In the case of Wingrove v. the United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr Thór Vilhjálmsson,
Mr L.-E. Pettiti,
Mr J. De Meyer,
Mr J.M. Morenilla,
Sir John Freeland,
Mr G. Mifsud Bonnici,
Mr D. Gotchev,
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 March, 27 September and 22 October 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

_____
Notes by the Registrar

1. The case is numbered 19/1995/525/611. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 1 March 1995 and by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 22 March 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 17419/90) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by a British national, Mr Nigel Wingrove, on 18 June 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46)

(art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention (art. 10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Macdonald, Mr J. De Meyer, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr D. Gotchev and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently, Mr Thór Vilhjálmsson, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 24 November 1995. The Secretary to the Commission subsequently informed the Registrar that the Delegate did not wish to reply in writing to the memorials filed.

5. On 17 November 1995, the President, having consulted the Chamber, had granted leave to Rights International, a New York-based non-governmental human rights organisation, to submit written comments on specified aspects of the case (Rule 37 para. 2). Leave was also granted on the same date, subject to certain conditions, to two London-based non-governmental human rights organisations, namely Interights and Article 19, to submit joint written comments. The comments were received between 2 and 5 January 1996. On 1 February 1996 the applicant submitted an explanatory statement on the origins and meaning of his video work.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 March 1996. Beforehand, the Court had held a preparatory meeting and had viewed the video recording in issue in the presence of the applicant and his representatives.

There appeared before the Court:

(a) for the Government

Mr M.R. Eaton, Deputy Legal Adviser, Foreign and Commonwealth Office, Agent,
Sir Derek Spencer, Solicitor-General,
Mr P. Havers QC,

Mr N. Lavender, Counsel,
Mr C. Whomersley, Legal Secretariat to the
Law Officers,
Mr R. Clayton, Home Office,
Mr L. Hughes, Home Office, Advisers;

(b) for the Commission

Mr N. Bratza, Delegate;

(c) for the applicant

Mr G. Robertson, QC, Counsel,
Mr M. Stephens,
Mr P. Chinnery, Solicitors.

The Court heard addresses by Mr Bratza, Mr Robertson and
Sir Derek Spencer.

AS TO THE FACTS

I. Circumstances of the case

7. The applicant, Mr Nigel Wingrove, is a film director. He was born in 1957 and resides in London.

8. Mr Wingrove wrote the shooting script for, and directed the making of, a video work entitled Visions of Ecstasy. Its running time is approximately eighteen minutes, and it contains no dialogue, only music and moving images. According to the applicant, the idea for the film was derived from the life and writings of St Teresa of Avila, the sixteenth-century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ.

9. The action of the film centres upon a youthful actress dressed as a nun and intended to represent St Teresa. It begins with the nun, dressed loosely in a black habit, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing. In her writhing, she spills a chalice of communion wine and proceeds to lick it up from the ground. She loses consciousness. This sequence takes up approximately half of the running time of the video. The second part shows St Teresa dressed in a white habit standing with her arms held above her head by a white cord which is suspended from above and tied around her wrists. The near-naked form of a second female, said to represent St Teresa's psyche, slowly crawls her way along the ground towards her. Upon reaching St Teresa's feet, the psyche begins to caress her feet and legs, then her midriff, then her breasts, and finally exchanges passionate kisses with her. Throughout this sequence, St Teresa appears to be writhing in exquisite erotic sensation. This sequence is intercut at frequent intervals with a second sequence in which one sees the body of Christ, fastened to the cross which is lying upon the ground. St Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side. Then she sits astride him, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal, and kisses his lips. For a few seconds, it appears that he responds to her kisses. This action is intercut with the passionate kisses of the psyche already described.

Finally, St Teresa runs her hand down to the fixed hand of Christ and entwines his fingers in hers. As she does so, the fingers of Christ seem to curl upwards to hold with hers, whereupon the video ends.

10. Apart from the cast list which appears on the screen for a few seconds, the viewer has no means of knowing from the film itself that the person dressed as a nun in the video is intended to be St Teresa or that the other woman who appears is intended to be her psyche. No attempt is made in the video to explain its historical background.

11. Visions of Ecstasy was submitted to the British Board of Film Classification ("the Board"), being the authority designated by the Home Secretary under section 4 (1) of the Video Recordings Act 1984 ("the 1984 Act" - see paragraph 24 below) as

"the authority responsible for making arrangements

(a) for determining, for the purposes of [the] Act whether or not video works are suitable for classification certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home,

(b) in the case of works which are determined in accordance with the arrangements to be so suitable

(i) for making such other determinations as are required for the issue of classification certificates, and

(ii) for issuing such certificates ...

..."

12. The applicant submitted the video to the Board in order that it might lawfully be sold, hired out or otherwise supplied to the general public or a section thereof.

13. The Board rejected the application for a classification certificate on 18 September 1989 in the following terms:

"Further to your application for a classification certificate ..., you are already aware that under the Video Recordings Act 1984 the Board must determine first of all whether or not a video work is suitable for such a certificate to be issued to it, having special regard to the likelihood of video works being viewed in the home. In making this judgment, the Board must have regard to the Home Secretary's Letter of Designation in which we are enjoined to `continue to seek to avoid classifying works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964 or which infringe other provisions of the criminal law'.

Amongst these provisions is the criminal law of blasphemy, as tested recently in the House of Lords in R. v. Lemon (1979), commonly known as the Gay News case. The definition of blasphemy cited therein is 'any contemptuous, reviling,

scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible ... It is not blasphemous to speak or publish opinions hostile to the Christian religion' if the publication is 'decent and temperate'. The question is not one of the matter expressed, but of its manner, i.e. `the tone, style and spirit', in which it is presented.

The video work submitted by you depicts the mingling of religious ecstasy and sexual passion, a matter which may be of legitimate concern to the artist. It becomes subject to the law of blasphemy, however, if the manner of its presentation is bound to give rise to outrage at the unacceptable treatment of a sacred subject. Because the wounded body of the crucified Christ is presented solely as the focus of, and at certain moments a participant in, the erotic desire of St Teresa, with no attempt to explore the meaning of the imagery beyond engaging the viewer in an erotic experience, it is the Board's view, and that of its legal advisers, that a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.

