

COURT (CHAMBER)

**CASE OF LASKEY AND OTHERS v. THE UNITED KINGDOM**

*(Application no. 21627/93; 21628/93; 21974/93)*

JUDGMENT

STRASBOURG

19 February 1997

**In the case of Laskey, Jaggard and Brown v. the United Kingdom** <sup>[1]</sup>,

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 <sup>[2]</sup>, as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr L.-E. PETTITI,

Mr C. RUSSO,

Mr A. SPIELMANN,

Sir John FREELAND,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

Mr P. KURIS,

Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 October 1996 and 20 January 1997,

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

## PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 December 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 three applications (nos. 21627/93, 21826/93 and 21974/93) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 14 December 1992 by three British nationals, Mr Colin Laskey, Mr Roland Jaggard and Mr Anthony Brown.

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 object of the request 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 8 of the Convention (art. 8).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the late Mr Laskey's father and the two other applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (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 8 February 1996, 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 C. Russo, Mr A. Spielmann, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr P. Kuris and Mr E. Levits (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).
4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's and the applicants' memorials on 2 and 15 July 1996 respectively.
5. On 17 July 1996, the President 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). The comments were received on 16 August 1996.
6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 October 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. CHRISTIE, Assistant Legal Adviser, Foreign and Commonwealth Office,	<i>Agent,</i>
Mr D. PANNICK QC, Mr M. SHAW,	<i>Counsel,</i>
Mr S. BRAMLEY, Ms B. MOXON,	<i>Advisers;</i>

(b) for the Commission

Mr G. RESS,	<i>Delegate;</i>
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(c) for the applicants

Lord LESTER OF HERNE HILL QC, Ms A. WORRALL QC, Mr D. JONAS, Mr A. HAMILTON, Mr I. GEFFEN,	<i>Counsel,</i>    <i>Solicitors,</i>
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Mr J. WADHAM,

*Adviser.*

The Court heard addresses by Mr Ress, Lord Lester of Herne Hill, Ms Worrall and Mr Pannick.

## AS TO THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. Mr Laskey, Mr Jaggard and Mr Brown, all British citizens, were born in 1943, 1947 and 1935 respectively. Mr Laskey died on 14 May 1996.
  
8. In 1987, in the course of routine investigations into other matters, the police came into possession of a number of video films which were made during sado-masochistic encounters involving the applicants and as many as forty-four other homosexual men. As a result the applicants, with several other men, were charged with a series of offences, including assault and wounding, relating to sado-masochistic activities that had taken place over a ten-year period. One of the charges involved a defendant who was not yet 21 years old - the age of consent to male homosexual practices at the time. Although the instances of assault were very numerous, the prosecution limited the counts to a small number of exemplary charges.

The acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare hands or a variety of implements, including stinging nettles, spiked belts and a cat-o'-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring.

These activities were consensual and were conducted in private for no apparent purpose other than the achievement of sexual gratification. The infliction of pain was subject to certain rules including the provision of a code word to be used by any "victim" to stop an "assault", and did not lead to any instances of infection, permanent injury or the need for medical attention.
  
9. The activities took place at a number of locations, including rooms equipped as torture chambers. Video cameras were used to record events and the tapes copied and distributed amongst members of the group. The prosecution was largely based on the contents of those videotapes. There was no suggestion that the tapes had been sold or used other than by members of the group.
  
10. The applicants pleaded guilty to the assault charges after the trial judge ruled that they could not rely on the consent of the "victims" as an answer to the prosecution case.
  
11. On 19 December 1990, the defendants were convicted and sentenced to terms of imprisonment. On passing sentence, the trial judge commented: "... the unlawful conduct now before the court would be dealt with equally in the prosecution of heterosexuals or bisexuals if carried out by them. The homosexuality of the defendants is only the background against which the case must be viewed."

