

THE TRIVIALISATION OF CHILD PORNOGRAPHY BY SOUTH AFRICAN COURTS AS REFLECTED IN SENTENCING POLICIES

Introduction

1 On 5 April 2007, a South African newspaper report of a child pornography case confirmed my disquiet about the contribution of courts in South Africa to the trivialisation of one of the most despicable crimes against children and society: sexual abuse, exploitation and pornography. According to the report, two Newlands East men picked up a 15-year-old school-girl, took her to a park, drank alcohol and smoked marijuana. They then indecently assaulted the girl, with the one using a mobile cellular phone to film the indecent assault by the other, and then being filmed by another friend while he indecently assaulted the girl. Both men entered into plea bargains and were given five-year suspended sentences, *wholly* suspended for five years, and a R10 000 fine each, for indecent assault and the creation, production and possession of child pornography. The newspaper also reported that the 20-second video clip of the girl, dressed only in her school shirt, was widely distributed among school children. The two men said they were “deeply remorseful” and realised the seriousness of the offences. But the sentence handed down to the two men raises the question: *why had the court not realised the seriousness of their offences? And why was no person charged with the distribution of that video clip? And why was the third person who filmed one of the two perverts not charged with the creation, production and possession of child pornography? And what about that ‘smoking marijuana’ bit? Is that not also an offence?*

I am reminded of what Dr Joe Tucci, Chief Executive of the Australian Childhood Foundation, said when many Australians expressed public outrage at the leniency of the sentence handed down by an Australian court in a recent child pornography case: *“This decision reflects an ongoing diminishing of the judiciary’s view about the seriousness of child pornography.”* He could very well have been talking about the South African judiciary.

2 The more recent judgment by the Eastern Cape Division of the High Court of South Africa in the *Brett Stevens and The State*¹ appeal, delivered in June of this year, is further confirmation of the “ongoing diminishing of the judiciary’s view about the seriousness of child pornography”.

The Judgment in the matter of *Brett Stevens and The State*

3 Brett Stevens was convicted in the Regional Magistrate’s Court on 2 charges of the indecent assault of a minor under section 14(1)(b) of the *Sexual Offences Act, 1957* and 8 charges of the creation and possession of child pornography under section 27(1)(a)(i) and (ii) of the *Films and Publications Act, 1996* (the Act). The Regional Magistrate took all 10 offences together for purpose of sentence and sentenced Stevens to 8 years imprisonment, with 3 years conditionally suspended for 5 years.

4 According to the judgment, Stevens removed the undergarments of two five-year old girls whilst they were sleeping and took photographs of them. He also took photographs of the two little girls “*with more active*

¹ Case No. CA & R 54/07, 22 June 2007

participation on their part", including some with *"his fingers on the vagina of the two young girls."* He took *"some 71 photographs of the children"*.

5 There are a number of statements in the judgment that point to a failure by South African courts to understand child pornography in the context of the sexual abuse and brutalization of children for the sexual gratification of perverts and that "the production and use of child pornography is one practice within a repertoire of child sexual abuse."²

6 The judgment also states that the *"permitted maximum penalty for any offence under section 14 is 6 years and 10 years for the latter offence."*³ The "latter offence" is, in fact, two offences – *possession* under section 27(1)(a)(i) and *creation* under section 27(1)(a)(ii) – and the maximum penalty is 10 years for each offence, making the maximum for both possession and creation 20 years. The High Court seems to have missed, entirely, the intended effect of the *Films and Publications Amendment Act, 2004*, with respect to child pornography offences.

Until the 2004 amendment, the creation, distribution, production and possession of child pornography constituted a single offence, with a maximum of 5 years imprisonment. However, Parliament, concerned at the increase in incidents of the sexual abuse and exploitation of children in pornography, both nationally and internationally, amended section 27 of the Act in two important respects. *Firstly*, Parliament created *possession, creation, importation and distribution* as separate offences and, *secondly*, increased the permitted maximum to 10 years for each separate offence.

