A CRITICAL EVALUATION OF THE PROHIBITION ON THE POSSESSION OF CHILD PORNOGRAPHY IN TERMS OF THE FILMS AND PUBLICATIONS ACT 65 OF 1996

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Submitted in partial fulfilment of the academic requirements for the degree Master of Laws, in the School of Law, University of Natal, Durban.

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DECLARATION

I, Sandra Govender, hereby declare that the work contained herein is entirely original and my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements for any other degree or qualification at any other university.

Signed and dated at Durban on the .... day of August 1999.

Sandra Govender

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CHAPTER 1

INTRODUCTION

> "The law may not change the heart, but it can restrain the heartless. Sinful men must be restrained or else they will destroy the precious lives of our innocent women and children."
>
> - Martin Luther King

Child pornography is a phenomenon that has evaded precise legal definition for a long time. Even today there is no universally accepted definition. This is due, in part, to the lack of a universally accepted definition of a "child".

Definition of a "child"

Different countries define a "child" differently. In Canada a child, for the purpose of child pornography, is a person under the age of eighteen years.[1] In the United States of America different states have different definitions of a child. The states of Arizona, Delaware, Florida, Georgia, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, North Dakota, Ohio, Tennessee, Virginia, West Virginia, Rhode Island, and Wisconsin define a child as a person under the age of eighteen.[2] The states of

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[1] Penal Code Sec 163.

[2] Ariz. Rev. Stat. Ann. ss1-215, 13-3508-3551 to 3555 (West Supp. 1978); Del. Code Ann. Tit.11, s1103 (Supp. 1978); Fla. Stat. Ann. s847.014 (1)(a) (Harrison Supp. 1978); Ga.Code Ann. ss54-309.1, 74-104 (Harrison 1973 & Supp. 1978); Iowa Code Ann. Section 728.1 (West Supp. 1978); Mass. Ann. Laws ch. 272, s29A (Michie/Law. Co-op Supp. 1978); Mich. Comp. Laws Ann. s750.145c (Supp. 1978); Minn. Stat. Ann. s617.246 (West Supp. 1978); N.H. Rev. Stat. Ann. s650:1 (Supp. 1977); N.D. Cent. Code s14-10-01 (Supp. 1977); Ohio Rev. Code Ann. s2919.22(B)(4) (Page Supp. 1979); R.I. Gen. Laws s 11-9-1 to 1.1 (Supp. 1979); Tenn. Code Ann. ss39-1019, 50-707 (t) (Supp. 1978); Va. Code ss1-13, 42, 18.2-379 (1975); W. Va. Code s61-8A-6 (1977); Wis. Stat. Ann. s940.203(6) (West (continued...)

Alaska, California, Connecticut, Hawaii, Kansas, Maine, Maryland, New Jersey, New Mexico, New York, North Carolina, Oklahoma,Pennsylvania, South Carolina and South Dakota define a child as a person under the age of sixteen.[3] The states of Alabama, Louisiana, Montana and Texas define a child as a person under the age of seventeen.[4] The federal law defines a child as a person under the age of sixteen.[5] The states of Illinois and Nebraska define a child as a person under sixteen or who appears as a prepubescent.[6] Indiana defines a child as one who is or appears to be under sixteen.[7]

The United Nations Convention on the Rights of the Child defines a child as a

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2 (...continued)
Supp. 1979).

3 Alaska Stat. s11.41.455 (Supp. 1978); Cal. Lab. Code s1309.5 (West Supp. 1979) and Cal. Penal Code s311.4 (West Supp. 1979); Conn. Gen. Stat. Ann. s53a-1939 West Supp. 1979); Haw. Rev. Stat. s707-750 to 751 (Supp. 1978); Kan. Stat. Ann. s21-3516 (Supp. 1978); Me. Rev. Stat. Ann. tit. 17, s2921 (West Supp. 1978); Md. Ann. Code art. 27, s419A (Supp. 1978); N.J. Stat. Ann. s2A:142:A-1 (West Supp. 1978); N.M. Stat. Ann. s30-6-1 (Supp. 1978); N.Y. Penal Law s263.00 McKinney Supp. 1978); N.C. Gen. Stat. s14-190.6 (Supp. 1977); Okla. Stat. Ann. tit. 21, ss1021.2 to .3 (West Supp. 1978); 18 Pa. Cons. Stat. Ann. s6312 (Purdon Supp. 1978); S.C. Code s16-15-180 (1976); S.D. Compiled Laws Ann. ss22-22-23 to 24 (Supp. 1978).

4 Ala. Code tit. 13, ss7-231 to 238 (Supp. 1978); La. Rev. Stat. Ann. s14:81.1 (West Supp. 1978); Mo. Ann. Stat. s568.060 (Vernon Pamph. Supp. 1979); Tex. Penal Code Ann. Tit. 9, ss43.23, . 25 (Vernon 1974 & Supp. 1978).

5 (18 U.S.C.A ss2252, 2256)

6 Ill. Ann. Stat. Ch. 38, s11-20a (Smith-Hurd Pamph. Supp.1978); Neb. Rev. Stat. s28-1463 (supp. 1978)It is submitted that the definitions adopted by the States of Illinois, Nebraska and Indiana are unsatisfactory. These could be used to prevent adults, who appear much younger than they are, from posing for sexually explicit materials. The definitions, as they stand, are vague. It has been suggested, with good reason, that these definitions are constitutionally broad. T. Christopher Donnelly, Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation, 1979 Journal of Law Reform Vol 12:2 295 at 320.
Kentucky provides for two age classifications (sixteen and eighteen) and varies punishment according to the victim's age (KY Rev. Stat. Ss 531.300-370 Supp 1978).

7 Ind. Code ss35-30-10.1-2 to 3 (Supp.1978).

person under the age of eighteen. In South Africa a child is defined as a person under the age of eighteen. This definition is found in the Child Care Act 74 of 1983 and in the South African Constitution.[8] Concerns regarding the definition of child pornography were voiced in Parliament when the Films and Publications Bill[9] was being debated. It was suggested that the debate about child pornography is still raging because of the fear surrounding the fact that there is no definition of pornography.[10]

Definition of "pornography"

The concept of pornography is admittedly an elusive one resulting in a failure to effectively combat the problem. What amounts to pornography depends to a large extent on the society and the community in which it surfaces. Whether a particular depiction will be labelled as pornographic or not depends on different cultural, moral, social and religious beliefs. It accordingly follows that the determination of what amounts to pornography is a subjective determination and it is extremely difficult, if not impossible, to formulate a legal definition which can encompass all of these inherent subjective elements.

The problem of defining "pornography", coupled with the varying definitions of a "child", pose an almost insurmountable problem to those who seek to address the problem of child pornography. After all, it is not easy to prevent a phenomenon which we cannot define with certainty. [11]

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[8] Section 28(3) of the Constitution of South Africa.

[9] Now the Films and Publications Act 65 of 1996.

[10] Hansard, Debates of the Senate, 3rd session, 1st parliament, 10 October 1996.

[11] Some international bodies have, however, attempted to reach a common, if not, very similar definition of child pornography. For example, the United Nations defines child pornography as "any visual or audio material which uses children in a sexual context". Child pornography is seen as consisting of the visual depiction of a child (continued...)

Child Pornography as a Worldwide Problem

Child pornography is a world-wide problem of staggering proportion. The size of the industry was highlighted at the World Congress against the Commercial Exploitation of Children.[12] It is estimated that more than one million children worldwide are used in the production of pornographic material and that this is a multi-billion dollar industry.[13] Child pornography has not received the attention that other issues relating to children, such as child prostitution and child labour, have received. It is submitted that this may be attributed, in part, to the lack of a uniform definition of child pornography as well as to the clandestine nature of the industry. Child pornography is something which definitely exists but the clandestine nature of the industry allows perpetrators to evade detection resulting in the impression that the industry is not a massive and lucrative one. This could be one of the reasons for the lack of attention given to the problem. One of the aims of the Congress[14] was to draw the attention of the international community to the severity and the reality of the problem of child pornography.

The Convention on the Rights of the Child (1989)

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11 (...continued)
engaged in explicit sexual conduct, real or simulated, or the lewd exhibition of the genitals intended for the sexual gratification of the user, and involves the production, distribution and/or use of such material. The Council of Europe defines child pornography as "any audio-visual material which uses children in a sexual context". The International Criminal Police Organisation (INTERPOL) defines child pornography as "the visual depiction of the sexual exploitation of a child, focusing on the child's sexual behaviour or genitals". There is certainly a common thread running through all of these definitions.

12 Held in Stockholm, Sweden from 27-31 August 1996.The Planning Committee consisted of the Government of Sweden; the United Nations Children Fund (UNICEF); the non-governmental organisations: End Child Prostitution in Asian Tourism (ECPAT); and the Group for the Convention on the Rights of the child.

13 Page 1 of the background document for the World Congress against the Commercial Sexual Exploitation prepared by the United Nations Children's Fund (UNICEF) in conjunction with (ECPAT).

14 Supra.

South Africa ratified the Convention on the Rights of the Child on 16 June 1995[15] and is accordingly under a duty to implement all appropriate measures to prevent the exploitative use of children in pornographic materials and performances. Article 34(c) of the Convention on the Rights of the Child provides as follows:
"State parties undertake to protect the child from all forms of sexual exploitation and sexual abuse."[16] For these purposes, State parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials.[17]

Clause (c) expressly requires state parties to take action against child pornography. This is an issue which was not addressed in South Africa previously. However, as a party to this convention South Africa has made notable efforts to fulfil its obligations in terms of the above article. Much has been done to improve the quality of life of children in this country and to protect them from unscrupulous adults. The first and

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15 This is the most widely ratified human rights treaty in history. As at the end of February 1996 it had been ratified by 187 out of 193 governments. Only the Cook Islands, Oman, Somalia and the United Arab Emirates had not ratified.

16 The Convention defines a child as anyone below the age of 18 years.

17 The Convention defines child pornography as "any visual or audio material which uses children in a sexual context". Child pornography is seen as consisting of the visual depiction of a child engaged in explicit sexual conduct, real or simulated, or the lewd exhibition of the genitals intended for the sexual gratification of the user, and involves the production, distribution and/or use of such material.

most important step was the entrenchment of children's rights in the Bill of Rights.[18] The second step was the legislative prohibition on the production, importation and possession of publications and films containing child pornography.[19] This marks the beginning of a children's rights culture in South Africa.

Bearing these difficulties in mind, this work critically analyses the prohibition on the possession of child pornography by the Films and Publications Act 65 of 1996. Chapter 2 of this work deals briefly with the history of obscenity legislation in South Africa and its culmination in the promulgation of the Films and Publications Act 65 of 1996 (hereafter referred to as "the Act"). The Act is also dealt with very briefly. The chapter focuses on the rationale behind a statutory prohibition on the possession of child pornography. The objective is to find out whether such a prohibition is really necessary and if so, why.

Chapter 3 is devoted to a detailed analysis of those provisions in the Act which deal with child pornography. Attention is drawn to potential problems with the Act. Some of these problems have already been remedied by the Films and Publications Amendment Act of 1999.

Chapter 4 focuses on South African cases dealing with possession and privacy. Our courts have not yet had the opportunity to deal with child pornography in terms of the Act. It will be interesting to see how they implement the provisions of the Act in the light of the constitution.

Chapter 5 examines foreign case law and legislation dealing with possession of child

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18 Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996. Section 28 encompasses the constitutional rights of children. One of those rights is the right to be protected from maltreatment, neglect, abuse or degradation as set out in Section 28 (1) (d).

19 Section 27 of the Films and Publications Act 65 of 1996.

pornography. The American and Canadian approaches are examined in some detail. The approaches adopted by other countries is mentioned with the aim of establishing internationals trends in the area of child protection.

Chapter 6 sees the conclusion of this work. The submissions made in the preceding chapters are summarised and reasons are given as to why the prohibition may not achieve its aims.

