Fifty years after *Handyside*: restricting free speech on grounds of public morality

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Introduction

It is now fifty years since Richard Handyside was prosecuted under the Obscene Publications Act 1959 for having in his possession for publication copies of *The Little Red Schoolbook*, a pamphlet providing liberal sexual advice to young persons. The prosecution told us much about both the prosecution policy on obscenity and the public morals of the establishment in the United Kingdom at the time. However, the case became even more famous for the subsequent appeal to the European Court of Human Rights. In *Handyside* v *United Kingdom,*[1] the Court accepted that the domestic authorities should be given a wide margin of appreciation in regulating speech that conflicts with public morality, stressing that the domestic authorities were better placed than the international judge to assess the necessity and proportionality of such laws.[2] Accordingly, as detailed below, the Court found that the interference with Handyside's free speech was necessary and proportionate, despite the fact that other European countries had not taken legal action against the publication.

Indeed, the subsequent case law of the European Court shows a marked reluctance to attack the domestic laws of blasphemy, indecency and obscenity, accepting that such laws intended to uphold public morality, or to safeguard the sensibilities of certain sections of society.[3] This has led to a relatively low level of protection of literary and artistic speech by the European Court, in contrast to other forms of constitutional speech; an approach generally followed in the domestic courts.[4]

This short article will revisit the case of *Handyside*, both to celebrate the fiftieth anniversary of the initial prosecution, and, to a lesser extent, to assess the importance of the European Court's decision with respect to the control of 'offensive' speech. It does so in the full realization that times have changed and that many of the decisions examined in the article are of purely historical and academic interest. The cases were, at the time, *cause celebre,* and their prosecution and defence indicative of the establishment's fight to safeguard public morality, and the new guard's duty to insist on a more liberal approach to these matters.

Fifty years on, the content of the material appears harmless, lame and passe; their prosecution inexplicable and fruitless. That is not to say that the regulation of 'offensive' speech is no longer relevant or lacking controversy. The regulation of hate speech is very much on the legal and moral agenda, and in particular, the balance between free speech and the protection of religion and religious sensibilities is the source of intense debate and differences of moral, ethical opinion.[5] There has, also, been a shift from protecting *public* morality, prevalent from the 1950's, to ensuring that *individuals* are not harmed or offended, the main aim of regulated speech at present. The article recognises this ongoing

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[1] (1976) 1 EHRR 737.

[2] In that case, the European Court upheld the prosecution of the applicant for obscenity for distributing a publication that was freely available in most other parts of Europe, holding that the prosecution was both necessary and proportionate.

[3] See *Müller* v *Switzerland* (1988) 13 EHRR 212, *Otto-Preminger Institute* v *Austria* (1994) 13 EHRR 34, and *Wingrove* v *United Kingdom* (1996) 24 EHRR 1, considered below.

[4] Notably in *R v Gibson and Sylverie,* below, and *R v Gay News and Lemon* [1979] 1 All ER 898.

[5] See Steve Foster, 'Accommodating Intolerant Speech: Religious Free Speech Versus Equality and Diversity' (2019] 6 *European Human Rights Law Review*, 609.

debate, but will focus on *Handyside*, and the regulation of speech that threatens, or at least threatened at the time, public morality, in particular sexual morality. The author recognizes that much of what follows is of historical significance, and the intention is to provide an insight into the suppression of immoral speech before the millennium, since which time new challenges to offensive free speech have arisen.

The prosecution of the Little Red Schoolbook: *R v Handyside*; *Handyside v United Kingdom*

The applicant owned the British publishing rights in the *Little Red Schoolbook*, a Danish publication that had been translated into several languages and sold in different countries.[6] The publication was intended as a reference book on sexual matters and contained chapters on topics such as abortion, homosexuality, sexual intercourse and masturbation. Several hundred review copies were distributed and the book was advertised for sale at 30 pence. After several thousand copies had been sold in the United Kingdom, a number of complaints were received and the Metropolitan Police obtained a warrant to search the applicant's premises. A number of copies were seized during the search and the applicant was subsequently charged under s.1 of the Obscene Publications Act 1959 with having in his possession for gain several hundred copies of an obscene publication. He was fined £50 by the magistrates' court, and after his appeal to the Inner London Quarter Sessions was unsuccessful the remainder of the books were destroyed. Subsequent, unsuccessful, prosecutions were brought in Scotland, but no proceedings were brought in Northern Ireland, the Isle of Man or the Channel Islands, and the book circulated freely in most European countries. A revised edition of the book was allowed to circulate freely.