² Professors Kelly and Regan, *Rhetoric and Realities: Sexual Exploitation of Children in Europe* (2000)

³ Paragraph 1 of the judgment

The permitted maximum for section 27(1)(a) is, therefore, 40 years. However, the maximum could, in fact, be higher. Each separate image of child pornography may be charged as a separate offence, since each image is created⁴ individually and separately. According to the judgment, Stevens created 71 images of child pornography, and, therefore, could, and should, have been charged with 71 counts under section 27(1)(a)(i) and 71 counts under section 27(1)(a)(ii). Stevens would then have been facing a maximum of 710 years under section 27(1)(a)(i) and 710 years under section 27(1)(a)(ii)⁵. Even taking all counts as one for purpose of sentence, Stevens should have been facing a maximum of 20 years and not 10 years on the child pornography conviction.

7 The statement in paragraph 3 of the judgment that *"there was no evidence that the girls suffered any physical harm, nor is there any evidence that either of the girls showed any serious signs of psychological harm until the time of the trial"* is further evidence of the judiciary's "ongoing diminishing of the seriousness of child pornography".

Section 27(1)(a) of the Act is not only harm-based⁶. That much should be obvious since even the product of one's imagination, where

⁴ It should be noted that the act of downloading an image of child pornography from the Internet will constitute both the offences of the *creation* and *possession* of that image

⁵ The possibility of a sentence of 710 years imprisonment may sound absurd. But is it? In January 2007, the "Appleton Post Crescent" of Appleton, WI, USA, reported that a 32-year-old man was facing up to 575 years, and \$2.3 million in fines, if convicted on 23 counts of possessing child pornography, while the "Korea Times" of Seoul, South Korea reported that the Arizona Supreme Court upheld the 200-year prison sentence of an Arizona man convicted for possession of 20 pornographic images of children. Stevens created, and was in possession of, 71 child pornography images!

⁶ The decision of the United States Supreme Court in the *Free Speech Coalition v Ashcroft* case was that child pornography as a product of one's imagination, where no

child pornography is created without the use of a real child, is caught within section 27(1)(a) when read with the definition of child pornography in the Act.⁷ The judgment of the Canadian Supreme Court in *R v Sharpe*⁸ is instructive with regard to the question of harm and child pornography and reflects our own Parliament's intention with regard to child pornography:

"Child pornography....is inherently harmful to children and society. This harm exists independently of dissemination or any risk of dissemination and flows from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. Although not empirically measurable, nor susceptible to proof in the traditional manner, the attitudinal harm inherent in child pornography can be inferred from degrading or dehumanizing representations or treatment. Expression that degrades or dehumanizes is harmful in and of itself as all members of society suffer when harmful attitudes are reinforced. The possibility that pornographic representations may be disseminated creates a heightened risk of attitudinal harm. The violation of the privacy rights of the persons depicted constitutes an additional risk of harm that flows from the possibility of dissemination. Child pornography is harmful whether it involves real children in its production or whether it is a product of the imagination. Section 163.1 was enacted to protect children, one of the most vulnerable groups in society. It is based on the clear evidence of

real child was used in its creation, enjoys First Amendment protection since no child is harmed in its production. The decision of the Canadian Supreme Court in the case of *R v Sharpe*, on the other hand, reflects the intention of the South African Parliament.

⁷ "child pornography" includes any image, however created, or any description of a person, real or simulated..."

⁸ 2001 SCC 2. File No.: 27376

direct harm caused by child pornography, as well as Parliament's reasoned apprehension that child pornography also causes attitudinal harm. The lack of scientific precision in the social science evidence relating to attitudinal harm is not a valid reason for attenuating the Court's deference to Parliament's decision." [Emphasis added]

Parliament's decision, expressed in the amendments to the definition of child pornography, the separation of the different offences in section 27(1)(a) and the hundred per cent increase in the permitted maximum custodial sentence for each offence, is that child pornography is a serious criminal offence and that sentences should reflect the seriousness of the offence.

8 The statement, in paragraph 6 of the judgment, that *"the evidence upon which the appeal must be decided is also to the effect that the photographs were never distributed to anyone else..."* suggests, perhaps only to me, an attitude that the sentence should be reduced. Stevens was not convicted for contravention of section 27(1)(a)(iv) of the Act for distributing but for creating and being in possession of child pornography. I fail to see the relevance of introducing an offence with which he was neither charged nor convicted, except to make the point that the sentence is too harsh! If the Judge wanted to refer to *distribution*, it would have been more appropriate, and relevant to show the seriousness of child pornography, if he introduced it in the sense articulated in the *Sharpe* judgment: *"The possibility that pornographic representations may be disseminated creates a heightened risk of attitudinal harm. The violation of the privacy rights of the persons depicted constitutes an additional risk of harm that flows from the possibility of dissemination"*. But that would have been an argument for a harsher and not a lesser term of custodial sentence.

