By Neville Mark Hummings - Feb 1985

VIDEO CENSORSHIP

The Video Recordings Act 1984 is an example of British legislative procedure at its worst. Its passage was a caricature of parliamentary democracy; its drafting showed most of the defects of which British statutory style is accused. It raises serious questions about private member's bills. And it confirms once again that public bodies devote time to an issue in inverse proportion to its importance. Above all, it displayed an unusual degree of intellectual and political dishonesty.

The dishonesty was inherent in the very bones of the bill. The motive for its introduction and passage was expressed to be the protection of children from "video nasties", i.e. sexually explicit sado-masochistic films on video. As Graham Bright MP said on drawing first place in the Private Members' Ballot, there was a "proliferation of video cassettes of a violent and horrific nature - often accompanied by scenes of sexual sadism - which are grossly offensive to any reasonable people and whose unrestricted availability, particularly to children, can no longer be tolerated"[1]; "I have been spurred on by the need to protect young people....Surely no one could defend the right of people to deal in such material when, by its nature, it may fall into the hands of children and, I believe, damage their view of adult life for ever"[2]. "The main beneficiaries, obviously, are the children who will be protected from seeing material that might injure their young minds"[3].

This notwithstanding, the bill was given an anodyne and uninformative short title, "Video Recordings Bill", the long title being almost equally broad: "to make provision for regulating the distribution of video recordings and for connected purposes", as if it were a measure on copyright or trading practices. But the supporters of the bill fought hard and successfully to prevent its censorship nature being made explicit; some indeed insisted that the bill did not introduce censorship at all, even though it clearly represents a classic censorship scheme.

The method adopted by the drafters of the bill to attain their protective aim was not that of the successful Children and Young Persons (Harmful

Publications) Act 1955, a simple, short and clear measure prohibiting the violence in "horror comics" and entrusting enforcement to the ordinary criminal law. Instead, a full-scale pre-censorship was chosen, applying to the vast majority (estimated at over 6,000 titles) of entertainment and other films distributed in video form, including Disney cartoons and silent classics. Administrative prior restraint was chosen because the "moral majority" pressure groups and their sympathisers in both Houses of Parliament were insistently dissatisfied with all existing forms of content control of the arts and entertainment. Prosecution under the Obscene Publications Act was too long-drawn-out, uncertain and liberal (juries tended to acquit) and the British Board of Film Censors, a non-statutory body, was accused of letting through far too many unsuitable films[4].

The Act imposes compulsory pre-censorship on all videocassettes and video-discs which move for reward from one person to another ("supply"): a person who supplies a video recording (i.e. a cassette or disc) containing an uncensored video work (e.g. a film, play, interview, lecture, advertisement, computer graphics) is guilty of an offence (s.9), so long as the work is a series of visual images produced electronically and shown as a moving picture.

That is the nub of the Act. The remaining 22 sections are concerned with the classifying (censoring) process, definitions and exemptions, evidence, procedure and penalties. And yet it is buried in the very middle of the Act under the heading "Offences and Penalties" and is reached only after an introductory definition clause, exception clauses (which do not say from what they are exempting) and clauses on designation of a classification authority and on classification certificates (with no indication of why works should be classified).

The prohibition is in general terms but is made subject to exemptions. This emphasises again the wide difference between the ostensible purpose of the promoters of the Act and the terms of the Act itself. In fact, of the two prongs of that purpose one, protection of children, is only present indirectly and totally disguised in s.7(2)(a) as the first of three permitted categories of censorship certificate (equivalent to the present "U" classification for cinema films). There is thus no basis at all anywhere in the Act for interpreting it as

intended to protect children. It is a general censorship measure.