Mr Laskey was sentenced to imprisonment for four years and six months. This included a sentence of four years' imprisonment for aiding and abetting keeping a disorderly house (see paragraph 31 below) and a consecutive term of six months' imprisonment for possession of an indecent photograph of a child. Under section 47 of the Offences against the Person Act 1861 ("the 1861 Act" - see paragraph 27 below), Mr Laskey also received concurrent sentences of twelve months' imprisonment in respect of various counts of assault occasioning actual bodily harm and aiding and abetting assault occasioning actual bodily harm.

12. Mr Jaggard was sentenced to imprisonment for three years. He received two years' imprisonment for aiding and abetting unlawful wounding - contrary to section 20 of the 1861 Act (see paragraph 25 below) -, and a further twelve months' imprisonment for assault occasioning actual bodily harm, aiding and abetting the same offence, and unlawful wounding.
13. Mr Brown was sentenced to imprisonment for two years and nine months. He received twelve months' imprisonment for aiding and abetting assault occasioning actual bodily harm, a further nine months' imprisonment for assault occasioning actual bodily harm, and a further twelve months' imprisonment for further assaults occasioning actual bodily harm.
14. The applicants appealed against conviction and sentence.
15. On 19 February 1992, the Court of Appeal, Criminal Division, dismissed the appeals against conviction. Since, however, the court found that the applicants did not appreciate that their actions in inflicting injuries were criminal, reduced sentences were imposed.
16. Mr Laskey's sentence was thus reduced to eighteen months' imprisonment as regards the charge of aiding and abetting keeping a disorderly house. This sentence was to run concurrently with another three months' sentence in respect of the various counts of assault and consecutively with six months' imprisonment for the possession of an indecent photograph of a child, totalling two years' imprisonment.
17. Mr Jaggard's and Mr Brown's sentences were reduced to six months' and three months' imprisonment respectively.
18. The applicants appealed to the House of Lords on the following certified point of law of public importance:

"Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the 1861 Act?"
19. On 11 March 1993, the appeal, known as the case of R. v. Brown ([1993] 2 All England Law Reports 75), was dismissed by a majority of the House of Lords, two of the five law lords dissenting.

20. Lord Templeman, in the majority, held after reviewing the case-law that:

"... the authorities dealing with the intentional infliction of bodily harm do not establish that consent is a defence to a charge under the Act of 1861. They establish that consent is a defence to the infliction of bodily harm in the course of some lawful activities. The question is whether the defence should be extended to the infliction of bodily harm in the course of sado-masochistic encounters ...

Counsel for the appellants argued that consent should provide a defence ... because it was said every person has a right to deal with his own body as he chooses. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be taken. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted harm on willing victims ...

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty ...

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised."

21. Lord Jauncey of Tullichettle found that:

"In my view the line falls properly to be drawn between assault at common law and the offence of assault occasioning actual bodily harm created by section 47 of the 1861 Act, with the result that consent of the victim is no answer to anyone charged with the latter offence ... unless the circumstances fall within one of the well known exceptions such as organised sporting contests or games, parental chastisement or reasonable surgery ... the infliction of actual or more serious bodily harm is an unlawful activity to which consent is no answer.

... Notwithstanding the views which I have come to, I think it right to say something about the submissions that consent to the activity of the appellants would not be injurious to the public interest.

Considerable emphasis was placed by the appellants on the well-ordered and secret manner in which their activities were conducted and upon the fact that these activities had resulted in no injuries which required medical attention. There was, it was said, no question of proselytising by the appellants. This latter submission sits ill with the following passage in the judgment of the Lord Chief Justice:

'They [Laskey and Cadman] recruited new participants; they jointly organised proceedings at the house where much of this activity took place; where much of the pain inflicting equipment was stored.

Cadman was a voyeur rather than a sado-masochist, but both he and Laskey through their operations at the Horwich premises were responsible in part for the corruption of a youth "K" who is now it seems settled into a normal heterosexual relationship.'