CHAPTER 2

THE RATIONALE BEHIND THE STATUTORY PROHIBITION ON THE POSSESSION OF CHILD PORNOGRAPHY

The Films And Publications Act 65 of 1996

The promulgation of the Films and Publications Act[20] (hereafter referred to as "the Act") has been a welcome step for South Africa. This Act, besides dealing with the classification of films and publications, also prohibits the possession of films and publications dealing with child pornography. The Act has been a long-awaited instrument for the protection of children from exposure to and use in the production pornography.

Reasons for the Prohibition on Possession of Child Pornography

At the very outset the burning question which must be asked is: "Is there a need to prevent child pornography by means of legislation and if so, why?" This is a question which is often asked by those who see child pornography as just another evil which cannot be eliminated by legislation. The answer cannot be anything but in the affirmative. There is indeed a dire need to prevent child pornography as there is to prevent all other forms of human rights and children's rights violations. One common argument in favour of criminalising the production and possession of child pornography is that consumers of pornography are tempted to carry out what they view or read. In other words, pornography leads to rape, child molestation and other forms of violence against children and women. This may be true but to date there has been no scientific or empirical evidence to support such argument.

There are, however, convincing reasons for the prevention of child pornography, some of which are the following:

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[20] Act 65 of 1996.

1. Pornography harms the children who are used in its production.
   There may be harm to the physiological, emotional and mental health of the child. It has been found that sexually exploited children are unable to develop healthy relationships as adults, have sexual dysfunctions, have a tendency to become sexual abusers in later life and are predisposed to self destructive behaviour such as alcohol and drug abuse and prostitution.[21]

   This argument is not without merit but neither is it flawless. One cannot assume that a child depicted in pornographic material always suffers harm. What about candid photographs taken of a pair of youngsters swimming together in the nude? These children suffer no harm of any kind as they are caught on camera without their knowledge. Furthermore, they are not forced or coerced by the photographer into doing anything. How can it then be said that these children are harmed by the taking of pornographic photographs when they have absolutely no idea that such photographs have even been taken? This example proves that harm to the child is not present in all cases.[22]

2. Pornography affects the child's adult life.
   It has been suggested that "pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography".[23] An example of such

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[21] New York v Ferber 458 U.S. 747 (1982) at 758-60, n9.

[22] This is, however, a case of invasion of privacy. Despite this, there is no emotional trauma or mental anguish suffered by the child.

[23] Shouvlin: *Preventing the Sexual Exploitation of Children: A Model Act*, (1981) 17 Wake Forest Law Rev 535' 545.

a situation is to be found in the case of Brooke Shields,[24] a famous actress and model. When Brooke Shields was sixteen years old she sued a photographer to enjoin the publication of nude photographs taken of her at age ten. Her reason for doing this was that the photographs embarrassed her and she felt that they would jeopardise her reputation.[25]

It is submitted that this reason for the prevention of child pornography is not as convincing as it appears at first sight. There are many things and incidents in a person's life which cause him/her embarrassment. Should we then criminalise all of these things simply because they have the potential to cause embarrassment? To do so would certainly lead to absurd results. Why then should child pornography be treated differently? Is it because of the nature of child pornography? This can be the only acceptable answer. Child pornography, because of its nature, can cause painful humiliation as opposed to mere embarrassment. It is submitted that painful humiliation is experienced when the child feels a sense of deep shame and responsibility for what has happened to him or her. Embarrassment, it is submitted, is a less intense feeling than humiliation and is more lighthearted. It does not have the negative connotations associated with humiliation since it does not include an element of shame.

3. Children do not have the capacity to consent to the acts depicted in pornographic materials.

Despite the definition of a child in South Africa as discussed in chapter one above the age of consent for sexual intercourse is sixteen years. The Sexual Offences Act 23 of 1957 provides an age limit of sixteen for sexual intercourse

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24 *Shields v Gross* 448 N.E 2d 108, 112 (N.Y. 1983).

25 The New York Court of Appeals held that Brooke Shields could not revoke her mother's prior consent to the sale of the photographs.

and nineteen for immoral or indecent acts.[26] Labuschagne is of the view that these age limits are arbitrary.[27] It is submitted that this may be so but with good reason. There is no objective formula which would enable us to draw the line between childhood and adulthood. It may be argued by some that the only solution is to conduct a subjective inquiry into the level of maturity of each child. This is the ideal solution but it is not a practical one. The only other solution is to adopt a particular age limit which is not incompatible with the age of consent for marriage[28] and the age of majority.[29] It is submitted that this is what has been done in South Africa.

In terms of the common law a girl over the age of twelve years can validly consent to sexual intercourse. The consent of such girl is a defence to a charge of rape but does not prevent a conviction under section 14 of the Sexual Offences Act[30] which makes sexual intercourse with a girl under sixteen a statutory offence unless she is married. The conclusion here is simply that there can be no lawful sexual intercourse with a person under the age of sixteen in South Africa[31] (unless such intercourse takes place within the bounds of marriage). It is submitted that the inability of a child to consent to acts of a sexual nature is the main difference between adult pornography and child pornography. Adult pornography is the depiction of consensual sexual acts by adults. An adult is in a position to exercise his or her discretion and to decide

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[26] Section 14 (1) and 14(3).

[27] "Ouderdomsgrense en die Bestraffing van Pedofilie" (1990) 16 SACJ 10.

[28] In terms of s26(1) of the Marriage Act No. 25 of 1961 the age of consent for marriage is 15 for females and 18 for males.

[29] In terms of section 1 of the Age of Majority Act No. 57 Of 1972 the age of majority is 21 for both males and females in South Africa.

[30] Act No. 23 of 1957.

[31] Section 14(3) of the Sexual Offences Act 23 of 1957 provides that sexual intercourse by a female with a male under the age of sixteen is an offence. On the whole, the law does prohibit sexual intercourse with girls and boys under the age of sixteen.

whether to participate in the production of pornography or not. A child, on the other hand, does not have the capacity to do so. There cannot be any doubt that this is a solid reason for criminalising child pornography. It amounts to exploitation of children for commercial gain or personal sexual gratification. This certainly calls for protection of children from pornographers.

An important issue to consider is the age requirement in child pornography legislation. The main reason for the prohibition on child pornography is that the child is unable to consent to the sexual conduct involved in the pornography. If the child is over the age of consent required for sexual conduct, the sexual conduct that the child engages in will be lawful. This is regardless of whether such sexual conduct is pornographic or not. It follows therefore that a prohibition on child pornography must incorporate an age requirement that is neither lower nor higher than the age of consent for lawful sexual conduct. If the age requirement for child pornography is higher than that for consensual sexual conduct, there will be problems. It has often been argued that the possession of child pornography should be prohibited because it causes injury to the child.[32] If, however, the child is engaging in conduct that he or she is capable of consenting to, then it cannot be argued that the child has suffered injury.[33]

John Quigley[34] uses the cases of *New York v Ferber*[35] and *Osborne v Ohio*[36] to illustrate this point. In the former case the statute regulated sexually explicit depictions by children under the age of sixteen. The age of consent for sexual conduct in New York

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32 *New York v Ferber* 458 U.S. 747 (1982) at 753.

33 John Guigley: *Child Pornography and the Right to Privacy* (1991) 43 U. Fla L.R 347 at 391.

34 Supra.

35 Supra.

36 495 U.S. 103 (1990).

was seventeen. This meant that sexual conduct in terms of the New York child pornography legislation was unlawful. In the latter case the Ohio statute did not specify an age requirement but the court specified that the age was eighteen. The age of consent for sexual conduct was, however, fifteen. This meant that in a pornographic depiction of a child over the age of fifteen but under the age of eighteen, the sexual conduct depicted would be considered lawful. The message here is that a child of, for example, fifteen years, may lawfully engage in sexual conduct but a depiction of such conduct is unlawful.

It is submitted that if child pornography legislation sets an age requirement that is lower than the age of consent for sexual conduct, the legislation will not be fulfilling its purpose which is to protect children. It is further submitted that a child who is not old enough to consent to sexual conduct is not old enough to be depicted in pornographic material. If, for example, the child pornography legislation sets the age limit at sixteen but the age of consent for sexual conduct is eighteen, there exists a lacuna in the law. The seventeen year old child is left at the mercy of child pornographers. Does this say that the seventeen year old child may not lawfully engage in sexual conduct but that if he or she does so, then depictions of such conduct may be lawfully distributed or possessed? It is not sufficient to say that in this case it is the unlawful sexual conduct itself which will attract liability. Adopting that stance would amount to punishing the action and ignoring the expression. It is crucial that we punish the distribution and the possession of such depictions in order to provide children with the maximum protection possible. It will always be easy to assume that if one piece of legislation does not provide a remedy another will. This cavalier attitude will not do when dealing with something as precious as children's rights.

In South Africa the age of consent for sexual intercourse is sixteen[37] but the age limit for child pornography is eighteen years.[38] We are accordingly faced with the situation where a child may lawfully engage in sexual conduct but such conduct may not be recorded. It is difficult to understand the rationale behind this. It is also possible that this discrepancy will come under constitutional attack. A seventeen year old child may argue that the age limit for the prohibition of pornography, in terms of the Films and Publications Act, amounts to an infringement of his/ her right to free economic activity. The child may want to perform in pornographic movies but will not be hired by anyone in the industry because they do not want to contravene the Act. This is an area for further research.

The Sexual Offences Act[39] also provides that a person under the age of nineteen cannot lawfully participate in immoral acts. Does this mean that possession of a pornographic photograph of a person who is over eighteen but under nineteen will not attract liability? The actual act of committing an indecent or immoral act with the person under nineteen years amounts to an offence but the recording of such act amounts to an offence only if the child is under eighteen years.[40] This inevitably means that possession of such a recording is not an offence because the child depicted therein is over the age of eighteen.

The above combinations indicate the need to draft anti- child pornography legislation with due regard to other pieces of legislation affecting children. This is the only way

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[37] Sections 14 1(a) and 14 3(a) of the Sexual Offences Act 23 of 1957.

[38] Films and Publications Act 65 of 1996, Schedule 1.

[39] Supra.

[40] The definition of child pornography as contained in the Films and Publications Act 65 of 1996 makes reference to a child under the age of 18. It can therefore be safely assumed that a depiction will not constitute child pornography if the child depicted therein is over the age of 18. Such depiction will be classified as adult pornography and will therefore enjoy constitutional protection.

to ensure that all loopholes are closed thereby giving children the protection they desperately need.

Section 27 of the Films and Publications Act[41] prohibits the possession of films and publications containing child pornography. It can be argued that the problem of child pornography has to be attacked at all levels, that is, at the levels of production, importation, distribution and possession. One can understand the need to curb production, importation and distribution. Is it necessary, however, to prohibit possession also or does that amount to legislative overkill?

Several reasons have been advanced as to why individuals possess child pornography:[42]

1. Individuals use pornography to aid in sexual stimulation. Some use it as a prelude to actual sexual activity with children.
2. Paedophiles use child pornography to convince themselves that their behaviour and inclinations are normal and are shared by other so-called "normal" people.
3. Child abusers use child pornography to lower the inhibitions of children so that they would engage in sexual activity.
4. Pornography may be used under the guise of "sex education" to stimulate sexual arousal in children.
5. Child pornography ensures that there will always be an image of the child at the age of sexual preference.
6. Pornographic materials are used to ensure the silence of victimised children by threatening to show such materials to their parents, friends, etc.
7. Child pornography is used as a means of establishing trust and as a show of

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[41] Supra.

[42] Child Pornography and Paedophilia: Report made by the permanent Subcommittee on Investigations. U.S. Senate, 99th Congress. 2d Sec. 34 (1986) U.S. Senate Report.

good faith when establishing contact with paedophiles, child molesters, etc.

8. Some exploiters use child pornography to gain access to other sex markets and to other children.

The first point is problematic in the sense that many things, other than child pornography, can be used to aid in sexual stimulation. It is neither possible nor realistic to prohibit the use of all such things. The practical difficulty in attempting to do something like that is that it is impossible to compile a list of all those things which can be used to aid in sexual stimulation. Each individual is unique and different things stimulate different people. It is submitted that the answer lies in looking at the nature of child pornography. Once again it is undeniable that child pornography is different because of its reprehensible nature. Most of the other things that are used to aid in sexual stimulation do not cause harm to other people. Child pornography exploits and harms children and cannot be tolerated for that reason.

