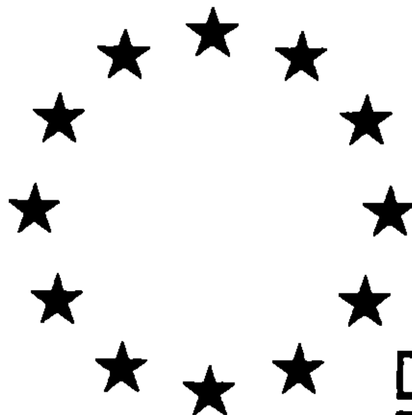

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 5493/72

Richard HANDYSIDE against The United Kingdom

Report of the Commission

(Adopted on 30 September 1975)

Strasbourg

TABLE OF CONTENTS

		Pages
I.	INTRODUCTION (paras. 1-17)	1
	The substance of the applicant's complaints (paras. 3-8)	1
	Proceedings before the Commission (paras. 9-17)	2
II.	ESTABLISHMENT OF THE FACTS (paras. 18-45)	4
III.	SUBMISSIONS OF THE PARTIES (paras. 46-131)	12
	Submissions of the applicant (paras. 46-94)	12
	Submissions of the Government (paras. 95-131)	24
IV.	OPINION OF THE COMMISSION (paras. 132-176)	32
	Concerning Art. 10 (paras. 134-157)	32
	" Art. 1 of Protocol No. 1(paras.158-169)	38
	" Art. 17 (para. 170)	41
	" Art. 18 (paras. 171-175)	41
	Conclusion (para. 176)	42
	Additional opinion of MM. Welter, Busuttil and Daver	43
	Separate opinion of Mr. Polak	45
	Dissenting opinion of MM. Fawcett and Triantafyllides	46
	Dissenting opinion of MM. Kellberg, Nørgaard & Trechsel	52
	Dissenting opinion of Mr. Ermacora	56
	Dissenting opinion of Mr. Opsahl	61
APPENDIX I	- History of Proceedings	62
APPENDIX II	- Decision on Admissibility of the Application	67
APPENDIX III	- Friendly Settlement (separate document)	

I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

2. The applicant, Mr. Richard Handyside, is a United Kingdom citizen, born in 1943, and resident in London. He is a publisher and proprietor of the publishing firm "Stage One" in London. He has published among other books, the English edition of a book by Søren Hansen and Jesper Jensen entitled "The Little Red Schoolbook"

The substance of the applicant's complaints

3. The application concerns the publication of this book which had originally been published in Denmark in 1969. The applicant had purchased the British rights of the Schoolbook in September 1970 and after having had it translated into English had intended to publish the book in the United Kingdom on 1 April 1971.

4. However, on 30 March 1971, after having received complaints about the publication of "The Little Red Schoolbook", the Director of Public Prosecutions asked the Metropolitan Police to undertake enquiries. On the following day a successful application was made for a warrant under Section 3 of the Obscene Publications Act 1959 to search premises occupied by Stage One and Libro Libre (Booksellers) and on the same day 1,069 copies of the book were seized together with a quantity of advertising material and correspondence relating to the publication and sale of the book. On 1 April 1971 further successful applications were made to search again the premises occupied by Stage One and Libro Libre and to search also the premises of the printers of the book. As a result of these searches which were carried out later that day further copies of the book were seized as well as correspondence relating to it and the printer's matrix with which the book had been printed.

5. On 8 April 1971 a successful application was made at Clerkenwell Magistrates' Court for two summonses against the applicant under the Obscene Publications Acts 1959 and 1964 charging him of possessing for publication for gain copies of an obscene book. The summonses were answerable on 28 May at Clerkenwell Magistrates' Court, but on an application by the Director of Public Prosecutions, the case was adjourned until 29 June 1971 when it was heard at Lambeth Magistrates' Court. Witnesses were called for both prosecution and defence and on 1 July 1971 the applicant was found guilty of both offences. He was fined £25 on each summons and ordered to pay £110 costs. The Court further made a forfeiture order under the Obscene Publications Acts for the destruction of the books by the police.

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6. On 10 July 1971 the applicant filed notices of appeal against both convictions. On 20 October 1971 he appeared at the Inner London Quarter Sessions for the hearing of the appeal which ended on 26 October. At the hearing nine expert witnesses called by the applicant and seven by the respondent were examined. Judgment was delivered on 29 October 1971 upholding the convictions and dismissing the appeal. The applicant was ordered to pay another £854 costs.

7. In his judgment the judge stated that the Court was satisfied beyond reasonable doubt that the book had a tendency to deprave and corrupt a substantial majority of children under 16 and was therefore obscene within the meaning of the Obscene Publications Act. Furthermore, the applicant had not made out the statutory defence that, on the balance of probabilities, the publication was for the public good.

8. The applicant complained to the Commission that the action by the United Kingdom authorities and courts against himself and The Little Red Schoolbook were in breach of his rights to freedom of thought, conscience and belief, under Art. 9 of the Convention, his right to freedom of expression under Art. 10 of the Convention and his right to the peaceful enjoyment of possessions under Art. 1 of Protocol No. 1. He also maintained that the proceedings brought against him had been retrospective in nature and thus contrary to Art. 7 of the Convention, that contrary to Art. 14 of the Convention the United Kingdom had failed to secure to him the above rights without discrimination on the ground of political or other opinion; finally the respondent Government were also in breach of Art. 1 and Art. 13 of the Convention.

Proceedings before the Commission

9. The present application was lodged with the Commission on 13 April 1972 and registered on 17 April 1972.

10. On 4 April 1974 the Commission declared inadmissible the applicant's complaints under Arts. 1, 7, 9, 13 and 14 of the Convention. On the other hand, it declared admissible the application insofar as it concerned the applicant's allegations under Art. 10 of the Convention and under Art. 1 of Protocol No. 1 in relation to the allegations under Art. 10. This decision was taken by the Commission after having obtained written observations from the parties on the admissibility of the application and after hearing the parties' oral submissions at a hearing to which they had been invited in order to make full submissions both as to the admissibility and as to the merits of the case. Subsequently further written submissions on the merits were made by the applicant on 15 May 1974 and by the respondent Government on 9 August 1974. The respondent Government were also invited to submit additional information regarding the historical background of the passing of the Obscene Publications Acts 1959 and 1964 and, as far as possible, the complete

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jurisprudence and practice in the United Kingdom in regard to the relevant provisions of the said Obscene Publications Acts. The Government complied with this request on 21 May 1974.

11. The applicant has been represented before the Commission by Mr. Cedric Thornberry, a barrister and lecturer in law at London University who was assisted by Mrs. J. G. Peirce, LL.B. Free legal aid has been granted for his representation in accordance with the Addendum to the Commission's Rules of Procedure.

12. The respondent Government has been represented by Mr. Paul Fifoot, as Agent, who was assisted by Mr. Michael Eastham, Q.C., Mr. Gordon Slynn, Q.C., as well as by MM. A. H. Hammond and de Deny, Home Office, as advisers.

13. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention after deliberations and votes in plenary session on 7 and 8 July 1975 the following members being present (1):

MM. G. SPERDUTI, Acting President
J. E. S. FAWCETT
M. A. TRIANTAFYLLIDES
F. WELTER
E. BUSUTTIL
L. KELLBERG
B. DAVER
K. MANGAN
J. CUSTERS
C. A. NØRGAARD
C. H. F. POLAK
R. J. DUPUY
G. TENEKIDES
S. TRECHSEL

14. The text of the report was adopted by the Commission on 30 September 1975 and is now transmitted to the Committee of Ministers in accordance with para. (2) of Art. 31.

15. A friendly settlement of the case has not been reached and the purpose of the Commission in the present Report, as provided in Art. 31 (1), is accordingly:

(1) to establish the facts, and
(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

16. A schedule setting out the history of proceedings before the Commission, the Commission's decision on the admissibility of the application and an account of the Commission's unsuccessful attempts to reach a friendly settlement are attached hereto as Appendices I-III.

17. The full text of the pleadings of the parties together with the documents lodged as exhibits are held in the archives of the Commission and are available, if required.

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(1) Since MM. Ermacora and Opsahl were not present when a final vote on a breach of the Convention was taken, the Commission took special decisions on 30 September 1975, in accordance with Rule 52 (3) of its Rules of Procedure, to permit these members to express separate dissenting opinions in the Commission's Report.

II. ESTABLISHMENT OF THE FACTS

18. The facts of the case as they have been submitted by the parties are not in dispute. They may be summarised as follows:

Background

19. In 1968 the applicant opened a small publishing firm which prior to the publication of The Little Red Schoolbook had published three works, namely Socialism and Man in Cuba, by Che Guevara, Major Speeches, by Fidel Castro, Revolution in Guinea, by Amilcar Cabral. Then came the publication of the Schoolbook which appeared in a revised edition on 15 November 1971, and since then the applicant has published four further titles, namely Revolution in the Congo, by Eldridge Cleaver, a book of writings from the Women's Liberation Movement called the Body Politic, China's Socialist Revolution, by John and Elsie Collier, and The Fine Tubes Strike, by Tony Beck.

20. The British rights of The Little Red Schoolbook written by Søren Hansen and Jesper Jensen, two Danish authors, had been purchased by the applicant after the Frankfurt Book Fair in September 1970. The book had first been published in Denmark in 1969 and subsequently in Belgium, Finland, Germany, Holland, Iceland, Norway, Sweden and Switzerland as well as several non-European countries. Certain judicial or administrative action had been taken against the book in Belgium and in France, but in both countries it was subsequently published uncensored and put on sale. The original English language edition of the book has altogether 208 pages. It contains an introduction headed "All grown-ups are paper tigers", an "Introduction to the British edition", and chapters on the following subjects: Education, Learning, Teachers, Pupils and The System. The chapter on Pupils contains a 26 page section headed "Sex" which includes the following sub-sections: Masturbation, Orgasm, Intercourse and petting, Contraceptives, Wet dreams, Menstruation, Child molesters or "dirty old men", Pornography, Impotence, Homosexuality, Normal and abnormal, Find out more, Venereal disease, Abortion, Legal and illegal abortion, Remember, Methods of abortion, Addresses for help and advice on sexual matters. The introduction to the British edition states that the "book is meant to be a reference book. The idea is not to read it straight through, but to use the list of contents to find and read about the things you're interested in or want to know more about. Even if you're at a particularly progressive school you should find a lot of ideas in the book for improving things".

21. After having arranged for the translation of the book into English the applicant prepared an edition for the United Kingdom with the help of a group of children and teachers. He intended publication in the United Kingdom on 1 April 1971. As soon as printing was completed he sent out several hundred review copies of the book, together with a press release, to a variety of publications, from national and local newspapers to educational

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and medical journals. He also placed advertisements for the book in various publications including "The Bookseller", "The Times Educational and Literary Supplements" and "Teachers World".

22. On 22 March 1971 the Daily Mirror published an account of the book's contents, and further accounts appeared in The Sunday Times and the Sunday Telegraph on 28 March 1971. Further reports on the book were carried by the Daily Telegraph on 29 and 30 March 1971. These reports also indicated that representations would be made to the Director of Public Prosecutions demanding that action should be taken against the publication of the book.

The seizure of the book and the applicant's conviction and sentence

23. Indeed, after receipt of a number of such complaints, on 30 March 1971 the Director of Public Prosecutions asked the Metropolitan Police to undertake enquiries. As a result of these, on 31 March 1971, a successful application was made for a warrant under Section 3 of the Obscene Publications Act 1959 to search premises at 21 Theobalds Road in London which were occupied by Stage One and Libro Libre, a bookseller. The warrant was executed on the same day and 1,069 copies of the book were seized together with leaflets, posters, showcards and correspondence relating to the publication and sale of the book.

24. Acting on the advice of his lawyers the applicant continued distributing copies of the book in the subsequent days. After the Director of Public Prosecutions had received information that further copies of the book had been taken to the premises after the search, further successful applications were made on 1 April 1971 to search again the premises at 21 Theobalds Road and to search also the premises of Hazell, Watson & Viney Ltd., the printers of the book at Tring Road, Aylesbury, Buckinghamshire. Searches of both premises were carried out later that day. Altogether 132 copies of the book were seized at 21 Theobalds Road and, at the printers, 20 spoiled copies of the book, together with correspondence relating to it and the printer's matrix with which the book was printed. On both occasions, however, 14,000 copies of the book, which were stored elsewhere on the applicant's premises, were missed.

25. On 8 April 1971, a successful application was made at Clerkenwell Magistrates' Court for two summonses against the applicant for the following offences:

(a) On 31 March 1971 at 21 Theobalds Road, WC2, for having in his possession 1,069 obscene books entitled "The Little Red Schoolbook" for publication for gain;

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(b) On 1 April 1971 at 21 Theobalds Road, WC2, for having in his possession 132 books entitled "The Little Red Schoolbook" for publication for gain.

These summonses were issued under Section 2 (1) of the Obscene Publications Act 1959, as amended by Section 1 (1) of the Obscene Publications Act 1964. They were served on the applicant on the same day who thereupon ceased distribution of the book and advised bookshops accordingly. By that time, a total of 17,000 copies of the book had already been distributed.

26. The summonses were answerable on 28 May 1971 at Clerkenwell Magistrates' Court, but, on the application of the Director of Public Prosecutions, the case was adjourned until 29 June 1971. On that day the applicant appeared at Lambeth Magistrates' Court to which the case had been transferred, having consented to the case being heard and determined in summary proceedings by a magistrate rather than by a judge and a jury on indictment. He was represented by counsel having been granted legal aid for the representation of his case. On 1 July 1971, after witnesses had been called for both prosecution and defence, the applicant was found guilty of both offences and fined £25 on each summons and ordered to pay £110 costs. At the same time the Court made a forfeiture order for the destruction of the books by the police.

27. On 10 July 1971 notices of appeal against both convictions were received by the Metropolitan Police from the solicitors representing the applicant. The grounds stated in the notices were "that the magistrates' decision was wrong and against the weight of the evidence". The appeal was heard before the Inner London Quarter Sessions on 20, 21, 22, 25 and 26 October 1971. At this hearing seven witnesses gave evidence on behalf of the prosecution, and nine on behalf of the applicant. Judgment was delivered on 29 October 1971: both convictions were upheld and the applicant was ordered to pay another £854 costs.

