

The Right to Freedom of Expression under Article 10 of the European Convention on Human Rights*

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I disapprove of what you say, but I will defend to the death your right to say it.

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INTRODUCTION

Freedom of expression is one of the fundamental liberties which humanity cherishes and endeavours to protect. At international level, this is clearly evident in the freedom of expression guarantee enshrined in several important international human rights documents – notably Art. 19 of the Universal Declaration of Human Rights (UDHR). It states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²

In Europe, the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) have been playing important roles in protecting human rights of people living in the countries which are the parties to the Convention. Article 10 of the ECHR is the provision which guarantees the right to freedom of expression, despite a few exceptions. This paper examines the key legal principles of article 10 of the ECHR and the jurisprudence of the ECtHR.

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1 Tallentyre, S.G., *The Friends of Voltaire*, (Smith, Elder & Co., London, 1906) 199.

2 However, it should be noted that the UDHR is not an international treaty, thus does not have a legally binding effect. Nonetheless, it sets an important standard of human rights protection. It also has a great influence on several international human rights treaties, including the ECHR.

I. BRIEF INTRODUCTION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

The ECHR was introduced at the Council of Europe's First Session of the Consultative Assembly in 1949, in response to the serious violations of human rights in Europe during the Second World War.³ It was signed in 1950 and came into effect in 1953.⁴ It has two important functions. First, it elaborates the obligations of the contracting states ('High Contracting Parties'), listing what rights and freedoms the contracting states are required to guarantee and protect. Second, it sets up enforcement mechanisms '[t]o ensure the observance of the engagements undertaken by the High Contracting Parties [with regard to the protection of rights and freedoms enumerated in the ECHR]'.⁵

At the heart of the ECHR's enforcement mechanisms is the ECtHR which has jurisdiction over all contracting states.⁶ It has power to receive complaints (or 'applications') from the contracting states – i.e. the legal entity under international law⁷ – claiming that there is a breach of provisions of the ECHR by another contracting state (this is known as an inter-state application);⁸ and from persons – i.e. natural and juristic persons such as non-governmental organisations or groups of individuals, regardless of nationality – claiming that an authority of a particular contracting state has violated his/her/its rights and freedoms guaranteed by the ECHR (this is known as an individual application).⁹

The ECtHR's judgement is legally binding on the relevant contracting states.¹⁰ The judgement is initially transmitted to the Committee of Ministers. As the judgement does not give an instruction regarding the execution of the judgement, the Committee of Ministers will discuss with the respondent state and its relevant department how the judgement can be executed in the respondent state and how to prevent a similar violation in the future.¹¹ The respondent state has freedom to choose the way in which the judgement is executed, depending on its legal system. The execution of the judgement can take the forms of an amendment to the legislation at issue, the implementation of individual measures and remedies or damages to the applicants.¹² The execution of the judgment is supervised by the Committee of Ministers.¹³ If the respondent state refuses to execute the judgement, the Committee of Ministers has two coercive methods. The first is the adoption of an interim resolution 'to provide information on the state of progress of the execution, or ... to express concern and/or

3 Rehman, J., *International Human Rights Law* (2nd ed), (Longman, Harlow, 2010), p.184

4 Robertson, A.H., 'The Council of Europe 1949-1953 : Part I' (1954) *International Law and Comparative Law Quarterly*, 3(2), p.235.

5 Art. 19 of the ECHR.

6 Art. 32 of the ECHR.

7 See generally for the subjects of international law Shaw, M.N., *International Law* (New York: Cambridge University Press, 2008), pp.195-264.

8 Art. 33 of the ECHR.

9 Art. 34 of the ECHR.

10 The Public Relations Unit of the European Court of Human Rights, *The European Court of Human Rights : The ECHR in 50 Questions*, The Public Relations Unit of the European Court of Human Rights, Strasbourg, 2009).

11 *Ibid*, p.10.

12 *Ibid*. See also Section 5.1.1.