The second point that child molesters use child pornography to convince children to engage in sexual conduct is contentious. There is nothing to suggest that child molesters do not use adult pornography for the same purpose. It is submitted that adult pornography can also be used to lower the inhibitions of children so that they would engage in sexual activity. In fact, it is possible that adult pornography would be more likely to lower a child's inhibitions than child pornography would. Children often believe that adults are always right and they try to emulate them. If a child sees a pornographic film or picture depicting adults that child is likely to believe that the depicted conduct is acceptable. Can it then be said that there should be a prohibition on adult pornography as well because such material may be used by child molesters to coerce children into engaging in sexual conduct? Should the law proscribe constitutionally protected expression such as adult pornography simply because it may be used to harm or exploit children? Should the law then not go further and impose a ban on the possession of all potentially harmful items such as guns, knives,

whips, etc.? This list is infinite for the simple reason that almost any object can be used to inflict harm, especially on a child.

This argument can be taken even further to cover everything that could possibly be used to coerce children to engage in sexual conduct. What about sweets, toys and all possible gifts that can be used to win a child over? It is known that child abusers use many strategies to entice children into engaging in sexual activity. Sweets, toys, clothes, money, rides in expensive cars, are only a few of the things that are used by child abusers to gain the friendship and trust of children thereby making them more receptive to sexual advances. It is quite obvious that the situation becomes a ludicrous one and that arguments made in favour of proscribing the possession of child pornography must therefore be made with extreme caution.

The other points made above do have merit and prove that the negative aspects of child pornography clearly outweigh the positive aspects. It is submitted that efforts to treat child pornography as just another sex aid or aphrodisiac will never be successful for the simple reason that child pornography runs contrary to our sense of morality and to the duty of every citizen and the State to protect children.

It is admitted that a possessor of child pornography does not necessarily directly cause harm to children. After all, he/she is not the person who creates or produces the pornographic material. The production stage is the stage at which the child is subjected to some form of abuse. Possessors do not participate in this act. It is submitted that despite what has been said above, possessors do contribute indirectly to the abuse of children. They are also to blame for the abuse and exploitation of children because they create a market for child pornography. Possessors provide an economic incentive for the production of child pornography. Once this economic incentive is removed production will be curtailed.

It is submitted that in order for the child pornography industry to be destroyed legislation will have to attack production, distribution and possession. It is not enough to simply legislate against one part of the industry. For example, if only production is criminalised, possessors will find no reason to get rid of the pornographic material which they already have in their possession. This will mean that those materials which have already been produced will remain in circulation. These materials will then be used to entice other children into engaging in sexual conduct with adults. The resultant sexual conduct will not be recorded because of the criminalisation of production. The material which was used to perpetrate the wrong in the first place will still remain in circulation and will continue to be used to harm children. This state of affairs can only be terminated if the pornographic material is destroyed. It is submitted that only a ban on possession can achieve this.

CHAPTER 3

AN ANALYSIS OF THE FILMS AND PUBLICATIONS ACT 65 OF 1996

Introduction

Prior to the union of South Africa there were various pieces of legislation dealing with the regulation of indecent and obscene materials.[43] However, none of these pieces of legislation specifically or expressly considered child pornography. There were also various pieces of legislation dealing with immorality.[44]

There were basically three pieces of post-union legislation which dealt with the regulation of obscene and indecent materials in South Africa. The first was the Publications and Entertainment Act 26 of 1963. This Act was later repealed by the Publications Act 42 of 1974. The 1974 Act was used mainly as a tool in the prevention of the distribution of indecent and obscene materials. The third piece of legislation was the Indecent or Obscene Photographic Matter Act 37 of 1967. This

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[43] In the Cape there was the Obscene Publications Act 31 of 1892 (C); in the Transvaal there was the Criminal Law Amendment Act 38 of 1909 (T); in the Orange Free State there was the Police Offences Ordinance no. 21 of 1902 (O). These pieces of legislation dealt with the regulation of domestically produced indecent and obscene materials. After union these pieces of legislation were replaced by a common piece of legislation, namely, the Publications and Entertainment Act 26 of 1963. This Act was later repealed by the Publications Act 42 of 1974.
The different colonies also had different pieces of legislation which prohibited the importation of indecent and obscene materials. In Natal there was the Customs Consolidation and Shipping Act 13 of 1899 (N); in the Transvaal there was the Customs Management Ordinance 23 of 1902 (T); in the Cape there was the Customs Act 10 of 1872 (C). After the union of the colonies these different pieces of legislation were replaced by one common piece of legislation, namely, the Customs Management Act 9 of 1913. This Act prohibited the importation and posting of indecent and obscene matter .

[44] In the Cape there was The Betting Houses, Gaming Houses and Brothels Suppression Act no. 36 of 1902; in the Transvaal there was The Immorality Ordinance no. 46 of 1903; in the Orange Free State there was The Suppression of Brothels and Immorality Ordinance no. 11 of 1903.

Act prohibited the possession of obscene or indecent photographic matter. Section 2(1) of the 1967 Act, which deals with the possession of obscene photographic material, came under constitutional attack recently and was found to be in violation of the right to privacy.[45]

In August 1994 the Minister of Home Affairs, Dr M G Buthelezi, appointed a Task Group to draft a new Act which would replace the Publications Act of 1974. When the cases of *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*[46] were referred to the constitutional court, the Task Group advised the minister that the prohibition on possession of indecent or obscene matter, in terms of the Indecent or Obscene Photographic Matter Act[47] violated the individual's right to privacy as enshrined in section 13 of the interim constitution.[48]

The task group was divided on the issue of imposing a ban on the possession on child pornography in the new Act. The majority felt that such a prohibition was rendered necessary by the ever-increasing rate of child abuse in South Africa. The minority was of the view that possession of pornographic material does not indicate with certainty that some form of abuse has occurred. They felt that section 14 of the Sexual Offences Act could be used to protect children if there was suspicion of abuse within the home. In other words, they were of the view that the inclusion of a prohibition on possession in the new Act would amount to legislative overkill. Their opinion was that a prohibition on possession was not necessary as a prohibition on

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45 In Case and Another v Minister Of Safety And Security And Others; Curtis v Minister of Safety and Security and Others 1995 (1) SACR 587 (CC).

46 1996 (1) SACR 587 (CC). Both accused were charged in terms of the Indecent and Obscene Photographic Matter Act for the possession of obscene photographs. The accused challenged the constitutionality of the offences with which they were charged.

47 Act 37 of 1967.

48 Act 200 of 1993.

distribution would afford children adequate protection.

In addition, the minority felt that a ban on the possession of child pornography would amount to a violation of the individual's right to privacy. Kobus Van Rooyen[49] reminds us that while our attempts to protect children by imposing a ban on the possession of child pornography are noble, we should always remember South Africa's painful past. In so doing he makes the following comment which will undoubtedly be shared by many South Africans:

> "the spectre of the past....where police would go through one's private library in search of what may possibly be undesirable, is to my mind so abominable that the mere fact of possession of child pornography simply does not justify any invasion."[50]

It is respectfully submitted that this is a valid concern but does it necessarily mean that we should simply tolerate the current disintegration of children's rights in this country?[51] The answer is an emphatic "no!" The protection of children's rights and the right to privacy are not mutually exclusive. We must simply ensure that in interpreting and implementing our new legislation we do not create scope for or condone arbitrary police action.

This Act has brought about much needed reform in the areas of censorship and obscenity law,[52] more especially with regard to child pornography. The Act itself is,

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49 Kobus Van Rooyen, SC, University of Pretoria.

50 Van Rooyen, K. *The End of The Indecent or Obscene Photographic Matter Act*, (1996) SACJ (1996) 9:3 at 329.

51 Schurink, E. (Human Sciences Research Council South Africa) *Statistics of Shame: South Africa's Child Protection System Disintegrating*. (1996) 4:3 Focus Forum 6.

77 The Act ensures that there is no arbitrary censorship of films and publications. Provision is made for the classification of films and the establishment of a Films

(continued...)

however, not flawless. There are many ambiguous and vague terms and phrases used in the Act. These pose a problem for those seeking to interpret certain provisions of the Act. The problems are analysed and solutions are suggested.

Definitions of terms used in the Films and Publications Act 65 of 1996

Section 27 of the Act[53] provides as follows:

(1) A person shall be guilty of an offence if he or she knowingly-

(a) creates, produces, imports or is in possession of a publication[54] which contains a visual presentation[55] of child pornography; or

(b) creates, distributes, produces, imports or is in possession of a film[56]

(...continued)

and Publications Board as well as a Films and Publications Review Board. At the same time the Act expressly prohibits child pornography by imposing certain age restrictions. In this way the Act strikes a balance between children's rights and the constitutional rights of all South Africans.

53 Act 65 of 1996.

54 Section 1 of the Act defines a publication as:
(a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
(b) any writing or typescript which has in any manner been duplicated;
(c) any drawing, picture, illustration or painting;
(d) any print, photograph, engraving or lithograph;
(e) any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or on which sound has been recorded for reproduction;
(f) computer software which is not a film;
(h) any figure, carving, statue or model.
(i) any message or communication, including a visual presentation placed on any distributed network including, but not confined to, the Internet.

55 Section 1 of the Act defines a visual presentation as:
(a) a drawing, picture, illustration, painting, photograph or image; or
(b) a drawing, picture, illustration, painting' photograph or image or any combination thereof, produced through or by means of computer software on a screen or a computer printout.

56 Chapter 1 of the Act defines a film as:

(continued...)

which contains a scene or scenes of child pornography.

Section 1 of the Act defines child pornography to include "any image, real or simulated, however created, depicting a person who is, or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children".

Schedule 11 of the Act goes on to define sexual conduct as "genitals in a state of stimulation or arousal; the lewd display of genitals; masturbation; sexual intercourse, which includes anal sexual intercourse; the fondling, or touching with any object, of genitals; the penetration of a vagina or anus with any object; oral genital contact; or oral anal contact". The Act thus makes reference to "a lewd display of the genitals". The question which inevitably arises is: what is the meaning of the term "lewd"? This question has vexed the American courts for a long time and it is certain that South Africa is also headed in the same direction.

The Oxford dictionary[57] defines "lewd" as "lascivious, unchaste, indecent, obscene". We most certainly cannot rely on the words "obscene" and "indecent" for any guidance in the interpretation of "lewd" in a legal context. The words "obscene" and "indecent" have added enough uncertainty to the law already and hopefully our

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56 (...continued)
(a) any sequence of visual images recorded on any substance, whether a film, magnetic tape, disc or any other material, in such manner that by using such substance such images will be capable of being seen as a moving picture;
(b) the soundtrack associated with and any exhibited illustration relating to a film as defined in paragraph (a);
(c) any picture intended for exhibition through the medium of any mechanical, electronic or other device.

57 The Concise Oxford Dictionary, 7th edition (1982), Oxford University Press.

courts will not follow that route again. These words, as they appeared in the Publications and Entertainment Act; [58] the Publications Act 42 of 1974;[59] and the Indecent or Obscene Photographic Matter Act[60] proved highly problematic.

The following cases are but a few illustrations of the high degree of vagueness attached to these words and the resultant uncertainty in the law. In *R v Meinert*[61] the court interpreted the phrase "indecent and obscene" to mean "subversive of morality, or grossly offensive to common propriety". In *R v W*[62] the court found a figurine , alleged by the defence to be a reproduction of the famous street fountain in Brussels, depicting a naked boy in the act of urination, to be indecent. The court noted that "it is very likely that our people would regard as indecent what the people of Brussels are said to have tolerated for more than three hundred years". The court in *S v H*[63] accepted that the phrase "indecent and obscene" as it appeared in the Indecent and Obscene Photographic Matter Act[64] was simply too wide and the court had to engage in a process of narrowing the scope of its application. The court formulated a test which would look at the probable effect of the material upon the consumer. The question being asked was whether the material had a tendency to deprave or corrupt. That test was rejected in *S v Nunes*[65] where the court concluded that: "dit is duidelik...dat die toets is vir 'n hof om te besluit of uit te maak, in elke geval wat voor hom kom, of die betrokke onbetaamlike of onwelvoeglike fotografiese

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58 Supra.

