



10-1-1977

# Doctrine of Margin of Appreciation and the European Convention on Human Rights

Cora S. Feingold

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

## Recommended Citation

Cora S. Feingold, *Doctrine of Margin of Appreciation and the European Convention on Human Rights*, 53 Notre Dame L. Rev. 90 (1977).  
Available at: <http://scholarship.law.nd.edu/ndlr/vol53/iss1/6>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## NOTES

### THE DOCTRINE OF MARGIN OF APPRECIATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS\*

#### I. Introduction

The European Convention on Human Rights<sup>1</sup> is an agreement designed to secure international recognition and observance of those human rights considered necessary in a democratic society. The Convention is the first international agreement to integrate a concern for the protection of human rights with an enforcement procedure to ensure that Member States comply with their obligation to uphold those rights. The Convention's enforcement apparatus consists of two organs: the European Commission of Human Rights<sup>2</sup> and the European Court of Human Rights.<sup>3</sup>

The Commission, a quasi-judicial body, serves a dual function. First, the Commission determines whether an application alleging a breach of the Convention is admissible for consideration on its merits. The criterion used by the Commission in determining admissibility is whether there is some indication of a breach of the Convention. An application may be brought by an individual claiming to be the victim of a violation by a Member State or by one Member State against another.<sup>4</sup> Second, the Commission determines the merits of an application by investigating the facts of the application and deciding whether there has been a breach of the Convention. The Commission decides the admissibility and the merits of an application in separate proceedings, receiving evidence and submissions from the parties in adversary form. Although the Commission's determination of admissibility is conclusive, its decision on the merits of an application is not.

The final decision on the merits of an application is made by the Court, the authoritative body of the Convention. The Court's jurisdiction to determine the merits of an application, however, depends upon a favorable determination of admissibility by the Commission.<sup>5</sup>

The power of the Commission and Court to determine breaches of the Convention and to hold Member States accountable for violations of human

---

\* The author wishes to thank Professor James E. S. Fawcett and David Newell, Esq., for their invaluable assistance in the preparation of this note.

1 The European Convention on Human Rights, signed in Rome on November 4, 1950, took effect on September 3, 1953. Seventeen nations have ratified the Convention: Austria, Belgium, Cyprus, Denmark, France, Greece, Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Sweden, Turkey, and the United Kingdom. Hereinafter cited as the Convention.

2 Hereinafter cited as the Commission.

3 Hereinafter cited as the Court.

4 In the case of an individual application, the Commission may only deal with the matter after the applicant has exhausted all his domestic remedies.

5 Article 45 of the Convention provides: "[T]he jurisdiction of the Court extends to all cases concerning the interpretation and application of the Convention referred to it by a Member State or the Commission."

rights distinguishes the Convention from other international agreements.<sup>6</sup> Most international conventions do not encompass enforcement procedures and as a result share a common characteristic: impotence.

The Convention's ability to protect human rights is seriously threatened, however, by the doctrine of margin of appreciation. Under this doctrine, the Commission and Court extend to Member States a certain margin or latitude in determining whether or not a Member State has violated the Convention. The exact nature of the doctrine and of the threat that it poses to the effectiveness of the Convention is best illustrated by the *Handyside Case*, the latest and most dramatic application of the doctrine.

This note analyzes the development of the concept of margin of appreciation. This analysis provides the context necessary for a full assessment of the scope and significance of the doctrine as applied in the *Handyside Case*.

## II. The Doctrine of Margin of Appreciation: Its History Prior to the *Handyside Case*

### A. *Margin of Appreciation and Article 15 of the Convention*

Initially employed by the Commission in 1956, the doctrine of margin of appreciation originated in a series of applications involving Article 15 of the Convention. Article 15 states that in time of war or other public emergency threatening the life of the nation, a Member State may take measures derogating from certain of its obligations under the Convention. The Article restricts such measures, however, to those strictly required by the exigencies of the situation.<sup>7</sup>

The first case in the series involved an application brought by Greece against the United Kingdom concerning the United Kingdom's alleged nonobservance of the Convention in Cyprus.<sup>8</sup> Greece submitted that the United Kingdom's invocation of Article 15 failed to satisfy the emergency conditions required under the Article. The British government maintained that at the time of its derogation there existed in Cyprus a "public emergency threatening the life of the nation" due to repeated acts of violence (murder and sabotage) aimed at the subversion of the lawful government of Cyprus. The United Kingdom alleged that it was forced to institute certain emergency measures of detention and deportation.

6 Member States undertake to abide by the decision of the Court in any case to which they are parties. If the Court finds that a decision or measure taken by a Member State conflicts with that State's obligations under the Convention, the decision of the Court shall afford just satisfaction to the injured party.

7 Article 15 of the Convention provides:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation. . . .

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

8 The Cyprus Case, [1958-59] 2 Y.B. EUR. CONV. ON HUMAN RIGHTS 174.

These measures resulted in an encroachment of Article 5, which provides that "[e]veryone has the right to liberty and security of person."

