

**THE RIGHT TO FREEDOM OF EXPRESSION
AND THE PROTECTION OF HEALTH AND MORALS
— THE JURISPRUDENCE OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

Fort Fu-Te Liao

Department of Law, Tunghai University

Abstract

This essay analyses how and where the European Commission and Court of Human Rights draw the line between the guarantee of the right to freedom of expression and the protection of health and morals by a detailed study of the case-law of Article 10 of the European Convention on Human Rights. It argues that the institutions of the Convention, by referring too much to the doctrine of margin of appreciation, limited the protection of the right to freedom of expression. On the other hand, by judging that limiting the provision of abortion information did not comply with Article 10 of the Convention, the Court enhanced the guarantee of the right. It also argues that the institutions should not put too much emphasis on the "principle of subsidiary" and the "doctrine of margin of appreciation," as the institutions themselves have been the product of a "European consensus" exercising "international judicial review." Rather, the institutions should apply the "doctrine of proportionality" and try to establish a "European standard" for protecting the right to freedom of expression.

Key Words: The Right to Freedom of Expression, Protection of Health and Morals, European Convention on Human Rights, European Court of Human Rights, the Principle of Proportionality

This essay's analysis focuses on the conflicts between the guarantee of the right to freedom of expression and the protection of health and morals. Six sections are included in this essay. For the purpose of better understanding of the arguments within this essay, section one briefly introduces the supervision system and contents of the right to freedom of expression within the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹ Sections two to four analyse the case-law of the Convention. It has to be noted that there has been only one case relating to the second section's concern, the protecting of health. That case deals with whether the provision of information to aid and abet suicide can legitimately be limited. The third and fourth sections are concerned with the protecting of morals. Section three focuses on whether obscene publications have to be prohibited to protect morals. It is argued that the Convention's institutions have drawn too much attention to the doctrine of margin of appreciation whereas, instead, they should go beyond the doctrine and develop their own views on applying the principle of proportionality. Continuing the theme of protecting morals, the fourth section concludes by agreeing with the Court's decision, which found that the provision of abortion counselling should not be prohibited even for the protection of morals. My view is that the judgment enhances the right to freedom of expression. At the fifth section, because the

¹ 213 U.N.T.S. 221; E.T.S. 5; U.K.T.S. 71 (1953); Council of Europe, *Collected Texts* (Council of Europe, 1995), pp. 13-36. The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed on 4 November 1950 and came into force on 3 September 1953. Hereafter cited as "the Convention" or "the European Convention" or "the European Convention on Human Rights."

European Commission of Human Rights² and the European Court of Human Rights³ have generally found in favour of defendant Governments, on the basis of the lack of European consensus on moral issues and the discretion of national authorities, there will also be an evaluation of the doctrine of margin of appreciation, the principle of subsidiarity, the concept of European consensus, and the principle of proportionality. A brief conclusion will be found at the last section.

I. The Convention and the Right to Freedom of Expression

The Convention establishes not only the world's most successful system of international law for the protection of human rights, but one of the most advanced forms of any kind of international legal process.⁴ The Convention is the first international agreement ever to allow individuals to submit petitions concerning human rights issues against their own countries in an international tribunal. In contrast to the traditional view that looked upon individuals as objects of international law, it enables individuals to be regarded as subjects of international law⁵

² Hereafter cited as "the Commission."

³ Hereafter cited as "the Court." When the Commission and the Court are both referred, this essay uses the term "the Strasbourg institutions" (as the Commission and the Court seat in Strasbourg), "the institutions of the Convention" or "the Convention's institutions."

⁴ Mark Janis, Richard Kay & Anthony Bradley, *European Human Rights Law: Text and Materials* (Oxford: Clarendon Press, 1995), p. 1.

⁵ See Mark Janis, "Individuals as Subjects of International Law," 17 *Cornell International Law Journal* 61 (1984). He suggests that, as international law is not properly "inter-national," we continue using the word international but understand "nation" to mean not only the national state also the individuals

and leads human rights protection towards an international path, specifically towards international judicial protection.

The Convention has gained a worldwide reputation due not only to the guarantees of human rights that it contains, but perhaps more importantly to the existence and activity of its organs. Before Protocol No. 11 to the Convention became effective three institutions participated in the proceedings of examining cases: the Commission, the Court and the Committee of Ministers of the Council of Europe. The Commission and the Court, arguably the world's most powerful international human rights bodies,⁶ were established to ensure the observance of the engagements undertaken by the contracting States. The Commission had four functions: first, as a filter, examining the admissibility of cases; secondly, as a mediator, trying to secure a friendly settlement; thirdly, as a fact-finder, writing reports; and finally, as an interpreter, presenting cases to the Court.⁷ The Court, judging whether cases were in violation of the Convention, played the most important role as the final interpreter of the Convention. The Committee of Ministers, although a political organ which is not established by the Convention but by the statute of the Council of Europe, also had a role in judicial decision-making.

If the Commission held cases⁸ to be inadmissible, such a de-

who are the nationals of the state.

⁶ Adam Tomkins, "Civil Liberties in the Council of Europe," in C. A. Gearty (ed.), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (London: Martinus Nijhoff Publishers, 1997), p. 2.

⁷ See Mark Janis, Richard Kay & Anthony Bradley, *supra* note 4, pp. 35-64.

⁸ Applications under the Convention may come from States or individuals. Since there are few inter-State cases referred to the Strasbourg institutions

cision was final, since no appeal was provided. On the other hand, an admissible case in which the parties had reached no friendly settlement might be referred to the Court by the Commission, by the contracting States concerned and by the individual or non-governmental organisation⁹ who had submitted the petition.¹⁰ However, if cases were not brought to the Court, the Committee of Ministers had to decide the question concerned by a 2/3 majority. The Committee of Ministers, although it had far fewer chances than the Court to decide cases, actually had judicial power. Consequently, the Commission's decisions on inadmissibility,¹¹ the Committee of Minister's resolutions and the

and they have not presented many important issues, the cases examined in this essay are limited to individual applications only.

⁹ Protocol No. 9 gives individuals and non-governmental organisations of consenting States the right to bring cases to the Court. This Protocol has been repealed by Protocol No. 11.

¹⁰ On the day before Protocol No. 9 was opened for signature, the then President of the European Court of Human Rights, Rolv Ryssdal, said that "we are now in a position to take a new step, a decisive step towards a European Constitutional Court." See Speech by Rolv Ryssdal, President of the European Court of Human Rights, on 5 November 1990, Cour (90) 289 (Strasbourg: Council of Europe, 1991).

¹¹ The old Article 26 before Protocol No. 11 entered into force provided that the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. Article 27 requires that the Commission shall not deal with any individual application which is anonymous or is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information. Article 27 also stated that the Commission shall consider inadmissible any individual petition which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of peti-

Court's judgments were all, in different stages, final decisions and bound the individuals and nations. They are therefore all important resources for analysing the Convention's case-law.

Several decades after the Convention was established its control mechanism, suffering from the Convention's own success, faced three major problems: the obsolescence of the system, the growing backlog of cases, and the growing number of member States of the Council of Europe.¹² These problems required that the system be improved to face new challenges. From 1985 onwards, three main proposals were developed for the reform of the system. The first was to preserve the system adopted in 1950, but with more full-time members of the Commission and the Court. The second invoked keeping a two-tier system, which suggested converting the Commission into a first instance court. The third supported the creation of a new, permanent, single, full-time court. The last proposal was finally endorsed by the Heads of State and Government of the Council of Europe member States at the 1993 Vienna summit¹³ and was later given

tion. It however has to be noted that when the Commission decides a case to be "manifested ill-founded" it states its opinions concerning the legitimacy of limiting the right to freedom of expression. Therefore, the cases in which the Commission has decided to be manifested ill-founded are reviewed in this essay.

¹² See, for example, Henry G. Schermers, "The Eleventh Protocol to the European Convention on Human Rights," 19 *European Law Review* 367, 369 (1994).

¹³ The Heads of State and Government of the Council of Europe member States delivered the following opinion. "We are of the opinion that it has become urgently necessary to adapt the present control mechanism to this development in order to be able to maintain in the future effective international protection for human rights. The purpose of this reform is to enhance the efficiency of the means of protection, to shorten procedures

form by Protocol No. 11, which has been in force since 1 November 1998.

Protocol No. 11 provides several reforms to the original system. First, it provides that the right of individual petition shall cease to be optional for States. It gives individuals the general right to submit applications direct to the new Court. The Protocol grants the individual a legal status as a “party” before the Court. Secondly, it also grants States the right to submit applications directly to the Court concerning alleged breaches by other States. Thirdly, it invests the Court with general jurisdiction over all matters concerning the interpretation and application of the Convention and Protocols on questions relating to admissibility and merits. Fourthly, the Protocol abolishes the judicial decision-making power of the Committee of Ministers. Lastly, the permanence of the new Court entails a transformation of the nature of the judges’ mandate to full time position.

The Commission continued to exist until 31 October 1999 to finish the examination of cases already declared admissible. Applications, whose admissibility had not been decided by the Commission before Protocol No. 11 entered into force, have been examined by the permanent Court under the new system.¹⁴ The Committee of Ministers no longer has judicial decision-making power, but it maintains its important role as a

and to maintain the present high quality of human rights protection. To this end we have resolved to establish, as an integral part of the Convention, a single European Court of Human Rights to supersede the present controlling bodies.”

¹⁴ The details of how to deal with the pending cases after Protocol No. 11 comes into force are set out in detail in Article 5 of Protocol No. 11.

supervisory institution ensuring that governments comply with the Court's judgments. The Court ceased to exist when the new permanent European Court of Human Rights¹⁵ was inaugurated on 1 November 1998. The remaining cases that the old Court had not decided have been passed to the Grand Chamber of the new Court.

