicted that they would be proceeded against by way of the common law offence rather than under the OPA with its concomitant public good defence. The Commission in *S and G* however stated that:

the difference between the common law offence of outraging public decency and the statutory offence of obscenity [is] a qualitative one of fact and morals, the former being concerned with more offensive material which engenders such revulsion, disgust and outrage that it is irrelevant whether its consequence is actually to undermine public morals. This distinction ... meets the applicants' objection that they could not have foreseen a prosecution for that offence, rather than a prosecution under section 2 of the OPA 1959.

It is submitted that this vastly overstates the degree of foreseeability possible and the degree to which it is possible to discern a distinction between the multiple notions of obscenity and indecency. Further, the Commission here seemed to accept that it is not necessarily 'public morals' that the offence may be trying to protect. This *may* help rationalise the Commission's finding that the interference was indeed prescribed by law; but it is submitted that this acceptance must vitiate its subsequent finding that the offence did pursue a legitimate aim (see below).

An artist or exhibitor against whom a prosecution was brought today would surely have a strong claim that outraging public decency did not meet the 'prescribed by law' requirement. The very fact that the *Sensations* and *Apocalypse* exhibitions were not proceeded against only serves to increase the uncertainty. And just because a law is rarely, if ever, enforced does not mean that it does not potentially breach the Convention – the very threat of prosecution itself may constitute a breach.⁵⁶

Does the Interference Pursue a Legitimate Aim?

The categories of 'legitimate aim' in article 10(2) are very wide. Consequently it is very easy to show that an interference is in pursuit of a legitimate aim. Rarely has a state been found to have breached article 10 for failure under this head.⁵⁷ However, there is an argument that the offence of outraging public decency does indeed fall foul of this requirement. The most obvious candidate for a legitimate aim that the offence is designed to pursue is that of the 'protection of health or morals'. Indeed this is the legitimate aim that the Commission accepted was being pursued in *S and G* itself.⁵⁸ It will be recalled however that outraging decency is not necessarily

concerned with protecting morals; it is about protecting people from shock, disgust and outrage. Indeed one of the main reasons why the Court of Appeal reached the decision it did in *Gibson* was that ‘the object of the common law offence was to protect people from suffering feelings of outrage by such exhibition’.⁵⁹ It was precisely *because* the Court of Appeal felt able to distinguish between offences that merely cause outrage and those which deprave and corrupt that enabled it to avoid the statutory bar in s.2(4) OPA. Furthermore at Strasbourg the Commission itself accepted that a prosecution for outraging public decency may not have as its aim the protection of morals.

In considering a future *Gibson* type of case it would surely ill behove a court if it were to accept the s.2(4) argument on behalf of the prosecution whilst at the same time accepting that the offence is designed to pursue the legitimate aim of protecting morals. If it did do this it would, for the purposes of circumventing the statutory bar, be according a narrow s.1(1) meaning to the word ‘obscene’ as used in the s.2(4) – it would be saying that it *is* necessarily to do with morals, with depravity and corruption. The offence of outraging public decency by contrast is not designed to protect morals – it is there to prevent shock and outrage – that is why the s. 2(4) bar has no bite upon it. On the other hand, for the purpose of shoehorning the offence into the ‘protection of morals’ category in article 10(2), the court would be claiming that the offence *is* designed to protect morals after all. This would surely be a case of the court allowing the prosecution to ‘both have its cake and eat it’.