Be that as it may, in considering the public interest it would be wrong to look only at the activities of the appellants alone, there being no suggestion that they and their associates are the only practitioners of homosexual sado-masochism in England and Wales. This House must therefore consider the possibility that these activities are practised by others and by others who are not so controlled or responsible as the appellants are claiming to be. Without going into details of all the rather curious activities in which the appellants engaged it would appear to be good luck rather than good judgment which has prevented serious injury from occurring. Wounds can easily become septic if not properly treated, the free flow of blood from a person who is HIV-positive or who has AIDS can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented. Your Lordships have no information as to whether such situations have occurred in relation to other sado-masochistic practitioners. It was no doubt these dangers which caused Lady Mallalieu to restrict her propositions in relation to the public interest to the actual rather than the potential result of the activity. In my view such a restriction is quite unjustified. When considering the public interest potential for harm is just as relevant as actual harm. As Mathew J. said in *Coney* 8 Queen's Bench 534, 547:

‘There is however abundant authority for saying that no consent can render that innocent which is in fact dangerous.’

Furthermore, the possibility of proselytisation and corruption of young men is a real danger even in the case of these appellants and the taking of video recordings of such activities suggests that secrecy may not be as strict as the appellants claimed to your Lordships."

22. Lord Mustill and Lord Slynn of Hadley dissented. The first considered that the case should not be treated as falling within the criminal law of violence but rather within the criminal law of private sexual relations. He gave weight to the arguments of the appellants concerning Article 8 of the Convention (art. 8), finding that the decisions of the European authorities clearly favoured the right of the appellants to conduct their private life undisturbed by the criminal law. He considered after an examination of the relevant case-law that it was appropriate for the House of Lords to tackle afresh the question whether public interest required penalising the infliction of this degree of harm in private on a consenting recipient, where the purpose was not profit but gratification of sexual desire. He found no convincing argument on grounds of health (alleged risk of infections or spread of AIDS), the alleged risk of the activities getting out of hand or any possible risk of corruption of youth which might require the offences under the 1861 Act to be interpreted as applying to this conduct.
23. Lord Slynn of Hadley found that as the law stood adults were able to consent to acts done in private which did not result in serious bodily harm. He agreed that it was in the end a matter of policy in an area where social and moral factors were extremely important and where attitudes could change. It was however for the legislature to decide whether such conduct should be brought within the criminal law and not for the courts in the interests of "paternalism" to introduce into existing statutory crimes relating to offences against the person concepts which did not properly fit there.
24. The proceedings were given widespread press coverage. All the applicants lost their jobs and Mr Jaggard required extensive psychiatric treatment.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Offences against the persons

#### 1. *The Offences against the Person Act 1861*

25. Section 20 of the Offences against the Person Act 1861 ("the 1861 Act") provides:

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, ... shall be liable ... to [imprisonment] ... for not more than five years."

26. According to the case-law, to constitute a wound for the purposes of the section, the whole skin must be broken, not merely the outer layer or epidermis.
27. By section 47 of the 1861 Act:

"Whosoever shall be convicted on indictment of any assault occasioning actual bodily harm shall be liable ... to imprisonment for not more than five years."

Actual bodily harm is defined as "any hurt or injury calculated to interfere with health or comfort" (Liksey J, in *R. v. Miller* [1954] 2 Queen's Bench Reports 282, at 292).

### 2. Case-law prior to *R. v. Brown*

28. In the case of *R. v. Donovan* ([1934] 2 King's Bench Reports, at 498), the accused had beaten with a cane a girl for the purposes of sexual gratification, with her consent. Swift J held:

"It is an unlawful act to beat another person with such a degree of violence that the infliction of actual bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."

29. In *Attorney-General's Reference (No. 6 of 1980)* ([1980] Queen's Bench Reports, at 715) where two men quarrelled and decided to fight each other, Lord Lane CJ in the Court of Appeal had held:

"It is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases."

### 3. Case-law subsequent to *R. v. Brown*

30. In *R. v. Wilson* ([1996] 3 Weekly Law Reports, at 125), where a man had been convicted of assault occasioning actual bodily harm for having branded his initials with a hot knife on his wife's buttocks with her consent, the Court of Appeal, Criminal Division, allowed the appeal. In the course of the court's judgment, Lord Justice Russell stated:

"... there is no factual comparison to be made between the instant case and the facts of either *Donovan* or *Brown*: Mrs Wilson not only consented to that which the appellant did, she instigated it. There was no aggressive intent on the part of the appellant ...

