

**THE LAW ON PORNOGRAPHY IN ZAMBIA:**  
**ITS RELEVANCE AND EFFICACY.**

BY



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the degree of Bachelor in Law.

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**DECLARATION**

I, **Soi Kaingu** computer number 26088371, do hereby declare that this directed research is the result of my own investigation and research, except to the extent indicated in the acknowledgements and references and by comments indicated in the body of the essay.

I bear absolute responsibility for all errors, defects or any omissions therein.

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## ABSTRACT

Pornography and obscenity are not subjects that have very recently received much limelight. Their definitions differ from jurisdiction to jurisdiction but it is generally accepted that they have a sexual connotation to them.

Although mainly seen as a moral issue, there are two main legal questions surrounding this vice. Firstly, what are the justifications for legislating against pornography? How far should the law go in legislating against pornography especially with regards to the advent of Human rights in Zambia? Secondly, what is the law governing pornography in Zambia and how efficient is it?

The first question is especially important because pornography was until recently regarded as a moral issue which did not warrant the intervention of the law. This view is exacerbated by the advent of human rights and it is argued that civil liberties must be respected and instances when they can be derogated from must form the exception and not the norm. This is to say that human rights should not be easily derogated from, and especially not for a reason that has a shaky moral basis.

The second question focuses particularly on Zambia. In this regard, the law in Zambia on this issue has been critically analyzed, presenting not only its weaknesses but its strengths as well. The paper discusses the justification of this law but goes further to show whether the law in Zambia is efficient in combating the vice.

## **ACKNOWLEDGEMENTS**

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Fantasy Enterprises CC t/a Hustler The Shop v. Minister of Home Affairs & Ors, unreported, Case No. A 159/96

Jacobellis v. Ohio 378 U.S. 184 (1964)

Kachasu v Attorney General (1967) Z.R. 145 (H.C.) p.167

Leco Limited v. The People (1975) Z.R 16 (HC)

Lawrence v. Texas 539 U.S. 558 (2003)

Miller v. California 413 U.S. 15 (1973)

Patel v Attorney General (1968) Z.R. 99 (H.C.) p.115

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## **CHAPTER ONE: GENERAL INTRODUCTION AND DEFINITION OF CONCEPTS**

### **1.1 GENERAL INTRODUCTION**

Sexual intercourse is a deep and mysterious part of human nature. It is intimately linked to many aspects of human behaviour, including those with the potential for good and the potential for evil. Today, in many societies, sexual intercourse is regarded as one of the sacred components of the institution of marriage. Thus uncouth regard of the practice, for instance pre – marital sex, rape or defilement is frowned upon by society. This is more so with pornography and like activities, which are outlawed in most countries today.

This paper presents outcomes of a research carried out on the law on pornography, both generally and Zambia in particular. The paper has two main areas of interest. Firstly, this paper seeks to determine the relevance of a law illegalizing pornography. This area is interested in resolving whether there is a justification in having a law criminalizing pornography. This section of the paper will present different viewpoints that have been advanced on the issue. Notable among these viewpoints are those advanced by the feminist jurists, who argue that pornography is a tool used by the male to perpetuate male dominance over the female, and those by the positivist who argue that law should not be concerned with morals.

The second area of interest presented in this paper is the efficacy of the law regulating pornography in Zambia. This part of the paper seeks to discuss the current law under which pornography is governed and evaluate its effectiveness in combating pornography in Zambia. In this regard, the paper will compare the law in Zambia with that in other jurisdictions, namely Canada, USA and UK to determine the weaknesses, omissions or possible strengths. The paper will also discuss to what extent the law seeks to criminalize the practice regard being had to

modes of transmission such as the internet and satellite television channels. Other aspects such as enforcement mechanisms will also be discussed especially with regard to the usually personal nature of the crime. This is to say most people offending against this law will usually do so in the privacy of their homes.

This aspect last mentioned leads the writer to discuss other issues that are raised in the implementation of the law on pornography. These issues include how this law illegalizing pornography relates to human rights such as the right to privacy, freedom of expression and freedom of conscience, and how the law relates to media rights.

The aim of this chapter is thus to provide a platform on which the results of the research will be presented. Therefore, it is in this chapter that the preliminaries of the paper are laid down. These include an overview of jurisdictions reviewed in the paper, a brief history of pornography and definitions and analysis of concepts that will be used throughout the paper. In other words, this chapter is a general introduction to this work.

## **1.2. PROBLEM STATEMENT**

One of the functions of law is that it is an instrument of public order. The law in this respect prescribes certain acceptable behaviour that aims to achieve public order in the society in which one lives. On the other hand, it is not disputed that the moral fibre of that particular society is also important in the preservation of public order in the society, and morality is thus an instrument of social order. This has sparked controversial debates on whether morals should be legislated upon. One legal offense that falls in the centre of this debate is the law against pornography. In order that a law is accepted in a society, it must reflect the standards or norms of that society. The controversy around the law of pornography is as much due to ignorance on the

relevance of the law as to the content of the law. These problems inspired the author to write on the subject.