59 Supra.

60 Supra.

61 1932 SWA 56 at 60.

62 1953 (3) SA 52 (SWA) at 55D.

63 1974 (3) SA 405 (T) at 408.

64 Act 37 of 1967.

65 1975 (4) SA 929 (T) at 931.

materiaal is in terme van art 1, en dit is 'n objektiewe toets". In *S v Film Fun Holdings (Pty) Ltd and Others*[66] the court also rejected the test formulated in *S v H*[67] and adopted the test in *S v Nunes.*[68] Similar problems had been experienced in respect of the Publications Act.[69]

It is submitted that, in the light of the abovementioned problems, no reliance should be placed on the words "obscene" and "indecent" when attempting to attribute a meaning to the word "lewd". To do so would be to open the floodgates to a host of problems similar to those encountered by our courts previously. The cases mentioned represent only a few of the problematic cases that came before our courts. The only possible solution is to ensure that the word "lewd" is given a narrow interpretation so as not to cast the proscriptive net too wide. Affording a narrow interpretation will also prevent the relevant section from being declared unconstitutional due to vagueness.

In the American case of *New York v Ferber*[70] the court was faced with a statute which covered "actual or simulated sexual intercourse, deviate sexual intercourse sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals". The court acknowledged that the term "lewd" was problematic in the sense that it was difficult to define or limit. In upholding the validity of the statute the court said that it would not assume "that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on lewd

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66 1977 (2) SA 377 (E) at 378-9.

67 Supra.

68 Supra.

69 Act no. 42 of 1974.

70 458 U.S. 747 (1982).

exhibition of the genitals".[71] Very simply put, the court was saying that the term "lewd" must be narrowly interpreted. This does not, however, solve the problem. Lewdness is a subjective criterion and some judges may find any display of genitals to be lewd.

How then should our courts determine whether a depiction is lewd or not? The only solution is to devise a test to be applied by judges in deciding whether a particular depiction is lewd or not. There are two possible tests that can be used here. Firstly, there is the "reasonable reader/viewer" test. In terms of this test the focus is on the impression gained by the reasonable reader/viewer upon reading or viewing a particular publication or film. It is submitted that if the reasonable reader/viewer finds the material disgusting, loathsome, repulsive or offensive then that depiction may be classified as lewd.

Who is the reasonable reader/viewer? He is a reader of average intelligence and experience. He is neither too liberal nor too conservative. This is a person who is well-balanced in every respect. "He is not the highly-educated man, the lawyer, the literarian, the theologian, the professional man or the philosopher; nor is he the lowly educated, the prude, the narrow-minded or the debased person...Such a man is one who is prepared to make some allowance for deviations and who is aware that he may be wrong in his own views and allows for it. He is a man who is prepared to allow a certain amount of latitude to others although he personally does not approve".[72] Simply put, he is an average person.

How would a court decide whether a particular depiction is disgusting, loathsome or repulsive to the reasonable reader? It is submitted that the courts will have to look

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[71] Supra at 773.

[72] Based on the decision in *SAUK v O'Malley* 1977 (3) SA 394 (A) and defined by the Publications Appeal Board in its decision on *The Dawn Comes Twice* (144/76).

at contemporary community standards in order to make such a determination.

"The standards are that of the community at large as represented by the average, decent-minded, law-abiding, modern and enlightened citizen with Christian principles; not of the libertine or the ultra modern, nor of the prude or ultra-conservative, but that of the man of balance with a tolerant view in regard to the views of others... Furthermore, it is not how such average citizen himself acts but how he believes, after serious reflection, the average citizen should act in society. Such a man will consider all relevant factors pertaining to the particular issue before him or peculiar to the enquiry. The list of factors he will take into account is never closed. Even the time factor must be taken into account: what was undesirable at some stage might lose that character with the march of time... and vice versa. Such a man will take modern trends into account, will examine them and allow for them; but not with a rapidity that would shock him or his fellow citizens."[73]

The issue of contemporaneity is crucial and inevitably arises as a matter of logic. After all, it would make no sense to focus on community standards that prevailed twenty or thirty years ago. For example, the attitude of the South African community as a whole towards homosexuality has undergone drastic change in the last ten years. Homosexuality is certainly more acceptable now than it was ten years ago. This is just one example of changing community attitudes towards a particular issue. It is thus clear that attitudes change with time, possibly because people become more aware of and more knowledgeable about controversial issues. Knowledge wipes away fear and suspicion leading to greater levels of tolerance. This is by no means a suggestion that people always become more liberal in their thinking as time passes. The converse could also be true. People may become more opposed to certain practices as they learn more about it. For example, many communities are now

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[73] Supra.

taking a stand against gangsterism. This may be due, in part, to the knowledge that they are gaining about it. Many ex-gangsters are coming forward with their stories and communities are becoming aware of the harm caused by gangsterism. Once again this illustrates the importance of considering contemporary community standards.

The second possible test is the "likely reader test". This test involves looking at the effect of a publication on the likely readers thereof. At first sight this test appears to be a suitable one but upon deeper analysis a fatal problem is discovered. The first question that is asked when applying this test is: who are the likely readers of the particular publication? In the case of publications containing child pornography there is, it is submitted, very often a specific group of people who are likely readers. Publications of such a nature usually appeal to people with a specific interest. It is submitted that these people do not find the depictions of children repulsive or disgusting. If they did find the depictions repulsive they would not be reading such publications. They are immune to child pornography. As stated by Steyn, C.J in *Publications Control Board v William Heinemann Ltd*[74]: "It may be that the reactions of some have been so benumbed by repeated exposure to a particular stimulus through the reading of many other books, that they tolerate that kind of stimulus with cold indifference, even if it is presented in extravagant form. That proves nothing as to the reactions of other readers who may more properly have to be regarded as the so-called average readers".

In the light of the above, it is submitted that the attitude of the likely reader to a particular publication is not indicative of whether such publication is repulsive, disgusting or loathsome by community standards. It follows that the "likely reader test" has to be rejected in favour of the "average reader test".

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[74] 1965 (4) SA 137 (A) at 148H.

A counter-argument to attributing a narrow meaning to the word "lewd"is that the proscriptive net should be cast as wide as possible in order to give children maximum protection against child pornographers. This means attributing a wide meaning to the word "lewd". This is indeed a noble argument but it loses sight of the fact that such an approach is not workable. It created many problems for the courts previously and will do so again.[75] It follows that the best approach is to simply adopt a narrow interpretation of the word "lewd". The American court in *New York v Ferber*[76] also resigned itself to this solution.

The use of the word "lewd" created many problems for the American courts just as the words "indecent" and "obscene" vexed our courts. The American courts, for all their ingenuity and creativity, failed to suggest an alternative word which would pose no problems such as those inherent in the word "lewd". This is not due to incompetence on their part but to the fact that the area of obscenity is difficult to regulate. One can never know for certain where to draw the line and so the search for the perfect word continues.

The next question which arises in relation to the use of the word "lewd" is : what should the lewdness pertain to? Does lewdness refer to the state of the genitals (erection, sexual excitement) or does it refer to the demeanour of the person whose genitals are being displayed?[77] It is possible that a display of genitals may be lewd even if the person does not have an erection but has a suggestive look on his face.

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75 Indecent and Obscene Photographic Matter Act37 of 1967; Publications Act 42 of 1974.

76 Supra.

77 John Quigley in his article *Child Pornography and the Right to Privacy* (1991) 43 U. Fla. L.R 347 at page 385 cites the following excellent example of the uncertainty that exists: "A photograph showing a nude frontal view of a child walking towards the camera would probably not constitute lewdness. By contrast, if the child had a coy facial expression, one could argue that this constitutes a lewd exhibition of the genitals".

The person is clearly displaying his or her genitals in a lewd manner. On the other hand, the person may have a neutral expression on his face but his genitals, which he is displaying, may be in a state of noticeable sexual excitement. Which is the correct interpretation to be attributed to the phrase "lewd exhibition of the genitals"? The Act does not answer this question.

It is suggested that both interpretations be allowed. The reason behind this suggestion is that the aim of the Act is to protect children. One must look at the mischief that the Act is aimed at. The child who has an erection is serving the same purpose as the child who displays non-erect genitals with a suggestive look on his face. Both children, by their conduct, have the ability to cause sexual arousal in others. Judged by contemporary community standards, both scenarios would be disgusting because they depict children engaging in conduct which is far from childlike. It is submitted that the Act will be contravened as soon as there is a hint of lewdness in the depiction of a child.

The Films and Publications Act[78] prohibits possession but does not specify whether such possession must have a commercial purpose. This is a decision which will have to be made at some time. In the United States of America the commercial purpose requirement led to the failure of legislation[79] seeking to destroy the industry by criminalising the production and commercial distribution of child pornography. In an article dealing with this issue it was suggested the "child pornography network can be characterized as an informal cottage industry which operates for the pleasure, not

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78 Supra.

79 Section 2252 of the Protection of Children against Sexual Exploitation Act 18 U.S.C (1979) prohibited the knowing receipt, transportation or mailing in interstate commerce, for the purpose of sale or distribution for sale, of any obscene material which contained a child under the age of sixteen engaging in sexually explicit conduct.

the profit, of paedophiles, who produce pornography for their own use".[80] The idea being conveyed was that the inclusion of a commercial purpose requirement in the Act[81] had resulted from the incorrect assumption that pecuniary gain was what motivated child pornographers. The ultimate result was that the Act did not hone in on the source of the problem. It failed to protect children from those individuals who posed the greatest threat to them.

It is submitted that the provision relating to child pornography in the Films and Publications Act[82] should be interpreted so as to prohibit the possession of child pornography regardless of whether the material has been produced commercially and even if the possessor has no intention to distribute such material. This is the only way in which to give children the maximum amount of protection. Not much is known about South Africa's child pornography industry. Whether this is due to the possible small size of the industry or to the clandestine nature of the industry is a question which cannot be answered. Some may argue that if the child pornography industry is very small in South Africa there should be no need to interpret the Act widely. If we proceed on that assumption we run the risk of depriving children of the protection which the Legislature intended for them to have. Many paedophiles and collectors of child pornography will escape liability with ease. South Africa will then find itself in a situation similar to that experienced in the United States of America where the statute failed to cover most of the child pornography industry.

It is submitted that regardless of which factor is responsible for our lack of knowledge about the industry, the solution remains the same. The truth is that we do not really know who or what we are dealing with. South Africa's child pornography industry

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80 Lisa S. Smith, *Private Possession of Child Pornography: Narrowing At-Home Privacy Rights*, 1991 Annual Survey of American Law 1014.

81 The Protection of Children Against Sexual Exploitation Act 18 U.S.C. (1979).

82 Supra.

could very well be run by paedophiles only. They could be using the pornographic material for personal pleasure and not for profit. On the other hand, the industry could provide a source of income for certain people, for example, hiring and/or exchanging of video tapes and magazines. In both scenarios children have suffered or been exploited somewhere along the way. In order for a person to possess child pornography, that material must have been produced by someone and a child/children would have been used in such production. Once again the harm suffered by children still forms part of the equation. This is what causes concern.[83] In order to see results the provisions relating to child pornography will have to be interpreted widely. The prohibition of possession for both personal and commercial purposes will close all possible loopholes in the Act.

What does "possession" in terms of the Films And Publications Act entail? The Act does not provide any guidance in this respect. Once again it will be left to the courts to decide exactly when a person may be said to be in possession of child pornography thereby contravening the Act.[84] The courts will be faced with the situations that arose in the past in the cases of *S v R*[85] and *S v Brick*.[86] Defining the term has been

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[83] In a report prepared by ECPAT (End Child Prostitution in Asian Tourism) for the World Congress Against The Commercial Exploitation of Children it was stated that "law enforcement agents have found that a significant number of arrested child molesters are in possession of child pornography. One detective in the Los Angeles Police department estimated that of 700 child molesters arrested over ten years for child sex crimes, more than half had child pornography in their possession and about 80% owned either child or adult pornography. From 1986 to 1988, an organisation called Childwatch in England found that of the 27 child molesters convicted, 23% were using their child victims to make pornography and nearly all of the child molesters had child pornography in their possession".