The process and the structure of the permanent Court under Protocol No. 11 can be summarised as follows. The new Court sits in Committees, Chambers, and a Grand Chamber. Whereas an inter-state case is directly examined by a seven-judge Chamber for the decisions on both admissibility and merits, an individual application is first assigned to and prepared by a Judge Rapporteur, then referred to a three-judge Committee for the determination of admissibility. If a case is not held to be inadmissible,¹⁶ which needs a unanimous decision by the three judges, the individual application will be referred to a Chamber, which will decide on both admissibility and merits. A Chamber may try to reach a friendly settlement between the parties. If no friendly settlement is reached, a judgment should be given. Nonetheless, before it renders its judgment, a Chamber may relinquish jurisdiction to the Grand Chamber, consisting of seventeen judges, where a case raises a question affecting the interpretation of the Convention or its Protocols, or where the Chamber's decision may be inconsistent with a previous judg-

¹⁵ Within this essay, the permanent European Court of Human Rights established by Protocol No. 11 is cited as "the new Court" or "the permanent Court."

¹⁶ It should be noted that Article 35 of the Convention keeps "manifestly ill-founded" as a reason for declaring an individual application to be inadmissible.

ment of the new Court. However, if one of the parties objects, a case cannot be relinquished. There will still be a possibility of rehearing the case before the Grand Chamber, “if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.”¹⁷ The rehearing application should be made at the request of any party within three months from the date of a Chamber’s judgment, and a panel of five judges of the Grand Chamber will consider whether or not to refer the case.

Article 10 of the Convention reads:

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.

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 or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁸

¹⁷ Article 43 of the Convention.

¹⁸ It has to be noted that Protocol No. 11 to the Convention, which came into force on 1 November 1998, inserts the heading of Article 10 as “Freedom

Therefore, any restriction on the right to freedom of expression must be legal—prescribed by law—and legitimate—having a legitimate aim or aims and necessary in a democratic society. In examining the cases concerning Article 10, the Commission and the Court have focused primarily on the issue whether particular limitations on freedom of expression can be legitimately justified. The essential issue in disputes about the right to freedom of expression in the Convention does not usually concern its existence as a basic human right but the legitimacy of the restrictions imposed on it. Research on the right to freedom of expression in the Convention can be said to be about the legitimate boundaries of the limits of freedom of expression. If these boundaries can be determined, the reality of the meaning of the right to freedom of expression may then be found. However, it is not reasonable to examine all the legitimate boundaries between the right to freedom of expression and all the aims enshrined in Article 10 paragraph 2 at an essay like this. It intends to focus merely on the legitimacy of limiting the right to freedom of expression for the protection of health or morals.

II. Providing Information to Aid and Abet Suicide

Providing information to help those who would commit suicide, even the old or sick, may not be a proper exercise of freedom of expression and this information can be restricted for the protection of health. *R. v. the United Kingdom*¹⁹ has been the only case before the Strasbourg institutions relevant to lim-

of expression” not “The Right to Freedom of Expression.”

¹⁹ *Eur. Commission HR, Application No. 10083/82 decision of 4 July 1983, 33 D & R 270.*

iting free expression for the aim of protecting health. The applicant, a member of the Voluntary Euthanasia Society EXIT, arranged for persons wishing to commit suicide to meet another person who would assist them in this. He was convicted and sentenced to 18 months' imprisonment for providing information to aid and abet suicide and for conspiring to aid and abet suicide.

The Commission's decision focused on the doctrine of margin of appreciation. Thus the Commission took account of the State's legitimate interest in taking measures to protect the life of its citizens, particularly those who were elderly or infirm.²⁰ The Commission recognised "the right of the State under the Convention to guard against the possible criminal abuses that would occur, in the absence of legislation, against the aiding and abetting of suicide."²¹ Although in the Commission's view the applicant appeared to have been well intentioned—he only acted out of compassion for old or sick people—it did not alter the justification for the general policy. Accordingly, the Commission found that the interference was necessary in a democratic society for the protection of health.

Every country certainly has a legitimate interest in protecting its citizens and a right to guard against criminal abuses. However, before the Commission could find that a defendant Government was acting within its discretion it had to explain the reasons for giving the State the benefit of a margin of appreciation, and why the State was within its margin. It is regrettable that the Commission did not express its viewpoints on these issues but found for the Government directly. Moreover, the Commission

²⁰ *Ibid.*, para. 17.

²¹ *Ibid.*

did not examine the contents or the application of the criminal provisions of the United Kingdom. The key point of the case should be whether aiding and abetting suicide could be treated as a legitimate exercise in imparting information in a democratic society, a point which the Commission did not focus on. A more detailed examination of the subject by the new Court is awaited.

III. Obscene Publications

Whether publications are obscene and whether they should be prohibited are questions that have been controversial at both the national and the international law levels. This section analyses the opinions of the Strasbourg organs on these two issues. To present the analyses and arguments more clearly, this section classifies publications into four categories, which are: books intended for young readers, magazines sent beyond national borders, the graphic arts, and video films.

1. Books Intended for Young Readers

Protecting young people provides an especially strong reason for prohibiting obscene publications. In two early cases, *X. and the German Association of Z. against the Federal Republic of Germany*²² and *X., Y., and Z. v. Belgium*,²³ the Commission referred to the margin of appreciation to find that the defendant

²² Eur. Commission HR, Application No. 1167/61 decision of 16 December 1963, 6 Yearbook of the European Convention on Human Rights 204.

²³ Eur. Commission HR, Application No. 6782/74, 6783/74 and 6784/74 decision of 1 March 1977, 9 D & R 13.

Governments' limitations on freedom of expression were necessary in a democratic society. In the former case, X. delivered publications for Z's publication, "Das Journal Capriccio," which was described by the Office of Public Prosecutor of the then West Germany as manifestly liable to corrupt the young because seven of its illustrations were likely to over-excite and misdirect the sexual fantasies of adolescents.²⁴ The first applicant was therefore fined. The Commission found that the relevant German criminal provisions in no way exceeded the margin of appreciation and represented measures necessary to protect the morals of young persons.²⁵ In regard to the application of the provisions, the Commission found that the German domestic courts had not applied these provisions in a manner contrary to the Convention. On this basis, the Commission held that it was not necessary to examine the actual contents of the publication in question.

In the latter case the three applicants formed an association and circulated a periodical among its members. They were fined for distributing immoral literature or pictures and outraging public morals.²⁶ In deciding whether these applications were admissible, the Commission recalled that the machinery of protection established by the Convention was subsidiary to national systems. The Commission then observed that the Belgian court had made a detailed examination of the publications in dispute, and supported the opinion expressed by the Belgian court.

The point which could be criticised in both cases was that the Commission did not express sufficient reasons to support its

²⁴ *Application No. 1167/61*, *supra* note 22, p. 208.

²⁵ *Ibid.*, p. 218.

²⁶ *Application No. 6782/74, 6783/74 and 6784/74*, *supra* note 23, p. 18.

conclusions. As Morrisson explains in his comment on the former case, the Commission relied completely on the decisions of the domestic courts “in the crucial matter of the nature of the expression, in spite of considerable evidence at the trial that the publication was innocuous.”²⁷ Before the Commission granted a margin of appreciation it had to review the publication involved “against its own standards for the Convention phrase, however ephemeral they might be.”²⁸ It might be argued that these decisions were based on insufficient reasons and were grave restrictions on free expression.

The Commission’s treatment of the inquiry into necessity was similarly limited to a superficial finding. The Commission’s reasoning was unacceptable because the Commission gave no reason when it found for the Governments. In the former case it just referred to “the general evidence” before it but did not examine the actual contents of the publication. In the latter case the Commission simply stated its support for the opinion of the Belgian court but did not state its own view on the publications, especially why they ought not to be read by young people. It was hard to tell from the Commission’s reasoning whether the German courts had exercised their rights in a manner contrary to Article 10 paragraph 2. Since it had not set out its views on the magazine published by the applicant associations in detail, the Commission did not have sufficient reasons to support the domestic courts. The real reason for the decisions was possibly that these cases were early in the Convention’s jurisprudence,

²⁷ Clovis C. Morrisson, Jr., “Margin of Appreciation in Human Rights Law,” 6 *Revue Des Droits De L’Homme* 263, 280 (1973).

²⁸ *Ibid.*

when the Commission attempted to avoid finding member States in violation of the Convention.

The most important case addressing the protection of the morals of young people is the well-known *Handyside*²⁹ case. Mr. Handyside published an English edition of the Little Red Schoolbook, which was originally published in Denmark and subsequently in many other countries. Before the publication of the English edition, a warrant was issued under the Obscene Publication Act 1959 and many copies of the book were seized. The applicant was fined £25 on each summons and a forfeiture order was made for the destruction of the book. Thereupon the applicant published a revised edition, which did not lead to a prosecution.

In this judgment the Court presented its detailed reasoning on the doctrine of margin of appreciation. It pointed out that the machinery of protection established by the Convention was subsidiary to the national systems safeguarding human rights.³⁰ The Court ruled that State authorities were 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.³¹ This conclusion was based on three considerations: it was not possible to find in the domestic law of the various contracting States a uniform European conception of morals;³² the requirements of morals varied from time to time and from place to place, especially in the

²⁹ *Eur. Court HR, Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24.*

³⁰ *Ibid.*, para. 48.

³¹ *Ibid.*

³² *Ibid.*

era which was characterised by a rapid and far-reaching evolution of opinions on the subject; and domestic authorities were in direct and continuous contact with the vital forces of their countries.³³ The Court also expressed the following views. National authorities were entitled to make the initial assessment of the reality of the pressing social need implied by the notion of necessity;³⁴ therefore Article 10 §2 left the contracting States a margin of appreciation. This margin was given both to the domestic legislator and to the judicial and other bodies, which were called upon to interpret and apply the laws in force.³⁵ Nevertheless, Article 10 §2 did not give the contracting States an unlimited discretion; the Court was empowered to give a final ruling. The domestic margin of appreciation thus went hand in hand with European supervision. However, the Court's task was to review the decisions they delivered in the exercise of their power of appreciation.³⁶ Such supervision concerned both the aim of the measure challenged and its necessity; and it covered not only the basic legislation but also the decision applying it, even one given by an independent court.³⁷

In examining the necessity requirement the Court attached particular importance to the intended readership of the Schoolbook. In the Court's view, it was aimed primarily at children and adolescents aged 12 to 18. Another factor that the Court relied on was the fact that the applicant had made clear that he planned a widespread circulation of the book. The Court also

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*, para. 49.

noted that the applicant had set a modest sale price, arranged for a reprint, and chosen a title suggesting that the work was a kind of handbook for use in schools.