### **1.3. OBJECTIVES OF RESEARCH**

This research has two main objectives. Firstly, it seeks to give a detailed discussion on the relevance of the law on pornography in Zambia. This paper will discuss the importance of preserving a society's moral fibre in contrast to the importance of protecting the civil liberties of individuals in line with the basic principles of democracy. Secondly, this paper seeks to critically analyze the law on pornography in Zambia. In this regard, the paper will discuss whether the offence is properly regulated by the provisions of the law and will further analyze the enforcement of the law in the state.

### **1.4 RESEARCH QUESTIONS**

The research questions that will be answered by this research are:

- Should pornography be criminalized, and if so, what are the justifications for the criminalization of pornography?
- What are the weaknesses of the current law on obscenity in Zambia?
- How can these weaknesses be overcome?
- What are constitutional issues raised against the crime of pornography?

### **1.5. RATIONALE OF THE RESEARCH**

The rationale of this research is that at the completion of the report, information will be presented as to the relevance of the law on pornography. This is intended to help provide a justification that will encourage the acceptance of the law in society. This paper is also intended

to present the weaknesses in the current law on pornography, and give recommendations in the plight that these will be employed to better the law and avoid injustice in society.

## **1.6 RESEARCH METHODOLOGY**

The research methodology pursued was mainly of a qualitative nature. This entails that most of the material on the subject was sourced from literature on the subject both hard copy publications and online.

The research methodology took a legal centralist approach in that the research was based mostly on studies of the black letter law and its interpretation. The basis of this research is a comparative study of the laws of other jurisdictions in the area of interest with the law in Zambia. In addition to statutes and case law, the material used in this research also included legal scholarly writings.

## **1.7. BRIEF HISTORY OF PORNOGRAPHY**

The depiction of sexual acts has existed since time immemorial. Archaeologists in Germany reported in April 2005 that they had found what they believed was a 7,200-year-old scene depicting a male figurine bending over a female figurine in a manner suggestive of sexual intercourse.<sup>1</sup> However, the Romans are perhaps most famous for their sexual depictions.

Studies have shown that the Romans idea of sexuality is much different from its social orientation today. Terms like 'heterosexual' or 'homosexual' have little meaning to the early Roman Empire. Sexual depictions were everywhere and were graphic in nature. In the town of Pompeii, depictions of sexual acts were found in Upper class Roman houses, gardens, lower

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<sup>1</sup> Hyde Montgomery, A History of Pornography. (London: Heinemann, 1969) p.14

class taverns, and in the streets<sup>2</sup>. This graphic nature inspired the archaeologist to find a new word for visual displays of sexuality. He used the Greek word '*pornographein*' and it is from here that the word pornography is derived.

The unbridled nature of the Romans sexuality was supported by their culture. It was however dampened by the Judeo – Christian wind that swept the land in the last thirty years of the Roman Empire. The Christians viewed sex as an act of pro – creation and everything else was classified as immoral.

When archaeologists discovered the explicit sexual depictions in the Victorian era, many of them were locked away in the Secret Museum in Italy<sup>3</sup>, and privileged to only a selective few<sup>4</sup>. Later, the Parliament of the United Kingdom promulgated the first law against pornography<sup>5</sup>.

## **1.8. DEFINITIONS AND ANALYSIS OF CONCEPTS**

### **1.8.1 PORNOGRAPHY**

As earlier explained, in early times erotic depictions were often intertwined with religious and cultural beliefs. . In Asian countries such as India, Nepal, Sri Lanka, Japan and China, representations of sex and erotic art have specific spiritual meanings within the native religions of Hinduism, Buddhism, Shinto and Taoism<sup>6</sup>. Thus, the modern concept of pornography only appeared with the Victorian Era. The first definition of pornography in this regard appeared in Webster's Dictionary 1864 as "licentious painting employed to decorate the walls of rooms

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<sup>2</sup> www.unrv.com 18/09/09

<sup>3</sup> Galleries in the Naples National Archaeological Museum. These were locked away in 1819

<sup>4</sup> These were the elite males.

<sup>5</sup> Obscene Publications Act, 1857

<sup>6</sup> Hyde Montgomery, A History of Pornography. p. 14

sacred to bacchanalian orgies, examples of which exist in Pompeii.”<sup>7</sup> It has been stated that this was the beginning of reference of pornography to explicit images, because it had early been used in reference to prostitutes. At this time, viewing pornography was largely legal.

According to other encyclopaedias, pornography is defined as a non – legal term deriving from the Greek words for "harlot" and "writing," and pertains to depictions of erotic and lewd behaviour, including works with artistic or literary merit<sup>8</sup>.