[84] Whiting, R.C. *"The Unwilling Possesor of Pornography"* (1971) 88 SALJ 296.

[85] 1971 (3) SA 798 (T). R received an envelope containing two booklets of a pornographic nature. These booklets had been published in Sweden and were sent to R at his flat via ordinary mail. Upon opening the envelope R realised that it contained material of a pornographic nature and that the possession of such material was illegal. R suspected that the booklets may have been sent to him as a joke by a friend who was travelling overseas. He considered destroying the booklets but (continued...)

a task of considerable difficulty for our courts.[87] In addition to this problem of interpretation we are now faced with the problem of implementation. The cases of *S v R*[88] and *S v Brick*[89] were decided at a time when South Africa did not have a Constitution or a Bill of Rights. It was therefore much easier for the courts to decide

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85 (...continued)
eventually decided against it. Instead he decided to consult his lawyer. He had to wait until the next morning to do that. In the meantime he placed the booklets in a wardrobe. The police arrived at his flat about an hour later and he immediately handed the booklets over to them. He was charged and convicted of a contravention of section 2(1) of Act 37 of 1967.
On appeal Joubert J A came to the conclusion that the word "possession" in s2(1) of the 1967 Act was intended to mean "physical detention with the intention of the holder to exercise control for his own purpose or benefit". In respect of intention the learned judge found that the evidence showed that the appellant had no intention to exercise control over the booklets for his own purpose or benefit. This finding was based on appellant's evidence that he had wanted to get rid of the booklets the following day but that he had kept them temporarily in order to seek legal advice from his lawyer. The appeal succeeded.

86 1973 (2) SA 571 (A). Upon B's return from a business trip the caretaker of his flat handed him an envelope saying that it had come from Copenhagen or Stockholm. Upon opening the envelope, B found that it contained two pamphlets and a book but no accompanying letter. He was taken by surprise as he had not ordered such material. He showed it to his friend who also lived in the flat. He was exhausted from his trip so he went to bed. He overslept the next morning and he got to work late. Shortly after he reached home that evening the police arrived. He was charged and convicted of having been in possession of indecent or obscene matter in contravention of Act 37 of 1967.

87 In S v Brick (supra) at page 579 the learned judge acknowledged that "the precise meaning to be assigned to the word 'possession' occurring in a penal statute is often a matter of considerable difficulty. In the ultimate analysis, however, the decision vitally depends upon the intention of the Legislature as reflected in the context of the particular statutory enactment concerned".

For further insight as to the problems experienced by our courts in defining the term "possession", see: *R v Gumbi* 1927 TPD 660 at 662; *R v Schulze* 1943 TPD 7 at 9; *R v Pule* 1960 (2) SA 668; *R v Tsheleza* 1931 SALJ 105; *R v Koza* 1933 TPD 204; *R v Seboko and Another* 1936 AD 176; *R v Van Ewyk* 1945 TPD 73; *R v Kasamula* 1945 TPD 256; *R v Keswa* 1949 (3) SA 3; *R v African Canning Co. (S.W.A) Ltd. And Others* 1954 (1) SA 201H; *R v de Olim* 1957 (1) SA 158H; *R v Smit and Another* 1958 (2) SA 609H; *R v Binns and Another* 1961 (2) SA 107G-H; *S v Smith* 1965 (4) SA 171 D-E; *S v Mjoli* 1968 (3) SA 397 (T); *S v Skosana* 1973 (1) SA 322.

88 Supra.

89 Supra.

certain issues then which would pose a great dilemma for courts today. In implementing a ban on possession, law enforcement officials have to tread carefully in order to ensure that fundamental rights, as enshrined in the Bill of Rights, are not violated. Of particular significance here is the right to privacy[90] and the right to free speech and expression.[91] Any ban on possession, including a ban on the possession of child pornography, will have to pass constitutional muster.

In *S v R*[92] the court attributed a narrow meaning to the term "possession" but in *S v Brick*[93] the opposite approach prevailed. The questions which arise now are: "how would South African courts deal with this situation today? Would it be sufficient to find a person guilty of possessing child pornography in contravention of the Films and Publications Act[94] only if he has the intention to possess such material for his own use or purpose or would mere physical detention suffice?

In *S v Brick*[95] the court acknowledged the difficulty associated with the meaning of the term "possession". The answer, the majority felt, was to be found by inquiring as to the intention of the legislature. This was done and the court found that the objective of the Act was to prohibit the possession of indecent or obscene photographic matter. Having regard to this objective, Ogilvie Thompson C J was of the view that witting physical detention, custody or control of such matter is penalised.[96] He went on to

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90 Section 14 of the South African Constitution.

91 Section 16 of the South African Constitution.

92 Supra.

93 Supra.

94 Supra.

95 Supra.

96 Op Cit 580. On appeal Ogilvie Thomson C.J. made the following remarks: " in terms of the statute, the offence is committed by any person who 'has in his possession' any (continued...)

say that once it is shown that the holder was aware of the existence of such photographic in his detention, custody or control, it is not essential for a conviction that the State should prove that the holder intended to exercise control over the photographic matter for his own purpose or benefit. The learned judge admitted that this interpretation could lead to harsh results but that such harshness was ameliorated by section 3 of the Act which provided that no prosecution could be instituted except on the written authority of the Attorney-General or his designate.

Jansen J A disagreed with the interpretation adopted by the majority.[97] He felt that the interpretation was too wide and would lead to unconscionable results which parliament could not have intended. In his opinion, even recognition of the necessity for awareness of the nature of the pornographic matter being controlled, did not exclude the possibility of hard cases. The example that he uses in support of his

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96 (...continued)
indecent or obscene photographic matter as defined in sec. 1(ii) and (iii). Having regard to the obvious objective of Act, it appears to me that witting physical detention, custody or control of such matter...is penalised. Once it is shown that the holder was aware of the existence of such photographic matter in his detention, custody or control, it is not, in my view, essential for a conviction under sec. 2(1) of the Act that the State should affirmatively prove that the holder intended to exercise control over the photographic matter in question for his own purpose or benefit". The learned judge was of the opinion that a contravention of the statute was established even if it be assumed in the appellant's favour that he innocently acquired the material in issue and that he intended to inform the police of their receipt and was only deterred from doing so because of his business worries.

97 Jansen J.A., dissenting, felt that the term "possession" was being interpreted too widely, thereby leading to unreasonable results. He remarked as follows on page 581: "a perusal of the Act does not, in my view, disclose the clear language required in the circumstances to indicate an intention by the legislature to throw its net so wide as to create unreasonable results. The word "possession" is used. In ordinary legal parlance this does not mean detention or custody or mere intentional physical control - words the legislature could easily have used had it so intended...In our law "possession" ordinarily connotes intentional physical control with, at least, the qualification that it is effected for one's own purpose or benefit, as stated, e.g., by Voet, 41.2.1., over 200 years ago....In the premises I am of the view that "possession" in sec. 2 (1) of the Act should not be read in a wide sense and should be taken to bear its ordinary technical meaning of holding for one's own use or benefit, as held in *S v R* 1971 (3) SA 798 (T).

argument is that of a person who innocently purchases a magazine only to find that it contains indecent photographic matter. Such person, he argued, would not be able to dispose of the magazine without exercising that intentional physical which would lead to a contravention of the section. He explains how this purchaser could open the floodgates to contraventions of the section by other innocent people. In his opinion, even a police official to whom the magazine is handed over, will not escape liability since he will be exercising intentional physical control over the magazine containing obscene photographic matter. Any person who receives such material through the post will be equally guilty. It is thus clear that the interpretation adopted by the majority is problematic in certain respects.

Jansen J A looked at the ordinary meaning of "possession" which is to exercise intentional physical control for one's own purpose or benefit. He was of the opinion that the term "possession", as it appeared in the Act, should bear its ordinary legal meaning. This view accorded with that expressed by the court in *S v R*.[98] He acknowledged that his approach would not solve the problem entirely but that it would go a long way towards eliminating some of the hard cases that would otherwise arise.

It is submitted that the approach adopted by the majority is understandable but unacceptable. It is understandable to the extent that it prevents a possessor from simply claiming that the obscene material in her possession did not belong to her or that she was simply holding it on behalf of someone else, thereby escaping liability. The approach of the majority ensures that every individual who acts as a conduit in the chain will be caught out. This sounds very tempting, especially in view of South Africa's high crime rate, but it is not the solution that we are looking for. Even the learned judge's attempt to soften the blow, by pointing out that a prosecution could

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[98] Supra.

not be instituted without the written authority of the Attorney-General, does not make his approach acceptable. There is still too much room for corruption and abuse of power. If we adopt the approach of the majority in *S v Brick*[99] we are in effect casting the proscriptive net too wide. In so doing we leave the door open for the gross abuse of legislation which was intended to protect children and not to victimise innocent citizens.

The approach adopted by Jansen J.A. is a much more practical approach than that adopted by the majority of the court. The merits of such an approach come to light in the area of child pornography. Firstly, the factual circumstances that arose in *S v R*[100] and in *S v Brick*[101] can arise again. This approach will ensure that innocent individuals are not victimised. It may also allow certain individuals who are not all that innocent to escape punishment. It is submitted that such a consequence is more tolerable than those which would arise from the approach adopted by the majority.

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99 Supra.

100 Supra.

101 Supra.

CHAPTER 4

AN ANALYSIS OF SOUTH AFRICAN CASES

Introduction

In this chapter the focus is on South African cases dealing with pornography and privacy. None of the cases deal specifically with child pornography but the principles enunciated in these cases are extended to cover the area of child pornography where possible. The objective here is to determine how the attitude of the courts has changed recently and how they are likely to address the issue of child pornography.

Case and Another v Minister of Safety and Security[102]

Case and Another v Minister of Safety and Security was South Africa's first constitutional court case dealing with the issue of possession of pornographic matter. Patrick and Inga Case and Stephen Roy Curtis were found in possession of about 150 video cassettes containing sexually explicit matter. These cassettes had been seized by the police during a raid on the Case residence. Curtis was found in possession of 5 similar cassettes, which were taken from him in the course of a police operation conducted in a shopping centre parking lot. All three were charged with the contravention of section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967. The matter was referred to the Constitutional Court for a determination as to whether section 2(1) was constitutional.

Mokgoro J traced the history of South African obscenity legislation with a view to highlighting its inadequacies and overt moralism. She decided the matter on the

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102 *Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (1) SACR 587 (CC).

basis of a violation of section 15 of the Interim Constitution[103] - the freedom of speech, expression and artistic creativity. Her approach to the case differed markedly from that of the other judges who decided the matter on the basis of a violation of section 13 of the South African Constitution - the right to privacy. Her statement on page 610 is of particular importance:

> "I have had the privilege of reading the admirably concise opinion of Didcott J......I must agree with his conclusion that the 1967 Act unreasonably and unjustifiably infringes the constitutional right to privacy. I would, however, respectfully part company from Justice Didcott to the extent that any part of his opinion might be read to suggest that it is not in any circumstances the business of the State to regulate the kinds of expressive material an individual may consume in the privacy of her or his own home. It may be so that, as in England, a South African's home is his (or her) castle. But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials."

Mokgoro J was clearly not prepared to assume that the right to privacy was inviolable in every situation where people possess pornographic material. It is submitted that the learned judge obviously did not want to commit herself to anything which could backfire in the future. She ensured that the door to State intervention in the case of private possession would not be locked and the key thrown away. This approach was clearly adopted with great foresight. It leaves the door open for State intervention in certain cases, the most important of which is child pornography.

It is submitted that the approach of the learned judge (who was in the minority)

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103 Constitution of the Republic of South Africa Act 200 of 1993.

leaves no room for possessors of child pornography to escape liability on constitutional grounds. This is important in view of the fact that the case in question did not deal specifically with the possession of child pornography. The learned judge was simply ensuring that the decision taken in this case would not prove to be an obstacle in future cases dealing with possession of sexually explicit material.