13 Art. 46 of the ECHR as amended by article 1 of the Protocol No.11. Steiner, H., Alston, P., and Goodman, R., *International Human Rights in Context: Law, Politics and Morals* (3rd ed.) (Oxford University Press, Oxford, 2008) 940.

to make relevant suggestions with respect to the execution'.¹⁴ The Committee of Ministers can adopt interim resolutions to urge the respondent state to comply with the judgement.¹⁵ The second method is the enforcement of Art. 8 of the Statute of the CoE against the respondent state. Under Art. 8, if a member state persists in denying execution of judgement, it is deemed to have seriously violated its obligations to the principles of rule of law, and to the enjoyment ... of human rights and fundamental freedoms' enshrined in Art. 3 of the Statute of the CoE.¹⁶ Its rights of representation may be suspended and it may be requested by the Committee of Ministers to withdraw from membership of the CoE.¹⁷ It may also have to pay a fine.¹⁸ From a political viewpoint, failure to execute the judgement may also mean embarrassment in the international arena.¹⁹

II. ARTICLE 10 OF THE ECHR

This section examines article 10 of the ECHR in detail to give an overall picture of its main legal principles. Article 10 has two paragraphs. The first paragraphs lays down basic principles of how the right to freedom of expression shall be guaranteed and protected; and the second one stipulates certain conditions, allowing a contracting state to interfere with the right to freedom of expression.

A. The General Legal Principles of Article 10

Article 10 (1) reads:

'[e]veryone 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...' resson as it may require to protect certain public interests.

In principle, it means that article 10 (1) guarantees that all individuals are free to express and receive ideas and information without state interference, especially in the form of censorship. The protection of 'freedom of expression'²⁰ in article10 (1) is generally construed to safeguard both two elements of expression: (1) the methods in which such ideas/opinions

14 Rule 7 of Rules Adopted by the Committee of Ministers for the Application of Article 46, Paragraph 2, of the ECHR.

15 Lambert-Abdelgawad, E., *The Execution of Judgments of the European Court of Human Rights*, (Council of Europe Publishing, Strasbourg, 2002).

16 The Committee of Ministers has officially threatened to enforce Art. 8 against Turkey for failing to execute the judgement of *Loizidou v. Turkey*, (1996) No.15318/89, 1996-VI; See Lambert-Abdelgawad, E., *supra*, p.38

17 Art. 7 of the Statute of the CoE

18 Lambert-Abdelgawad, E., *supra*, pp.45-48

19 *The International*, 28th October 2012.

20 The term 'expression' appears to have a wider meaning and more inclusive than 'speech'. The ECtHR does not have to deal with the question as whether the communicative act at issue is 'expression'. By contrast, the US Supreme Court has to deal with the question of whether the communicative act in question constitutes 'speech' or not.

are expressed, conveyed and received (the means of expression) and (2) the substance or the content of ideas/opinions and information (the messages).²¹

Regarding the means of expression, the ECtHR in *Oberschlick v. Austria (no.1)* held that all types of forms and means in which the messages conveyed were protected.²² This would mean that expression in any forms – such as words (written²³ or spoken),²⁴ paintings,²⁵ motion pictures,²⁶ photographs,²⁷ or cartoons²⁸ – all come under the wide umbrella of article 10 (1). Traditional media – such as publications,²⁹ radio,³⁰ films or video-recordings³¹ – and the Internet³² are also covered by article 10 (1).

As far as the content of expression (the message) is concerned, the text of article 10 (1) does not specify what types of expression or content are within the scope of protection. Nevertheless, the ECtHR has developed significant jurisprudential principles through the interpretation of article 10 (1). The first one can be found in the landmark case of *Handyside v. UK*.³³ In this case, the ECtHR had to consider whether the seizure and confiscation of copies of *The Little Red Schoolbook* (the *Schoolbook*) – an anti-authoritarian sex education pamphlet that contained liberal ideas towards sexual matters³⁴ – and a criminal prosecution against its publisher constituted a violation of article 10 of the ECHR. The ECtHR laid down a general principle that:

‘Subject to paragraph 2 of Article 10 (art. 10-2), [article 10] is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as

21 Macovei, M., *Human Rights Handbook No.2 : A Guide to the Implementation of Article 10 of the European Convention on Human Rights*, 2nd ed (2004); see, for example, *Oberschlick v. Austria (no.1)* (1999) No.11662/85, A 204, para.57; *Sokolowski v. Poland* (2005) No. 75955/01, hudoc, para.44.

22 (1991) No.11662/85, A313, paras.10-33, para.57. The case concerned defamation proceedings against an Austrian journalist who published an article criticising an Austrian politician and his allegedly discriminated policy-campaign in a magazine ‘Forum’.

23 See, for example, *Karataş v. Turkey* (1999).

24 See, for example, *Zana v. Turkey* (1997) No.18954/91, 1997-VII.

25 See, for example, *Müller and Others v. Switzerland* (1988); and *Vereinigung Bildender Künstler v. Austria* (2007) No.68354/01, hudoc.