The judgment of the Appeal Court

28. The Court examined two principal issues presented by the case, namely, first, whether or not the Crown had proved beyond reasonable doubt that The Little Red Schoolbook was an obscene book or an obscene article within the meaning of Sec. 1 (1) of the Obscene Publications Act 1959; and secondly, if so, whether or not the applicant had established the statutory defence open to him under Sec. 4 of the Obscene Publications Act 1959 to the effect that he had shown, on a balance of probabilities, that publication of the book was justified as being for the public good.

29. On a preliminary point, the Court dealt with the meaning of the expression "article" in the 1959 Act. The main complaint by the prosecution had been that that part of the book headed

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"Sex" was obscene and that it was that part, and that part only, which was the article which, taken as a whole, had to be proved to be obscene. On the other hand, the applicant had submitted that the whole book had to be regarded as the article for the purposes of the Act and that, whatever the Court's view of the content of that part headed "Sex" was, the book taken as a whole was not obscene. The Court pointed out that there was a possible third view, namely that that section headed "Pupils", in which the part headed "Sex" was included, was the article with which the Court should be concerned. However, in the Court's view, its conclusions on the question of guilt were identical whichever of the above three views it adopted.

30. The Court then dealt with the issue of obscenity which is defined in Sec. 1 (1) of the Obscene Publications Act 1959 as follows: "For the purposes of this Act an article shall be deemed to be obscene if its effect or ... the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it". Referring to the decision of the Court of Appeal, Criminal Division, in Calder & Boyers 52 Criminal Appeal Reports 706 (1968) the Court held that, in considering the persons who it was alleged were likely to read the article, it had to be satisfied that they would constitute a significant proportion. It also accepted the meaning of the words "deprave and corrupt" as it had been explained in that case and about which there had been no dispute between the parties. Furthermore, referring to the decision in D.P.P. v. A.B. and C. Chewing Gum Ltd. 1962 2 All England Reports 504), the Court decided that expert evidence should be admitted on the question of whether the article was obscene. Such evidence was not normally admissible for this purpose but only in connection with the defence of public good under Sec. 4 of the Act. However, the Court found that it was admissible in the present case which was concerned with the effect of the article upon children.

31. The Court then stated that it had heard a great deal of evidence, indeed seven witnesses on behalf of the respondent and nine on behalf of the applicant, being to a large extent experts in the fields of psychiatry and teaching in particular. However, the Court pointed out that there was an almost infinite variation in the relevant background of the children who would be in one way or another affected by the book, so that it was difficult to speak of "true facts" in this case in the same way as facts could be established in cases of dangerous driving or theft. The views of the applicant's witnesses had been those approaching the extreme of one wing of the more broadly varied outlook on the education and upbringing of children, whereas the evidence given on behalf of the respondent tended to cover the views of those who, although clearly tending in the opposite direction, were less radical. Particularly, when

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looking at the evidence on behalf of the applicant, the Court had been driven to the conclusion that most of the witnesses were so uncritical of the book looked at as a whole, and so unrestrained in their praise of very large parts of it, as to make them at times less convincing than otherwise they might have been. For example, the passage at page 101 of the book dealing with the question of contraceptives reads as follows: "There ought to be one or several contraceptive machines in every school. If your school refuses to install one, get together with some friends and start your own contraceptive shop". Not one witness called on behalf of the applicant had sought to persuade the court or had expressed the opinion that this was a sound responsible course to adopt or viewpoint that ought to be adopted, and acted upon. One after another had dismissed it as "silly" and had left it at that, but the Court did not share this view. It was plain from the evidence that no responsible or sensible headmaster could contemplate for one moment giving way to the demand that there should be one or more automatic dispensers for contraceptives in school. Consequently, this sort of advice was not to be regarded as a joke as it was, if followed, bound to cause controversy between the pupils and the headmaster, encouraged sexual intercourse on a considerable scale, and thus detracted from other advice discouraging full intercourse between children at school. In summary, the Court considered that, what had happened with a good deal of the witnesses in this case was that they had been so single-minded in an extreme point of view as to forfeit in a large measure the power to judge with that degree of responsibility which makes the evidence of any great value on a matter of this sort.

32. The Court then examined the contents of the book. It stressed that the Schoolbook was intended for children passing through a highly critical stage of their development, when they were gullible and had feelings of insecurity and unhappiness. At such a time a very high degree of responsibility ought to be exercised by the courts. Where, as in the present case, they had to consider, as a perfectly respectable adult opinion, a work of an extreme kind, unrelieved by any indication that there were any alternative views, this was something which detracted from the opportunity for children to form a balanced view on some of the very strong advice given therein.

33. For example, looking at the book as a whole, marriage was very largely ignored throughout the book. Next, the Court reached the conclusion that, on the whole, and quite clearly through the mind of the child, the book was inimical to good teacher/child relationships in that there were numerous passages under the headings of "Do you know", "Remember" and "Be yourself" that it found to be subversive, not only to the authority but to the influence of the trust between children and teachers. Indeed, a very particular view was expressed about the educational system and its defects at page 15 of the book which reads as follows:

> "The trouble is that few people really know how to do this. Those who do know, or at least have some good ideas, are not the people who actually control the education system.

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> The system is controlled by the people who have the money, and directly or indirectly these people decide what you should be taught and how.
>
> Whatever teachers and politicians may say, the aim of the education system in Britain is not to give you the best possible opportunity of developing your own talents.
>
> The industries and businesses that control our economic system need a relatively small number of highly educated experts to do the brain-work, and a large number of less well educated people to do the donkey-work. Our education system is set up to churn out these two sorts of people in the right proportions".

34. Further passages in the book which the Court quoted as indications of what it considered to result in a tendency to deprave and corrupt children were on page 77 under the heading "Be yourself":

> "Maybe you smoke pot or go to bed with your boyfriend or girlfriend - and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret.
>
> Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are 'approved of'".

The objectionable point was that there was no reference there to the illegality of smoking pot which was only to be found many pages further on in an entirely different part of the book. Similarly there was no mention at all in the book of the illegality of sexual intercourse by a boy who has attained the age of 14 and a girl who has not yet attained 16.

35. Again, on page 98 there was a passage headed "Intercourse and petting" under the main heading "Sex" which, laid before children as young as many of those who the Court considered would read the book, without any injunction about restraint or unwisdom, was to produce a tendency to deprave and corrupt.

36. Then the Court referred to the passages on pages 103 to 105 under the heading of "Pornography" and particularly to the last paragraphs which read as follows:

> "Porn is a harmless pleasure if it isn't taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed.

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But it's quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven't tried before".

37. The Court considered that the unfortunate thing here was that the sane and sensible first paragraph quoted above was immediately followed by a passage suggesting to children that in pornography they might find some good ideas which they might adopt. This was to raise the real likelihood that the children would feel it incumbent upon them to look for and practice such things. Moreover, just on the previous page there is the following passage: "But there are other kinds - for example pictures of intercourse with animals or pictures of people hurting each other in various ways. Pornographic stories describe the same sort of thing". The Court considered that, although it was improbable that young people would be likely to commit sexual offences with animals as a result of this, the possibility that they should practice some other forms of cruelty to one another, for sexual satisfaction, was a real likelihood in the case of a significant number of children if this got into the hands of children at a distrubed, unsettled and sexually excited stage of their lives.

38. The Court concluded "in the light of the whole of the book, that this book or this article on sex or this section or chapter on pupils, whichever one chooses as an article, looked at as a whole does tend to deprave and corrupt a significant number, significant proportion, of the children likely to read it".

39. There remained the question whether under Sec. 4 of the 1959 Act the statutory defence had been proved, and the burden to prove the case was on the applicant on the balance of probabilities. The Court stated that no doubt there were many features about the book which, taken by themselves, were good. The unfortunate thing was that so frequently the good was intermixed with things that were bad and detracted from it.

40. For example, much of the information about contraceptives was very relevant and desirable which should be laid before very many children who might not otherwise readily have access to it. But it was damaged by that suggestion backed by the recommendation to take direct action if the school authorities would not give way, that every school should have at least one contraceptive vending machine.

41. Similarly, the treatment of the subject of homosexuality had been a very proper and fair description, as a factual, very compassionate, understanding and valuable statement. But again, no matter how good one assessed the value of this section of information, it was hopelessly damning by its setting, its context, the fact that it only contained any suggestion

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of a stable relationship in relation to sex and that marriage received no such treatment at all.

42. Again, there were many matters of fact on a great many topics with regard to venereal diseases, contraception, the avoidance of unwanted pregnancies, abortion, where dispassionately and sensibly, and on the whole completely accurately, a great deal of advice had been given which ought not to be denied to young children. However, on the balance of probabilities, these matters could not outweigh what the Court was convinced had a tendency to deprave and corrupt. It thus regretfully came to the conclusion that the burden on the appellant to show that "publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern" within the meaning of Sec. 4 of the Obscene Publications Act 1959 had not been discharged.

The Revised Edition of the Little Red Schoolbook

43. Meanwhile, after the decision of the Lambeth Magistrates' Court on 1 July 1971 that the Schoolbook was obscene, and pending the appeal hearing, the applicant consulted his legal representatives concerning a revision of the Schoolbook to avoid further prosecutions. It was decided to eliminate or re-write the offending lines which had been attacked by the prosecuting counsel, but to do so necessitated, in some case, re-writing substantially more than these criticised sentences. There were other alterations made to the text by way of general improvement, for example in response to comments and suggestions from readers and the updating of changed data (addresses, etc.).

44. The revised edition was published on 15 November 1971. After consulting the Attorney General, the Director of Public Prosecutions announced on 6 December 1971 that the new edition would not be the subject of a prosecution.

Ancillary Proceedings

45. The applicant stated that early in 1972 he was summonsed to answer charges concerning the Schoolbook in Glasgow, but these charges were dismissed. Further, he was summonsed to attend the Sheriff's Court of the Lothians and Peebles at Edinburgh on 13 June 1972 to answer charges involving the indiscriminate sale of the Schoolbook which allegedly contained indecent and obscene passages. On 8 December 1972 these summonses were dismissed because of what appeared to be a technical fault. It is not clear, however, whether it was the first or the revised edition of the Schoolbook which was the subject of these prosecutions, which anyway are not the subject matter of the present case before the Commission.

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III. SUBMISSIONS OF THE PARTIES

A. The applicant's submissions

The background of the case

46. The applicant first gave further explanations as to the background of his case.

47. He pointed out that the Little Red Schoolbook was a famous book which had been, and continued to be, published in many countries. In England, however, this book had been banned after being judged obscene, not in part but in whole. The applicant submitted that his case, which was a "cause célèbre" in England, contained a certain political element in that the aims and objectives of a particular group in society, sometimes called the silent majority, caused a burst of controversy in England over the proper ambit of obscenity and the proper role of the State in dealing with minority opinions. The applicant stressed that there was a great diversity of approaches to the English education and class systems, in particular to questions of class, values, the attitude of teachers to children and of children to society.

48. The applicant maintained that he was in no sense a "pornographer". Since the publishing of the Little Red Schoolbook he had published the following books: Revolution in the Congo, by Eldridge Cleaver; a book of writings from the Women's Liberation Movement called the Body Politic; a book called China's Socialist Revolution by John and Else Collier; and a book relating to an industrial action entitled The Fine Tubes Strike, by Tony Beck.

49. The aim of the Schoolbook had been to explain the weakness and even intolerable situation in the English educational system to the children themselves and to suggest that they should be encouraged to do what they could to improve the situation for themselves and their fellows. His intent had been to propagate social ideas. Only a small part of this book dealt with sex and sex education and matters of information of this kind.

50. On a final introductory point the applicant submitted that the fact that there was no bill of rights in England had not always worked to the advantage of the individual in defence of his civil rights and to the development of a free, democratic society. The English civil liberties or civil rights law, in dealing with profound issues such as freedom of speech, freedom of thought, freedom of property, freedom against discrimination in law, was substantially handicapped because these were not concepts which were judicially recognisable under the present condition of English law.

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51. The applicant then reminded the Commission of the facts of the case in relation to the seizure of the book and to the trial and appeal proceedings. He explained why he had elected to go for summary trial rather than trial on indictment after proceedings were commenced. Referring to his written submissions he stated that, his business being effectively in suspense until trial, the long wait for jury trial would almost certainly have rendered him bankrupt. It would have been impossible for him to have obtained redress in a court pending trial. The advice that was given him was that it was necessary to opt for this particular form of trial because the other proceedings which might have been available would have been, and were in fact, more summary. And in respect of such proceedings, possibly no expert evidence might have been available to him. He submitted that, in confronting a search and seizure of such proportions, he was effectively attempting to resolve this block upon his property and his finances at the earliest possible opportunity. Had he opted for jury trial, there would have been no way of staving off bankruptcy and of applying in the interim to obtain the release of his whole material stock.

General observations

52. In his general observations on the case the applicant summarised his complaints and the meaning of "obscenity". The applicant commented that to say the Schoolbook was intended for young children was misleading. It was intended for teenagers between the ages of 12 - 18, but its appeal would be to the older ones. The book dealt with "the facts of teenage life" and was not a corrupting influence or merely a sex-manual. The applicant suggested that the stance adopted by the book had now been adopted by the respondent Government in another context as was shown in a government circular to the health service advising doctors that in supplying contraceptives to young girls under sixteen years of age they would not necessarily be acting illegally and nor need they inform the girl's parents if she so wished.

Article 10 of the Convention

Article 10 (1)

53. The applicant examined the theories and values underlying the concept of the right of freedom of expression under four headings: the need for individual self fulfilment, the attainment of truth, participation in decision-making and a balance between stability and change. He stated that the democratic societies of Western Europe had set themselves against authoritarian attempts to restrict the free traffic of ideas through laws attenuating the freedom of the press.

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54. He contended that Article 10 (1) existed principally to protect controversial expressions. There were strong pressures in modern society to eliminate controversiality and unorthodoxy but the right of freedom of expression was essential to ensure sufficient intellectual conflict in society to guarantee society's openess and flexibility. Any restriction of this right should be precisely formulated to avoid such abuses as the suppression of unpopular opinion in an attempt to oppose necessary change.

55. The applicant submitted that there was an absence of a conception of freedom of expression in English law and that free speech was in English law "a legal residue of the things which the State takes away".