The application was declared admissible. The Commission held that it was competent to ascertain both whether a public emergency existed in Cyprus and whether the measures enlisted by the United Kingdom were consistent with the Article 15 requirement that emergency measures be strictly required by the exigencies of the situation. Significantly, the Commission noted its willingness, in an application involving derogation from the Convention under Article 15, to extend to the derogating Member State "a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation."<sup>9</sup> In the *Cyprus Case*, therefore, the Commission conceived the margin of appreciation as a means by which it could grant to Member States experiencing a state of emergency the benefit of the doubt as to compliance with their obligations under the Convention.

The doctrine of margin of appreciation was again utilized in *Lawless v. Ireland*.<sup>10</sup> The case involved an application brought by an individual, Lawless, who contended that his arrest and detention without charge or trial contravened Article 5 of the Convention. In its defense, Ireland submitted that the arrest and detention of Lawless were committed pursuant to a 1940 emergency act. The emergency act empowered the Irish government to arrest and detain persons without trial when the government considered the exercise of such powers necessary to preserve peace and public order.

The questions facing the Commission were: (1) whether at the time of Lawless' arrest and continuing detention there existed a state of emergency in Ireland within the meaning of Article 15 and (2) whether the arrest and detention of Lawless without trial were measures "strictly required by the exigencies of the situation." The Commission held by a majority of 9 to 5 that a public emergency threatening the life of the Irish nation did exist. By a majority of 8 to 6, the Commission decided that the measures of arrest and detention were justified as "strictly required by the exigencies of the situation." Thus, the Commission held that the Irish government had committed no breach of the Convention. In view of the importance of the issues raised by the Lawless application and the substantial minority vote, the Commission referred the case to the Court for an authoritative decision.<sup>11</sup>

Commissioner Waldock, President of the Commission, testified before the Court in support of the Commission's judgment. His testimony is often cited as the best explanation of the rationale of the doctrine of margin of appreciation:

[The Commission] does recognize that the question of whether or not to employ exceptional powers under Article 15 involves problems of appreciation and timing for a government which may be most difficult, and especially difficult in a democracy . . . where governments are always susceptible to the impact of public opinion. It also recognizes that the government has to balance the ills involved in a temporary restriction of fundamental rights

9 *Id.* at 176.

10 *Lawless v. Ireland*, [1958-59] 2 Y.B. EUR. CONV. ON HUMAN RIGHTS.

11 *The Lawless Case*, [1960-61] 3 Y.B. EUR. CONV. ON HUMAN RIGHTS 492 (merits). The Court dismissed Lawless's complaint. The Court held that the Irish Government was entitled under Article 15 to take the measures challenged by Lawless.

against even worse consequences than for the people and perhaps larger dislocations than of fundamental rights and freedoms, if it is to put the situation right again. The concept behind [margin of appreciation in the context of Article 15] is that Article 15 has to be read in the context of the rather special subject matter with which it deals: The responsibilities of a government for maintaining law and order in a time of war or other public emergency threatening the life of the nation. The concept of the margin of appreciation is that a government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or Court is satisfied that the government's appreciation is at least on the margin of the powers conferred by Article 15, then the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favor of the legality of the government's appreciation.<sup>12</sup>

The third and final case involving Article 15 is the *Greek Case*.<sup>13</sup> The *Greek Case* involved applications brought by four Member States<sup>14</sup> alleging violations of the Convention by the Greek revolutionary government that had come into power in April, 1967. The government invoked Article 15 by Royal Decree on April 21, 1967, thereby suspending provisions of the Greek constitution that corresponded to Articles 5, 6, 8, 10 and 11 of the Convention.<sup>15</sup> Greece justified its actions by citing the existence of political instability that allegedly threatened the public order and the security of the Greek state.

The first issue facing the Commission was whether on April 21, 1967, a public emergency, actual or imminent, did in fact exist. Although acknowledging its "constant jurisprudence"<sup>16</sup> concerning the margin of appreciation afforded Member States under Article 15, the Commission rejected Greece's contention that a public emergency existed on April 21, 1967. The Commission thus found Greece's derogations unjustified and in breach of the Convention.<sup>17</sup>

Two dissenting opinions in the *Greek Case* highlight the significance of the case to the development of the doctrine of margin of appreciation. Commissioner Eustathiades' dissent focused on the Commission's modification of the doctrine in the *Greek Case* compared to its application in the *Cyprus* and *Lawless* cases.

12 C. MORRISSON, *THE DEVELOPING EUROPEAN LAW OF HUMAN RIGHTS* 150 n.170 (1967).

13 *The Greek Case*, [1969] 12 Y.B. EUR. CONV. ON HUMAN RIGHTS.

14 Application numbers 3321/67 Denmark v. Greece, 3322/67 Norway v. Greece, 3323/67 Sweden v. Greece, 3344/67 Netherlands v. Greece filed with Commission in September 1967, joined October 20, 1967, all four applications declared admissible. [1968] 11 Y.B. EUR. CONV. ON HUMAN RIGHTS 690.

15 Article 5 provides that everyone has the right to liberty and security of person. Article 6 provides that in the determination of civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 8 provides that everyone has the right to respect for his private and family life, his home, and his correspondence. Article 10 provides that everyone has the right to freedom of expression. Article 11 provides that everyone has the right to freedom of assembly and to freedom of association with others.