The second purpose, to suppress video nasties, does appear but it is hidden buried in a triple negative - an exception to an exception to the general rule. The "definition" of these particularly objectionable films is spelled out in s.2(2) where three alternative criteria are stated. These comprise the depiction, to any significant extent, of: (a) human sexual activity or acts of force or restraint associated with such activity, or (b) mutilation or torture of, or other acts of gross violence towards, humans or animals, or (c) human genital organs or human urinary or excretory functions. Only the first two of these categories, and then only in part, relate to video nasties as opposed to hard or even soft core pornography. "Human sexual activity" could be interpreted very broadly indeed. Nevertheless, in terms of the Act, s.2(2) videos (the term "video nasty" is never used in the Act) are clearly the hard core of the mischief to which the Act is addressed. It is deplorable, therefore, that this should be expressed in such a disguised and incidental manner. In particular, s.2(2) is not linked in any way to the censoring provisions of the Act and there is no requirement that the subsection's criteria should be taken into account when classifying films. Indeed no criteria are given at all in the Act, except the "suitability" of the video being viewed by persons of a particular age or being viewed in the home. The censoring authority (appointed by the Home Secretary) may refuse or restrict circulation of videos on any grounds it thinks fit.

The Act does contain a neat and subtle device for manipulating its coverage: exemption from the need to be censored may apply to the work itself, however it is supplied,or to the supply, whatever the nature of the work. The flexibility of this was demonstrated when it was sought to exempt medical training films. Educational works are excepted by s.2(1) but not if they show human genitals (s.2(2)). Films on obstetrics would thus have to be submitted for censorship. To avoid this, an amendment was tabled to make medical films exempt. But it was feared that such films might leach onto the porno market and so the exemption had to be restricted to medical films used in orthodox medical training. The first

solution (in the Commons) was to provide a new category of exempted work in s.2[redacted]: "if it is designed for use in training for ..... any medical occupation.....", medical occupation being restricted to persons registrable under the Medical Act 1983 etc., i.e. registered medical practitioners, nurses etc. That, however, would not have prevented such films being circulated for other purposes. Indeed, no definition of the work itself could do so. In the Lords, therefore, the provision was moved into s.3 on exempted supplies: "the supply of a video recording with a view only to its use in training for ..... any medical or related occupation ....." as defined in the Medical Act etc. is an exempted supply.

In principle all video works must be censored. Unlike the position in Singapore, the separate physical copies (the individual cassettes or discs, referred to in the Act as "video recordings", as distinct from the "video works" which are recorded onto the cassettes) do not have to be individually passed by the censors. Only the "work" is censored. However, the penultimate section of the Act, on residual interpretation, sneaks in an important provision that any alteration to a video work e.g. cuts or additions, takes it outside the protection of any censorship certificate already granted to it and it will therefore have to be resubmitted to the censor. This has serious implications for imports.

The defective drafting of the Act was exacerbated by the manner of its passage through Parliament. This involved blatant disinformation and manipulation. Bills have, of course, often been passed or clauses tacked on in a fit of unthinking reaction to some event or as the result of careful, sustained and even sinister lobbying by special interest groups. Rarely, however, do the two coincide. A reading of the debates on this bill in either House shows a disturbing and unusual phenomenon, which is confirmed by non-members who attended the debates and by hints dropped by meembers themselves: MPs and peers were placed under tremendous personal pressure not to oppose the bill or even criticise its provisions. This pressure was both psychological and social.

The psychological pressure came from the insistence on video nasties as a social scourge which must be stopped at all costs, on their shocking character and on the danger to any child who saw them. This originated in a campaign by a national newspaper, the Daily Mail, supported by moralistic pressure groups. What was new, however, were the steps taken to give spurious authenticity and effect to such merely political urgings. There were two. One was the so-called Parliamentary Group Video Enquiry, headed by a number of peers but having no official link with Parliament as such. The Enquiry, which was initiated[5] by a private meeting in the House of Lords three weeks before the 1st reading of the bill, on a proposal by Raymond Johnston of the Nationwide Festival of Light (as it used to be called), published an interim report on 23 November 1983,[6] the very day that the Commons Standing Committee on the bill sat for the first time. This document was rushed through "because our Parliamentary sponsors wished to have data available in time for it to be used in the Commons Committee Stage" of the bill[7]. Its main conclusion was that 40% of children in England and Wales had seen one or more violent video films that had been prosecuted under the Obscene Publications Act 1959, and this figure was subsequently used widely in the press and Parliament to emphasise the threat to children. Brian Brown, head of the Television Research Unit at Oxford Polytechnic where the research was based and associate director of the Enquiry until he dissociated himself and the Unit from it, made a strong attack on the report and summed up its effect: "A major piece of legislation has been discussed amidst an atmosphere of moral panic"[8].