To summarise, it is not the case that the sexual imagery in Visions of Ecstasy lies beyond the parameters of the `18' category; it is simply that for a major proportion of the work's duration that sexual imagery is focused on the figure of the crucified Christ. If the male figure were not Christ, the problem would not arise. Cuts of a fairly radical nature in the overt expressions of sexuality between St Teresa and the Christ figure might be practicable, but I understand that you do not wish to attempt this course of action. In consequence, we have concluded that it would not be suitable for a classification certificate to be issued to this video work."

14. The applicant appealed against the Board's determination to the Video Appeals Committee ("the VAC" - see paragraph 25 below), established pursuant to section 4 (3) of the 1984 Act. His notice of appeal, prepared by his legal representatives at the time, contained the following grounds:

"(i) that the Board was wrong to conclude that the video infringes the criminal law of blasphemy, and that a reasonable jury properly directed would so find;

(ii) in particular, the Appellant will contend that upon a proper understanding of the serious nature of the video as an artistic and imaginative interpretation of the `ecstasy' or `rapture' of the sixteenth-century Carmelite nun, St Teresa of Avila, it would not be taken by a reasonable person as contemptuous, reviling, scurrilous or ludicrous or otherwise disparaging in relation to God, Jesus Christ or the Bible. The appeal will raise the question of mixed fact and law, namely whether publication of the video, even to a restricted degree, would contravene the existing criminal law of blasphemy."

15. The Board submitted a formal reply to the VAC explaining its decision in relation to its functions under section 4 of the 1984 Act:

"The Act does not expressly set out the principles to be applied by the authority in determining whether or not a video work is suitable for a classification certificate to be issued in respect of it. In these circumstances, the Board has exercised its discretion to formulate principles for classifying video works in a manner which it believes to be both reasonable and suited to carrying out the broad objectives of the Act. Amongst these principles, the Board has concluded that an overriding test of suitability for classification is the determination that the video work in question does not infringe the criminal law. In formulating and applying this principle, the Board has consistently had regard to the Home Secretary's Letter of Designation under the Video Recordings Act ...

The Board has concluded on the advice of leading Counsel that the video work in question infringes the criminal law of blasphemy and that a reasonable jury properly directed on the law would convict accordingly. The Board submits and is advised that in Britain the offence of blasphemy is committed if a video work treats a religious subject (in particular God, Jesus Christ or the Bible) in such a manner as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented.

The video work under appeal purports to depict the erotic fantasies of a character described in the credits as St Teresa of Avila. The 14-minute second section of the video work portrays 'St Teresa' having an erotic fantasy involving the crucified figure of Christ, and also a Lesbian erotic fantasy involving the 'Psyche of St Teresa'. No attempt is made to place what is shown in any historical, religious or dramatic context: the figures of St Teresa and her psyche are both clearly modern in appearance and the erotic images are accompanied by a rock music backing. The work contains no dialogue or evidence of an interest in exploring the psychology or even the sexuality of the character purporting to be St Teresa of Avila. Instead, this character and her supposed fantasies about lesbianism and the body and blood of Christ are presented as the occasion for a series of erotic images of a kind familiar from 'soft-core' pornography.

In support of its contentions, the Board refers to an interview given by the appellant and published in Midweek magazine on 14 September 1989. In this interview, the appellant attempts to draw a distinction between pornography and 'erotica', denying that the video work in question is pornographic but stating that `all my own work is actually erotica'. Further on, the interviewer comments:

`In many ways, though, Visions calls upon the standard lexicon of lust found in down market porn: nuns, lesbianism, women tied up (Gay Nuns in Bondage could have been an alternative title in fact). Nigel Wingrove

flashes a wicked grin. `That's right, and I'm not denying it. I don't know what it is about nuns, it's the same sort of thing as white stocking tops I suppose.' So why does he not consider Visions to be pornography, or at least soft porn? `I hope it is gentler, subtler than that. I suppose most people think pornography shows the sex act, and this doesn't.'

It is clear from the appellant's own admissions that, whether or not the video work can rightly be described as pornographic, it is solely erotic in content, and it focuses this erotic imagery for much of its duration on the body and blood of Christ, who is even shown to respond to the sexual attentions of the principal character. Moreover, the manner in which such imagery is treated places the focus of the work less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography whether or not it shows the sex act explicitly. Because there is no attempt, in the Board's view, to explore the meaning of the imagery beyond engaging the viewer in a voyeuristic erotic experience, the Board considers that the public distribution of such a video work would outrage and insult the feelings of believing Christians ...

...

The Board ... submits that the appeal should be dismissed and its determination upheld."

16. The applicant then made further representations to the VAC, stating, inter alia:

"The definition of the offence of blasphemy set out in ... the reply is too wide, being significantly wider than the test approved in the only modern authority - see Lemon & Gay News Ltd v. Whitehouse [1979] Appeal Cases 617, per Lord Scarman at 665. For example, there is no uniform law of blasphemy in Britain; the last recorded prosecution for blasphemy under the law of Scotland was in 1843 - see Thos Paterson [1843] I Brown 629. Nor is any religious subject protected - the reviling matter must be in relation to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established.

In the Appellant's contention, these limitations are of the utmost significance in this case since the video is not concerned with anything which God or Jesus Christ did, or thought or might have approved of. It is about the erotic visions and imaginings of a sixteenth-century Carmelite nun - namely St Teresa of Avila. It is quite plain that the Christ figure exists in her fantasy as the Board expressly accepts ... The scurrilous and/or erotic treatment of religious subject matter has received the Board's classification without attempted prosecution in recent years, e.g. Monty Python's Life of Brian and Mr Scorsese's The Last Temptation of Christ.

... The Board argues that the video is purely erotic or

'soft-core' pornographic, without historical, religious, dramatic or other artistic merit. The implication is that, had it possessed such merit the Board's decision might very well have been otherwise. The Appellant will seek to argue and call evidence to the effect that the video work is a serious treatment of the subject of the ecstatic raptures of St Teresa (well chronicled in her own works and those of commentators) from a twentieth-century point of view.

The so-called 'rock music backing' was in fact specially commissioned from the respected composer Steven Severin, after discussion of the Director's desired artistic and emotional impact. The Board has based its decision upon the narrowest, most disparaging, critical appreciation of the work. The Appellant will contend that a very much more favourable assessment of his aims and achievement in making Visions of Ecstasy is, at the very least, tenable and that the Board ought not to refuse a certificate on a mere matter of interpretation.