16 12 Y.B. EUR. CONV. ON HUMAN RIGHTS 72.

17 The Commission transmitted a report of its findings to the Committee of Ministers in November, 1968 in accordance with Convention procedure. On the Committee's adoption of a resolution making the report of the Commission's findings public, the Greek government in December, 1969 denounced the European Convention, and in accordance with Convention procedure its denunciation operated as a release of Greece from membership in the Convention in 1970. Greece was readmitted to membership and re-ratified the Convention in 1974.

Eustathiades maintained that in past applications of the doctrine of margin of appreciation, the Commission had been careful to examine both whether a state of emergency actually existed in the Member State while emergency measures were in effect and whether the measures were "strictly required by the exigencies of the situation." Eustathiades pointed out that in the *Cyprus Case*, the Commission had considered alternative emergency measures available to the United Kingdom and whether such measures would have been adequate to deal effectively with the emergency situation in Cyprus. Similarly, in the *Lawless Case*, he asserted, the Commission and Court had undertaken extensive research to discover whether alternative solutions, less oppressive than arrest and detention without charge or trial, would have been sufficient to deal with Ireland's emergency. Eustathiades criticized the Commission's fact-finding process as incapable of making an accurate assessment whether Greece had acted within the margin of appreciation. Further, he objected to the Commission's failure to obtain "full and detailed evidence of the facts"<sup>18</sup> necessary for an appreciation of both the Greek government's stability and the necessity of the emergency measures it had adopted.

Commissioner Susterhenn's dissent sets forth the rationale of the doctrine as presently applied. Susterhenn explained his understanding of the doctrine of margin of appreciation as follows:

In the examination of the question whether or not there is a threat to the life of the nation the *right of decision lies with the responsible Government* within the limits of its *bona fide discretion*. In its review of this decision the Commission is not entitled to put itself in the position of the responsible Government and assume the functions of a sort of super government. *The Commission has rather to examine whether the respondent Government in exercising its discretion has not manifestly behaved in an unreasonable or even arbitrary manner.*<sup>19</sup> (emphasis added)

#### B. *Extension of the Doctrine to Other Articles in the Convention*

In its inception, the doctrine of margin of appreciation was exclusively applied to cases involving a national emergency under Article 15. The Commission and Court, however, soon extended the doctrine to non-emergency articles as well. In particular, the doctrine has been applied to Articles 8 through 11 of the Convention. The individual rights reserved in Articles 8 through 11 are, respectively: the right to respect for private and family life, the right to freedom of thought, conscience, and religion, the right to freedom of expression, and the right to freedom of peaceful assembly and association with others.

These rights are not absolute under the Convention, however, since each of these articles incorporates a "clause of exceptions." A "clause of exceptions" within a particular article permits a Member State to impose certain restrictions on the enumerated right. To be compatible with the Convention, these restrictions must be "necessary in a democratic society" in the interests of either national security, public order, health, morals, or the rights and freedoms of others. The

<sup>18</sup> 12 Y.B. EUR. CONV. ON HUMAN RIGHTS 108.

<sup>19</sup> *Id.* at 87.

“clause of exceptions” therefore permits a Member State limited discretion to restrict the rights contained in Articles 8 through 11.

By applying the doctrine of margin of appreciation to Articles 8 through 11, the Commission and Court have extended to Member States *unlimited* discretion to restrict the enumerated rights. In effect, Member States may impose restrictions without regard to whether such restraints are necessary in a democratic society.<sup>20</sup> Thus, the doctrine has been used to circumvent the express requirements of the Convention.

The potential for abuse inherent in this approach is best illustrated by the cases involving Article 10. These cases illustrate that by applying the doctrine to the non-emergency articles, the Commission and Court have effectively abdicated their powers of enforcement under the Convention and have thereby jeopardized the individual rights and freedoms contained therein.

### C. *Article 10 and the Doctrine of Margin of Appreciation*

Article 10 provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The Article also sets forth a “clause of exceptions,” which provides:

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health 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.

Under the clause of exceptions, a Member State may subject the right to freedom of expression to “formalities, conditions, restrictions or penalties” under several categories. The most frequently litigated of these categories are: national

<sup>20</sup> The following cases best illustrate the unlimited discretion that the doctrine of margin of appreciation allows Member States in restricting the rights contained in Articles 8 through 11:

Article 8 (the right to respect for private and family life): *X v. Sweden*, Application 911/60 [1961] 4 Y.B. EUR. CONV. ON HUMAN RIGHTS 198. *X v. Netherlands*, Application 1449/62 [1963] 6 Y.B. EUR. CONV. ON HUMAN RIGHTS 262.

Article 9 (the right to freedom of thought, conscience, and religion): *X v. Netherlands*, Application 1068/61 [1962] 5 Y.B. EUR. CONV. ON HUMAN RIGHTS 278.

