



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF PRYANISHNIKOV v. RUSSIA

(Application no. 25047/05)

JUDGMENT

STRASBOURG

10 September 2019

FINAL

10/12/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pryanishnikov v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Vincent A. De Gaetano, *President*,

Georgios A. Serghides,

Paulo Pinto de Albuquerque,

Helen Keller,

Dmitry Dedov,

Branko Lubarda,

Alena Poláčková, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 2 July 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 25047/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Sergey Viktorovich Pryanishnikov (“the applicant”), on 15 June 2005.

2. The applicant was represented by Mr A. Nachinkin, a lawyer practising in St Petersburg. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicant alleged that the refusal to grant him a film reproduction licence had violated his freedom of expression.

4. On 27 August 2009 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1957 and lives in St Petersburg.

6. The applicant is a producer. He owns the copyright to over 1,500 erotic films. The films were approved for public distribution by the Ministry of Culture for audiences over eighteen years old, and the applicant holds valid distribution certificates in respect of them. He has also produced

a film called *City of the Future*, which contained his election programme for the 2003 elections for the Governor of St Petersburg.

7. In 2003 the applicant applied to the Ministry of the Press, Broadcasting and Mass Media (hereafter “the Ministry of the Press”) for a film reproduction licence.

8. On 15 October 2003 the Ministry of the Press refused the applicant’s application for a licence. It referred to the fact that, according to information provided by a deputy Prosecutor General, the applicant “[was] involved in investigative measures concerning the illegal production, advertising and distribution of erotic and pornographic material and films”, an offence under Article 242 of the Criminal Code.

9. The applicant challenged the refusal before the Commercial Court of Moscow. In particular, he claimed that the refusal breached his right to engage in business activities and his copyright to the films. He submitted that the films had been approved for distribution and that he had never been charged with the distribution of pornography.

10. On 20 May 2004 the Commercial Court of Moscow rejected the applicant’s challenge and upheld the decision of 15 October 2003, relying on section 9 of the Licensing Act and section 14 of the Protection of Children Act (see paragraphs 17 and 27 below). It found that the decision had been lawful and justified. It noted that the applicant had never been formally charged with the distribution of pornography and had only been questioned by the police as a witness. However, no decision had yet been taken in the criminal proceedings and “it could not be ruled out that [the applicant] was involved in the illegal production of pornographic films with the aim of distributing them”. Therefore, it was necessary to refuse his application for a licence in order to protect minors from pornographic material.

11. On 7 September 2004 the Ninth Commercial Appeal Court (hereafter “the Appeal Court”) upheld the judgment on appeal. It found that the applicant’s involvement in the distribution of pornography had been confirmed by material from the Internet containing offers to sell pornographic products.

12. On 22 November 2004 the Federal Commercial Court of the Moscow Circuit (hereafter “the Court of Cassation”) upheld the judgments, finding that they had been lawful. It noted in particular that the licence had been refused because the applicant “[was] involved in investigative measures concerning the illegal production of pornographic material”. The applicant was absent from the hearing.

13. On 29 November 2004 a copy of the judgment was sent to the applicant. As the applicant did not receive it, he asked the Court of Cassation to send it to him again. He received a copy of the judgment on 18 April 2005.

14. According to the applicant, the charges of producing and distributing pornography were subsequently dropped in the absence of *corpus delicti* in his actions, and the prosecutor's office issued an official apology for unlawful prosecution.

II. RELEVANT DOMESTIC LAW

A. Freedom of expression

15. The Constitution of the Russian Federation guarantees freedom of thought and expression, freedom to receive and impart information, and freedom of the mass media. It prohibits censorship (Article 29).

B. Criminal liability for the distribution of pornography

16. The illegal production, distribution or advertising of pornographic material or objects, and the illegal selling of publications, films, videos, images or other objects of a pornographic nature were offences punishable by a fine or up to two years' imprisonment (Article 242 of the Criminal Code, as in force at the material time).

C. Protection of children

17. Section 14(1) of the Law on Basic Guarantees of the Rights of the Child in the Russian Federation (no. 124-FZ of 24 July 1998, as in force at the material time – hereafter “the Protection of Children Act”) provided that the authorities of the Russian Federation were to take measures to protect children from information, propaganda and incitement harmful to their health or moral and spiritual development, such as, among other things, printed material, audio and video products advocating violence and brutality, pornography, drug abuse or disorderly behaviour.

D. Copyright, distribution certificates and film reproduction licence

1. Copyright

18. An author had the exclusive right to use his work by any method, such as by reproduction; distribution; importation; a public showing; public performance; broadcasting, including through cable channels; translation; and revision (section 16(1) and (2) of the Law on Copyright and Related Rights, no. 5351-I of 9 July 1993, in force at the material time – hereafter “the Copyright Act”).

19. The authors of an audiovisual product were the director, the scriptwriter and the composer. Following the conclusion of a production

agreement for an audiovisual product, the exclusive right to its reproduction, distribution, public performance, broadcasting or any other public showing was transferred from the authors to the producer, unless the agreement provided otherwise (section 13(1) and (2) of the Copyright Act).

2. Registration of films and distribution certificates

20. At the material time, the registration of films was regulated by Governmental Decree no. 396 of 28 April 1993 on the Registration of Films and Control of their Public Distribution (hereafter “the Registration of Films Decree”).

21. All films intended for public (commercial and non-commercial) distribution or to be reproduced for the purposes of being sold, screened in cinemas or movie houses, hired out through video libraries or video rental facilities, or broadcast through television or cable channels were to be registered with the Ministry of Culture. Such registration pursued the aim of preventing the illegal use and distribution of films in the Russian Federation.

22. The Ministry of Culture issued distribution certificates (*прокатные удостоверения*) in respect of films which had been successfully registered. A distribution certificate indicated recommended age restrictions.

23. Individuals or legal entities owning the copyright to films could sell them for distribution to cinemas, cultural or educational centres, television production companies (including cable television) or other commercial or non-commercial organisations, or make copies for the purpose of selling the films or hiring them out, or distributing them through video libraries or hire centres. However, this was only possible after the films had been registered and distribution certificates issued.

24. The Ministry of Culture could refuse to issue a distribution certificate if the relevant applicant had not complied with the established procedure, or in other cases prescribed by law. The refusal could be challenged before a court.

25. By Order no. 112 of 15 March 2005, the Federal Culture and Cinematography Agency approved the Regulation on the Age Classification of Audiovisual Products. The regulation provides that the registration of a film may be refused if the film promotes: war; violence or cruelty; racial, ethnic, religious or social superiority or hatred; or pornography. It defines pornography as the naturalistic and detailed presentation of a sexual act or the detailed depiction of naked genitals in the process of sexual contact, whose primary purpose is to cause sexual arousal in the viewer and which has no artistic or educational aim, as well as the purposeless depiction of group sex. The regulation further provides that the depiction of a sexual act or other erotic scenes, as well as scenes of sexual violence and harassment, is permissible in films classified as being for distribution only to those aged

eighteen or over, provided that those scenes are justified by the plot and artistic aim of the film.

3. *Film reproduction licence*

26. A licence was required for the reproduction (production of copies) of audiovisual products and audio-recordings on all types of medium (section 17(86) of Law no. 128-FZ of 8 August 2001 on the Licensing of Certain Activities, in force at the material time – hereafter “the Licensing Act”).

