

HUMAN REMAINS AS ‘ARTISTIC EXPRESSION’ AND THE COMMON LAW OFFENCE OF OUTRAGING PUBLIC DECENCY: ‘HUMAN EARRINGS’, HUMAN RIGHTS AND *R. v. GIBSON* REVISITED

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INTRODUCTION

This paper is based on an article that was originally published in 2002¹ about a case, *R. v. Gibson*,² that was quite old even then, having been litigated over a decade before. The case concerned an artist, Rick Gibson, who obtained, legally, two freeze-dried human fetuses of three to four months’ gestation and attached them to a mannequin’s ear lobes to create a sculpture entitled *Human Earrings*.³ The piece was exhibited at the Young Unknowns Gallery in the Cut, London, and was open to the public. Gibson and the gallery owner, Peter Sylveire, were prosecuted and convicted of the common law offence of outraging public decency. Significantly, because the case was brought under the common law, the defendants were not able to avail themselves of the defence of the ‘public good’ that had been introduced when Parliament passed the Obscene Publications Act 1959 and which was intended to give, for the first time in English law, some protection to artists and writers who had previously been subjected to prosecutions under the common law of obscene libel.

The original purpose of my 2002 article was to examine the impact that the (then relatively new) Human Rights Act 1998 (HRA) would have if such a prosecution were brought again. In particular, how would the incorporation of Article 10 of the European Convention on Human Rights (ECHR) into UK law, the right to freedom of expression, affect any future prosecution of an artist for outraging public decency? This essay retains this underlying theme. However the Human Remains seminar has also provided an opportunity to reflect on the use of human remains in works of art, and to place *Gibson* in this, slightly different, context.⁴

Perhaps one of the themes to emerge from the other papers in this volume, from a variety of legal, archaeological and curatorial perspectives, is that when we are thinking, and talking, about the use, display and disposal of human remains, the main focus of our concern is almost always upon the feelings and interests of the *living* rather than those of the dead (whether they be recently dead, or ‘anciently dead’ or, indeed, never even born). For example: when we are concerned with the display of human remains in a museum it is our concern for the feelings of the *living* upon which we focus, in particular feelings of unease that may arise if it is thought that human remains are not being treated with respect and dignity;⁵ when we are concerned with the repatriation of human remains at the behest of Indigenous peoples it is the culture and belief systems of these *living*

1 The main part of this paper was first published as ‘Human Earrings, Human Rights and Public Decency’ (2002) 1(2) *Entertainment Law* 50. This version includes some updating, as well as some reflections upon the human remains aspects. I should like to thank the delegates and speakers at the Institute of Art and Law seminar, Human Remains and the Law, Natural History Museum, London, 13 Dec. 2013, for their helpful comments. Errors and omissions remain my own.

2 *R. v. Gibson* (1991) 2 QB 619.

3 An image of the piece can be seen here < <http://www.rickgibson.net/freeze-dry.html> >.

4 I do not propose here to enter the debate: “... but is it art?”.

5 The Human Tissue Authority code of practice states: “A key principle on which the [Human Tissue Act 2004] is based is that all human bodies and relevant material within its scope should be treated with respect and dignity”, Human Tissue Authority Code of Practice 7, Public Display (Sept. 2009) para. 17.

descendants that we are concerned to respect; when we debate the proper burial place of a Yorkist king, discovered beneath a car park in Leicester, it is the views of *living* descendants and *living* representatives of concerned interests that are taken into account.⁶ Granted, in many of these cases the living may attempt to take the perspective of the dead: ‘what would they have wanted if they had been able to tell us how they wished their remains to be dealt with?’. But the fact remains that it is, in reality, almost always the feelings of the living with which we are really concerned.

The other point to emerge from these papers is that a difficult balance needs to be struck between *these* interests of the living – those which, in a sense, are *on behalf of* the dead – on one hand and, on the other, the sometimes conflicting interests that the living have in the advancement of science, archaeology, history and education.

In *R. v. Gibson*, we see that the same underlying tensions exist in respect, not of the treatment of the deceased, but rather of those never actually born. As we shall see, the interests of the living in not being subjected to outrage in public were being protected by the prosecution. However, the right to freedom of artistic expression – which protects amongst other things the interests not just of the artist, but of people in having access to difficult and challenging works which may lead to deep reflection – was not afforded any weight at all. It is the basic argument of this paper that, in a case like *Gibson* it is important for us *at least to be able to have the argument* – to weigh in the balance the feelings of the living about the use of human remains, against the importance for the living in having access to provocative art works which force us to reflect upon what it is to be a human and inhabit a mortal body.

THE COMMON LAW OFFENCE OF OUTRAGING PUBLIC DECENCY

The very *existence* of the general common law offence of conspiracy to outrage public decency was confirmed by only a bare majority of the House of Lords in *R. v. Knuller*.⁷ Before this the common law had dealt with specific and disparate instances of indecency such as indecent exposure,⁸ acts of sexual indecency in public,⁹ indecent words,¹⁰ disinterring a corpse,¹¹ exhibiting deformed children,¹² exhibiting a picture of sores¹³ and procuring a girl for the purposes of prostitution.¹⁴ In *Knuller* however the majority decided that these offences had a “common element in that, in each, offence against public decency was alleged to be an ingredient of the crime ... that they were particular applications of a general rule whereby conduct which outrages public decency is a common law offence.”¹⁵ They were subsumed within a single offence of ‘outraging public decency’. Thus in applying the offence to facts which hitherto had not been brought within the ambit of the offence (the publication of written matter in a magazine containing contact

6 *R. (o/a Plantagenet Alliance Limited) v. Secretary of State for Justice and others* [2013] EWHC 3164 (Admin) (18 Oct. 2013). On the question of the possible human rights of the dead, see Kevin Chamberlain, above, p. 60.

7 *R. v. Knuller Publishing, Printing and Promotions Ltd* [1973] AC 435, Lords Simon at 493, Morris at 467 and Kilbrandon at 497. Some doubt persisted even after *Knuller* on the question of whether the substantive common law offence existed independent of conspiracy. Only Lord Simon and Lord Kilbrandon positively held that it did.

8 *R. v. Crunden* (1809) 2 Camp. 89.

9 *R. v. Mayling* [1963] 2 QB 717.

10 *R. v. Saunders* 1875 1 QB 15.

11 *R. v. Lynn* (1788) 2 Durn. & 733.

12 *Herring v. Walround* (1681) 2 Chan Cas 110.

13 *R. v. Grey* (1864) 4 F&F 73.

14 *R. v. Delavel* (1763) 3 Burr 1434. More recent manifestations of the offence include urinating on a war memorial while drunk (*R. v. Laing* unreported guilty plea, see <<http://www.theguardian.com/uk/2009/nov/26/student-urinated-war-memorial-sentenced>>) and pointing a camera up women’s skirts, without their knowledge, in a supermarket (*R. v. Hamilton* [2007] EWCA Crim. 2026; [2008] QB 224 (CA)).