Furthermore the European Court has famously and repeatedly stressed that the freedom of expression protected by article 10 is:

applicable not only to information and ideas that are favourably received or regarded as inoffensive ... but also to those that offend shock and disturb the State or any sector of the population. Such are the demands that pluralism, tolerance and broadmindedness without which there is no democratic society.⁶⁰

There are strong echoes here of Lord Simon’s dictum in *Kneller*: ‘I think the jury should be invited, where appropriate, to remember that they live in a plural society, with a tradition of tolerance towards minorities, and that this atmosphere of toleration is itself part of democratic society.’⁶¹

The Commission in *S and G* seems to have placed weight on this dictum as demonstrating that ‘freedom of expression is not wholly irrelevant in a prosecution for this offence’. In *Gibson* itself, however, it would appear that no such invitation was given. Presumably the judge did not consider it to be an ‘appropriate’ case. One could go further still. It could be argued that the effect of outrage may actually improve morality – if the effect of seeing the

work is to repel the viewer from indulging in the type of activities depicted⁶² or to arouse a sense of moral outrage, it may be said that the article reinforces morality.⁶³

It may be that in some circumstances one of the other paragraph 2 legitimate aims could be invoked by the state to justify the interference in expression. The obvious candidate would be the 'prevention of disorder or crime'. This was not claimed in *S and G*, but it may well be relevant in situations where, for example, the expression is such as to provoke violent public reaction. Examples might include provocative pieces of street 'performance art'. There is Convention case law to suggest, albeit in the context of the article 11 right to freedom of peaceful assembly, that in such situations there exists a positive duty on the state authorities to *protect* the right of speakers.⁶⁴ It must be conceded however that the protection afforded to artistic speech is notably weaker than that given to political expression (see below). Furthermore, the discretion which states are afforded in deciding what positive measures to employ in such situations is a wide one.⁶⁵ Thus, in the presumably very small number of cases where artistic expression does lead to the provocation of disorder or crime, it may be arguable that the offence of outraging public decency would indeed be in pursuit of this legitimate aim.

Is the Interference 'Necessary in a Democratic Society'?

The requirement that any interference be 'necessary in a democratic society' has been interpreted by the Strasbourg Court to mean that it must 'correspond to a pressing social need' and 'in particular ... whether the interference is proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it [are] relevant and sufficient ...'.⁶⁶

It is highly questionable whether a criminal prosecution for a strict liability offence with an absence of even the possibility of a public good defence could be held to be a proportionate response – especially given the ringing dicta in *Handyside* as to the importance of expression.⁶⁷ It is difficult to see how the common law offence could be viewed as anything other than the use of a 'steam hammer to crack a nut'.⁶⁸ Given the extreme vagueness of the rationale for the offence it is difficult to see how the reasons adduced to justify the interference could be 'relevant and sufficient'.

The Relevance of the 'Margin of Appreciation'

The protection afforded to artistic expression by the Strasbourg institutions has been very weak. This is largely due to the wide margin of appreciation that has been afforded to national authorities in situations where freedom of expression is alleged to impact in a deleterious way on morality. The margin

of appreciation is an international law 'doctrine of judicial self-restraint or deference'.⁶⁹ Its purpose is to allow a degree of latitude to states in how they protect the individual rights set out in the Convention. The doctrine has been particularly prominent in cases where there are serious threats to the very existence or integrity of the state and derogations have been issued under article 15.⁷⁰

The margin doctrine has also been prominent in cases in which breaches of article 10 have been alleged. A margin has been afforded to states in their assessment of what measures are 'necessary' in the restriction of the right. The doctrine has been applied in a variable way depending on what 'legitimate aim' is being pursued by the imposition of the penalty or restriction. Where the legitimate aim being pursued can be objectively ascertained, where there is supposedly a Europe-wide consensus, then it is apparent that the margin will be narrow. In particular the Court has often stressed the vital role of the press as a 'public watchdog' in democratic society. The margin is therefore very slim where restriction of press freedom is concerned.⁷¹ However, where a Europe-wide consensus is lacking, or is perceived to be lacking, then the margin will be much wider. Foremost amongst those areas where the requisite consensus is allegedly absent are those of morality.

In *Handyside v. UK* the Court stated that:

the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place the task of securing the rights and freedoms it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted.