Article 10 (the right to freedom of expression): *X v. Austria*, Application 753/60 [1960] 3 Y.B. EUR. CONV. ON HUMAN RIGHTS 310. *X v. Austria*, Application 1747/62 [1963] 6 Y.B. EUR. CONV. ON HUMAN RIGHTS 424. *X and the German Association of Z v. the Federal Republic of Germany*, Application 1167/61 [1963] 6 Y.B. EUR. CONV. ON HUMAN RIGHTS 204. *Dona and Schul v. Netherlands*, Applications 5354/72 and 5370/72 [1972] 15 Y.B. EUR. CONV. ON HUMAN RIGHTS 508. *X v. Austria*, Application 5777/72 [1974] 45 COLL. DEC. 87. Case of *Engel et al.* Jun. 8, 1976, Series Anno. 22 (Opinion of the Court).

security, prevention of disorder or crime, protection of the reputation or rights of others, and the protection of morals. Although each of these categories is susceptible of abuse, restrictions in the interests of national security, prevention of disorder or crime, and reputation or rights of others, are at least capable of objective scrutiny.

The category "protection of morals," however, is so vague as to be meaningless. The Convention provides no limitations to clarify the meaning of the protection of morals. Yet a Member State may classify a restrictive measure as necessary for the protection of morals and thus deprive an individual of his right to freedom of expression. In view of this potential for abuse, one would expect the Commission and Court to examine carefully any Member State's claim that a measure restricting the right to freedom of expression is necessary for the protection of morals. It is clear, however, that this is not the case. Rather, the Commission and Court mechanically apply the doctrine of margin of appreciation to such cases. As a result, the quality and scope of the right to freedom of expression guaranteed by Article 10 of the Convention have been greatly distorted.

### III. The *Handyside Case*

#### A. *An Overview*

On April 13, 1972, Richard Handyside, London publisher, filed an application with the Commission claiming that the United Kingdom had violated his Article 10 right to freedom of expression. The basis for Handyside's application was his conviction under the United Kingdom Obscene Publications Act of 1959, partially amended in 1964,<sup>21</sup> for the possession of copies of *The Little Red Schoolbook*<sup>22</sup> for publication for gain.<sup>23</sup> Handyside was found guilty of offenses under the Acts in Magistrates Court in July, 1971. He appealed his conviction to the Inner London Quarter Sessions, which affirmed the decision of the Magistrates Court.

On April 14, 1974, the Commission declared Handyside's application admissible for further examination on the merits.<sup>24</sup> On September 30, 1975, in its decision on the merits, the Commission rejected Handyside's claim. The Commission referred the case to the Court on January 12, 1976.

The United Kingdom submitted to the Court that its interference with Handyside's right to freedom of expression was justified under the clause of exceptions in subsection 2 of Article 10. The United Kingdom maintained that

21 Hereinafter cited as the Acts.

22 S. HANSEN & J. JENSEN, *THE LITTLE RED SCHOOLBOOK* (1971) [hereinafter cited as *THE SCHOOLBOOK*].

23 Prohibition of publication of obscene matter under the Acts:

Section (1) Subject as hereinafter provided, any person who, whether for gain or not publishes an obscene article (or who has an obscene article for publication for gain (whether gain to himself or gain to another)) shall be liable—

(a) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months;

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding three years or both.

24 *Handyside v. United Kingdom*, Application 5493/72 [1974] 45 COLL. DEC. 23.



the Acts' restrictions on the right to freedom of expression were "prescribed by law" and "necessary in a democratic society" "for the protection of morals." Thus, the United Kingdom argued, Handyside's prosecution and conviction under the Acts did not violate Article 10.

On December 7, 1976, the Court accepted the United Kingdom's reasoning and rejected Handyside's application. The Court held that both the Acts and the United Kingdom's decision to apply the Acts to Handyside were reasonable within the margin of appreciation afforded Member States by subsection 2 of Article 10. Thus, the Acts and the application of the Acts to Handyside were held compatible with the United Kingdom's obligation under the Convention to respect the right to freedom of expression.<sup>25</sup>

### B. *Proceedings Before the Commission*<sup>26</sup>

Handyside submitted that the Acts themselves as well as their application to him violated his right to freedom of expression. He argued that the Acts were incompatible with the Convention due to the vague definition of obscenity employed in the Acts.<sup>27</sup> According to Handyside, this vagueness enabled the police and Director of Public Prosecutions to take arbitrary action. Views critical of current establishment values in British society could thus be suppressed under the rubric of obscenity. Handyside argued that *The Schoolbook* had been judged obscene by the English courts because the book presented political and philosophical views inconsistent with establishment thinking. Thus, he asserted, the prosecution of *The Schoolbook* was directed at the book's political contents, not at the protection of the morals of children.

To support his contention, Handyside argued that the Inner London Court's opinion demonstrated that the true function of the Acts was to censor social ideas rather than to protect the morals of the young. The Inner London Court held that *The Schoolbook's* extreme subversive tone tended to undermine the idea of marriage as a social institution, the need for restraint in sexual matters, and the responsible influences of the Church, parental authority, and youth organizations. In addition, the Inner London Court held *The Schoolbook's* anti-authoritarian stance inimical to good teacher-child relationships.