15 *Knuller*, above, note 7, per Lord Simon at 493. Note however the strong dissents of Lord Reid at 457-8 and Lord Diplock at 469, neither of whom accepted that either the offence of conspiracy to outrage public decency or the generalised substantive offence existed. The latter also felt unable to draw the distinction between conspiracy to corrupt public morals and conspiracy to outrage public decency.

advertisements for gay men) the Lords claimed not to be creating a new offence but rather applying an existing offence to fit new facts. The offence is committed by anyone who says or does or exhibits in public anything which outrages public decency, whether or not it is obscene.¹⁶ The offence is most commonly used in cases of public sexual behaviour.¹⁷ It is the use of this offence to punish *artistic expression* which is, it is submitted, open to criticism.¹⁸

THE RELATIONSHIP BETWEEN OBSCENITY AND INDECENCY

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

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

The same point was made by Lord Parker in *R. v. Stanley* when he implied that concepts of indecency and obscenity were at different points on a single spectrum:

The words “indecent or obscene” convey one idea, namely, offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale.²⁰

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

ELEMENTS OF THE OFFENCE

According to the House of Lords in *Knuller*, for the common law offence to be made out the material must be so “lewd, disgusting and offensive” that the “sense of decency of members of the public would be outraged”. In 2010 the Law Commission, somewhat tentatively, advanced a definition: “the offence ... appears to consist of performing any indecent activity in such a place or way that more than one member of the public may witness and be disgusted by it.”²²

In *Knuller* ‘outrage’ was held to be a ‘strong word’ going beyond offending the susceptibilities

16 *Shaw v. DPP* [1962] AC 220 *per* Lord Reid at 281 and Lord Morris at 292.

17 For some recent examples of the use of the offence in attempts to control public sexual behaviour see: *R. v. Carroll* [2000] EWCA Crim. 723; *R. v. Pedley* 2000 WL 1629537; *R v Gaynor* [2000] 2 Cr App R (S) 163; *R. v. Wrench* [1996] 1 Cr App R 340; *Rose v. DPP* [2006] EWHC 852 (Admin), [2006] 1 WLR 2626.

18 There are obviously difficult questions here relating to the distinctions between expression and behaviour, especially in relation to ‘performance art’. The question of what constitutes ‘art’ is beyond the scope of this paper. See generally Eric Barendt, *Freedom of Speech* (2005, OUP).

19 1931 JC 10 at 13.

20 This ‘ordinary’ meaning has been given to the word obscene in several statutes, e.g. the Postal Services Act 2000 s. 85(3). See also *R. v. Anderson* [1972] 1 QB 304 and the Customs Consolidation Act 1876, s. 42.

21 See e.g. Lord Morris in *Knuller* above, note 7, at 468-9.

22 Law Commission, Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency, Consultation Paper No. 193, para. 3.1 (2010).

of or even shocking and disgusting reasonable people.²³ However, mitigating the harshness of the rule, it was also stressed that what would outrage public decency would vary from one generation to the next²⁴ and that the jury should be told to remember that they “live in a plural society, with a tradition of tolerance toward minorities and that this atmosphere of toleration is itself part of public decency”.²⁵

There was also held to be a requirement of a *public* dimension to the impugned activity. The principle underlying this is, according to Lord Simon, that “reasonable people [should be able to] venture out in public without the risk of outrage to certain minimum accepted standards of decency”. Further, it does not “necessarily negative the offence that the act or exhibit is superficially hid from view, if the public is expressly or impliedly invited to penetrate the cover”.²⁶

OUTRAGING PUBLIC DECENCY AND ART: THE ‘FOETUS EARRINGS’ CASE

The *Kneller* case had concerned the small ads column of a progressive magazine in which gay men placed adverts for sexual partners. One of the issues was whether the offence could be extended to cover printed materials where the alleged indecency occurred *inside* the publication. It was decided that it did. Lord Reid however strongly dissented. He argued that “if this new generalised crime were held to exist” then if there were “any book, new or old, a few pages ... or sentences of which any jury could find to be outrageously indecent those who took part in the publication and sale would risk conviction”. He had hoped that the days of “Bowdlerising the classics” were long past but the introduction of this new crime might make publishers think twice. What’s more, he predicted, there would be no defence based on literary, artistic or scientific merit.²⁷

Lord Reid’s fears that works of artists might be susceptible to the offence of outraging public decency were realised in the case of *R. v. Gibson*.²⁸ Richard Norman Gibson is a Canadian artist who specialises in shocking works. His provocative performance works have included *Obtaining Art Supplies* which involved walking through Brighton with a dog on a lead bearing a sign saying: ‘Wanted: Legally Preserved Human Fetuses’ (for which he was arrested for breach of the peace); and *Carnivore* in which he consumed, in public, a human testicle.²⁹

In 1987 Gibson created a work entitled *Human Earrings* consisting of a model’s head adorned with a pair of earrings. Each earring was made out of a freeze-dried human foetus of three or four months’ gestation with a ring fitting tapped into its skull and attached at the other end to the model’s earlobe.³⁰ The earrings were displayed along with 40 other items at the Young Unknowns Gallery in The Cut run by the second defendant Peter Sebastian Sylveire. The gallery was in a parade of shops and was open to the public without charge. Unbeknown to Sylveire,

23 *Kneller*, above, note 7, Lord Reid at 458; Lord Simon at 495.

24 *Ibid.*, Lord Morris at 468.

25 *Ibid.*, Lord Simon at 495.

26 *Ibid.*, Lord Simon at 494-5. The requirement of publicity has been interpreted quite widely: see e.g. *R. v. May* 91 Cr. App. Rep. 157 in which two schoolboys were asked by their schoolmaster to ask him to simulate sexual intercourse on his desk to their evident enjoyment. Since they themselves were not participants their presence was deemed to satisfy the publicity requirement. The act must be capable of being witnessed by more than one person – one person alone seeing it is not sufficient e.g. *Rose v. DPP* above, note 17, concerned a couple who performed an act of oral sex in a bank foyer within view of a CCTV camera (of whose presence they were oblivious), but the recording was not seen by a bank official until the following morning. They were found not guilty, the case illustrating not only that more than one person must be in a position to witness the act but also that the offence must be complete when the act is committed, and cannot wait in suspense until viewing occurs some time later. See Law Commission, above, note 22, para. 3.27 – 3.29.

27 *Kneller* above, note 7, 458.

28 *R. v. Gibson*, above, note 2.

29 See John Steeves, ‘The Snuffing out of Sniffy: an Interview with Rick Gibson’ (1992, *Vancouver Review*) available at <http://www.odlt.org/interviews/rick_gibson_interview.pdf>.

30 *Gibson* obtained the foetuses, which had been stored in formaldehyde for twenty years, from a British anatomy professor, see <<http://www.rickgibson.net/freeze-dry.html>>.

Gibson had advertised his exhibit with the result that the police and press were on the scene not long after the exhibition opened.