These observations apply, notably, to Article 10(2). In particular it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.⁷²

The protection of artistic expression which deals with sexual or religious issues has received notably low levels of protection.⁷³

The use of the margin by the Strasbourg institutions themselves has been subjected to severe criticism, both fundamentally, in that it introduces an unacceptable degree of cultural relativism into the protection of what are supposed to be universal rights, and also for lack of consistency and predictability in application.⁷⁴

Under s.2(1) HRA, UK courts must take the European case law into account. This case law includes the margin of appreciation doctrine. Thus on the face of it the cases will provide little assistance in these types of artistic expression cases. However the court only has to take into account the Strasbourg case law 'so far as, in [its] opinion, it is relevant'. Thus it will be open to the court to decide that the margin doctrine was an irrelevant aspect of a Strasbourg judgment and disregard it. If a European case would have been decided differently but for the application of the margin of appreciation then it is arguable that that should be 'taken into account' by the UK court – that the case should be decided on the basis of the European case law absent the margin of appreciation.

It is arguable that the margin should have no place in UK law post incorporation. As the above quotation from *Handyside* clearly demonstrates, the doctrine is designed to take account of the gap between the national authorities, who know well the requirements of their nations, and the international judge, who does not. When the determination is being performed by a national court there is no such gap – the national courts are perfectly well placed to assess whether restrictions on fundamental rights are necessary. The justification for the margin therefore falls away. As Jones presciently observed in 1995, a 'British court would ... be able to apply a more stringent test ... than that necessitated by the minimum regional standards set down by the European Court'.⁷⁵

There are, however, judicial dicta to the effect that something akin to the margin doctrine will have a role in post HRA jurisprudence.⁷⁶ This will stem from the need for judges to show deference to the democratically elected and accountable legislature and executive – that there must exist a 'discretionary area of judgment in which the judges will not interfere'. In his speech in *Kebilene*, Lord Hope said:

In some circumstances it will be appropriate for the courts to recognise that there is an area of judgement within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the convention. (emphasis added)

If the basis of the argument that there will be a domestic role for a quasi-margin doctrine is that the device allows for judicial deference to the democratically elected arm of government, then it is submitted that it should

have no role whatsoever in the *Gibson* type of case. It cannot be an instance of one of the circumstances envisaged by Lord Hope in *Kebilene*. This is because the use of the common law offence against artistic expression circumvents the will of Parliament, which provided in s.4 OPA 1959 for a statutory defence of the public good. Furthermore, in 1964 the Solicitor-General gave an assurance to Parliament, repeating an earlier assurance, that a conspiracy to corrupt public morals would not be used to circumvent the statutory defence in s.4.⁷⁷ Whilst this assurance was in relation to charges of conspiracy to corrupt public morals, Lord Morris certainly thought that 'the spirit and intendment of the assurance would clearly apply in reference to a charge of conspiracy to outrage public decency', and thus, by implication, to a charge of outraging public decency *per se*.⁷⁸ If this is right, then the will of the democratically elected arm of government has been made plain – such prosecutions should not take place. It would therefore not be appropriate to introduce arguments (based on the democratic credentials of the executive) to the effect that it is within the discretionary area of judgment to bring such prosecutions in order to protect morality. It is clear that it is quite contrary to the democratic will.

How would the HRA Operate?

If it is found that the use of the common law offence as it was used in *Gibson* would be contrary to article 10, how will this be effectuated by the HRA? Two alternatives appear to suggest themselves.

By virtue of section 6(3)(a), the court itself would be a 'public authority'.⁷⁹ It is therefore unlawful for it to act in a way which is incompatible with Convention rights. Thus it will have to exercise its functions compatibly with the Convention rights. Since its functions include the application and development of the common law, it will only be able use the common law offence having due regard to the article 10 points made above. One approach could be to give full weight to Lord Simon's *obiter* remarks in *Knulier*.⁸⁰ In so doing the balance required by the doctrine of proportionality could be adequately struck – the question of whether the penalty is really 'necessary in a democratic society' could be properly addressed.