56. The applicant pointed out that most freedom of expression, in quantitative terms, was exercised by the mass media, controlled by an oligopoly. For example, the first print of the Schoolbook had been 18,000 copies whereas the average television audience in Britain at young children's viewing time might be ten million. Therefore it was even more important to ensure the freedom of expression of minority groups.

57. The applicant noted that the right to freedom of expression was accorded to everyone, including teenagers. This age group was subject to a multitude of influences, often highly commercial and materialistic, and which emanated not only from parents and schools but also, for example, from the mass media. It was necessary to examine the Schoolbook in perspective and in the context of these other influences and pressures on teenagers when considering the application of Article 10 in this case.

58. The applicant stressed that Article 10's protection of freedom of expression was the very pivot of the Convention.

Article 10 (2)

59. The applicant claimed that the burden of proof was with the respondent Government to show that its otherwise unlawful conduct of suppressing the Schoolbook was legitimate under Article 10 (2). It must show that such suppression was justified so as to convince the Commission beyond any reasonable doubt.

60. Further the failure to prosecute the second version of the Schoolbook, which was materially the same as the first, estopped the respondent Government from relying on Article 10 (2) as a defence. The applicant explained that the passages selected as having a tendency to deprave and corrupt by the judge in the appeal case were, without significant exception, retained in the second edition. Therefore there was a fundamental inconsistency

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in the Government's position and either the defence under Article 10 (2) was not open to the Government as the book was not obscene or the defence was flawed by the failure to prosecute the equally damaging revised edition.

61. It was contended by the applicant that legal precision was a condition precedent to reliance upon any exception clause like Article 10 (2). Thus he submitted that the respondent Government must show that legal provisions limiting freedom of expression are precise and clearly delimited. Imprecise criminal law was dangerous as it left the administrators of the law with too wide a discretion which perhaps might lead to the arbitrary, erratic, subjective and/or emotional application of such law, as was demonstrated in the prosecution of the Schoolbook under the Obscene Publications Act.

62. The applicant then pointed out that the danger under English law was that there was unlimited discretion and that the law might be used to strike at social opinions which may be held by a substantial minority or, in this case, by a majority of those exposed to literature. The judgment of the Inner London Quarter Sessions was that the views expressed in the book did appear to fall broadly within the mainstream of current educational policy. Furthermore, various passages in the judgment demonstrated that social attitudes, comments and judgments upon the development of educational psychology and educational methods were used as a weapon to deal with other factual material and assisted the court in arriving at the conclusion that the book itself was obscene. The tendency to deprave and corrupt, which was central to the English test of criminal obscenity was, as shown by this judgment, a "wideranging, elusive and rather terrifying" concept. It was capable of being applied not simply to questions of pornography but, instead, to sincere and well-informed attempts to apply mainstream educational psychology to pupils in adolescence Again, such a concept might, in the applicant's submission, be used by a politically motivated minority who desire to maintain or restore an old-fashioned, authoritarian attitude to education and to use the law to make attempts at social and moral reform.

63. The applicant explained his views on the meaning and application of the phraseology and underlying ideology as Article 10 (2):

"Duties and responsibilities"

64. The applicant submitted that these words did not provide a basis for the limitation of freedom of expression, the limitations being already exhaustively laid down in

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Article 10 (2). Instead they related to the scope of these limitations and more appropriately concerned the responsibilities of the mass media. The author published to a voluntary, selective readership rather than to a semi-captive audience as in the case of television. It was claimed by the applicant that he was fully aware of his duties and responsibilities in publishing the Schoolbook and he considered he had acted in a socially responsible manner.

"Necessary in a democratic society"

65. The phrase related to the limitation on the right of freedom of expression which a State might properly impose. Such restrictions should be in accordance with current Western European standards and of necessity should be narrow in scope. The applicant submitted that it was for the Commission to evaluate such current standards and play a supervisory role in this field and that it was for the respondent Government to show that it complied with these standards. Further, the applicant claimed it was for the Commission to evaluate the permissible "margin of appreciation" in this field and its approach to the problem was quite different from the evaluation of the margin of appreciation in an Article 15 situation, for example.

66. The applicant submitted that, as shown by the facts of the case and background of the Schoolbook, English law in this area was not in accordance with the standards applied. The book was not arguably obscene within any common meaning of that term. However, under the jurisprudence of the Commission relating to the margin of appreciation, the burden was on the respondent Government to show that the book was obscene by Convention standards. Consequently, the issue might even be to determine whether the judgment, supposedly applying an obscenity law, was itself compatible with the concept of obscenity and obscene publication laws which were upheld by the Convention. In this connection the applicant referred to application No. 1167/61 (Yearbook 6, p. 204), hereinafter referred to as the "German case", and to application No. 5321/71 against Austria (Collection of Decisions 42, p. 107).

67. Alternatively, the applicant submitted that it was plainly open to the Commission to examine the judgment of the court itself and to refer to its own jurisprudence on the margin of appreciation in order to determine whether or not an item was obscene

68. The applicant alleged that the restrictions imposed on his exercise of Article 10 (1) rights far exceeded what was tolerable in a democratic society.

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"For the protection of morals"

69. The applicant examined the problems which in his view arise from the concept that society should protect its members against the degrading exploitations of baser human tendencies. Such problems included the lack of agreement on what are the baser instincts to be controlled by law, the problems of over-broad formulation of legal prohibitions, the possible abuses of such provisions for social or political motives, the needs of a pluralistic, diverse society and the maintenance of the individual's free choice of personal standards.

70. Moral restrictions, the applicant stated, were essentially speculative and might pose a grave threat to freedom of expression. He commented that the trend had been away from attempts to regiment expression and belief.

71. The applicant referred to the work of the British Arts Council and Dr. R.M. Jackson, Downing Professor of English Law at Cambridge, on the obscenity laws. The Arts Council Working Party Paper concluded that the law of obscenity in England was wrong and dangerous but it was unable to recommend any alternative solution to outright repeal. Dr. Jackson advanced the principle, as a compromise, that the law should continue to isolate "hard-core pornography", something which was easily identified.

72. The applicant cited the test of obscenity laid down in the leading United States case of Memoirs v. Massachussetts (1966) 383 US 413 where it was held that for an article to be criminally obscene "it must be established that

(a) the dominant theme of the material as a whole appeals to a prurient interest in sex;

(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters;

(c) the matter is utterly without redeeming social value" (Arts Council Report: The Obscenity Laws 1969 pp. 71-79).

73. It was conceded by the applicant that a law for the protection of morals consistent with freedom of expression might be limited to certain matters, e.g. where a publication would incite criminal conduct or which gave such a shock to the reader as to be equivalent to an assault or where it could be clearly shown that there

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would be a directly damaging effect upon young children (under 12 years of age). However laws formulated to encompass such matters could not reasonably be expected to interfere with a publication like the Schoolbook. It in no way fell within the aforementioned proposals for the limitations on obscene publications.

74. Further, any such laws must embody an effective and sensitive decision-making apparatus with carefully drafted criteria and differential tests to guide the tribunal involved and to avoid irrationality and subjectivity. In this respect the applicant compared New Zealand law with the English judicial techniques of determining the issue of obscenity.

75. Amplifying the question of protecting the morals of young people and the need for a different standard of obscenity for this group, the applicant compared application No. 1167/61 (Yearbook 6, p. 204), the German case, which dealt with a corrupting attitude to important matters of sexuality, with the Schoolbook case, which dealt with a book widely welcomed and, even if controversial, acclaimed in many quarters throughout the world. The applicant regretted that the Chairman of Inner London Quarter Sessions found himself able to dismiss the evidence, given by leading educationalists, as being evidence of extremists. He submitted that English law failed to comprehend adequately the true meaning and significance of para. (2) of Art. 10 of the Convention, and that it was dangerously undiscriminating to "lump together" a whole series of documents and publications instead of classifying them more narrowly as those deemed to protect the morals of young people.

76. Referring to the second edition of the book, the applicant submitted that, with the changes that had been made, the book still maintained all the characteristics which were found by the court to be obscene. Yet, in its revised edition, it was not prosecuted under English law. This showed, in the applicant's view, that the Obscene Publications Act, which was correctly applied in his case, simply did not provide effective and precise provisions for the protection of the young. The prosecution of the Schoolbook had little, if anything, to do with the protection of the morals of children. Rather it had to do with the protection of certain kinds of adults. The applicant stated that the Schoolbook was intended as a profoundly moral document and it was published because of major social dangers which exist. In the applicant's view it was inconceivable that this book did not protect the young.

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"For the protection of rights of others" (e.g. Parents)

77. The applicant submitted this clause had no application to his case and gave examples of where the phrase might be appropriate. He pointed out that there was no compulsion on anyone to read the Schoolbook, it was not a State book used in the schools. If it were possible to limit such publications for this reason one would have the absurd consequence that one group of parents could have a publication banned because it did not wish its children to read about such ideas or facts, contrary to the wishes of other parents. Consequently, only "unchallenging banalities" could ever be published.

Art. 1 of Protocol No. 1 in relation to Art. 10

78. The applicant first dealt with the facts which he submitted were relevant to his complaint under Art. 1 of Protocol No. 1.

79. The applicant submitted that the action taken against the book was chiefly based upon reports in one particular newspaper which, prior to its publication on 1 April 1971, had run a deliberate campaign to whip up hysteria by using emotive techniques appealing to certain types of political instincts. This had caused complaints to be made by people who almost certainly had not seen the book in question, and this in its turn had led, in the course of events, to pressure upon members of the Government. The Director of Public Prosecution had been contacted by the Government and police action had been engaged before the publication, using search and seizure techniques.

80. The applicant was of the opinion that, if Art. 1 of Protocol No. 1 had any meaning at all, it was meant to give protection against this kind of arbitrary action. He submitted that by the date of publication - and in this regard publication was meant in the sense of widespread public dissemination of materials and views - more than a thousand copies of the book had been seized, including the printer's matrix and all spoilt copies of the book. This had occurred before there had even been any study of the book with a view to prosecution. The applicant alleged that it had not been the intent of the Government or a prosecuting authority to look for evidence. Their intent had been to stop publication before there was any form of judicial determination on the difficult problem of whether a matter was in law obscene. The applicant submitted that it was possible for an English magistrate, in conformity with the law, to find that the opinions expressed in such authoritative journals as The Times Educational Supplement, The Teachers' World, The Cambridge Review, or The New Society, should be ignored because they did not reflect anything other than the standpoint of a particular wing of English education.

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81. In the applicant's submission the most likely interpretation of these facts was that these draconian measures took place in a climate amounting to a kind of repressive hysteria in certain sections of the public which were unfortunately allowed to affect the judgment of Government officials. In the applicant's view this action could only be regarded as being arbitrary.

82. The applicant contended that there was a generally accepted principle in the field of freedom of expression that no publication should be subject to restraint prior to its publication. However the search and seizure of the Schoolbook by the police before the prosecution was instituted constituted a violation of this principle and was unlawful under the Convention. The intention of the authorities had been to suppress the book before publication by seizing the whole stock. Art. 10 (1) specifically mentioned licensing by States of broadcasting, television and cinema enterprises and from such [illegible] might be inferred that no other prior restraints on publication are legitimate.

83. Turning to the legal issues under Art. 1 of Protocol No. 1, the applicant submitted that it was mainly the first paragraph of that Article which was relevant in his case and which gave protection to an applicant, such as himself, whose property had been arbitrarily seized and whose book had been suppressed in the guise of repression of obscenity. A great deal of what he intended to submit turned upon the conception of what was arbitrary and what was not and this conception had to be read in the light of the other guarantees of the Convention, especially in relation to Art. 10. Freedom of expression was, in his submission, the basic human right. Art. 10 could have no meaning unless it was supported by provisions precluding arbitrary search and seizure. Indeed, it could itself be undermined if Art. 1 of Protocol No. 1 were not given a meaning in this case which supported the fundamental guarantee of the right of ideas and published words to circulate.

84. The applicant recalled that the first paragraph of Art. 1 referred to the general principles of international law upon which the Commission had relied when it had ruled in previous decisions, e.g. in application No. 511/50 (Yearbook 3, page 422), that this provision could not be invoked by an applicant against a State of which he was a national. In the applicant's submission, this jurisprudence of the Commission should no longer be followed. The general principles of international law now included the general principles of international human rights law. In particular Art. 17, para. 2, of the Universal Declaration of Human Rights of 1948 provides that no one shall be arbitrarily deprived of his property. The view that the

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basic provisions of human rights law were now part of the general principles of international law had been expressed by several eminent international law professors and confirmed by the International Court of Justice in its 1971 opinion on the Status of Namibia. It followed that the general principles of international law precluded an arbitrary taking of property both from nationals and from aliens.

85. Dealing next with the question of the margin of appreciation, the applicant referred to application No. 3039/67 (Collection of Decisions 23, p. 66). He submitted that an appropriate test of this concept in relation to Art. 1 of Protocol No. 1 was given by J.E.S. Fawcett in his "Application of the European Convention on Human Rights" where he says that a taking of property must conform to "what the citizens in a democratic society would consider acceptable as being necessary to attaining the end permitted". The applicant reiterated that, under the Commission's established case-law, the margin of appreciation accorded to Governments was subject to the Commission's own judgment of the particular restriction concerned being within the limits of reasonableness and good faith necessary to good government. However, in the applicant's view the actions taken by the British Government against the Schoolbook did not conform to what citizens in a democratic society would consider as being necessary to attain the very limited end permitted and, on the facts advanced in this case, did not appear to be within the limits of good faith necessary to democratic government.

86. The applicant then referred to other jurisdictions, for example, to the United States jurisdiction where, before a single copy of a document or a film may be seized with a view to its prosecution, a thoroughly searching review must take place on the question of obscenity. The applicant submitted that the opposite had happened in this case. The procedure to obtain a warrant for the seizure was most probably summary in nature lasting only a few minutes. The applicant submitted that the respondent Government should disclose the circumstances of the grant of the warrant and should justify such interference with his property rights in terms of the Convention.

87. In the applicant's submissions on this point, the arbitrariness of the seizure within the meaning of Art. 1 of Protocol No. 1 was related to the seizure which took place prior to any form of judicial determination, and not to the forfeiture after the hearing in the two courts. Further, the fact that the Schoolbook was subsequently found to be obscene by a court was irrelevant in the context of this question because such seizure could not be justified ex post facto by a judicial decision.