The applicant registered a complaint under the European Convention, claiming that the seizure and destruction of the books was contrary to his right of freedom of expression under Article 10, and of his right to peaceful enjoyment of possessions under Article 1 of the First Protocol. The European Commission on Human Rights declared the application admissible, but found no violation on the facts and referred the case to the European Court of Human Rights.

The Court found that the applicant's criminal conviction and the seizure and destruction of the books was undoubtedly an interference with his Convention right to freedom of expression, thus constituting a violation unless falling within one of the exceptions provided by Article 10(2). It was also accepted by the Court and by the applicant that the interference was prescribed by law in that it had a legal basis in the Obscene Publications Acts 1959/1964, and that the Act had been correctly applied in the present case. Thus, the Court merely had to decide whether the interference was necessary in a democratic society for the purpose of achieving the legitimate aim of the protection of morals and the rights of others. The Court found that the Act had the legitimate aim of the protection of morals in a democratic society.[7] Accordingly, the question for the Court was whether the restriction was necessary in a democratic society for that legitimate purpose. In this respect, the Court attempted to lay down the rules on determining whether an actual restriction or penalty was necessary in a democratic society.

The Court stressed that machinery of protection established by the Convention was subsidiary to the national legal systems safeguarding human rights in that the Convention leaves to each contracting state, in the first place, the task of securing the rights and freedoms it enshrines. Thus, the Convention machinery only becomes involved through contentious proceedings and after all domestic remedies have been exhausted. This, in the Court's opinion, applied notably to Article 10(2) of the Convention. In particular, it was not possible to find in the domestic law of the various states a uniform conception of morals. The view taken by their respective laws of the requirements of morals varies from time to

[6] The book was written by Søren Hansen and Jesper Jensen, was first published in 1969, and was republished in 2014.

[7] The Court later rejected a claim that the book had been penalised purely for its anti-authoritarian views and that accordingly the restriction was not imposed for a legitimate purpose.

time and from place to place, especially in our era that is characterised by a rapid and far-reaching evolution of opinions on the subject:

> By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

The Court then considered the meaning of the word 'necessary' in the context of Article 10(2). In the Court's view, while the word was not synonymous with 'indispensable', neither did it have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, Article 10(2) leaves to the contracting states a margin of appreciation, this margin being given both to the domestic legislator and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. Nevertheless, the Court noted that Article 10(2) does not give the state an unlimited power of appreciation. The Court is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression. Thus, the domestic margin of appreciation goes hand in hand with European supervision, such supervision concerning both the aim of the measure challenged and its necessity, and covering not only the basic legislation but also the decision applying it, even one given by an independent court.

The Court then turned its attention to the principles of a democratic society. In its view, the Court was obliged to pay respect to the principles of such a society and noted that freedom of expression constituted one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic 'society'. This, in the Court's view, means that every formality, condition, restriction or penalty imposed must be proportionate to the legitimate aim pursued.

On the other hand, the Court noted that a person who exercises his freedom of expression undertakes 'duties and responsibilities', the scope of which depends on his situation and the technical means he uses. The Court must take this into account when deciding whether the 'restrictions' or 'penalties' were conducive to the 'protection of morals' which made them 'necessary' in a 'democratic society'. Thus, it was in no way the Court's task to take the place of the domestic courts, but rather to review (under Article 10) the decisions they delivered in the exercise of their power of appreciation. The Court must decide whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient under Article 10(2).