Previously such an exhibition might have been proceeded against by way one of a number of nineteenth-century statutes such as the Vagrancy Acts of 1824 and 1838 and the Indecent Advertisements Act 1889.³¹ The relevant parts of these Acts had however been repealed by section 5 of the Indecent Displays (Control) Act 1981. This Act could not be used in *Gibson* because displays in galleries and museums are specifically exempted.³² It would seem that the only option the authorities had to suppress the exhibition was the common law.³³

Gibson and Sylveire were charged with and convicted of outraging public decency. They appealed on three grounds. One ground of appeal argued by counsel Geoffrey Robertson Q.C. was that the Crown was required to prove *mens rea* by showing that the defendants had intended to outrage public decency, or at least had been aware that there was a risk of doing so. This argument was rejected by Lord Lane who cited with approval *R. v. Hicklin*³⁴ (obscene libel) and *R. v. Lemon*³⁵ (blasphemy) to reach the conclusion that there was no requirement of *mens rea* – the offence is one of strict liability. He added that when one had a display of foetus earrings, and outrage is satisfied to the satisfaction of the jury, a defendant is unlikely to be believed if he says he was unaware of the risk of causing offence and outrage to the public.³⁶

A further ground of appeal was that the jury had not been directed to consider the requisite element of publicity for the offence to be made out. This argument was given short shrift by Lord Lane. Gibson undoubtedly publicised his creation and Sylveire “was inviting the public to attend the gallery where there was a display of this object, as he well knew, for all who came onto the premises to see”.³⁷ The judge’s direction had been, in his view, correct.

Most interesting for the purposes of the present discussion was the remaining ground of appeal. This was that the prosecutions were barred by section 2(4) of the Obscene Publications Act 1959. This provides that a “person shall not be proceeded against for an offence at common law where it is the essence of the offence that the matter is obscene”. Thus, if the essence of the offence of outraging public decency were held to be that the human earrings were obscene the prosecution would be barred by section 2(4). The crucial question therefore was: what is meant by the term ‘obscene’ as used in section 2(4). As noted above, the term has two possible meanings. Firstly a broad meaning common in every day speech: “namely something which constitutes a serious breach of recognised standards of propriety on account of its tendency to corrupt morals or on account of its indecent appearance or its tendency to engender revulsion or disgust or outrage” – in short offences which involve an outrage to public decency, whether or not public morals are involved.³⁸ The second possible meaning of obscene is the ‘deprave and corrupt’ meaning that is to be found in section 1(1) of the OPA itself (see above).

If the *former*, ordinary everyday, meaning of the word ‘obscene’ were accepted as the correct meaning in section 2(4) then it was conceded by counsel for the Crown that the prosecution of Gibson and Sylveire for the common law offence of outraging public decency would be ‘plainly

31 The 1981 Act repeals the whole of the 1838 and 1889 Acts plus the part of s. 4 of the 1824 Act which dealt with the exhibition of indecent material.

32 Section 1(4)b.

33 See Geoffrey Robertson, *Obscenity* (1979, Weidenfeld and Nicholas) 199-209.

34 *R. v. Hicklin* (1868) LR 3 QB 360.

35 *R. v. Lemon* [1979] AC 617.

36 *Gibson* above, note 2, at 629. For critique of this aspect and more generally see Mary Childs, ‘Outraging Public Decency: The Offence of Offensiveness’ [1991] *Public Law* 20-9 at 27.

37 *Gibson* above, note 2, at 630.

38 *Gibson* above, note 2, at 623. Lord Lane cited Lord Morris in *Knüller* and Lord Reid in *Shaw* in support of the view that there are indeed two types of offence involving obscenity. Although he also noted that Lord Diplock in his minority speech in *Knüller* felt unable to draw the distinction between conspiracy to corrupt public morals and conspiracy to outrage public decency.

barred' since its essence concerned the human earrings which would be encompassed within this broad meaning.

If, on the other hand, the *latter* (section 1(1)) meaning were accepted as the true meaning of obscene in section 2(4) the prosecution would not be barred and the ground of appeal must fail. For this narrow meaning would restrict the use of the common law offences *only* where their essence was the publication of matter which had a tendency to deprave and corrupt, in other words where the matter had a deleterious effect on morality. And in *Gibson*, as Lord Lane said, there was no suggestion that anyone was likely to be deprived or corrupted by the exhibition of the earrings.³⁹

The appellants argued that the Obscene Publications Act 1959 had been the result of some powerful influences from the artistic and literary world.⁴⁰ For the first time in English law the Act had provided, under section 4, a 'public good defence' in which the publication of obscene articles could be justified in the interests of science, literature, art or learning or other objects of general concern. If the meaning of obscene were confined to the narrow section 1(1) meaning, (thus allowing a prosecution of artists under the common law for outraging public decency) this would mean that the liberalising effect of the 1959 Act would be seriously undermined – a result which must be contrary to the intention of Parliament.

Lord Lane was not persuaded by these arguments. He concluded that the Act was intended only to bar common law prosecutions for the 'deprave and corrupt' type of offence. Section 2(4) did not preclude prosecutions based on the offensive, disgusting or shocking nature of the article. In order to reach this conclusion he examined the wording of section 1(1). This states that an article is 'deemed to be obscene' if its effect is such as to tend to deprave and corrupt etc. He interpreted this as indicating that the restricted meaning should apply to the 1959 Act whatever meanings might be applicable elsewhere.⁴¹ Despite arguments to the contrary those plain words were 'uncontrovertible'. The definition in section 1(1) must govern the meaning of obscene in section 2(4). Otherwise it would mean that in section 2, where the word obscene is used three times, on two of those occasions it would have the narrow section 1(1) meaning and on one (in section 2(4)) it would have the wider meaning. Lord Lane said: "We are unable to find any justification for such a radical departure from the ordinary canons of construction."⁴²

The result of all this would seem to be that members of the public may lawfully be 'depraved and corrupted' – have their morals degraded – by art works if the publication is in the public good; but they may not be shocked, disgusted or outraged (whether or not their morals will be degraded) no matter what benefit the work may be to the public. It is interesting to note the anomaly that, had the earrings been filmed and the film subsequently shown, the prosecution would have had to have taken place under the OPA with its concomitant public good defence. This is due to the fact that section 2(4)A OPA bars prosecution for the common law offence in respect of a film exhibition where it is the essence of the offence that the exhibition is "obscene, indecent, offensive, disgusting, or injurious to morality".⁴³

And so in *Gibson* the offence of outraging public decency was extended to cover artistic expression for the first time, as predicted by Lord Reid in *Kneller*. This creates a potentially serious inhibition on artistic freedom, since the motive of the artist and exhibitor are irrelevant, and there is no public good defence. There is no room for consideration by the court of the message conveyed by the work. The possibility that the work in *Gibson* was a comment on the "cheapness of life – used as a mere ornament in the cosmetic age of postmodernism"⁴⁴ or that

39 *Gibson* above, note 2, at 624.

40 See e.g. the Report from the Select Committee on Obscene Publications (1958 London HMSO) which includes the evidence given by the authors T.S. Elliot and E.M. Forster.

41 Note Child's comment above, note 36, that this interpretation seems unusual, as the primary function of the word 'deem' is to bring within a definition something which would otherwise be excluded, *Barclays Bank Ltd v. IRC* [1961] AC 509.

42 *Gibson* above, note 2, at 625.

43 As inserted by the Criminal Law Act 1977 and amended by the Cinemas Act 1985, (emphasis added).

44 Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] *Crim LR* 652.

it was “a condemnation of a society in which women wear their abortions as lightly as their earrings”⁴⁵ was not possible. Whatever one may think of the merits of these arguments, it was not permissible for them even to be considered by the jury.