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88. If it were necessary to have prior restraint of publications in exceptional circumstances, the applicant claimed such procedure would be invalid without a strict time limitation on the retention of the article and without a preliminary judicial evaluation of the legal issue thereafter to be determined. Otherwise the public interest in the context of seizure of a publication would be adequately fulfilled by the seizure of only a few copies as evidence for a prosecution.

89. Search and seizure should not amount to an over-reaction but should rather be in the nature of a provisional act intended to obtain evidence in respect of a particular matter. It should be an act with all due safeguards having regard to the possible nature of the damage inflicted, even if only of a provisional character, and having regard to the underlying right to which it relates.

90. The applicant claimed that the prior restraint of the Schoolbook was contrary to the "public interest" and the "general interest" and restraints of this nature seriously threatened freedom of expression and could not be justified on the grounds of protecting public morals.

91. The applicant summarised the aspects of the arbitrariness of the seizure of the Schoolbook in relation to Art. 1 of Protocol No. 1 as follows:

(1) The power which was afforded to the State by Art. 1 of Protocol No. 1 was subject to three limitations, namely

i. that which is reasonably necessary in the public interest, meaning that which appears within the limits of reasonableness and good faith, to be necessary to government;

ii. that which is provided for by law, but domestic laws which must also appear to be within the limits of reasonableness and good faith;

iii. the general principles of international law, including the principles of human rights law which prevent the arbitrary deprivation of property, whether such deprivation is against nationals or aliens.

(2) The concept of arbitrariness in the context of Art. 1 of Protocol No. 1 depended upon the nature of the seizures, i.e. the quantity of the material seized, and upon the procedure before such a seizure took place.

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(3) The principle of effectiveness in the interpretation of the Convention required that the possibility of circumvention by a High Contracting Party of its obligations under Art. 10 should be checked by an interpretation of Art. 1 of Protocol No. 1 which would prevent such circumvention by the State.

(4) In the present case, the element of arbitrariness rested on three factors, namely

i. the circumstances in which the search and seizure warrants had been issued;

ii. the enormity of such search and seizure;

iii. the implications for Art. 10, namely the protection of freedom of expression.

Article 17

92. The applicant submitted that this provision had no application to his case.

Article 18

93. The applicant submitted that the seizure of the Schoolbook was not only in breach of Art. 10 (1) but also that the official justification of protecting public morals disguised ulterior motives to suppress a book by administrative action, the desire to impose upon society as a whole uniform standards of personal conduct, the desire to resist the development in schools of attitudes consistent with modern educational techniques and the desire to reassert authoritarian attitudes in schools and society. As such the seizure was unjustifiable under the exception clauses of Art. 10 and Art. 1 of the Protocol, being fatally flawed by the existence of these improper motives within the meaning of Art. 18. The adjective "improper" in this context was to be construed as being improper in relation to the Convention's permitted objectives.

Applicant's statement of losses

94. The applicant concluded by itemising the losses he had incurred as a result of the action against the first edition of the Schoolbook and himself. This included £14,184 in quantified damages plus a list of matters for which damages have not been assessed.

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B. Submissions of the respondent Government

Art. 10 of the Convention

95. The Government stated first that only one enquiry could be undertaken in this case. This was an enquiry into whether, first, the seizure of the book and, secondly, the prosecution and/or conviction of the applicant and, finally, the subsequent forfeiture of the book after conviction, were in any breach of any article of the Convention, to the extent that the applicant became thereby a victim of a violation of his rights under that Convention.

96. The Government remarked that the applicant conceded that the Schoolbook was intended for teenagers aged 12-18 years. The restrictions on obscene publications were for the protection of health and morals and it was generally recognised in democratic societies that there should be special protection for children from such material. The Government submitted that the nature and scope of the Obscene Publications Act was within the ambit of Art. 10 (2) and reflected current Western European standards.

97. The respondent Government emphasised that there was no burden of proof of any form on the Government. It remained firmly with the applicant since it is he who alleges that he is a victim of a violation of his rights.

98. The Government noted that the applicant sought to distinguish conceptually between paragraphs (1) and (2) of Art. 10, alleging that any limitation of the right to freedom of expression was, prima facie, unlawful. The Government contested this approach and considered Art. 10 should be read as a whole. It was recognised in Art. 10 (2) that the right "carries with it duties and responsibilities", a provision found nowhere else in the Convention. Thus Art. 10 required that persons exercising this right shall consider the effects of their behaviour on others. For this reason, therefore, it was for the applicant to show a violation of Art. 10 had occurred having regard to the whole Article and not just paragraph (1).

99. The Government submitted that there was no domestic act in the United Kingdom which expressly provided for the right of freedom of expression or otherwise, because the situation in England was that one had the right to say or do anything, provided it was not prohibited by law.

100. The Government pointed out that any democratic society was entitled to legislate specifically to protect the health and morals of the young from being exposed to obscene matter. The Government stated that, although in the United Kingdom

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there was some domestic legislation for the protection of the health of children, there was no specific legislation for their protection contained in the Obscene Publications Act of 1959. The reason was that the court was required to consider the type of person who, having regard to all relevant circumstances, was likely to read the publication concerned. Therefore, in the case of a book printed and published solely for children, the courts would have to consider children as being the persons likely to read the book. The Government stressed that the United Kingdom was not unique in legislating in order to protect the health and morals of the young, but that it was a universal practice of all civilised democracies, quite irrespective of the provisions of the Convention.

101. The Government referred to the right of States, under para. (2) of Art. 10 of the Convention, to determine the limitations to the freedom of expression insofar as they must be prescribed by law and be necessary in a democratic society.

102. The Government next submitted that it was well established that there was vested in each High Contracting Party a margin of appreciation in determining the limits to be placed by it on such freedoms as the freedom of expression.

103. In particular, reference was made to the "German case" where the applicant was convicted on the ground that he was liable to corrupt the young. The Government suggested that the situation in that case was somewhat trivial in comparison with the Little Red Schoolbook because the German court had found only two of the illustrations likely to have a corrupting influence on young persons. The Commission had in no way considered that the limitation on the publication, imposed by the German Statute in that case, exceeded the margin of appreciation. The Government recalled that, as in the case of the Schoolbook which was published freely in Scotland, in the German case the prosecution had occurred only in one particular province (Land), but that the Commission had been of the opinion that, because there had been a full court hearing, the applicant could not complain.

104. The Government pointed out that in the case of the Little Red Schoolbook a very careful investigation by two courts had taken place. The courts had been required to take into consideration the aesthetic merits in relation to the defence of public good. Unlike the German court, the court in this case did not just call one witness, but heard no less than 16 expert witnesses - seven called on behalf of the Crown and nine on behalf of the defence - before delivering a carefully formulated judgment.

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105. The respondent Government outlined the law in the United Kingdom relating to obscene publications and made certain other submissions which were contained in their written observations on admissibility. They again stressed that the 1959 Act represented a considerable step forward from the narrower and more rigid application of the common law and they reminded the Commission of the heading of the Act and its dual purpose which is "to amend the law relating to the publication of obscene matter, to provide for the protection of literature and to strengthen the law concerning pornography".

106. The Government denied that the Act was imprecise and referred to the Commission's decision on Art. 7 in this case to support the denial. The Act was well within the margin of appreciation allowed to States and envisaged in Art. 10. With the statutory defence of public good and provision for the examination of each case in concreto, the Act recognised varying degrees of impressionability and susceptibility of the recipient of obscene material. The Court found that the Schoolbook taken as a whole tended to corrupt the school children who were likely to read it. The Government submitted, therefore, that the application of the Obscene Publications Act in this case fell within the permissible restrictions under Art. 10 and within the margin of appreciation permissible in the implementation of the Convention.

107. The respondent Government pointed out that the seizure of the books and their subsequent forfeiture were strictly in accordance with the provisions of the 1959 Act, and of the 1964 amending Act, which provides for forfeiture in the event of a person being convicted of an offence under Section 2 of the 1959 Act.

108. The Government submitted further that, in relation to the margin of appreciation under the Obscene Publications Act, no book in the United Kingdom could be seized without a warrant issued by a Justice of the Peace. No book published in the United Kingdom could be forfeited and destroyed without an order of a competent court subsequent to the conviction of the publisher on a charge of publishing obscene material. Anyone accused of publishing obscene material is entitled as of right to trial by jury in order to decide whether it has been established by the prosecution that the article in question is such as to tend to deprave and corrupt those persons who are likely to read it.

109. The Government stated that in England there is one of the most comprehensive legal aid systems available in criminal proceedings and, if one elects to go for trial before a jury in an important matter, one is allowed, out of public funds, not only junior counsel but also Queen's counsel. The applicant, however, had not elected trial by jury because of the possible delay and because of his financial position.

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The procedure in such cases is that the case is heard by a magistrate and the appeal by a chairman of London Quarter Sessions, who is obliged to sit with the justices who together form an appeal committee.

110. The Government further stated that when considering the margin of appreciation under the Obscene Publications Act 1959, the prosecution has to satisfy the jury, or the magistrate as the case may be, so that the jury or the magistrate is sure of the guilt of the accused before he can be convicted. The Government maintained that if the jury is left in any reasonable doubt as to the guilt of any accused, he is then entitled, as of right, to be acquitted. Unlike the prosecution which has to prove everything beyond reasonable doubt, a defendant is only required to establish his defence on the balance of probabilities. The law, therefore, is in fact weighted heavily in favour of the defence.

111. The respondent Government reemphasised the recognition by the Commission that under Art. 10 of the Convention a High Contracting Party is given a certain margin of appreciation in determining the limits that may be placed on freedom of expression. In this connection the United Kingdom Government referred again to the Commission's opinion in the De Becker case (application No. 214/56, Publication of the Court, Series B, p. 125).

112. They further submitted that the Government are clearly entitled to legislate to prevent obscene publications, although such legislation must inevitably limit complete freedom of expression; that a heavy burden is cast upon the prosecution in any case involving the publication of obscene articles, although they conceded that it was difficult to define obscenity with complete precision. The Government noted that a conviction could only result when the prosecution could satisfy a court that the effect of the article, if taken as a whole, is such as to tend to deprave and corrupt persons who are likely to read it. In cases where the publication is directed at young readers, expert evidence is permitted as to whether or not the publication is obscene, and this had taken place in the case of the applicant's appeal. Expert evidence, however, could not be admitted when the publication is aimed at an adult readership. The Government further pointed out that the applicant is not entitled to put in evidence reviews in the press in the United Kingdom because under English law there can be no press comment on a case while it is sub judice. This was to protect the accused and to ensure that he is not "tried by newspaper" prior to his actual trial.

113. The Government submitted that, having regard to the margin of appreciation to determine the limits of free expression, it could not be said that the provisions of the

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Obscene Publications Act 1959, as amended, are unnecessary in a democratic society. They further submitted that legilsation to protect the morals of the young was not only desirable but absolutely essential in any democratic society.

114. Commenting on the applicant's claim that the Government are stopped from relying on Art. 10 (2) because of the failure to prosecute the revised edition of the Schoolbook, the Government noted that the particular passages criticised by the Court on the appeal hearing were nearly all amended to comply with the judge's comments and hence it was considered unnecessary to prosecute the applicant again on the revised edition.

115. In relation to the applicant's remarks on the Government's standpoint as reflected in its circular to the health service about supplying contraceptives to young girls, the Government commented that this publication was only issued to health authorities and doctors and its contents were some distance from those of the Schoolbook, for example, where the Schoolbook states that there should be contraceptive machines in every school. The Government annexed a copy of this circular to its written submissions.

116. The Government informed the Commission that they did not intend to rely on the aspect of "protection of the rights of others (e.g. parents)" raised in Art. 10 (2) and submitted no argument on this point.

117. The Government submitted that under English law it is totally irrelevant to inquire into the motive of the publisher or the author of the article found to be obscene. The reason for this is because the law is concerned with the effect of the obscene publication, namely the effect it has on the minds of persons who are likely to read it, which in this case is young children. Intention is irrelevant to the issue of guilt or innocence, but it is very relevant in mitigation. The Government then gave examples of other democratic countries where the intention of the publisher is, or appears to be, equally irrelevant.

118. Relying on the decisions of the Commission in application No. 290/57 (Yearbook 3, p. 214) and in the De Becker case (Yearbook 5, p. 320), the Government recalled that a complaint made by an individual to consider a statute in abstracto is inadmissible. Therefore, the Government limited their submission to considering the applicant's complaint as to his conviction and as to the order for forfeiture of the copies of the book which had been seized by the police.

119. Finally, the Government stated that, on the applicant's own admission, the Little Red Schoolbook was intended for, and likely to be read by, schoolchildren of the age of 12 and above. The court had reached the conclusion that the Little Red Schoolbook, taken as a whole, was such as to tend to

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deprave and corrupt children who were likely to read it. In this connection the court had referred to passages of the book which might incite children to commit criminal offences. The Government recalled that, according to the court's judgment, the book was not for the public good. In this connection, they referred to their previous submissions. Not only the Convention itself recognised the existence of the rights of the Government to legislate for the protection of health and morals of the young but, again, the Government had a margin of appreciation in determining the limits of the right of freedom concerned. The Government stressed that, under the Act of 1959, the court was required to balance the possible harmful effects of allowing obscene matter to be published against the advantages, in the public interest, of publishing material which might have some artistic or other merits, and that such provision was fully in accordance with the provisions and the spirit of the Convention. The Government submitted that it was really only Art. 10 which was the relevant Article in this case and that the complaint in this respect was manifestly ill-founded.

Article 1 of Protocol No. 1 in relation to Article 10

120. The Government first expressed the opinion that the complaint of a breach in this respect was also manifestly ill-founded. They explained that only the first paragraph of Art. 1 was relevant. The word "arbitrary" did not appear in the terms of Art. 1 at all. Furthermore, it is totally impossible to describe as arbitrary the seizure of articles authorised by a warrant issued by a Justice of the Peace under Section 3 (1) of the 1959 Act, as was inferred by the applicant. In the Government's submission the action taken by the United Kingdom authorities with regard both to the seizure and to the subsequent forfeiture were "provided for by law". Section 3 (1) of the 1959 Act provides for the seizure and the 1964 Act provides for the forfeiture following a conviction under Section 2 of the 1959 Act. The seizure, therefore, of the Schoolbook could not be described as "an administrative device without adequate legal controls" as claimed by the applicant.