Having established the guidelines of its inquiry, the Court then considered the decision of the domestic court with regard to the publication. In this respect, it attached particular significance to the readership of the book, a factor that drew attention from the domestic court. The book was aimed at children and adolescents aged from 12 to 18. It was also direct, factual and reduced to essentials in style, making it easily within the comprehension of even the youngest of such readers. Although the book contained correct and useful factual information, it also included - particularly in the chapter on sex and in the passage 'Be yourself' in the chapter on pupils - sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful to them or even to commit certain criminal offences. In these circumstances, despite the variety and constant evolution in the United Kingdom of views and ethics and education, the domestic judges were entitled, in the exercise of their discretion, to think at the relevant time that the publication would have pernicious effects on the morals of many of the children and adolescents who would read it.

Finally, the Court considered the measures in dispute. The applicant had argued that the failure to take legal action in other parts of the United Kingdom, that the book appeared and circulated freely in the majority of the member states of the Council of Europe, and that, even in Scotland and Wales, thousands of copies circulated without impediment despite the domestic court's ruling in 1971, showed that the judgment was not a response to a real necessity, even bearing in mind the national authorities' margin of appreciation. The Court, however, rejected those arguments. In particular, with regard to the practice of other states, it accepted that the contracting states had each fashioned their approach in the light of the situation obtaining in their respective territories, each having regard to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed did not mean the contrary decision of the Quarter Sessions was in breach of Article 10. The Court also accepted that the failure to take proceedings in other parts of the United Kingdom did not call into question the necessity of the proceedings in England. The subsequent failure to prosecute the book was explainable on the grounds that by that time the book had been revised, in order to omit some of the more objectionable passages. Accordingly, the applicant's claims failed.

Controlling obscenity and indecency in domestic law

At the domestic level, some laws control indecent speech and acts, while others relate to acts or speech that are classified as obscene. For example, the Indecent Displays (Control) Act 1981 makes it an offence to display any *indecent* matter in a public place, while the Obscene Publications Act 1959 makes it an offence to publish *obscene* articles, in other words those that are capable of depraving and corrupting its readership.[8] In one case, therefore, it is enough that the material is shocking or offensive, or lewd and disgusting,[9] whereas in other cases the material must go further, and deprave and corrupt the morals of its likely readership, thereby attacking or threatening those morals in some way.

One argument in support of such laws is that the dissemination of such information is capable of causing harm to society's morals, the argument becoming stronger if the publication is likely to deprave and corrupt the thoughts and actions of the young, or the mentally or emotionally weak. That argument was, of course, very influential in the European Court's judgment in *Handyside*. An alternative is that restriction and regulation of such speech or acts protects society or individuals from shock or offence, or in certain cases, outrage.[10] Whether these laws are necessary and proportionate and in compliance with the European Convention depend on a number of related factors. These include whether there is a legitimate aim for its suppression or sanction; whether the offences are sufficiently clear to be 'prescribed by law'; the *mens rea* required for the offence; the nature and severity of the penalty and whether it imposes prior restraint; and whether there are any defences for 'legitimate' speech (particularly where such speech serves the public interest and the public's right to know).

In *Handyside*, the *Little Red Schoolbook* had been prosecuted under the Obscene Publications Act 1959, which at that time was at the heart of discussions regarding the control of free speech on grounds of public morality. The Act has been the source of many *causes célèbres*, most notably the prosecution of Penguin Books for the publication of *Lady Chatterley's Lover*, thus highlighting the danger of obscenity and indecency law to works of artistic or literary merit.[11] The Act is controversial in that the offending material will not merely be restricted and thus available at different locations or at a different time: an

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[8] Some provisions cover both definitions. For example, s.85 of the Postal Services Act 2000 (formerly s.11 of the Post Office Act 1953) makes it an offence to send an indecent *or* obscene article through the post.
[9] In *R* v *Anderson* [1972] 1 QB 304, the Court of Appeal held that the meaning of obscenity in s.11 of the Post Office Act 1953 (now s.85 of the Postal Services Act 2000) was to be construed in accordance with its natural meaning so as to include something which was lewd and revolting. This equated with the general meaning of the word 'indecency', which generally covers something that can be described as lewd, crude or disgusting.
[10] Thus, offences under the Indecent Displays (Control) Act 1981 and the variety of broadcasting controls operate on the basis that publication or broadcast of such material will upset public morality or the sensibilities of individual citizens or viewers.
[11] *R* v *Penguin Books* [1961] Crim LR 176.

action under the Act will stop publication, or future publication, completely, and the reader will be deprived of an opportunity to digest that information. However, the Act attempts to ensure that regulation is balanced against the need to allow valuable free speech, as s.4 provides a public good defence, allowing arguments to the effect that the publication of the material would enhance literary or other concerns.

