



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2024

Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

‘CASE ANALYSIS: WINGROVE V THE UNITED KINGDOM’

INTRODUCTION

The ECtHR has been a model for human and fundamental right jurisprudence, with many maxims coming out of Strasbourg, the following Blog analyses a landmark case relating to obscenity, blasphemy and religion, where ECtHR enunciated once more that in such matters, the state has greater margin of appreciation in greater interests of the public and explores its relevancy in current scenarios since the offence of blasphemy has been done away with in most of the EU.

THE FACTS

- The plaintiff, Nigel Wingrove a film director, wrote and directed a short film called ‘Visions of Ecstasy’ that portrayed the ecstatic visions of Christ experienced by a sixteenth century Carmelite nun, St Teresa of Avila.
- The cast list appeared for a short time on the screen, there is no point in the video where its context is explained.
- The film was submitted to the British Board of Film Certification (Hereinafter BBFC) for a classification certificate for distribution under section 4(1) of the Video Recordings Act, 1984.¹ The board rejected the same describing it as ‘Blasphemous’ by

¹ Video Recordings Act, 1984, § 4(1), No. 39, Acts of Parliament, 1984 (the United Kingdom). (“The British Board of Film Certification is 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....”)

the erstwhile definition of Blasphemy,² saying that the calculated manner of presentation of the video, which contained nudity, fetishism, lesbianism and implication of sex between Christ and the nun, might injure Christians.

- The plaintiff appealed to the Video Appeals Committee under section 4(3) of the act.³ contending inter alia, that Blasphemy didn't have a concrete definition and the one applied by the board is very wide. The panel dismissed the appeal stating that there was no material to support the claim that Teresa had elements of sex and lesbianism in her visions. The panel concluded that the video tended to exploit religion only carnally which was blasphemous.
- The plaintiff appealed to the European Court of Human Rights (ECtHR) for violation of article 10 of the European Convention on Human Rights (ECHR).⁴

ISSUES FRAMED

The issues in front of the court were as under:

1. Whether the rejection to issue certificate of classification by BBFC to plaintiff's work read in conjunction to the statutory law that criminalizes distribution without such certificate⁵ violates article 10 of the ECHR?

In relation to blasphemy laws and restrictions by the board under the 1984 act, further sub-issues were framed by the court reading the same with the exceptions under article 10 para 2⁶:

² R v Lemon; R v Gay News Ltd [1979] 1 All ER 898. (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.)

³ Video Recordings Act, 1984, § 4(3), No. 39, Acts of Parliament, 1984 (the United Kingdom).

⁴ Article 10, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. (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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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.)

⁵ Video Recordings Act, 1984, § 9, No. 39, Acts of Parliament, 1984 (the United Kingdom).

⁶ *Supra note 4.*

- 1.1. Whether the restriction was prescribed by law?
- 1.2. Whether it pursued an aim that was legitimate under that provision?
- 1.3. Whether such interference was necessary in a democratic society?

ANALYSIS AND JUDGMENT

To determine the contentions the examination of the sub-issues is needed first, article 10(2) prescribes that the right of expression should be read subject to restrictions which are **prescribed by law, in pursuance of a legitimate aim** that should be **necessary in the interests of a democratic society**. This test has been concretized in numerous judgements as cornerstone to evaluate any violation of article 10.⁷

1.1. WHETHER THE INTERFERENCE WAS ‘PRESCRIBED BY LAW’

The applicant contended that the definition of the offence of Blasphemy was so vague and wide that it was impossible to know the outcome of deliberations of the board. Thus, he couldn't have ‘Reasonably Foreseen’ the outcome of its speculations. The requirement of reasonable foresight flows from the expression ‘Prescribed by Law’ which wasn't fulfilled.

The court agreeing with the government, stated that it was a feature of common law that various courts can reach different verdicts after applying the same law, this didn't make the decision unforeseeable per se also, given that there were only so many ways and methods of publishing Blasphemous matter, the codification of what images would be specifically blasphemous isn't possible.

Blasphemy, by its very nature can't be defined precisely, thus the court noted that national authorities must be given flexibility in these cases.⁸ However, there was no uncertainty with regards to the latest definition of Blasphemy as propounded by the House of Lords, and there was sufficient legal advice available to the applicant, that could have made him foresee that his work seen in light of the definition particularly the scenes with Jesus and Teresa could be blasphemous.

⁷ The Sunday Times v The United Kingdom (1979) EHRR 245.

⁸ Tolstoy Miloslavsky v the United Kingdom (1995) 20 EHRR 442.

Thus, the impugned action can be said to be ‘Prescribed by law’ as it was reasonably foreseeable to predict board’s decision, whose discretion was based on statute and not arbitrariness.⁹

1.2. WHETHER THE INTERFERENCE ‘PURSUED A LEGITIMATE AIM’

The government contested that refusal of certification was valid as it pursued a legitimate aim of protection of citizens right of not to be offended in their religious feelings. The court had already accepted this as a legitimate aim, opining that respect for religion can allow state to legitimately restrict publication of provocative portrayals of the sacred.¹⁰

The board restricted the circulation of the film because ‘the calculated manner of presentation (that is, bound, not intended) to outrage those of understanding of Christian faith because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented.’¹¹ The court viewed the video itself and concluded that the scenes involving Christ and Teresa were indeed legitimately fitting of such description.