In Canada, Pornography is material that condones or encourages sexual debasement. Such a definition cuts across conventional definitions because it means that very explicit sexual depictions can be called “erotica,” while sexual material with relatively inexplicit but demeaning content can be called “pornography. Thus as long as “erotica” is not found to be obscene it is perfectly legal and is readily accessible in retail stores through the sale and exchange of DVDs, videos, films, books and magazines, as well as in theatres, on television and over the Internet<sup>9</sup>.

Today pornography is widely defined as the depiction of sexual; behaviour that is intended to arouse sexual excitement. It must be noted that the term ‘pornography’ is quite broad and though all pornographic material have sexual depictions, there is often made a distinction between hardcore pornography and soft-core pornography. Hardcore refers to pornography that is sexually explicit, and usually is a blatant disregard of moral or cultural standards<sup>10</sup>. Soft-core pornography on the other hand refers to pornography that is sexually suggestive but not explicit<sup>11</sup>. The often-cited example of soft-core pornography is magazines such as *Playboy*<sup>12</sup>.

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<sup>7</sup> [www.wapedia.com](http://www.wapedia.com) 9/01/2010

<sup>8</sup> <http://law.jrank.org> 12/11/2009

<sup>9</sup> [www2.parl.gc.ca](http://www2.parl.gc.ca) 09/01/10

<sup>10</sup> Linda Williams, Hard Core: Power, Pleasure and the Frenzy of the Visible (University of California Press, 1989). p. 2

<sup>11</sup> Linda Williams, Hard Core: Power, Pleasure and the Frenzy of the Visible p. 2

## 1.8.2 OBSCENITY

It should be stated at the onset that the precise definition of obscenity is a legal term that varies from country to country according to the laws applicable. This has been aptly put by the famous words of Justice Potter Stewart in the case of *Jacobellis v. Ohio*<sup>13</sup>:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...

Although in the strict sense, obscenity transcends sexual connotations to include any filthy or disgusting thing, the word has increasingly taken on this sexual connotation to become almost synonymous with pornography. It is true that pornography is deemed illegal in most countries under so – called ‘obscenity laws’ and Zambia is no exception. It would therefore be premature to attempt a concrete definition of the term at this stage of the research save to give a few definitions as provided by other legal systems. In addition, the author wishes to caution that her primary interest is the regulation or control of pornography. However, this area in Zambia is covered in the law on obscenity.

According to the American Law and Legal information, obscenity is a legal term of art that applies to certain depictions of sex that are not protected by the constitutional guarantee of free speech because they appeal to debased sexual desire rather than the intellect.<sup>14</sup> This definition was echoed in the American case of *Miller v. California*<sup>15</sup> in which the U.S. Supreme Court defined obscenity as “material that is predominantly ‘prurient’ (that is, appealing to impure sexual desire) according to contemporary community standards; is ‘patently offensive’ in its

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<sup>12</sup> An American Men’s Magazine

<sup>13</sup> 378 U.S. 184 (1964)

<sup>14</sup> <http://law.jrank.org> 12/11/2009

<sup>15</sup> 413 U.S. 15 (1973)

portrayal of sexual acts; and lacks 'serious literary, artistic, political, or social value' when considered as a whole".

The American definition of obscenity is thus confined to those works not protected by the first amendment. This in essence would mean that not all that is pornographic is obscene because if it had "serious literary, artistic, political, or social value" then it would receive constitutional protection and thus not be obscene or illegal.

Section 163 (8) of the Canadian Criminal Code provides an elaboration of what is obscene as "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."

### **1.8.3 INDECENCY**

A number of statutes in England refer to indecency. Indecency denotes a lower degree of moral depravity than is connoted by obscenity and thus this makes a prosecutor's task easier. For instance, in *R. v. Oz Publications Ltd*, the defendants, though acquitted under the Obscene Publications Act of 1959, were convicted under the Post Office Act, which made goods liable to be forfeited if they were 'indecent or obscene.'

Indecent matter is further regulated, in England, under the Indecent Displays (Controls) Act of 1981. This can be sharply contrasted with the situation pertaining in Zambia which does not having such a law.

## **1.9. OVERVIEW OF JURISDICTIONS REVIEWED**

As already alluded to in the introduction, this paper will refer to other jurisdictions in evaluating the efficacy of the law on pornography in Zambia. The jurisdictions chosen for this purpose are:

### **1.9.1 CANADA**

The writer has picked Canada because of the large literature that not only gives in – depth analysis of the current law of pornography or obscenity, but also traces its development. The jurisdiction also provides resourceful insights into the relevance of the law on pornography.

### **1.9.2 UNITED STATES OF AMERICA**

The United States of America is another jurisdiction that has much literature on the subject of pornography. However, the writer was particular interested in this jurisdiction because of its advances in democracy and thus protection of civil liberties. It is the writer's view that this insight is cardinal in the discussion of both the relevance of the law on pornography and in relating the law on pornography to issues of human rights, most notably freedom of expression, and in media rights.