Didcott J based his decision on section 13 of the Interim Constitution[104] - the right to privacy. He first looked at whether section 2(1) clashed with section 13 of the interim constitution. In so doing he made the following comment:

> "what erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which s13 of the interim constitution guarantees that I shall enjoy."[105]

He concluded that there was a clash between s2(1) of the Indecent and Obscene Photographic Matter Act[106] and s13 of the interim constitution and that such infringement of the right to privacy was not reasonable and justifiable.

The learned judge's express reference to possession for personal use is very interesting. He clearly drew a distinction between possession for personal use and possession for commercial purposes. It is respectfully submitted that this distinction would pose many problems for those seeking to prohibit the mere possession of child

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[104] Act 200 of 1993.

[105] Op Cit 618 c-e.

[106] Supra.

pornography. As has been argued earlier, child pornography is harmful in many ways. Even a possessor who possesses child pornography for personal use can cause harm to children. Protection of children is our main objective and to achieve this objective possession per se will have to be prohibited. In the case of child pornography there should be no room for distinguishing between possession for personal use and possession for commercial purposes. To provide for such a distinction would simply amount to leaving a loophole in the system. It is admitted that this approach sounds draconian but the rationale behind it is not without merit.

In the course of his judgment the learned judge dealt with the reasons advanced in favour of a ban on possession of pornographic material. One of the reasons was that the viewing of pornographic materials by possessors has a negative influence on them. This, it was argued, leads to the commission of sexual crimes by possessors. The learned judge correctly concluded that there exists no empirical evidence in support of such an argument.

It was also argued by the State that a ban on the possession of pornographic material serves a useful purpose in curbing production. In effect the State was arguing that a ban on possession serves as a deterrent to consumers of pornographic material, thereby reducing the demand and ultimately decreasing production. It is submitted that the reasoning behind such argument is that of supply and demand. If there is no demand by possessors, there will be no scope for production. After all, it cannot be assumed that all possessors create their own pornographic materials or simply borrow it from their friends. Some of them are surely purchasing the materials either directly or indirectly from producers. These are the people who pose the greatest threat because they are the reason behind production. They keep the industry alive by creating a constant demand for pornographic materials.

Didcott J agreed that "the production of pictures which exploited and degraded

women and children and of further types equally depraved, is certainly an evil and may well deserve to be suppressed. Perhaps as a means to that end, the same even goes for their possession, making it both reasonable and justifiable for society to mind the private business of its members".[107] Unfortunately, this point was not canvassed any further. However, the mere acknowledgment of such a possibility leaves the door open for State intervention in cases of possession of certain types of sexually explicit material. It is submitted that this approach, like that adopted by Mokgoro J, is flexible enough to ensure that child pornographers do not escape liability.

Langa J was of the opinion that s2(1) of the Indecent and Obscene Photographic Matter Act was overbroad thereby allowing for the unwarranted and unjustifiable invasion of the right to personal privacy.[108] He commented on Justice Didcott's statement that possession for personal use within the privacy of the home is neither the business of society nor that of the State. Justice Langa noted that such statement was subject to the qualification that the right to privacy is not exempt from limitation. He was of the opinion that Justice Didcott acknowledged that such limitation may extend to possession even in the privacy of one's home in certain circumstances.[109] However, he offers no explanation as to what these circumstances are. It is submitted that child pornography is such a circumstance.

Although the case itself did not deal with child pornography, Justice Madala saw fit to comment on that issue. The following passage from his judgment is relevant to the issue of child pornography:

> "While I agree that one's right to privacy should be respected, this, in my view, does not mean that all pornographic or similar material

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[107] Op cit 619 c-d.

[108] Op cit 620 d-e.

> warrants protection under that right or even under the wing of free expression. There seems to be considerable consensus, both here and abroad, that some forms of pornography and obscene matter should not enjoy constitutional protection. In my view, children should not be exposed to or participate in the production of pornography......However, possession by adults, in the privacy of their homes for personal viewing of sexually explicit erotica, portraying nudity, sexual interaction between consenting adults, without aggression, force, violence or abuse, may not be prohibited, for the benefit of those who derive pleasure in viewing such material."[110]

The express reference to sexual interaction between consenting adults is interesting. It is respectfully submitted that the learned judge was of the opinion that the right to privacy may be limited in cases of child pornography. This submission is based on the reasoning that if the learned judge had intended to protect child pornography he could have mentioned sexual interaction between consenting parties. Instead, he chose to use the phrase "sexual interaction between consenting adults". The only logical conclusion is that the learned judge did not see the possession of child pornography as a situation that warrants constitutional protection.

The National Coalition For Gay and Lesbian Equality v The Minister of Justice[111]

The recent constitutional court case of *The National Coalition For Gay and Lesbian*

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[110] Op cit 622 f-h.

[111] *The National Coalition For gay And Lesbian Equality (First Applicant) and The South African Human Rights Commission (Second Applicant) v The Minister Of Justice (First Respondent), The minister Of Safety And Security (Second Respondent) and The Attorney-General Of The Witwatersrand (Third Respondent)* Case CCT 11/98 decided on 9 October 1998.

Equality v The Minister of Justice[112] offers some insight into the approach of the court to the issue of privacy. Sachs J started by asking whether anti-sodomy laws punish the act or the person. He says that socially deviant behaviour is usually punished because it causes some kind of harm and not simply because it is deviant. Since the case deals with sodomy he says the following about homosexuality: "In the case of male homosexuality, however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalised. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony".[113]

The above statement made by the learned judge raises some interesting questions which can be extended to the area of child pornography. Firstly, what does anti-child pornography legislation punish? Does it indirectly punish paedophiles because paedophilia creates the impression that children are legitimate sexual partners or does it attempt to protect children from harm? The answer, especially in a society as diverse as South African society, is not simple. There is a possibility that the Films and Publications Act[114] is indirectly aimed at punishing paedophiles. It was suggested in parliament that the Act will result in "a greater clampdown on paedophiles and distributors of pornography".[115] It is submitted that this does not mean that the Act is specifically aimed at paedophiles. Paedophiles are certainly more likely to be affected by this piece of legislation because they are likely collectors of child

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112 Supra.

113 Op Cit Para [108].

114 Supra.

115 Hansard, Debates of the Senate, 3rd session, 1st Parliament, 8 to 10 October 1996.

pornography. (No other group has been identified with more certainty as collectors of child pornography).

The Act cannot be branded as a piece of legislation which attacks paedophiles in an underhanded way. There can be no denying that the Act does affect paedophiles but this is certainly not its primary objective. It is therefore possible that the Act is in fact aimed at protecting children but in so doing it affects paedophiles. If this is the case there can be no objection to the Act on the basis that it punishes a person rather than action.

It is submitted that the anti-child pornography legislation[116] is different from the anti-sodomy laws in the sense that the former has a bona fide objective of protecting children. This submission is based on much of what was said when this Act was being debated in Parliament.[117] Those debates reflect the motives behind the promulgation of this piece of legislation. One of the points noted in Parliament was that the Act is not about censorship but about the protection of basic human rights, particularly the protection of children.[118] The African National Congress was of the view that the Act does not attempt to regulate morals but to protect those who are vulnerable, namely, women and children.[119] Despite the skepticism of a few of the political parties regarding the Act, the protection of children was a concern shared by all.

In paragraph [116] Sachs J. says that "there is no good reason why the concept of privacy should.....be restricted simply to sealing off from state control what happens

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[116] In terms of the Films and Publications Act 65 of 1996.

[117] Debates of the National Assembly of 1995, 23 January to 2 June, Vol. 5, pg 1110 and Debates of the Senate, 3rd session, 8 to 10 October 1996, pg 3168.

[118] Debates of the National Assembly of 1995, Vol. 5, 11 May 1995, pg 1159 - 1160. This point was voiced by the African Christian Democratic Party.

[119] Debates of the Senate, 3rd session, 10 October 1996, pg 3186.

in the bedroom......that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private". He makes an important point that "what is crucial is the nature of the activity, not its site".[120] These comments by the learned judge can once again be extended to the area of child pornography. It helps to a certain extent to alleviate the harshness of the statement made by Didcott J. in the *Case*[121] judgment where he said, "what erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State".[122]

The emphasis on the nature of a particular activity rather than the place where it occurs is important. To adopt the opposite stance would amount to saying that a person can do anything he pleases in the privacy of his home without state intervention. In the words of Sachs J., "there is no reason why the concept of privacy should be extended to give blanket libertarian permission for people to do anything they like provided that what they do is sexual and done in private".[123] It is submitted that it is only logical to focus on the type of activity being engaged in before making any comment.

With regard to child pornography it is the nature of the activity itself which causes concern. Child pornography is often associated with the sexual exploitation of

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[120] Para 117 of the judgment.

[121] *Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (1) SACR 587 (CC).

[122] Op Cit 618.

[123] *The National Coalition For gay And Lesbian Equality (First Applicant) and The South African Human Rights Commission (Second Applicant) v The Minister Of Justice (First Respondent), The minister Of Safety And Security (Second Respondent) and The Attorney-General Of The Witwatersrand (Third Respondent)* Case CCT 11/98 decided on 9 October 1998 at para [118].

children.[124] This is what calls for action. It is irrelevant whether acts associated with child pornography take place in public or in private. At the end of the day children still suffer harm.[125] The overall point being made here is that the Films and Publications Act[126] prohibits possession of child pornography because such possession is linked to harm. This is regardless of whether it is private possession for personal use or possession for commercial purposes.

Sachs J uses the examples of sex involving violence, deception, voyeurism, intrusion or harassment where "the privacy interest is overcome because of the perceived harm".[127] It is submitted that the threat posed by child pornography to the well-being of children is sufficient to overcome the privacy interest. One cannot begin to compare the harm suffered by children through child pornography with the feelings of a person whose privacy has been invaded. Most South Africans may not even tolerate such a comparison because of the threat that it poses to our recently acquired freedom. This attitude has already been adopted by one writer and academic who feels that "the spectre of the past....where police would go through one's private library in search of what may possibly be undesirable, is to my mind so abominable that the mere fact of possession of child pornography simply does not justify any invasion".[128]

It is respectfully submitted that the attitude described above will lead to an even greater erosion of children's rights in South Africa. There is potential for abuse in

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

125 Attorney General's Commission on Pornography, Final Report 600 (1986) at 856-66.

126 Act 65 of 1996.

127 Supra.

128 Kobus Van Rooyen SC, *The End of the Indecent or Obscene Photographic Matter Act*, 1996 (9) SACJ at 329.

almost every situation but this should not stop us from doing what is necessary to protect children. The potential for abuse in this particular situation is reduced by section 27(3) of the Films and Publications Act[129] which provides that "no prosecution shall be instituted in respect of a contravention of subsection (1),[130] and no search warrant shall be issued in terms of the Criminal Procedure Act, 1977 (Act no. 51 of 1977), in respect of a publication or film which may be involved in such a contravention, without the written authority of the attorney-general concerned".

On the other hand, it is submitted that s27(3) of the Films and Publications Act is not practical as it does provide for those situations where the police may have to act immediately so as not to defeat the object of their search. It is therefore submitted that a better approach would be to allow magistrates to issue search warrants if there are reasonable grounds for believing that a person has pornographic material in his or her possession. This warrant should authorise both search and seizure. In addition, police officers should be allowed to search and seize without a warrant if they have no option but to take immediate action. In other words, it is submitted that the law relating to search and seizure, as provided for by the Criminal Procedure Act[131] should apply to the Films and Publications Act[132] as well. The written authority of the attorney-general should not be a requirement as it may render the Films and Publications Act less effective than it would otherwise be in the fight against child pornography.

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[129] Supra.

[130] Supra. Subsection (1) prohibits the production, importation and possession of films and publications depicting children under the age of eighteen participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity.

[131] Section 21 of the Criminal Procedural Act 51 of 1977.

[132] Act 65 of 1996.

