

European Court of Human Rights judgments on the right to freedom of expression

Bulletin XXIX: Focus on obscenity, public morals and freedom of expression

20 January 2014

This bulletin summarises several European Court of Human Rights judgments that deal with the issue of public morals and ‘obscenity’. This is an area where the European Court typically allows States a considerable “margin of appreciation” in deciding the extent to which restrictions can be imposed on the right to freedom of expression. The Court does not allow States unlimited discretion – any restrictions that States impose must still be justified as “necessary” in a democratic society, and be imposed by a clearly formulated law – but the Court does recognise that public morals vary considerably from country to country. What the public in one country might find perfectly acceptable may be highly obscene to the public in another country. The Court distinguishes between forms of expression that are purely artistic and political speech, applying a higher standard of protection to political speech.

The following cases indicate how the Court approaches such cases.

- ***Müller and others v. Switzerland*** (application no. 10737/84) 24 May 1988: fine and temporary confiscation of obscene paintings did not violate right to freedom of expression

This concerned the exhibition of three sexually explicit paintings depicting fellatio, sodomy and sex with animals, at a contemporary art show. The exhibition had been widely advertised and was open to all, and the accompanying catalogue contained photographs of the paintings. On the opening day the public prosecutor initiated proceedings against the artists arguing that the paintings were obscene and should be destroyed. In the ensuing legal proceedings, the paintings were temporarily confiscated and the artists were fined. The artists appealed to the European Court of Human Rights.

The Court held that there had been no violation of the right to freedom of expression. The Court emphasised that on the topic of morals, countries are left a considerable margin of appreciation in deciding what is acceptable, stating that “it is not possible to find in the legal and social orders of the [European countries] a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position

than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them."

From Croatian translation:

35. Osuda podnositelja predstavke na osnovi članka 204. švicarskog Kaznenog zakona imala je namjenu da zaštiti moral. Danas, kao i u vrijeme donošenja presude u predmetu Handyside (prethodno citirana, str. 22, stavak 48), nije moguće u zakonitim i društvenim porecima država ugovornica naći jedinstven europski koncept morala. Stajalište vezano za zahtjeve morala varira od vremena do vremena i od mjesta do mjesta, posebno u našoj eri koju takvu kakva jeste karakterizira dalekosežna evolucija mišljenja na ovu temu. Zbog njihovog izravnog i trajnog kontakta s vitalnim snagama njihovih zemalja, državne vlasti su u načelu u boljoj poziciji od međunarodnog suca da daju mišljenje o stvarnom sadržaju ovih zahtjeva, kao i o "neophodnosti" "ograničenja" ili "kazne" koji su namijenjeni da ih zadovolje.

Considering the fine on the artists and the confiscation of the paintings, the Court considered that the paintings showed sexual manners in a crude manner, particularly between men and animals, and that the exhibition of which they formed part was open to the public at large, without admission being charged. Although the Court acknowledged that concepts of sexual morality had changed over time, it held that it was reasonable and within the limits of the margin of appreciation for the Swiss courts to have held that the paintings were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity".

From Croatian translation:

“u najvećoj mjeri odgovorne za povredu osjećaja prikladnosti ljudi normalne osjetljivosti

With regard to the temporary confiscation of the paintings, the Court held that it was common practice across Europe to allow for confiscation of "items whose use has been lawfully adjudged illicit and dangerous to the general interest". Considering that the purpose of the temporary confiscation was to prevent repetition of the offence, and that the paintings were later returned, the Court did not consider that this constituted a violation of the right to freedom of expression.

- ***Vereinigung Bildender Künstler v. Austria*** (application no. 68354/01) 25 January 2007: permanent ban on display of painting showing politicians in a sexually explicit caricature violated the right to freedom of expression

This concerned a fine and withdrawal from public display of a painting entitled "Apocalypse", a collage of 34 public figures – including Mother Teresa, the Austrian cardinal Hermann Groer and the former head of the Austrian Freedom Party Jörg Haider – all naked and involved in sexual activities. The bodies of those figures were painted but their heads and faces used photos taken from newspapers, the eyes of some of the people portrayed being hidden by black bands. Among those portrayed was Mr Meischberger, a former general secretary of the Austrian Freedom Party, who was shown in a sexual pose with Mr Haider, two other politicians and Mother Teresa. The painting had been on display as part of an exhibition by an association of Austrian artists. Mr Meischberger sued the artists and won a judgment permanently barring the display of the painting on the grounds that

the painting debased him and his political activities. The association of artists complained to the European Court of Human Rights.