26 See, for example, *Otto Preminger Institut v. Austria* (1994) No.13470/87, A295-A; and *Wingrove v. UK* (1996) No.17419/90, 1996-V.

27 See, for example, *Hachette Filipacchi Associés v. France* (2007) No.71111/01, hudoc; and *Egeland and Hanseid v. Norway* (2009) No.34438/04, hudoc.

28 See, for example, *Cumpănă and Mazăre v. Romania* (2004); and *Kuliś and Różycki v. Poland* (2009) No.27209/03, hudoc.

29 See, for example, *Handyside v. UK* (1976); *Sunday Times v. UK (no.1)* (1979).

30 See, for example, *Groppera Radio AG and Others v. Switzerland* (1990) No.10890/84, A173.

31 See, for example, *Otto Preminger Institut v. Austria* (1994); *Wingrove v. UK* (1996); and *S v. Switzerland* (1993) No.17116/90, the Decision of the European Commission on Human Rights.

32 *Yildirim v. Turkey* (2012) No.3111/10, Hudoc. In this case, the Turkish government attempted to block an entire online platform (Google Sites) on the ground that a website on Google Sites insulted the memory of Atatürk. The ECtHR ruled that the blocking order by a Turkish court violate the right to freedom of expression (Art. 10), since the relevant Turkish law did not allow such a sweeping blocking. Therefore, the sweeping blocking did not meet the ‘prescribe by law’ condition, especially the ‘foreseeability’ requirement.

33 (1976) No.5493/72, A024.

34 Bailey, S.H., Harris, D.J., and Ormerod, D.C., *Civil Liberties : Cases and Materials* (5th ed), (Butterworths LexisNexis, London, 2001), p.691; For the the scanned version of the Red Little Schoolbook see <http://www.nla.gov.au/apps/cdview?pi=nla.aus-vn4512714>, visited 17th August 2010.

a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.³⁵

The second principle is found in the ruling in *Müller and Others v. Switzerland*.³⁶ In this case, the ECtHR had to determine whether the confiscation of the sexually explicit paintings exhibited in a gallery and criminal prosecutions against the painter and the organisers of the exhibition breached Art. 10. The ECtHR stated that:

‘Admittedly, Article 10 ... does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the [ECtHR] all acknowledged, it includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.’³⁷

Given the above principles, it can be said that expression – regardless of whether it may cause offence, shocking or disturbing feelings to ‘the state or any sector of the population’ – should be free from state interference (except the state acting in accordance with conditions set out in article 10 (2)).³⁸ Furthermore, all kinds of content which can lead to public exchange of ideas or information come within the ambit of article 10 (1). This would mean that, apart from artistic expression (the issue before the court in *Müller*),³⁹ expressions in other areas, e.g. politics,⁴⁰ the economy (commercial advertisements),⁴¹ and general public interest (civil expression),⁴² fall within the scope of article 10 (1) protection. In short, as a general principle, the scope of article 10 (1) covers almost all types and genres of content.

However, it is important to note that, within article 10 jurisprudence, not all categories of expression enjoy an equal level of protection. The levels of protection (weak or strong) affordable to a particular expression depend primarily on what type of expression is. Political expression – i.e. the type of expression which directly relates to political matters or issues of public concern⁴³ – is on the top and entitled to a strong protection; whereas non-political expression is at the bottom and received a weaker protection. This is known as the ‘hierarchy of expression’.⁴⁴ The ECtHR attaches more importance to political expression because, in the

35 (1976) No.5493/72, A024, para.49.

36 (1988) No.10737/84, A133.

37 *Ibid.*, para.27.

38 Harris, D.J., O’Boyle, M., and Warbrick, *Law of the European Convention on Human Rights*, (2nd ed), (Oxford University Press, Oxford, 2009), p.445.

39 See, for example, *Karataş v. Turkey* (1999) No.23168/94, 1999-IV; and *Lindon, Otchakovsky-Laurens and July v. France* (2007) No.21279/02 and 36448/02, hudoc.

40 See, for example, *Lingens v. Austria* (1986) No.9815/82, A103; and *Lombardo and other v. Malta* (2007) No.7333/06, hudoc.

41 See, for example, *Markt intern Verlag GmbH and Klaus Beermann v. Germany* (1989). No.10572/83, A165; *Casado Coca v. Spain* (1994) No.15450/89, A285-A; See generally Munro, C.R., ‘The Value of Commercial Speech’ (2003) *Cambridge Law Journal*, 62(1), pp.134-138.