Section 2 of the Act makes it an offence for a person to publish (whether for gain or not), or to have in their possession for publication for gain, an obscene article. Consequently, it is not an offence to read such material, or to have it in one's possession, provided one does not intend to publish the material. The Act thus concentrates on the publication of such information, attempting to prevent its dissemination. It is not necessary to prove an intention to deprave and corrupt and the intention or motive of the publisher or original author are not relevant in determining liability.[12] Further, the question is whether the *tendency* of the article is to deprave and corrupt the likely readership, not whether it has been proved to have had that effect. These features of the offence are further compounded by the fact that expert evidence is generally not available to discover the intention of the author, or its likely effect on the readership.[13] The Act does not define the words deprave and corrupt, but in *Penguin Books,* it was held that 'deprave' meant to make morally bad, to pervert or corrupt morally, and 'corrupt' meant 'to render morally unsound or rotten, to destroy the moral purity of, to pervert or ruin a good quality.' Further, in *Knuller* v *DPP,*[14] it was held that the Act applied to a publication that would produce a real social evil. The section thus concentrates on the likely effect on the reader, rather than its likely effect on public morals as a whole.[15]

It must be stressed that the Act does not employ a lesser test of indecency, and it is not sufficient that the publication would merely shock and disturb its readership. In *R* v *Anderson*,[16] the defendants were charged under s.2 of the Act for publishing and sending copies of the 'School kid's issue' of their magazine, *Oz*. The magazine contained items relating to lesbianism, homosexuality, oral sex and drug taking and the prosecution argued that it would deprave and corrupt its young readers. The trial judge directed the jury that the test in the Act covered that which was repulsive, loathsome and lewd, but on appeal, it was held that the sole test for obscenity under the Act was a tendency to deprave and corrupt. As the jury may have misunderstood the ambit of the statutory words, the conviction under the Act was quashed.[17]

There is also an implied 'defence' of aversion, and the defendant will escape liability if the likely effect of the publication is that it will cause revulsion in the reader. In *R* v *Calder and Boyars,*[18] the defendants had been convicted for publishing the controversial novel *Last Exit to Brooklyn*, which depicted the decadent lifestyle of a young man living in Brooklyn. On appeal, it was held that as the book contained many words and incidents rightly described as obscene in the ordinary sense of the word, it was important to explain to the jury the specific defence that their true effect in context was the reverse of tending to deprave and corrupt. This will allow the court to consider whether the true effect of the publication is to revolt the reader and, possibly, to reinforce their existing morality. Of course, this has

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[12] *R* v *Penguin Books* [1961] Crim LR 176.
[13] However, such evidence can be made available to explain particular concepts, such as drug taking, to an inexperienced jury, provided that does not attempt to explain the likely effect of the article on its intended readership. See *R* v *Skirving* [1985] QB 819, and *DPP* v *A and BC Chewing Gum Ltd* [1968] 1 QB 159: in this case the court held that the Act applied to the obscene depiction of violence.
[14] [1973] AC 435.
[15] Although *public* morality is highly relevant, because the question is whether those morals are likely to be distorted by the reader as a result of reading the material.
[16] [1972] 1 QB 302.
[17] The convictions under the 1959 Act were therefore quashed; although the court agreed that the meaning of obscene within s.11 of the Post Office Act was the ordinary meaning, which included shocking, lewd and indecent matter.
[18] [1969] 1 QB 151.

to be speculated on in most cases: is the reader going to look at a book about devious sexual practices and say 'that looks like a good idea' or are they going to be repelled by the idea?