The Appellant takes objection to the Board's quotation ... of comments attributed to him from an article by one Rob Ryan published in Midweek magazine 14th September 1989. The remarks are pure hearsay so far as the Board is concerned. That aside, the piece quoted is in large part the comments of the author of the article. An entirely misleading impression of what the Appellant said to the author is conveyed by the interpolation of the words attributed to him, and by taking this passage out of context.

Above all, the Appellant disputes the key assertion by the Board that the video work is solely erotic in content."

17. The appeal was heard by a five-member panel of the VAC ("the Panel") on 6 and 7 December 1989; oral and affidavit evidence was submitted. By a majority of three to two, a written decision rejecting the appeal was given on 23 December 1989. The Panel also considered itself bound by the criteria set out in the designation notice (see paragraph 24 below). It had difficulty, however, in ascertaining and applying the present law of blasphemy. It commented as follows:

"The authorities on this Common Law offence were reviewed by the House of Lords in the case of Lemon and Gay News Ltd v. Whitehouse which concerned a magazine called Gay News, the readership of which consisted mainly of homosexuals although it was on sale to the general public at some bookstalls. One edition contained a poem entitled The Love that Dares to Speak its Name accompanied by a drawing illustrating its subject matter.

In his judgment Lord Scarman said that it was unnecessary to speculate whether an outraged Christian would feel provoked by the words and illustration to commit a breach of the peace, the true test being whether the words are calculated to outrage and insult the Christian's religious feelings, the material in question being contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England. It should perhaps be

added that the word `calculated' should be read in the dictionary sense of `estimated' or `likely' as it was decided that intent (other than an intent to publish) is not an element in the offence.

In the same case Lord Diplock said that the material must be `likely to arouse a sense of outrage among those who believe in or respect the Christian faith'.

In the present case the Board's Director ... said in evidence that the Board's view was that the video was `contemptuous of the divinity of Christ'. He added that although the Board's decision was based upon its view that the video is blasphemous (blasphemy being an offence which relates only to the Christian religion), it would take just the same stance if it were asked to grant a Certificate to a video which, for instance, was contemptuous of Mohammed or Buddha."

18. The Panel went on to review the content of the video and accepted that the applicant had in mind St Teresa, a nun, "who is known to have had ecstatic visions of Christ although, incidentally, these did not start until she was 39 years of age - in marked contrast to the obvious youthfulness of the actress who plays the part".

19. The Panel reached the following conclusion:

"From the writings of St Teresa herself, and the subsequent writings of others, there seems no reason to doubt that some of her visions were of seeing the glorified body of Christ and being shown his wounds but, even so, it seems clear that Mr Wingrove has taken considerable artistic licence with his subject.

Apart from the age discrepancy - a comparatively minor matter - we were made aware of nothing which would suggest that Teresa ever did anything to injure her hand or that any element of lesbianism ever entered into her visions. More importantly, there seems nothing to suggest that Teresa, in her visions, ever saw herself as being in any bodily contact with the glorified Christ. As one author, Mr Stephen Clissold, puts it `Teresa experienced ecstasy as a form of prayer in which she herself played almost no part'.

So, in view of the extent of the artistic licence, we think it would be reasonable to look upon the video as centring upon any nun of any century who, like many others down the ages, had ecstatic visions.

There is also another reason for taking this stance: unless the viewer happens to read the cast list which appears on the screen for a few seconds, he or she has no means of knowing that the nun is supposed to be St Teresa, nor that the figure of the second woman is supposed to be her psyche. And he or she in any event may well be unaware that Teresa was a real-life nun who had ecstatic visions.

It is true that Mr Wingrove says that it is intended that the sleeve or jacket for the video will provide 'basic historical

information to assist the viewer', but we feel bound to regard this as irrelevant. Firstly because it by no means follows that every viewer will read any such description; and secondly because the Board's and the Appeal Panel's decision must be based solely upon the video itself, quite apart from the fact that at the time of making a decision the sleeve or jacket is usually - as in the present instance - not even in existence.

However, although we have thought it proper to dwell at some length with the 'St Teresa' aspect, we are of the opinion that in practice, when considering whether or not the video is blasphemous, it makes little or no difference whether one looks upon the central character as being St Teresa or any other nun.

The appellant, in his written statement, lays stress upon the undoubted fact that the whole of the second half consists of Teresa's vision or dream. Hence he says the video says nothing about Christ, his figure being used only as a projection of St Teresa's mind, nor was it his intention to make that figure an active participant in any overt sexual act.

He goes on to say `Rather the very mild responses are those of St Teresa's conjecture: the kiss, hand clasp and ultimately the tears of Christ. To show no response to a creation of her own mind would be nonsense; no woman (nor man) whose deep love could cause such visions/ecstasies would imagine the object of that love coldly to ignore their caresses'.

Although we quite appreciate the logic of this point of view, we have reservations about the extent to which a vision or dream sequence can affect the question of whether what is pictured or said is blasphemous.

It would, for instance, be possible to produce a film or video which was most extremely contemptuous, reviling, scurrilous or ludicrous in relation to Christ, all dressed up in the context of someone's imaginings. In such circumstances we find it hard to envisage that, by such a simple device, it could reasonably be said that no offence had been committed. If in our opinion the viewer, after making proper allowance for the scene being in the form of a dream, nevertheless reasonably feels that it would cause a sense of outrage and insult to a Christian's feelings, the offence would be established.

We should perhaps also deal, albeit briefly, with a further submission made on behalf of the appellant, namely that the crime of blasphemy may extend only to the written or spoken word and hence that a court might rule that no film or video, and perhaps nothing shown on television, could become the subject of such a charge. Suffice it to say that in our view this is too unlikely to cause it to be taken into account by the Board or a panel of the Appeals Committee when reaching a decision.

In the opinion of a majority of the Panel the video did not, as the appellant claims, explore St Teresa's struggles against her visions but exploited a devotion to Christ in purely carnal terms. Furthermore they considered that it lacked the

seriousness and depth of The Last Temptation of Christ with which Counsel for the appellant sought to compare it.

Indeed the majority took the view that the video's message was that the nun was moved not by religious ecstasy but rather by sexual ecstasy, this ecstasy being of a perverse kind - full of images of blood, sado-masochism, lesbianism (or perhaps auto-erotism) and bondage. Although there was evidence of some element of repressed sexuality in St Teresa's devotion to Christ, they did not consider that this gave any ground for portraying her as taking the initiative in indulged sexuality.