The European Court held that the fine and ban violated the association's right to freedom of expression. While the Court noted that the painting depicted Mr Meischberger in a somewhat outrageous manner, it was clear that the figures were caricatures and the painting was satirical. The Court emphasised that satire was a form of artistic expression and social comment which, by exaggerating and distorting reality, was both intentionally provocative and political in nature. As such, restrictions on it should be examined with particular care. Mr Meischberger had been depicted in the context of his political work and functioning, and the painting could be seen as a reaction against the Austrian Freedom Party, whose members had previously been critical of the artist's work. Meischberger was of the least prominent of those depicted – and at the time he sued, he was not recognisable at all since his photograph had been covered with red paint. The Court also took into consideration that the injunction granted by the Austrian courts had been unlimited and left the association – which directed one of Austria's best known modern art galleries – no possibility of exhibiting the painting ever again, irrespective of whether Mr Meischberger was known, or was still known, at the place and time of a potential exhibition in the future.

- ***Akdaş v. Turkey*** (application no. 41056/04) 16 February 2010: **ban on translation of classic work of literature that contained graphic descriptions of sex violated the right to freedom of expression**

This concerned a Turkish publisher who published the Turkish translation of the erotic novel "Les onze mille verges" ("The Eleven Thousand Rods") by French writer, Guillaume Apollinaire. The book included graphic sexual descriptions, including of practices such as sadomasochism, vampirism and paedophilia. The Turkish publisher was prosecuted and convicted for publishing obscene material liable to arouse and exploit sexual desire. He was fined €1,100. The publisher complained to the European Court of Human Rights, arguing that the book had been written by literary specialists, did not contain any violent overtones and that its humorous and exaggerated tone was more likely to extinguish sexual desire than to arouse it.

The Court held that the conviction violated the right to freedom of expression. While the Court emphasised that the requirements of morals vary from time to time and from place to place, even within the same country, and that national authorities are in a better position to judge this than the European Court, it held that the Turkish authorities had not applied the correct standard. The French original of the book had been first published in 1907, had been republished in various languages and had obtained the status of a 'classic' work of European literature. There was no "pressing social need" that could possibly justify banning access to a literary work of such status and fining its publisher.

- ***Karttunen v Finland*** (application no. 1685/10), 10 May 2011 – admissibility decision: conviction for displaying child pornography downloaded from the internet as part of art installation demonstrating against pornography did not violate the right to freedom of expression

This case concerned the conviction for possession and public display of child pornography of a Finnish artist who had included photographs of teenage girls and young women in sexual poses in an exhibition in an art gallery, under the title “the Virgin-Whore Church”. The pictures had been downloaded from publicly accessible internet sites and the artist had intended to use her exhibition to criticise the free availability of such material online. The exhibition was closed, the pictures were confiscated and the artist was convicted of distributing child pornography – but because the artist had intended the exhibition as a protest, no fine or other sentence was imposed. She complained to the European Court of Human Rights that the conviction and confiscation of the photographs violated her right to freedom of expression.

The European Court held that the conviction did not violate the right to freedom of expression. It noted that while the artist’s intention had been to protest the availability of child porn on the internet, the possession and public display of child pornography was a criminal offence in Finland. The conviction of the artist was therefore still justified – there was a genuine social need to protect children against sexual abuse, to protect their privacy and for other moral considerations. The applicant’s right to freedom of expression and her good intentions did not justify the possession and public display of child pornography.

- ***Perrin v. United Kingdom*** (application no. 5446/03) 18 October 2005: (admissibility decision) obscenity conviction for publishing website showing very graphic scenes of sex did not violate the right to freedom of expression

This concerned the conviction and 30 month prison sentence for a man who published a website showing scenes of sex involving excrement, including the eating of excrement, and fellatio. The website was published through a company registered in the United States and from servers in the US, and complied with US law. However, the publisher lived in the UK and he was prosecuted under UK law on obscenity. He complained to the European Court of Human Rights that his conviction and imprisonment had violated his right to freedom of expression. He argued that because the material was published through a US-based company and was published on US-based servers, he should not be subject to English law.

The European Court of Human Rights held that the conviction did not violate the publisher’s right to freedom of expression. It held that because the publisher resided in the UK and published the website as a business, he should have taken legal advice as regards the applicability of UK law. The Court held that UK law on obscenity was sufficiently clear and it was obvious that material such as that on the website fell within its scope. The Court also considered that some of the material was available free of charge and that the domestic courts had been right to note that it could be sought out by very young people – which is precisely what the law on obscenity sought to prevent. The fact that publication of the material was legal in the United States was irrelevant: the European Court emphasised that on issues of public morals, standards differ from country to country. The Court also

held that imprisonment was not disproportionate: it emphasised that the publisher's only aim was financial (the material was of no artistic or literary merit and did not contribute to any political debate) and that the publisher would have been eligible for release after fifteen months.

Prepared by Peter Noorlander, Director of Media Legal Defence Initiative, London in cooperation with HRA



British Embassy
Podgorica

Bulletins are published within the project "Monitoring of Journalistic Self-Regulatory Bodies in Montenegro" funded by the British Embassy Podgorica.