121. The Government then turned to the words "and by the general principles of international law". In this connection they cited a passage of the decision in application No. 511/59 (Yearbook 3, p. 422) where the Commission held that measures taken by a State with respect to the property of its own nationals were not subject to these general principles of international law in the absence of a particular treaty clause specifically so providing, and that the High Contracting Parties had had no intention of extending the application of these principles to the case of the taking of the property of nationals.

122. In the submission of the respondent Government, the United Kingdom as a High Contracting Party had made it quite plain, when entering into the Convention, that Art. 1 of

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Protocol No. 1 was not to extend to property rights in regard to its own nationals, and that it had never done anything thereafter to indicate that it was prepared to accept a change in that position.

123. The Government then turned to the question whether the action taken was within the qualification "except in the public interest". In this connection they relied on the decision in application No. 3039/67 (Yearbook 10, page 506) where the Commission had expressly recognised the margin of appreciation to be given to the High Contracting Party concerned when determining whether or not a certain measure was "in the public interest".

124. It was not unreasonable that a very large number of parents with young children should become very concerned about such a book falling into their children's hands. In a democratic State, the State would be failing in its duty, where public concern of such magnitude is expressed, if it did not investigate the matter.

125. Art. 1 permits deprivation of property "in the public interest" and in this case, it was submitted, it was in the public interest to seize the book pending adjudication as it was obscene. The permissible restrictions under Art. 10 could only be effective with the withdrawal of the publication from circulation. The Government relied principally on paragraph one of Art. 1, but if the Commission wished to consider this aspect in the light of paragraph two, the Government remarked that the phrase "general interest" referred to therein was of even wider scope than "public interest" and similarly applied to the seizure and forfeiture of the Schoolbook.

126. The reason why the disclaimer and caution procedure was not used but proceedings under Section 2 of the 1959 Act were used against the applicant was, first, because children were concerned and there was very considerable public concern, and, secondly, no possibility really arose that the applicant would have consented by way of disclaimer to the whole publication being destroyed. Disclaimer could only be carried out with the consent of the person who owns the publication. Therefore, the only way of deciding in the present circumstances, whether the book was obscene or not was to seize it and bring proceedings under Section 2, so that an independent, competent court could decide whether it was obscene.

127. The Government further submitted that it would have been a breach of the State's public duty if it had not taken the entire stock. It was not for the police to condemn the article and to suppress the publication. The object was to bring the book before a court. If either the Director of Public Prosecutions had recommended that there should be no proceedings or, if after the proceedings the court had

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acquitted the applicant, the book could have been published and published with the benefit of the publicity of the proceedings in which the acquittal occurred. The applicant's suggestion that the seizure of only a few copies of the book was necessary for evidential purposes ignores the provision of Art. 10 (2) that it may be necessary to take steps for the protection of morals.

Articles 17 and 18

128. The Government submitted that no issue arose under these Articles which is additional to those raised under Art. 10 and Art. 1 of Protocol No. 1.

129. Commenting on the applicant's claim that Art. 18 is relevant because the prosecution of the Schoolbook violated the principle prohibiting previous restraints and had social or political motives behind it, the Government stated that the question of previous restraints was irrelevant to Art. 18 and that the applicant had produced no evidence of the ulterior motives of the authorities. On the contrary, the evidence showed that the Court was only concerned with the section of the book on sex and the offending passages having been withdrawn or revised there was no need to prosecute the revised edition of the book.

Conclusion

130. The Government concluded by requesting the Commission to reject the application on the grounds that no violation of the Convention or Protocol No. 1 was disclosed.

131. Concerning the applicant's statements of losses, the Government noted that claims for compensation were not within the jurisdiction of the Commission.

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IV. OPINION OF THE COMMISSION

132. The questions which have to be decided in this case concern the existence or non-existence of a breach of Art. 10 of the Convention, or Art. 1 of Protocol No. 1 in relation to the allegations under Art. 10 and, furthermore, the issues under Arts. 17 and 18 of the Convention which the Commission has raised ex officio.

133. The Commission considers that the central point at issue relates to the alleged breach of Art. 10 of the Convention and it will therefore deal with this issue first. It will then consider Art. 1 of Protocol No. 1, Arts. 17 and 18 of the Convention and will finally state the conclusions reached.

Art. 10 of the Convention

134. Art. 10 provides 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."

135. The applicant has submitted that the authorities and courts in the United Kingdom, by convicting him for publishing the Little Red Schoolbook under the Obscene Publications Acts 1959 and 1964 and by seizing and forfeiting his publiction, interfered with his right to freedom of expression within the meaning of Art. 10 of the Convention in a way that could not be justified under para. (2) of that provision. He maintained that this interference had not been necessary in a democratic society for the protection of morals of young people, as the

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book was not an obscene book despite the finding in accordance with the Obscene Publications Act whose test of obscenity was, in any event, unsatisfactory. Besides, the burden of proving the application of Art. 10 (2) was on the respondent Government.

136. The respondent Government have replied that there had been no breach of the applicant's rights under Art. 10 in the present case. Art. 10 should be read as a whole and it was for the applicant to show a violation of Art. 10 had occurred having regard to the whole Article and not just para. (1). The Government pointed out that, in accordance with the Commission's established case-law, States had a discretion in determining the limits that may be placed on freedom of expression, and this discretion had in no way been exceeded in the present case.

137. As regards the relationship of para. (2) to para. (1) of Art. 10, it is clearly that of an exception to the general rule. The general rule is the protection of the freedom; the exception is its restriction. The restriction - interpreted in the light of the general rule - may not be applied in a sense that the expression or the dissemination of an opinion in a particular matter is completely suppressed. In other words, an expression of an opinion or its dissemination may only be restricted insofar as it is necessary for preserving the values protected in para. (2) of Art. 10. The grounds permitting such restrictions are exhaustively enumerated in Art. 10 (2).

138. Accordingly, the method of examining complaints under Art. 10 of the Convention requires the Commission first to consider whether or not there has been, in a given case, an interference with the right protected and, if so, whether or not this interference was justified in the light of para. (2) of Art. 10. This method is a logical consequence of the relationship of the two paragraphs as described above.

139. Having clarified this, the Commission is unanimously of the opinion that the punishment imposed on the applicant for publishing the Little Red Schoolbook and the seizure, forfeiture and destruction of the copies of the book as a result of his conviction clearly constituted an interference with the rights protected by Art. 10 (1) of the Convention.

140. The question therefore arising is whether or not the interference complained of was prescribed by law and was, in the circumstances, necessary in a democratic society for any of the criteria enumerated in Art. 10 (2) having regard to the duties and responsibilities which the exercise of the freedom of expression under Art. 10 carries with it.

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141. In this respect the Commission stresses the proposition implied in Art. 10 (2) that an appreciation of this question must take into account the duties and responsibilities incumbent on everyone in the exercise of the right to freedom of expression. It is true that reference to such duties and responsibilities is alone not sufficient to justify an interference with this right by the State, but such justification must be found in the grounds specifically listed in para. (2) of Art. 10. However, the Commission, in assessing these grounds, must also have regard to the particular situation of the person exercising freedom of expression and to the duties and responsibilities which are incumbent on him by reason of this situation. Thus, different standards may be applicable to different categories of persons, such as civil servants, soldiers, policemen, journalists, publishers, politicians, etc., whose duties and responsibilities must be seen in relation to their function in society.

142. In the present case, the Commission is concerned with the publisher of a book intended to be read by schoolchildren and it is against this background that the interference with the exercise of the right to freedom of expression must be seen.

143. There can be no question that the interference complained of was prescribed by law, namely the said Obscene Publications Act 1959, as amended.

144. Section 3 of the Obscene Publications Act 1959 provides for the seizure of any publication in a person's possession for gain which may reasonably be considered obscene by the police. It further provides that the publication should be brought to court for a determination of its obscenity within the meaning of Section 1 of the said Act, that is to say, as to whether the effect of the publication is, "if taken as a whole, such as tends to deprave and corrupt persons who are likely having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it". If the publication is found to be obscene, then the publisher may be punished (section 2 of the Act) and the book may be forfeited (section 3 of the Act). Forfeiture normally results in the destruction of the material in the case of a book. This was the legal procedure which was followed in the applicant's case.

145. The question whether restrictions on freedom of expression are necessary in a democratic society cannot be answered in abstracto but must be answered by reference to the particular case and to the "democratic society" which the Convention envisages. The Commission considers that "democratic society" in the sense of the Convention is meant to refer to those States which are member States of the Council of Europe.

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146. The questions which then fall to be considered are the needs or objectives of a democratic society in relation to freedom of expression; for without a notion of such needs the limitations essential to support them cannot be evaluated. The Commission agrees with the applicant who stated that freedom of expression is based on the need of a democratic society to promote the individual self-fulfilment of its members, the attainment of truth, participation in decision-making and the striking of a balance between stability and change. The aim is to have a pluralistic, open, tolerant society.

147. Of necessity this involves a delicate balance between the wishes of the individual and the utilitarian "greater good of the majority". But democratic societies approach the problem from the standpoint of the importance of the individual and the undesirability of restricting the individual's freedom.

148. The Commission accepts, however, that, in striking the balance, certain controls on the individual's freedom of expression may, in appropriate circumstances, be acceptable in order to respect the sensibilities of others. It notes, in this context, that "freedom of expression is commonly subject in a democratic society" to laws importing restrictions considered "necessary to prevent seditious, libellous, blasphemous and obscene publications" (de Becker case, Application No. 214/56).

149. The Commission therefore acknowledges the necessity of certain restrictions on obscene publications for the protection of the morals of that society, particularly the morals of young people and children.

150. In this respect, the Commission considers that the Obscene Publications Act, as such, is not in breach of Art. 10 of the Convention. The applicant is nevertheless entitled to raise the question of compatibility of the Act with the Convention as he is not simply challenging, in abstracto, its compatibility, but also claims that he is himself a victim of the application of the Act. Moreover, the legislation involved should be considered in this light because, in certain cases, laws imposing general restrictions on all forms of publication, for example, would, in the Commission's opinion, raise serious questions under the Convention.

151. However, it cannot be contested that legislation preventing the publication and dissemination of obscene publications is necessary for the protection of morals within the meaning of Art. 10 (2) of the Convention. In fact, the legal codes of all the member States of the Council of Europe contain legislation restricting in one way or another the right to freedom of expression, insofar as indecent, obscene or pornographic objects and literature are concerned. This can be regarded as a clear/

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of the necessity in a democratic society to have legislation, such as the Obscene Publications Act in the United Kingdom, designed to protect morals.

152. However, the compatibility of the legislation itself with the Convention does not automatically validate its application in terms of the Convention. The question remains whether the action taken against the applicant and the Schoolbook was necessary for the protection of morals.

153. In dealing with such cases, the Commission has consistently held that Art. 10 gives to States a certain discretion in determining the necessary limitations on freedom of expression in accordance with Art. 10 (2). In Application No. 1167/61 (Yearbook 6, p. 204), the Commission found, without a thorough study of the problems at the stage of admissibility, that the German law of 9 July 1953 did not exceed the governmental discretion envisaged in Art. 10 (2) since its provisions represented "measures necessary 'for the protection of morals' of young persons". (See also Application No. 753/60). However, in each case, the Commission considers that it has the duty to control the extent of such limitations and to review the exercise of that discretion.

154. The Commission's approach to this problem is that it is impossible to impose uniform standards of morality on the member States, but that the moral standards prevailing in the country in question must be considered in order to determine whether the action taken was necessary to protect the said standards. To this end, the Commission has examined the decision of the domestic appeal court, the Inner London Quarter Session, in its determination of the question of the obscenity of the Schoolbook, as such determination overlaps the Commission's task of assessing both the prevailing standards of morality in the United Kingdom at the time and the necessity of their protection.

155. The Schoolbook certainly contained chapters with a moral element, particularly those sections on sex and drugs. It is undisputed that it was intended for schoolchildren from the age of 12 upwards. The court made a thorough examination of the book and heard several expert witnesses on its literary merits, in particular on the questions whether or not it would tend to deprave and corrupt its teenage readers and whether or not it was for the public good. After giving careful consideration to the interests involved the Court held the book as a whole to be obscene and ordered its forfeiture and destruction and penalised the publisher, the present applicant.

156. The Commission refers to paras. 28-42 ante, the summary of the court hearing. The court pin-pointed several passages which in its opinion tended to deprave and corrupt schoolchildren:

1. "There ought to be one or several contraceptive machines in every school. If your school refuses to install one, get together with some friends and

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start your own contraceptive shop" (p. 101 Schoolbook). The court comments "What this must mean to a child is the encouragement of sexual intercourse on a considerable scale" (p. 13 Judgment).

2. The court noted that the book's attacks on traditional child/parent, child/teacher relationships "undermine many of those influences which might otherwise provide restraint, the sense of responsibility for oneself ..." (p. 16 Judgment) and that "the overriding tenor of the whole book is completely without the respect or regard for marriage that in our judgment are so vital if some of the strong advice here is not to be looked upon in ways which will result in a tendency to deprave and corrupt" (p. 19 Judgment).

3. Under the heading "Be Yourself" in the book:

"Maybe you smoke pot or go to bed with your boyfriend or girlfriend - and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret.

Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are 'approved of'."

In the court's judgment "this passage has clearly manifested a tendency to deprave and corrupt. There is no ... mention /in this section of the book/ ..., of the illegality of smoking pot ... of the illegality of sexual intercourse by a boy who has attained 14 and a girl who has not yet attained 16" (pp. 19-20 Judgment).

4. Under the heading of "Pornography":

"But it is quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven't tried before ..."

Again the court found that this passage "is suggesting to children that in pornography they may find some good ideas which they may adopt ...", which creates "the likelihood that they will feel it incumbent upon them to look for and practice such things", the likelihood that a significant

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number of children would feel they "should practise some ... forms of cruelty to one another, for sexual gratification ... That such conduct is undesirable is a sign of corruption and depravity ... To deprave and corrupt must include the admission or encouragement to commit criminal offences" (pp. 21-23 Judgment).

The court concluded therefore "that this book or this article on sex, or this section or chapter on pupils, whichever one chooses as an article, looked at as a whole does tend to deprave and corrupt a significant number, significant proportion, of the children likely to read it".