The second ploy was the screening to MPs of a film of clips of horrific scenes from selected videos. The film was shown in both Houses: in the Commons a few days before the 2nd reading, in the Lords only a few minutes before 2nd reading. It had a tremendous impact and ensured that the debate was flooded with the horrific memories still vivid in the MPs' and peers' minds, rational discussion thus being impossible. Paradoxically, the clips had all been taken from films which had been seized by the police under their existing powers. Indeed, the

rather shadowy part played by the police in the lobbying on this bill deserves further investigation.

While this psychological campaign worked on the internal will of the legislators, the social pressure came from their immediate surroundings. There can be few instances in recent Parliamentary history of MPs and peers being so afraid to espouse an unpopular view, to the extent that even criticism of the bill's detail or probing of the solutions chosen were regarded by their colleagues as putting them beyond the pale. In the Commons only Robert Maclennan, an Alliance MP, engaged in any significant questioning and that was of a very tentative and mild nature. In the Lords only Lord Houghton, with the (non-speaking) support of Lord Jenkins, subjected the bill to the scrutiny it deserved. The leadership of both major parties supported the bill, and leading figures on both sides played an active role in its passage.

Part of this pressure took the form of an artificial sense of urgency. The bill, which took nearly four months in the drafting, must be passed through all stages by mid-summer; therefore all amendments must be discouraged as productive of delay. For most of the Commons committee stage this approach was successfully maintained , and both liberal and restrictive amendments were nearly all repelled - until report stage when a batch of amendments was passed. The same claim was made again in the Lords - with an even greater sense of urgency since amendments there would necessitate the bill returning to the Commons. In the event amendments were made but the bill still came in on time.

Partly as a result of these tactics, the bill never received an adequate analysis or indeed adequate consideration. Committee stage in both Houses was devoted to blocking those few who would rock the boat and not to genuine examination of the provisions and their implications. Indeed, the Commons Committee passed suspiciously quickly over all the serious clauses. Six out of its nine days ($11\frac{1}{2}$ hours of debate out of a total of $28\frac{1}{2}$ hours) were devoted, in whole or part, to whether the British Board of Film Censors should be allowed to be designated as the censoring authority. Of the time remaining, $4\frac{1}{2}$ hours were spent on defining the exempted works and the hard core exclusions from exemption, $2\frac{1}{2}$ hours to

exempted supplies (a very difficult set of provisions), 2 hours on the definition and 2 hours on all the rest. Eleven clauses received no debate at all and these covered such important matters as search and seizure, forfeiture, alteration of the work and labelling requirements. In other words, the legislature was not doing its job.

This lack of adequate social and legal analysis of legislation is becoming all too typical. The failure of Parliament is made worse by lack of adequate preparation of bills by the government departments concerned. We consequently have sloppy bills, cursorily considered in Parliament with no consideration given at any stage to anything which is not obvious; even lobbyists only consider main-stream issues. This is not good for the health of our democracy and is not necessary. Swedish legislation, which is usually preceded by an elaborate white paper or committee report, is introduced in a lengthy bill which contains detailed reasons for all its choices and solutions, well supported by necessary background justification. That is a far cry from the typical slovenly 2nd reading speech at Westminster and the completely uninformative so-called "explanatory memorandum" attached to a new English bill.

The Video Recordings Bill suffered in a further way. It was officially a private member's bill but in reality it was a Home Office bill in disguise. Graham Bright, its sponsor, was previously a Home Office MP. It was drafted with Home Office "help". David Mellor, the Under-Secretary of State who shadowed the bill for the Home Office, adopted an increasingly proprietorial tone and at times in committee was hard put to remember that it was not his own bill. There are signs elsewhere that debasement of private member's bills is spreading and that ambitious young MPs who come high on the ballot are too ready to adopt Government bills as their own. Graham Bright was sincere, but it is an unfortunate trend.

The passage of the video bill displayed another undesirable feature linked perhaps to its hybrid private/public origin. The divisions in both Houses were dominated by members who had not attended the debate in question. That is of course standard practice on party matters, i.e. most of the time, when the

individual member is either under party discipline (if there is a whip) or at least can follow his party's line if he has no view of his own. That is not the case with private member's bills. They were, one thought, the last refuge for genuine persuasion by debate on the floor of the House. But to have a large voting majority which is out of reach of persuasion in the chamber means that the only way to influence the outcome is to persuade other members privately, i.e. to lobby them. That would mark a further degeneration of the Westminster system.