They considered the over-all tone and spirit of the video to be indecent and had little doubt that all the above factors, coupled with the motions of the nun whilst astride the body of Christ and the response to her kisses and the intertwining of the fingers would outrage the feelings of Christians, who would reasonably look upon it as being contemptuous of the divinity of Christ.

In these circumstances the majority were satisfied that the video is blasphemous, that a reasonable and properly directed jury would be likely to convict and therefore that the Board was right to refuse to grant a Certificate. Hence this appeal is accordingly dismissed.

It should perhaps be added that the minority on the Panel, whilst being in no doubt that many people would find the video to be extremely distasteful, would have allowed the appeal because in their view it is unlikely that a reasonable and properly directed jury would convict."

20. As a result of the Board's determination, as upheld by the Panel, the applicant would commit an offence under section 9 of the 1984 Act (see paragraph 23 below) if he were to supply the video in any manner, whether or not for reward.

21. The applicant received legal advice that his case was not suitable for judicial review (see paragraphs 30-31 below) on the grounds that the formulation of the law of blasphemy, as accepted by the Panel, was an "accurate statement of the present law".

II. Situation of the video industry in the United Kingdom

22. According to statistics submitted by the Government, in 1994 there were 21.5 million video-recorders in the United Kingdom. Out of approximately 20.75 million households in the United Kingdom, 18 million contained at least one video-recorder.

There were approximately 15,000 video outlets in the United Kingdom. Videos were available for hire in between 4,000 and 5,000 video rental shops. They were also available for sale in 3,000 "high street" shops and in between 7,000 and 8,000 "secondary" outlets such as supermarkets, corner shops and petrol stations.

In 1994 there were 194 million video rentals and 66 million video purchases in the United Kingdom. It is estimated that

a further 65 million illegal copies ("pirate videos") were distributed during that year.

III. Relevant domestic law

A. The regulation of video works

23. The Video Recordings Act 1984 ("the 1984 Act") regulates the distribution of video works. Subject to certain exemptions, it is an offence under section 9 (1) of that Act for a person to supply or offer to supply a video work in respect of which no classification certificate has been issued. Under section 7 there are three categories of classification: works deemed suitable for general viewing (and to which a parental guidance reference may be added); works for which the viewing is restricted to people who have attained a specified age; and works which may only be supplied by licensed sex shops. The Secretary of State for the Home Department may require that the content of certain works be labelled (section 8). It is an offence to ignore such conditions, for example by supplying someone under 18 years of age with an "18" classified work (section 11).

24. Under section 4 (1) of the 1984 Act the Secretary of State may by notice designate any person or body as the authority for making arrangements for determining whether or not video works are suitable for classification certificates to be issued in respect of them (having special regard to the likelihood of certified video works being viewed in the home). By a notice dated 26 July 1985 the British Board of Film Classification was so designated. In the case of works which are determined in accordance with the arrangements described above to be suitable for classification certificates, the Board is responsible under section 4 (1) for making arrangements for the issue of certificates and making other determinations relating to their use. The Secretary of State's notice enjoined the Board "to continue to seek to avoid classifying works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964 or which infringe other provisions of the criminal law".

25. Pursuant to section 4 (3) of the 1984 Act arrangements were made for the establishment of the Video Appeals Committee to determine appeals against decisions by the Board.

B. The law of blasphemy

26. Blasphemy and blasphemous libel are common law offences triable on indictment and punishable by fine or imprisonment. Blasphemy consists in speaking and blasphemous libel in otherwise publishing blasphemous matter. Libel involves a publication in a permanent form, but that form may consist of moving pictures.

27. In the case of Whitehouse v. Gay News Ltd and Lemon [1979] Appeal Cases 617 at 665, which concerned the law of blasphemy in England, Lord Scarman held that the modern law of blasphemy was correctly formulated in Article 214 of Stephen's Digest of the Criminal Law, 9th edition (1950). This states as follows:

"Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating

to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves."

The House of Lords in that case also decided that the mental element in the offence (mens rea) did not depend upon the accused having an intent to blaspheme. It was sufficient for the prosecution to prove that the publication had been intentional and that the matter published was blasphemous.

The Gay News case, which had been brought by a private prosecutor, had been the first prosecution for blasphemy since 1922.

28. As stated above, the law of blasphemy only protects the Christian religion and, more specifically, the established Church of England. This was confirmed by the Divisional Court in 1991. Ruling on an application for judicial review of a magistrate's refusal to issue a summons for blasphemy against Salman Rushdie and the publishers of The Satanic Verses, Lord Watkins stated:

"We have no doubt that as the law now stands it does not extend to religions other than Christianity ...

...

We think it right to say that, were it open to us to extend the law to cover religions other than Christianity, we should refrain from doing so. Considerations of public policy are extremely difficult and complex. It would be virtually impossible by judicial decision to set sufficiently clear limits to the offence, and other problems involved are formidable." (R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury [1991] 1 All England Law Reports 306 at 318)

29. On 4 July 1989 the then Minister of State at the Home Department, Mr John Patten, had sent a letter to a number of influential British Muslims, in which he stated inter alia that:

"Many Muslims have argued that the law of blasphemy should be amended to take books such as [The Satanic Verses] outside the boundary of what is legally acceptable. We have considered their arguments carefully and reached the conclusion that it would be unwise for a variety of reasons to amend the law of blasphemy, not the least the clear lack of agreement over whether the law should be reformed or repealed.

...

... an alteration in the law could lead to a rush of litigation which would damage relations between faiths.

I hope you can appreciate how divisive and how damaging such litigation might be, and how inappropriate our legal mechanisms

are for dealing with matters of faith and individual belief. Indeed, the Christian faith no longer relies on it, preferring to recognise that the strength of their own belief is the best armour against mockers and blasphemers."

C. The availability of judicial review as a remedy

30. Decisions by public bodies which have consequences which affect some person or body of persons are susceptible to challenge in the High Court on an application for judicial review. Amongst the grounds on which such a challenge may be brought is that the body in question misdirected itself on a point of law. The Video Appeals Committee is such a public body because it is established pursuant to an Act of Parliament (see paragraph 25 above). Furthermore, its decisions affect the rights of persons who make video works because confirmation of a decision that a video work cannot receive a classification certificate would mean that copies of that work could not be lawfully supplied to members of the public.