27. A licence could be refused if the relevant application contained untrue or misrepresented information, or if the applicant or the objects belonging to him or used by him did not meet the licensing requirements and conditions. The refusal could be challenged before a court (section 9(3) and (4) of the Licensing Act).

28. In addition to technical requirements regarding the equipment used, the licensing requirements included the requirement that the applicant possess documents confirming his right to reproduce audiovisual products – such as a copyright agreement or permission for reproduction from the copyright owner – and a distribution certificate (Governmental Decree no. 381 of 4 June 2002 on Licensing the Reproduction (Making of Copies) of Audiovisual Products and Audio-Recordings on All Types of Medium, in force at the material time).

29. On 4 May 2008 section 17(86) of the Licensing Act was amended. The amended section 17(86) stated that persons who had copyright to audiovisual products and audio-recordings under a provision of federal law, or under a contract, did not need a licence to reproduce such material. On 4 May 2011 the Licensing Act was repealed and replaced by Law no. 99-FZ, which reproduced verbatim the amended section 17(86) of the Licensing Act (section 12(38) of Law no. 99-FZ).

E. Discontinuation of criminal proceedings

30. The Code of Criminal Procedure of 2001 provides that a person who has been acquitted or against whom criminal proceedings have been discontinued is entitled to “rehabilitation” (*реабилитация*) (Article 134). A prosecutor issues an official apology to the rehabilitated person on behalf of the State (Article 136 § 1).

F. Service of a copy of a final judgment

31. A copy of a judgment of the Court of Cassation must be sent to the parties within five days of the judgment being adopted (Article 289 § 4 of the Code of Commercial Procedure of 24 July 2002).

III. RELEVANT COUNCIL OF EUROPE MATERIAL

32. The relevant extracts from Recommendation No. R (89) 7 of the Committee of Ministers to member states concerning principles on the distribution of videograms having a violent, brutal or pornographic content (adopted by the Committee of Ministers on 27 April 1989 at the 425th meeting of the Ministers' Deputies) read as follows:

“The following principles are designed to assist member states in strengthening their action against videograms having a violent, brutal or pornographic content – as well as those which encourage drug abuse – in particular for the purpose of protecting minors. They should be envisaged as a complement to other existing Council of Europe legal instruments.

These principles concern in particular the distribution of videograms.

1. Systems for the distribution of videograms

The member states should:

- encourage the creation of systems of self-regulation, or
- create classification and control systems for videograms through the professional sectors concerned or the public authorities, or
- institute systems which combine self-regulatory with classification and control systems, or any other systems compatible with national legislation.

In all cases, member states remain free to make use of criminal law and dissuasive financial and fiscal measures.

...

3. Classification and control systems

3.1. The member states should encourage the creation of systems of classification and control of videograms by the professional sectors concerned in the framework of self-regulatory systems, or through the public authorities. Such systems may be implemented either prior to, or following the distribution of videograms.

...

3.3. The classification and control systems shall involve either the issue of a free distribution certificate, a limited distribution permit specifying the videogram's distribution conditions, or possibly an outright prohibition.

3.4. Under the classification and control system, the age of the public to whom the videogram can be distributed shall be specified according to national criteria.

3.5. All classified videograms shall be registered and their material mediums (video-cassettes, videodiscs, etc.) shall display in a clear and permanent fashion the classification of the videograms and the public for whom they are intended. In the case of material mediums featuring several videograms, the member states shall take measures so that the most restrictive classification be applied.

3.6. When the video classification procedure is separate from that of cinematographic films, the member states shall look for consistency between the two, in so far as possible, but taking account of the differences between the two media.

3.7. Allowance should be made, within the classification and control system, for simplified procedures or exemption of procedures for certain types of programmes, such as material whose purpose is educational, religious or informative. These exemptions should not apply to programmes having an unduly pornographic or violent content.

3.8. The control of the distribution of videograms shall apply to the distribution of both nationally produced videograms and imported ones.

...

6. Application of criminal law

In conjunction with, parallel to, or independently from the application of classification and control systems, or as an alternative to such systems, the member states should consider if the application of their criminal law concerning videograms is effective in dealing with the problem of videograms having a violent, brutal or pornographic content, as well as those which encourage drug abuse.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant complained about the refusal to grant him a film reproduction licence. He relied on Article 10 of the Convention, which reads as follows:

“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.”

A. Submissions by the parties

1. *The applicant*

34. The applicant submitted that the refusal to grant him a film reproduction licence had interfered with his right to freedom of expression. That interference had been unlawful, had not pursued any legitimate aim and had been unjustified. The domestic decisions refusing to grant him a

film reproduction licence had not contained any proof that he had ever distributed pornography. The domestic courts had relied on information from unspecified websites obtained by them *proprio motu* in the absence of a request from the parties. They had not verified that information and had not made any assessment of it.

35. The applicant further submitted that he had never been convicted of producing or distributing pornography. The charges against him had been dropped for absence of *corpus delicti* in his actions, and the prosecutor's office had issued an official apology for unlawful prosecution. The applicant asserted that he had never distributed pornographic videos, and insisted that he possessed requisite distribution certificates for all the videos which he owned and intended to distribute. The Ministry of Culture had therefore certified that they were not pornographic or otherwise illegal. However, the refusal of a film reproduction licence had made it impossible for him to copy and distribute those videos.

36. Lastly, the applicant argued that an unsubstantiated and therefore hypothetical possibility that he might distribute pornographic videos at some point in the future could not serve as lawful grounds for a refusal to grant him a film reproduction licence.

2. *The Government*

37. The Government conceded that the refusal to grant the applicant a film reproduction licence had interfered with his right to freedom of expression. That interference had been based on legal provisions which were clear and foreseeable. In particular, section 9 of the Licensing Act provided that a film reproduction licence could be refused if reproduction was unlawful (see paragraph 27 above). The domestic courts had found that the videos distributed by the applicant were pornographic and could therefore be harmful to citizens' health and rights.

38. The Government submitted that Article 10 § 1 of the Convention expressly permitted the licensing of broadcasting, television or cinema enterprises. Film reproduction licensing was a measure of State regulation to prevent the imparting of information and ideas judged incompatible with respect for the freedom of thought, conscience and religion of others (they referred to *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295-A). The pornographic videos produced and distributed by the applicant came under the category of such information. Production and distribution of pornography was a criminal offence in Russia. Moreover, under the 1923 Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, Russia had an obligation to punish the production, distribution, public showing and hiring out of pornographic material. The Government also referred to Recommendation No. R (89) 7 of the Committee of Ministers of the Council of Europe to member states concerning principles on the distribution of videograms having a violent,

brutal or pornographic content, which they interpreted as requiring a complete prohibition of pornographic videos (paragraph 3.3, see paragraph 32 above).

39. The Government further argued that the interference had pursued the legitimate aims of protecting morals and the rights of others, in particular protecting children from access to pornographic material. Moreover, it had been necessary in a democratic society for the following reasons. The applicant had previously been granted film reproduction licences on many occasions. However, on this occasion it had been established that the film he intended to distribute was clearly pornographic. If that film had been distributed, it would not have been subject to any form of control by the authorities and could have been viewed by children (compare *Hoare v. the United Kingdom*, no. 31211/96, Commission decision of 2 July 1997). The domestic courts had found that there were relevant and sufficient reasons to prohibit the film's distribution, and it was not the Court's role to question that finding. Furthermore, at the material time the applicant had been involved in a criminal investigation relating to the production of pornography. A limitation of his freedom of expression had therefore been justified.