CHAPTER 5

THE INTERNATIONAL PERSPECTIVE ON THE POSSESSION OF CHILD PORNOGRAPHY

Introduction

In this chapter the approaches of other countries to the burning issue of the possession of child pornography are investigated. The objective is to determine why other countries have seen fit to criminalise the possession of child pornography. Cases and legislation are dealt with here. It is important to look at the ways in which other countries have addressed this problem since it gives us some idea as to how far governments are willing to go to root out this vile practice.

United States of America

The first case (*Stanley v Georgia*)[133] is analysed with a view to determining the approach of American courts to private possession of offensive material. This case does not deal specifically with child pornography but with the possession of obscene material in general. The objective here is to see how far the American courts have come and why they chose the path that they did. This can only be done by tracing the case law back to where the controversy surrounding the issue of possession began.

The Protection of Children Against Sexual exploitation Act of 1977[134] prohibited the production, distribution, and sale of material depicting sexually explicit conduct by minors. It also criminalized the mailing, receipt, or trafficking in interstate or foreign commerce of such material for the purpose of sale or distribution. The Act did not, however, prohibit possession. This Act was a failure as was clear from the report of

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133 394 US 557 (1969).

134 Pub. L 95-225, 92 stat 7.

the Attorney General's Commission on Pornography in 1976.[135] The report stated that in spite of the enactment of the 1977 Act approximately 264 commercial magazines depicting children in sexual poses continued to be produced each month and 300 000 children continued to be sexually exploited each year in the United States.

The Child Protection Act of 1984[136] revised the 1977 Act. It removed the requirement that trafficking, receipt, and mailing be for the purposes of sale or distribution for sale. This made it possible to prosecute those individuals (especially paedophiles) who traded child pornography for self-gratification rather than for profit The Act also removed the requirement that material be obscene before its production, distribution, sale, mailing, trafficking, and receipt could be found criminal. The age limit was raised from sixteen to eighteen years. Once again, Congress did not find it necessary to include a prohibition against possession of child pornography. The Act did make it possible to halt the non-commercial aspect of the child pornography industry. The Act was further amended in 1986 and 1988 but not to include the criminalization of possession.[137]

Stanley v Georgia,[138] the first American case in which the private possession of obscene materials was fully considered, dealt specifically with the state's attempt to regulate the private possession of obscene films. The defendant was tried and convicted in the lower court of "knowingly having possession of obscene matter" in violation of a

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135 Attorney General's Commission on Pornography, Final report 600 (1986) at 601.

136 Pub. L 98-292, 98 Stat 204.

137 18 U.S.C.A. §2251-2252 (West Supp. 1989).

138 Supra.

Georgia statute.[139] The obscene matter in question consisted of films which a state officer seized after federal and state agents had found them in a desk drawer in a bedroom of the defendant's home. The lower court held that a charge for the possession of obscene matter did not require that such possession must have been with intent to sell, expose or circulate same. The main argument on behalf of the State was that since the State can protect the body of a citizen it can protect his mind.

On appeal the United States Supreme Court held that the Georgia statute, insofar as it made mere private possession of obscene matter a crime, was unconstitutional. Justice Marshall said that:

> "the difficulties of proving an intent to distribute obscene matter or in producing evidence of actual distribution, under statutory schemes prohibiting the distribution of obscene matter, which difficulties might exist if a statutory prohibition of mere possession of obscene matter is not upheld, do not justify an infringement resulting from this latter prohibition, of an individual's right to read or observe what he pleases...".[140] It was made quite clear that "the broad power of the States to regulate obscenity does not extend to mere possession of obscene matter by an individual in the privacy of his own home."[141]

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139 The relevant section of the statute, Ga Code Ann §26-6301 (Supp 1968), reads as follows: "Any person who shall knowingly bring or cause to be brought into this state for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony ..."

140 Op cit 544.

141 Op cit 545.

In essence the court was saying that the State may not dictate what printed or visual materials a person may possess in his own home for his personal use. In the words of Justice Marshall:

> "...a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds".[142] This statement was made in response to the State's argument that a ban on private possession was necessary in order to protect the individual's mind from the effects of obscenity. The court rejected this argument as amounting to nothing more than the assertion that the State has a right to control the moral content of a person's thoughts."[143]

The court said :

> "given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit the possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."[144]

The court was of the opinion that the possession of certain printed or visual materials

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142 Op cit 550.

143 In reaching this conclusion the judge relied on the following passage: "Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe too that adults as well as children are corruptible in morals and character and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the consumer. Obscenity, at bottom, is not crime. Obscenity is sin". - Henkin, *Morals and the Constitution: The Sin of Obscenity*, 1963 Col L Rev. 391, 395 .

144 Op cit 550.

such as classified national security materials could still be penalised because of the harm that it could cause. Obscenity possessed for personal use was not seen to fall into this category and the prohibition of such materials would be unconstitutional. The court dismissed arguments that the regulation of obscene materials is justified by the harm to consumers or persons depicted in such material.

It is submitted that the court's comparison between the possession of chemistry books and obscene materials cannot be extended to cover child pornography. The reason for this is simply that child pornography entails exploitation, degradation and physical or psychological (or both) right from the production stage. Even if a possessor of child pornography does not use it to harm others there will still be a reason for a ban on possession. This reason, which has already been discussed earlier, is that the possessor provides a market for the producer. The possessor purchases the material and becomes a link in the chain. Chemistry books, on the other hand, can lead to harm only if the possessor chooses to use the information contained therein in a harmful way. There is usually no harm to anyone during production. It is submitted that the difference lies in the nature of the two types of material compared by the court.

New York v Ferber[145] dealt with a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of sixteen. In this case the proprietor of a bookstore was convicted of selling films depicting young boys masturbating. The United States Supreme Court held that child pornography is not protected speech and based its decision on the harm suffered by children as a result of being used in the production of pornographic material. The court did not see a need to address the issue of possession of child pornography because the New York statute did not prohibit possession.

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145 Supra.

This case is significant because of its influence on other American states with regard to the enactment of legislation prohibiting the possession of child pornography. Eighteen states took their cue from the State of New York and enacted legislation prohibiting the possession of child pornography regardless of whether there was an intention to distribute or not.[146] These eighteen States made possession of child pornography an offence with a penalty as serious as that imposed in respect of distribution. These States did not, however, explicitly ban private possession. Despite this, possessors of child pornography were tried and convicted for private possession.[147]

In *State v Meadows*[148] the Ohio Supreme Court upheld a conviction for possession of child pornography. In this case police officers searched Meadows' hotel room and found magazines depicting children engaging in sexual activity. The Supreme Court of Ohio started its inquiry by looking at the reasoning in *Stanley v Georgia*.[149] In so doing the court noticed that in Stanley's case the court had declined to state whether compelling reasons existed to justify the criminalizing the possession of non-obscene materials. The Meadows court used this and the state interests set forth in *New York v Ferber*[150] to justify criminalising the possession of child pornography. The court found that permitting possession of child pornography was of "trifling" social value[151] and the significant state interest in protecting children heavily outweighed this weak

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146 These states were Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Dakota, Texas, Utah, Washington, West Virginia.

147 *State v Meadows* 480 U.S. 936 (1987); *Ex Parte Felton* 526 So.2d 638 Ala. (1988); *People v Geever* 488 U.S. 920 (1988); *Savery v State* 819 U.W. 2d 837 (Tex. Crim. App. 1991); *State v Davis* 53 Wash. App. 768 p. 2d 499 (Wash. App. 1989).

148 Supra.

149 394 U.S. 557 (1969).

150 458 U.S. 747 (1982).

151 Op cit 703.

individual interest."[152]

A similar provision was upheld in the State of Alabama in the case of *Ex Parte Felton.*[153] Felton was convicted of privately possessing a sexually explicit film depicting minors. The court did not rely on Stanley's[154] case because that case dealt with obscenity and not with child pornography. The court followed the decision in *State v Meadows*[155] and upheld the law prohibiting possession of child pornography.

In the State of Illinois an anti-possession statute came under the spotlight in *People v Geever.*[156] The court reviewed the decision in *Stanley v Georgia*[157] and came to the conclusion that the State's interest in protecting children outweighed an individual's right to sanctuary in his own home. In Texas a similar conviction was upheld in *Savery v State*[158] and in Washington a conviction was upheld in *State v Davis.*[159] The Illinois and Ohio courts found that the harm to the child used in the production and distribution of child pornography outweighed an individual's privacy interest in possessing such material privately for personal use.

It is submitted that the approach adopted by the Illinois and Ohio courts is the correct approach because it focuses on the reason behind the ban on possession of child pornography. The reason advanced by these courts for upholding a ban on

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[152] Op cit 704.

[153] 526 So. 2d 638 (Ala. 1988).

[154] Supra.

[155] 480 U.S. 936 (1987).

[156] 488 U.S. 920 (1988).

[157] Supra.

[158] 819 S.W. 2d 837 (Tex. Crim. App. 1991).

[159] 768 P. 2d 499 (Wash. App. 1989).

possession of child pornography, namely, the prevention of harm to children, is not based merely on morality and emotion. These courts looked at the situation rationally and practically and in so doing they found the reason for a ban on possession. There can be no denying that arguments in favour of prohibiting child pornography often amount to nothing more than emotional outbursts. The reasons advanced are often based on protection of readers and viewers from the so-called negative influence of pornography. The Illinois and Ohio courts differed in their approach, which, it is submitted, is the correct one.

Osborne v Ohio[160] dealt with the possession of photographs depicting nude minors. In terms of an Ohio statute it was illegal for a person to possess or view any material depicting a minor, who is not such person's child or ward, in a state of nudity. Osborne was found in possession of four photographs of a nude male adolescent in sexually explicit positions. The court was faced with a combination of the situations in *Stanley v Georgia*[161] and that in *New York v Ferber.*[162] In Stanley's case the court recognised the individual's right to privacy whilst in Ferber's[163] case the court recognised the State's right to regulate child pornography. In this case the court was faced with the private possession of child pornography. The private possession of child pornography encompasses the individual's privacy right because it deals with possession in the private sphere. It also encompasses the State's right to step in because of the very nature of child pornography.

The United States Supreme Court held that the State's proscription of the possession of child pornography was not unconstitutional because the State did not rely on a

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160 495 U.S. 103 (1990).

161 Supra.

162 Supra.

163 Supra.

paternalistic interest in regulating a person's mind, but rather sought to serve a compelling state interest in protecting the victims of child pornography. In concluding that the State may constitutionally proscribe the possession of child pornography the court considered the following arguments advanced by the State:

(1) the State's interest in protecting the victims of child pornography is so great that it may legitimately attempt to eliminate the industry at all levels in the distribution chain;

(2) since the decision in *New York v Ferber*[164] much of the child pornography market had been driven underground, making it to difficult to eliminate the industry by only attacking production and distribution. This argument was supported by the fact that since that decision nineteen States found it necessary to prohibit the possession of child pornography;[165]

(3) the materials produced by child pornographers permanently record the victim's abuse and causes the victims lifelong harm by haunting them;[166]

(4) the State's ban on possession encourages possessors of child pornography to destroy such material.

(5) it is good to encourage the destruction of pornographic material because paedophiles use such material to seduce other children into sexual activity. It has been suggested that paedophiles use child pornography to induce children to engage in sexual activity and to pose for photographs and films[167]. The

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164 Supra.

165 See n. 97 supra for the first eighteen States which enacted legislation to ban the possession of child pornography. Since then Alabama has been added to the list: Ala. Code §13A-12-192 (1988).

166 *Shields v Gross* 448 N.E 2d 108, 112 (N.Y. 1983).

167 Josephine Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, (1987-88) 76 Ky. L.J. 15, 26.
Attorney General's Commission on Pornography, Final Report 600, at page 649.
Osborne v Ohio 495 U.S. 103 (1990) at 111.

paedophile uses a process similar to systematic desensitization utilised by psychologists in treating behaviour disorders.[168] First the paedophile may allow the child to browse through a magazine containing mild depictions of a sexual nature, such as hugging and kissing. Once the child is comfortable with these, the paedophile may introduce the child to more explicit depictions, such as sexual intercourse between adults. This progresses to the point where the child is shown pictures and films depicting sexual activity between adults and children and even homosexual activity. By this time it is highly likely that the child would not feel inhibited.