Indeed Lord Lane stated that even if the public good defence had *potentially* been available “in this type of case . . . it was unlikely that the defence of the public good could possibly arise”.⁴⁶

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

it is instructive to compare the way the police handled the Sensation exhibition with their treatment of Gibson and Sylveire. An ineluctable conclusion is that the difference in status of the exhibition’s venues may have figured in police thinking; but perhaps for good reason. Police prosecution of personnel in the RA, the very core of the art establishment, and artists exhibited by it, might have inaugurated considerable protest at the lack of a guarantee of liberty of artistic expression...⁴⁷

Even more apposite to the current discussion are the touring *Body Worlds* exhibitions in which Gunther von Hagens, a German anatomist who has developed a process of body-preservation known as ‘plastination’, displays flayed human cadavers in a startling variety of life-like poses.⁴⁸ These have included a reclining pregnant woman with her unborn child *in-situ* and visible in her uterus which was first exhibited in London in 2002.⁴⁹ No prosecution has been brought in the United Kingdom although the exhibitions are arguably equally, if not more, outraging to public decency as Gibson’s work.⁵⁰ Von Hagens stresses that all those whose bodies are displayed gave their consent though clearly this does not cover the remains of the unborn.

The ‘fundamental principle’ of the Human Tissue Act 2004, is that “consent is obtained for the removal, storage and use of relevant material that has come from a human body for certain purposes, including public display”.⁵¹ Any ‘public display’ requires a licence from the Human Tissue Authority.⁵² Consequently the *Body Worlds* exhibitions since the coming into force of the Act in September 2006 have been granted the appropriate licences: clearly the Human Tissue Authority does not consider that these displays risk causing outrage to public decency. Perhaps it is the purportedly scientific/educational purpose expressly claimed by the creators of *Body*

45 Geoffrey Robertson, *Freedom, the Individual and the Law* (1993, Penguin) 247.

46 Kearns above, note 44, at 444.

47 *Ibid.*, 659.

48 See <<http://www.bodyworlds.com/en/prelude.html>>.

49 Stephen Adams, ‘Flayed Babies’ Bodies Included in New Body Worlds Exhibition’ *Telegraph*, 23 Oct. 2008; Kate Bluett, ‘Playing with death: Gunter von Hagen’s *Body Worlds*’ (2007) 3, *Salvo* <<http://www.salvomag.com/new/articles/salvo3/3bluett.php>>.

50 This is to be contrasted with the situation in France where legal action has been taken to ban the *Body Worlds* exhibitions on account of their commercial purpose, see Cour de cassation, Chambre civile 1, 16 Sept. 2010, 09-67.456, available at <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rec hJuriJudi&idTexte=JURITEXT000022826393&fastReqId=2129976925&fastPos=6>>. I am grateful to Mathilde Roellinger for this point.

51 Human Tissue Authority Code of Practice 7, Public Display (Sept. 2009), para. 29. See Part 1 of The Human Tissue Act 2004. Consent is not required where over 100 years have elapsed since the death of the person. Foetal tissue is regarded as the mother’s tissue for the purpose of the Human Tissue Act, see Human Tissue Authority Code of Practice 1, Consent (Sept. 2009), para. 157. See further the paper by Caroline Browne at p. 100 of this volume.

52 See Part 2 of the Human Tissue Act, and Code of Practice 7, *ibid.*, para. 38.

Worlds that is the distinguishing feature,⁵³ as compared to the more nebulous and hard-to-pin-down artistic message of Rick Gibson's *Human Earrings*. Whether this justifies the differential treatment is, however, open to question.

THE HUMAN RIGHTS ACT 1998

The Human Rights Act (HRA)⁵⁴ is intended to “give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights.” The ‘Convention rights’ are set out in section 1 and Schedule 1. They include Article 10: “Everyone has the right to freedom of expression”. Under section 6 it is “unlawful for a public authority to act in a way which is incompatible with a Convention right.” This certainly includes the police and also, under subsection 3, courts and tribunals. Under section 7(1)b a person who claims that a public authority has acted in a way which is unlawful under section 6(1) is able to rely on the Convention right in any proceedings against him and can thus use the Convention right as a defence in criminal proceedings. Under section 3 “as far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention Rights”. Section 2(1) requires that a court must take into account Strasbourg case law so far as, in its opinion, it is relevant to the proceedings in question.

Impact of the HRA on the Offence of Outraging Public Decency

Article 10 provides that:

- i. 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...
- ii. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health of morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights (‘the Court’) has placed a high value on freedom of expression saying that it “constitutes one of the essential foundations of a [democratic] society and for the development of every man”.⁵⁵ In the jurisprudence of the European Court and Commission (‘the Commission’) of Human Rights ‘expression’ has been given a wide meaning. It has been held to include utterances as diverse as polemical journalism⁵⁶ and commercial advertising.⁵⁷ It also covers artistic expression. The Court stated in *Müller v. Switzerland* that its particular importance lies in the fact that it “affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.”⁵⁸ In the same case the Commission stated:

Through his creative work the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only

53 The *Body Worlds* website talks of “improving overall anatomical instruction” and “improving awareness of medial issues, particularly among the general public” see <http://www.bodyworlds.com/en/institute_for_plastination/mission_objectives.html>.

54 For a discussion of the potential application of the HRA to claims by Indigenous peoples for the repatriation of human remains held in museum collections, see the paper by Kevin Chamberlain, above, p. 60.

55 *Handyside v. UK* (1976) 1 EHRR 737 para. 49. In more recent judgments the words “every individual” have been substituted for “every man”.

56 *Lingens v. Austria* (1986) 8 EHRR 407.

57 *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* (1989) 12 EHRR 161.

58 *Müller v. Switzerland* [1988] 13 EHRR 212 para. 27.

helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day.⁵⁹

It seems beyond doubt that Gibson's *Human Earrings* would be expression for the purposes of Article 10.⁶⁰

Is the Prosecution Legitimated by Article 10(2)?

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

In any *Gibson*-type prosecution for outraging public decency the prosecutor would have to show that the restriction was "prescribed by law"; that the penalty or restriction was in pursuit of one of the "legitimate aims" set out in paragraph 2; and that it was "necessary in a democratic society".⁶¹ Convention case law has established that these paragraph 2 limitations must be narrowly interpreted.⁶²

After their conviction Gibson and Sylveire actually applied to Strasbourg claiming a breach of their right to freedom of expression.⁶³ The Commission declared their application to be manifestly ill-founded: it found that the restriction on expression was sufficiently "prescribed by law" (the common law offence of outraging public decency was sufficiently certain to meet this requirement); that it pursued a "legitimate aim" (the protection of morals); and that it was "necessary in a democratic society". On this last point the Commission noted the wide margin of appreciation afforded to States where the protection of morals is concerned. It will be argued below, however, that the Commission's decision is seriously questionable and that, in any event, it should be by no means fatal to the prospects of using Article 10 as a defence in any such prosecution in the future.

Is the Interference Prescribed by Law?