40. The Government also mentioned that the domestic law had since been changed, so an owner of audiovisual products no longer needed to obtain a film reproduction licence to be able to reproduce and distribute them. The applicant was therefore no longer prevented from reproducing and distributing the films owned by him, even though he did not have a film reproduction licence. He had therefore lost his victim status.

41. Lastly, the Government submitted that the applicant had not submitted any documents confirming that the prosecutor's office had apologised to him for unlawful prosecution. He had therefore attempted to mislead the Court on an issue that was important for the proper determination of the case (they referred to *Sarmin and Sarmina v. Russia* (dec.), no. 58830/00, 22 November 2005).

B. The Court's assessment

1. Admissibility

(a) Alleged abuse of the right of individual application

42. The Court reiterates that under Article 35 § 3 of the Convention an application may be rejected as an abuse of the right of individual application if, among other reasons, it was knowingly based on untruths. The submission of incomplete and thus misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information. The same applies if new, important

developments have occurred during the proceedings before the Court and where, despite being expressly required to do so by Rule 47 § 7 (former Rule 47 § 6) of the Rules of Court, the applicant has failed to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts. However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014, with further references).

43. The Court notes that the criminal charges against the applicant were brought after the facts of the present case. The Government did not deny that they had eventually been dropped, they only disputed the applicant's assertion that the prosecutor had apologised for unlawful prosecution. However, domestic law requires a prosecutor to apologise in the event that criminal proceedings are discontinued (see paragraph 30 above). The fact that the applicant did not submit a copy of the official apology therefore appears to be due to a simple omission rather than an intention to mislead the Court. In any event, the domestic courts did not rely on the criminal charges against the applicant in their decisions concerning the reproduction licence, explicitly noting that at that time the applicant had not been formally charged with any criminal offences. It follows that the information about the development of the criminal proceedings after the facts of the present case is not essential for deciding the case.

44. The Court concludes from the above that there is no basis for finding that the applicant submitted untrue information concerning the very core of the case with the intention of misleading the Court and thereby abused his right of individual petition. In view of the foregoing considerations, the Court rejects the Government's request for the application to be declared inadmissible under Article 35 § 3 of the Convention as an abuse of the right of application.

(b) Victim status

45. In so far as the Government argued that the applicant had lost his victim status owing to a change in the domestic law, the Court reiterates that a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 82, ECHR 2012 (extracts)).

46. In the present case, the national authorities did not expressly acknowledge a breach of Article 10 of the Convention in the domestic proceedings or in the Strasbourg proceedings. Nor could the change in the domestic law be interpreted as acknowledging, in substance, that the

applicant's right to freedom of expression had been breached. Moreover, the change in the law took place more than four years after the refusal to grant a reproduction licence to the applicant, and was in no way related to the present case.

47. In the absence of an acknowledgment by the national authorities of a breach of the applicant's rights under the Convention, the Court holds that, for the purposes of Article 34 of the Convention, he may claim to be the victim of the alleged violation of the right to freedom of expression.

(c) Conclusion on admissibility

48. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

49. The Court refers to the recapitulation of its general principles concerning freedom of expression in the recent Grand Chamber case of *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 75, 27 June 2017.

50. The Court further reiterates that freedom of expression includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression (see *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133, and *Kaos GL v. Turkey*, no. 4982/07, § 47, 22 November 2016).

51. However, artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10 of the Convention. In accordance with the express terms of that paragraph, whoever exercises his freedom of expression takes on “duties and responsibilities”, and the scope of those duties and responsibilities will depend on his situation and the means he uses (see *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 26, 25 January 2007, and *Akdaş v. Turkey*, no. 41056/04, § 26, 16 February 2010).

52. The Court also bears in mind that under the third sentence of Article 10 § 1, States are permitted to regulate, by means of a licensing system, the way in which broadcasting, television or cinema enterprises are organised in their territories, particularly in their technical aspects. The

grant of a licence may also be made conditional on such matters as the nature and objectives of a broadcasting, television or cinema enterprise, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. This may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they may not correspond to any of the aims set out in paragraph 2. However, the compatibility of such interferences must be assessed in the light of the requirements of paragraph 2 (see, *mutatis mutandis*, *Demuth v. Switzerland*, no. 38743/97, § 33, ECHR 2002-IX; *Meltex Ltd and Movsesyan v. Armenia*, no. 32283/04, § 76, 17 June 2008; and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 139, ECHR 2012).

53. Lastly, as regards the protection of morals, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements, as well as on the “necessity” of a “restriction” or “penalty” intended to meet those requirements (see *Müller and Others*, cited above, § 35, and *Kaos GL*, cited above, § 49).

(b) Application to the present case

54. It has not been disputed between the parties that the refusal to grant the applicant a film reproduction licence amounted to an interference with his right to freedom of expression. Indeed, the applicant owns the copyright to over 1,500 erotic films. He holds valid distribution certificates for all of them, therefore they have been approved by the competent authorities for public distribution in Russia. However, under the domestic law in force at the material time, the applicant needed a film reproduction licence to be able to make copies of those films for the purpose of selling them, broadcasting them, or distributing them to cinemas, video libraries or video rental facilities. Without such a licence, the applicant was therefore *de facto* unable to distribute them. Given that the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory (see *Dvorski v. Croatia* [GC], no. 25703/11, § 82, ECHR 2015, with further references), the Court does not see any reason to disagree with the parties that the refusal to issue a film reproduction licence amounted to an interference with the applicant’s freedom of expression (see, *mutatis mutandis*, cases concerning refusals to issue broadcasting licences, such as *Meltex Ltd and Movsesyan*, cited above, § 74, with further references, and

Centro Europa 7 S.r.l. and Di Stefano, cited above, § 136, with further references).

55. The Court has no reason to doubt that the interference was “prescribed by law” – in particular by section 9 of the Licensing Act combined with section 14 of the Protection of Children Act – and “pursued legitimate aims” for the purposes of Article 10 § 2: protecting morals (see *Müller and Others*, cited above, § 30, and *Kaos GL*, cited above, § 55) and the rights of others, in particular children. It remains to be determined whether the interference was “necessary in a democratic society”.

56. To ascertain whether the “necessity” of the interference was convincingly demonstrated in the present case, the Court must essentially have regard to the reasons advanced by the domestic courts (see *Sapan v. Turkey*, no. 44102/04, § 37, 8 June 2010, and *Kaos GL*, cited above, § 57). The only reason advanced by the domestic courts for refusing a reproduction licence in the present case was that the applicant might be producing or distributing pornography. The domestic courts relied on the following grounds in support of the suspicion against the applicant: (i) referring to an ongoing criminal investigation in which the applicant had been questioned as a witness, the Commercial Court of Moscow found that “it could not be ruled out that [the applicant] was involved in the illegal production of pornographic films with the aim of distributing them” (see paragraph 10 above); (ii) the Appeal Court referred to (unspecified) material from the Internet containing offers to sell pornographic products (see paragraph 11 above); and (iii) the Court of Cassation noted that the applicant “[was] involved in investigative measures concerning the illegal production of pornographic material” (see paragraph 12 above). The domestic courts’ judgments did not give any further details or mention any other facts in support of the suspicion against the applicant.