### **1.9.3 UNITED KINGDOM**

One of the compelling reasons behind choosing this jurisdiction is the dual legacy that Zambia has inherited from England. Despite attaining independence and establishing its own legal order, Zambia still depends on English law in terms of Common law. Besides this however, The United Kingdom also presents rich literature in the area of pornography regard being had to the fact that there is not much literature on the subject in Zambia.

It must be stated that although it is true that jurisdictions will provide most of the basis of the research, the writer will not restrict herself to these jurisdictions and regard will be had to other jurisdictions in order to present the most accurate and properly balanced information. In line with this, in certain instances, the writer will refer to African jurisdictions in order to fully appreciate the cultural aspect of the subject.

#### **1.10. PORNOGRAPHY IN ZAMBIA**

The law in Zambia does not provide a definition of pornography nor is it particularly criminalized. However, the obscenity law of the land governs illegality of pornography. The writer found that for instance when the Drug Enforcement Commission (DEC) seizes such material; it does so and charges the offenders under the obscenity section of the penal code. Part of this section is reproduced below:

S. 177 (1) Any person who –

- a) makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other object tending to corrupt morals; or
- b) imports, conveys or exports, or causes to be imported, conveyed or exported, any such matter or things, or in any manner whatsoever puts any of them in circulation; or
- c) carries on or takes part in any business, whether public or private, concerned with any such matter or thing, or deals in any such matter or thing in any manner whatsoever, or distributes any of them, or exhibits any of them publicly, or makes a business of lending any of them; or

- d) advertises or makes known by any means whatsoever with a view to assisting the circulation of, or traffic in, any such matters or things, that a person in any of the acts referred to in this section, or advertises or makes known how, or from whom, any such matter or thing can be procured either directly or indirectly; or
- e) publicly exhibits any indecent show or performance or any show or performance tending to corrupt morals;

is guilty of a misdemeanour and is liable to imprisonment for five years or to a fine of not less than fifteen thousand penalty units nor more than seventy – five thousand penalty units.

This section will be discussed in detail in the succeeding chapters, though it will suffice, at this moment, to note that this section provides no definition of either obscenity or pornography.

### **1.11. SOCIAL NORMS AND PORNOGRAPHY**

Social norms are standard expectations of behaviour to which members of a society adhere. These change from society to society as well as from time to time. The law on pornography though found under Chapter XVII dealing with nuisances and offences against health and convenience is really a law dealing with offences against morality. This is especially in contrast with other laws that for instance provide for collection of revenue or those that seek to regulate behaviour between people like the Business Premises Act. The law on obscenity is an attempt by the legislature to legislate morality and social norms. This will be discussed in detail in the next chapter.

## **1.12. CONCLUSION**

The aim of this chapter was to introduce this work. It has brought out the issues that are to be discussed in the succeeding chapters. It has also discussed the concepts that the reader will encounter throughout this paper and given some background information on the subject. This is done to enable the reader appreciate the thrust of the paper from the very onset.

As earlier alluded to, the law on pornography is an attempt to legislate morality. The next two chapters are a discussion on the relevance of the law on pornography. The chapters will discuss, among other things, the implications and controversies surrounding the role of law in society in relation with morals. Chapter Two will focus solely on the arguments given for the opposition of the law on pornography, while Chapter Three will address the reasons given in support of the law on pornography.

Chapter Four is a discussion of the *Zambian Law on pornography*. This chapter gives an analysis of the *Zambian law on pornography* highlighting the weaknesses and strengths of the law. The next chapter then gives recommendations on how the weaknesses of the *Zambian Law* discussed in Chapter Four can be addressed.

## **CHAPTER TWO: ARGUMENTS AGAINST THE CRIMINALIZATION OF PORNOGRAPHY**

### **2.1. INTRODUCTION**

This chapter is one of the two chapters that discuss the relevance of the law on Pornography. It gives an in – depth discussion of the arguments put forward against the criminalization of pornography. In this regard, this chapter will, discuss amongst others, arguments from the positivist school of thought. This chapter will conclude with the writer’s analysis of the arguments given in the chapter.

### **2.2. ARGUMENTS AGAINST THE CRIMINALIZATION OF PORNOGRAPHY**

#### **2.2.1 LEGAL LIBERTARIAN ARGUMENT**

As earlier alluded to, the law on pornography is really an attempt to legislate morality. There has been a long-standing controversy on the question of whether immorality of a kind of behaviour can ever be, by itself, sufficient justification for making that kind of behaviour illegal. The Legal Libertarians are jurists that argued against the above stated proposition. However, it should be brought forward at this point that these scholars are not particularly concerned with pornography or obscenity but with immorality in general. For the purposes of this paper, the writer has selected two of the most famous libertarians whose arguments she will produce. These are John Stuart Mill and Professor H. L. A. Hart.