Handyside noted that at the time of publication of *The Schoolbook*, a large proportion of the British press considered the book a serious contribution to

<sup>25</sup> The Handyside Case, Eur. Ct. Human Rights (Dec. 7, 1976).

<sup>26</sup> The first obstacle Handyside faced in filing an application with the Commission was Article 26, which provides that the Commission may only consider an application after all domestic remedies available to the applicant have been exhausted.

<sup>27</sup> Test of obscenity under the Acts:

(1) For the purpose of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) In this Act "article" means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures.

(3) For the purpose of this Act a person publishes an article who

(a) distributes, circulates, sells, lets or hires, gives, or lends it, or who offers it for sale. . . .

English education. Handyside also pointed out that not one review had found either *The Schoolbook* as a whole or its most highly publicized aspect, the section on sex, obscene.

In response, the United Kingdom contended that the doctrine of margin of appreciation left to Member States the right to determine the limits on certain of the rights in the Convention. The United Kingdom argued that subsection 2 of Article 10 established the government's right to control, through appropriate legislation, the publication and distribution of obscenity. The United Kingdom maintained that the Acts represented legitimate legislative control "prescribed by law" and "necessary in a democratic society" "for the protection of morals." According to the United Kingdom, therefore, the Acts were compatible with the individual's right to freedom of expression reserved in Article 10.

The United Kingdom also asserted that the application of the Acts to Handyside was justifiable under subsection 2 of Article 10. In support of its position, the United Kingdom cited the Inner London Court's findings that: (1) *The Schoolbook* was intended for and likely to be read by school children of the age of 12 and above, and (2) *The Schoolbook* tended to deprave and corrupt children who were likely to read it as the book did not present alternative views, and thus prevented children from forming a balanced view of the subjects of discussion.<sup>28</sup>

A majority of the Commission proceeded as though it were a Court of Appeal. The majority merely reviewed the judgments of the English courts and concluded that the courts had acted reasonably, in good faith, and within the limits of the margin of appreciation afforded under subsection 2 of Article 10. Thus, the Commission dismissed Handyside's claim that his right to freedom of expression had been violated.

In adopting this approach, the majority completely disregarded its obligation under Article 10. The Commission was bound to determine whether the interference with Handyside's right to freedom of expression was necessary for the protection of morals in a democratic society. Under Article 10, *necessity* and not reasonableness should be the yardstick by which the Commission measures a Member State's interferences with an individual's right to freedom of expression. The Commission must objectively assess whether the facts of an application reveal an unlawful interference by a Member State with an individual's right to freedom of expression. In the *Handyside Case*, the Commission was thus under a duty to determine the true nature of *The Schoolbook*, the necessity of the Acts themselves, and the necessity of Handyside's prosecution under the Acts for the protection of morals. Moreover, the Commission was under a duty to make these determinations in a manner separate and apart from the English courts.

A sizeable minority of the Commission in the *Handyside Case* rejected the doctrine of margin of appreciation. The minority chose instead to examine

---

<sup>28</sup> The alleged absence of alternative views in *THE SCHOOLBOOK* should not serve as a basis upon which to justify a finding of obscenity. The establishment views of the Church, parental authority, and youth organizations wield a far greater influence than the occasional non-establishment publication such as *THE SCHOOLBOOK*. Do publications of the Church and youth organizations present children with a balanced view on subjects discussed, i.e., with alternate views such as are presented in *THE SCHOOLBOOK*? If not, are these publications obscene as well?

*The Schoolbook* and the necessity of Handyside's prosecution under the Acts without relying on the findings of the English courts. Nevertheless, the majority of the Commission examined only the reasonableness and the good faith of the English courts, and on those bases rejected Handyside's application.

### C. *Opinion of the Court*<sup>29</sup>

Unfortunately, the Court followed the misguided approach of the Commission. The Court extended the doctrine of margin of appreciation to the United Kingdom, stating:

"[I]t is no way the Court's task to take the place of the competent national court but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation."<sup>30</sup>

The Court concluded that "the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that *The Schoolbook* would have pernicious effects on the morals of many of the children and adolescents who would read it."<sup>31</sup>

Thus, the Court relied on the English courts' conclusions as the basis for its rejection of Handyside's claim and did not conduct an independent assessment of *The Schoolbook*.

In its opinion, the Court referred only to those passages of *The Schoolbook* specifically quoted or mentioned by the English courts. For example, the Court accepted the English courts' characterization of the following passage as indicative of *The Schoolbook's* overall tendency to undermine children's responsibility to the community:

#### "Be Yourself"<sup>32</sup>

Maybe you smoke pot or go to bed with your boy friend or girl friend and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret. Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are "approved of."

The Court found objectionable the passage's lack of reference to the illegality of smoking marijuana, despite the fact that this *was* expressed in the next section in the book on drugs.

The Court referred to a passage headed "Intercourse and Petting"<sup>33</sup> in *The Schoolbook's* section on sex as a further example of the book's tendency to deprave and corrupt, on the grounds that the passage gave children no warning as to the desirability of restraint in sexual activity. Also found unsatisfactory was the following passage, which appeared under the heading of "Pornography:"<sup>34</sup>

<sup>29</sup> The Commission referred The Handyside Case to the Court for a decision whether the facts of the case disclosed a breach by the United Kingdom of its obligations under Article 10.