The Court's judgment also expressed its rejections of the arguments of the applicant and the minority of the Commission. First, the applicant and the minority of the Commission drew attention to the fact that the original edition of the Schoolbook had not been the subject of any proceedings in many other parts of the United Kingdom and that even in England and Wales thousands of copies had been circulated without impediment. However, the Court recalled that the Obscene Publications Act 1959 did not extend to Scotland or Northern Ireland. The Court held that, bearing in mind the national authorities' margin of appreciation, their failure to act did not prove that the judgment under consideration was not responsive to a real necessity. In the Court's view, these remarks also applied to the fact that many copies had been circulated in England and Wales.³⁸ Secondly, the applicant and the minority of the Commission stressed that the revised edition was not the object of proceedings in England and Wales. The Court nonetheless ruled that the absence of proceedings against the revised edition rather suggested that the competent authorities wished to limit themselves to what was strictly necessary.³⁹ Thirdly, in the opinion of the applicant and the Commission's minority many publications circulated in the United Kingdom were dedicated to hard-core pornography and were devoid of intellectual or artistic merit, which suggested an extreme degree of tolerance. However, the

³⁸ *Ibid.*, para. 54.

³⁹ *Ibid.*, para. 55.

Court's opinion was that it was not its function to compare different decisions of national authorities and it had to respect the independence of the courts. The Court noted above all that those other publications had a different object from that of the Schoolbook. Lastly, the applicant and the minority of the Commission claimed that along with the original edition translations of the Little Book appeared and circulated freely in the majority of the member States of the Council of Europe. Nevertheless, the Court again referred to the national margin of appreciation to prevent itself from accepting the argument. In the Court's opinion, the fact that most countries decided to allow the book to be distributed did not mean that the contrary decision of the United Kingdom courts was a breach of Article 10. The Court further emphasised that some of the editions published outside the United Kingdom did not include the passages, or at least not all the passages, cited as striking examples of a tendency to "deprave and corrupt."⁴⁰ For the above reasons the Court reached the conclusion that no breach of the requirements of Article 10 could be established.

The *Handyside* judgment is most important for its discussion of three points, which are the margin of appreciation that should be left to State authorities in constructing the requirements of morals, the relative nature of morals, and the necessity of a measure in a democratic society.⁴¹

⁴⁰ *Ibid.*, para. 57.

⁴¹ H. Mosler, "Problems of Interpretation in the Case Law of the European Court of Human Rights," in Frits Kalshoren, Pieter Jan Knyper and Johan G. Lammers (eds.), *Essays on the Development of the International Legal Order: In Memory of Haro F. van Panhuys* (London: Sijhoff & Noodhoff, 1980), p. 165; Renée Koering-Joulin, "Public Morals," in M. Delmas-Marty

Handyside is the Court's first detailed explanation of the margin of appreciation doctrine and its relationship to the phrase "necessary in a democratic society."⁴² In the Court's view, because moral conceptions and laws are different in European Countries and domestic institutions are more familiar with the situations within their countries, whereas the Court has a power of final supervision, member States should be given an extended margin of appreciation. The Court's judgment really gave too wide a margin of appreciation to the domestic authority. The Court probably took the view that the standards applied by each member State did not need to be national but might be local.⁴³ It is difficult to understand why the European Court should treat itself as subordinate to national courts in making decisions for protecting human rights. Should not the Strasbourg organs, when considering the importance of freedom of expression, promote a European standard of protection of human rights? It is certainly not the Court's function to substitute itself for the national authorities, but to consider whether the national authorities have adopted legitimate aims and methods in taking the decision in question. If the margin of appreciation is to form the basis for judgment, then the Court must provide more comprehensive arguments to support the doctrine. The Court's conclusion might only demonstrate that obscenity was one of those touchy issues over which the Court felt it had to avoid a clash with the Gov-

et al. (eds.), *The European Convention for the Protection of Human Rights: International Protection versus National Restriction* (The Netherlands: Kluwer Academic Publisher, 1992), p. 89.

⁴² Timothy H. Jones, "The Devaluation of Human Rights under the European Convention," *Public Law* 430, 435 (1995).

⁴³ Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1985), p. 266.

ernment.⁴⁴ While the book could be circulated in many other European States and some parts of the United Kingdom, a margin of appreciation was given to the State which seemed to indicate that there was a peculiar privilege given to the national institution. If this was pushed too far, it would tend to undermine the very idea of having a European system for the protection of human rights.⁴⁵ The Court has taken the view that any restriction on free expression must be proportionate to the aim pursued. In this case too much emphasis on the margin of appreciation deprived the Court of the opportunity of reviewing whether the limitation was proportionate.

As to the relative nature of morals, Harris stresses that the absence of a European standard of public morality is an inevitable conclusion for a group of States with such disparate moral standards as the Mediterranean and Scandinavian countries.⁴⁶ Merrills also expresses the view that the Court cannot pretend that a clear standard exists before there is any evidence and so on a matter where there are clear differences of view there must be room for a significant margin of appreciation.⁴⁷ However, van Dijk and van Hoof make the point:

The conclusive consideration for the Court was evidently

⁴⁴ Thomas A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights," 4 *Human Rights Quarterly* 474, 482 (1982).

⁴⁵ Timothy H. Jones, *supra* note 42, p. 436.

⁴⁶ D. J. Harris, "Decisions on the European Convention on Human Rights During 1975-1976," 48 *British Yearbook of International Law* 373, 384 (1976-77).

⁴⁷ J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 1993), pp. 162-163.

that no such thing as “a uniform European conception of morals” exists. Even if this statement is correct, it still leaves one with the question of whether it is then not up to the Court to develop such a “European conception” in its case-law, since the term “morals” is repeatedly in the Convention. That this term is interpreted in each case by reference to the national conceptions on this point is irreconcilable with an international system like the Convention, certainly in the long run.⁴⁸

Indeed, the Court cannot rely on national conceptions all the time. In *Handyside* the Court tried to show that in the field of protecting morals domestic authorities have a wider margin of appreciation than in other matters. Moral conceptions are truly different from one State to another, even from one place to another in the member States of the Convention. The position in relation to the other aims listed in Article 10 §2 has also varied from one country to another in the Council of Europe; but in these circumstances the Court has sometimes tried to establish a European standard. If the Court has tried to establish a “European conception” in other fields, it should surely have a duty, or at least a right, to do similar work respecting morals. A European moral standard can never exist without the Court’s efforts to establish one. The Court, which has been established as an international human rights tribunal, cannot always rely on or follow national standards.

While there might have been an absence of consensus of morals generally, there was a consensus as to the book — it

⁴⁸ P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed.) (The Netherlands: Kluwer Law and Taxation Publisher, 1990), pp. 435-436.

could be published in most member States of the Council of Europe and even in other parts of the United Kingdom. Therefore, the relative conception of morals was actually not the major point in this case. As Judge Mosler has found, it was difficult to understand why a measure that was not thought necessary outside England and Wales was deemed to be so in London.⁴⁹ The Court in effect ruled that it would only require a common minimum degree of free speech protection—beyond that it was open to each state to determine its own standards.⁵⁰ If the rights to freedom of expression and freedom to receive information were protected regardless of frontiers, a book that could be circulated in many other member States of the Convention deserved to be available in England.

The Court has revealed that the word “necessary” implies a pressing social need. However, whether there was a pressing social need to prohibit the publication of the book was really in doubt. When the applicant and the minority of the Commission argued that hard-core pornographic magazines which were often available to children were not prosecuted by the British authorities, the Court’s reply was that it was not its function to compare different decisions taken and that it had to respect the independence of the courts. However, this explanation did not seem very convincing: since more serious items could be freely circulated in the same place there was no reason why less obscene publications could not be published.

It is also doubtful whether the reasons for imposing the re-

⁴⁹ *Handyside v. the United Kingdom*, *supra* note 29, separate opinion of Judge Mosler.

⁵⁰ Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1985), p. 267.

striction were relevant and sufficient. The Court noted the facts that the applicant had set a modest sale price and intended a widespread circulation of the publication. However, the Court did not make clear why it regarded the two factors as important. The extension of circulation and the selling price did not seem to have much connection with whether or not the book needed to be prohibited. Whilst these two business methods could make the book more easily obtainable by children, the key issue was still whether the Schoolbook was obscene. When the Court said that it was not its function to compare different decisions taken and that it had to respect the independence of the courts, it appeared deliberately to be avoiding the hard question. The fact that almost 90 percent of the first edition of the Schoolbook and of other publications that had similar features were not prosecuted suggested that there was no sufficient reason to justify the interference.

2. Magazines Sent beyond National Borders

Publications can be circulated within a State and be mailed to other countries. According to the Commission's decisions obscene publications sent from other countries or to be mailed abroad may be forbidden in a democratic society for the protection of morals. In *X. v. the United Kingdom*⁵¹ two packets containing pornographic magazines were sent through the post from Denmark to the applicant in London. A criminal proceeding was issued against the applicant. However, because he denied that he had ordered the magazines, no prosecution was

⁵¹ *Eur. Commission HR, Application No. 7308/75 decision of 12 October 1978, 16 D & R 32.*

brought against him, but the police retained the packets. In *X. Company v. the United Kingdom*,⁵² a large number of the applicant company's magazines were seized. Although some copies had already been on sale in the United Kingdom without attracting any seizure or analogous measures, the magazines were ordered to be seized and forfeited. The seized magazines were awaiting dispatch not only to readers in England and Wales but also to Europe, Africa, and the United States. The copies waiting to be delivered to foreign countries greatly outnumbered those intended for the United Kingdom.