The Act is not concerned solely with the corruption of sexual morals, but covers other matters such as the depiction of violence,[19] and drug taking. For example, in *John Calder Publications* v *Powell,*[20] *Cain's Book*, concerned the life of an imaginary junkie in New York and, in the court's view, highlighted the favourable effects of drug taking. The court noted that far from condemning such activities, it advocated them, and consequently there was a real risk that its readership might be tempted to experiment with drugs and to get the favourable sensations highlighted by the book. Further, in *DPP* v *Whyte,*[21] it was held that the Act was principally concerned with the effect of the material on the mind of the reader, including the emotions of the persons who read it, and that it was not necessary to show that the reader would manifest those depraved thoughts in any physical way.[22] Further, it was no defence that the likely readership was already corrupted,[23] the law believing that we are all capable of moral salvation.

In order to liberalise the law, s.4 of the Act provides a defence if it can be shown that the publication of the material can be justified in the public interest.[24] As s.4 is only considered after a finding of obscenity, the court will not allow the defence to be used in a way that revisits the question of whether the article was likely to deprave or corrupt. For example, in *DPP* v *Jordan*,[25] the House of Lords held that the phrase 'other objects of general concern' did not cover the alleged therapeutic value of the material.[26] Further, in *AG's Reference (No 3 of 1973)*,[27] it was held that the word 'learning' in s.4 could not be read so as to allow expert evidence to be available regarding the magazines in that they provided information to the readers about sexual matters. In the court's view, if learning was a noun, it must mean the product of scholarship, and cover something whose inherent excellence is gained by the product of the scholar. The defence could not be used, therefore, to argue that the article educated, or could have educated, the reader, and informed them of matters of which they were ignorant in the first place: 'well, I am glad I read that, now I know; you learn something every day!'

The Act and its wording and interpretation were, therefore, unscientific and often random. Today, prosecutions under the Obscene Publications Act are rare and it is more likely that action is taken under s. 63 of the Criminal Justice and Immigration Act 2008, which created the offence of possessing extreme pornographic images.[28] Section 63 (1) provides that it is an offence for a person to be in possession of

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[19] *DPP* v *A and BC Chewing Gum Ltd* [1968] 1 QB 159, Divisional Court.
[20] [1965] 1 QB 509.
[21] [1972] AC 849. Husband and wife booksellers had been charged under the Act with having in their possession for gain a number of pornographic magazines, including the intriguingly entitled *Dingle Dangle No 3*.
[22] This is also the case for prosecutions under the common law offence of corrupting public morals; *DPP* v *Shaw* [1962] AC 220.
[23] In this case, it had been argued that their readers were inadequate, dirty old men, who were addicts of this type of material and whose morals were already in a state of depravity. Rejecting the plea that such people were incapable of corruption, it was held that the Act was concerned not only with the protection of the wholly innocent, but also with the protection of the less innocent from further corruption, and the addict from feeding or increasing his corruption.
[24] Section 4 provides that: a person shall not be convicted of an offence under s.2 of the Act, and a forfeiture order under s.3 of the Act shall not be made, if it proved that the article in question is justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning, or of other objects of general concern.
[25] [1977] AC 699.
[26] It had been argued that certain hard-core pornographic articles had some psychotherapeutic value for various categories of persons, providing a relief for their sexual tensions by way of sexual fantasy and masturbation and acting as a safety valve to save them from psychological and antisocial and possibly criminal activities directed at others.
[27] [1978] 3 All ER 1166.
[28] Under s.63(10) of the Act proceedings for an offence may not be instituted in England and Wales, except by or with the consent of the Director of Public Prosecutions. The maximum penalty on conviction on indictment is

an extreme pornographic image,[29] in other words one that is both pornographic and constitutes an extreme image.[30] An image is then defined as pornographic if it is of such a nature that it must *reasonably be assumed* to have been produced solely or principally for the purpose of sexual arousal.[31] An extreme image is then defined as an image which is grossly offensive, disgusting or otherwise of an obscene character,[32] and portrays, in an *explicit and realistic way*,[33] any of the following acts: one which threatens a person's life; which results, or is likely to result, in serious injury to a person's anus, breasts or genitals; one which involves sexual interference with a human corpse; or one of a person performing an act of intercourse or oral sex with an animal (whether dead or alive). This provision is, of course, subject to criticism,[34] but it is clearly based on avoiding identifiable and physical harm, rather than the often indefinable concept of public morality.