Thus, the aim of the board as highlighted indeed fits the expression ‘Protection of Rights of Others’ in article 10.

1.3. WHETHER THE INTERFERENCE WAS ‘NECESSARY IN A DEMOCRATIC SOCIETY’

No restriction on freedom of expression, whether in the context of religious beliefs or in any other, can be compatible with Article 10 unless the ‘Test of Necessity’ is satisfied, in this regard, some limited margin of appreciation is granted to the states, it’s always the ECtHR that has the final say in the compatibility of the convention, by accessing inter alia, the ‘Pressing Social Need’ and ‘Legit Aim Pursued’ in the case.¹²

It can be argued that the film wasn’t a feature film, rather it was a short-film whose distribution, if granted won’t have been wide, also, it can be given an ‘A’ rating and can be

⁹ Open Door and Dublin Well Women v Ireland, (1993) 15 EHRR 244.

¹⁰ Otto-Preminger-Institut v. Austria, 11/1993/406/485, Council of Europe: European Court of Human Rights, 23 August 1994.

¹¹ Para 15, Wingrove v The United Kingdom, Application No. 17419/90.

¹² Goodwin v The United Kingdom, Application No. 17488/90.

sold in licensed sex shops under the 1984 act. Further, when protection has already been granted by laws like obscenity, then an archaic blasphemy law, is rendered superfluous. However, the court opined that obscenity laws have a different object than blasphemy laws and although these laws are archaic, they are in force in many nations, with their use becoming rare but, there is no consensus between the member states that blasphemy laws are ‘unnecessary in a democratic society’ in pursuance to the convention.¹³

The court also noted that a wider margin of appreciation is available to the states when prosecuting claims of freedom of expression religion as there is no uniform definition of ‘Protection of Rights of Others’ when it comes to religion. As the conception of what is outrageous changes across countries and times, the state deemed to have a better understanding of its own environment is given such margin in ‘Necessity’ and ‘Protection of Rights’,¹⁴ however that doesn’t exclude final EU supervision, given the wideness of blasphemy and risk of state arbitrariness.¹⁵

The court’s work in this case therefore is just to look at the reasons given by national authorities to justify the necessity of the action. The English blasphemy law doesn’t prohibit expression, but only the perverse manner of it¹⁶ this degree provides a veritable safeguard against arbitrariness. Against this background the necessity must be analysed.

Now, the film portrays Teresa and Christ indulged in an overt sexual act, and by seeing it the board and the committee concluded that the focus wasn’t on the erotic feelings of the character but the audience, that is a function of pornography¹⁷ and no attempt was made to explore the context of the story apart from the cast list, thus the film was purely for engaging viewer in ‘erotic voyeuristic experiences’ that could have caused grave harm to feelings of Christians by the sheer manner of presentation if distributed and having viewed the film, the court agreed so.

As regards to the smaller viewing pool of the film and selling in sex shops, the court citing the state of the video industry in the UK¹⁸ opined that as is in nature of video-works it can be easily pirated and sold illegally.

¹³ *Supra note 16.*

¹⁴ *Müller v Switzerland IHRL 77 (ECHR 1988).*

¹⁵ *The Observer and Guardian v The United Kingdom (1992)14 EHRR 153.*

¹⁶ *Supra note 2.*

¹⁷ *Supra note 20.*

¹⁸ Para 22, *Wingrove v The United Kingdom*, Application No. 17419/90. (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.) Judging by this the court opined on the nature of video industry in general.

Therefore, the authorities had no other option but to ban the film from distribution and thus, they didn't overstep their margin of appreciation in doing so.

AUTHOR'S OPINION AND CONCLUSION

Since **the interference was prescribed by law and the verdict of the board was foreseeable**, the interference **pursued a legitimate aim of safeguarding religious feelings of citizens** and the **interference was necessary**, the facts satisfy the caveats of article 10 and therefore the **refusal didn't violate it**.

The case set a precedent in both religious and freedom of speech jurisprudence within the European Union.

The author agrees with most of the contentions of the case but one, the interference being necessary in a democratic society. The board and the panel took a view that the work would hurt religious feelings of Christians and decided to ban it, this gives the case a colour of a case of 'Prior Restraint' where the authorities being sacrosanct ban a thing based on their opinion while the real opinion of the masses remains unknown, thus the idea of 'Pressing Social Need' falls apart, as the film hasn't even been opined on by society. The wideness of margin of appreciation also being subjective to define in cases of religion by set principles questions the idea of necessity.

Further, the law of blasphemy was discriminatory towards Anglicanism, a democratic society consists of a wide range of religions, this itself raises a question on necessity. If we look at India's provisions of hurt of religious sentiments under IPC 295-A¹⁹, they are neutral on religion, but this law specifically favoured Christianity.

Strasbourg's approach needs to change today as almost two decades after this case, a consensus has been forming in EU that blasphemy is unnecessary in a democratic society, since this case, five nations have abolished it, including UK.²⁰ The margin of appreciation and the interplay between freedom of religion and freedom of speech needs re-evaluation.

¹⁹ Indian Penal Code 1860, § 295A, No. 45, Acts of Imperial Legislative Council, 1860 (India).

²⁰ Robert Kahn, *Five Thoughts About the Repeal of Denmark's Blasphemy Ban*, Conference Paper, Loyala Constitutional Law Collegium, 2018 (Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112778)