57. In particular, there is no indication in the domestic judgments that any evidence corroborating the suspicion against the applicant was examined in the judicial proceedings. Although the courts referred to the ongoing criminal investigation into the illegal production and distribution of pornography, they did not rely on any document from the criminal case file suggesting that the applicant was suspected of that offence and giving reasons for that suspicion. Indeed, the domestic courts explicitly noted that the applicant had been involved in the investigative measures as a witness rather than a suspect.

58. As regards the material from the Internet containing offers to sell pornographic products, mentioned by the Appeal Court, that court did not give any description of the products offered for sale or any reasoning as to why it believed them to be pornographic. Nor did it explain why it considered that it was the applicant who had produced or distributed those products or published the offers.

59. Further, as regards the Government's argument that it had been established that the applicant intended to distribute a clearly pornographic film (see paragraph 39 above), the Court notes that they did not provide any information about that film, such as its name or date of production, a copy of it or at least a description of its content, a domestic decision establishing that it was pornographic and explaining the reasons for that finding, or any evidence that the applicant had produced that film or was involved in its distribution. Nor did the domestic courts' judgments contain references to any specific pornographic film which, as claimed by the Government, the applicant had been found to have been trying to distribute.

60. In these circumstances, the Court finds that the domestic judgments – in so far as they relied on a suspicion regarding the applicant's involvement in producing and distributing pornography – were based on assumptions rather than reasoned findings of fact. Therefore, the domestic courts did not provide relevant and sufficient reasons for the finding that the applicant produced or distributed pornography.

61. Further, although in their judgments the domestic courts briefly referred to the need to protect minors from pornographic material, from the domestic judgments it does not appear that the applicant was ever suspected of distributing pornography to children. Indeed, in Russia at the material time the ban on distributing pornography was not limited to minors, and extended to any audience. The Court has recently found that even a temporary ban on distributing a piece of pornographic material to any audience was not justified. It held that the domestic authorities could have applied a less restrictive measure, for example a ban on selling the material in question to persons under eighteen years old, an obligation to sell it with a special cover with a warning addressed to persons under eighteen years old, or an obligation to sell it via a subscription only (see *Kaos GL*, cited above, § 61).

62. Lastly, the Court observes that the refusal of a film reproduction licence made it impossible for the applicant to distribute any films, including the more than 1,500 films for which the competent authorities had issued distribution certificates after verifying that they were not pornographic, or indeed any other audiovisual products or audio-recordings on any types of medium (see paragraph 26 above). There is no evidence in the text of the domestic judgments that the domestic courts weighed the impact which the refusal of a film reproduction licence would have on the applicant's ability to distribute the films for which he had distribution certificates or on his freedom of expression in general. The domestic courts therefore failed to recognise that the present case involved a conflict between the right to freedom of expression and the need to protect public morals and the rights of others, and failed perform a balancing exercise between them.

63. The Court considers that such a far-reaching restriction on the applicant's freedom of expression, depriving him of the opportunity to distribute any audiovisual products or audio-recordings to any audiences, cannot be considered justified. There was therefore no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

64. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

66. The applicant asked to be granted a film reproduction licence. He did not claim pecuniary or non-pecuniary damage.

67. The Government submitted that the applicant's activities were no longer subject to licensing requirements.

68. The Court notes that the domestic law was amended after the facts of the present case, so the applicant no longer needs a film reproduction licence to distribute films for which he owns the copyright. The applicant's request for a film reproduction licence is therefore now redundant.

69. In these circumstances, the Court does not find it reasonable or practical to order any award under Article 41. In any event, any decision on the general or individual measures to be applied in the present case must remain the responsibility of the Committee of Ministers, discharging its supervisory functions under Article 46 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 September 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Pinto de Albuquerque and Dedov are annexed to this judgment.

V.D.G.
J.S.P.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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I. Introduction

1. I concur with the finding of a disproportionate interference with the applicant’s rights under Article 10 of the European Convention on Human Rights (“the Convention”). However, I would like to expand on three distinct questions which deserve to be developed further.

2. Firstly, the Chamber failed to address head-on the question whether the criminalisation of the production and distribution of pornography in any form and to any audience is admissible under the Convention, in spite of the fact that this question was specifically raised by the respondent State. Indeed, the Chamber ignored the Russian Government’s assertion that they are confronted with contradictory international obligations regarding pornography.

Secondly, the Chamber did not clarify the State’s obligation to protect children¹ from pornography. Specifically, it did not address the question, raised in the Government’s observations and in the internal domestic proceedings, whether the Convention requires the Contracting Parties to prohibit and punish the distribution of pornography to children. Here again, the Russian Government’s contention remained unheeded.

Thirdly, I find it particularly timely for the Court to deal with the question of pornography, including pornography for adult consumption, in a principled manner, in the light of the fresh impetus which has been given to the Council of Europe’s work in the area of violence against women by the Council of Europe Convention on preventing and combating violence against women and domestic violence². The Istanbul Convention requires

¹ For the purpose of this opinion, I will consider any person under the age of 18 to be a child, according to the standard set by the United Nations Convention on the Rights of the Child. This does not prevent States Parties to the European Convention on Human Rights from extending the legal protection of children beyond that age.

² CETS No. 210, hereafter “the Istanbul Convention”.

the States Parties to respond to the phenomenon of violence against women with a holistic approach, which necessarily involves tackling the particularly negative impact of violent and extreme pornography on women.

II. The Russian legal framework on pornography

3. At the time of the facts, Article 242 of the Russian Criminal Code provided that the illegal production, distribution or advertising of pornographic material or objects, and the illegal selling of publications, films, videos, images or other objects of a pornographic nature were offences punishable by a fine or up to two years of imprisonment³.

4. Under Governmental Decree no. 396 of 28 April 1993, a film's distribution depends on the delivery of a distribution certificate by the Ministry of Culture of the Russian Federation, which is competent for verifying whether audio-visual material contains any element which is criminally liable in the Russian Federation - for instance, pornography. On 15 March 2005 the Federal Culture and Cinematography Agency approved the Regulation on the Age Classification of Audiovisual Products, which provides that the registration of a film may be refused if the film promotes pornography. Pornography is defined as the naturalistic and detailed presentation of a sexual act or the detailed depiction of naked genitals in the process of sexual contact, whose primary purpose is to cause sexual arousal in the viewer and "which has no artistic or educational aim", as well as the "purposeless" depiction of group sex⁴.

5. Furthermore, the 2005 Regulation makes a distinction between erotic and pornographic films, a fact which significantly affects the scope of the material that would fall under the above-mentioned blanket prohibition. Under the above-mentioned Regulation of 15 March 2005, depictions of a sexual act or "other erotic scenes", as well as scenes of sexual violence and harassment, could be admissible forms of artistic expression in films for distribution only to those aged 18 or over "provided that those scenes are justified by the plot and artistic aim of the film"⁵. Under this Regulation, the Russian State has considerable leeway to weigh carefully the different interests and rights at stake, including freedom of expression and artistic creation protected under Article 10 of the Convention and the right to education protected under Article 3 of Protocol No. 1.

6. Federal Law No. 14-FZ, of 29 February 2012, amended Article 242 of the Criminal Code (Illegal Making and Distribution of Pornographic Materials or Objects) as follows:

"1. Illegal making and/or movement across the State Border of the Russian Federation for the purpose of distribution, public demonstration or advertising,

³ See paragraph 16 of the present judgment.