Whether one approves of censorship or not, either in principle or as a solution to the problem of video nasties, there are two further aspects of the bill which received no serious attention from Parliament. These are the two prongs of the European dimension, namely the Common Market and the European Convention on Human Rights.

The supporters of the bill were concerned with the supply of videos within the UK and the rules were drafted with that in mind. Nice legal problems will arise over the location of the supply when the supplier is overseas, sending by mail or carrier. Of more direct concern to the EEC, however, is the effect of the Act's rules on imported videos. Imports by UK distributors raise no problems. A distributor, by definition, has the resources to fulfil the various requirements whether the video is imported or manufactured in the UK. But the Act will be catastrophic on informal or parallel imports in a number of ways. If the film has not already been censored and given a video classification, it will be wholly uneconomic to order it from a UK dealer to get from abroad as one does with foreign books. The cost of censoring (estimated at some £400 for a normal full-length feature film) would make impossible the ordering of single copies or even as many as 25. Secondly, s.22(2) provides that where any alteration is made to a censored video it shall be treated as uncensored (and therefore unsuppliable). If this is interpreted strictly it could make parallel imports of continental films uneconomic even if they had been given UK video certificates since the UK version will almost certainly have been subtitled or dubbed while the import will probably

not be and therefore will need recensoring as a different version. Strict application of this rule could also have the effect of protecting the monopoly of the UK distributor unless parallel importers have access to the censored copy to find whether their version is identical. All of this would seem to infringe Art.30 EEC, and even if Art.36(1) were applicable the second paragraph would then come into play to hold the Act disproportionate, notwithstanding R. v. Henn & Darby[9] (ECJ). Where the imported film has been censored in the member-State of origin the Cassis de Dijon principle would also have some application.

Proportionality was also a key concept in Handyside v. UK[10] (ECHR). Although both the European Courts have upheld UK obscenity laws, at least on the facts of the two cases taken to them, neither has yet been faced with a pre-censorship system. Since the fading out of the Irish censorship of literature, the only pre-censorship in Western Europe in recent times has been of film performances (not the sale or hire of prints of films) and even that is being abolished in State after State. It is quite likely, therefore, that a full-scale pre-censorship system covering nearly all videos will not be saved by Art.10(2) ECHR; the application to them of the ordinary obscenity laws, however, even if widened to cover horror material, would probably be acceptable under the Convention.

The analysis of the Act from a domestic human rights angle (as opposed to its constituutional aspects on which this note has concentrated) would occupy as much space again. Mention should nonetheless be made of the power given to magistrates in s.15 to impose fines of £20,000 (increased from £10,000 in committee). As the normal maximum for magistrates is £2,000 this is a significant power which, because there is no right to jury trial, is not restricted to simple fact-finding ("Did the defendant sell the X-rated video to a juvenile?") but will also be exercised on such ~~tricky~~ subtle legal issues as whether a video of a Covent Garden opera production is an exempted work ("designed to educate"? "concerned with music"?) or whether the sale of a home movie to a friend is an exempted supply (s.3(5)) or whether an anti-rape propaganda video is exempted as designed to inform or instruct (s.2(1)) or de-exempted because it depicts, to a significant extent, human sexual activity (s.2(2)). Misjudgment of the legal categories can be

a very expensive error.

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FOOTNOTES

1. See press release by Graham Bright MP of 14 July 1983.

2. Graham Bright introducing the 2nd reading debate on 11 November 1983 (Hansard Commons c.523 ~~524~~).

3. Lord Nugent of Guildford introducing the 2nd reading debate in the House of Lords on 2 April 1984 (Hansard Lords c.514).

4. See for instance Sir Bernard Braine in Standing Committee C at c.137.

5. See Brian Brown "Exactly What We Wanted" in Martin Barker (ed.), The Video Nasties p.68 et seq.

6. Video Violence and Children pt.I.

See Video Violence and Children pt.II at para.1.11.

8. Brian Brown op.cit. at p.87.

9. [1979] E.C.R. 3795, [1980] 1 C.M.L.R. 246.

10. 1 E.H.R.R. 737.