In addition to prosecutions under the Obscene Publications Act, public morality was, and is, protected from corruption and outrage at common law. The common law offence of conspiring to corrupt public morals, came to prominence in 1961 in the House of Lords' decision in *DPP* v *Shaw*.[35] In that case, the defendants had published the *Ladies' Directory*, a booklet containing the contact numbers, predilections and prices charged by female prostitutes. They were charged with conspiracy (with the prostitutes) to corrupt public morals and the House of Lords confirmed that such an offence did exist at common law and that it had been committed in this particular case.[36] The House of Lords held further that a specific intent was required to commit the offence, and that liability was based on the *corruption* of society's morals rather than causing mere shock and offence. However, unlike the 1959 Act, there is no public interest defence available to the defendant and the offence could be used to circumvent that safeguard in cases where the material has arguable public interest content.[37]

Further, in *Shaw* the House of Lords suggested that in addition to the offence of conspiracy to corrupt public morals, there existed at common law an offence of outraging public decency. This was confirmed by the House of Lords in *Knuller* v *DPP*,[38] where it was held that the offence existed at common law and could be brought both as a conspiracy charge and as a substantive offence. No specific *mens rea* is required for this offence and, again, the s.4 defence is not available. On the other hand, the House of Lords stressed that for the offence of outraging public decency to be committed, the contents must be so lewd, disgusting and offensive that the sense of decency of members of the public would be outraged by seeing or reading them, and that outrage went beyond shocking the public. Further, the prospect of

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three years imprisonment for possession of images portraying life-threatening acts or acts threatening serious injury, and two years for depictions of necrophilia and bestiality; 6 moths for all offences on summary conviction (s.67 Criminal Justice and Immigration Act 2008).

[29] An image is defined in s.63(8) of the Act as either a moving or still image (produced by any means), or data (stored by any means) which is capable of conversion into such an image.

[30] Section 63(2) Criminal Justice and Immigration Act 2008.

[31] Section 63(3).

[32] Section 63(6).

[33] This will exclude cartoons and drawings, which can quite often excite a strong response from the public or certain individuals.

[34] *See Susan Easton, 'Criminalising the possession of extreme pornography: sword or shield? (2011) 75(5), J. Crim. L., 391, and McGlynn and Rackley Criminalising Extreme Pornography: a lost opportunity [2009] Crim. LR 245.*

[35] [1962] AC 220.

[36] Similarly, in *Knuller* v *DPP* [1973] AC 435, the House of Lords upheld the convictions of the defendants when they had published a *Gentlemen's Directory*, consisting of a who's who of male homosexuals, and containing adverts such as 'alert young designer, 30, seeks warm, friendly, pretty boy under 23 who needs regular sex, reliability and beautiful surroundings. If the cap fits and you need a friend, write.' The House of Lords confirmed that there existed the offence of conspiracy to corrupt public morals, stating that to corrupt indicates that the conduct was destructive of the very fabric of society and meant more than being led morally astray.

[37] Such a defence was unlikely to have succeeded in *Shaw*, although it is extremely unlikely that the substance of the offence would be made out today.

[38] [1973] AC 435.

outrage must be related to the time and place of the exhibition – thus, public decency is to be distinguished from public morals.