⁴ See paragraph 25 of the present judgment.

⁵ *Idem*.

or distribution, public demonstration or advertising of pornographic materials or objects, shall be punishable with ...

2. Distribution, public demonstration or advertising of pornographic materials or objects to minors, or involvement of minors in distribution of pornographic materials effected by a person who has reached eighteen years of age shall be punishable ...”

The same Law amended Article 242.1 of the Russian Criminal Code (Making and Distribution of Materials or Objects with Pornographic Pictures of Minors) and Article 242.2 (Using a Minor for the Purpose of Making Pornographic Materials or Objects).

III. The European case-law on pornography

7. In *Hoare v. the United Kingdom*⁶, the European Commission of Human Rights considered that the applicant's conviction for publishing obscene works was proportionate to the legitimate aim pursued, since the obscene video cassettes were distributed to a limited circle of viewers but there was no further control over them and the official channels for certification of videos were not used. The Commission also noted that no claim had been made for any artistic merit in the applicant's video cassettes: to that extent, the case was different from cases where an applicant had claimed that artistic considerations should prevail over protection grounds⁷.

8. In *Wingrove v. the United Kingdom* and *Otto-Preminger-Institut v. Austria*, both cited in the footnotes, the Court accepted that respect for the religious feelings of believers can move a State legitimately to restrict the publication of provocative portrayals of God or persons and objects of religious veneration, such as the persons of Jesus Christ and the Virgin Mary and the writings of St Teresa of Avila⁸. In *I.A. v. Turkey*⁹, the Court decided that Muslim believers could legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages:

⁶ *Hoare v. the United Kingdom*, no. 31211/96, Commission decision of 2 July 1997.

⁷ As in the *Müller and Others v. Switzerland* judgment of 24 May 1988, Series A no. 133, the *Wingrove v. the United Kingdom* judgment of 25 November 1996, Reports 1996, and the *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994, Series A no. 295-A.

⁸ As I wrote in my opinion in *Mouvement Raelien v. Switzerland* [GC], no. 16354/06, 13 July 2012, “The State may not unduly suppress or restrict free communication of all believers, agnostics, atheists and sceptics, under the guise of respecting the religious sentiment of the majority. Consequently, freedom of expression allows for criticism of religion, churches, religious institutions and the clergy, as long as it does not derail into defamation (i.e., deliberate insult of persons and institutions), or hate speech (i.e., promotion of hatred against a religious group) or blasphemous speech (i.e., wilful deprecation of a particular religion by denigrating its doctrine or its deities).”

⁹ *I.A. v. Turkey*, no. 42571/98, 13 September 2005. In their joint dissenting opinion, Judges Costa, Cabral Barreto and Jungwiert invited the Court to revisit the *Wingrove* and *Otto-Preminger-Institut* case-law.

“Some of these words were, moreover, inspired in a surge of exultation, in Aisha’s arms. ... God’s messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.” Hence, the applicant’s conviction had met a pressing social need, in that the book in issue had contained an abusive attack on religion, in particular Islam, and had offended and insulted religious feelings.

9. In *Müller and Others* the Court did not find unreasonable the Swiss courts’ view that the disputed paintings, with their emphasis on sexuality in some of its crudest forms, were “liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity” and that the applicants should therefore be convicted (under Article 204 § 1 of the Swiss Criminal Code) for publishing obscene material. It found that the paintings in question depicted sexual relations, particularly between men and animals, in a crude manner and that the general public had free access to them, as the organisers of the exhibition had not imposed any admission charge or any age-limit.

10. More recently, the Court showed itself more sympathetic towards pornography advocates when it stated that even a temporary ban on distributing a piece of pornographic material to any audience is not justified¹⁰. The Court held that the domestic authorities should have limited their intervention to the protection of persons under 18 years of age, by imposing a ban on selling the material in question to these persons or by imposing an obligation to sell it via subscription only.

11. *A fortiori*, it can thus be concluded that the prohibition and punishment of the production of pornography involving adults, of possession of pornography by adults and of distribution of pornography to adults is, in principle, not admissible under the Convention. According to the current state of the Court’s case-law, the religious beliefs of believers and the vulnerability of children are the sole legitimate grounds to restrict the freedom of adults to produce, possess and distribute pornographic material and content.

12. To sum up, the three main traits of the Court’s current case-law on pornography are the following:

1. the protection of children (minors and juveniles until the age of 18) from pornographic material and content;
2. the protection of believers from pornographic material and content with offensive portrayals of God or persons and objects of religious veneration;
3. the protection of the freedom of choice of adults with regard to all other pornographic material and content that do not infringe the rights of the two groups of people mentioned above.

¹⁰ *KAOS GL V. Turkey*, no. 4982/07, § 61, 22 November 2016.

IV. The international-law framework on pornography

13. In justifying the strict ban on pornography the Russian Federation relied on the 1923 Convention for the Suppression of the Circulation of and Traffic in Obscene Publications (“the 1923 Convention”)¹¹, which is still in force in many European countries. Article 1 of this Convention provides:

“The High Contracting Parties agree to take all measures to discover, prosecute and punish any person engaged in committing any of the following offences, and accordingly agree that it shall be a punishable offence:

(1) For purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects;

(2) For the purposes above mentioned, to import, convey or export or cause to be imported, conveyed or exported any of the said obscene matters or things, or in any manner whatsoever to put them into circulation;

(3) To carry on or take part in a business, whether public or private, concerned with any of the said obscene matters or things, or to deal in the said matters or things in any manner whatsoever, or to distribute them or to exhibit them publicly or to make a business of lending them;

(4) To advertise or make known by any means whatsoever, in view of assisting in the said punishable circulation or traffic, that a person is engaged in any of the above punishable acts, or to advertise or to make known how or from whom the said obscene matters or things can be procured either directly or indirectly.”

14. This prohibitive stance of international law has been reinforced by the UN Committee on the Elimination of Discrimination against Women General Recommendation No. 19 on Violence against Women, which noted the correlation between pornography and gender-based violence in quite clear terms:

“11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.

¹¹ See paragraph 38 of the present judgment.

12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.”¹²

Lately, the United Nations Human Rights Committee has expressed itself in even more explicit language, demanding that the States restrict the publication and dissemination of pornography:

“As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material.”¹³

In this regard, the Chamber has failed to take note of the existence of conflicting norms of international law at the relevant time and still today. This discloses an issue of broader significance, for it is clear that the Court’s current case-law is at odds with the obligations derived from the 1923 Convention. Whilst the 1923 Convention obliges the Contracting Parties to criminalise all forms of pornography (“obscene matters or things”), the Court’s case-law on pornography rejects such strict interference. For the Court, save for the case of pornographic material and content with offensive portrayals of God or persons and objects of religious veneration and pornographic material and content distributed to children, the production, possession and distribution of pornography is, in general, a question with moral contours, pertaining to the sphere of autonomy of each individual adult, not a question demanding a State response, let alone a response of a criminal-law nature.