<sup>30</sup> The Handyside Case, *supra* note 25, at 18.

<sup>31</sup> *Id.* at 19.

<sup>32</sup> THE SCHOOLBOOK at 77.

<sup>33</sup> *Id.* at 97-98.

<sup>34</sup> *Id.* at 105.

Porn is a harmless pleasure if it isn't taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed.

But it is quite possible that you will get some good ideas from it and you may find something which looks interesting and that you haven't tried before.

The Court found the "sane and sensible" first paragraph marred by the second paragraph's suggestion that children might find ideas worth adopting in pornography. The Court foresaw "the real likelihood that a substantial number of children would feel it incumbent to look for and practice such things."<sup>35</sup> The Court concluded: "Such acts might very well be criminal offenses just like smoking pot and sexual intercourse between a boy of at least 14 and a girl not yet 16. The expression 'to deprave and corrupt' must include the admission of or the encouragement to commit criminal offenses of that kind."<sup>36</sup>

Although the Court acknowledged the high quality of *The Schoolbook's* treatment of contraceptives, homosexuality, venereal diseases and abortion, it held that these sections could not outweigh the tendency of the cited passages to deprave and corrupt a significant number of the children likely to read it.

By relying on the doctrine of margin of appreciation and accepting a diminished, secondary role whereby only the reasonableness of the English courts' judgments was reviewed, the Court presented an inaccurate, distorted picture of *The Schoolbook*. In its description and treatment of *The Schoolbook*, the Court, by its concentration on the 26-page section on sex, the 2-page section on pornography and the 1/2-page section entitled "Be Yourself," neglected to account for 179 1/2 pages of the book. The Court was thus unable to obtain a balanced view of *The Schoolbook*.

Included within *The Schoolbook's* remaining 179 1/2 pages was a 32-page section on the dangers of drug abuse.<sup>37</sup> The section begins by defining drugs as "poisons which can have a pleasant effect" and states: "They [drugs] can affect your body directly. And they can be habit-forming or addictive, which means that you can become mentally or physically dependent on them."<sup>38</sup> *The Schoolbook* then gives an individual and detailed breakdown of various drugs, outlining their detrimental effects and dispelling the myths associated with each. After listing references to accurate books on drugs, material on how the police and courts deal with drug offenders, and several London addresses where children may turn for help with drug problems, the section ends on the following cautionary note:<sup>39</sup>

"Remember"

If anybody offers you pills, injections or types of pot you don't know, refuse them. You can never be absolutely certain you're not going to get hooked.

\* \* \* \* \*

35 The Handyside Case, *supra* note 25, at 11.

36 THE SCHOOLBOOK at 12.

37 *Id.* at 120-53.

38 *Id.* at 120.

39 *Id.* at 151-52.

If you do accept, you must understand that by doing so you are losing part of your freedom. This is the freedom to decide for yourself whether to stop or take more. It may change your whole life.

Before you start you're free. Afterwards you're not free: the drug rules your life.

Drugs won't solve your problems. The only way to solve problems is to change the things that cause them not to try to escape or drop out altogether.

*The Schoolbook's* drug section is but one example of the intelligent, straightforward, and accurate discussion the book offers in areas of knowledge important to every adolescent in modern society. To classify *The Schoolbook* as obscene solely on the basis of its discussion of sexual matters calls into question the test of obscenity utilized by the English courts.<sup>40</sup> Yet the Court made no inquiries as to the validity, or more precisely, the necessity, of the English criterion of obscenity. The Court refused to examine the basis of the classification despite Handyside's vigorous objection that the English criterion of obscenity was incompatible with the Article 10 requirement that *any* restriction on the right to freedom of expression must be *necessary* for the protection of morals in a democratic society. The Court, like the Commission, failed to address these objections and assumed the necessity of the Acts. On that assumption, the Court upheld as reasonable the English courts' determination that *The Schoolbook* was obscene.

Under Article 10, before the Court could reach a decision as to the obscenity of *The Schoolbook*, it was under a duty to examine carefully whether the Acts' criterion of obscenity was a necessary and thus valid one. Had such an examination been made by the Court, the English criterion of obscenity could not have been upheld as necessary for the protection of morals in a democratic society.

#### IV. The Obscene Publications Acts: Background History and Criticisms

Prior to the Acts, the law relating to obscenity in the United Kingdom was based on the 1868 case of *R. v. Hicklin*.<sup>41</sup> *Hicklin* involved the prosecution of a seller of pamphlets entitled "The Confessional Unmasked."<sup>42</sup> Lord Justice Cockburn, in holding the pamphlets obscene and their seller guilty of a misdemeanor, stated the test of obscenity as:

*whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.*<sup>43</sup>

In 1957, an Obscene Publications Bill, predecessor of the Acts, was brought before Parliament for consideration. A Select Committee was appointed to investigate the desirability of amending and consolidating the law relating to

40 See note 27 *supra*.

41 *R. v. Hicklin*, [1868] L.R. 3 Q.B. 360.