157. The Commission is satisfied that the interference with the publication of the book of which the applicant complains was necessary for the protection of morals of young persons in a democratic society. The United Kingdom authorities acted reasonably and in good faith and within the discretion afforded to member States in Art. 10 (2) for the protection of morals. The Commission, therefore, finds by eight votes against five with one abstention, no violation of Art. 10.

Art. 1 of Protocol No. 1

158. The Commission has next considered the case in the light of Art. 1 of Protocol No. 1 which provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

159. The applicant claimed that the seizure by the police of over 1,000 copies of the Schoolbook, together with the printer's matrix, prior to its publication or distribution was an arbitrary act in violation of Art. 1 of Protocol No. 1, contrary to the general principle of "no prior restraint" on freedom of expression and the guarantees of Art. 10. He submitted that

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the action was arbitrary and in breach of the Convention as no determination of the issue of obscenity preceded it, but merely a few minutes consideration by a Magistrate when granting the search and seizure warrant to the police.

160. On a legal point the applicant submitted that a national could invoke the general principles of international law, referred to in Art. 1 of Protocol No. 1, since international human rights law, prohibiting the arbitrary taking of property, was now part of the general principles of international law. The applicant requested the Commission to review the respondent Government's discretion in acting "in the public interest" or "the general interest" in the light of what is reasonable in a democratic society to achieve the permitted result.

161. The respondent Government replied that the seizure was not arbitrary but effected in accordance with a valid judicial decision of a Magistrate when the warrant was issued. Further, the seizure was "in the public interest" or even "the general interest" for the protection of morals of youth. However, the Government submitted that, in accordance with the decision of the Commission in application No. 511/59, the applicant, as a British national, could not invoke Art. 1 of Protocol No. 1 against the United Kingdom authorities.

162. The Commission has examined the preliminary legal point as to whether a national may invoke the said Art. 1 against his State. The parties referred to application No. 511/59 from which the respondent Government concluded that a national, and thus the applicant, could not do so. The Commission considered in that case, involving a tax levy, the condition "subject to the general principles of international law". The general principles of international law provided that aliens should be compensated for the confiscation of their property by a State. The Commission held that a national was not so entitled and Art. 1 of Protocol No. 1 would not seem to have extended such general principles to nationals, thus affording them a right to compensation.

163. In the Commission's opinion, Art. 1 of Protocol No. 1 requires member States to respect the property of "every natural or legal person" within their jurisdiction, which of necessity includes nationals. To decide otherwise would be to render the Article meaningless. Art. 1 "se dirige essentiellement contre la confiscation arbitraire de la propriété" (see applicstion Nos. 1420/62, 1477/62 and 1478/62, Yearbook 5, pp. 625-7).

164. In its consideration of the merits of the applicant's claim relating to the seizure of the <u>Schoolbook</u>, the Commission has also considered the forfeiture and destruction of the book as a second separate issue under Art. 1 of Protocol No. 1.

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165. First, the seizure of the Schoolbook clearly constituted an interference with the applicant's right to the peaceful enjoyment of his property. As such it was not a deprivation of property as the possibility existed at that time that the books could have been returned to him after judicial consideration of the issue of obscenity. The Commission considers that such action constitutes a prima facie interference with the peaceful enjoyment of possessions within the terms of Art. 1 of Protocol No. 1. But para. (2) of the said Article permits a member State "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". By intervening to prevent the distribution of the Schoolbook by its seizure the respondent Government controlled the use of the book pending the outcome of the criminal proceedings. It remains to be decided therefore whether such control was "in the general interest", it being clear that the seizure was prescribed by, and enforced according to, the domestic law.

166. The forfeiture and destruction of the Schoolbook, on the other hand, constituted a deprivation of property. It too was effected in accordance with "the conditions provided for by law" and therefore the Commission must consider whether such deprivation was "in the public interest".

167. A comparison with the right of member States to act in the public or general interest as distinguished from acts "necessary in a democratic society", as prescribed by Art. 10, reveals that the discretion afforded to States by Art. 1 of Protocol No. 1 is wider in scope. Clearly the public or general interest encompasses measures which would be preferable or advisable, and not only essential, in a democratic society. The Commission is of the opinion, however, that it has the duty to review the actions of member States purporting to be in the public or general interest, in order to establish that they have acted reasonably and in good faith.

168. In respect of the seizure, the Commission notes that it was effected only after a warrant had been issued by a Magistrate. Although the applicant claims that this procedure was superficial, lasting only a few minutes, nevertheless, the Commission accepts that the purpose of such speedy provisional measures was to prevent the distribution of the book. The book had been carefully considered by the prosecuting authorities and deemed obscene by them and thus a successful application for a warrant of search and seizure was made in accordance with prescribed legal procedure. It appears, in the Commission's opinion, that the authorities acted reasonably and in good faith. Their action was well within the scope of the "general interest" for the protection of morals and the control of property which is to be the object of criminal proceedings. The Commission finds that no violation of Art. 1 of Protocol No. 1 is disclosed by the seizure of the Schoolbook. This was the opinion of eleven of the participating members of the Commission.

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169. Concerning the forfeiture, the Commission notes that the appeal court found the book to be obscene and the law provided therefore for the forfeiture and destruction of the book. Having accepted that the repression of the Schoolbook was necessary in accordance with Art. 10 (2) for the reasons already given, the Commission equally accepts that strong measures were necessary to ensure finally that it would not be distributed. The measures adopted, namely the forfeiture and destruction, were reasonable and taken in good faith in the "public interest". The Commission concludes therefore that there was, in the circumstances, no violation of Art. 1 of Protocol No. 1. This conclusion was reached by a vote of nine against four with one abstention.

Article 17

170. The parties have not submitted arguments under this Article and, therefore, the Commission considers, unanimously, that, as no substantial issues arise which are additional to those already raised under Art. 10 and Art. 1 of Protocol No. 1, further discussion under Art. 17 is unnecessary. This conclusion was reached by twelve of the participating members, with two abstentions.

Article 18

171. Art. 18 provides as follows:

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

172. The applicant submitted that the proceedings against him were brought, not for the protection of morals, but for ulterior reasons, because of a desire to impose upon society as a whole uniform standards of personal conduct, to resist the development in schools of modern educational techniques and attitudes and to reassert authoritarian attitudes in schools and in society.

173. The respondent Government denied this and claimed that the applicant had not adduced evidence to this effect.

174. The Commission has already concluded that the interference with the right to freedom of expression in the present case was justified, in accordance with the terms of Art. 10 (2) of the Convention.

175. Furthermore, an examination of the case as it has been submitted does not disclose any evidence which might suggest that the authorities and courts in the United Kingdom in taking the action complained of against the publication and distribution of the Schoolbook, have in any way been guided by motives other than those described in Art. 10 (2).

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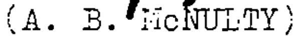
The Commission concludes, therefore, that no breach of Art. 18 of the Convention has been established in the present case. The conclusion was unanimous.

CONCLUSION

176. An examination of the present case has disclosed that there has been no violation of the rights and freedoms guaranteed in the Convention and in particular those set out in Articles 10 and 18 of the Convention and Art. 1 of Protocol No. 1, Art. 17 of the Convention being of no application.

Secretary to the Commission



(A. B. McNULTY)

Acting President of the Commission

(G. SPERDUTI)

Additional opinion of MM. Walter, Busuttil, and Daver

We are prepared to go further than our colleagues forming the majority in this case and assert that the action of the United Kingdom authorities was justified as a necessary measure taken in a democratic society in the interest of national security or public safety within the framework of Art. 10 (2).

The Little Red Schoolbook, although it contains a section of some 20 pages on sex, is not a book about sex as such. It is a book which is, in essence, subversive, tending as it does to instil into young children an anti-authoritarian attitude not merely against parent and teacher but also against the established institutions of the State.

The book's point of departure is the bold announcement that "all grown-ups are paper tigers" (p. 9). Child readers are then enjoined not to feel ashamed or guilty about doing things they really want to do and think are right because their parents and teachers might disapprove; they are assured that the things they want to do will be more important to them later in life than the things that are "approved of" (p.77). They are told that "teachers are dogs on leads" and have no say in the running of their school (p. 42). They are encouraged to "act" against the school authorities by way of organized demonstrations and strikes (pp. 50-52). And for good measure, they are advised to demand contraceptive machines in every school and urged to install one themselves should the school authorities refuse to install one officially (p. 101).

The real message of the book, however, is contained in the section on "School and Society" (pp. 202-fine). The children are told that each school is a small society governed by outmoded rules which are out of step with the surrounding society. In the surrounding society change comes rapidly; at school, change comes slowly. Then comes the clinching argument:

> "Many people will tell you that changes are on the way and you only have to wait. But if you just wait you'll have to wait for ever ... Sometimes you have to fight against people who don't have much power, people who are afraid of change and afraid of having to make an effort themselves. This won't last long. In the long run teachers and pupils are on the same side in the struggle against the forces which control their lives ...
>
> You can't separate school from society. You have to change one to be able to improve the other. But don't let this put you off ...

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> Every little thing you change in school may have results in society. Every little thing you change in society may have consequences in school ...
>
> Work for change always starts with you. The struggle is carried on by many different people in many different plac es - but it's the same struggle ..."

Against the backcloth of this brief description of the book's contents, we are of the opinion that the ideas propagated in the book constitute the first stage in a revolutionary process which purports to begin at school and ultimately engulfs the whole of society.

We conclude, therefore, that there has been no violation of Art. 10, the authorities' interference with the book being justified as necessary in a democratic society for the protection of morals and also in the interest of national security or public safety, within the ambit of paragraph 2 of that Article.

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Separate opinion of Mr. Polak

I concur with the decision of the Commission that there has been no violation of the Convention in this case but I should like to set out the reasoning that to my mind is decisive in this case.

The task of the Commission is to examine and state its opinion about complaints that a State has committed one or more acts which amount to a violation of the Convention. Therefore, we have to focus our attention on the acts of the State authorities about which the applicant complains, namely the Court case and not the Schoolbook, per se.

All members of the Commission consider that the Obscene Publications Acts should be deemed necessary in a democratic society for the protection of morals. In view of the very broad and vague text of the prohibitions contained in this legislation, I have some hesitations about this conclusion. However, looking at the similar legislation existing in the member States of the Council of Europe in 1971, I have to accept it.

This being so, one also has to acknowledge that the English judiciary has a duty to apply and enforce the national law including the Obscene Publications Acts. In my opinion, this means that if the judges when applying the law act in a responsible and reasonable way their judgment must not only be deemed to be in accordance with the law but also to be necessary in a democratic society.

In the present case, the Inner London Quarter Sessions Court acting as an appeal court, heard several expert witnesses. It made a careful and detailed examination of the contents of the Little Red Schoolbook with emphasis on the fact that it was intended for schoolchildren from the age of 12 upwards. The Court came to the reasoned decision that the book is obscene within the meaning of the Obscene Publications Acts.

The reasoning of the Court, as always in such cases, does not convince everyone, but nevertheless is as objective as possible, pertinent and certainly falls within the field of public morals.

Under these circumstances I conclude that the Court's decision to convict the applicant and destroy the book was necessary in a democratic society for the protection of morals.

Dissenting opinion of MM. Fawcett and Triantafyllides

1. In our opinion, the prosecution of the editor of the Little Red Schoolbook was a breach of Art. 10 (1) of the Convention, not justified under Art. 10 (2) or any other provision of the Convention; and the seizure and destruction of copies of the book were both consequently breaches of Art. 1 of Protocol No. 1, no justification being found for them in the qualifications in that Article.

2. In stating our reasons we shall describe briefly the contents of the book, and then say how we think the Convention provisions apply.

3. The book is directed essentially to activities and conduct in school, but it has sections devoted specifically to sex and the use of drugs.

Since the prosecution was brought under the Obscene Publications Acts 1959 and 1964, with their criterion of what tends to deprave or corrupt, it can be assumed that these two sections were important, if not the principal, targets of the prosecution. We will take them first.

4. The section on sex, in its own words, "says nothing about love and very little about feelings" (p. 84) but includes them in describing what may motivate sexual activities. The section offers "practical information" and factually it contains what any concerned parent would want children to know; and indeed a number of useful warnings. There are however passages that must fairly be said to raise questions. So it may be asked whether: "Judge for yourself from your experience" (p. 95); "They should talk about it and tell each other what they really enjoy" (p. 97); "But it's quite possible that you may get some good ideas from it /"porn"/ and you may find something which looks interesting and that you haven't tried before" (p. 105), do not invite, and weaken the control of, sexual activities. Again on contraceptives, on which there is some sensible advice, the passages: "There ought to be one or several contraceptive machines in every school. If your school refuses to install one, get together some friends and start your own contraceptive shop" seems rather daring. But these passages are, in a way characteristic of some of the muddled thinking in the book, matched by statements which contradict or nullify them. So the sentence before that quoted above on "porn" reads: "Anybody who mistakes it for reality will be greatly disappointed" (p. 105). Again the young managers of the school "shop" for contraceptives are warned about the items they sell: "But do remember, they must be electronically tested. Some are of very poor quality and hence not safe" (pp. 101-102). Finally, there is the general dark warning that: "Someone seeking security rarely finds it with someone who only wants sexual satisfaction. Someone who feels under pressure to have a

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sexual relationship may not find sexual satisfaction" (p. 95). Taking these passages as a whole - and particularly the absurd idea that a contraceptive "shop" could be run in school either as efficiently as indicated or without intervention by the school management - we do not believe that they would seriously influence teenagers to more sex or to less. On balance, as parents who have had children in school over a long period and seen some of the changing patterns of behaviour, we believe that the section on sex could hopefully be of some help rather than damaging.

5. The section on the use of drugs and alcohol is, in our opinion, sensible and practical. We find nothing in it to justify its suppression.

6. What is perhaps the real base of opposition to the book is that it is said to be subversive of parental and school discipline and authority; and this description is directed particularly at those sections which are devoted to conduct and activities in school.

We have identified a number of passages which can fairly be said to encourage challenges to or defiance of the authority of teachers, and perhaps, indirectly, of parents, though it is curious how little parents are mentioned in the book. For example:-

Page 13 "Whatever teachers and politicians may say, the aim of the education system in Britain is not to give you the best possible opportunity of developing your own talents".