In *X. v. the United Kingdom*, the Commission referred to the contents of the magazines and a "European consensus" to find that the interference was necessary for the protection of morals. It found that "the magazines depict adult persons engaged in homosexual acts with adolescents and invite the readers to send their own photographs of similar characters."⁵³ The Commission therefore was of the opinion that the magazines were not only obscene but also aimed to propagate obscenity. At the same time, the Commission pointed out that the British provisions had "their counterparts in the legal systems of most of the other member States of the Council of Europe"⁵⁴ as a justification of the limitation.

The Commission's *X. Company v. the United Kingdom* decision noted that the moral standards and legal policies regarding obscene publications varied greatly from one country to another. The Commission thus ruled that the restriction of

⁵² *Eur. Commission HR, Application No. 9615/81 decision of 5 March 1983, 32 D & R 231.*

⁵³ *Application No. 7308/75, supra note 51, para. 2.*

⁵⁴ *Ibid.*

such material had in principle to be decided in relation to the moral standards of the possible readership. The Commission found that, whatever the ultimate destination of the publication may be, it was the publishing act itself which was morally and legally disapproved of in the United Kingdom. The Commission also found that the publications under consideration belonged to the category of so-called “hard pornography”⁵⁵ and were so clearly obscene that it was not even necessary to take any evidence on the moral standards of the likely readers abroad. In the Commission’s view, the United Kingdom had an interest in protecting its own moral standards and thus preventing the country from becoming the source of a flourishing export trade. It followed that the measure complained of could be considered necessary in a democratic society for the protection of morals.

The decisions suggest that a publication, which is permitted to be published in one of the contracting States of the Convention, does not mean that it will necessarily be allowed to be read in another contracting Nation. It has to be observed that on the one hand the Commission noted that the British provisions which prohibited obscene publications had their counterparts in most member States of the Convention, but on the other hand it was of the view that the moral standards and legal policies regarding obscene publications varied greatly from one country to another. The views indicate that there is a European consensus that obscene publications should be prevented, but the extent of the prohibition is left to be decided by national authorities. This approach does not clearly state where the borderline is between freedom of expression and the protection of morals by way of

⁵⁵ *Application No. 9615/81, supra* note 52, p. 234.

preventing obscene publications. It is obvious that every nation has to protect its own standards of morals; a state which holds more liberal views on obscene publication does not mean that other nations have to follow that standard. Nevertheless, whether magazines, obscene though they might be, can be posted to other contracting States of the Convention has to be decided by a European standard since Article 10 has set out that the right to freedom of expression has to be protected "regardless of frontiers." It is hoped that the new Court can set a criterion for the member States of the Convention.

3. Expressions by Graphic Arts

Opinions may be expressed not only in writing but also in artistic works. However, the borderline between the protections of artistic forms of expression and of morals is not always clear. *Müller*⁵⁶ was the first case in which the Court had to consider the relevance of the protection of morals to the expression through the graphic arts.⁵⁷ The first applicant was invited by one of the other nine applicants to produce large paintings for an exhibition. On the basis of the information that a young girl had reacted violently to the paintings, and that another visitor had apparently thrown down one of the paintings, trampled on it and crumpled it, the applicants were prosecuted and fined for publishing obscene material. The paintings were ordered to be deposited in a museum for safekeeping for more than six

⁵⁶ *Eur. Court HR, Müller and others v. Switzerland judgment of 24 May 1988, Series A no. 133.*

⁵⁷ J. G. Merrills, "Decision on the European Convention on Human Rights During 1988," 59 *British Yearbook of International Law* 365, 392 (1989).

years until the applicant applied for their return.

The Court's judgment was divided into two parts, covering the conviction of the applicants and the confiscation of the paintings. In relation to the conviction, the Court's judgment concentrated on the character of the paintings and the public nature of the exhibition. The Court found that the paintings depicted "in a crude manner sexual relations, particularly between man and animals"⁵⁸ and were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensibility."⁵⁹ As to the latter point, the Court noted that the general public had free access to the exhibition and the paintings. Despite recognising that "conceptions of sexual morality have changed in recent years,"⁶⁰ the Court had regard to the margin of appreciation and found that the Swiss courts were entitled to consider that it was necessary for the protection of morals to impose a fine on the applicants for publishing obscene material.⁶¹

The applicants also claimed that "the exhibition of the pictures had not given rise to any public outcry and indeed the press on the whole was on their side."⁶² The Court admitted that the applicant had been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the exhibition. However, the Court ruled that "it does not, in all the circumstances of the case, respond to a genuine social need."⁶³

The other part of the Court's judgment observed that al-

⁵⁸ *Müller and others v. Switzerland*, *supra* note 56, para. 36.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

lowing confiscation of “items whose use has been lawfully adjudged illicit and dangerous to the general interest”⁶⁴ was a common principle of law in the contracting States of the Convention. The Court found that the original confiscation “was not absolute but merely of indeterminate duration, which left room to apply for a reconsideration.”⁶⁵ It was thus open to the owner to apply to have the confiscation order discharged or varied. The Court, again referring to the margin of appreciation, held that the Swiss courts were entitled to hold their judgments. Accordingly, the Court concluded that the disputed measures did not infringe Article 10 of the Convention.

According to the Swiss court’s judgment, the reason for the return of the paintings was that “there was no reason to believe that the applicant will use the three paintings in future to offend other people’s moral sensibilities.”⁶⁶ It might be argued that the verdict of the Swiss court was based on an assumption. The real point should however be whether an alternative method existed which was less severe than the confiscation. As the Commission’s report explained, the confiscation deprived Mr. Müller of all use of the paintings; thus the interference was particularly serious.⁶⁷ The Swiss courts could have considered other measures, such as “prohibiting all further exhibition of the paintings or imposing a prior-permission requirement or setting an age-limit for admission to the exhibition,”⁶⁸ which might have been enough to protect morals in Switzerland. When less severe

⁶⁴ *Ibid.*, para. 42.

⁶⁵ *Ibid.*, para. 43.

⁶⁶ *Ibid.*, para. 19.

⁶⁷ *Eur. Commission HR, Müller and others v. Switzerland*, report, para. 94.

⁶⁸ *Ibid.*, para. 102.

limitations existed, it was difficult to regard the choice by the Swiss court as proportionate.

It might be argued that the Court did not offer sufficient protection of artistic expression: in the name of margin of appreciation, weaker protection had been given to artistic expression than to political speech. Artistic expression might have to be considered in different ways, since freedom of expression in relation to art cannot properly be impeded because the contents of the material may offend others.⁶⁹ The Court has pointed out that those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society.⁷⁰ Therefore, any limitation imposed on these people's freedom of expression should be examined with care. In this case in fact only a few persons were shocked by the paintings but the general public was willing to accept the paintings. To say that "art upset me" is to say something in the realm of personal response rather than to say something of art's inadequacy or culpability.⁷¹ Even though the Court was of the view that moral standards varied from one State to another, it had a duty to understand all the circumstances as to how the domestic courts find the paintings as "obscene" before it gave a margin of appreciation to the authorities. The reasons for condemning the paintings were really not convincing, since at the time of exhibi-

⁶⁹ David Pannick, "Article 10 of the European Convention on Human Rights," in P. Birks (ed.), *Criminal Justice and Human Rights* (Oxford: Clarendon Press, 1995), Vol. 1 of *Pressing Problems in the Law*, p. 120; David Pannick, "Article 10 of the European Convention on Human Rights," 4 *King's College Law Journal* 44, 49 (1993-94).

⁷⁰ *Müller and others v. Switzerland*, *supra* note 56, para. 33.

⁷¹ Paul Kearns, *The Legal Concept of Art* (Oxford: Hart Publishing, 1998), p. 177.

tion the moral views of the general public in Switzerland, or at that in the area where the exhibition was held, did not regard the paintings as obscene or disgusting. The judgment seems to indicate that the application of the standards prevailing in a small part of Switzerland has an effect of universal proportion.⁷² In view of the fact that the paintings could be exhibited in other parts of Switzerland and other European nations it is difficult to accept the Court's endorsement of the prohibition. The conviction of the applicant did not appear to be necessary in a democratic society for the protection of morals.

4. Prohibitions on Video Films

The analysis now turns to a different subject, video film. In *Scherer v. Switzerland*,⁷³ the applicant ran a sex shop for homosexuals. The nature of the shop was not apparent to passers-by whereas customers knew it through advertisements in particular magazines or at meeting places of homosexuals. At the back of the shop there was a room used for showing video films. Customers heard its showing programmes by words of mouth. While showing a sex video film the shop was searched. The applicant was fined and his film was confiscated.

In the Commission's view, this case was of particular relevance as to whether the videotape was displayed to the general

⁷² Colin Warbrick, " 'Federalism' and Free Speech—Accommodating Community Standards: The American Constitution and the European Convention on Human Rights," in Ian Loveland (ed.), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (Oxford: Hart Publishing, 1998), p. 187.

⁷³ *Eur. Court HR, Scherer v. Switzerland judgment of 25 March 1994, Series A no. 287.*

public. Because the nature of the applicant's shop was not discernible from the street, and showing of the films was passed on by word of mouth among interested persons, the Commission found that the video display had no public character.⁷⁴ Moreover, the Commission noted that it was undisputed that minors had no access to the film, as young people's access to the shop was controlled.⁷⁵ The Commission therefore found that there were no compelling reasons to justify the interference.

The case was however struck off the Court's list,⁷⁶ so it is not possible to ascertain the Court's opinion as to whether this limitation was legitimate. However, it has to be noted that the Commission, like the Court in *Müller*, focused on the publicity of the obscene publication concerned. The Commission also emphasised that the young were not the objects. These views appear to indicate that factors influencing whether obscene publications other than written words can be shown are whether they are of public character and whether they are aimed at minors.

In relation to obscene publications, the Convention's institutions have been willing to deliver pro-government judgments, particularly when the object is young people. It seems that obscene publications made in different forms—including books, magazines, paintings, and video films—or sent from or to foreign countries may be restricted for the protection of morals in a democratic society. In addition, the character of the expression—whether it is private or public—is possibly the essential factor in examining some forms of expression other than the

⁷⁴ *Eur. Commission HR, Scherer v. Switzerland*, report, para. 61.