### 2.2.1.1 John Stuart Mill

John Stuart Mill<sup>16</sup> was concerned with the question of the limit of the power of the state over the individual. He submitted that the fact of living in society renders it indispensable that each person should observe a certain line of conduct towards the rest. This conduct consists, first, in not injuring the interest of one another and secondly, in each person's bearing his share of the work and sacrifices incurred for defending the society. These conditions, he admits, society is justified in enforcing at all costs to those who withhold fulfilment. His central thrust therefore is that, as soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it and the law can be rightly used. However, there is no such room when a person's conduct affects the interests of no persons besides himself.

John Stuart Mill aptly puts this position thus:

“The sole end for which mankind is warranted individually or collectively, in interfering with the liberty of action of any other member, is self – protection.... The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. There are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with evil, in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part that merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign”<sup>17</sup>.

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<sup>16</sup> 1806 – 1873

<sup>17</sup> John Stuart Mill, *On Liberty*, cited in Carlson Anyangwe, *An Outline of the study of Jurisprudence* (Lusaka: Unza Press, 2005) p 388

John Stuart Mill was arguing about liberty in general. According to his postulation, one cannot rightfully be compelled to do or forebear because it would be better for him to do so, or because it will make him happier, or because, in the opinion of others, to do so would be wise, or even right. As long as his conduct does not affect others, it is not the business of the law. Thus, it is easy to see why his argument has been extended to the area of sexual morality, in which pornography invariably falls. John did not advocate that such vices be left unpunished but argued that public opinion and not the law could only punish them. Thus, it can be attributed to his work that morals should not be legislated. It is in this aspect that the writer disagrees with Mill's postulation. There are some activities that man can be engaged in, which are personal, but invariably end up affecting others. For instance, prostitution is an act that is personal between the parties to the act, but it can also affect society in general, for instance through the spread of Acquired Immuno – deficiency Syndrome (AIDS). The law in such a case will be a proper instrument for discouraging the vice, even to the extent of making it a criminal activity. It must be considered that man is a social animal and thus his actions will usually affect someone else either directly or indirectly. John Stuart Mill seems to be concerned only with actions that directly affect others.

However, it must be mentioned that John Stuart Mill's postulation has received judicial acclamation. In the United State's case of **Lawrence v. Texas**<sup>18</sup>, the Supreme Court stated that the 'government can no longer rely on the advancement of a moral code, i.e., preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest....such an interest cannot can justify infringing one's liberty interest to engage in consensual sexual conduct in private' This case put into practice John Stuart Mill's

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<sup>18</sup> 539 U.S. 558 (2003)

postulation by stating that the government cannot treat as state interest the acts of consenting adults. This of course is in the instance that those acts do not affect society.

### **2.2.1.2 Professor H. L. A. Hart**

Professor Hart is a legal positivist who is famous for the Devlin – Hart debate. This is a debate between himself and Lord Patrick Devlin on the legal enforcement of morality, which was sparked by the Wolfenden Report<sup>19</sup>. Lord Devlin attacked the report's observation that there was a realm of private life that was not the concern of the law. He argued that this area was the law's concern because it is one of the functions of law to maintain public morality. Devlin's thrust was that society was held together by, among other things, a public morality, which had to be maintained for the continuance of society. Professor Hart wrote mainly in response to this.

He admits that a consensus on certain matters is essential if society is to be worth living in. He illustrates that laws against murder and theft would be of little use if they were not supported by a widely diffused conviction that what these laws forbid is also immoral. However, he argues that:

“...it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web: one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law. Surely even in the face of the moral feeling that is up to concert – pitch we must pause to think. We must ask whether a question at two different levels. First, we must ask whether a practice that offends moral feeling is harmful, independently of its repercussions on the moral

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<sup>19</sup> A report produced by a committee in England established to consider the existing English penal laws concerning homosexuality and prostitution and recommend changes.

code. Secondly, is it really true that failure to translate this item of general morality into criminal law will jeopardize the whole fabric of morality and so of society?"<sup>20</sup>

Thus Hart, while agreeing that there are some immoral practices that are justifiably the area of law (e.g. Murder and theft), advocates for some liberty of action in the same way Mill does. Hart further believed in a society of 'moral pluralism' with mutual tolerance and co – existence of divergent moralities, such that one group should not be at liberty to enforce its morals on another. Thus, he makes his case for moral liberty. His position is that when morality is enforced individual liberty is necessarily cut down.

In essence, the legal libertarians' argument is that there must be an area of the individual's life that must be kept free from state interference. They argue that a state may not justifiably legislate against an immoral act when the only person affected is the perpetrator of the vice. Thus, the law must have no say in what consenting adults choose to do in private.

Thus according to Hart's postulations, in order to justifiably legislate against pornography, we should ask, is pornography harmful? Will failure to translate pornography into a criminal offence jeopardize, not only the fabric of morality, but also society itself? Only when these questions are answered in the affirmative can society justifiably legislate against morality.