15. In justifying the domestic prohibition of pornographic videos the Russian Federation also relied on Recommendation of the Committee of Ministers of the Council of Europe No. R (89) 7 concerning principles on the distribution of videograms having a violent, brutal or pornographic content¹⁴. Although the preamble to Recommendation No. R (89) expressly reiterates its commitment to the right of freedom of expression under Article 10 of the Convention, which must include a careful balancing

¹² CEDAW General Recommendation No. 19: Violence against Women, 1992. See also Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, § 27: “Risk of harm arises from both online content (sexist, misogynistic, degrading and stereotyped portrayals of women, online pornography) and behaviours (bullying, stalking, harassment, intimidation facilitated and perpetrated via social media, tracking applications, and profiling technology).”

¹³ General Comment No. 28: The equality of rights between men and women, adopted by the Human Rights Committee at the Sixty-eighth Session, CCPR/C/21/Rev.1/Add.10, 29 March 2000, § 22.

¹⁴ See paragraph 38 of the present judgment.

exercise between the interference and the aim sought, it is also crucial to pay close attention to the wording of the text of Recommendation No. R (89) 7 itself, which indeed encouraged “member states [to] consider if the application of their criminal law concerning videograms is effective in dealing with the problem of videograms having a violent, brutal or pornographic content...”¹⁵.

16. Furthermore, Parliamentary Assembly Resolution 1835 (2011) called on the member States:

“... to establish an obligation for companies to submit all audiovisual works for classification prior to commercial distribution; where applicable, strengthen sanctions for non-compliance with the obligation to submit audiovisual works for classification with the relevant body and sanctions for distributing such material without classification; assess the impact of existing laws and regulations applying to violent and extreme pornography and revise them, if appropriate, taking into account the possibility of: introducing specific legislation to criminalise the production and distribution of violent and extreme pornography; criminalising the possession of violent and extreme pornography, including for personal use ...”.

With regard to the protection of minors, the Assembly called on member States:

“... to introduce and enforce adequate sanctions for the sale of pornographic material to minors; enforce adequate sanctions for breaches of the prohibition for adults to be portrayed as minors; introduce the compulsory classification of all video games, including pornographic and violent games, and make their sale and distribution conditional upon receiving clearance from the relevant classification body.”

These recommendations were made on the assumption that:

“Violent and extreme pornography is first and foremost a threat to the dignity of women, who represent the great majority of the victims of the violent acts depicted. Secondly, pornography’s normalisation of these acts contributes to the creation of an environment in which violence is considered acceptable, with an impact on society’s standards of tolerance. Likewise, the danger of imitation should not be underestimated. Violent and extreme pornography dehumanises women and turns them into sexual objects who are forced to experience violence for the sole purpose of exciting sexual arousal. Several cases of crimes committed by men addicted to extreme pornography demonstrate the risk that some viewers can be led or encouraged to act out their criminal fantasies.”¹⁶

¹⁵ See point 6 of Recommendation No. R (89) 7.

¹⁶ PACE Report, doc. 12719, 19 September 2011, on Violent and extreme pornography, by the (Former) Committee on Equal Opportunities for Women and Men Rapporteur Mr Michał STULIGROSZ.

Very recently, the issue was again put on the top of the political agenda by the Council of Europe Gender Equality Strategy 2018-2023. In this laudable strategic document, the Council of Europe describes the current situation as follows:

“Violent and degrading online content, including in pornography, normalisation of sexual violence, including rape, reinforce the idea of women’s submissive role and contribute to treating women as subordinate members of the family and society. They feed into violence against women, sexist hate speech targeting women, particularly feminists, and contribute to maintaining and reinforcing gender stereotypes and sexism.”¹⁷

In view of this adverse context for gender equality, the Council of Europe has included the fight against violent and degrading pornography as part of the “Strategic objective 1: Prevent and combat gender stereotypes and sexism”:

“Council of Europe action in this area will seek to: ... build partnerships with relevant stakeholders to curb violent and degrading internet pornography, given its negative influence on gender relations, harmful sexual practices and coercion ...”¹⁸

This strategic objective is in line with the extraordinary contribution of the Committee of Ministers and the Parliamentary Assembly to gender equality, by means of recommendations and resolutions that cover a diversity of issues, including combating sex-based discrimination, eliminating sexist language, protecting women against violence, achieving a balanced participation of women and men in political and public decision-making, mainstreaming gender in education, in sport, in the media and in the audio-visual sector, providing gender equality standards and mechanisms, protecting and promoting the rights of women and girls with disabilities, and ensuring gender equality in the media¹⁹.

V. The prohibition of pornography in comparative law

17. At present, twenty Council of Europe member States, including Russia, are bound by the 1923 Convention²⁰, all of which face the dilemma

¹⁷ Council of Europe Gender Equality Strategy 2018-2023, paragraph 40.

¹⁸ Ibid, paragraph 45.

¹⁹ See at: <http://website-pace.net/fr/web/as-ega/main>. See also, within the European Union, the European Parliament Resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality, when it highlights that pornography, especially online pornography, creates gender stereotypes, which may have the effect of presenting women as commodities.

of contradictory international-law obligations as described above. The Court's current permissive case-law is at odds with the broad criminalisation of the production, distribution, public showing and hiring out of pornographic material under the 1923 Convention. Comparative law shows that the Court is isolated in its permissive stance²¹.

18. In England, for example, sections 63-67 of the Criminal Justice and Immigration Act 2008 criminalised the possession of extreme pornography when three requirements are fulfilled: firstly, the image has to be pornographic – that is, it is meant to cause sexual arousal; secondly, it has to be grossly offensive or disgusting; and thirdly, it has to portray in an explicit and realistic way bestiality, necrophilia, life-threatening acts or serious injuries to intimate parts of the human body²². Scotland introduced similar provisions in section 42 of the Criminal Justice and Licensing (Scotland) Act 2010.

19. Another example is Germany. Not only does Section 184 of the German Criminal Code punish the dissemination of pornography to minors and the public and paid presentation of a pornographic film²³, but section 184a prescribes a fine or no more than three years of imprisonment for whoever “disseminates, displays publicly, presents, produces ... pornographic materials that have as their object acts of violence or sexual acts of persons with animals”.

20. The Court's case-law is also not in line with that of the Canadian Supreme Court. Canadian law criminalises the fabrication and distribution of obscene pornographic material, as well as its possession for the purposes of distribution. The definition of obscenity is laid down in section 163(8) of the Canadian Criminal Code: “For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, mainly, crime, horror, cruelty and violence, shall be deemed to be obscene”. In a famous case from 1992, the Canadian Supreme Court upheld the anti-pornography legislation on the basis that there is a “substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual

²⁰ They are Albania, Austria, Belgium, Cyprus, the Czech Republic, Finland, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Montenegro, Norway, Poland, Romania, Russia, Serbia, Slovakia and Turkey. Denmark, Germany and the Netherlands (with regard to the European territory) withdrew from this Convention in 1968, 1974 and 1985 respectively.

²¹ See the data provided in the PACE Report, doc. 12719, 19 September 2011, cited above.

²² On this law, see Julia Hornle, “Countering the dangers of online pornography, Shrewd regulation of lewd content”, in *European Journal of Law and technology*, vol. 2, no. 1, 2011, pp. 1-26.

²³ § 184 Abs. 1 Nr. 7 of the Criminal Code was found compatible with the German Basic Law by the Federal Constitutional Court (BVerfGE v. 17.1.1978 I 405 - 1 BvL 13/76).

treatment results in harm, particularly to women and therefore to society as a whole”²⁴.