9 The Judge rightly rejected the defence argument against a custodial sentence and for *"the benefit of private treatment for his sexual affliction under supervision of his family....because he might not get adequate treatment in prison"* as *"spurious"* and would *"disregard almost totally the seriousness of the offence.....and the community expectations in that regard."* And then contradicted himself by finding the sentence imposed as *"inappropriately harsh"* and reducing it to 6 years, with 2 years conditionally suspended for 5 years. Effectively, Stevens would serve 4 years, if not less with time off for good behaviour, for the indecent assault of two five year-old children and the creation and possession of child pornography – a judgment that is *"inappropriately lenient"* and certainly not reflective of either the seriousness of the offences or the expectations of the community for crimes against the most vulnerable in society. Stevens received an effective 4-year sentence. His victims will probably suffer a life sentence.

Sentencing patterns in child pornography offences in the United States

10 Sentencing patterns in the United States more correctly reflect the seriousness of child pornography offences, as seen in the examples of reported cases between January and March 2007. What is even more surprising about the difference in sentencing patterns between courts in the United States and South Africa is that there are further consequences following convictions in the United States, such as "naming and shaming" through sex offender registers.

- The *Eagle Times*, Claremont, NH, USA. A Vermont man will spend the next **13 years in prison** after he pleaded guilty to transporting **child pornography** across state lines.
- *KSL-TV*, Salt Lake City, UT, USA. The owner of a religious bookstore is sentenced to **15 years in prison** for producing **child pornography**.
- *Detroit Free Press*, Detroit, MI, USA reported that Mariscal was sentenced by a federal judge to **100 years in prison** for producing, importing and distributing **child pornography**.
- *Korea Times*, Seoul, South Korea. An Arizona man who received a **200-year prison sentence** for **possessing 20 pornographic images of children** failed on Monday to persuade the Supreme Court to have his sentence reduced.
- *KHQ Right Now*, Spokane, WA, USA had a report of 66-year-old Thomas Herman who was sentenced to **10 years in prison** in federal court after pleading guilty to **one count of possession of child pornography**.
- *Muncie Star Press*, Muncie, IN, USA. Rinehart, 33, pleaded guilty before Judge David F. Hamilton to two counts of producing **child pornography** and was sentenced to **15 years in prison**.
- *Frederick News Post*, Frederick, MD, USA reported that a Frederick man whose computers contained thousands of images of **child pornography** accepted a plea agreement that put him in jail for **18 years**.

- *York Dispatch*, York, PA,USA. A man who saw himself as a lover of boys, not a collector of **child pornography**, will spend the next **16 years in federal prison**.
- *The DenverChannel.com*, Denver, CO,USA. Roger Deatherage, 54, was sentenced to **25 years in federal prison** for producing **child pornography**, said a United States district attorney.
- *Appleton Post Crescent*, Appleton, WI,USA. A 32-year-old Oshkosh man faces up to **575 years in prison** and **\$2.3 million** in fines if convicted on 23 counts of possessing **child pornography**.
- Teacher found guilty of possession of child pornography and exposing children to pornography sentenced to **5 years imprisonment suspended for 5 years**.
- Man who indecently assaulted his own daughter and took pornographic pictures of her over a period of two years sentenced to **7 years imprisonment**.
- "Father Christmas" guilty of indecent assault, exposing children to pornography and possession of child pornography sentenced to **5 years imprisonment**.
- Man found guilty of four counts of creation and possession of child pornography and of exposing children to pornography sentenced to **5 years in prison**.

10.1 In contrast, reports from South African courts will read as follows (from actual cases)-

- Two Newlands East men get **5 year** sentences, **wholly suspended for 5 years**, after pleading guilty to the **creation, production, possession and distribution of child pornography and indecent assault**.
- Man who claims to have child pornography for research sentenced to a **fine** of R24 000, **half of which was conditionally suspended**. The magistrate agreed to a deferred fine of sixteen monthly payments of R750.00.
- Teacher found guilty of possession of 180 minutes of video recording, 265 digital movie clips, 16 slides and 626 still images of child pornography and indecent assault of children sentenced to **6 years imprisonment**.
- Man court finds to be a homosexual paedophile sentenced to **2 years imprisonment**, with **1 year suspended**, for possession of child pornography.
- Man found guilty of the indecent assault of two minor children and the creation and possession of 71 images of child pornography has sentence reduced to **6 years imprisonment, with 2 years suspended for 5 years**.