Further, in this argument, Carlson Anyangwe states that there are at least two reasons why the law must shrink from following the path of morality<sup>21</sup>. He argues that firstly, the proposed moral standard may not necessarily reflect the popular sentiment of the populace to warrant legal action. Secondly, and perhaps more relevant to this research, Anyangwe argues that the

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<sup>20</sup> Richard A. Wasserstrom (ed), Morality and the Law (California: Wadsworth Publishing Company Inc, 1971) p. 52

<sup>21</sup> Carlson Anyangwe, An Outline of the study of Jurisprudence (Lusaka: Unza Press, 2005) p 388

intervention of the law may create more evil than it would prevent. He cites as examples moral offences such as drunkenness and fornication. He argues that the maintenance of offences that are generally not enforced are harmful in that they tend to subtract from the authoritative nature of laws by bringing laws into disrepute.

### 2.2.2 SHIFTS IN MORAL STANDARDS

Society is ever – growing and ever – changing. It can hardly be contested that some values that were once held in high esteem in society are now not regarded. For instance, there was a time in Europe when murdering someone with a wooden stake through the heart on suspicion of witchcraft was not only legal but also encouraged<sup>22</sup>. Today society does not hold the same beliefs in witchcraft to justify such actions.

Pornography or obscenity as a crime depends largely on the moral standards of a particular society. This is well illustrated in the case of **Leco Limited v. The People**<sup>23</sup> in which the judge in that case expressly stated, “What is or is not obscene varies from place to place and indeed from generation to generation.”

In that case, the court referred to Chapters 16 and 17 of Humanism in Zambia Part II published in 1974 to determine the moral standards of Zambia then. The argument therefore is how do you justify a law on morals that are forever changing? It is clear that the standard used in the Leco case will not be the standard used in a case being determined today. This is because Humanism is not as strong in the Zambian society today as it was 30 years ago. Thus using the law as an

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<sup>22</sup> Behringer, Wolfgang. Witches and Witch Hunts: A Global History. (Malden Massachusetts: Polity Press, 2004), p. 35

<sup>23</sup> (1975) Z.R 16 (HC)

instrument of enforcing morality abrogates one of the principle elements of a good legal system: certainty in the law.

### **2.2.3 HARMLESS – CRIME ARGUMENT**

Advocates for pornography argue that a law against pornography is unjustifiable because pornography is both a harmless and victimless crime. The argument is that from the perspective of the principles behind criminal law, the criminalization of pornography is unsupported. This can be illustrated using two of the most important principles of criminal law, deterrence and retribution. In arguing from the standpoint of deterrence, advocates for pornography advance similar views to those of the libertarians, in that they argue that the law should not be used to deter a harmless though immoral act.

From the standpoint of retribution, the argument is; retribution for what? They advocate that pornography is harmless fun, and the only probable victim is the perpetrator. They argue that as a matter of principle society may not legitimately prohibit conduct that harms only the actors. One strong argument in this regard is that pornography, as a victimless crime, generally has no complaining party. Thus, the legal machinery is usually set in motion in the police.

Victimless crimes tend to have no complaining parties other than the police because the immediate participants in these crimes do not see themselves as victims, have no desire to complain to the police, and would fear criminal liability if they did complain. Moreover, since such illegal acts usually take place in private and do not directly victimize any third party; other citizens are unlikely to observe the acts or to have sufficient incentive to complain to the police.

This in turn makes it harder for such crimes to be detected and prosecuted than in crimes that have victims. For instance, the recent case of **Chansa Kabwela v. The People**<sup>24</sup>, it is strongly argued that the legal machinery in that case to charge the accused under the obscenity law was instigated by the President at a press conference.

This leads to the argument of waste of public resources in pursuing an action that is neither injurious to society nor complained about by anybody. It is argued that the resources that are used in enforcing such a law will be better used in combating other crimes in which society is actually harmed.

### **2.3. CONCLUSION**

In conclusion, one may summarize the arguments given against criminalizing pornography as firstly, the need to delineate civil liberties from interference by the law, the inherent lack of preciseness of any such law, and the perceived lack of harm or victims. Opponents of a law on pornography argue that these reasons take away any justification to enact such a law.

The next chapter will discuss counter – arguments before analyzing the arguments given by both sides.

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<sup>24</sup> Unreported

## **CHAPTER THREE: ARGUMENTS FOR THE CRIMINALIZATION OF PORNOGRAPHY**

### **3.1. INTRODUCTION**

The previous chapter delved into the arguments put forward against the criminalization of pornography. This chapter seeks to give the counter – arguments given by the proponents of the laws against pornography. This chapter will also consolidate the arguments for and against pornography and give a position as to the relevance of the law on pornography.