31. On an application for judicial review a court would not normally look at the merits of any decision made by such a body, except where the decision was so unreasonable that no reasonable body, properly instructed, could have reached it. However, where the decision is based on a point of law and it is alleged that the body has misdirected itself on that point, the decision could be challenged by an application for judicial review. In the case of C.C.S.U. v. Minister for the Civil Service [1984] 3 All England Law Reports at 950, Lord Diplock, in the House of Lords, classified under three heads the grounds on which administrative action is subject to control by judicial review. He called the first ground "illegality" and described it as follows:

"By `illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the State is exercisable."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr Wingrove applied to the Commission on 18 June 1990. He relied on Article 10 of the Convention (art. 10), complaining that the refusal of a classification certificate for his video work Visions of Ecstasy was in breach of his freedom of expression.

33. The Commission declared the application (no. 17419/90) admissible on 8 March 1994. In its report of 10 January 1995 (Article 31) (art. 31), it expressed the opinion, by fourteen votes to two, that there had been a violation of Article 10 of the Convention (art. 10). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed

version of the judgment (in Reports of Judgments and Decisions 1996-V), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

34. In their final submissions, the Government requested the Court to declare that the facts of the present case disclose no violation of Article 10 of the Convention (art. 10).

The applicant, for his part, invited the Court to "produce a judgment which declares the British blasphemy laws as unnecessary in theory as they are in practice in any multi-cultural democracy".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION (art. 10)

35. The applicant alleged a violation of his right to freedom of expression, as guaranteed by Article 10 of the Convention (art. 10), which, in so far as relevant, provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

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

36. The refusal by the British Board of Film Classification to grant a certificate for the applicant's video work Visions of Ecstasy, seen in conjunction with the statutory provisions making it a criminal offence to distribute a video work without this certificate (see paragraph 23 above), amounted to an interference by a public authority with the applicant's right to impart ideas. This was common ground between the participants in the proceedings.

To determine whether such an interference entails a violation of the Convention, the Court must examine whether or not it was justified under Article 10 para. 2 (art. 10-2) by reason of being a restriction "prescribed by law", which pursued an aim that was legitimate under that provision (art. 10-2) and was "necessary in a democratic society".

A. Whether the interference was "prescribed by law"

37. The applicant considered that the law of blasphemy was so uncertain that it was inordinately difficult to establish in advance whether in the eyes of a jury a particular publication would constitute

an offence. Moreover, it was practically impossible to know what predictions an administrative body - the British Board of Film Classification - would make as to the outcome of a hypothetical prosecution. In these circumstances, the applicant could not reasonably be expected to foresee the result of the Board's speculations. The requirement of foreseeability which flows from the expression "prescribed by law" was therefore not fulfilled.

38. The Government contested this claim: it was a feature common to most laws and legal systems that tribunals may reach different conclusions even when applying the same law to the same facts. This did not necessarily make these laws inaccessible or unforeseeable. Given the infinite variety of ways of publishing "contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible" (see paragraph 27 above), it would not be appropriate for the law to seek to define in detail which images would or would not be potentially blasphemous.

39. The Commission, noting that considerable legal advice was available to the applicant, was of the view that he could reasonably have foreseen the restrictions to which his video work was liable.

40. The Court reiterates that, according to its case-law, the relevant national "law", which includes both statute and common law (see, inter alia, the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 30, para. 47), must be formulated with sufficient precision to enable those concerned - if need be, with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, for instance, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37, and the Goodwin v. the United Kingdom judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, pp. 496-97, para. 31).

41. It is observed that, in refusing a certificate for distribution of the applicant's video on the basis that it infringed a provision of the criminal law of blasphemy, the British Board of Film Classification acted within its powers under section 4 (1) of the 1984 Act (see paragraph 24 above).

42. The Court recognises that the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence (see, mutatis mutandis, the Tolstoy Miloslavsky judgment cited above at paragraph 40, p. 73, para. 41).

43. There appears to be no general uncertainty or disagreement between those appearing before the Court as to the definition in English law of the offence of blasphemy, as formulated by the House of Lords in the case of Whitehouse v. Gay News Ltd and Lemon (see paragraph 27 above). Having seen for itself the content of the

video work, the Court is satisfied that the applicant could reasonably have foreseen with appropriate legal advice that the film, particularly those scenes involving the crucified figure of Christ, could fall within the scope of the offence of blasphemy.

The above conclusion is borne out by the applicant's decision not to initiate proceedings for judicial review on the basis of counsel's advice that the Panel's formulation of the law of blasphemy represented an accurate statement of the law (see, mutatis mutandis, the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246-A, p. 27, para. 60).

44. Against this background it cannot be said that the law in question did not afford the applicant adequate protection against arbitrary interference. The Court therefore concludes that the impugned restriction was "prescribed by law".

B. Whether the interference pursued a legitimate aim

45. The applicant contested the Government's assertion that his video work was refused a certificate for distribution in order to "protect the right of citizens not to be offended in their religious feelings". In his submission, the expression "rights of others" in the present context only refers to an actual, positive right not to be offended. It does not include a hypothetical right held by some Christians to avoid disturbance at the prospect of other people's viewing the video work without being shocked.

In any event - the applicant further submitted - the restriction on the film's distribution could not pursue a legitimate aim since it was based on a discriminatory law, limited to the protection of Christians, and specifically, those of the Anglican faith.

46. The Government referred to the case of Otto-Preminger-Institut v. Austria (judgment of 20 September 1994, Series A no. 295-A, pp. 17-18, paras. 47-48) where the Court had accepted that respect for the religious feelings of believers can move a State legitimately to restrict the publication of provocative portrayals of objects of religious veneration.

47. The Commission considered that the English law of blasphemy is intended to suppress behaviour directed against objects of religious veneration that is likely to cause justified indignation amongst believing Christians. It follows that the application of this law in the present case was intended to protect the right of citizens not to be insulted in their religious feelings.

48. The Court notes at the outset that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner "as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented" (see paragraph 15 above).

This is an aim which undoubtedly corresponds to that of the

protection of "the rights of others" within the meaning of paragraph 2 of Article 10 (art. 10-2). It is also fully consonant with the aim of the protections afforded by Article 9 (art. 9) to religious freedom.

49. Whether or not there was a real need for protection against exposure to the film in question is a matter which must be addressed below when assessing the "necessity" of the interference.

50. It is true that the English law of blasphemy only extends to the Christian faith. Indeed the anomaly of this state of affairs in a multidenominational society was recognised by the Divisional Court in R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury [1991] 1 All England Law Reports 306 at 317 (see paragraph 28 above). However, it is not for the European Court to rule in abstracto as to the compatibility of domestic law with the Convention. The extent to which English law protects other beliefs is not in issue before the Court which must confine its attention to the case before it (see, for example, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 18, para. 33).