42 See, for example, *Steel and Morris v. the United Kingdom* (2005) No. 68416/01, 2005-II.

43 For expression relating to political matters see, for example, *Lingens v. Austria* (1986) No.9815/82, A-103, *Lombardo and Others v. Malta* (2007) No.7333/06, hudoc; for expression relating to issues of public concern see, for example, *The Sunday Times v. UK (no.1)* (1979) No.6538/74, A30, *Jersild v. Denmark*, (1994) No.15890/89, A298.

44 Harris, D.J. *et al.*, *supra*, pp.458, 461.

eyes of the ECtHR, political expression is ‘the bedrock of any democratic system’.⁴⁵ To ensure a healthy democratic society, it is essential to ensure that the state and politicians can be criticised; and that the public and mass media can impart, receive and exchange political ideas/information.⁴⁶ Therefore, the ECtHR has to adopt a stringent proportionality review, leaving little room for national authorities to exercise their discretionary power (a narrow margin of appreciation) when considering the restriction imposed on political expression.⁴⁷ By contrast, the ECtHR typically gives lesser significance to non-political expression – i.e. the type of expression which, in the eyes of the ECtHR, neither relates to political matters nor contributes to discussion of public interest – by applying a more relaxed proportionality test when considering the restriction of non-political expression. It leaves more leeway for national authorities to determine the level of protection afforded to non-political expression (a wide margin of appreciation).⁴⁸ (The doctrine of margin of appreciation will be examined in more detail below.) Some examples of expression that the ECtHR has considered to be non-political include *the Schoolbook* in the *Handyside* case – a book which had chapters pertinent to sexual matters (such as lovers of children or ‘dirty old men’, pornography, impotence, homosexuality, venereal diseases, and abortion), and aimed at school children aged 12 years and above as prime target readership;⁴⁹ and the paintings which depicted sexually explicit acts (e.g. sodomy, fellatio, bestiality, erect penises and masturbation) in the *Müller* case.⁵⁰

It is notable that *Vereinigung Bildender Künstler v. Austria*⁵¹ is the only exceptional case in which the ECtHR applied a strict review to sexually explicit expression. In this case, the Vienna Court of Appeal issued an injunction against the applicant, an association of artists called *Vereinigung Bildender Künstler*,⁵² prohibiting it from continuing to display a painting entitled *Apocalypse*⁵³ which portrayed naked bodies of several public figures – one of whom was Mr. Meischberger (a well-known Austrian politician) – involving explicit sexual activities.⁵⁴ Interestingly, unlike other sexually explicit expression-related cases, the ECtHR applied a strict review to consider the Austrian court’s injunction to find that the injunction constituted a violation of article 10. The ECtHR held that the right to freedom of artistic expression outweighed Mr. Meischberger’s personal interest (the protection of his reputation against damage caused by the exhibition of *Apocalypse*).⁵⁵ Does this ruling mean that the ECtHR’s position regarding sexually explicit expression has become more liberal, and that it

45 Harris, D.J. *et al.*, supra, p.455; *Handyside v. UK*, (1976) No.5493/72, A024, para.49; See also Section 3.3.2.

46 See, for example, *Sunday Times (No.1) v. UK* (1979) No.6538/74, A30, para.65; *Lingens v. Austria* (1986) No.9815/82, A103, para.41; and *Jersild v. Denmark* (1994) No.15890/89, A298, para.31.

47 See, for example, *Sener v. Turkey* (2000) No.26680/95, para.40; *Lombardo and Others v. Malta* (2007) No.7333/06, hudoc, paras.53-56.

48 Harris, D.J. *et al.*, supra, pp.458, 461.

49 (1976) No.5493/72, A024, paras.20-21.

50 (1988) No.10737/84, A133, para.18; One of the three paintings can be seen at <http://www.jfmuell.ch/cms/index.php/sitemap/7-jfm/11-3-naechte-3-bilder>

51 (2007) No.68354/01, hudoc.

52 *Ibid.*, para.7.

53 The painting can be seen at http://www.ippt.eu/files/2007/IPPT20070125_ECHR_Vereinigung_Bildender_Kunstler_v_Austria.pdf,

54 Mr. Meischberger is a former general secretary of the Austrian Freedom Party (FPÖ). The painting ‘Apocalypse’ portrayed him as ‘gripping the ejaculating penis of Mr. Haider – the former head of the FPÖ – whilst at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa’. (2007) No. 68354/01, hudoc, paras.8,16.