Any interference with the right to freedom of expression must be prescribed by law. This is the 'rule of law' requirement and is a fundamental thread running right through the Convention.⁶⁴ The Court has held firstly that, to meet this requirement, the law must be adequately *accessible*: the citizen must have an indication, that is adequate in the circumstances, of the legal rules applicable to a given case. Secondly it carries with it a requirement of *precision*: 'the norm', in order for it to qualify as law, must be formulated with sufficient precision to enable the citizen to be able reasonably to foresee the consequences that his actions might entail.⁶⁵ There is not a requirement of absolute certainty – this is in any event unattainable. In *Sunday Times v. UK* it was held that the common law does potentially fulfil the 'prescribed by law' requirement even though in many cases it is necessarily retrospective in nature.⁶⁶

59 Commission's report adopted on 8 Oct. 1986, Series A, No. 133, at 37, para. 95.

60 This is to be contrasted with the other, non-expression activities against which outraging public decency has been used, see notes 8-14 above.

61 Paul Mahoney, 'Universality versus Subsidiarity in Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments' [1997] EHRLR 364. Mahoney argues that this scheme provides for two levels of protection against abuse of governmental power: first against bad faith abuse of governmental power and secondly against good faith limitations on liberty which are nevertheless 'unnecessary'. The first two requirements can be seen as minimum pre-conditions for any restriction in a democracy, the requirement of the *rule of law* and the requirement that the aim of the restriction be *legitimate*. This first level of protection is aimed at "naked abuse of power" by the State, it is a "bulwark against totalitarianism". The second level of protection, that of 'necessity', comes into "play when these preliminary 'democratic' conditions do exist, namely to prevent individuals and groups suffering from the excesses of majoritarian rule".

62 See e.g. *Klass v. Germany* (1979) 2 EHRR 214.

63 *S and G v. UK* (App. No. 17634/91) Hudoc (9 Jan. 1991).

64 See e.g. the Preamble to the ECHR, Art. 7 and the requirements of 'lawfulness' in Arts 2, 5 and 6.

65 See *Sunday Times v. UK* (1979) 24 EHRR 245, para. 49.

66 There was a certain political inevitability about this – had the Court held otherwise it would either have

However, it is far from inevitable that the requirement will be satisfied.

In *Hashman and Harrup v. UK*⁶⁷ the use by magistrates of powers under common law and statute to bind over not to act *contra bonos mores* were not precise enough to meet the foreseeability requirement inherent in the words ‘prescribed by law’. The case concerned bind over orders in respect of hunt saboteurs who had distracted the hounds of the Portman hunt. The Court considered the definition of *contra bonos mores*: “conduct which has the property of being wrong rather than right in the judgment of the vast majority of contemporary fellow citizens”.⁶⁸ The Government had argued that this ‘definition’ carried an objective element: that it related to ‘conduct likely to cause annoyance’. The Court disagreed. This latter definition described behaviour by reference to consequences, i.e. annoyance. The Court considered that the former, actual, definition however (conduct which is wrong rather than right in the judgment of the majority of contemporary citizens) was “conduct which was not described at all, but merely expressed to be wrong in the opinion of a majority of citizens”.⁶⁹ The Court found that it could not have been evident to the applicants what was required of them to abstain from for the period of their binding over. It therefore was not ‘prescribed by law’.

It is submitted that the common law of outraging public decency could well fall foul of the ‘prescribed by law’ requirement. It is at least as vague as the bind over power in *Hashman*. The *actus reus* is uncertain. For example in *Gibson* what was the cause of the alleged outrage? Was it the fact that the earrings were made of human foetuses? Would the offence have been made out if the earrings had merely looked like foetuses but had been modelled out of clay or if animal foetuses had been used and the public had been *told* they were real human foetuses.⁷⁰ As Feldman points out: “if it is correct that the essence of the offence lies in the outraging of people’s sense of decency, what people are led to believe about an exhibit would seem to be at least as important as what it really is”.⁷¹

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

the difference between the common law offence of outraging public decency and the statutory offence of obscenity [is] a qualitative one of fact and morals, the former being concerned with more offensive material which engenders such revulsion, disgust and outrage that it is irrelevant whether its consequence is

required the UK to undergo a complete overhaul of its common law system, or to leave the Council of Europe. See also *SW and CR v. UK* (1995) 21 EHRR 363 in which the Court held that the judicial abolition of the common law rule that a man could not rape his wife was foreseeable and therefore not a breach of Art. 7 ECHR.

67 Magistrates Courts Act 1980 s. 115; Justices of the Peace Act 1361.

68 *Hughes v. Holley* (1998) Cr. App. R. 130 *per* Glidewell LJ.

69 *Hashman* above, note 67 para 38.

70 The discussion here is much indebted to David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, 2002, OUP) in particular at 934. Some doubt was expressed by the Law Commission in 1974 as to whether, even subsequent to *Shaw* and *Knüller*, the generalised offence of outraging decency could be said definitely to exist *at all*. See Law Commission, *Conspiracies Relating to Morals and Decency* (1974 Working Paper No. 57) 44, para. 5 and para. 61. This point was not argued in *Gibson* itself. Presumably, post *Gibson*, the offence can safely be said to actually exist.

71 Feldman, *ibid*. The Law Commission in 2010 above, note 22 argued that the offence was sufficiently certain to be prescribed by law: “If an offence is defined as consisting of any conduct which produces a given result, and the result is defined with sufficient certainty, the definition of the offence does not become unacceptably uncertain because of purely factual doubts as to whether a given course of conduct will produce that result”, at para. 4.32. The Law Commission proposes that the offence be put on a statutory basis under which conduct would be criminal only if it is *foreseen* as liable to produce the reaction in question, paras 6.12–6.16.

actually to undermine public morals. This distinction . . . meets the applicants' objection that they could not have foreseen a prosecution for that offence, rather than a prosecution under section 2 of the OPA 1959.

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

An artist or exhibitor against whom a prosecution was brought today would surely have a strong claim that outraging public decency did not meet the 'prescribed by law' requirement. The very fact that the *Sensations*, *Apocalypse* and *Body Worlds* exhibitions were not proceeded against only serves to increase the uncertainty. And just because a law is rarely if ever enforced does not mean that it does not potentially breach the Convention – the very threat of prosecution itself may constitute a breach.⁷²

Does the Interference Pursue a Legitimate Aim?

The categories of 'legitimate aim' in Article 10(2) are very wide. Consequently it is very easy to show that an interference is in pursuit of a legitimate aim. Rarely has a State been found to have breached Article 10 for failure under this head.⁷³ However there is an argument that the offence of outraging public decency does indeed fall foul of this requirement. The legitimate aim that was accepted by the Commission in *S and G* as being pursued by the offence is that of the 'protection of health or morals'.⁷⁴ It will be recalled however that outraging decency is not necessarily concerned with protecting morals; it is about protecting people from shock, disgust and outrage. Indeed one of the main reasons why the Court of Appeal reached the decision it did in *Gibson* was that the object of the common law offence was to protect people from suffering feelings of outrage by such exhibition.⁷⁵ It was precisely *because* the Court of Appeal felt able to distinguish between offences that merely cause outrage and those which deprave and corrupt that enabled it to avoid the statutory bar of section 2(4) of the OPA. Furthermore at Strasbourg the Commission itself accepted that a prosecution for outraging public decency may not have as its aim the protection of morals.