...

We do not think that we are entitled to assume that the method adopted by the appellant and his wife was any more dangerous or painful than tattooing ...

Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution."

## B. Offences against public decency

31. Keeping a "disorderly house" is a common law offence. A disorderly house is defined as

"one which is not regulated by the restraints of morality and which is so conducted as to violate law and good order. There must be an element of 'open house', but it does not need to be open for the public at large ... Where indecent performances or exhibitions are alleged as rendering the premises a disorderly house, it must be proved that matters are there performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency, or (b) tends to corrupt or deprave, or (c) is otherwise



calculated to injure the public interest so as to call for condemnation and punishment" ([1996] Archbold's Criminal Pleading, Evidence and Practice 20, at 224).

## PROCEEDINGS BEFORE THE COMMISSION

32. Mr Laskey, Mr Jaggard and Mr Brown applied to the Commission on 14 December 1992. They relied on Articles 7 and 8 of the Convention (art. 7, art. 8), complaining that their convictions were the result of an unforeseeable application of a provision of the criminal law which, in any event, amounted to an unlawful and unjustifiable interference with their right to respect for their private life.
33. On 18 January 1995, the Commission declared the applications (nos. 21627/93, 21826/93 and 21974/93) admissible as to the complaint under Article 8 of the Convention (art. 8). In its report of 26 October 1995 (Article 31) (art. 31), it expressed the opinion, by eleven votes to seven, that there had been no violation of that provision (art. 8).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment [\[3\]](#).

## FINAL SUBMISSIONS TO THE COURT

34. At the hearing, the Government invited the Court to agree with the majority of the Commission that there had been no breach of the Convention in this case.

The applicants, for their part, asked the Court to consider the position of each individual applicant upon the basis of the agreed facts and the charges which were pertinent to them and to find a violation of their right to respect for their private lives through the expression of their sexual personality, as guaranteed by Article 8 of the Convention (art. 8).

## AS TO THE LAW

### ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

35. The applicants contended that their prosecution and convictions for assault and wounding in the course of consensual sado-masochistic activities between adults was in breach of Article 8 of the Convention (art. 8), which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of

health or morals, or for the protection of the rights and freedoms of others."

It was common ground among those appearing before the Court that the criminal proceedings against the applicants which resulted in their conviction constituted an "interference by a public authority" with the applicants' right to respect for their private life. It was similarly undisputed that the interference had been "in accordance with the law". Furthermore, the Commission and the applicants accepted the Government's assertion that the interference pursued the legitimate aim of the "protection of health or morals", within the meaning of the second paragraph of Article 8 (art. 8-2).

36. The Court observes that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8 (art. 8). In the present case, the applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life (see, *mutatis mutandis*, the *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Series A no. 45, p. 21, para. 52). However, a considerable number of people were involved in the activities in question which included, *inter alia*, the recruitment of new "members", the provision of several specially equipped "chambers", and the shooting of many videotapes which were distributed among the "members" (see paragraphs 8 and 9 above). It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.

However, since this point has not been disputed by those appearing before it, the Court sees no reason to examine it of its own motion in the present case. Assuming, therefore, that the prosecution and conviction of the applicants amounted to an interference with their private life, the question arises whether such an interference was "necessary in a democratic society" within the meaning of the second paragraph of Article 8 (art. 8-2).

### **"Necessary in a democratic society"**

37. The applicants maintained that the interference in issue could not be regarded as "necessary in a democratic society". This submission was contested by the Government and by a majority of the Commission.
38. In support of their submission, the applicants alleged that all those involved in the sado-masochistic encounters were willing adult participants; that participation in the acts complained of was carefully restricted and controlled and was limited to persons with like-minded sado-masochistic proclivities; that the acts were not witnessed by the public at large and that there was no danger or likelihood that they would ever be so witnessed; that no serious or permanent injury had been sustained, no infection had been caused to the wounds, and that no medical treatment had been required. Furthermore, no complaint was ever made to the police - who learnt about the applicants' activities by chance (see paragraph 8 above).