This solution however does not give full rein to the objections that the offence does not meet the 'prescribed by law' or the 'legitimate aim' requirements in paragraph 10(2).

There is, it is submitted, a better solution, which would prevent the common law offence being used in such cases of expression, yet would still permit prosecution for acts of public indecency. Under s.3 HRA, all legislation must 'so far as it is possible to do so ... be read and given effect in a way which is compatible with Convention rights'. Now recall s.2(4)

OPA. Defendant's Counsel in *Gibson* argued that of the two possible meanings of obscene – the wider and the narrower – the wider one should be the one used in s.2(4). It was accepted by all, including Crown counsel, that if this interpretation were right the prosecution would have been 'plainly barred'. The argument was dismissed by the Court of Appeal, Lord Lane finding himself 'unable to find any justification for such a radical departure from the ordinary canons of construction'.⁸¹

It is submitted that now there does exist just such a justification (indeed injunction) in the form of s.3 HRA.⁸² Under this section the court will be compelled to adopt this alternative 'possible' interpretation of the word 'obscene' in s.2(4). This would result in the s.2(4) statutory bar being applied to any attempt to use the common law offence. Any prosecution would have to take place under the OPA. If the work *were* found to be obscene, the artist would then be able take advantage of the defence of artistic merit in s.4. Whilst this twin stage test has been subjected to trenchant criticism,⁸³ it does at least require a balancing act to be performed between the public benefit to be derived from artistic freedom of expression, on the one hand, and harm on the other. It is therefore likely, in principle at least, to meet the requirements of proportionality inherent in Article 10(2).

Conclusions

Several conclusions may be drawn from the above analysis. Perhaps most obviously and narrowly, there are implications for the use of the offence of outraging public decency itself. For the reasons outlined it will cease to have relevance in cases of artistic expression. In cases where it is being alleged that morals have been or may be affected detrimentally, then the prosecution should take place under the OPA by virtue of s 2(4) – for it will be a situation where the 'essence of the offence [is] that the matter is obscene'. Where, on the other hand, it is not being alleged that the article is injurious to morality – but simply outrageous to public decency (as was the case in *Gibson*), then the interpretive obligation under s.3 of the HRA will require the court to adopt an interpretation of s.2(4) OPA which is compatible with Article 10 ECHR. That is to say, it will have to adopt a wide interpretation of the word 'obscene' as used in s.2(4) so as to preclude any prosecution for the common law offence. Thus, all such prosecutions of artists in the future will have to be channelled through the OPA as was evidently intended by Parliament. And in such cases arguments based on the artistic merit of the work in question (and expert evidence thereon) will be able to be put to the jury. Thus the threat of prosecution under the common law which has hung over *avant-garde* artists since *Gibson* has, it is submitted, ceased to exist.

A second, broader conclusion can be drawn. There are areas of UK law which have been sorely in need of reform for decades. The law relating to obscenity and indecency is foremost amongst these, being 'illogical in theory, uncertain in scope and unworkable in operation'.⁸⁴ Famously, the Williams Committee concluded in 1979 that the law in this area 'in short is a mess'.⁸⁵ Little has changed in the intervening years to require a significant reappraisal of this conclusion. This situation is largely the result of an incremental approach and the absence of any real consensus as to what it is that the law is trying to achieve. It is an area rarely visited by governments, which tend to steer clear of it as one where there is little political capital to be gained and much to be risked.⁸⁶ However it becomes apparent that the HRA may be able to be used as a pervasive agent of law reform. It establishes a new template against which the law of obscenity and indecency must now be measured, and at least some of illogicalities and inconsistencies, it is hoped, will be ironed out as a result of its application.