Page 15 Concerning teachers who do not explain to pupils why they must learn certain things:- "These teachers are wrong. They should explain. If something's worth learning, they should tell you why. If it's not, but they have no choice, they should tell you honestly".

Page 24 Concerning dull lessons: "But if you really can't persuade the teacher to make his teaching less boring, then you always have possibilities of escape".

Pages 44 - 50 deal with how to have influence in school.

Page 80 concerns the expectations teachers have of their pupils.

Pages 88 - 90 criticise certain out of school activities.

Page 159 comments on marks.

Page 176 "The school's regulations on uniform are usually part of the form of consent. Even if parents don't really want their children to wear uniform, they have to sign [the form] - or find another school. It's a form of blackmail."

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Finally, pages 205 - 207 deal with careers and effecting a change in society.

However, there are also a number of passages which counter or qualify the subversive passages.

For example, the recommendation of a "demo" on p. 52 by means which are unquestionably defiant of the school management and in themselves unacceptable, is arrived at only on the basis that a number of suggestions for cooperation with teachers, to solve difficulties and complaints, have been tried without success.

Further examples:

Page 17 "You yourself know best when you are bored. Or when you feel you're never allowed to say anything. Tell the teacher. He wants you to learn. Most teachers also want you to enjoy lessons. Because then they enjoy them more too. Talk to your teacher and see if you can't persuade him to make his teaching more interesting."

Page 24 Concerning teachers who want to let pupils try something new - "If you're lucky enough to have a teacher like this, it's a good idea to think of the difficulties he has and give him your support. In return you'll enjoy working with him".

Page 26 Concerning a new teacher - "It's best to give them a chance ... Never muck about unless you're absolutely certain that the teacher is an incurable bore and you've tried every way of persuading him to change. But remember - even if a teacher is a bore, mucking about won't actually solve the problem".

Page 38 "A bad relationship often develops between teachers and pupils because they don't know enough about one another. If you feel that a teacher is treating you badly because he doesn't know enough about you, don't feel afraid of telling him more about yourself, who you are and what you want to do."

Page 50 Concerning disagreements in school to be dealt with, for example, by a school council - "Perhaps all the suggestions made by the school council are either rejected by the authorities or accepted but not acted on. Repeat the suggestions, several times, and insist on action. Use all available channels".

Page 55 Concerning complaints against a teacher - "Once you've collected evidence for, say, a month, first show a copy of it to the teacher and talk to him about it. Most teachers would prefer to keep this sort of thing within the class, so maybe you can settle it by talking to the teacher concerned."

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Pages 56-57 suggest other ways of dealing with complaints such as discussions with the headmaster or the school authorities.

Page 71 "Do remember that teachers may make mistakes without realising it themselves. Always try talking to them about it first. It's not necessary to complain every time. It's best if you can avoid having to complain."

Pages 90-92 make constructive proposals for certain out-of-school activities which pupils could organise for themselves.

Page 160 "Ask your teacher to tell you where your strength lies and where your weaknesses are, what you've learnt properly and what you still have to learn. And work out for yourself the most important thing: what really interests you and what doesn't interest you."

Page 162 Concerning the value of marks and as an alternative, for a teacher with a "sensible attitude" to marks, a pupil could ask for "constructive comments on each piece of work, or a proper written evaluation of your term's work. And ask them to talk to your parents. Because it is often parents who are most firmly convinced that marks tell you everything".

Finally, pages 184-185 suggest how pupils can obtain information for themselves about opportunities for careers or further education.

7. It is plain that the book has Maoist inspiration. "Stage One" as the publisher, grown-ups as "paper tigers", "democracy from below", "clashes of interest", "solidarity and struggle" are all too familiar. But it is not the ideals, aims or intentions of the publisher that are in issue under Art. 10. The issue is whether the actual effects of the book as it stands on teenagers could be such as to justify its suppression under one or more of the clauses in Art. 10 (2).

8. Here one of two assumptions has to be made: either that teenagers will read the book with some care and attention, in which case it must be taken as a whole and not assessed by reference to particular statements taken from it often out of context; or, and more probably, that much of it is unlikely to be found either practical or appealing by the majority of teenagers, with the exception, perhaps of the sections on sex and drugs.

9. On the first assumption and with the added assumption that the sections on sex and drugs would in any case catch attention, without which the prosecution would be groundless, it has to be asked whether the prosecution of the publisher was necessary under Art. 10 (2); for it cannot be contested that it was an infringement of his freedom to impart information and ideas under Art. 10 (1). Four possible grounds present themselves: the interests of national security, the prevention of crime, the protection of health and morals, and the protection of the rights of others.

10. The first ground must be rejected since, apart from the difficulty of seeing how this book could possibly threaten the national security of the United Kingdom, the Obscene Publications Acts are not directed to national security, and if the statute was being used to prosecute the publisher, not for an obscene publication, but really to curb sedition and the subversion of national security, then the prosecution would be a plain breach of Art. 18. In any case, the United Kingdom does not invoke national security as justification for the actions taken.

11. For the reasons we have already given, we do not think that the book is a danger to health or morals, so as to call for its suppression. As to health, the information on drugs, venereal disease and abortion is factual and apt. As to morals, which, whatever may be its precise meaning in Art. 10(2), must cover sex conduct and possibly certain behaviour in school, we would add two remarks to what we have said above:-

(i) the book cannot be fairly described as pornographic as that term is generally understood;

(ii) as the affidavit of Sir Robert Mark put in evidence to the Court of Appeal in England and made available to the Commission shows, and as is obvious to any United Kingdom resident, there is, for various reasons, a measure of tolerance in the United Kingdom of publicity for sex, including homosexual activities, even when it is pornographic. It is then impossible to maintain that it is necessary under Art. 10(2) to prosecute a book, which is not pornographic and is a serious, even if, in the minds of some, misguided, attempt to inform, when there is a public display of publications and films that remain free from prosecution though they are manifest commercialisation of sex.

12. As regards prevention of crime, which might come within the reach of what depraves or corrupts under the Obscene Publications Acts, there is in the book much cautioning on the use of drugs, alcohol and contraceptives, and it cannot be seriously said to incite to crime in these uses. As regards the legal age of consent to sexual intercourse, the Family Planning Service of the Department of Health and Social Security, has recognised the right of a doctor to prescribe contraceptives for those under 16; and what this book is endeavouring to do is to offer, by way of information and guidance, similar protection in a country where there are, as a matter of brute fact, unwanted pregnancies for eleven year olds and upward.

13. The rights of others, namely, the right of teachers and parents to a reasonable measure of respect and to support for a proper exercise of their authority, cannot be invoked in respect of the prosecution, since the protection of these

particular rights cannot be derived from the Obscene Publications Acts. However, the protection of these rights might be invoked as being in "the public interest" to justify the destruction of the books. But for the reasons we have given we do not think that these rights are imperilled by the book; indeed, there is some evidence that some of the principles of teacher-pupil relationships set out in the book are not only approved by many teachers, but actually practised in some teacher-training colleges and schools. Further, there is no indication that the seizure was carried out "in conditions prescribed by law" serving this particular public interest.

14. Finally, we take into account the fact that this book has been published in at least six European countries, that the Director of Public Prosecutions saw no reason to prosecute a second edition, with only minimal deletions -and of substantially none of the so-called "anti-authoritarian" passages - and that no less than 14,000 copies of the book were overlooked in the initial seizure or not covered by the search order.

15. We conclude that this was a symbolic prosecution, that it was an infringement of the rights of the publisher under Art. 10(1), that it was not necessary under Art. 10(2), and that the seizure of copies was not justified on any ground under Art. 1 of Protocol No. 1,nor was their later destruction.

Dissenting opinion of MM. Kellberg, Nørgaard and Trechsel

We do not agree with the approach of the Commission to the questions before it in the present case nor with its conclusions.

In our opinion it is not the Commission's task to review the appeal court-decision of the Inner London Quarter Sessions or the Obscene Publications Acts, but to examine the Little Red Schoolbook itself, solely in the light of the Convention. The Court decision is only one of the indications of the moral climate prevailing in Great Britain at the material time.

Considering the Schoolbook itself, it is clear that it contains sections which raise moral questions, particularly the sections on sex and drugs. The book also has an anti-authoritarian element. However, we find that these sections provide much useful information which should be available to children.

The anti-authoritarian nature of the book, notably in those parts of it dealing with school activities, has caused controversy. It is said that the book encourages children to disregard the traditional restraining influences of parents and teachers who hitherto have controlled the moral development of children.

We do not think that the book's views encourage children to reject the role of parents and teachers in their lives. There is no evidence that it does so. Moreover, we find that the views expressed are consistent with mainstream educational philosophy, as the Inner London Quarter Session hearing acknowledged. Education is no longer based on relationships of authority, rigid discipline and fear but on respect and reasonableness and the establishment of a dialogue between the educator and the pupil.

As regards the Convention, we agree with the Commission that the prosecution of the applicant and forfeiture of the Schoolbook was an interference with the applicant's freedom of expression within the meaning of Art. 10(1). However, we are unable to conclude that the interference was justifiable under Art. 10 (2).

In our opinion freedom of expression is one of the most important rights ensured by the Convention. Any limitation of that right must fall clearly within the scope of the restrictions envisaged in Art. 10 (2).

The respondent Government submit that the suppression of the Schoolbook was necessary for the protection of health and morals within the meaning of Art. 10 (2).

We have limited our consideration of this case to this heading being the only one relied on by the Government and deeming it inappropriate to consider, ex officio, even greater limitations on a freedom than is strictly necessary.

We are of the opinion that "moral", in the French text "la morale", referred to in Art. 10 (2) relates to public morals, meaning the public manifestation of the community's moral standards. Art. 10 (2) therefore acknowledges the possibility of restrictions on freedom of expression which are necessary for the protection of such morality.

We must, therefore, consider the prevailing public morality in the United Kingdom in 1971. We can then apply this community's standards, those which are determinable and reasonable, to the facts of the present case.

We note that in the United Kingdom in 1971, as there is now, there was a considerable quantity of, so-called "hard-core" pornographic material, such as obscene films, sexshops, strip clubs, pornographic objects and literature, easily available.

Children are also exposed to such material, and in particular to programmes on television portraying pornographic, erotic, sadistic or gratuitously violent scenes.

It has been submitted by the respondent Government that in the face of so much obscene material it is difficult to enforce, in each instance, the provisions of the Obscene Publications Acts and that attempts at prosecution either fail or result in low penalties against the offenders. The resources of the police force are limited and have to be deployed where the need is greatest within the whole network of law enforcement /Affidavit of Sir Robert Mark, Commissioner of Police of the Metropolis in the case of Regina v. Commissioner of Police of the Metropolis Ex parte Blackburn (1973) 2WLR/. In this respect therefore, the respondent Government argue, the availability of other obscene material does not reflect a low standard of morality in the United Kingdom.

But we are unable to agree with this argument concerning practical difficulties. On the contrary, we consider the failure to prosecute, because of the lack of resources of the police force, indicates that the public is not offended by such obscene material and does not wish to be protected in this way, otherwise the police would be pressured by public opinion to take action. Further the failure of prosecutions, or the minimal penalties imposed, reflects the public's lack

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of concern, or their acceptance and tolerance of such material. Sir Robert Mark himself stated in the said affidavit that "The comparative absence of public complaint and the penalties imposed by the Courts suggest that pornography causes less public unease than most other breaches of the law" (ibid. p. 6).

We conclude therefore that the standards of morality in the United Kingdom in 1971, as they are today, were flexible. The British public tolerates a great deal of material which is clearly obscene.

We have already expressed our opinion about the contents of the Little Red Schoolbook. In comparison with other allegedly obscene material we find the Schoolbook "tame", even taking into account that its proposed readers are teenagers. We note that much of the evidence submitted to the Inner London Quarter Sessions hearing demonstrated that the book was a useful basis for discussion, albeit controversial.

We fail to see, therefore, how the moral standards prevailing in the United Kingdom at that time required protection from this book. It would attach too much importance to it to declare that it was necessary in a democratic society to suppress it.

If this book had posed the threat which is claimed, it is difficult to understand the failure by the Director of Public Prosecutions to prosecute the revised edition of it. The revised edition contained only minor amendments (in only 18 lines) to those passages criticised by the Courts. The other alterations were made as a result of comments and suggestions from readers. The views expressed and the approach of the authors remained the same.

There is yet another example of inconsistency reflected in the Government's attitude to the sexual relationships of teenagers. The acknowledgement of such relationships in the Schoolbook was considered by the Courts to be implicit encouragement for teenagers to have sexual intercourse, particularly by the book's failure to stress the legal ages of consent. However, a similar acknowledgement is contained in an official Government document, a Health Service Circular from the Department of Health and Social Security to the Regional Health Authorities on the "Family Planning Services". In this circular the Department advises doctors that prescribing contraceptives for girls under 16, the legal age of consent, would not necessarily be illegal: "It is for the doctor to decide whether to provide contraceptive advice and treatment, and the Department /of Health and Social Security/ is advised that if he does so for a girl under the age of 16, he is not acting unlawfully provided he acts in good faith in protecting the girl against the potentially harmful effects of intercourse" (p. 6 Health Service Circular "Family Planning Services").

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Having regard to the standards of morality prevailing in the United Kingdom at the relevant time, the Government policy in relation to those standards, the contents of the Schoolbook itself and the measures taken against it and the applicant, we conclude that the interference complained of was not necessary in a democratic society for the protection of morals within the meaning of Art. 10 (2). We therefore find a breach of Art. 10 of the Convention.

We have next considered the case in the light of Art. 1 of Protocol No. 1.

In respect of the seizure of the Schoolbook, we note that it was only effected after a warrant had been issued by a Magistrate in accordance with prescribed law. Although the applicant submitted that this procedure lasted only a few minutes, nevertheless, we accept that it is "in the general interest" to have speedy provisional measures for the control of property which is being considered as the potential object of a criminal prosecution. The action was not irrevocable. The possibility existed that the book may have been returned to the applicant in the not too distant future, in which case the applicant would not have been unduly prejudiced. In our opinion, the seizure was reasonable and effected in good faith for the purposes of criminal proceedings and as such did not constitute a violation of Art. 1 of Protocol No. 1.