⁷⁵ *Ibid.*, para. 62.

⁷⁶ *Scherer v. Switzerland*, *supra* note 73, para. 32.

written word.

When finding for the defendant States in *Handyside* and *Müller*, the Court emphasised that those who exercised their freedom of expression were subject to duties and responsibilities, the scope of which depended on their situations and the technical means they used.⁷⁷ However, it did not clearly state what the duties and responsibilities of publishers and artists were. The Court's approach seems to suggest that different people have different duties and responsibilities, therefore they enjoy different degrees of freedom of expression. If this is correct, the Court will have to put every occupation and method of expression into categories and give them their own boundaries of freedom of expression.

IV. Injunction on Abortion Information

The main issue in *Open Door Counselling and Dublin Well Women v. Ireland*⁷⁸ was whether an injunction on providing abortion information was necessary in a democratic society for the protection of morals. There were six applicants in the case. Two companies, Open Door Counselling Ltd. and Dublin Well Women Centre Ltd., were engaged in counselling pregnant women; two applicants worked as trained counsellors for Dublin Well Women; and two women joined in the Dublin Well Women's application as women of child-bearing age. Because abortion was illegal in Ireland the applicant companies coun-

⁷⁷ *Handyside v. the United Kingdom*, *supra* note 29, para. 49; *Müller and others v. Switzerland*, *supra* note 56, para. 34.

⁷⁸ *Eur. Court HR, Open Door Counselling and Dublin Well Women v. Ireland judgment of 29 October 1992, Series A no. 246.*

elled pregnant women to travel abroad to obtain abortions. A private society in Ireland sought a declaration that the activities were unlawful because of Article 40(3)(3) of the Irish Constitution. The society also sought an order to restrain the defendants from providing such counselling. Subsequently, the Irish High Court issued an injunction against the applicants' counselling activities, which was upheld by the Supreme Court of Ireland.

When examining whether the limitation was legitimate, the Court acknowledged that national authorities enjoyed a wide margin of appreciation in matters of morals, particularly on matters of belief concerning the nature of human life. However, the Court could not agree with the defendant Government's submission which argued that "the State's discretion in the field of the protection of morals is unfettered and unreviewable."⁷⁹ The Court stated that to accept this plea would amount to an abdication of the Court's responsibility to ensure the observance of the engagements undertaken by the contracting States.⁸⁰ Accordingly, the Court decided that it had to examine the question of necessity.

The Court was first struck by the absolute nature of the injunction which imposed a "perpetual" restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy.⁸¹ On this ground alone, the Court found that the restriction appeared over-broad and disproportionate.

⁷⁹ *Ibid.*, para. 68.

⁸⁰ *Ibid.*, para. 69.

⁸¹ *Ibid.*, para. 73.

The judgment was confirmed by other factors. First, the corporate applicants' counsellors neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options. Therefore, "the link between the provision of information and the destruction of unborn life was not as definite as contended."⁸² Secondly, the information provided by the applicants which concerned abortion facilities abroad was not made available to the public at large.⁸³ Thirdly, the information could be obtained from other sources in Ireland, such as magazines and telephone directories or by persons with contacts in Great Britain. As a result the information that the injunction sought to restrict was already available elsewhere.⁸⁴ Fourthly, the injunction appeared to be largely ineffective in protecting the unborn since it did not prevent large numbers of Irish women from obtaining abortions in Great Britain.⁸⁵ Fifthly, the available evidence suggested that the injunction had created a risk to the health of those women who were seeking abortions at a later stage in their pregnancy. These women were not availing themselves of customary medical supervision after their abortion.⁸⁶ Finally, the injunction might have had greater adverse effects on women who did not have sufficient resources or the necessary level of education to have access to alternative sources of information.⁸⁷

Deciding whether there is a violation of human rights at international level is never a smooth process. Valuing how

⁸² *Ibid.*, para. 75.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para. 76.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, para. 77.

much latitude is appropriate in a particular case may be controversial. What one Judge or Commissioner sees as a legitimate exercise of national sovereignty may strike another as outside the boundaries of permissible conduct.⁸⁸ In the *Open Door* case, the Commission and the Court presented four different conclusions: 1) none of the applications disclosed violation of the Convention;⁸⁹ 2) all of the applications disclosed violations for the reason that the Irish provisions could not be prescribed by law;⁹⁰ 3) all of the applications disclosed violations because the injunction was disproportionate to the aim pursued;⁹¹ and 4) four of the applications disclosed violations but two did not.⁹² The most controversial point in the case was whether the Government should be granted a margin of appreciation. The minority of the Court referring to the Constitutional right and the referendum held in Ireland found that the Irish authority was within its margin.⁹³ Conversely, the majority believed that

⁸⁸ A. H. Robertson and J. G. Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (Manchester: Manchester University Press, 1993), p. 202.

⁸⁹ *Open Door Counselling and Dublin Well Women v. Ireland*, *supra* note 78, dissenting opinion of Judge Cremona and dissenting opinion of Judges Pettiti, Russo and Lopes Rocha and report of the Commission, dissenting opinion of Mr. E. Busuttill and Mr. L. Loucaides joined by Mr. A. Weitzel.

⁹⁰ *Eur. Commission HR, Open Door Counselling and Dublin Well Women v. Ireland*, report, para. (c) 2.

⁹¹ *Open Door Counselling and Dublin Well Women v. Ireland*, *supra* note 78, para. 80.

⁹² *Open Door Counselling and Dublin Well Women v. Ireland*, *supra* note 90, partly concurring and partly dissenting opinion of Sir Basil Hall.

⁹³ *Open Door Counselling and Dublin Well Women v. Ireland*, *supra* note 78, dissenting opinion of Judge Cremona and dissenting opinion of Judges Pettiti, Russo and Lopes Rocha.

the restrictions were too broad and inefficient, and found that these limitations were not proportionate.

Although these opinions were controversial, from the view of the Court's majority it seemed that the Strasbourg institutions, influenced by the development of transfrontier flow of information, were moving progressively towards a liberal approach to the right to freedom of expression, particularly in comparison with the *Handyside* judgment. In 1979, the *Schoolbook* was allowed to circulate in many member States of the Council of Europe and even in other parts of the United Kingdom, yet the Court granted the margin of appreciation to the defendant Government. However, thirteen years later in *Open Door*, despite the fact that 67 percent of the Irish voted for a prohibition on abortion, the Court did not find that the Irish authorities were within their margin of appreciation. This decision suggests that the Court will not rely heavily on the doctrine of margin of appreciation but will review whether restrictions are proportionate to the protection of morals. The necessity requirement and proportionality test thus might play an important role in this subject in the future.

It can be observed that the case was rightly decided, particularly as the information being disseminated was already widely available from other sources. It was virtually impossible to implement the injunction fully when a large amount of similar information could already be obtained. Since information can flow freely from one country to another, it is becoming much more difficult to justify restrictions on providing information, a point which is significant in this case. The Court has rightly insisted on protecting the freedom to impart information.

In the Court's view, even women who were not pregnant should not be restrained from receiving abortion information.

This shows that the Court also placed great emphasis on the freedom to receive information. Indeed information should not be limited to a small or special group of people. Information on abortion should be a part of social education and should be available to women who are not yet pregnant. The Court's judgment enhances the freedom to receive information.

This judgment suggests that even though the right to life of the unborn was protected by Irish Constitutional law and confirmed by a referendum, the protection of freedom of expression, particularly the imparting of information, should be viewed from a European concept. The Court's opinion indicates that a complex or even controversial issue that is regulated by Constitutional provisions will still be subject to European supervision, which will not necessarily endorse that domestic authorities are within a margin of appreciation. Indeed the meaning of the phrase "necessary in a democratic society" should not be determined by the situation in a particular State, but refers to a common set of values of the member States of the Council of Europe.

A special feature of the Court's judgment is that it pointed out that the injunction would be harmful to women in the later stages of pregnancy and to those not having sufficient information, resources or education to gain access to alternative sources of information. This view probably suggests that if a restriction does more harm than good, it may not be necessary in a democratic society even if it is trying to protect public morals. It appears that the Court will take the result of an interference as evidence in deciding whether it violates Article 10 of the Convention.

In holding that the injunction was too broad, the Court also

emphasised that the information provided by the applicants was not available to the public at large. It seems that the Court took the extension of exercising freedom of expression as an element in examining the proportionality test. Truly, a right practised by a small number of people does not need a wide limitation. Human rights could be restricted, but only to balance conflicting rights or to protect more important common interests. The interference with the right to freedom of expression therefore cannot be broader than is necessary. However, it is regrettable that the Court did not expressly rule that a restriction on free expression should be the minimum that is necessary.

While the earlier decisions of the institutions of the Convention took an unjustifiable narrow approach to freedom of expression in cases relating to public morals, presumably *Open Door* signals a change in attitude and the institutions will develop their own approach to the protection of morals. Moreover, the reasoning in this case seems to indicate that the Court is gradually adopting principles of judicial review from constitutional courts⁹⁴ or national courts and taking the Convention as a “European Constitution of Human Rights” more

⁹⁴ In the German Constitutional Court, for example, the proportionality test has been applied in three stages: whether any limitation is capable of reaching its goal (Principle of Suitability or Appropriateness; *Geeignetheit*), whether it is indispensable to reach the goal (Principle of Necessity; *Erforderlichkeit*), and whether the limitation is adequate (Principle of Proportionality [in the narrow sense]; *Proportionalität*). The Constitutional Court applies the “suitability” or “appropriateness” principle first, then the “necessity” and “proportionality” principles.

However, some German scholars (Lerche and Krauss for instance) use the “*übermaßverbot*” (avoidance of excess) doctrine to replace the principle of proportionality and insist that only the “necessity” and “proportionality *stricto sensu*” doctrines should be applied.

than a regional international treaty.

V. Comments

Since most of the decisions in this essay relied on the lack of a European moral consensus and domestic authorities' familiarity with domestic conditions as justifications for giving national authorities a wide margin of appreciation, there is a need for further discussion of the following concepts: the doctrine of margin of appreciation, the principle of subsidiarity, the concept of European consensus, and the principle of proportionality.