A further possible conclusion could be drawn. This is that the UK courts should not be hidebound by the Strasbourg institutions' reticence in making bold decisions protecting expression where purported restrictions are based upon the alleged protection of morals. This reticence, based on the application of the international law doctrine of the margin of appreciation, should have no place in such cases under the HRA. Arguments for judicial deference based upon the existence of a 'discretionary area of judgment' and the democratic credentials of the executive *may* have a place in cases of national security or the prevention of disorder or crime.⁸⁷ But the application of the doctrine in 'protection of morals' cases at Strasbourg is based upon the proposition that 'it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals'.⁸⁸ The doctrine has arisen in order to take account of *diversity between* European states. It is therefore axiomatic that this rationale cannot be used to justify the operation of the doctrine *within* England and Wales. This should lead to more rigorous application of Convention standards by the domestic courts than has hitherto been undertaken by the by European Commission and Court. Consequently, it is submitted, the HRA should have the result of significantly enhancing freedom of artistic expression in the UK.

NOTES

I would like to thank Jonathan Griffiths, Marc Stauch, Michael Gunn and Kay Wheat for their helpful comments on earlier drafts of this paper. Errors and omissions remain my own.

1. *Guardian*, 10, 12 and 14 March 2001.
2. See for example the *Rabelais Pictures* case, *The Times*, 6 November 1890.
3. *Muller v. Switzerland* [1988] 13 EHRR 212, at 225.

4. See for example P. Kearns, 'Obscene and Blasphemous Label: Misunderstanding Art', *Criminal Law Review* (2000), 652.
5. *Handyside v. UK* [1976] 1 EHRR 737; *Muller* (note 3).
6. For contrasting comments, see P. Mahoney, 'Universality versus Subsidiarity in Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments', *European Human Rights Law Review* 4 (1997), 364; and Lord Lester of Herne Hill, 'Universality versus Subsidiarity: a reply', *European Human Rights Law Review* 1 (1998), 73. See also H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague and London: Kluwer Law International, 1996), 125.
7. *R v. Knuller* [1973] AC 435, at 493 per Lord Simon, at 467 per Lord Morris, and at 497 per Lord Kilbrandon. Some doubt persisted even after *Knuller* on the question of whether the substantive common law offence existed independent of conspiracy. Only Lord Simon and Lord Kilbrandon positively held that it did.
8. *R v. Crunden* [1809] 2 Camp 89.
9. *R v. Mayling* [1963] 2 QB 717.
10. *R v. Saunders* [1875] 1 QBD 15.
11. *R v. Lynn* [1788] 2 Durn & E 733.
12. *Herring v. Walround* [1681] 2 Chan Cas 110.
13. *R v. Grey* [1864] 4 F & F 73.
14. *R v. Delavel* [1763] 3 Burr 1434.
15. *Knuller* (note 7), at 493 per Lord Simon. Note however the strong dissents at 457–8 of Lord Reid and at 469 of Lord Diplock, neither of whom accepted that either the offence of conspiracy to outrage public decency or the generalised substantive offence existed. The latter also felt unable to draw the distinction between conspiracy to corrupt public morals and conspiracy to outrage public decency.
16. *Shaw v. DPP* [1962] AC 220, at 281 per Lord Reid, and at 292 per Lord Morris.
17. For some recent examples of the use of the offence to control public sexual behaviour, see *R v. Carroll* [2000] EWCA Crim 723; *R v. Pedley* [2000] WL 1629537; *R v. Gaynor* [2000] 2 Cr App R (S) 163; *R v. Wrench* [1996] 1 Cr App R 340.
18. There are obviously difficult questions here relating to the distinctions between expression and behaviour, especially in relation to 'performance art'. The question of what constitutes 'art' is beyond the scope of this paper. See generally E. Barendt, *Freedom of Speech* (Oxford: Clarendon, 1985).
19. *McGowan v. Langmuir* [1931] JC 10, at 13.
20. This 'ordinary' meaning has been given to the word obscene in several statutes, for example The Post Office Act 1953, s.11: *R v. Anderson* [1972] 1 QB 304. This Act has now been replaced by The Postal Services Act 2000, which contains a similar provision in s.85(3). See also the Customs Consolidation Act 1876, s.42.
21. See for example *Knuller* (note 7), at 468–9 per Lord Morris.
22. *Ibid.*, at 458 per Lord Reid; at 495 per Lord Simon.
23. *Ibid.*, at 468 per Lord Morris.
24. *Ibid.*, at 495 per Lord Simon.
25. *Ibid.*, at 494–5 per Lord Simon. The requirement of publicity has been interpreted quite widely, see for example *R v. May* 91 Cr App Rep 157, in which two schoolboys were asked by their schoolmaster to ask *him* to simulate sexual intercourse on his desk to their evident enjoyment. Since they themselves were not participants their presence was deemed to satisfy the publicity requirement.
26. *Knuller* (note 7), at 458 per Lord Reid.
27. The 1981 Act repeals the whole of the 1838 and 1889 Acts plus the part of s.4 of the 1824 Act which dealt with the exhibition of indecent material.
28. 1981 Act, s.1(4)(b).
29. See G. Robertson, *Obscenity* (London: Weidenfeld and Nicolson, 1979), 199–209.
30. *R v. Gibson* [1991] 1 All ER 439, at 447. For critique of this aspect and more generally, see M. Childs, 'Outraging Public Decency: The Offence of Offensiveness', *Public Law* (1991), 20–9 at 27. See also D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Clarendon, 1993), 708.