The potential for severe injury or for moral corruption was regarded by the applicants as a matter of speculation. To the extent that issues of public morality had arisen - with reference to Mr Laskey's conviction for keeping a disorderly house and for the possession of an indecent photograph of a child (see paragraph 11 above) - these had been dealt with under the relevant sexual offences provisions and appropriately punished. In any event, such issues fell outside the

scope of the case as presented before the Court.

39. The applicants submitted that their case should be viewed as one involving matters of sexual expression, rather than violence. With due regard to this consideration, the line beyond which consent is no defence to physical injury should only be drawn at the level of intentional or reckless causing of serious disabling injury.
40. For the Government, the State was entitled to punish acts of violence, such as those for which the applicants were convicted, that could not be considered of a trifling or transient nature, irrespective of the consent of the victim. In fact, in the present case, some of these acts could well be compared to "genital torture" and a Contracting State could not be said to have an obligation to tolerate acts of torture because they are committed in the context of a consenting sexual relationship. The State was moreover entitled to prohibit activities because of their potential danger.

The Government further contended that the criminal law should seek to deter certain forms of behaviour on public-health grounds but also for broader moral reasons. In this respect, acts of torture - such as those in issue in the present case - may be banned also on the ground that they undermine the respect which human beings should confer upon each other. In any event, the whole issue of the role of consent in the criminal law is of great complexity and the Contracting States should enjoy a wide margin of appreciation to consider all the public-policy options.

41. The Commission noted that the injuries that were or could be caused by the applicants' activities were of a significant nature and degree, and that the conduct in question was, on any view, of an extreme character. The State authorities therefore acted within their margin of appreciation in order to protect its citizens from real risk of serious physical harm or injury.
42. According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the national authorities (see, *inter alia*, the *Olsson v. Sweden* (no. 1) judgment of 24 March 1988, Series A no. 130, pp. 31-32, para. 67), whose decision remains subject to review by the Court for conformity with the requirements of the Convention.

The scope of this margin of appreciation is not identical in each case but will vary according to the context. Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned (see the *Buckley v. the United Kingdom* judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1291-92, para. 74).

43. The Court considers that one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise.
44. The determination of the level of harm that should be tolerated by the law in situations where the

victim consents is in the first instance a matter for the State concerned since what is at stake is related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual.

45. The applicants have contended that, in the circumstances of the case, the behaviour in question formed part of private morality which is not the State's business to regulate. In their submission the matters for which they were prosecuted and convicted concerned only private sexual behaviour.

The Court is not persuaded by this submission. It is evident from the facts established by the national courts that the applicants' sado-masochistic activities involved a significant degree of injury or wounding which could not be characterised as trifling or transient. This, in itself, suffices to distinguish the present case from those applications which have previously been examined by the Court concerning consensual homosexual behaviour in private between adults where no such feature was present (see the Dudgeon judgment cited above, the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, and the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259).

46. Nor does the Court accept the applicants' submission that no prosecution should have been brought against them since their injuries were not severe and since no medical treatment had been required.

In deciding whether or not to prosecute, the State authorities were entitled to have regard not only to the actual seriousness of the harm caused - which as noted above was considered to be significant - but also, as stated by Lord Jauncey of Tullichettle (see paragraph 21 above), to the potential for harm inherent in the acts in question. In this respect it is recalled that the activities were considered by Lord Templeman to be "unpredictably dangerous" (see paragraph 20 above).

47. The applicants have further submitted that they were singled out partly because of the authorities' bias against homosexuals. They referred to the recent judgment in the Wilson case (see paragraph 30 above), where, in their view, similar behaviour in the context of a heterosexual couple was not considered to deserve criminal punishment.

The Court finds no evidence in support of the applicants' allegations in either the conduct of the proceedings against them or the judgment of the House of Lords. In this respect it recalls the remark of the trial judge when passing sentence that "the unlawful conduct now before the court would be dealt with equally in the prosecution of heterosexuals or bisexuals if carried out by them" (see paragraph 11 above).