1. The Doctrine of Margin of Appreciation

It has been established that underlying the doctrine of margin of appreciation⁹⁵ are two assumptions. First, what is

⁹⁵ The doctrine of margin of appreciation derives from classical martial law doctrine, French "marge d'appréciation," and other continental systems of administrative law. In national laws, taking German administrative law as an example, the doctrine of margin of appreciation has been used particularly in decisions concerning examinations, education and assessments under civil service law because of their highly personal nature. Through "indefinite legal concepts," judicial institutions admit that the administration possesses better expertise and experience, and stands in a closer relationship with the problems concerned. Therefore, administrative organs may be given a margin of appreciation.

In the context of the European Convention on Human Rights, the doctrine of margin of appreciation can be found neither in the legislative history nor the text of the Convention but derives from the decisions of the institutions of the Convention. The doctrine first appeared in the Commission's report in the *First Cyprus* case. As for the Court, the first case applying the doctrine was *Lawless*. To start with, the doctrine was applied

necessary to achieve the legitimate interests may vary from state to state even in democratic societies. Second, a government's assessment of what is necessary is entitled to be treated with some deference by an international court, presumably less familiar with the relevant local circumstances.⁹⁶

Scholars' attitudes toward the doctrine are quite different. Some oppose the doctrine. Jones claims that it is a doctrine of judicial-restraint and deference.⁹⁷ Furthermore, some writers believe that the doctrine reduces both the independence of the Commission and the Court and their ultimate decision-making power to determine breaches of the Convention.⁹⁸ The general effect of the doctrine can only "devalue"⁹⁹ or be a "threat"¹⁰⁰ to the Convention rights and freedoms. Unless the Strasbourg institutions hold member States accountable for their actions, the Convention's ability to preserve and enhance human rights and fundamental freedom is substantially impaired.¹⁰¹ Correspondingly, some authors describe the doctrine in negative terms.

only to derogation cases under Article 15 of the Convention. However, the doctrine has been expanded to many other areas, such as criminal and civil due process under Articles 5 and 6, the limitation clauses of Articles 8, 9, 10, 11, Articles 1 and 2 of Protocol I, and Article 2 of Protocol IV, and discrimination cases under Article 14.

⁹⁶ Mark Janis, Richard Kay and Anthony Bradley, *supra* note 4, p. 167.

⁹⁷ Timothy H. Jones, *supra* note 42, p. 431.

⁹⁸ D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), p. 292; Cora S. Feingold, "The Doctrine of Margin of Appreciation and the European Convention on Human Rights," 53 *Notre Dame Lawyer* 90, 91 (1977).

⁹⁹ D. J. Harris, M. O'Boyle and C. Warbrick, *supra* note 98, pp. 448-449.

¹⁰⁰ Cora S. Feingold, *supra* note 98, p. 91.

¹⁰¹ Cora Feingold, "The Little Red Schoolbook and the European Convention on Human Rights," 3 *Human Rights Review* 21, 42 (1978).

Kelly believes that the margin of appreciation gives national authorities “a certain freedom to do the wrong thing as well as the right one.”¹⁰² In Feingold’s view, the doctrine establishes that under certain articles of the Convention there exists “a no-man’s-land between compliance and contravention by a Member State.”¹⁰³ Jacobs argues that the Convention organs have often used the margin of appreciation inappropriately; they have simply assumed that the State’s discretion was properly exercised.¹⁰⁴ Delmas-Marty and Soulier also assert that the margin of appreciation would exempt the States from any obligation to comply with European norms,¹⁰⁵ exclude the control of conformity and thus the absolute pre-eminence of the European system, which would oblige national practices to meet the requirements of European norms.¹⁰⁶ Lester is of the opinion that the concept of the margin of appreciation has become as slippery and elusive as an eel. The Court appears to use the margin of appreciation as a substitute for coherent enjoyment of the other Convention rights and freedoms.¹⁰⁷

¹⁰² John Kelly, “The European Convention on Human Rights and States Parties: International Control of Restrictions and Limitations,” in Irena Maier (ed.), *Protection of Human Rights in Europe: Limits and Effects* (C. F. Müller Juristischer Verlag, 1982), p. 168.

¹⁰³ Cora Feingold, *supra* note 101, p. 42.

¹⁰⁴ Francis G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975), p. 202.

¹⁰⁵ Mireille Delmas-Marty and Gérard Soulier, “Restraining or Legitimizing the Reason of State?” in M. Delmas-Marty *et al.* (eds.), *The European Convention for the Protection of Human Rights: International Protection versus National Restriction* (The Netherlands: Kluwer Academic Publisher, 1992), p. 13.

¹⁰⁶ *Ibid.*

¹⁰⁷ Anthony Lester, “Universality versus Subsidiarity: A Reply,” *European*

On the other hand some writers take the opposite point of view. Bernhardt, who was the President of the Court, believes that the doctrine, if recognised and applied in a proper manner, is absolutely necessary in the implementation of human rights conventions.¹⁰⁸ The late President of the Court, Ryssdal, was convinced that the doctrine of margin of appreciation is an enduring concept in the jurisprudence of the court.¹⁰⁹ Mahoney argues that the doctrine is the natural product of distribution of powers: it serves to delineate the dividing line.¹¹⁰ The judges therefore must pay some deference, through the doctrine of the margin of appreciation, to the wishes expressed by the people's freely elected representatives.¹¹¹ The purpose of the doctrine is "to prevent the judges from exceeding their given function of interpretation."¹¹² Mahoney goes on to argue that criticising a wide application of the margin of appreciation is to ignore the

Human Rights Law Review 73, 75 (1998); Anthony Lester, "General Report on Theme 2: The European Convention on Human Rights in the New Architecture of Europe," in Council of Europe, *8th International Colloquy on the European Convention on Human Rights* (Strasbourg: Council of Europe, 1996), p. 236.

¹⁰⁸ Rudolf Bernhardt, "Thoughts on the Interpretation of Human-Rights Treaties," in Franz Matscher and Herbert Petzold (eds.), *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag KG, 1988), p. 68.

¹⁰⁹ Rolv Ryssdal, *The Future of the European Court of Human Rights* (Council of Europe, 1990), p. 6; Rolv Ryssdal, *Speech before Conference of Presidents and Attorney Generals of the Supreme Court of the European Communities* (Council of Europe, 1992), p. 4.

¹¹⁰ Paul Mahoney, "Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin," 11 *Human Rights Law Journal* 57, 81 (1990).

¹¹¹ *Ibid.*

¹¹² *Ibid.*, p. 87.

text of Article 10, the way in which political democracy operates, and the nature of “constitutional” review of national action at supranational level.¹¹³ He believes that the doctrine is not a sinister brake on individual liberty but is inherent in the nature of the Convention as an international human rights instrument limiting national democratic discretion to regulate citizens’ conduct for the general interest of the community.¹¹⁴

Between the two attitudes I have discussed, there exists a third position. Delmas-Marty thinks that the concept of margin of appreciation, be it European or national, introduces a novel feature into legal reasoning. It creates a relationship between national and European legal rules, without subordinating one completely to the other.¹¹⁵ Consequently, the process of reviewing how legal rules are decided draws simultaneously on two different legal systems.¹¹⁶ Van Dijk and van Hoof divide the doctrine into two parts, determinations of facts and questions of law. As to the former part, they believe that application of the margin of appreciation doctrine by the Strasbourg organs would seem to be justified and self-evident.¹¹⁷ In relation to the latter, their view is that the opinion of national authorities must be reviewed by the Strasbourg organs on the basis of an independent

¹¹³ Paul Mahoney, “Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments,” *European Human Rights Law Review* 364, 368 (1997).

¹¹⁴ *Ibid.*, p. 370.

¹¹⁵ Mireille Delmas-Marty, “The Richness of Underlying Legal Reasoning,” in M. Delmas-Marty *et al.* (eds.), *The European Convention for the Protection of Human Rights: International Protection versus National Restriction* (The Netherlands: Kluwer Academic Publisher, 1992), p. 320.

¹¹⁶ *Ibid.*

¹¹⁷ P. van Dijk and G. J. H. van Hoof, *supra* note 48, p. 585.

examination and interpretation¹¹⁸ because leaving this task to the national authorities would eventually undermine the Convention's entire structure.¹¹⁹

In this author's view, the doctrine of margin of appreciation might not be so harsh as to give member States "a right to do wrong things," but the fact is that the Strasbourg institutions have used this doctrine to find that domestic authorities did not make wrong decisions. Nor does the doctrine create a "no-man's-land" because domestic authorities' discretion is under supervision by the Strasbourg institutions.

It may not be right to say that the doctrine is designed "to prevent the judges from exceeding their given function of interpretation." The Court was established to ensure the observance of the undertakings given by the contracting Nations. No provision of the Convention tries to limit the power of the judges of the Court. The doctrine has been created by the Convention organs themselves, but is not found in the text of the Convention. Therefore there seems to be no reason why the judges should be afraid of holding too many powers.¹²⁰ Ryssdal says

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, p. 601.

¹²⁰ Schermers sees five arguments justifying the right of judges to ignore or overrule acts taken by a democratically elected Parliament. First, is a pragmatic argument. A Parliamentary majority may ignore the interests of a minority; political compromises may lead to imperfect rules. Secondly, courts are particularly suitable for supervising the legislator because courts have no right of initiative and because courts may criticise legislation but cannot replace it. Thirdly, judges are carefully selected. Their legal training ensures a basic knowledge of the legal system of the state. Fourthly, the judiciary has tradition and long precedent: for many hundreds of years judges have decided disputes, including disputes on the rules made by governments. Finally, no one else can perform this supervisory role better

that “the Court needs flexibility to deal with vague concepts in the Convention and the diversity of legal systems and practices in member states.”¹²¹ It might be argued that the doctrine’s purpose is to reconcile the effective operation of the Convention.¹²² Perhaps the doctrine was created by the Strasbourg organs in an attempt to gain the confidence of member States and thereby to ensure the survival of the Convention’s institutions in the early stages of their operation.