31. *Gibson* (note 30), at 442. Lord Lane cited *Knuller* (note 7), at 913 per Lord Morris, and *Shaw* (note 16), at 281 per Lord Reid, in support of the view that there are indeed two types of offence involving obscenity. Although he also noted that Lord Diplock, in his minority speech in *Knuller*, felt unable to draw the distinction between conspiracy to corrupt public morals and conspiracy to outrage public decency.
32. See for example the Report from the Select Committee on Obscene Publications (London: HMSO, 1958), which includes the evidence given by the authors T.S. Elliot and E.M. Forster.
33. Section 4. The question of whether the article in question is in the public good is a separate one from whether it is obscene: 'juries ... consider first whether they are satisfied beyond reasonable doubt that the article ... is obscene ... within the meaning of s.2(1). If they are not so satisfied, that is the end of the matter ... If, however they are satisfied that the article ... is obscene they should then go on to consider whether on the balance of probabilities, the defence of the public good under s.4(1) ... has been made out', *DPP v. Jordan* [1977] AC 699, at 726-7 per Lord Salmon. By virtue of s.4(2), expert evidence is admissible on the merits of the article. For a critique, see Robertson (note 29), ch.6; and Barendt (note 18), 270, who comments that the defence requires juries to perform 'mental gymnastics of Olympic proportions'.
34. Note the comment by Childs (note 30) that this interpretation seems unusual, as the primary function of the word 'deem' is to bring within a definition something which would otherwise be excluded, *Barclays Bank Ltd. v. I.R.C.* [1961] AC 509.
35. As inserted by the Criminal Law Act 1977 and amended by the Cinemas Act 1985.
36. Kearns (note 4).
37. G. Robertson, *Freedom, the Individual and the Law*, 7th edn. (London: Penguin, 1993), 247.
38. *Gibson* (note 30), at 444 per Lord Lane.
39. Kearns (note 4), 659.
40. *Handyside* (note 5), para.49. In more recent judgments in more enlightened days, the words 'every individual' have been substituted for 'every man'.
41. *Lingens v. Austria* [1986] 8 EHRR 407.
42. *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* [1989] 12 EHRR 161.
43. *Muller* (note 3) at 225.
44. Commission's report adopted on 8 October 1986, Series A, No.133, at 37, para.95.
45. This is to be contrasted with the other, non-expression activities against which outraging public decency has been used – see above note 17.
46. Mahoney (note 6) has argued that this scheme provides for two levels of protection against abuse of governmental power: first against bad faith abuse of governmental power, and secondly against good faith limitations on liberty which are nevertheless 'unnecessary'. The first two requirements can be seen as minimum preconditions for any restriction in a democracy – the requirement of the *rule of law* and the requirement that the aim of the restriction be *legitimate*. This first level of protection is aimed at 'naked abuse of power' by the state – it is a 'bulwark against totalitarianism'. The second level of protection, that of 'necessity', comes into 'play when these preliminary "democratic" conditions do exist, namely to prevent individuals and groups suffering from the excesses of majoritarian rule'.
47. See for example *Klass v. Germany* [1979] 2 EHRR 214.
48. *S. and G. v. UK* App. No.17634/91.
49. See for example the preamble to the ECHR, Article 7, one of the few core non-derogable rights, and the requirements of 'lawfulness' in Articles 2, 5 and 6.
50. See *Sunday Times v. UK* [1979] 2 EHRR 245 para.49.
51. *Hughes v. Holley* [1998] Cr App R 130 per Glidewell L.J.
52. *Hashman and Harrup v. UK* [1999] 30 EHRR 241, para.38.
53. Law Commission Report No.222 (1994). This is far from determinative factor though. See *S.W and CR v. UK* [1995] 21 EHRR 363. A distinguishing feature on which the Court placed emphasis in *Hashman* was the prior nature of the restraint.
54. Law Commission, *Conspiracies relating to Morals and Decency* (1974 Working Paper No.57), 44.
55. The discussion here is much indebted to Feldman (note 30), in particular at 713. Some doubt was expressed (see for example paras.5 and 61) by the Law Commission in 1974 (note 54)