21. In the United States, pornography is lawful unless it meets the three-pronged obscenity test set out in the case of *Miller v. California*:

- “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value”²⁵.

The standards established by *Miller* were refined in *Pope v. Illinois*²⁶, which held that the first two prongs of the *Miller* test were to be evaluated according to a “community standard”, but not the third, which was to be held to the higher standard of a “reasonable person” evaluating the work for value. In 1982, the Supreme Court held that the distribution of child pornography was unprotected by the First Amendment²⁷ and subsequently extended this case-law to the mere possession of child pornography²⁸. The tide turned in 1997, when the Supreme Court ruled that the anti-indecency provisions of the Communications Decency Act were unconstitutional²⁹. The Act had criminalised the sending of “obscene or indecent” material to minors over the internet. In 2002 the Supreme Court went even further and held that sexually explicit material that only appears to depict minors, but actually does not, might be exempt from obscenity rulings³⁰.

VI. The international call for co-regulation of harmful online content

22. In the present case, the domestic courts upheld the ban on the applicant’s video material for the purpose of protecting and safeguarding children from harmful content³¹. This highly delicate issue was superficially addressed in the reasoning of the judgments delivered by the domestic courts and in the present judgment.

23. It is true that the UN Convention on the Rights of the Child highlights the importance of freedom of expression of the child, which

²⁴ *R v. Butler* [1992] DLR (4th) 44.9.

²⁵ 413 U.S. 15 (1973).

²⁶ 481 U.S. 497 (1987).

²⁷ *New York v. Ferber*, 458 U.S. 747 (1982). The Court ruled that the First Amendment right to free speech did not forbid states from banning the sale of material depicting children engaged in sexual activity, even if the material was not obscene.

²⁸ *Osborne v. Ohio*, 495 U.S. 103 (1990).

²⁹ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

³⁰ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

³¹ See paragraph 39 of the present judgment.

includes the seeking, receiving and imparting of information and ideas of all kinds, save for the protection of, *inter alia*, public health or morals. Similarly, it reiterates that “the primary responsibility for the upbringing and development of the child lies with the parents”³², which suggests the use of non-statutory regulatory measures to ensure that children are brought up in an appropriate environment. Several international-law documents have highlighted the benefits of a co-regulatory approach, whereby self-regulation, education and some form of additional censorship co-exist³³. Co-regulation is considered as a generic term for co-operative ways of regulation that are designed to accomplish public objectives and that contain elements of self-regulation and of traditional regulation. Self-regulation can be described as the process by which the industry actively partakes in and is responsible for its own regulation while remaining subject to the general rule of law. A code of practice, guidelines adopted by the industry and a complaints-resolution process, which incorporates sanctions, are considered as the basic elements of self-regulation³⁴.

24. Providing users with proper information about the content they may receive and giving parents and caregivers the means to protect children from potentially harmful content is also of extreme importance. Most importantly, States should promote education and awareness-raising initiatives and programmes, which may include preventive measures and education about rights and responsibilities in the digital environment, the identification and reporting of violations and the solutions available to address those problems³⁵. In particular, these programmes should teach children to understand, in line with their age and capacities, what it means to give consent, to respect other people’s fundamental rights, to seek change when needed and to use the proper tools to defend their rights in the digital era. Moreover, the programmes should enable children to understand potentially dangerous content, such as pornography, and the potential consequences of the way in which information about children or shared by children might be distributed in different settings and by others³⁶.

25. Thus, responsibility for protecting children from pornography lies primarily with society at large and, in particular, with parents. But the State has an unquestionable co-responsibility in ensuring that children do not

³² Article 18, Convention on the Rights of the Child 1989.

³³ Directorate General of Human Rights and Legal Affairs of the Council of Europe, Protecting children from harmful content: Report prepared for the Council of Europe’s Group of Specialists on Human Rights in the Information Society by Andrea Millwood Hargrave, June 2009.

³⁴ *Ibid.*

³⁵ Recommendation CM/Rec(2018)7 of the Committee of Ministers of the Council of Europe on Guidelines to respect, protect and fulfil the rights of the child in the digital environment, September 2018.

³⁶ *Ibid.*

access content that is restricted to adult viewing³⁷. This is particularly so in the light of Article 17 of the Istanbul Convention, which states:

“1. Parties shall encourage the private sector, the information and communication technology sector and the media, with due respect for freedom of expression and their independence, to participate in the elaboration and implementation of policies and to set guidelines and self-regulatory standards to prevent violence against women and to enhance respect for their dignity.

2. Parties shall develop and promote, in co-operation with private sector actors, skills among children, parents and educators on how to deal with the information and communications environment that provides access to degrading content of a sexual or violent nature which might be harmful.”

VII. The State’s positive obligation to protect children from pornography

26. The safeguarding of children from potentially harmful content, such as pornography, requires State intervention. It is clear today that the production, possession and distribution of child pornography are considered by both international customary law and treaty law as forms of conduct that must be criminalised and punished accordingly³⁸.

In addition to this, Council of Europe States have a positive obligation to establish a regulatory framework to prohibit the distribution of pornography to minors, including by means of a system defining age-inappropriate material and content, and preventing under-18s from accessing pornographic material and content through mandatory age verification³⁹. These age-verification measures are particularly important with regard to online content and should be extended to social media, which requires that national classification systems also be applied to the internet⁴⁰. Deliberate violations of the State regulatory framework and, especially, the deliberate

³⁷ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, Article 17(e): “Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.”

³⁸ See my opinion in the case of *Söderman v. Sweden* [GC], no. 5786/08, 12 November 2013: “In view of this broad consensus and constant practice, the criminalisation of child pornography, namely, any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes, is now part of international customary law, binding on all States”.

³⁹ See, *a fortiori*, *KAOS GL v. Turkey*, cited above, § 61.

⁴⁰ Already pointing in this direction, Recommendation Rec (2001)8 of the Committee of Ministers on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), adopted on 5 September 2001.

distribution of pornographic material and content to minors warrant a criminal-law response.

27. There are two conditions for a Convention-compatible implementation of such age-check measures: first, age-verification providers must not have any links to the pornography industry itself, in order to avoid a potential conflict of interest, and second, they must comply with strict data-protection and data-security standards, in order to remove any risk that data submitted to age-verification providers could enable users' identities to be linked to their browsing histories, hacked or sold on to third companies.

28. That there are tools that would allow for circumventing the age-verification restrictions, such as a virtual private networks or the anonymous Tor browser, is no excuse. The fact that the law can be broken by some does not justify its not being imposed on the many, otherwise no prohibitive law would ever be adopted.

VIII. The State's positive obligation to prohibit extreme pornography

29. State responsibility *vis-à-vis* pornography does not end with the protection of children. Pornography frequently desensitises the consumer to sexual aggression, normalises sexual assault and promotes a rape culture, which impacts seriously on gender equality. Research suggests that those who are most affected by the harmful effects of pornography are primarily women who are being abused by men and, particularly, women who belong to vulnerable groups and are disadvantaged on several levels, such as by poverty, drug addiction, racial and ethnic discrimination, homophobia, transphobia and childhood sexual abuse⁴¹. The evidence also supports the conclusion that exposure to pornographic material and content increases the acceptance of the proposition that women like to be forced into sexual practices, or in more colloquial terms, that the woman who says "no" really means "yes"⁴².