The doctrine involves some judicial self-restraint. Sometimes, and to some degree, it devalues the rights and freedoms protected by the Convention because consistently broad grants of state discretion can turn the term “necessary in a democratic society” from an applicant’s word into a defendant’s shield.¹²³ It is understandable that the Convention organs had some trouble handling all the difficult issues in the initial stages. However, “diverse national practices somehow dictate a broad grant of national freedom of action under the Convention: the broad scope of the margin sanctions the continued national independence of

than judges cano. Henry G. Schermers, *Active or Hyper-Active European Courts?* (Oxford: Centre for the Advanced Study of European and Comparative Law, University of Oxford, 1997), pp. 7-9.

¹²¹ Rolv Ryssdal, “Human Rights Proceedings: European Provisions and Experience,” in Commonwealth Secretariat, *Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms* (London: Commonwealth Secretariat, 1992), Vol. 4 of *Developing Human Rights Jurisprudence*, p. 129.

¹²² Humphrey Waldock, “The Effectiveness of the System Set up by the European Convention on Human Rights,” 1 *Human Rights Law Journal* 1, 9 (1980).

¹²³ Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (London: Martinus Nijhoff Publishers, 1996), p. 193.

action.”¹²⁴ The margin of appreciation should not permit the institutions to evade their obligation to explain why their intervention in particular cases may or may not be appropriate.¹²⁵ Whether the Convention is regarded as an international treaty or as a “European Constitution of Human Rights,” its provisions should not be explained solely by domestic courts even when the Convention has been incorporated into many domestic legal systems, but ought to be interpreted by the Convention’s organs from a pan-European perspective.

Some warnings should be made concerning the doctrine of margin of appreciation. First, the margin of appreciation should not lead the Convention’s institutions to eschew independent determination of the law, because then their decisions are likely to become mere ratification of national action based on faith that member States have exercised their discretion reasonably. Secondly, the Court should not use the margin of appreciation as merely pragmatic substitute for a thought-out approach to the problem of the proper scope of review.¹²⁶ The danger of continuing to use the doctrine of margin of appreciation is that it will become the source of a pernicious “variable geometry” of human rights, eroding the *acquis* of existing jurisprudence and giving undue deference to local conditions, traditions, and practices.¹²⁷

¹²⁴ H. C. Yourow, “The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence,” 3 *Connecticut Journal of International Law* 111, 150 (1987).

¹²⁵ R. St. J. Macdonald, “The Margin of Appreciation,” in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (London: Nijhoff, 1993), p. 124.

¹²⁶ *Ibid.*, pp. 84, 124.

¹²⁷ Anthony Lester, “Universality versus Subsidiarity: A Reply,” *supra* note 107, p. 76.

Thirdly, this danger will be exacerbated with the extension of the Convention to the new democracies. The combined effects of the expansion of the Convention and of the structural changes of the mechanism of the Convention create the risk that it will be even more difficult for the institutions to draw clear lines in the case-law.¹²⁸ The increase in the number of contracting Nations to the Convention must not lead to a lowering of the requirements of the protection of rights and freedoms through the margin of appreciation. In a recent case, *Janowski v. Poland*,¹²⁹ the new Court's judgment seems to grant wider extension of margin of appreciation to new member States of the Convention. However, it would be unacceptable to establish a "two-speed" system of European human rights protection; and it would not be appropriate to give lower standards to new States than those for the old members.

2. The Principle of Subsidiarity

The Strasbourg institutions believe that they are in a subsidiary position to national authorities in the field of human rights protection. Subsidiarity means that international jurisdiction should only be triggered where domestic judicial authorities are unable or fail to act.¹³⁰ Subsidiarity requires that problems are

¹²⁸ Eva Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights," 56 *Heidelberg Journal of International Law* 240, 313-314 (1996).

¹²⁹ *Eur. Court HR, Janowski v. Poland judgment of 21 January 1999, Reports of Judgments and Decisions 1999*. This is one of the cases that the new Court first ever decided and the first case relevant to Article 10 against one of the new East European member States of the Convention.

¹³⁰ Rudolf Bernhardt, *Speech on the Occasion of the Diplomatic Conference on the Establishment of an International Criminal Court* (Council of

solved by those who understand them best, and by those who are most affected.¹³¹ It allows some scope for properly functioning democracies to choose different solutions adapted to their different and evolving societies.¹³² Two sets of reasons have been established to allow the institutions of the Convention to give some leeway to national authorities.¹³³ The first set of reasons, which are encountered in most judicial systems, concern the problem of interpreting vague and general notions, the limited control of policy decision, and the issue of judicial restraint. The second set of reasons relate to the particular position of the institutions of the Convention. There is some inevitable tension between the centralised human rights enforcement system established by the European Convention and the national sovereignty of the European states. There is moreover conflict between autonomous interpretation and evolutionary interpretation.

However, it should be emphasised that the Court, the guarantor of the Convention, has been established to be a human rights protector “in the last resort.”¹³⁴ Putting too much emphasis on the principle of subsidiarity could weaken this idea. To ensure the effective protection of human rights, the principle of subsidiarity should mean the effective protection of universal human rights by national courts as well as by international institutions, rather than a very weak form of European judicial

Europe, 1998).

¹³¹ Dinah Shelton, “Subsidiarity, Democracy and Human Rights,” in Donna Gomien (ed.), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Stockholm: Scandinavian University Press, 1993), pp. 43-44.

¹³² Paul Mahoney, *supra* note 113, p. 369.

¹³³ Eva Brems, *supra* note 128, pp. 293-307.

¹³⁴ Rudolf Bernhardt, *supra* note 130.

supervision.¹³⁵ If too much emphasis is put on the principle of subsidiarity there cannot be effective protection of the Convention rights across Europe. The Court should not be too self-restrained since, as Schermers has pointed out, the member States of the Convention share a European culture which grants a strong position to individuals.¹³⁶ The new Court established by Protocol No. 11 is the sole judicial organ under the Convention and the Convention now has member States covering almost all of Europe. The Court is therefore in a unique position to set human right standards for Europe as a whole. When ensuring the observance of the engagements undertaken by national authorities the Court exercises an “international judicial review” to set minimum standards for the protection of civil and political rights for the whole Europe, the character of which is not necessarily subsidiary to national authorities.

3. The Concept of European Consensus

It might be argued that the Strasbourg authorities have not developed a detailed concept of what constitutes a European consensus. Their approach could be criticised in several ways. First, the institutions’ comparative approach could be criticised for being too superficial. They have often referred generally to the presence or absence of a consensus in the laws of the member States without undertaking any thorough comparative research. The Strasbourg institutions’ comparative exercise is less a means of interpretation than one of justification. The process of com-

¹³⁵ Anthony Lester, “Universality versus Subsidiarity: A Reply,” *supra* note 107, p. 75.

¹³⁶ Henry G. Schermers, *supra* note 120, p. 18.

parison is not a “method” that actually yields the “meaning” of a Convention provision, but instead is used to legitimate their exercise of discretion.¹³⁷ Some may argue that the institutions should elaborate a methodology for analysing the issue of consensus in order to increase the transparency and predictability of the approach. Helfer suggests “half of the Contracting States”¹³⁸ as a minimum standard for the European consensus. This suggestion, however, adds a difficulty for the Strasbourg institutions, in that they have to search regional trends all the time. Nevertheless, it has to be born in mind that the average level of protection afforded by member States is not necessarily an indication of the degree of protection required by the Convention. The essential point is not what are the common legal systems within the member States, but which approach enhances the protection of human rights in Europe, which is the primary aim of the Convention. Secondly, it could be argued that the European consensus is based on the majority principle. It is not always accurate to say that a state which is in a minority is “staying behind.” The consensus principle might establish a presumption of violation of the Convention and put a heavy burden of proof on such a State. Thirdly, there is some doubt whether the comparative aspect of the European consensus principle could be applied to new member States without modifications. If it is adopted, the result could be a levelling-down of human rights protection in Europe which

¹³⁷ Paolo G. Carozza, “Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights,” 73 *Notre Dame Law Review* 1217, 1225 (1998).

¹³⁸ Laurence R. Helfer, “Consensus, Coherence and the European Convention on Human Rights,” 26 *Cornell International Law Journal* 133, 155 (1993).

might defeat the purpose of the accession of the new member States to the Convention.

Lack of European consensus has been an important reason for the Strasbourg institutions to give margins to national authorities, especially in the field of protecting morals. Lack of consensus may provide a useful reason for finding for Governments, whereas the consensus principle will not always provide an easy answer to the question of whether a restriction on a Convention right or freedom is necessary in a democratic society. Taking *Open Door* as an example, the fact that abortion information similar to that provided by the applicants had been and continued to be tolerated by the national authorities led the Court to state that the limitations on the applicants required careful scrutiny.¹³⁹ Nevertheless, the Court needed more reasons to support its judgment and still had to examine other elements of the case. It seems that European consensus provides a reason for going into detailed examination, but it does not constitute as in and of itself. On the other hand, when European consensus does not yet exist the Strasbourg institutions should establish some general principles that could be applied to almost all the member States, as the institutions themselves have been the products of European consensus exercising “international judicial review.” Considering that the Convention sets standards of protecting human rights for all contracting States, it would be unacceptable to leave these States with complete freedom to interpret terms differently or subject rights and freedoms to different limitations. These legal terms, rights, and freedoms

¹³⁹ *Open Door Counselling and Dublin Well Women v. Ireland*, *supra* note 78, para. 72.

must be understood from an international or European viewpoint. Solutions for controversial human rights issues are not always found by social evolution. The institutions of the Convention can play an important role in developing common standards, not merely waiting for domestic social changes and then recognising them. Although they are occasionally disputed, judgments of domestic courts are in almost all cases respected and obeyed. It thus might be argued that the member States should trust the Strasbourg institutions and let them develop common rules for the whole Europe. Since "laws and societies are not and will not become uniform in all member States of the Council of Europe, and it is the difficult task of a court or any other international organ to keep in line with general developments,"¹⁴⁰ possibly what the institutions of the Convention need to do is to review individual cases on their facts and decide whether the limitations are proportionate to their aims and necessary in a democratic society. After many cases have been examined, common rules or principles for European States can therefore be achieved.