Moreover, it is clear from the judgment of the House of Lords that the opinions of the majority were based on the extreme nature of the practices involved and not the sexual proclivities of the applicants (see paragraphs 20 and 21 above).

In any event, like the Court of Appeal, the Court does not consider that the facts in the Wilson case were at all comparable in seriousness to those in the present case (see paragraph 30 above).

48. Accordingly, the Court considers that the reasons given by the national authorities for the measures taken in respect of the applicants were relevant and sufficient for the purposes of Article 8 para. 2 (art. 8-2).

49. It remains to be ascertained whether these measures were proportionate to the legitimate aim or aims pursued.

The Court notes that the charges of assault were numerous and referred to illegal activities which had taken place over more than ten years. However, only a few charges were selected for inclusion in the prosecution case. It further notes that, in recognition of the fact that the applicants did not appreciate their actions to be criminal, reduced sentences were imposed on appeal (see paragraphs 15-17 above). In these circumstances, bearing in mind the degree of organisation involved in the offences, the measures taken against the applicants cannot be regarded as disproportionate.

50. In sum, the Court finds that the national authorities were entitled to consider that the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health within the meaning of Article 8 para. 2 of the Convention (art. 8-2).
51. In view of this conclusion the Court, like the Commission, does not find it necessary to determine whether the interference with the applicants' right to respect for private life could also be justified on the ground of the protection of morals. This finding, however, should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 8 of the Convention (art. 8).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 1997.

Rudolf BERNHARDT

President

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 concurring opinion of Mr Pettiti is annexed to this judgment.

R. B.

H. P.

## CONCURRING OPINION OF JUDGE PETTITI

*(Translation)*

I concurred with all my colleagues in finding that there had been no violation of Article 8 of the Convention (art. 8). However, my reasoning differs from theirs in some respects.

Firstly, the Court implicitly accepted that Article 8 (art. 8) was applicable since it assumed there had been an interference, and the application referred to State interference under Article 8 (art. 8): "the institution of criminal proceedings infringed that Article (art. 8)."

In my view, that Article (art. 8) was not even applicable in the instant case. The concept of private life cannot be stretched indefinitely.

Not every aspect of private life automatically qualifies for protection under the Convention. The fact that the behaviour concerned takes place on private premises does not suffice to ensure complete immunity and impunity. Not everything that happens behind closed doors is necessarily acceptable. It is already the case in criminal law that the "rape" of a spouse where there is doubt whether consent was given may lead to prosecution. Other types of behaviour may give rise to civil proceedings (internal telephone tapping for example). Sexual acts and abuse, even when not criminal, give rise to liability.

The case could have been looked at differently, both in domestic law and subsequently under the Convention. Can one consider that adolescents taking part in sado-masochistic activities have given their free and informed consent where their elders have used various means of enticement, including financial reward?

In domestic law, sado-masochistic activities could be made the subject of a specific criminal offence without that being contrary to Article 8 (art. 8) of the European Convention on Human Rights.

It seems to me that the wording used by the Court in paragraph 42 is too vague. The margin of appreciation has been used by the Court mainly in dealing with issues of morals or problems of civil society, but above all so as to afford better protection to others; consequently, a reference to the *Müller and Others v. Switzerland* judgment would have been preferable to the reference to the *Buckley v. the United Kingdom* judgment (see Olivier de Schutter's commentary on that judgment in *Revue trimestrielle des droits de l'homme*, Brussels, 1997, pp. 64-93).

It seemed to me necessary to expand paragraph 43 by noting "to regulate and punish practices of sexual abuse that are demeaning even if they do not involve the infliction of physical harm".

The dangers of unrestrained permissiveness, which can lead to debauchery, paedophilia (see paragraph 11 of the judgment) or the torture of others, were highlighted at the Stockholm World Conference. The protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness or the promotion of criminal immoralism.

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[\[1\]](#) The case is numbered 109/1995/615/703-705. 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.

[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-I), but a copy of the Commission's report is obtainable from the registry