30. Since pornography reinforces stereotypes, discrimination and gender inequality, exploits existing inequality between the sexes and contributes to gender-based violence, the question arises to what extent the Court should proscribe pornography in the same way that it proscribes male violence against women in general⁴³. The question is even more pressing with regard

⁴¹ UN Economic and Social Council [ECOSOC], "Preliminary Report of the Special Rapporteur on Violence Against Women," ¶ 240, UN Doc. E/CN.4/1995/42 (Nov. 22, 1994) (submitted by Radhika Coomaraswamy) ("[Many] definitions fail to address the issue that most pornography represents a form of violence against women and that the evidence shows that it is directly causative of further violence against women.").

⁴² See the studies referred to in David Makin and Amber Morczek, "The dark side of internet searches: a macro-level assessment of rape culture", in *International Journal of Cyber Criminology*, vol. 9, no. 1, pp. 1-23.

to pornographic content which depicts particular types of sexual violence⁴⁴ and deviant sexuality like necrophilia⁴⁵ and bestiality⁴⁶.

31. My answer to this question is straightforward: a gender-sensitive interpretation of the Convention⁴⁷ warrants the prohibition of all forms of extreme pornography. Extreme pornography contributes, directly and indirectly, to violence against women. The Convention provides two grounds for this interpretation in Article 10 § 2: a “harms-and-dangers”-based ground (“the protection of the ... the rights of others”) and a morality-based ground (“the protection of ... morals”). The harms-and-dangers argument can justify criminal-law policy and other types of policy choices, while the morality-based argument can only justify other types of policy choices, but not criminal-law policy choices.

32. Hence, the Court should seek to reconcile its case-law with international-law standards by prohibiting the following forms of pornography:

1. child pornography;
2. pornography with offensive portrayals of God or persons and objects of religious veneration;
3. pornography distributed to children;
4. violent pornography; and
5. pornography portraying necrophilia and bestiality.

33. It is submitted that the three first forms of pornography require a criminal-law response on harms-and-dangers-based grounds. States should retain some discretion in implementing the prohibition of violent pornography and pornography portraying necrophilia and bestiality, which need not necessarily be implemented by means of criminal-law penalties, since robust administrative-law penalties may suffice to deter potential offenders. This would avoid the excessive expansion of criminal law into new areas and a greater invasion of privacy in the investigation of offences. Ultimately, the State should not interfere with the depiction of freely consented, non-violent sexual intercourse between adults, when this form of expression is covered by freedom of expression and of artistic creation.

⁴³ See my opinions in *Volodina v. Russia*, no. 41261/17, 9 July 2019, and *Valiulienė v. Lithuania*, no. 33234/07, 26 March 2013.

⁴⁴ An act which threatens a person’s life or an act which results, or is likely to result, in serious injury to a person, including rape or any other type of sexual assault.

⁴⁵ An act which involves sexual interference with a human corpse.

⁴⁶ An act which involves a person performing an act of intercourse or oral sex with an animal (whether dead or alive).

⁴⁷ See my opinions in *Volodina v. Russia* and *Valiulienė v. Lithuania*, both cited above.

IX. Conclusion

34. In the present case, the Russian distribution certificate issued by the Ministry of Culture already acts as a regulatory measure by issuing indications of age restrictions⁴⁸. The definition of age-inappropriate content is likely to protect Russian children in accordance with societal values⁴⁹. In addition, Article 242 of the Criminal Code proscribes all expression containing child pornography, pornography with offensive portrayals of God or persons and objects of religious veneration, pornography distributed to children, violent pornography and pornography portraying necrophilia and bestiality. The artistic and educational clauses of the above-mentioned Regulation of 15 March 2005 allow for a purposefully oriented, restrictive interpretation of criminal law, safeguarding freedom of expression and of artistic creation as well as the right to education.

35. If I have found a violation in the present case, it is because I joined my colleagues in their assessment of the facts of the case, which indicates that the domestic judgments were based on assumptions rather than reasoned findings of fact. Furthermore, at least until the change in the domestic law referred to by the Government⁵⁰, the refusal of a film reproduction licence impinged on the applicant's right to distribute the films for which he had already obtained distribution certificates. This constituted a clear *venire contra factum proprium* on the part of the respondent State.

⁴⁸ See paragraph 22 of the present judgment.

⁴⁹ OECD: Working Party on Information Security and Privacy, The protection of children online: Risks faced by children online and policies to protect them, 2 May 2011.

⁵⁰ See paragraphs 29 and 40 of the present judgment.

CONCURRING OPINION OF JUDGE DEDOV

I agree that the authorities violated the Convention in the present case, and the Court rightly pointed out the deficiencies of the domestic procedures. My only concern is the applicability of Article 10 to the present case.

The authorities approved the public performance (“*прокат*” or “distribution” in the terms of the judgment) of more than 1,500 erotic films produced by the applicant or purchased by him for the purpose of distribution, but then refused to grant him a reproduction licence. While the former right could be considered a right to impart information, the latter pertains to copyright – in this case, the right to produce copies of the film for sale purposes as confirmed in paragraph 54 of the judgment – and therefore it should have been covered by Article 1 of Protocol No. 1.

Indeed, the production of copies could be considered a necessary part of the process for the purpose of public performance of the films. This approach should be based on the nature of the information, opinions and ideas under Article 10, and this is a weak point of the judgment, in my view. Article 10 is designed to protect democratic values, whereas erotic scenes could be attributed to the applicant’s self-fulfilment, and therefore to his private life. Within the domestic proceedings, the parties did not disagree about the content of the applicant’s films, they did not discuss any political context, including the elections, and the applicant did not raise any such arguments.

Certainly, the issue of pluralism in the audiovisual sphere was not at stake at this case, and the case-law regarding this part of Article 10 as mentioned in paragraph 52 of the judgment should not have been used for the purpose of the examination of the case (see, for example, the leading authority *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, ECHR 2012). In paragraphs 129-30 of the *Centro Europa* judgment the Court stressed that “it is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself (see *Manole and Others v. Moldova*, no. 13936/02, § 95, ECHR 2009, and *Socialist Party and Others v. Turkey*, 25 May 1998, §§ 41, 45 and 47, *Reports* 1998-III)”. The Court went on to observe that “to ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed”. Again, there is no political context in the present case.

The Court in the present case tried to expand the sphere of freedom of expression to include the freedom of artistic expression – notably as part of the freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions, which is essential for a democratic society. In paragraph 52 of the judgment the Court referred to its case-law to support the above idea, including the case of *Kaos GL v. Turkey* (no. 4982/07, 22 November 2016); however, that case does not correspond to the present case because it relates to the right of an LGBT association – in other words, a minority group – to freedom of expression.

Under those circumstances, in my view, the application in the present case is not compatible *ratione materiae* with Article 10 of the Convention.

As regards ideas, or in other words, the very content of information, even the domestic law provides that the depiction of erotic scenes is permissible for the purpose of the issuing of a performance certificate, provided that those scenes are justified by the plot and artistic aim of the film (see paragraph 25 of the judgment). There was no dispute between the parties that erotic scenes took up about 95% of each of the applicant's films. However, the authorities granted the applicant the performance certificates in breach of the domestic law, and I can only regret that such contradictory decisions were taken by the domestic authorities. Since the Court, although master of its own procedure, applied the democratic rule under Article 10 to erotic films, I should also regret how the Convention was interpreted by the Court in the present case.