The heaviest sentence imposed by a South African court is 7 years. Sentences in excess of 10 years is almost the mean in the United States.

11 These are just a few examples from the over 800 reports of child pornography cases received since 1 January 2007. [There were in excess of 3 000 reports for the period January – December 2006, a number that is set to be exceeded this year. The Internet Watch Foundation, one of the most respected organisations involved in the fight against child pornography, has reported (Annual Report 2006) not only a 400 per cent increase in child pornography since 2005, but also that the images were more graphically sadistic and cruel and of younger children.] Comparing sentencing policies in American courts with those of South African courts make one wonder if American courts are dealing with something completely different. It cannot be that American law provides for stiffer penalties. In terms of the *Films and Publications Act*, the creation, production, distribution and possession of child pornography are separate offences, each of which carries a maximum of 10 years imprisonment. In addition, each different image may be charged as a separate count. There is, therefore, no legal impediment to imposing custodial sentences that reflect the seriousness of offences involving the sexual abuse and exploitation of children.

12 In its report⁹, the United Kingdom Sentencing Advisory Panel stated "*.....it is fundamentalthat **sentencing for these offences should reflect the harm suffered by children who are abused and exploited by the production and distribution of indecent photographs. An offender sentenced for possession of child pornography***

⁹ *The Panel's Advice to the Court of Appeal on Offences Involving Child Pornography*, Chairperson Prof Martin Wasik, August 2002

should be treated as being in some degree complicit in the original abuse which was involved in the making of the images. Sentences for possession should also reflect the continuing damage done to the victim or victims, through copying and dissemination of the pornographic images. Those who make or distribute the images bear a more direct responsibility for their eventual use, as well as for encouraging further production." [Emphasis added]

One would look in vain for a reflection of such sentiments in the judgments and sentencing policies of South African courts in child pornography cases¹⁰.

The reality of child pornography

13 The problem with South African courts, in my opinion, is the failure to understand child pornography in the context of the sexual abuse, brutalisation, rape, torture and even murder of child-victims and as "*one practice within a repertoire of child sexual abuse*".¹¹ Part of the problem is the use of the term "child pornography".

In an article¹² on the Constitutional Court's judgment in what is usually referred to as the *de Reuck* case¹³, I argued that the definition of

¹⁰ Section 28(1)(d) (Chapter 2: Bill of Rights) affirms the right of every child to be protected from maltreatment, neglect, abuse and degradation. Child pornography is the maltreatment, neglect, abuse and degradation of a child, and more. Child pornography is not just a serious criminal offence but also a direct violation of every child's right to protection.

¹¹ *Rhetoric and Realities: Sexual Exploitation of Children in Europe* (2000)

¹² *One Step Forward, Two Steps Back*

“child pornography” by the Constitutional Court was not only flawed but inconsistent with the definitions adopted by all other jurisdictions, as revealed in some of the leading cases¹⁴, international organisations, and as defined in certain conventions¹⁵, as well as the definition in the *Films and Publications Act, 1996*, which echoes Parliament’s clear intention to make the prohibitions on child pornography absolute. The Constitutional Court’s definition of “child pornography” with reference to the Oxford Dictionary definition of “pornography” and twinning that with the meaning of a “child” is, to put it mildly, absurd and a display of gross ignorance about the reality of child pornography. It is as absurd as trying to define “baby shower” by twinning the definitions of “baby” and “shower”, to arrive at a meaning which suggests that a “baby shower” means an infant having a bath.