- as to whether, even subsequent to *Shaw* and *Knuller*, the generalised offence of outraging decency could be said definitely to exist at all. This point was not argued in *Gibson* itself. Presumably, post *Gibson*, the offence can safely be said actually to exist.
56. See for example *Dudgeon v. UK* [1981] 4 EHRR 149 para.41, in respect of largely un-enforced legislation criminalising homosexuality: 'the maintenance in force of the impugned legislation constitutes a continuing interference with the Applicants' right ...'. The Court commented on the absence of a stated policy not to prosecute in this case and the possibility of private prosecutions. See also Lord Reid's dissenting speech in *Knuller* (note 7), at 458, 'bad law is not defensible on the ground that it will be judiciously administered'.
 57. See the discussion in D.J. Harris, M. O'Boyle and C. Warbrick, *The Law of the European Convention on Human Rights* (London: Butterworths, 1995), 290. They make the point that in such a claim the applicant's case is that the reason given by the state is not the 'real reason' – it is essentially an allegation of bad faith on the part of the government.
 58. Apparently the applicants conceded this point in their case before the Commission.
 59. *Gibson* (note 30), at 445 per Lord Lane, following *Knuller* (note 7), at 493 per Lord Simon, 'it does not seem to me to be an exorbitant demand of the law that reasonable people should be able to venture into public without their *sense of decency being outraged*' (emphasis added).
 60. First stated in *Handyside* (note 5).
 61. *Knuller* (note 7), at 495 per Lord Simon.
 62. The discussion here is much indebted to Feldman (note 30), at 714. There is a parallel here with the so called 'aversion defence' under the OPA, see for example *R v. Anderson* (note 20); *R v. Calder and Boyars* [1969] 1 QB 151.
 63. If the prosecution is a private one – as they seem to be so often in these matters (the 'Mary Whitehouse phenomenon') – it is arguable that the state should not be able to rely on the protection of morals exception at all. For if its law were really trying to protect the morals of its citizens then it ought to be incumbent on the *state* to utilise it – and not wait for a private individual to do so. As the Commission pointed out in *Gay News Ltd and Lemon v. UK* Application No.8710/79 [1983] EHRR 123, at para.11, a case of private prosecution for blasphemy, it could not be said that the 'public interest (prevention of disorder or protection of morals) was so preponderant that it provided the real basis for the interference with the applicants' right to freedom of expression. In the circumstances, the justifying ground must therefore primarily be sought in the protection of the rights of the private prosecutor'.
 64. *Plattform 'Arzte fur das Leben' v. Austria* [1988] 13 EHRR 204, paras.32–34.
 65. *Ibid.*, para.34.
 66. See for example *Lehideux and Isorni v. France* [2000] 30 EHRR 665, para.51; *Surek v. Turkey (No 4)*, 8 July 1999, para.54.
 67. See *R v. Secretary of State for Home Department ex parte Daly* [2001] UKHL 26, for recent judicial comment on proportionality and its relationship to traditional standards of review. In particular, see the speech of Lord Steyn. For a recent discussion of proportionality in domestic law, see G. Wong, 'Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality', *Public Law* (2000), 92.
 68. In *R v. Goldstein* [1983] 1 WLR 151, at 155 Lord Diplock famously cautioned against using a 'steam hammer to crack a nut, if a nutcracker would do', to illustrate the principle of proportionality.
 69. For a discussion of the application of the margin of appreciation by the Strasbourg institutions both justificatory and critical, see Yourow and also the debate between Mahoney and Lester (note 6); P. Mahoney, 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Marvellous Richness or Invidious Cultural Relativism', *Human Rights Law Journal* 19/1 (1998), 1; N. Lavender, 'The Problem of the Margin of Appreciation', *European Human Rights Law Review* 4 (1997), 380; T. Jones, 'The Devaluation of Human Rights Under the European Convention', *Public Law* (1995), 430.
 70. See for example *Ireland v. UK* [1978] 2 EHRR 25; *Bramigan and McBride v. UK* [1993] 17 EHRR 539.
 71. See for example *Lingens* (note 41); *Thorgeirson v. Iceland* [1992] 14 EHRR 843.
 72. *Handyside* (note 5), at para.48.