The Supreme Court decided that the State's interest in prohibiting the private possession of child pornography overrode the individual's right to privacy. In Stanley's case the court allowed the State of Georgia to proscribe the circulation of obscene material but did not extend this proscription to the private possession of obscene materials. The most important difference between *Stanley v Georgia*[169]and *Osborne v Ohio*[170] is that the former dealt with obscene material whilst the latter dealt with child pornography. In Stanley's case the court did not accept the State's argument that a prohibition on possession would dry up the market for obscene materials but in Osborne's case the court accepted this argument.

It is clear from the approach adopted by the American courts that statutes prohibiting possession of child pornography have passed constitutional muster. What is admirable about the American approach is the fact that it regards the protection of children as the most important factor to be considered.

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168 Attorney General's Final Report, see n. 88 supra, at 604; Robert J. Clinton, *Child Protection Act of 1984 - Enforceable Legislation to Prevent Sexual Abuse of Children*, (1985)10 Okla. City U.L. Rev. at132.

169 Supra.

170 495 U.S. 103 (1990).

Canada

The possession of child pornography is an offence in Canada in terms of section 163.1 of the Criminal Code. The Canadian Supreme Court has adopted a different approach to pornography from that adopted in the United States of America. The Canadians have adopted a standard based solely on the harm believed to be engendered by sexually explicit material. The Americans, on the other hand, have adopted an approach based on a public-morality consideration.

In the case of *Ontario (Attorney General) v Langer*[171]court was faced with the issue of whether certain drawings and paintings fell within the definition of child pornography, the production and distribution of which were prohibited by the Canadian Criminal Code. The paintings and sketches which were seized from an art gallery depicted explicit sexual relations between adults and children. McCombs J found that s163.1 of the Criminal Code violated the freedom of expression guaranteed in the Canadian Charter of Rights and Freedoms.[172] This violation was, however, found to be justified in terms of section 1 of the Charter.[173] At pp. 325 - 26 of the judgment the learned judge stated:

> " ...on the basis of the opinion evidence which I have accepted, private possession of child pornography poses a realistic risk of harm to children by reinforcing cognitive distortions, fuelling fantasies, and its potential use in "grooming" possible child victims. It is entirely reasonable and within the legitimate objectives of parliament to criminalise private

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171 (1995) 97 C.C.C. (3d) 290 (Ont. Ct. Gen. Div).

172 Section 2(b) of the Charter.

173 Section 1 of the Charter provides as follows: "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

possession of child pornography."

Despite the above statement, the court held that the depictions had artistic merit and did not pose a realistic risk of harm to children. The court accordingly ordered that the paintings and sketches be returned to the person from whom they had been seized.

The most recent Canadian case dealing with the possession of child pornography is that of *R v Sharpe.*[174] In April 1995 several computer discs, books, manuscripts and photographs were seized from the accused at his home. Many of the seized photographs were of nude boys displaying their genitals or anal regions. The computer disks contained a text entitled "Sam paloc's Flogging, Fun and Fortitude - A Collection of Kiddiekink Classics". Some of the seized items were intended for resale whilst others were not. The accused challenged, inter alia, the constitutionality of section 163.1(4) of the Criminal Code which provides as follows:

> (4) "Every person who possesses any child pornography is guilty of:
>
> (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) an offence punishable on summary conviction."

It was pointed out that the word "possess" is not limited. The inevitable consequence is that any purpose will suffice to make possession of child pornography a crime. Subsection 4 was contrasted with subsections 2[175] and 3 [176] which prohibit possession

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[174] Supreme Court of British Columbia, Docket X050427, 13 January 1999.

[175] Subsection 2 provides as follows:
"Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography, is guilty of:
(a) an indictable offence and liable to imprisonment for a term not exceeding ten
(continued...)

for purposes of publication, sale or distribution.

The Crown conceded that subsection 4 of the Criminal Code violates the guarantee of freedom of expression set out in section 2(b) of the Canadian Charter of Rights and Freedoms. Justice Shaw had to decide whether such violation was justified under section 1 of the Charter. In deciding this issue the learned judge referred to Langer's[177] case discussed above. He pointed out that the section 1 analysis in Langer's case consisted of the weighing of the legislative objectives against the effects of the legislation. He was of the opinion that this test was too narrow and that a better approach was that adopted in *Dagenais v Canadian Broadcasting Corporation.*[178] In the Dagenais case Lamer C.J.C. stated that in certain cases it is appropriate to weigh the salutary effects of legislation against its deleterious effects. Justice Shaw adopted that approach in the present case. He weighed the deleterious effects against the salutary effects of the prohibition of simple possession of child pornography.

The learned judge found that the detrimental effects substantially outweighed the salutary effects. He was of the opinion that the intrusion into freedom of expression and the right of privacy is so profound that it is not outweighed by the limited beneficial effects of the prohibition. He said that the simple possession prohibition deals with a very intimate and private aspect of a person's life and that aspect should

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175 (...continued)
years; or
(b) an offence punishable on summary conviction."

176 Subsection 3 provides as follows:
"Every person who imports, distributes, sells or possesses for the purpose of distribution or sale any child pornography, is guilty of
(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
(b) an offence punishable on summary conviction."

177 Supra.

178 [1994] 94 C.C.C. (3d) 289 (S.C.C.).

be given considerable weight. Accordingly he found that the limited effectiveness of the prohibition was insufficient to warrant its highly invasive effects. In arriving at this conclusion the judge took into account that the Criminal Code contains what he considered to be powerful measures to tackle the problem of harm to children arising from pornography. The outcome of this case was that subsection 4 is in violation of section 2(b) of the Charter and is not justified under section 1 of the Charter. Accordingly, subsection 4 was declared null and void and the accused was acquitted of charges brought under that section.

This is a highly controversial decision which has caused a public outcry in Canada. The decision is being appealed against by the provincial government.

Other Countries

Many other countries have also penalised the possession of child pornography. In July 1994 the Austrian government amended the Penal Code[179] to prohibit the possession of child pornography. Initially legislation in the Netherlands prohibited the manufacture, dissemination, transport and export of pornography involving children under the age of sixteen. In April 1995 the government passed legislation amending the Penal Code[180] and making it an offence to possess pornographic material involving children under the age of sixteen. In 1992 Norway's Penal Code was amended to include a prohibition on possession of child pornography. The possession of child pornography is an offence in Germany.[181] Both countries prohibit the mere possession of child pornography. In England and Wales it is an offence for a person to have even one indecent photograph of a child in his possession with a

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179 Section 207a was amended.

180 Penal Code Art. 240b, Section 1.

181 German Penal Code §184 Abs. 5 StGB (Strafgesetzbuch).

view to distributing or showing it.[182] The European countries distinguish between possession for distribution and possession for personal use.[183] In Cambodia, a draft proposal[184] for a law against child exploitation includes a provision which prohibits the production, possession, importation, exportation or advertisement of material depicting persons under the age of eighteen in an indecent, obscene or derogatory manner. None of the Eastern European countries, with the exception of Estonia,[185] have laws specifically dealing with child pornography.

One cannot help noticing the change in attitude towards child pornography all around the world. It is about time that governments realised the impact of child pornography, as well as other crimes against children, on the quality of life of children. The steps being taken by these countries are exactly what is needed to thwart the growth of an otherwise thriving industry.

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182 Section 1(1) of the Protection of Children Act 1978.
Section 160 of the Criminal Justice Act 1988.

183 Criminal code art. 228 (U.S.S.R.) - prohibits possession of pornographic materials for sale or distribution.
Penal Code art. 528, Royal Decree No. 1398 (It.) - prohibits possession of obscene publications for purposes of commerce or distribution.
Penal Code art. 283 (Fr.) - prohibits possession of publications contrary to good morals for purposes of commerce, distribution or display.

184 Law on the Abolition of Child Trafficking and Prostitution, Art 9A i, ii, iii.

185 Penal Code, Art. 200/3.

CHAPTER 6

CONCLUSION

The reality of the South African situation is laid bare in this chapter. Will the issue of child pornography continue to be overshadowed by other problems such as hunger, poverty, illiteracy, unemployment, and violence as often seems to happen in developing countries[186] or will South Africa rise to the occasion by giving the problem of child pornography the attention it requires?

It is clear from the discussion in chapter five above that many countries regard child pornography as a very serious problem which can no longer be swept under the carpet. In certain countries the industry has wreaked such havoc in the lives of children that the mere possession of child pornography has now been banned. Poverty and desperation have led parents to sell their children into a life of prostitution and all other evils associated with it[187]. There is no reason to think that South Africa is any different. South Africa is plagued by poverty, unemployment and crime. There is also a growing number of street children. It is submitted that this combination of circumstances provides fertile ground for the growth of industries which exploit children, namely, child prostitution and child pornography.

During the course of this work many arguments in favour of prohibiting the possession of child pornography have been advanced. These arguments have not, however, taken into account the prevailing conditions in which the prohibition is to operate. The South African government has an overwhelming number of problems

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[186] This is a reality that was highlighted by the international non-governmental organisation, End Child Prostitution in Asian Tourism (ECPAT), in a paper prepared for the World Congress against the Commercial Exploitation of Children, which was held in Stockholm, Sweden from 27-31 August 1996.

[187] Crime, pornography, child labour.

to attend to. Crime, poverty and illiteracy are just a few of the major problems facing this country. In view of this reality there are certain questions which demand answers, namely, "where exactly does the prevention of child pornography fit into the government's list of priorities or is it even a priority? Does the government intend to enforce the provisions of the new Act or are they merely paying lip-service to the protection of children? Does the government have the resources to enforce the prohibition on possession?" It is submitted that in attempting to follow international trends and to show our commitment to children's rights we should not forget the enormity of other problems facing us.

With regard to the first question the answer must be in the affirmative. Every government should place children at the very top of its list of priorities. To do any less would amount to denying children the protection they deserve. As mentioned in chapter one, South Africa is trying very hard to develop a children's rights culture.

The second question cannot be answered at this stage as it is too soon after the coming into effect of the new Act to be able to see results. The last question is the one that causes the most concern. It is highly unlikely that the country has the resources to implement the prohibition on possession of child pornography. The crime rate in this country is appalling and the police already have their hands full. It is submitted that the answer lies in a combination of proper law enforcement and community effort. This is no time to turn a blind eye to child pornography or to other problems facing children. There can be no denying that financial constraints will prove to be an obstacle. It is therefore incumbent upon the South African community at large to stop exploiting children. This is only part of the bigger picture. What about the health of the children depicted in these pornographic materials? Does it not follow as a matter of logic that they should be provided with some sort of support and counselling? This is, however, not likely in this country. Our child protection and child welfare systems are already being stretched to the limit. There

is a lack of manpower and severe financial constraints. As the need for child protection services continues to grow the situation becomes more hopeless. There is a severe shortage of specialised services such as counselling and psychological treatment for traumatised children.

The Legislature's intentions in drafting the Films and Publications Act[188] are indeed worthy of praise. The Act, as it appears on paper, is a wonderful instrument for the protection of children. This does not mean that the Act will work in practice. If the Act does not prove workable, such failure will not be due to any shortcomings on the part of the Legislature.

There is no doubt that a prohibition on the possession of child pornography is going to spark many constitutional debates. These will be especially in respect of private possession; possession without a commercial rationale; and the absence of an exemption in cases where the prohibited material has artistic, dramatic, literary, scientific or documentary value. It is also possible that the sections dealing with possession will be challenged as being too wide. These problems are anticipated and cannot be avoided.

South Africa has come a long way but still has a long way to go in establishing a children's rights culture. The promulgation of legislation is just one little step in the right direction. The answer to the problem of child pornography lies in the proper interpretation and enforcement of such legislation.

At the end of this journey into the world of child pornography the inevitable conclusion is that the prohibition on the possession of child pornography is not legislative overkill but a justifiable means to a worthy end.

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[188] No. 65 of 1996.

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