As Julian Sher explained¹⁶, child pornography is not pornography. It is not consensual. It has nothing to do with sex. *“It’s not even the way we think of children. Often people think of Lolita, a kind of older-looking teenage girl parading around in an erotic costume. But here’s the shocking fact: 40 per cent of the pictures investigators are finding are children under five. And 20 per cent are under three. So these are infants*

*being abused and tortured....It’s better to call it child exploitation materials.”*¹⁷

Max Taylor and Ethel Quayle¹⁸ came to the conclusion about the inappropriateness of the expression “child pornography” even earlier. *“However, its (“child pornography”) continuing use does present some problems, notably in terms of the comparisons it invites with ‘adult pornography’*¹⁹. *The issue here is our often-ambivalent view of the nature of adult pornography and the sense in which that ambivalence might leak into the way we think about child pornography. Adult pornography can be bought in respectable bookshops, it is available from newsagents (even if on the top shelf); we see frankly pornographic advertisements for new cars, we may be sent mildly pornographic calendars. There is often a sense of titillation, of adolescent manly mild rudeness, associated with adult pornography that inappropriately diminishes its abusive content..... A better term than child pornography would be ‘images of sexual abuse’ or more simply ‘abuse images.’*²⁰ *This unambiguously expresses the nature of child pornography, and places it firmly outside the range of acceptable innuendo and smutty-jokes.....”* [Emphasis added]

¹³ CCT 5/03, *Tascoe Luc De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*

¹⁴ See, especially, *New York v Ferber*, 458 U.S. 747 (1982); *R v Sharpe* [2001] 1 S.C.R. and *US v Matthews* 209 F.3d.338 (4thC 2000)

¹⁵ See, for instance, the UN Convention on the Rights of the Child and the Budapest Cybercrime Convention

¹⁶ In *One Child at a Time: The Global Fight to Rescue Children from Online Predators*, a two-researched book published by Random House, Canada (2007)

¹⁷ Speech to the Justice Institute of B>C in New Westminster, April 2007

¹⁸ *Child Pornography: An Internet Crime*, Brunner-Routledge (2003)

¹⁹ A point I explored in *One Step Forward, Two Steps Back*

²⁰ A better expression would be “child abuse materials”, to include descriptions of child sexual abuse, and not only images

14 The sexual abuse, exploitation, abduction, rape and murder of children is a disturbing fact and has become almost a daily news item in South African papers in recent months²¹.

The problem, of course, is not unique to South Africa. Mary Eberstadt's survey of literature, science and social commentary *"arguing for, or insinuating the normality of, adult sexual contact with teenagers and even prepubescent children"* concludes that the *"social consensus against the sexual exploitation of children and adolescents.....is apparently eroding."*²² Is there a similar erosion of social consensus against the sexual abuse and exploitation of children and intergenerational sex in South Africa? Professor Carson Holloway makes a compelling argument that paedophilia is being increasingly accepted in America *".....as a manifestation of a general sexual corruption that has taken root in the last thirty years"*²³ and that this entrenched corruption poses a serious challenge to stopping paedophilic activities in the United States. Given the number of sexual assaults suffered upon children in South Africa, one may be forgiven for coming to the same conclusion about South Africans.

It certainly seems to be the case in a number of other countries as well. According to the Internet Watch Foundation (IWF) (Annual Report 2006), images of child abuse traded via the Internet are fast becoming more graphic and sadistic and increasingly involve younger children and

²¹ The tragic cases of 7-year old Sheldean Human and 11-year old Annestacia Wiese are the most recent at the time of this article

²² *Pedophilia Chic*, *The Weekly Standard*, 17 June 1996 and *Pedophilia Chic Reconsidered*, *The Weekly Standard*, 1 January 2001

²³ *From Playboy to Pedophilia: How Adult Sexual Liberation Leads to Children's Sexual Exploitation*, Carson Holloway, Professor of Political Science, University of Nebraska, *Witherspoon Lectures* (Family Research Council, Washington D.C.)

toddlers. In the last three years, reports the IWF, the number of images involving the severe abuse, including the penetrative and sadistic sexual abuse of younger children, has quadrupled. According to Peter Robbins, Chief Executive of the IWF, *"Sadly we have to report new trends regarding the young age of the child victims in the images we assess and the dreadful severity of abuse they are suffering". "This is babies, toddlers and pre-pubescent children suffering some of the most horrific abuse. Sadly the commercial sites are just responding to a demand by people around the world to buy that level of image. If there's profit to be made they will carry on doing it. The vast majority of web sites were linked to the United States or Russia, where they are often run by organised criminal gangs"*, added a spokeswoman for the IWF.