Although it is highly questionable whether the defendants in the above cases would have succeeded under any public interest defence, the case of *R* v *Gibson and Sylverie*,[39] fuelled the debate concerning the prosecution of material outside the Obscene Publications Act. The case concerned the prosecution of an artist and a gallery owner in connection with the display of an exhibit at a gallery located in a shopping arcade. G had made a model's head and had attached to each of its ears an earring made out of a freeze-dried human foetus of 3–4 months' gestation. The model was displayed in a gallery, which was in a parade of shops, and following complaints, G and S, the gallery owners, were charged with conspiracy to corrupt public morals. The Court of Appeal confirmed that the charge of outraging public decency did not require an intention on behalf of the defendants to outrage, or an appreciation that there was a risk of such outrage coupled with a determination to run that risk, although the court felt that it made very little difference in this case. A subsequent appeal under the European Convention was dismissed as inadmissible.[40]

Morality, free speech and the European Court of Human Rights

In relation to the case law of the European Convention on Human Rights, the European Court has held that Article 10 of the Convention is wide enough to cover morally offensive speech. Thus, in *Handyside* it held that broadmindedness, tolerance and pluralism are hallmarks of a democratic society, and that accordingly Article 10 covers speech that shocks and offends. However, as we have already seen, in that case the Court made it clear that such speech is more susceptible to interference than, for example, political expression, and that the domestic authorities would be given a wide margin of appreciation in regulating speech that causes harm to the morals of a particular state or the interests of particular individuals.[41]

Thus, not only has the Court accepted that the protection of public morality and the sensibilities of others are legitimate aims for the purpose of Article 10(2), it has also made it clear that each member state has a wide discretion in deciding what laws to adopt and how to apply them.[42] This approach was evident in *Handyside,* and is also seen in *Müller* v *Switzerland*.[43] In this case, several paintings portraying various unnatural sexual acts, crudely depicted in large format, had been displayed in an art exhibition and were seized by the authorities. The applicants, the artists and promoters, were subsequently prosecuted and fined for displaying obscene materials and the paintings were held to be examined only by specialists. The paintings were returned to the owners eight years later. The applicants claimed that this amounted to an unjustified interference with their Article 10 rights. The European Court held that offensive and indecent material could be regulated by domestic law, provided it caused more than mere shock to the public. In the present case, it was not unreasonable for the domestic courts to find that the paintings were likely to 'grossly offend the sense of sexual propriety of persons of ordinary sensibility'. The proceedings therefore fell within the state's margin of appreciation as being necessary in a democratic society and accordingly there had been no violation of Article 10.

The Court and Commission thus have also given little protection to hard-core pornography, particularly where it is likely to be viewed by unwitting or vulnerable individuals;[44] although a greater tolerance has been shown in cases where the adult audience willingly encounters such material.[45] A 'hands-off'

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[39] [1991] 1 All ER 441.
[40] *S and G* v *United Kingdom* (Application No 17634), considered below
[41] For a broad coverage of the Court's jurisprudence in this area see The European Court of Human Rights Council (Research Division), 'Cultural Rights in the case law of the European Court of Human Rights' available at https://www.echr.coe.int/documents/research_report_cultural_rights_eng.pdf
[42] See Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006), pages 410–422.
[43] (1988) 13 EHRR 212.
[44] *Hoare* v *United Kingdom* [1997] EHRLR 678.
[45] *Scherer* v *Switzerland* (1994) 18 EHRR 276.

approach was also evident in the admissibility decision in *Marlow* v *United Kingdom*,[46] where the applicant had published a book about the cultivation and production of cannabis. He was convicted for incitement to commit an offence under the Misuse of Drugs Act 1971, and claimed that the book was a genuine contribution to the debate about the legalisation of cannabis and that he had made it clear that the growing of cannabis was unlawful. In rejecting his application as manifestly ill-founded, the European Court held that the prosecution and conviction pursued a legitimate aim and that in the circumstances it was a necessary and proportionate act.

This approach has also been adopted with respect to artistic expression.[47] Thus, in *S and G* v *United Kingdom,*[48] the European Commission of Human Rights restated the principles in *Handyside,* and held that the law of outraging public decency was sufficiently clear, had a legitimate aim and was not disproportionate, even though there was no defence based on artistic merit. In the Commission's view, the defendants could have argued that the exhibition was not an outrage to public decency and thus have raised the issue of freedom of expression. In conclusion, the prosecution was within the state's margin of appreciation, taken for the legitimate aim of the protection of morals.