55 (2007) No.68354/01, hudoc, paras.26,38.

is willing to give stronger protection to sexually explicit expression? Steve Foster – a European Human Rights law scholar – doubts that this is the case. The ECtHR does not here take a more liberal on sexually explicit expression; rather, it regarded *Apocalypse* as political expression.⁵⁶ This might be because the ECtHR judges found a political message in the depiction of Mr. Meischberger’s being involved in sexual activities – which could be read as ‘some sort of counter-attack against the Austrian Freedom Party which always criticised the painter’s work’.⁵⁷ Hence, as Foster argues, *Vereinigung Bildender Künstler* ‘re-affirm[s] the value of political speech and the right to oppose and attack political figures’.⁵⁸

It can be argued that, however, the *Schoolbook* and Mr. Müller’s sexually explicit paintings could be considered to be ‘political expression’. As Helen Fenwick and Gavin Phillipson – both European Human Rights scholars – persuasively note, the chapters relating to ‘dirty old man’, sexual intercourse, masturbation, pornography, homosexuality, and abortion, all impart attitudinal ideas towards sex and sexuality from a liberal point of view.⁵⁹ Mr. Müller’s paintings arguably communicates the idea of sexual liberty. The idea of sexual liberty can be seen as an attempt to challenge the dominating sexual mores. It is an opinion on sex and sexuality in society, which is an issue of public discussion. Therefore, the *Schoolbook* and Mr. Müller’s paintings could be considered as “informal” political expression in this sense. Nonetheless, as can be seen in the decisions of *Handyside* and *Müller* the ECtHR appeared to overlook the political element of the *Schoolbook* and Müller’s paintings, and granted a wide margin of appreciation to national authorities.

B. The Conditions for Restricting the Right to Freedom Expression

Article 10 (2) sets out requirements which a contracting state (and its law enforcement agencies) has to meet before being able to implement a restrictive measure against an expression. In other words, if the state can satisfy the ECtHR that it has fulfilled all conditions stipulated in article 10 (2), the ECtHR will typically rule that the restriction in question does not breach Art. 10. It reads:

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

1. Duties and Responsibilities

The right to freedom of expression under article 10 of the ECHR does not mean that an individual can exercise his/her right freely without taking into account his/her duties and responsibilities. *Otto Preminger Institut v. Austria*⁶⁰ – the case which involved the seizure and

56 Foster, S., ‘Case Comment : Artistic Expression, Public Morality and the European Convention of Human Right 1950 Art.10’ (2007) *Coventry Law Journal*, 12(1),pp.56-62, 59-61.

57 (2007) No.68354/01, hudoc, para.34.

58 Foster, S., supra, p.62.

59 Fenwick, H., and Phillipson, G., *Media Freedom under Human Rights Act* (Oxford University Press, Oxford, 2006), p.412.

60 (1994) No.13470/87, A295-A

forfeiture of a religiously offensive film *Das Liebeskonzil* – could serve as a prime example. In this case, the ECtHR stated that the ‘duties and responsibilities’ in the context of religious opinions and beliefs included ‘an obligation to avoid as far as possible expressions that [were] gratuitously offensive to others.’⁶¹ Given this jurisprudence, in *Handyside*, although the ECtHR did not identify what the duty and responsibility were, it could be inferred from the facts surrounding the case that the duty and responsibility meant the author’s obligation to avoid depraving and corrupting the *Schoolbook*’s readership (school children).⁶² Similarly, in *Müller*, it could be inferred from the ECtHR’s rulings that Mr. Müller, the painter, and the organisers of the exhibition had duty and responsibility to prevent children from entering the gallery, and inform adult visitors of sexually explicit nature of the paintings.⁶³ In these three cases, it appears that the applicants failed to comply with their duties and responsibilities.