Pornography and sexual liberalisation in South Africa

15 South Africa, it would appear, suffers from the reputation of being "the dumping ground for the worst kinds of pornography". I am informed, for instance, that there are two versions of the pornographic magazine, the *Hustler*, produced each month – a "soft-core" version for markets overseas and a "hard-core" *Gold* version for distribution in South Africa. Pornography that is beyond the generally-accepted community level of tolerance in other countries is promptly shipped off to South Africa. Since June 1998, the Film and Publication Board has approved for distribution in South Africa in excess of 30 000 "hard-core" pornographic DVDs and video cassettes, including a *genre* of pornography referred to as *Gonzo*.

"Gonzo movies have no pretensions to the conventions of a Hollywood film. They are simply a filmed series of "sex" acts, including oral, vaginal and anal penetration, often performed while the men call the women "bitch", "c..t", "whore" and other similar demeaning and degrading names, all the while expecting women to say how much they like what is being done to them"²⁴. This genre of pornography has become increasingly normalized, mainstream pornography and constitutes the bigger percentage of the market in South Africa. And pornographers are still pushing the limits of what is acceptable and have turned to using younger and younger looking "porn" stars, blurring the boundary lines between a woman who is actually over the age of 18 years but pretending to be younger and a woman who is actually under 18 years pretending to be an adult. The most popular types of "sex" in *gonzo movies* are so demeaning and degrading that it is difficult to describe them without offending a great many people.

16 Professor Jensen's observation that this so-called "sexual liberalism" seems to be creeping into American television, even prime-time television, with its frequent and approving depictions of extra-emotional sex, incest and what comes disturbingly close to intergenerational sex, is, judging by the number of public complaints made to the Board, equally applicable to South African television.

17 My concern is about the potential for changes in attitudes, especially in men as the main consumers of pornography, towards women and children that such demeaning, degrading, and often verbally and

²⁴ *Just a John? Pornography And Men's Choices*, Robert Jensen, Professor of Journalism, University of Texas, speech delivered to the Second Annual Conference on the College Male, Saint John's University, Collegetown, MN, 26 February 2005

physically abusive depictions of younger-looking women encourages in men and the youth who are also exposed to such materials²⁵. *Gonzo "ATM"* is a good example – a popular *gonzo* practice that is difficult to describe without being offensive. All I can say is that "ATM" does not stand for "automated teller machine" in *Gonzo* movies.

18 Establishing a "cause-and-effect" connection between pornography and changes in attitudinal behaviour is controversial and any study contemplated will raise serious ethical questions. But that is no reason to ignore the evidence of what is being reported in the daily papers. The *Mail & Guardian* of April 13 – 19, 2007 reported that an estimated 150 children are raped every day in South Africa. And that, according to a senior police officer from Cape Town, we are seeing a "level of brutality and violence over the past year or two that I don't understand. The levels of violence men use against small children – and women – are disproportionate. We see sadistic undertones in a lot of these cases...." Is too far-fetched to conclude that sexual liberalism in South Africa and the easy access to "hard-core" pornography even on the streets of the major cities, as well as on the Internet and, now increasingly, on mobile cellular phones, is a contributory factor to the almost-visible increase in the sexual abuse of women and children?

Conclusions

19 If Parliament's intention to make child pornography a serious offence with appropriate consequences is clearly and unambiguously

²⁵ See the report on *Internet Usage and Exposure of Pornography to Learners in South African Schools*, Film and Publication Board, November 2006

articulated in the amendments to the definition of child pornography, the separation of the different acts involving child pornography as separate offences and the increase in the permitted maximum custodial sentence, the problem must be that there is no clear understanding by our courts of the true nature of child pornography.

Michael S Malone of ABC News provided a graphic and chilling summary of what child pornography is all about.

"You may think you know what the child pornography industry is, but, no matter how cynical you are, you do not. Yes, it is naked children exposing themselves. But it is worse than that. It is adults having sex with children, even babies. But it is worse than that. It is the rape and torture of little children.

"But, as hard as it may be to accept, it is even worse than that. A couple of years ago, there was the arrest of an Italian-pederast ring that was taking orders from customers to kidnap Russian orphans according to pre-specified characteristics, like hair colour, then torture and kill them on camera for posting on the Web.

"This is the very heart of darkness. These are images that are more than shocking and repulsive. They kill your soul because you know that every poor child you see on these sites is dead, if not now at the hands of a sadist, then decades from now from drugs, alcoholism or suicide.....The pictures first make you sick, then angry, and finally homicidal.....This is not somebody else's problems but ours....."