### **3.2. ANTI – PONOGRAPHY ARGUMENTS**

#### **3.2.1 FERMINIST ARGUMENT**

This is perhaps the strongest movement against the practice of pornography. This movement is closely linked to feminist jurisprudence, and radical feminists have specifically spoken on the matter of pornography. According to Carlson Anyangwe, “the central thrust of the feminist school of jurisprudence is that the law is made by men and in their image, reflecting masculine values and standards, and serving male interests. This maleness of the law is a manifestation of patriarchal power which engenders the inequality between women and men and the oppression of women by men.”<sup>25</sup>

Radical feminists in particular view inequality as systematic subordination of women through male dominance. Many such feminists allege that pornographic films and magazines eroticize the sexual assault, torture, and exploitation of women<sup>26</sup>. These feminists have debated whether

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<sup>25</sup>Carlson Anyangwe, *An Outline of the study of Jurisprudence* (Lusaka: Unza Press, 2005) p 345

<sup>26</sup> Andrea Dworkin, *Life and Death: Unapologetic writings on the Continuing War against Women*. (New York: The Free Press, 1997) p. 133 - 134.

pornography is merely a reflection of a sexist culture or a significant causal factor in the pervasive sexual violence against women.

In the 1980s, feminist philosophers and legal theorists argued that pornographic works could precipitate sexual assaults against women because they endorse or recommend the violation and degradation of women<sup>27</sup>. Scholars such as Catherine Mackinnon assert that women's subordination results primarily from the sexual dominance of women by men, and is thus sexual in nature. This brings her to discuss such areas of law as pornography and sexual harassment. Having given this brief background on the feminist movement, this paper will now discuss the feminist view on the particular subject of pornography. The views of two particular scholars will be discussed and a general conclusion will be drawn.

### 3.2.1.1 Catherine Mackinnon

MacKinnon followed the mainstream of feminist theory in arguing that gender was not biological, that is, a product of innate characteristics, but it was a social construct. She however differed from other feminist theories because she asserted that sexuality was the primary cause of inequality<sup>28</sup>. Thus, Mackinnon opposed traditional arguments against pornography based on the idea of morality or sexual innocence. She asserted that pornography was "hate literature" which encourages violence against women, and characterized it as a form of sexual discrimination<sup>29</sup>.

Mackinnon asserts that pornography is not speech in need of the First Amendment Protection, but is action that degrades women<sup>30</sup>. She argues that in pornography, all of the abuses that

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<sup>27</sup> M.D.A Freeman, Lloyd's Introduction to Jurisprudence, 7<sup>th</sup> ed. (London: Sweet & Maxwell, 2001) p. 1300

<sup>28</sup> Raymond Wacks, Understanding Jurisprudence: An Introduction to Legal Theory, (New York: Oxford University Press, 2005) p. 313

<sup>29</sup> Frances Olsen, Feminist Legal Theory II (New York: New York University Press, 1995) p. 534

<sup>30</sup> Stevi Jackson and Jackie Jones, Contemporary Feminist Theories, (New York: New York University Press, 1998) p. 213

women have struggled with for so long are articulated; rape, battery, sexual harassment, prostitution, and sexual abuse of children. Only in pornography, they are called sex. Thus, pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse and thereby celebrates, promotes, authorizes and legitimizes them<sup>31</sup>. In this way, pornography creates a false consciousness in women, which makes them fail to realize that they are the victims. Thus, Mackinnon's fight against pornography was an effort to awaken women to their degradation.

Mackinnon argues that pornography acts against women twice. Firstly, in her view, women are degraded, raped and beaten in the making of these pornographic films and pictures. Secondly, these pictures and films further participate in the degradation, rape and murder of women by the users of pornography. Women in such videos are put in degrading positions that show their subordination to men, and are portrayed as sex objects that are used for the pleasure of men. This is the message of pornography.

Mackinnon attacked the First Amendment protection of some pornography in America. She argues that pornography was not speech and did not deserve First Amendment Protection. She argued that pornography was actually action that violated against women's civil rights. She argued that criminal obscenity laws should not be used against pornography but it must be prosecuted as an act of discrimination against women's civil rights<sup>32</sup>.

### **3.2.1.2 Andrea Dworkin**

Andrea Dworkin is often cited for her book, *Pornography: Men possessing Women*<sup>33</sup>, in which she analyzes pornography as an industry of 'women – hating dehumanization'. She argues that

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<sup>31</sup> Catharine MacKinnon, 'Pornography, Civil Rights, and Speech,' 20 Harv. C.R.-C.L. L. Rev. 1 (1985)

<sup>32</sup> Catharine MacKinnon, 'Pornography, Civil Rights, and Speech,' 20 Harv. C.R.-C.L. L. Rev. 1 (1985)

<sup>33</sup> Andrea Dworkin, *Pornography: Men Possessing Women*, (New York: Penguin Books) p. 113

this is done especially in its social consequences of its consumption by encouraging men to eroticize the domination, humiliation, and abuse of women.

Dworkin was against obscenity laws, arguing that they were largely ineffective, and when they were effectual they only suppressed pornography from public view while allowing it to flourish out of sight, and that they suppressed the wrong material, or the right material for the wrong reasons, arguing that obscenity laws are also woman-hating in their very construction. Their basic presumption is that women's bodies are dirty<sup>34</sup>.