2. *Prescribed by Law*

‘Prescribed by law’, is generally understood to mean that the restrictive measures imposed on freedom of expression must have a basis on the national law.⁶⁴ Thus, the contracting states are required to prove the existence of the national law that empowers their authorities to curb the right to freedom of expression of individuals.⁶⁵ According to the ECtHR, the term ‘law’ is not limited merely to statutory/written laws, but also covers the unwritten forms of law (common-law rules)⁶⁶ and domestic application of international law principles.⁶⁷

The law must meet the ‘quality of law’ requirements.⁶⁸ In *The Sunday Times (No.1)*, the ECtHR stipulated two criteria to determine whether the law in question can be considered ‘law’ within the meaning of Art.10 (2). The first is ‘accessibility’, which means that ‘the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case’; the second is ‘foreseeability’, which can be construed as meaning that the rule or norm in question must be ‘formulated with sufficient precision to enable the citizen ... to foresee ... the consequences which a given action may entail.’⁶⁹ Put differently, the law must have a certain degree of clarity and precision, allowing people to know what expression is subject to legal prohibition or restriction.

3. *Legitimate Aims*

61 Ibid., para.49

62 Van Rijn, A., ‘Freedom of Expression (Article 10)’, in van Dijk, P., van Hoof, F., van Rijn, A., and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (4th ed), (Intersentia, Antwerpen, 2006), pp.773-816, 807; (1976) No.5493/72, A024, para.49

63 (1988) No.10737/84, A133, para.36; In comparison, in *Otto Preminger Institut v. Austria* (1994) No.13470/87, A295-A, the audience was warned beforehand of the offensiveness which might be caused by the film, and the cinema also charged the entrance fee. However, despite the warning, the ECtHR ruled that the Austrian authorities’ actions against the film and the organisation that showed the film did not violate Art. 10.

64 Macovei, M., supra, p.30.

65 Harris, D.J. *et al.*, supra, p.444.

66 See an example case *Sunday Times v. United Kingdom (no.1)* 66 (1979) No.6538/74, A30, para.47.

67 See example cases *Groppera Radio AG and Others v. Switzerland* (1990) No.10890/84, A173, para.68; and *Autronic AG v. Switzerland* (1990) No.12726/80, A187, para.57.

68 White, R., and Ovey, C., *Jacobs, White and Ovey : The European Convention on Human Rights* (5th ed), (Oxford University Press, Oxford, 2010), p.312.

69 (1979) No.6538/74, A30, para.49.

The second paragraph of Art.10 enumerates nine legitimate aims, which constitute the second requirement. These are: (1) the protection of national security; (2) the protection of territorial integrity; (3) the protection of public safety; (4) the prevention of disorder or crime; (5) the protection of health; (6) the protection of morals; (7) the protection of the reputation or rights of others; (8) the prevention of the disclosure of information received in confidence; and (9) the maintenance of the authority and impartiality of the judiciary.⁷⁰ To satisfy the second requirement, domestic enforcement of any laws which constitutes interference with the right to freedom of expression must be based on at least one of the nine interests. Typically, it is the duty of national courts to identify a particular interest in question and to ensure that it is on the list provided in Art.10 (2).⁷¹

4. *Necessity in a Democratic Society*

Among other conditions required by the second paragraph of article 10, this condition appears to be the most vital. The phrase ‘necessary in a democratic society’ connotes the idea that the contracting state’s interference with freedom of expression must be ‘relevant’, ‘sufficient’, ‘necessary’ (in other words, there is a pressing social interest, i.e. the nine legitimate aims enumerated in Art. 10 (2))⁷² and ‘proportional’ to a legitimate aim that the state pursues.⁷³ The principle of proportionality appears to be most important for the ‘necessary in the democracy’ condition. Without this principle, ‘the formulation of [the ECHR] provisions would be open to restrictions depriving the rights and freedoms of all content so long as they were prescribed by law and for a legitimate purpose.’⁷⁴ In other words, without the requirement of proportionality, the state signatory to the ECHR can restrict freedom of expression without being concerned about whether the restrictive measure in question excessively burdens individuals’ rights to freedom of expression; or to consider whether there is any less restrictive alternative, so long as they can claim that the implementation of such restriction is allowed by a law and has a legitimate aim. For this reason, the principle of proportionality serves as a buffer between the state’s implementation of restrictive measure to achieve or secure public interest and individuals’ rights and freedoms, by requiring the state to strike a fair balance and not to make ‘the intensity of restriction ... excessive in relation to the legitimate needs and interests, which the specific restriction aims to redress’.⁷⁵ Therefore, the state authorities should be selective in choosing a restrictive measure which is ‘the least burdensome on individual person’s rights, but equally capable of achieving the same legitimate objective’.⁷⁶

5. *Margin of Appreciation Doctrine*

70 Harris, D.J. *et al.*, *supra*, p.474.

71 Macovei, M., *supra*, p.34.

72 *Lingens v. Austria* (1986) No.9815/82, A103, para.39.