The 2006 Annual Report of the Internet Watch Foundation, referred to above, makes it clear that this description is not an exaggeration.

Child sexual abuse and exploitation investigators and prosecutors have expressed deep frustration with the sentencing policies of South African courts. I know of at least one prosecutor with valuable prosecution experience who, frustrated and disappointed with some of the sentences handed down in child pornography cases, moved out of prosecution into administration and management: *"Sentencing policies in our courts are a betrayal not only of children but of the hard work put in by police and prosecutors in cases which also have a psychologically-traumatising effect on us. And I am told that magistrates are not prepared to attend the very informative workshops and seminars on child pornography organized and presented by the NPA and the FPB because they are "a class above prosecutors and police."* Whether or not that is true is besides the point. What matters is that the judiciary, it seems, is not involved in what are really continuing education programmes on issues critical to the development of a rights-based society. There can be no proper interpretation and application of a law if there is no proper understanding and appreciation of the subject-matter of that law. The subject-matter of section 27(1) of the *Films and Publications Act* is child pornography and is a direct response to the constitutional right of children to be protected from maltreatment, neglect, abuse and degradation as expressed in section 28(1)(d) of the *Constitution*. The protection of children and women from sexual abuse, degradation and exploitation is critical to the promotion of a rights-based South Africa.

Harmonisation of child pornography laws

20 Given the global nature of the trade in child pornography, and the fact that all offenders in all countries access and download the same images from the same sites, the differences in sentencing policies is disturbing.

Responding to calls from law enforcement agencies faced with jurisdictional barriers in the efficient investigation, prosecution and punishment of child pornography offenders, many Governments have been talking about the need for the harmonisation of child pornography laws. For instance, according to research by the International Centre for Missing and Exploited Children, many countries have no or very inadequate laws on child pornography. (To our Government's credit, South Africa was identified as one of only five countries with a comprehensive legislative response to child pornography, together with Australia, Belgium, France and the United States.) The Budapest Cybercrime Convention set out what is regarded as the minimum requirements for any law dealing with child pornography. A number of countries have joined together in a Global Task Force on Child Pornography on the Internet. But all of these initiatives have not resulted in the harmonisation of national legislations. Many countries with inadequate or no laws against child pornography provide safe havens for those profiting from the trade in the sexual abuse and exploitation of children.

Harmonisation is frustrated by a number of factors, including cultural attitudes towards intergenerational sex. There are problems with the definition of a "child", as well as problems with what will constitute child pornography. In the United States, for instance, "virtual" child pornography is not an offence since no child was harmed in its creation.

In South Africa, child pornography includes images as well as descriptions. Not so in many countries. Harmonisation of child pornography laws is a very long way away.

Courts, however, have an opportunity to harmonise sentencing in child pornography cases, without having to submit to any bureaucratic protocols. It is not difficult to find points of similarities in child pornography cases. The same or substantially similar number of the same type of images in possession by persons in different countries downloaded from the same websites.

There is no impediment to the harmonisation of sentencing policies. Courts, therefore, have an opportunity to make a major contribution to the harmonisation of child pornography laws and enhance the protection of all children from sexual abuse and exploitation.

In the meantime, however, South African courts should pay attention to the frustrations expressed by the general public and child protection practitioners about the "slap-on-the-wrist" cautionary sentences handed down to convicted paedophiles and child pornography offenders. It is time members of the judiciary, including judges but especially magistrates, participate in continuing education programmes about the true nature of child pornography, even if organized and presented by those of a "lower" status, so that their sentencing policies will reflect, more appropriately, the seriousness of these crimes against children and toddlers.

I mean no disrespect to the judiciary and I think highly of many of those who sit in judgment in our courts. But, to borrow (freely) from Patrick

Henry,²⁶ different people often see the same subject in different lights. *"Therefore I hope that it will not be thought disrespectful to the judiciary, if, entertaining as I do opinions of a character very opposite to it, I shall speak my sentiments freely and without reserve. Should I keep back my opinions, through fear of giving offense, I should consider myself guilty of an act of betrayal of all children."*

Iyavar Chetty
2007

²⁶ Patrick Henry's "Give me liberty or give me death" speech on 23 March 1775, in Virginia, USA