HUMAN EARRINGS, HUMAN RIGHTS

71

73. See above, note 6.
74. See for example the dissenting opinion of Judge De Meyer in *Z v. Finland* [1998] 25 EHRR 371; Fried van Hoof, 'The Future of the ECHR', cited in Mahoney (note 6); T. Jones (note 69); Lester (note 6).
75. Jones (note 69), at 447.
76. *R v. DPP, ex parte Kebilene* [1999] 4 All ER 801, at 844. See also D. Pannick, 'Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment', *Public Law* (1998), 545; R. Singh, M. Hunt, M. Demetriou, 'Is there a role for the "Margin of Appreciation" in National Law after the Human Rights Act', *European Human Rights Law Review* 1 (1999), 15.
77. Solicitor General, 695 HC, col.1212, 3 June 1964.
78. *Knüller* (note 7), at 468 per Lord Morris.
79. *Douglas and Zeta-Jones v. Hello! Ltd* [2001] 2 WLR 992; [2001] 2 All ER 289.
80. *Knüller* (note 7), at 495 per Lord Simon.
81. *Gibson* (note 30), at 444 per Lord Lane.
82. For an example of the power of the interpretive obligation contained in s.3 HRA, see *R v. A* UKHL [2001] 25.
83. See note 33.
84. Robertson (note 29), 307.
85. *Report of the Committee on Obscenity and Film Censorship* (London: HMSO, 1979), Cmnd.7772.
86. See A. Travis *Bound and Gagged* (London: Profile, 2000), 293.
87. For a recent example, see *R v. Secretary of State for the Home Department, Ex parte Louis Farrakhan*, *The Times*, 6 May 2002.
88. See for example *Handyside* (note 5), para.48; *Muller* (note 3), para.35.