73 Arai-Takahashi, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerpen, 2001), pp.11-12.

74 McBride, J., ‘Proportionality and the European Convention of Human Rights’, in Ellis, E. (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999), pp.23-35, 24.

75 Tsakyrakis, S., ‘Proportionality : An Assault on Human Rights?’ (2009) *International Journal of Constitutional Law*, 7(3), pp.468-493, 476.

76 Arai-Takahashi, Y., p.15.

Another significant element that is relevant to the ‘necessary in a democratic society’ requirement is the margin of appreciation doctrine. The doctrine is not prescribed anywhere in Art. 10 or in the ECHR, but has been developed by the ECHR judicial bodies themselves – i.e. the European Commission and the ECtHR.⁷⁷ The margin of appreciation can be explained – in general terms – as a doctrine according to which signatory state governments are granted a certain degree of latitude with regard to the evaluation of factual situations and to the implementation of legislative, administrative or judicial measures in the area of the ECHR’s protected rights.⁷⁸ This latitude refers principally to the discretionary power, in accordance with their national laws, which the authorities of the contracting state have in taking actions as necessary to satisfy particular pressing societal needs (the nine legitimate aims).⁷⁹ Consequently, although such actions may amount to interference with the right guaranteed by article 10,⁸⁰ the ECtHR would typically find that there is no breach of article 10.⁸¹

In practice, the ECtHR applies the doctrine of margin of appreciation by deferring its reasoning, to a greater or lesser extent, to the relevant domestic authorities’ decisions in relation to the necessity of restriction on a particular freedom/right in question and the selection of means to accomplish a specific legitimate goal.⁸² This can be called ‘judicial deference’.⁸³ In this regard, the application of the doctrine could be seen as a justification for the ECtHR’s refraining from replacing the national (local) authorities’ discretion and evaluation with its opinions, which is normally based on international perspectives.⁸⁴ As a result, the ECtHR can avoid the risk of ‘[making] an unqualified substantive [*emphasis added*] judgement as to whether a right has been violated’.⁸⁵ However, this does not mean that the domestic authorities have unlimited power of discretion.⁸⁶ The ECtHR still maintains a supervisory role to ensure (review) that the exercise of national authorities’ discretionary power complies with the ECHR’s legal framework.⁸⁷

6. *The Application of the Margin of Appreciation Doctrine*

The principle of proportionality – which prevents the state from excessive restriction of individual rights and freedoms – and the doctrine of margin of appreciation – which allows the state to exercise discretionary power to restrict individuals’ rights and freedoms in accordance with the local moral values – have an inverse relationship. The relation between the proportionality principle and the margin of appreciation doctrine also correlates with the

77 Letsas, G., ‘Two Concepts of the Margin of Appreciation’ (2006) *Oxford Journal of Legal Studies*, 26(4), pp.705-732, 705-706.

78 Harris, D.J. *et al.*, *supra*, p.11; For a comprehensive analysis of the margin of appreciation doctrine in the context of the ECtHR’s case-law.

79 Feldman, D., *Civil Liberties and Human Rights in England and Wales* (2nd ed.), (Oxford University Press, Oxford, 2002), p.756.

80 It should be noted that, apart from the right to free expression (Art.10), the margin of appreciation doctrine is also applicable to other rights (e.g. the right to privacy (Art.8), the right to conscience and religion (Art.9) and the right of association (Art.11)).

81 Letsas, G., *supra*, p.710.

82 Fenwick, H., and Phillipson, G., *supra*, p.49.

83 Shany, Y., ‘Toward a General Margin of Appreciation Doctrine in International Law’ (2006) *The European Journal of International Law*, 16(5), pp.907-939, 909.

84 *Ibid.*, *supra*, p.910.

85 Letsas, G., *supra*, p.721.

86 *Handyside v. UK* (1976) No.5493/72, A024, para.49.