In considering a future *Gibson* type of case it would surely ill behave a court if it were to accept the section 2(4) argument on behalf of the prosecution whilst at the same time accepting that the offence is designed to pursue the legitimate aim of protecting morals. If it did do this it would, for the purposes of circumventing the statutory bar, be according a narrow section 1(1) meaning to the word 'obscene' as used in section 2(4) – it would be saying that it *is* necessarily to do with morals, with depravity and corruption. The offence of outraging public decency by contrast is not designed to protect morals – it is there to prevent shock and outrage – that is why the section 2(4) bar has no bite upon it. On the other hand, for the purpose of shoe-horning the offence into the 'protection

72 See e.g. *Dudgeon v. UK* (1981) 4 EHRR 149 para. 41 in respect of largely unenforced legislation criminalising homosexuality: "the maintenance in force of the impugned legislation constitutes a continuing interference with the Applicants' right...". The Court commented on the absence of a stated policy not to prosecute in this case and the possibility of private prosecutions. See also Lord Reid's comment in his dissenting speech in *Knüller* at 458: "bad law is not defensible on the ground that it will be judiciously administered".

73 See the discussion in D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (2009, OUP) 348. They comment that in such a claim the applicant's case is that the reason given by the State is not the 'real reason', it is essentially an allegation of bad faith on the part of the Government.

74 Apparently the applicants conceded this point in their case before the European Commission on Human Rights.

75 Lord Lane at 445 following Lord Simon in *Knüller* at 493: "it does not seem to me to be an exorbitant demand of the law that reasonable people should be able to venture into public without their *sense of decency being outraged*" (emphasis added).

of morals' category in Article 10(2), the court would be claiming that the offence *is* designed to protect morals after all. This would surely be a case of the court allowing the prosecution to 'both have its cake and eat it'.

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

applicable not only to information and ideas that are favourably received or regarded as inoffensive . . . but also to those that offend shock and disturb the State or any sector of the population. Such are the demands that pluralism, tolerance and broadmindedness without which there is no democratic society.⁷⁶

There are strong echoes here of Lord Simon's dictum in *Knuller*:

I think the jury should be invited, where appropriate, to remember that they live in a plural society, with a tradition of tolerance towards minorities, and that this atmosphere of toleration is itself part of democratic society.⁷⁷

The Commission in *S and G* seem to have placed weight on this *dictum* as demonstrating that "freedom of expression is not wholly irrelevant in a prosecution for this offence". In *Gibson* itself however it would appear that no such invitation was given. Presumably the judge did not consider it to be an 'appropriate' case. One could go further still. It could be argued that the effect of outrage may actually improve morality, if the effect of seeing the work is to repel the viewer from indulging in the type of activities depicted⁷⁸ or to arouse a sense of moral outrage it may be said that the Article reinforces morality.⁷⁹

The Article 10(2) legitimate aim that *would* better reflect the purpose of protecting people from feelings of shock and disgust, but which was not argued in *S and G v. UK*, is that of protecting the 'rights of others'. As Lord Simon said in *Knuller* "it does not seem to me to be an exorbitant demand of the law that reasonable people should be able to venture into public without their sense of decency being outraged".⁸⁰ The European Court of Human Rights has certainly recognised that there does exist, in some circumstances, a right not to be subjected to severe offence by the expression of others. For example, in *Otto-Preminger-Institut v. Austria*, a case concerning the banning of a satirical film critical of religion in an area with a majority Roman Catholic population, the Court held that in respect of insult to the religious feelings of others that is 'gratuitously offensive':

... as is borne out by the wording itself of Article 10(2) whoever exercises the rights and freedoms enshrined in the first paragraph of that Article ... undertakes "duties and responsibilities". Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are *gratuitously offensive to others and thus an infringement of their rights*, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.⁸¹

76 *Handyside v. UK* [1976] 1 EHRR 737 para. 49.

77 *Knuller* above, note 7 at 495.

78 There is a parallel here with the so called 'aversion defence' under the OPA: see e.g. *R v. Anderson* [1972] 1 QB 304; *R. v. Calder and Boyars* (1969) 1 QB 151.

79 If the prosecution is a private one, as often seems to be the case in these matters, – the 'Mary Whitehouse phenomenon' – it is arguable that the State should not be able to rely on the protection of morals exception at all. For if its law were really trying to protect the morals of its citizens then it ought to be incumbent on the State to utilise it, and not wait for a private individual to do so. As the Commission pointed out in *Gay News Ltd and Lemon v. UK* App. No. 8710/79, (1983) EHRR 123 at para. 11, a case of private prosecution for blasphemy, it could not be said that the "public interest (prevention of disorder or protection of morals) was so preponderant that it provided the real basis for the interference with the applicants right to freedom of expression. In the circumstances, the justifying ground must therefore primarily be sought in the protection of the rights of the private prosecutor".

80 *Knuller* above, note 7, at 493.

81 *Otto-Preminger-Institut v. Austria* (1995) 19 EHRR 34, para. 49 (emphasis added). This decision has

In 2010 the Law Commission considered that it was *this* kind of legitimate aim, rather than the protection of morals, that justified the application of the offence of outraging public decency in cases of artistic expression:

[it] falls within the exception for the “protection of the reputation or rights of others” in Article 10(2) ... Like other offences with an environmental flavour, outraging public decency exists to protect a right of public amenity. If for example an artistic installation had the effect of blocking the public highway for several hours, or filling a residential neighbourhood with a malodorous vapour or with noise on an industrial scale it would clearly fall within the offence of public nuisance and could not be defended as the exercise of freedom of artistic expression. The same must in principle be true of indecent public displays, if indecent enough.⁸²

It is likely therefore that the Article 10(2) legitimate aim that could properly be claimed by the State would be that of protection of the rights of others not to be subject to ‘gratuitous offence’, rather than the protection of morals that was asserted in *S and G v. UK*. However, even if it is held that the aim is legitimate, it still must be shown that the interference is necessary in a democratic society, if there is to be no breach of Article 10.

Is the Interference ‘Necessary in a Democratic Society’?

The requirement that any interference be ‘necessary in a democratic society’ has been interpreted by the Strasbourg Court to mean that it must “correspond to a pressing social need” and “in particular . . . whether the interference is proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it [are] relevant and sufficient . . .”⁸³

It is highly questionable whether a criminal prosecution for a strict liability offence with an absence of even the possibility of a public good defence could be held to be a proportionate response, especially given the ringing *dicta* in *Handyside* as to the importance of expression.⁸⁴ It is difficult to see how the common law offence could be viewed as anything other than the use of a ‘steam hammer to crack a nut’.⁸⁵ Given the extreme vagueness of the rationale for the offence it is difficult to see how the reasons adduced to justify the interference could be ‘relevant and sufficient’.

The Relevance of the Margin of Appreciation

The protection afforded to artistic expression by the Strasbourg institutions has been very weak. This is largely due to the wide margin of appreciation that has been afforded to national authorities in situations where freedom of expression is alleged to impact in a deleterious way on morality. The margin of appreciation is an international law “doctrine of judicial self-restraint or deference”.⁸⁶ Its purpose is to allow a degree of latitude to States in how they protect the

been subjected to much criticism, see e.g. H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP), 488- 493, not least because it is difficult to see any artistic expression that is trying to convey *some* message, as ‘gratuitously offensive’.