The uncontested fact that the law of blasphemy does not treat on an equal footing the different religions practised in the United Kingdom does not detract from the legitimacy of the aim pursued in the present context.

51. The refusal to grant a certificate for the distribution of Visions of Ecstasy consequently had a legitimate aim under Article 10 para. 2 (art. 10-2).

C. Whether the interference was "necessary in a democratic society"

52. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society. As paragraph 2 of Article 10 (art. 10-2) expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory (see the Otto-Preminger-Institut judgment cited above at paragraph 46, pp. 18-19, paras. 47 and 49).

53. No restriction on freedom of expression, whether in the context of religious beliefs or in any other, can be compatible with Article 10 (art. 10) unless it satisfies, inter alia, the test of necessity as required by the second paragraph of that Article (art. 10-2). In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Court has, however, consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation. It is, in any event, for the European Court to give a final ruling on the restriction's compatibility with the Convention and it will do so by assessing in the circumstances of a particular case, inter alia, whether the interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued" (see, mutatis mutandis, among many other authorities, the Goodwin judgment cited above at paragraph 40, pp. 500-01, para. 40).

54. According to the applicant, there was no "pressing social need" to ban a video work on the uncertain assumption that it would breach the law of blasphemy; indeed, the overriding social need was to allow it to be distributed. Furthermore, since adequate protection was already provided by a panoply of laws - concerning, inter alia, obscenity, public order and disturbances to places of religious worship - blasphemy laws, which are incompatible with the European idea of freedom of expression, were also superfluous in practice. In any event, the complete prohibition of a video work that contained no obscenity, no pornography and no element of vilification of Christ was disproportionate to the aim pursued.

55. For the Commission, the fact that Visions of Ecstasy was a short video work and not a feature film meant that its distribution would have been more limited and less likely to attract publicity. The Commission came to the same conclusion as the applicant.

56. The Government contended that the applicant's video work was clearly a provocative and indecent portrayal of an object of religious veneration, that its distribution would have been sufficiently public and widespread to cause offence and that it amounted to an attack on the religious beliefs of Christians which was insulting and offensive. In those circumstances, in refusing to grant a classification certificate for the applicant's video work, the national authorities only acted within their margin of appreciation.

57. The Court observes that the refusal to grant Visions of Ecstasy a distribution certificate was intended to protect "the rights of others", and more specifically to provide protection against seriously offensive attacks on matters regarded as sacred by Christians (see paragraph 48 above). The laws to which the applicant made reference (see paragraph 54 above) and which pursue related but distinct aims are thus not relevant in this context.

As the observations filed by the intervenors (see paragraph 5 above) show, blasphemy legislation is still in force in various European countries. It is true that the application of these laws has become increasingly rare and that several States have recently repealed them altogether. In the United Kingdom only two prosecutions concerning blasphemy have been brought in the last seventy years (see paragraph 27 above). Strong arguments have been advanced in favour of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations - as put forward by the applicant - or that legal mechanisms are inadequate to deal with matters of faith or individual belief - as recognised by the Minister of State at the Home Department in his letter of 4 July 1989 (see paragraph 29 above). However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention (see, mutatis mutandis, the Otto-Preminger-Institut judgment cited above at paragraph 46, p. 19, para. 49).

58. Whereas there is little scope under Article 10 para. 2 of the Convention (art. 10-2) for restrictions on political speech or on debate of questions of public interest (see, mutatis mutandis, among

many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, para. 42; the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 43; and the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 27, para. 63), a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. 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 with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended (see, mutatis mutandis, the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 35).

This does not of course exclude final European supervision. Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material. In this regard the scope of the offence of blasphemy and the safeguards inherent in the legislation are especially important. Moreover the fact that the present case involves prior restraint calls for special scrutiny by the Court (see, mutatis mutandis, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 30, para. 60).

59. The Court's task in this case is to determine whether the reasons relied on by the national authorities to justify the measures interfering with the applicant's freedom of expression are relevant and sufficient for the purposes of Article 10 para. 2 of the Convention (art. 10-2).

60. As regards the content of the law itself, the Court observes that the English law of blasphemy does not prohibit the expression, in any form, of views hostile to the Christian religion. Nor can it be said that opinions which are offensive to Christians necessarily fall within its ambit. As the English courts have indicated (see paragraph 27 above), it is the manner in which views are advocated rather than the views themselves which the law seeks to control. The extent of insult to religious feelings must be significant, as is clear from the use by the courts of the adjectives "contemptuous", "reviling", "scurrilous", "ludicrous" to depict material of a sufficient degree of offensiveness.

The high degree of profanation that must be attained constitutes, in itself, a safeguard against arbitrariness. It is against this background that the asserted justification under

Article 10 para. 2 (art. 10-2) in the decisions of the national authorities must be considered.

61. Visions of Ecstasy portrays, inter alia, a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature (see paragraph 9 above). The national authorities, using powers that are not themselves incompatible with the Convention (see paragraph 57 above), considered that the manner in which such imagery was treated placed the focus of the work "less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography" (see paragraph 15 above). They further held that since no attempt was made in the film to explore the meaning of the imagery beyond engaging the viewer in a "voyeuristic erotic experience", the public distribution of such a video could outrage and insult the feelings of believing Christians and constitute the criminal offence of blasphemy. This view was reached by both the Board of Film Classification and the Video Appeals Committee following a careful consideration of the arguments in defence of his work presented by the applicant in the course of two sets of proceedings. Moreover, it was open to the applicant to challenge the decision of the Appeals Committee in proceedings for judicial review (see paragraph 30 above).

Bearing in mind the safeguard of the high threshold of profanation embodied in the definition of the offence of blasphemy under English law as well as the State's margin of appreciation in this area (see paragraph 58 above), the reasons given to justify the measures taken can be considered as both relevant and sufficient for the purposes of Article 10 para. 2 (art. 10-2). Furthermore, having viewed the film for itself, the Court is satisfied that the decisions by the national authorities cannot be said to be arbitrary or excessive.