4. The Principle of Proportionality

In regard to the principle of proportionality,¹⁴¹ the Stras-

¹⁴⁰ Rudolf Bernhardt, *supra* note 108, p. 70.

¹⁴¹ The principle of proportionality is derived from Administrative and Constitutional Laws, primarily German laws. It has been argued that the principle of proportionality is a cardinal principle of German public law and comparative study shows that the concept of proportionality seems to be most elaborate in Germany. In Germany, the principle of *Verhältnismässigkeit* (principle of proportionality) can be traced in the late nineteenth century judicial pronouncements of the Prussian Administrative Court in the areas of Police Law. Before World War I, German scholars,

such as von Berg, Otto Meyer, F. Fleiner and W. Jellinek tried to establish that police power should be used only when “necessary.” The most famous term to describe the principle is: “Die Polizei soll nicht mit Kanonen auf Spatzen schießen;” and the sentence later became well known as: “One ought not to shoot a swallow with a cannon.” After World War I in the Weimar Republic, however, the principle was not used in Police Law but in Criminal Procedure. The principle of proportionality has been used at a Constitutional Law level only since the German *Grundgesetz* (Basic Law) was made. Since then the principle has acquired constitutional status. Therefore the principle of proportionality is not only applied to administrative actions but also to legislative measures. From the 1950s the principle has often been seen in German laws and judgments.

Some scholars, however, believe that it is the spirit of the 1215 Magna Carta from which the principle of proportionality originates. Furthermore, the 1689 Bill of Rights stated that “excessive baile . . . excessive fines” and “cruell and unusuall punishments” were not allowed. It has therefore been argued that the principle of proportionality “has been employed, often under other names, in a number of areas of English law.” The principle of reasonableness, which is well known as *Wednesbury* unreasonableness, has long been developed and applied in English Administrative law. In English law, one opinion believes that proportionality may be tested under the heading of rationality or reasonableness. Another asserts that proportionality is an individual ground for judicial review, separate from the criteria of legality, procedural propriety and rationality. Nonetheless, some writers, Jowell and Lester for instance, have argued that “the *Wednesbury* test should now be replaced by independent principle of substantive review, of which proportionality is one.” Craig is of the opinion that the proportionality principle is highly likely to be recognised as an independent ground of review within English Administrative law for the reasons that a number of the British judiciary are in favour of it, and that developments within the EC and under the Convention will acclimatise and require the British judiciary to apply it. He also argues that this principle should not be regarded as capable of curing all ills in the British regime of review, nor as entirely dangerous or alien. Furthermore, the Human Rights Act 1998 incorporates the Convention into English law, which might lead to the development of a further recognition of the doctrine in England.

bourg institutions have held that the word “necessary” within Article 10 §2 is not synonymous with “indispensable,” nor with “admissible,” “ordinary,” “useful,” “reasonable” or “desirable.” In other words, the threshold of necessity of the restrictive measure falls between being “indispensable”—which would be too high a standard—and being “acceptable”—which is not sufficient for this purpose.¹⁴² As to the burden of proof, the Commission and the Court have pointed out that defendant Governments have a duty to prove the existence of a pressing social need. By putting the burden on governments, rights and freedoms are given a superior status. It has been claimed that the burden of proof introduces “a new dilemma for the Court: how is it to make its decision in a principled manner so that its judgments do not appear to the states as the substitute of one

French administrative law has set out a distinction between questions of legality and questions of merits. Judicial control operates only on the former, ensuring that state power is exercised within the limits set by law; the appropriateness of the exercise of power in a given case is not subject to judicial review. The principle of proportionality seems to have been gradually adopted into French Administrative law. Judge Guy Braibant, for example, has considered the principle to be a “rule of common sense,” that one ought not to “crush a fly with a sledgehammer.” However, the principle of proportionality has not yet been recognised as a general principle of law in France.

In international law, the principle of proportionality was applied in the customary international law of reprisals and self-defence and then to several other areas of international law. The principle seems to have been applied in three main areas: non-discrimination, limitation clauses, and derogation. In the context of the European Convention on Human Rights, the principle of proportionality made its first appearance in the *Belgian Linguistic Case*. The Strasbourg organs now use the principle to examine whether limitations on human rights are legitimate more often than they did in their early years.

¹⁴² Mireille Delmas-Marty, *supra* note 115, p. 326.

discretion for another?”¹⁴³ Nevertheless, being an international human rights tribunal, the Court has to face this dilemma and try to solve it. If more precise guidance can be obtained after examining some controversial cases, the Court will be able to give a clear picture of when it is necessary in a democratic society to interfere with protected rights or freedoms.

Undoubtedly the term “a democratic society,” as the Convention’s mechanism and many writers have confirmed, refers to the societies of European countries. The term stresses the vital importance of democratic principles.¹⁴⁴ However, the Commission and the Court have not discussed in any detail the character of a democratic society, but only take “pluralism, tolerance and broadmindedness”¹⁴⁵ as its hallmarks. In fact, the term “necessary in a democratic society” serves as an important criterion for deciding whether restrictions are legitimate and provides guidance on the balancing of the competing interests in issue. That is, a limitation must pursue not only a legitimate aim but also use a legitimate method to be considered necessary in a democratic society. Furthermore, the interpretation of the phrase epitomises the Convention’s underlying tension between the rights of the individual and the interests of society as a whole.¹⁴⁶ The Convention’s institutions, therefore, should use the hallmarks of a democratic society to find a good balance

¹⁴³ D. J. Harris, M. O’Boyle and C. Warbrick, *supra* note 98, p. 295.

¹⁴⁴ See Council of Europe (ed.), *Collected Editions of the “Travaux Préparatoires” of the European Convention on Human Rights*, Vol. V (London: Martinus Nijhoff Publishers, 1979), p. 194.

¹⁴⁵ *Handyside v. the United Kingdom*, *supra* note 29, para. 49.

¹⁴⁶ Donna Gomien, David Harris and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing, 1996), p. 215.

among conflicting interests. It is also essential for the Strasbourg organs to apply the proportionality test to decide whether the limitations are “necessary in a democratic society.”

The Court can insist on the importance of the standard of proportionality as a means of assessing any innovation that comes before it for judgment. It might be argued that the principle of proportionality is a general principle of law well recognised in Council of Europe countries. The principle provides an excellent way of balancing the adverse effects that a decision may have on the rights, liberties and interests of the individual against the purpose pursued by the decision. According to the Preamble of the Convention, one of the purposes of the Convention is to pursue greater unity between the member States of the Council of Europe through the maintenance and further realisation of human rights. Therefore, there may come a point where there is no longer room for differences on important issues between the member States in the protection of human rights.¹⁴⁷ After more than forty years’ development the Strasbourg institutions are possibly mature enough to go beyond the doctrine of margin of appreciation, whether or not European consensus exists, and to apply only the proportionality principle in reviewing whether restrictions are necessary in a democratic society to enhance the rights and freedoms protected by the Convention, particularly the right to freedom of expression.

VI. Conclusion

It is still difficult to discern the attitude of the Convention

¹⁴⁷ P. van Dijk and G. J. H. van Hoof, *supra* note 48, p. 783.

organs concerning the relationship between exercising freedom of expression and protecting health, since there has been only one case examined by the Commission. As to the protection of morals, the Convention's institutions refer to the lack of European consensus to give the widest margin of appreciation to domestic authorities. It might be argued that it is a "fuzziness," and it is an "impressionistic fuzziness" and not "logical fuzziness"¹⁴⁸ that leads the States to be granted such a wide margin of appreciation, which risks escaping the control of the Court.¹⁴⁹ Nevertheless, the Strasbourg institutions may try to reduce the "fuzziness" and establish common rules on the protection of morals. It is worth attaching much importance to the words of Judge Zekia: "Whenever it considers it reasonable and feasible, this Court should work out a uniform international European standard for the enjoyment of the rights and freedoms included in the Convention."¹⁵⁰ Since the new Court established by Protocol No. 11 is the sole judicial organ under the Convention and the Convention now has member States covering almost all of Europe, the Court is therefore in a unique position to set human right standards for Europe as a whole. When ensuring the observance of the engagements undertaken by national authorities the Court exercises an "international judicial review" to set minimum standards for the protection of civil and political rights for the whole Europe. *Open Door* has opened a door toward establishing a moral standard for Europe.

¹⁴⁸ Renée Koering-Joulin, *supra* note 41, p. 83.

¹⁴⁹ *Ibid.*, p. 97.

¹⁵⁰ *Eur. Court HR, the Sunday Times v. the United Kingdom (No. 1) judgment of 26 April 1979, Series A no. 30*, concurring opinion of Judge Zekia.

Fort Fu-Te Liao, Visiting Assistant Professor of Law, Law Department, Tunghai University. Master of Laws, National Chung-Hsing University, Taiwan, 1995; D.Phil., Law Faculty, Oxford University, England, 1999.

表現自由權與健康及道德之保護— 歐洲人權公約案例研究

廖福特

摘 要

本文探討歐洲人權公約第十條之案例法中，保護表現自由權及維護健康及道德如何平衡。本文認為，歐洲人權機構給予各簽約國廣泛之「判斷餘地原則」，因而其並未妥善保障表現自由權。然而歐洲人權法院認為限制墮胎資訊之提供乃是違反公約第十條之規定，此意見加強表現自由權之保護，同時其亦表示，即使是各簽約國之具爭議性之憲法規定，亦需接受歐洲人權法院之審查，而歐洲人權法院已開始走向成為「歐洲憲法法院」之路程。本文認為歐洲人權機構不應過度強調「判斷餘地原則」及「輔助性原則」，因為歐洲人權機構本身即為「歐洲共識」之產品，而其所施行者為「國際司法審查」，因而歐洲人權機構應以「比例原則」檢視各案件以建立「歐洲準則」。

關鍵詞： 表現自由、健康及道德保護、歐洲人權公約、歐洲人權法院、判斷餘地原則