82 Law Commission above, note 22, at para. 4.33.

83 See e.g. *Lehideux and Isorni v. France* (2000) 30 EHRR 665, para. 51.

84 See *Secretary of State for Home Department ex parte Daly* [2001] UKHL 26 for judicial comment on proportionality and its relationship to traditional standards of review. In particular see the speech of Lord Steyn. For discussion of proportionality in domestic law see e.g. Tom Hickman, ‘The Structure and Substance of Proportionality’ [2008] *Public Law* 694, 711.

85 In *R v. Goldstein* [1983] 1 WLR 151 at 155 Lord Diplock famously cautioned against using a “steam hammer to crack a nut, if a nutcracker would do” to illustrate the principle of proportionality. The Law Commission seemed to accept that the use of the offence in *Gibson* may indeed have been disproportionate above, note 22, at para. 4.34.

86 For a discussion of the application of the margin of appreciation by the Strasbourg institutions both justificatory and critical see e.g. Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2001, Intersentia); Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (2012, OUP); Paul Mahoney, ‘Universality versus Subsidiarity in Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments’ [1997] EHRLR 364; Lord Lester of Herne Hill, ‘Universality versus Subsidiarity: a Reply’ [1998] EHRLR, 73;

individual rights set out in the Convention. The doctrine has been particularly prominent in cases where there are serious threats to the very existence or integrity of the State and derogations have been issued under Article 15.⁸⁷

The margin of appreciation doctrine has also been prominent in cases in which breaches of Articles 8 to 11 have been alleged. A margin has been afforded to States in their assessment of what measures are ‘necessary’ in the restriction of the right in question. The doctrine has been applied in a variable way depending on what ‘legitimate aim’ is being pursued by the imposition of the penalty or restriction. Where the legitimate aim being pursued can be objectively ascertained, where there is supposedly a Europe-wide consensus, then it is apparent that the margin will be narrow. In particular the Court has often stressed the vital role of the press as a ‘public watchdog’ in a democratic society. The margin is therefore very slim where restriction of press freedom is concerned.⁸⁸ However, where a Europe-wide consensus is lacking, or is perceived to be lacking, then the margin will be much wider. Foremost amongst those areas where the requisite consensus is allegedly absent are those of morality.

In *Handyside v. UK* it was stated that:

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

These observations apply, notably, to Article 10(2). In particular it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.⁸⁹

The protection of artistic expression which deals with sexual or religious issues has received notably low levels of protection.⁹⁰

The use of the margin by the Strasbourg institutions themselves has been subjected to severe criticism both fundamentally, in that it introduces an unacceptable degree of cultural relativism into the protection of what are supposed to be universal rights and also for lack of consistency and predictability in application.⁹¹

Under section 2(1) Human Rights Act, UK courts must take the European case law into account. This case law includes the margin of appreciation doctrine. Thus on the face of it the cases will provide little assistance in these types of artistic expression cases. However the court has to take into account the Strasbourg case law only “so far as, in the opinion of the court, it is relevant”. Thus it will be open to the court to decide that the margin doctrine was an irrelevant aspect of a Strasbourg judgment and disregard it. If a European case would have been decided differently

Nicolas Lavender, ‘The Problem of the Margin of Appreciation’ [1997] EHRLR 380; Timothy Jones, ‘The Devaluation of Human Rights Under the European Convention’ [1995] *Public Law* 430; George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26(4) *OJLS* 705.

87 See e.g. *Ireland v. UK* (1978) 2 EHRR 25; *Brannigan and McBride v. UK* (1993) 17 EHRR 539.

88 See e.g. *Lingens v. Austria* (1986) 8 EHRR 407; *Thorgeirson v. Iceland* (1992) 14 EHRR 843.

89 *Handyside*, above, note 54, para. 48.

90 See e.g. *Müller v. Switzerland* [1988] 13 EHRR 212; *Otto-Preminger-Insititut v. Austria* (1995) 19 EHRR

91 See e.g. the dissenting opinion of Judge De Meyer in *Z v. Finland* (1998) 25 EHRR 371; Timothy Jones, above, note 86; Lester above, note 86.

but for the application of the margin of appreciation then it is arguable that that should be ‘taken into account’ by the UK court, that the case should be decided on the basis of the European case law absent the margin of appreciation.

It is arguable that the margin should have no place in UK law. As the above quotation from *Handyside* clearly demonstrates the doctrine is designed to take account of the gap between the national authorities who know well the requirements of their nations and the international judge who does not. When the determination is being performed by a national court there is no such gap: the national courts are perfectly well placed to assess whether restrictions on fundamental rights are necessary. The justification for the margin therefore falls away. As Jones presciently observed in 1995 “[a] British court would . . . be able to apply a more stringent test . . . than that necessitated by the minimum regional standards set down by the European Court”.⁹²

Notwithstanding the above arguments, in the case law since the HRA it is clear that a kind of domestic surrogate of the margin of appreciation has been developed, namely judicial deference.⁹³ This stems from the need for judges to show deference to the democratically elected and accountable legislature and executive that there must exist a “discretionary area of judgment in which the judges will not interfere”. In his speech in *R. v. DPP ex parte Kebilene* Lord Hope said:

In *some circumstances* it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the convention.⁹⁴

If the basis of the argument that there is a need for a domestic quasi-margin doctrine to take account of the democratic will of the elected arm of government then it is submitted that it should have no role whatsoever in the *Gibson* type of case. It cannot be an instance of one of the circumstances envisaged by Lord Hope in *Kebilene*. This is because the use of the common law offence against artistic expression circumvents the will of Parliament which provided in section 4 OPA 1959 for a statutory defence of the public good. Furthermore, in 1964 the Solicitor-General gave an assurance to Parliament, repeating an earlier assurance, that a conspiracy to corrupt public morals would not be used to circumvent the statutory defence in section 4.⁹⁵ Whilst this assurance was in relation to charges of conspiracy to corrupt public morals Lord Morris certainly thought that “the spirit and intendment of the assurance would clearly apply in reference to a charge of conspiracy to outrage public decency”, and thus by implication to a charge of outraging public decency itself.⁹⁶ If this is right then the will of the democratically elected arm of government has been made plain – such prosecutions should not take place. It would therefore not be appropriate to introduce arguments (based on the democratic credentials of the executive) to the effect that it is within the discretionary area of judgment to bring such prosecutions in order to protect morality. It is clear that it is quite contrary to the democratic will.

How Would the HRA Operate?

If it is found that the use of the common law offence as it was used in *Gibson* would be contrary to

92 Jones, above, note 86, at 447.

93 David Pannick, ‘Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment’ [1998] *Public Law* 545; R. Singh, M. Hunt, M. Demetriou, ‘Is there a Role for the “Margin of Appreciation” in National Law after the Human Rights Act’ [1999] *EHRLR* 15; T.R.S. Allan, “Human Rights and Judicial Review: a Critique of Due Deference” (2006) 65(3) *CLJ* 671; Aileen Kavanagh, ‘Deference or Defiance: the Limits of the Judicial Role in Constitutional Adjudication’ in Grant Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (2011, CUP) 184; *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] *EWCA Civ.* 158, paras 83-87 (Laws LJ); *R. (ProLife Alliance) v. BBC* [2004] 1 AC 185, paras 74-77, *per* Lord Hoffmann.