62. It was submitted by both the applicant and the Delegate of the Commission that a short experimental video work would reach a smaller audience than a major feature film, such as the one at issue in the Otto-Preminger-Institut case (cited above at paragraph 46). The risk that any Christian would unwittingly view the video was therefore substantially reduced and so was the need to impose restrictions on its distribution. Furthermore, this risk could have been reduced further by restricting the distribution of the film to licensed sex shops (see paragraph 23 above). Since the film would have been dispensed in video boxes which would have included a description of its content, only consenting adults would ever have been confronted with it.

63. The Court notes, however, that it is in the nature of video works that once they become available on the market they can, in practice, be copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities.

In these circumstances, it was not unreasonable for the national authorities, bearing in mind the development of the video industry in the United Kingdom (see paragraph 22 above), to consider that the film could have reached a public to whom it would have caused offence. The use of a box including a warning as to the film's content (see paragraph 62 above) would have had only limited efficiency given the varied forms of transmission of video works mentioned above. In any event, here too the national authorities are in a better position

than the European Court to make an assessment as to the likely impact of such a video, taking into account the difficulties in protecting the public.

64. It is true that the measures taken by the authorities amounted to a complete ban on the film's distribution. However, this was an understandable consequence of the opinion of the competent authorities that the distribution of the video would infringe the criminal law and of the refusal of the applicant to amend or cut out the objectionable sequences (see paragraph 13 above). Having reached the conclusion that they did as to the blasphemous content of the film it cannot be said that the authorities overstepped their margin of appreciation.

D. Conclusion

65. Against this background the national authorities were entitled to consider that the impugned measure was justified as being necessary in a democratic society within the meaning of paragraph 2 of Article 10 (art. 10-2). There has therefore been no violation of Article 10 of the Convention (art. 10).

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no breach of Article 10 of the Convention (art. 10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1996.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Bernhardt;
(b) concurring opinion of Mr Pettiti;
(c) dissenting opinion of Mr De Meyer;
(d) dissenting opinion of Mr Lohmus.

Initialled: R. B.

Initialled: H. P.

CONCURRING OPINION OF JUDGE BERNHARDT

Personally, I am not convinced that the video film Visions of Ecstasy should have been banned by the refusal of a classification certificate, and this conviction is, inter alia, based on my impression when seeing the film. But it is the essence of the national margin of appreciation that, when different opinions are possible and do exist, the international judge should only intervene if the national decision cannot be reasonably justified.

I have finally voted with the majority for the following reasons:

(1) A prior control and classification of video films is not excluded in this most sensitive area and in view of the dangers involved, especially for young persons and the rights of others.

(2) Such a control requires a proper procedure and a careful weighing of the interests involved whenever a classification certificate is refused. In this respect, the present judgment describes in detail (paragraphs 11-19) the considerations and reasons in the decisions of the British authorities.

(3) In respect of the question whether the interference was "necessary in a democratic society", I am convinced that the national authorities have a considerable margin of appreciation, and they have made use of it in the present case in a manner acceptable under Convention standards.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I voted with the majority, but for reasons which are substantially different in structure and content from those given in the judgment; I have not followed the reasoning in the Otto-Preminger-Institut case (judgment of 20 September 1994, Series A no. 295-A).

The first problem considered concerned the British legislation making blasphemy a criminal offence.

Admittedly, it is regrettable that the protection afforded by this legislation does not apply to other religions, for such a limitation makes no sense in 1996 now that we have the United Nations and UNESCO instruments on tolerance. However, the European Convention on Human Rights does not, on the one hand, prohibit legislation of this type, which is found in a number of member States, and, on the other hand, it leaves scope for review under Article 14 (art. 14). In the present case no complaint had been made to the European Court under that Article (art. 14).

The Court had to decide the case under Article 10 (art. 10). To my mind, the law on blasphemy provides a basis for consideration of the case under paragraph 2 of Article 10 (art. 10-2) and cannot automatically justify a ban on distribution.

Article 9 (art. 9) is not in issue in the instant case and cannot be invoked. Certainly the Court rightly based its analysis under Article 10 (art. 10) on the rights of others and did not, as it had done in the Otto-Preminger-Institut judgment combine Articles 9 and 10 (art. 9, art. 10), morals and the rights of others, for which it had been criticised by legal writers. However, the wording adopted by the Chamber in paragraphs 50 and 53 creates, in my opinion, too direct a link between the law of blasphemy and the criteria justifying a ban or restriction on the distribution of video-cassettes.

The fact that under the legislation on blasphemy, profanation

or defamation may give rise to a prosecution does not in itself justify, under Article 10 (art. 10) of the European Convention, a total ban on the distribution of a book or video.

In my view, the Court ought to have made that clear. There can be no automatic response where freedom of expression is concerned.

The Court should, I think, have set out in its reasoning the facts that led the Video Appeals Committee - to which the applicant appealed against the determination of the British Board of Film Classification - to prohibit distribution of the video.

I consider that the same decision could have been reached under paragraph 2 of Article 10 (art. 10-2) on grounds other than blasphemy, for example the profanation of symbols, including secular ones (the national flag) or jeopardising or prejudicing public order (but not for the benefit of a religious majority in the territory concerned).

The reasoning should, in my opinion have been expressed in terms both of religious beliefs and of philosophical convictions. It is only in paragraph 53 of the judgment that the words "any other" are cited.

Profanation and serious attacks on the deeply held feelings of others or on religious or secular ideals can be relied on under Article 10 para. 2 (art. 10-2) in addition to blasphemy.

What was particularly shocking in the Wingrove case was the combination of an ostensibly philosophical message and wholly irrelevant obscene or pornographic images.

In this case, the use of obscenity for commercial ends may justify restrictions under Article 10 para. 2 (art. 10-2); but the use of a figure of symbolic value as a great thinker in the history of mankind (such as Moses, Dante or Tolstoy) in a portrayal which seriously offends the deeply held feelings of those who respect their works or thought may, in some cases, justify judicial supervision so that the public can be alerted through the reporting of court decisions.

But the possibility of prosecution does not suffice to make a total ban legitimate. That question has been raised recently: can a breach of rules of professional conduct (medical confidentiality) in itself justify a total ban on a book?

Mr Wingrove's own argument and the contradictions it contained could even have been used to supplement the Court's reasoning.

In his application he claimed that intellectual works should be protected against censorship on exclusively moral or religious grounds. In an article which is not reproduced in the video Mr Wingrove indicated that he was seeking to interpret St Teresa's writings explaining her ecstasies. In his submission, they amounted practically to a Voltairean work or one having anti-religious connotations. The film is quite different. Mr Wingrove did not even agree to cut (which he was entitled to do as the film-maker) the "simulated copulation" scene which was quite unnecessary, even in the context of the film. Indeed, he acknowledged that as the video stood,

it could have been called Gay Nuns in Bondage, like a pornographic film (see the Commission's report, decision on admissibility, p. 32).