87 *Ibid.*,

type of expression and the legitimate aims that the state pursues. The ECtHR's formula appears to be as follows. At the first stage, the ECtHR asks what type of expression is at issue and what the legitimate aims are that the state is pursuing. If the expression is political and the legitimate aim is not related to the protection of morality, the ECtHR would tend to give a narrow margin of appreciation to national authorities. This means that the ECtHR would apply a rigorous standard to consider whether the restriction of expression and the legitimate aim that the state pursues is proportionate. Interestingly, Yukata Arai-Takahashi – a researcher in the margin of appreciation doctrine – observes that, in some cases, the ECtHR did not apply the margin of appreciation doctrine at all. For example, in *Lingens v. Austria*, the ECtHR attached great importance to political expression and the press, which had a duty to impart opinion on the political matters. It then adopted a strict proportionality test to consider whether the restriction imposed on the political expression at issue (i.e. articles published in the magazine *Profil* that criticised an Austrian politician in strong language) was proportionate to 'necessary in a democratic society to protect the rights of others'. It found that the restriction was not proportionate, and thus constituted a violation of article 10. In this case, the ECtHR did not even mention the margin of appreciation doctrine at all. The *Sunday Times* (No.1) is another case that involves political expression (an issue of public interest). The core issue of this case is news coverage of litigation involving compensation claims by families of the victims who suffered from effects of drugs which contained thalidomide against Distillers Company – the manufacturer of the drugs. The Attorney General filed a contempt of court action, seeking to stop newspaper reporting on this matter, because the negotiation between parties was still before the court. The ECtHR considered the doctrine of margin of appreciation and ruled that the legitimate aim of the maintenance of the authority and impartiality of the judiciary was more objective in nature than public morality (which might differ from place to place and from time to time). Thus a narrow margin of appreciation was granted to the national authorities. As a result, the ECtHR applied a strict standard of scrutiny to the restriction (the injunction against publication), and ruled that the restriction was not proportionate to the legitimate aim, i.e. the protection of 'authority of the judiciary'.

By contrast, if the type of expression at issue is not relevant to political matters (in the strict sense) and the legitimate aim is the protection of morality, the ECtHR would typically grant a wide margin of appreciation to national authorities, and applies a more relaxed standard of proportionality; and, in some cases, the proportionality test is not considered at all. In the *Handyside* case, the ECtHR did not regard the *Schoolbook* as political expression, and was satisfied that the law at issue, namely the Obscene Publication Act 1959/1964, aimed to protect morality. Given these two factors, the ECtHR readily granted a wide margin of appreciation to the national authorities. Regarding the principle of proportionality in this case, the ECtHR did not even attempt to consider whether the seizure and the destruction of several hundreds of copies of the *Schoolbook* and the criminal sanction against the publisher was proportionate to the legitimate aim of protecting morality. Similarly, in the *Müller* case, the ECtHR was of the opinion that the paintings in question were of non-political expression (as they were artistic expression). Regarding the legitimate aim, it considered that the Swiss obscenity law had a legitimate aim to protect morality which, in this case, had a link to another legitimate aim, namely the protection of the rights of others (against offence). As a result, the ECtHR granted a wide margin of appreciation to the Swiss authorities. Interestingly, unlike in *Handyside*, the ECtHR in *Müller* did consider the proportionality between restrictions imposed on the expression (criminal conviction against the painter and the organisers of the exhibition, and the confiscation of the paintings) and the legitimate aim (the protection of morality and the rights of others) in some detail. However, as a wide margin of appreciation had already been

granted, the ECtHR was ready to apply a more relaxed standard of proportionality to the restrictions at issue. Given this, it is unsurprising that the ECtHR agreed with the Swiss courts in imposing a criminal penalty on the applicants. Regarding the confiscation of the paintings, the ECtHR considered that, having regard the Swiss authorities' margin of appreciation, the confiscation (as an alternative to the destruction of the paintings) and the fact that Mr. Müller could apply to the Swiss courts to have the paintings returned earlier, met the 'necessary in a democratic society' requirement.

III. CONCLUSION

Undoubtedly, the right to freedom of expression is universally recognised as one of important human rights. The UDHR makes it clear that all individuals have the right to express their ideas, opinions and information. Similarly, the ECHR also has article 10 as a provision to protect the right to freedom of expression in general, despite certain conditional exceptions. However, the protection of the right to freedom of expression is not simple. As discussed above, it is necessary to strike a proper balance between individuals' right to freedom of expression and the protection of other important public interests. The ECtHR has set up a sophisticated system and developed significant legal doctrines to ensure both important values.

In conclusion, in practice, the ECtHR would begin with considering the meaning (or meanings) of the expression and the actual intention of the person who expressed it. If the expression in question is deemed to have political or social values, it is typically given strong protection against interference by a government. In contrast, if the expression does not have a clear political or social message and is considered to be against public morality, the ECtHR will normally give the local authorities a great degree of discretion to take action against the expression under the 'Margin of Appreciation Doctrine.'