94 *R. v. DPP, ex p. Kebilene* [1999] 4 All ER 801 at 844, emphasis added.

95 Solicitor General, 695 HC Debs, col. 1212 (3 June 1964).

96 Lord Morris in *Knüller* above, note 7, at 468.

Article 10, how will this be effectuated by the HRA? Two alternatives appear to suggest themselves.

By virtue of section 6(3)a the court itself would be a ‘public authority’.⁹⁷ It is therefore unlawful for it to act in a way which is incompatible with Convention rights. Thus it will have to exercise its functions compatibly with the Convention rights. Since its functions include the application and development of the common law it will be able to use the common law offence only having due regard to the Article 10 points made above. One approach could be to give full weight to Lord Simon’s *obiter* remarks in *Knüller* that:

the jury should be invited, where appropriate, to remember that they live in a plural society, with a tradition of tolerance towards minorities, and that this atmosphere of toleration is itself part of democratic society.

In so doing the balance required by the doctrine of proportionality could, perhaps, be adequately struck, and the question of whether the restriction is really ‘necessary in a democratic society’ could be properly addressed.

An alternative solution would be to utilise section 3 HRA by virtue of which *all* legislation must “so far as it is possible to do so . . . be read and given effect in a way which is compatible with Convention rights”. Now recall section 2(4) OPA. The defendants’ counsel in *Gibson* argued that there were two possible meanings of obscene: the wide and the narrow. It was accepted by all, including Crown counsel, that if the wide interpretation was adopted the prosecution would have been ‘plainly barred’ by virtue of section 2(4) OPA 1959. This argument was dismissed by the Court of Appeal, Lord Lane finding himself “unable to find any justification for such a radical departure from the ordinary canons of construction”.⁹⁸

It is submitted that if such a case were prosecuted today there *would* now exist just such a justification, in the form of section 3 HRA. Under this section the court will be compelled to adopt this alternative ‘possible’ interpretation of the word ‘obscene’ in section 2(4).⁹⁹ This would result in the section 2(4) statutory bar being applied to any attempt to use the common law offence. Any prosecution would have to take place under the OPA and the artist would therefore be able claim the defence of artistic merit in section 4 and the requirements of proportionality inherent in Article 10(2) would be satisfied. The defendant would then be able to make an argument that his or her work did possess some artistic merit which, as we have seen under the approach adopted in *Gibson*, was not possible. Thus an artist in *Gibson*’s position would at least be able to *have the argument* that his or her work deserved protection.

CONCLUSION

In the wake of the conviction of Gibson and Sylveire for outraging public decency there were fears that this new extended version of the common law offence would be used to curtail the freedom of *avant-garde* artists and act as a chill on artistic expression. These fears have not been realised in the two decades plus that have elapsed since *Gibson*. One of the most interesting and unfathomable questions is why there have been no such prosecutions of artists since? A number of answers suggest themselves. One possible explanation is that we are, as a people, less shock-able now than we were in the late 1980s and early 1990s. The depiction of ever more extreme material on television and (now) online, has increased the tolerance levels of what we are prepared to accept in public.¹⁰⁰ Or perhaps the passage of legislation protecting freedom of expression – the Human Rights Act itself – has impacted on the approach taken by

⁹⁷ *Douglas and Zeta-Jones v. Hello! Ltd* [2001] 2 WLR 992; [2001] 2 All ER 289.

⁹⁸ *Gibson* above, note 2, at 625.

⁹⁹ See *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557 for an illustration of the extent to which s. 3 HRA requires a court to go by way of adjustment to statutory wording in order to achieve a result that is compatible with Convention rights.

¹⁰⁰ I am grateful to Chris King of Birmingham City University for this point.

prosecuting authorities, especially given, and in addition to, the high levels of criticism that have accompanied legal attacks on legitimate art works.¹⁰¹ Or perhaps it is the case that artists have moderated their expression, engaged in forms of self-censorship so that their works have been less likely to cause offence, though this seems unlikely in the light of such exhibitions as *Sensations*, *Apocalypse* and *Body Worlds* mentioned above.

In respect of prosecutions of artists under the common law of outraging public decency, it may well be that the display of warning signs by galleries and museums to give clear notice to potential viewers of what they might encounter have had an impact on prosecutorial attitudes. This can be seen in the 2007/8 case of an exhibition, *Gone, Yet Still*, by Terence Koh at Gateshead's Baltic Centre for Contemporary Art featuring several plaster figures with erections, including one of Jesus Christ.¹⁰² A private prosecution for outraging public decency was initiated by a member of a Christian organisation but the Crown Prosecution Service, exercising its right to take over the case, halted the prosecution. The Chief Crown prosecutor Nicola Raesbeck, stated:

We have taken into account all the circumstances, including the fact that there was no public disorder relating to the exhibition and that there was a warning at the entrance to the gallery about the nature of the work on display ... The case has therefore been discontinued.¹⁰³

Thus, in the context of outraging public decency and artistic expression the fact that a warning is given so that people do not just happen-across material that they may find shocking and disgusting would seem to be a crucially important factor.¹⁰⁴ If the Article 10(2) legitimate aim of the offence is, as the Law Commission suggests, a protection of a 'right of public amenity' then reasonable steps taken to avoid the possibility of unwilling viewers being offended by seeing the material would seem to severely undercut any State argument that the offence is necessary to protect such interests. Further, it will be recalled that in *Knüller* the defendants failed in their contention that since the advertisements in question were inside the publication they could not be guilty of outraging public decency. As Lord Simon said, it does not "necessarily negative the offence that the act or exhibit is superficially hid from view, if the public is expressly or impliedly invited to penetrate the cover".¹⁰⁵ But in any situation where a warning notice was present it could not be asserted by the prosecution that there was any kind of invitation to view, whether express or implied.

However, even in the case of exhibitions that are not guarded by such warning signs, as in *Gibson* itself, it is nevertheless crucial that the artist is able, in law, to at least argue the case from the perspective of freedom of artistic expression, to make the argument that there is some societal value in the expression, some important message, to be balanced against the interest in protecting members the public from outrage to their decency.

101 See e.g. the academic criticism over *Gibson* itself: Childs above, note 36; Feldman above, note 70; Paul Kearns, *The Legal Concept of Art* (1998, Hart); H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (2006, OUP) See also, for instance: the outcry over the police raiding and threat of prosecution under the Protection of Children Act 1978, of the *I am a Camera* exhibition at the Saatchi gallery in 2001 which included several pictures by the photographer Tierny Gearnon, of her children in states of undress, see *Guardian*, 10, 12 and 14 March 2001; and the threat of prosecution under the OPA in respect of a book containing photographs by Robert Mapplethorpe in the library of the University of Central England, in 1998, see Lynda Nead, 'The Naked and the Damned' *Times Higher Education*, 13 April 1998.

102 Other figures thus depicted included Mickey Mouse, ET and a garden gnome.

103 "'Indecent' Jesus action stopped' BBC News, 10 Nov. 2008 <<http://news.bbc.co.uk/1/hi/england/tyne/7720587.stm>>.

104 It will be recalled that no such warning was given in *Gibson* itself.

105 *Knüller* above, note 7, Lord Simon at 494-5.