42 The pamphlet purported to show the depravity of the Romish priesthood and the iniquity of the Confessional and the questions put to women in confession.

43 L.R. 3 Q.B. at 371.

obscene publications.<sup>44</sup> During its investigations, the Committee entertained memoranda and oral testimony from a number of authorities in the area of obscene publications. The Committee's minutes demonstrate the manifest problems with the *Hicklin* test.

Following are excerpts from the minutes of evidence taken during the Committee's examination of Sir Theobald Mathew, the Director of Public Prosecutions at that time.<sup>45</sup> The Committee examiners questioning Sir Mathew are Mr. Elwyn Jones, Mr. Roy Jenkins, Mr. Simon and Viscount Lambton.

Jones: Have you . . . been conscious of the unsatisfactory state of the law in regard to obscenity?

\* \* \* \* \*

Mathew: . . . I think it is very difficult . . . when you are dealing with expressions like "calculated to corrupt and deprave" to get an objective yardstick . . . it must vary very considerably either way. . . .

\* \* \* \* \*

Jenkins: Would not it suggest to you that the law was in a rather unusually vague state . . . ?

Mathew: I think I said or conceded earlier that as far as I am prepared to go on policy, anything . . . that depends upon what is the meaning of "calculated to corrupt and deprave" must always be extremely difficult. There is no yardstick by which you can judge what is "calculated to corrupt and deprave."

\* \* \* \* \*

Mathew: . . . *I do not know, and I do not suppose anybody else knows, what corrupts.* (emphasis added)<sup>46</sup>

\* \* \* \* \*

Lambton: I think you would agree that there are certainly in circulation now a large number of books which are . . . pornographic in content . . . but which do not arouse your interest because they are not brought to your notice.

Mathew: *I am quite prepared to accept that there is a great deal of pornographic literature which does not come my way.* (emphasis added)

<sup>44</sup> Evidence was obtained from the Home Secretary, the Director of Public Prosecutions, Commissioner of Police of the Metropolis, Society of Authors, Publishers Association and Association of Chief Officers of Police of England and Wales, among others.

<sup>45</sup> Minutes of Evidence, examination of Sir Theobald Mathew, Director of Public Prosecutions, at 25-46 (May 27, 1957).

<sup>46</sup> *Id.* Mathew recalled and further examined, (Jun. 3, 1957).

Lambton: *Do you not think that these leave a loophole open for persecution of publisher or printer? . . . If so, you might become, as it were an instrument of persecution in the hands of somebody who had an axe to grind?* (emphasis added)

Mathew: I suppose it is always possible.

\* \* \* \* \*

Lambton: . . . *you said you did not mention the word "corrupt" because it is so difficult to know what is corrupting. Now is not the law as it stands based on this phrase that which would deprave or corrupt those into whose hands this matter may fall?* (emphasis added)

Mathew: Yes.

Lambton: *Are we then having to take a judgment . . . framed on a law of which you are not quite sure of the meaning?* (emphasis added)

Mathew: No. I cannot give a definition in terms as to what is "corrupt" . . . But if I look at material . . . then I know. . . . But it is very difficult . . .

Lambton: *And you might, therefore leave it as a weakness of the law, and one of the reasons why it should therefore be changed, that, . . . the Hicklin judgment is open to individual interpretation . . .* (emphasis added)

Mathew: It is not what I think or say or what any other Director of Public Prosecutions thinks or says. It is what the Magistrates at one level and juries at another think.

Lambton: *I am thinking about it before it goes to a jury.* (emphasis added)

\* \* \* \* \*

Lambton: . . . *my point is that it does seem somewhat peculiar that for ninety years we have been going on a judgment which the Director of Public Prosecutions finds difficult to explain.* (emphasis added)

Mathew: If you think that is a fair way of summing up my evidence, I will accept it. . . .

In its final recommendations, the Committee noted the ambiguity of the words "deprave and corrupt" and the desirability of removing uncertainty in the law. The Committee, however, decided to retain the *Hicklin* test, stating that "any amendment of the law relating to obscene publications is liable to be controversial. To attempt too much might well give rise to fears that the law would be unduly relaxed. . . ." <sup>47</sup> In its final form, the Committee's recommended statu-

<sup>47</sup> Report from the Select Committee on Obscene Publications at iv (1958).

tory definition of obscenity was couched in the following terms:

Any matter shall be deemed to be obscene if its effect as a whole is such as to tend to deprave and corrupt persons to or among whom it was likely to be distributed, circulated or offered for sale.<sup>48</sup>

A comparison of the Committee's recommended definition with the definition of obscenity incorporated in the Acts reveals how closely the Committee's recommendations were followed. The test of obscenity under the Acts is:

[A]n article shall be deemed to be obscene if its effect or . . . the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely . . . to read, see or hear the matter contained. . . .<sup>49</sup>

The Committee's minutes are germane to the issue of the necessity of the Acts, since the test of obscenity contained in the Acts corresponds closely to the *Hicklin* test.