However, the Court has displayed less tolerance to the interference of indecent speech when such expression serves a political purpose and constitutes political satire. Thus, in *Kunstler* v *Austria,*[49] it was held that there had been a violation of Article 10 when the applicants' painting – depicting several outrageous sexual acts being performed by political and religious figures – was the subject of an injunction and an action for damages brought by a politician who claimed to have been debased by the painting. The European Court held that although states were given a wide margin of appreciation with respect to obscene and blasphemous material, in this case the painting had depicted political satire and that the law and the victims should be more tolerant of such depictions.[50] It should be noted, however, that the reasons for interference were not based on public morals, but on the desire to protect individuals from attacks on their reputation and honour. The decision should not, therefore, be taken as questioning the stance adopted by the Court in cases such as *Muller*, and there is evidence that it is prepared to control such speech where it causes outrage or an affront to a country's heritage.[51]

Conclusions

Handyside was decided 45 years ago and the original trial was 50 years ago, and whilst the original prosecution is showing its age (as is much of the case law under the 1959 Act and related offences), the European Court's approach has been maintained. Thus, as long as domestic law attempted to safeguard the public from gross offence, and public morality from corruption, the European Court tended to support the domestic authorities rather than seek to disturb that morality and promote a more liberal

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[46] (Application No 42015/98), decision of the European Court 5 December 2000.
[47] See Andra Matei, 'Art on Trial. Freedom of Artistic Expression and the European Court of Human Rights' (May 29, 2018). Available at
SSRN: https://ssrn.com/abstract=3186599 or http://dx.doi.org/10.2139/ssrn.3186599
[48] (Application No 17634). The domestic proceedings have been dealt with above.
[49] (Application No 68354/01), decision of the European Court 25 January 2007.
[50] See also *Tatar v Hungary* (Application nos. 26005/08 and 26160/08), decision of the Court 12 June 2012. Here the applicants were fined for illegal assembly after staging a performance which involved exposing items of dirty clothing on a fence surrounding the Parliament building in Budapest. The applicants stated that the event was a political performance symbolising "hanging out the nation's dirty laundry". The Court found a violation of Article 10, ruling that the applicant's performance amounted to a form of "political expression" and that the authorities had not given "relevant and sufficient" reasons for the interference.
[51] *Ehrmann and SCI VHI v France* (Application 2777/10), decision of the European Court 1 October 2001. In this case, the applicants (a visual artist and a real estate company) were subjected to criminal and civil penalties for breaching planning regulations on account of the art works that were placed on the outer walls and boundary wall of a well-known contemporary art venue located within sight of a church and a manor house, both of which landmark buildings. The Court dismissed the applicants' complaint and underlined that in the present case the disputed interference intended to ensure the quality of the environment surrounding protected national heritage structures and that "this was a legitimate aim for the purposes of protecting a country's cultural heritage".

attitude to offensive speech and expression. What has changed, of course, is the social mores of each state, the public becoming more tolerant of sexual speech and acts; or at least conceding that the old standards cannot survive. The full force of obscenity and indecency law has also been replaced by the softer touch of broadcasting regulation, which ensures that public morality is safeguarded via standards of decency and taste and especially through broadcasting watersheds.

The *Handyside* litigation provides a useful insight into the mores of 50 years ago, and both statute and the common law provided support for the fight against sexual and other expression that threatened those standards. It is hard to imagine that figures such as Mary Whitehouse, who campaigned a clean-up campaign during the 1960's and 70's, had such a profound impact in the regulation of free speech. Today the law faces new challenges: hate speech; speech that threatens the enjoyment of religious or privacy rights; and as a result a new public and private morality has emerged, which the law must protect and balance against the democratic right of free speech. The idea of protecting public morality from corruption and outrage now seems antiquated, but those laws provided us with a fascinating battle between on the one hand free speech and emerging values, and on the other, the protection of the old guard and its own values. Handyside was perhaps the most famous of those cases, and it is apt to mark its fiftieth anniversary.