The use of the word "ecstasy" in the title was a source of ambiguity, as much for people interested in literary works as for those interested in pornography. The sale in hypermarkets and supermarkets of videos inciting pornographic or obscene behaviour is even more dangerous than the sale of books, as it is more difficult to ensure that the public are protected.

The recent world-wide conference in Stockholm on the protection of children highlighted the harmful social consequences of distributing millions of copies of obscene or pornographic videos to the public without even minimal checking of their identification marks. Disguising content is a commercial technique that is used to circumvent bans (for example, videos for paedophiles that use adolescent girls, who have only just attained their majority, dressed up as little girls).

Admittedly, before it was edited, Mr Wingrove's film was presented as having literary rather than obscene ambitions, but its maker chose not to dispel the ambiguity he had created. Nor did he seek judicial review, as it was open to him to do, of the Video Appeals Committee's dismissal of his appeal against the Board of Film Classification's refusal to grant a classification certificate.

It is true that section 7 of the Video Recordings Act 1984 contains a variety of provisions regulating the grant and use of certificates, ranging from outright bans to restrictions on viewing, identification requirements (in sales centres and on the cover) or measures to protect minors. On this point, British and North American case-law, particularly in Canada, contains a wealth of definitions of the boundaries between literature, obscenity and pornography (see the Revue du Barreau du Québec and the Supreme Court's case-law review).

The majority of the Video Appeals Committee took the view that the imagery led not to a religious perception, but to a perverse one, the ecstasy being furthermore of a perverse kind. That analysis was in conformity with the approach of the House of Lords, which moreover did not discuss the author's intention with respect to the moral element of the offence. The Board's Director said that it would have taken just the same stance in respect of a film that was contemptuous of Mohammed or Buddha.

The decision not to grant a certificate might possibly have been justifiable and justified if, instead of St Teresa's ecstasies, what had been in issue had been a video showing, for example, the anti-clerical Voltaire having sexual relations with some prince or king. In such a case, the decision of the European Court might well have been similar to that in the Wingrove case. The rights of others under Article 10 para. 2 (art. 10-2) cannot be restricted solely to the protection of the rights of others in a single category of religious believers or philosophers, or a majority of them.

The Court was quite right to base its decision on the protection of the rights of others pursuant to Article 10 (art. 10), but to my mind it could have done so on broader grounds, inspired to

a greater extent by the concern to protect the context of religious beliefs "or ... any other", as is rightly pointed out in paragraph 53 of the judgment.

In the difficult balancing exercise that has to be carried out in these situations where religious and philosophical sensibilities are confronted by freedom of expression, it is important that the inspiration provided by the European Convention and its interpretation should be based both on pluralism and a sense of values.

DISSENTING OPINION OF JUDGE DE MEYER

1. This was a pure case of prior restraint, a form of interference which is, in my view, unacceptable in the field of freedom of expression.

What I have written on that subject, with four other judges, in the case of Observer and Guardian v. the United Kingdom (1) applies not only to the press, but also, mutatis mutandis, to other forms of expression, including video works.

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1. Judgment of 26 November 1991, Series A no. 216, p. 46.
_____

2. It is quite legitimate that those wishing to supply video works be obliged to obtain from some administrative authority a classification certificate stating whether the works concerned may be supplied to the general public or only to persons who have attained a specified age, and whether, in the latter case, they are to be supplied only in certain places (2).

_____
2. Section 7 of the Video Recordings Act 1984.
_____

Of course, anything so decided by such authority needs reasonable justification and must not be arbitrary. It must, if contested, be subject to judicial review, and it must not have the effect of preventing the courts from deciding, as the case may be, whether the work concerned deserves, or does not deserve, any sanction under existing law.

3. Under the system established by the Video Recordings Act 1984 the British Board of Film Classification and the Video Appeals Committee may determine that certain video works are not suitable for being classified in any of its three categories (3), and they can thus ban them absolutely ab initio.

_____
3. Section 4 of the Act.
_____

This was indeed what actually happened in respect of the piece in issue in the present case.

It certainly goes too far.

4. To the extent that the criminal law of blasphemy might have been infringed by the applicant, I would observe that the necessity of such laws is very much open to question.

I would rather join Mr Patten's remark that for the faithful "the strength of their own belief is the best armour against mockers and blasphemers" (4).

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4. See paragraph 29 of the present judgment.

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DISSENTING OPINION OF JUDGE LOHMUS

1. I am unable to agree with the conclusion of the majority that the interference with the applicant's right to freedom of expression was "necessary in a democratic society".

2. The British Board of Film Classification and the five-member panel of the VAC took the view that the applicant would commit an offence of blasphemy if his video work Visions of Ecstasy were to be distributed (see paragraph 20 of the judgment).

3. In cases of prior restraint (censorship) there is interference by the authorities with freedom of expression even though the members of the society whose feelings they seek to protect have not called for such interference. The interference is based on the opinion of the authorities that they understand correctly the feelings they claim to protect. The actual opinion of believers remains unknown. I think that this is why we cannot conclude that the interference corresponded to a "pressing social need".

4. The law of blasphemy only protects the Christian religion and, more specifically, the established Church of England (see paragraph 28 of the judgment). The aim of the interference was therefore to protect the Christian faith alone and not other beliefs. This in itself raises the question whether the interference was "necessary in a democratic society".

5. As the Court has consistently held, the guarantees enshrined in Article 10 (art. 10) apply not only to information or ideas that are favourably received or regarded as inoffensive, but also to those that shock or disturb. Artistic impressions are often conveyed through images and situations which may shock or disturb the feelings of a person of average sensitivity. In my view, the makers of the film in issue did not exceed the reasonable limit beyond which it can be said that objects of religious veneration have been reviled or ridiculed.

6. The majority has found that in the field of morals the national authorities have a wide margin of appreciation. As in that field, "there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions" (see paragraph 58 of the judgment). The Court makes distinctions within Article 10 (art. 10) when applying its doctrine on the States' margin of appreciation. Whereas, in some cases, the margin of appreciation applied is wide, in other cases it is more limited. However, it is difficult to ascertain what principles determine the scope of that margin of appreciation.