The inadequacy of the criterion is dramatically illustrated by the 1968 case of *R. v. Calder and Boyars Ltd.* The case involved a prosecution under the Acts of the publishing firm of Calder and Boyars Ltd.,<sup>50</sup> for its publication of *Last Exit to Brooklyn*. The book was declared obscene by a London Magistrate, and the decision was affirmed by a jury at the Central Criminal Court. The defendants appealed the decision to the Court of Appeal on the grounds that the trial judge had inadequately instructed the jury as to the meaning of the statutory definition of obscenity. The trial judge explained the legal test of obscenity embodied in the Acts to the jury in the following manner:

Those . . . vital words "tend to deprave and corrupt" really mean just what they say. . . . "Tend" obviously means have a tendency to or be inclined to. "Deprave" is defined . . . as to make morally bad; to pervert or to corrupt morally, and the word "corrupt" has been defined as "to render morally unsound or to pervert" which brings us back pretty much to square one with the other word. The essence of the matter you may think, is moral corruption.<sup>51</sup>

The Court of Appeal rejected the contention that the trial judge should have explained the essence of moral corruption. The Court stated:

*When, as here, a statute lays down the definition of a word or phrase in plain English, it is rarely necessary and often unwise for the judge to attempt to improve upon or re-define the definition.*<sup>52</sup> (emphasis added)

Paradoxically, the Court's assessment of the plain meaning of the words "tend to deprave and corrupt" was contradicted by the assessment made by the Director of Public Prosecutions involved in the case. In his response to an in-

48 *Id.*

49 See note 27 *supra* for the full text of the test of obscenity under the Acts.

50 *R. v. Calder and Boyars Ltd.*, [1968] 3 W.L.R. 974 (C.A.).

51 *Id.* at 987.

52 *Id.* at 983.



quiry made by Calder and Boyars Ltd., prior to the publication of *Last Exit to Brooklyn* as to the likelihood of prosecution under the Acts, the Director answered: "If you find . . . as I am afraid you will . . . that this is a most unhelpful letter . . . it is not because I wish to be unhelpful, but because I get no help from the Acts."<sup>53</sup>

The aim of this section has been to point out the many criticisms of the Acts, demonstrating their inadequacy, obscurity, ineffectiveness and potential for discriminatory enforcement. These criticisms shed doubt on the necessity of the Acts for the protection of morals in a democratic society and thus call into question the compatibility of the Acts with the right to freedom of expression contained in Article 10 of the Convention. Despite these pervasive difficulties, the Court made no attempt to assess whether the Acts constituted a necessary restriction on the right to freedom of expression. The Court's failure to investigate the Acts was directly related to its cursory treatment of the necessity of applying the Acts to *Handyside*. These judicial failings may both be traced to a single source—the doctrine of margin of appreciation.

## V. Conclusion

In view of the preceding discussion of the doctrine of margin of appreciation as it has evolved in the jurisprudence of the Commission and Court, the decision of the Commission<sup>54</sup> and Court in the *Handyside Case* is not surprising. Nevertheless, the decision threatens not only the right to freedom of expression, but the continued viability of the Convention itself.

The Commission and Court failed to examine: (1) *The Schoolbook* in its entirety, independently of the English courts' references and conclusions; (2) the necessity of the Acts themselves for the protection of morals; and (3) the necessity of the application of the Acts to *Handyside* for the protection of morals. In each respect, the approach is wholly consistent with past precedent. Consistency in approach, however, does not signify accuracy in either interpretation or application of the Convention. By their reliance on the doctrine, the Commission and Court have established that under certain articles in the Convention there exists a no-man's-land between compliance and contravention by a Member State, in which the Commission and Court are powerless to intervene.

Why the Commission and Court should choose to rely on the doctrine of margin of appreciation is open to speculation. Perhaps it reflects a natural reluc-

<sup>53</sup> Note, *Depravity and Corruption for the Public Good*, 32 M.L.R. 198 (1969). The unsatisfactory and ineffectual nature of the Acts is further demonstrated by the findings of a 1969 Working Party set up by the Acts Council of Britain to investigate the workings of the Acts. The Working Party recommended repeal of the Acts. It found the Acts incapable of overcoming the fact that no two people could agree on what is obscene. The Working Party concluded:

[W]hen juries and defendants are without a comprehensive definition of the crime alleged, the defendant is left at the mercy of a personal opinion which is a system of censorship rather than a system of law . . . the laws against obscenity while constituting a danger to the innocent private individual provide no serious benefit to the public.

<sup>54</sup> All references to the decision of the Commission in the *Handyside* case in this section refer only to the decision of the majority of the Commission. A minority of the Commission in *The Handyside Case* rejected the doctrine of margin of appreciation.

tance on the part of the Commission and Court to find a Member State in breach of the Convention. Or perhaps the reliance on the doctrine represents a politically motivated choice of action by a Commission and Court fearful of denunciations, withdrawals, and flagrant breaches by Member States faced with a too intrenchable enforcement of the Convention.

Whatever the explanation for the doctrine, it is clear that it seriously undermines the independence and ultimate decision-making power of the Commission and Court. Without an effective machinery to hold Member States accountable for their actions, the Convention's ability to preserve and enhance human rights and fundamental freedoms is substantially impaired.

*Cora S. Feingold*