However, the same may not be said of the forfeiture and destruction of the Schoolbook. We have already concluded that the repression of the book was not necessary for the protection of morals. Similarly, therefore, the total destruction of the book cannot be said to be necessary for the protection of morals nor in the public or general interest for the protection of morals within the meaning of Art. 1 of Protocol No. 1.

We find that the forfeiture and destruction of the book was unreasonable and in violation of Art. 1 of Protocol No. 1.(1)

(1) Mr. Trechsel does not share this opinion as he considered a finding of a violation of Art. 10 sufficed, the Art. 1 issue arising from the same circumstances.

Dissenting opinion of Mr. Ermacora (1)

I am in general agreement with the dissenting opinion of Mr. Fawcett and Mr. Triantafyllides although I have the following further observations to make.

Concerning the Little Red Schoolbook itself, the minority conclusion seems to me to be correct as is shown by the fact that the Schoolbook has been published in its second edition with only small amendments and without any interference by the authorities. The following passages should be mentioned:

Original Edition	Court's comments on 1st Edition	Revised Edition
p. 101 Contraceptive machines in schools. If the school refused to instal dispensing machines, children should start own shop. Contraceptives bought wholesale are cheaper.	pp. 12-14 Subversive suggestion.	Passage omitted. p. 101. A revised passage on the general availability of contraceptives.
	p. 16. Marriage is largely ignored throughout Schoolbook.	Substantially the same. Slight change of emphasis in book, mentions emotions involved.
pp.73-77 "Pupils", "Do you know", "Remember" "Be yourself".	p. 17 These passages "are subversive not only to the authority but to the influence of the trust between children and teachers".	pp.73-77 Identical passages.
p.13 Education. Criticism of unimaginative people who control education and their form of control.	p. 18. No alternative view expressed, inimical opinion for a supposed reference book.	p. 13. Identical passages. No other views expressed.

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(1) Mr. Ermacora here expresses a dissenting opinion in accordance with Rule 52(3) of the Commission's Rules of Procedure (see footnote on page 3 above)

Original Edicion	Court's comments on 1st Edition	Revised Edition
P. 77 "Be yourself". Passage advising children not to feel guilty about certain activities, e.g. smoking pot or having sexual relations.	pp.19-20 Passage tends to deprave and corrupt. No reference to illegality of smoking pot or having sex with girls under 16 yrs. of age in this passage.	p.77 Identical passages. p. 95. Illegality of sex with girls under 16 and boys under 14. p.138 in 1st and revised editions - smoking pot is illegal
p.97 Under section on "Sex" sub-heading "Intercourse and petting".	p.21 Passage tends to deprave and corrupt because no injunction to restraint in these activities or of the unwiseness of them.	p.98 Substantially the same. One sentence concerning oral sex had been omitted and the paragraphs re-arranged slightly.
pp.103-105 "Pornography" last paragraph states pornography may give one some good ideas. Mention that some pornographic books show pictures of intercourse with animals or people hurting one another in various ways.	pp.21-22 Passage tends to deprave and corrupt because gives the children the idea to seek out pornographic books and put examples shown therein into practice. With paragraph that pornography a good idea, children may be incited to criminal offences of hurting each other for sexual gratification.	Omitted
pp.105-107 "Homosexuality"	p.25. No mention in this section that boys who have such experiences grow out of it and have normal sexual relations including marriage.	p.106 "Many people go through a temporary homosexual phase at some stage in their life usually when they are young".

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A further question is whether the domestic authorities were obliged under the law to apply such great restrictions to the Schoolbook. Certainly Section 1 of the Obscene Publications Act 1959 leaves to the domestic courts a wide margin of interpretation in the application of the law and, in my view such restriction was disproportionate to the provisions of Art. 10. However, the law itself seems not to be contrary to Art. 10 para. 2 of the Convention because it seems to correspond to the European legislative standard in this respect.

The question whether restrictions of the freedom of expression are necessary in a democratic society cannot be answered in abstracto but must be answered by reference to the "democratic society" which the Convention has in mind. The Rapporteur considers that "democratic society" in the sense of the Convention is meant to refer to those States which are member States of the Council of Europe. The existence in the United Kingdom of the legislation in question is thus not contrary to the needs of a democratic society if it can be shown that the majority of other members of the Convention also have introduced legislation. Any given European standard regarding restrictions to be placed on pornography and obscenity depends on the stage of comparative legislation in European States on the field in question. A survey of that legislation shows the following results:-

Austria since 1950 has a law making publication, distribution etc. of "obscene" (unzüchtige) matter a criminal offence. (Bundesgesetz vom 31.3.1950 über die Bekämpfung unzüchtige Veroffentlichungen und den Schutz der Jugend gegen sittliche Gefährdung.)

Belgium protects the "bonnes moeurs" against "obscénités" in Arts. 383 to 386 of the Criminal Code as amended or supplemented by various laws (e.g. Laws of 29.1.1905, 15.5.1912, 14.6.1926, 28.7.1962).

Cyprus, with its Obscene Publication Law, 1963 has adopted parts of the 1959 United Kingdom Act.

Denmark makes in Arts. 234 and 232 of the Criminal Code the selling of "obscene pictures ..." and "obscene behaviour" criminal offences.

In France a law of 1949 concerns the publications "destinées à la jeunesse". Otherwise Arts. 283 to 290 deal with "l'outrage aux bonnes moeurs commis notamment par la voie de la presse et du livre".

Ireland, in the Censhorship of Publications Act, 1946 establishes a Censorship Board with power to prohibit books which are "indecent or obscene" or which advocate "unnatural prevention of conception or the procurement of abortion or miscarriage" (Sec. 7 of the Act).

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Iceland law No. 19.1940 is directed against "obscenity in print".

The Penal Code of Italy, in Arts. 528,529 and 725, makes provisions against publications "osceno". Furthermore, a law of 8.2.1949 provides for protection against publications intended for children and adolescents.

In Luxembourg legislation exists for preventing the entry of "obscene publications from abroad" (29.12.37).

The Penal Code of the Netherlands makes, in Sections 240 and 451 SS the distribution or exhibition of "indecent writings or indecent pictures or any indecent object" a criminal offence.

Norway, in Arts. 211 and 212 of the Penal Code, combats actions and objects of an "obscene content".

Also Sweden's Press Act, 1949, and the Penal Code, 1962, combat "pornographic pictures" and the dissemination among children and young people of printed material which "might have a brutalising effect or otherwise result in grave danger to the moral education of the young".

Switzerland in its Penal Code provides penalties for "publications obscènes".

Finally, Arts. 426 to 428 of the Turkish Criminal Code provide penalties for the exhibition and distribution of "obscene" matter.

All these laws have the common purpose of limiting "obscene" and/or "pornographic" objects and writings. Most of them make selling and publication of such matter a criminal offence. The majority of these laws came into force before the Convention was drafted, but no member State adhering to the Convention made any reservation as to such laws.

The conclusion to be drawn must be that laws limiting obscene or pornographic objects and literature constitute restrictions on the right to freedom of expression, which are considered necessary in a democratic society and in the interests of the protection of morals.

It is to be observed that the legislation of the member States uses similarly vague expressions as are used in the United Kingdom Obscene Publications Act, i.e. obscene or indecent, without giving any definition of these terms.

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A certain variation, however, exists in the provisions limiting "obscene" or "pornographic" publications. Criminal law measures are provided for in nearly all member States. In some States criminal law actions are combined with administrative measures.

Having said this it seems quite clear that the Obscene Publications Acts in the present case can, insofar as they concern the prohibition of obscene publications, be considered to be in conformity with Art. 10 of the Convention as being restrictions on the exercise of the right to freedom of expression which are "necessary in a democratic society for the p protection of morals".

The question therefore was whether or not the application of such laws in the present case was equally in conformity with Art. 10 of the Convention. The answer to this is given in the conclusion contained in para. 15 of MM. Fawcett's and Triantafyllides' opinion.

Separate dissenting opinion of Mr. Opsahl (1)

The Commission by a majority is satisfied that the interference with the publication concerned was, in the terms of Art. 10(2), "necessary in a democratic society ... for the protection of ... morals" (or young persons, above para. 157). I do not agree with this view, even assuming that the book is to be held not only immoral by English standards but also "obscene" within the meaning of the Act applied. Even accepting that the authorities applied the English law correctly and in good faith, they did not apply the Convention or make any reference to it. The actions taken, and in particular the court decisions, therefore, do not in themselves show that to seize and destroy the book and to punish the publisher was necessary as required by the Convention, or within the discretion afforded by it.

The other dissenting opinions go into details about the contents of the book and other circumstances. I share many of the views expressed in these opinions. But much of this, in my opinion, is secondary. The main point is that freedom of expression under the Convention should be granted and defended also, and in particular, when it benefits those with whom one disagrees or relates to that which one dislikes. Therefore it is not of primary importance whether or not one regards the book as a "good" one. What matters is not what one thinks of the book but whether one is satisfied that what was done was necessary in the circumstances, for the protection of the morals of young persons as argued before the Commission.

The way the Act has been applied, including the position later taken as regards the revised edition of the same book, in my opinion refutes this argument. No similar action was taken to protect the morals of young persons against many other and perhaps much more harmful influences. This to my mind sufficiently demonstrates that the extraordinary action taken in this case could not be regarded as necessary within the meaning of Art. 10(2). Restrictions on the freedom of expression should be accepted only with great caution, on a strict understanding of what is necessary in a democratic society. This, I believe, is in keeping with the Commission's general attitude to the question of such restrictions (see also my dissenting opinion in the case of Five Soldiers against the Netherlands, Report p. 86), which was recently confirmed, as regards Art. 8 of the Convention, by the European Court of Human Rights in the Golder Case (judgment of 21 February 1975, Series A, Vol. 18, pp. 20-22).

In my opinion the action taken in this case therefore was in breach of the Convention.

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(1) Mr. Opsahl expresses a separate opinion in accordance with Rule 52(3) of the Commission's Rules of Procedure. (See footnote on page 3 above).

APPENDIX I

History of Proceedings

Item	Date	Note
Date of introduction of application	17 April 1972	
Date of registration	17 April 1972	
Examination of the application by three members of the Commission in accordance with Rule 45 of the Commission's Rules of Procedure (old version)	21 July 1972	
Decision of the group of three to request further information from the applicant		
Receipt of further information from applicant	20 November 1972	
Further examination of the case by group of three. Decision of the group to give notice to the respondent Government of the application through the President of the Commission and the Secretary General of the Council of Europe and invite their observations on admissibility in accordance with Rule 45(3) of the Rules of Procedure (old version)	7 February 1973	
Order of the President to this effect	8 February 1973	

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Item	Date	Note
Notification of application to Government together with invitation to submit written observations on its admissibility	9 February 1973	
Receipt of Government's observations on admissibility	29 June 1973	
Receipt of applicant's observations on admissibility in reply	24 August 1973	
Commission's deliberations and consideration of the future procedure in the case	12 October 1973	MM. F. Ermacora J.E.S. Fawcett M.A. Triantafyllides F. Welter L. Kellberg B. Daver T. Opsahl K. Mangan C.A. Nørgaard C.H.F. Polak
Commission's deliberations and decision to hold an oral hearing on both the admissibility and merits of the application and to grant legal aid to the applicant	12 December 1973	MM. F. Ermacora J.E.S. Fawcett B. Daver T. Opsahl K. Mangan J. Custers C.A. Nørgaard C.H.F. Polak
Oral hearing on the admissibility and merits of the application	2 & 3 April 1974	MM. G. Sperduti J.E.S. Fawcett F. Ermacora M.A.Triantafyllides F. Welter E. Busuttil L. Kellberg T. Opsahl K. Mangan J. Custers C.A. Nørgaard J.A. Frowein G. Jörundsson

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Item	Date	Note
		Applicant represented by Mr. C. Thornberry Mrs. J. G. Peirce Government represented by: MM. P. Fifoot M. Eastman G. Slynn A. H. Hammond de Deny
Commission's decision 1) to declare admissible that part of the application concerning allegations under Art. 10 and Art. 1 of Protocol No. 1 in connection with Art. 10 2) to declare inadmissible the remainder of the application 3) to consider, ex officio, any issue which may arise from the circumstances of the case under Arts. 17 and 18.	4 April 1974	MM. G. Sperduti J.E.S. Fawcett F. Ermacora M.A. Triantafyllides F. Welter E. Busuttil L. Kellberg T. Opsahl K. Mangan J. Custers C.A. Nørgaard C.H.F. Polak J.A. Frowein G. Jörundsson
Receipt of further information on historical background to the Obscene Publications Acts from the Government	27 May 1974	
Receipt of applicant's Memorandum on the merits of the case	27 May 1974	
Receipt of Government's Counter-Memorandum on the merits of the case	19 August 1974	

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Item	Date	Note
Commission's deliberations and decision to request the Government to provide a full transcript of the hearing of the case before the Inner London Quarter Sessions on 29 October 1971	4 October 1974	MM.G. Sperduti J.E.S. Fawcett F. Ermacora M.A. Triantafyllides F. Welter E. Busuttil L. Kellberg B, Daver T. Opsahl K. Mangan J. Custers C.A. Nørgaard C.H.F. Polak G. Jörundsson
Commission's deliberations and decision to maintain its request for the said full transcript despite possible delays in its preparation	16 December 1974	MM.G. Spertudi J.E.S. Fawcett F. Ermacora M.A. Triantafyllides F. Welter E. Busuttil L. Kellberg B. Daver K. Mangan J. Custers C.A.Nørgaard C.H.F. Polak J.A. Frowein G. Jörundsson R. J. Dupuy
Receipt of full transcript requested	26 May 1975	
Commission's deliberations and final vote	7 & 8 July 1975	MM.G. Sperduti J.E.S. Fawcett M.A. Triantafyllides F. Welter E. Busuttil L. Kellberg B, Daver K. Mangan J. Custers

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Appendix I

Item	Date		Note
			C.A. Nørgaard C.H.F. Polak R. J. Dupuy G. Tenekides S. Trechsel
Adoption of Report	30 September 1975	MM.	G. Sperduti J.E.S. Fawcett F. Ermacora F. Welter E. Busuttil L. Kellberg B, Daver T. Opsahl J. Custers C. A. Nørgaard C.H.F. Polak G. Jörundsson R. J. Dupuy S. Trechsel

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