Dworkin was opposed to the first amendment protection of pornography arguing that the free speech rights of men must not be treated as being more important than the rights of women to be free of sexual abuse. Mackinnon's and Dworkin's postulation that pornography exacerbates inequality was judicially recognized in the case of **R v. Butler**<sup>35</sup>, in which it was stated that 'if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to violent and degrading material.'

Dworkin is often criticized as being subjective arguing that her work is informed by her negative personal experiences such as sexual abuse, prostitution and an abusive husband. Thus, Dworkin does not present a completely objective argument on pornography. Dworkin also is guilty of portraying women as passive victims, which is a criticism also levelled against Catherine Mackinnon by other feminist.

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<sup>34</sup> Dworkin's testimony before the Meese commission, reported in the Meese Report, 1986.

<sup>35</sup> (1992) 1 S.C.R 452 at p. 468

### 3.2.2 HARMFUL CRIME ARGUMENT

In 1985, President Ronald Regan of the United States of America set up a commission to determine the nature, extent, and impact of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees. This commission came up with its report<sup>36</sup> in 1986 in which the question of pornography and harm was thoroughly covered<sup>37</sup>.

In the preliminaries of determining the harm, if any, from pornography, the commission covered many incidental issues. These include aspects such as what harm is, the distinction between harm and offense, the standard of proof to be adopted in determining whether or not pornography causes harm, the problem of multiple causation in determining the harm caused by pornography and the variety of evidence to be considered in determining the harm caused by pornography. It is important that these preliminaries be addressed before considering the question of harm to set a foundation on which the argument is premised.

#### 3.2.2.1 What is harm?

In their consideration of whether pornography causes harm to society, the commission was of the view that the noticeable harm is not only restricted to that that causes physical or financial harm to identifiable individuals. It asserted that an environment -physical, cultural, moral, or aesthetic- can be harmed, and so can a community, organization, or group be harmed independent of

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<sup>36</sup> The Meese Report, 1986.

<sup>37</sup> This report of significant value in this research because, although carried out in the United States, its research on the question of pornography was not restricted or confined to the legal or constitutional definition of obscenity in that country, which makes allowance for material that has received the first amendment protection despite being pornography for instance because it has artistic value.

identifiable harms to members of that community. This in essence meant that the commission was not restricting itself to the individual harm but was also considering harm to a society in terms of the moral fibre, much like the argument of Lord Patrick Devlin. This broad interpretation of harm cannot be criticized, because one of the functions of law is to maintain public order in a community. Therefore, any harm that is perpetuated against a community is properly an area of the law even if it does not harm the members of the society individually.

In discussing what harm is, it is important to be mindful of the distinction between what constitutes harm and what is merely offensive. The Meese Commission was mindful of this fact and properly warned themselves that despite a distinction being hardly clear, there are some things that offend people, or offend others, that still would be hard to describe as harms. To this distinction, the writer adds that what is harmful to individuals or society is objective while what is offensive is subjective and depends on the sensibilities that one has been brought up with. In this regard, the harm that we are concerned with, with regard pornography, is objective, and it would be an abuse of the instrument of the law to protect people's sensibilities. This was stated in the case of **R. v. Keegstra**<sup>38</sup> in the terms '...as this Court has repeatedly affirmed, the content of a statement cannot deprive it of the protection accorded by s.2(b), no matter how offensive it may be. The content of Mr. Keegstra's statements was offensive and demeaning in the extreme; nevertheless, on the principles affirmed by this Court, that alone would appear not to deprive them of the protection guaranteed by the Charter.'

Further, having elucidated that the concept of harm here employed is broad, the writer thinks it useful to distinguish, albeit roughly, two types of harm: primary harm and secondary harm.

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<sup>38</sup> (1990) 3 S.C.R. 697

Primary harms, are acts that are intrinsically harmful in their very nature<sup>39</sup>. For instance, acts such as murder, rape, assault are treated as harmful not because of what they lead to, but because of their very nature. Secondary harms on the other hand, are acts in which the concern is not on the act itself but where it will lead<sup>40</sup>. For instance, the Penal Code provides that “any person who, without lawful authority or excuse, the proof whereof shall lie upon him, has in his possession or in or upon any premises occupied by him any offensive weapon or any offensive material is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding seven years.”<sup>41</sup> The possession of such weapons or material is prohibited because of what these may be used for.

Thus, this inquiry has to focus on whether the harms alleged in relation to pornography are primary or secondary. If they are primary, then the inquiry can focus directly on the nature of the alleged harm. However, if it is the latter, then there must be a two-step inquiry. First, it is necessary to determine if the alleged result is in fact harmful, and secondly the inquiry can turn to whether the causal link exists between the act and the harmful result. In the present research, it can be largely accepted that the harms caused by pornography, if any, should be categorized in the secondary harms, because the viewing of pornography is not an act that is intrinsically harmful. The harms are what pornography allegedly leads to. This makes the alleged harm from pornography secondary in nature. Therefore, in establishing whether pornography is harmful, firstly one has to identify perceived harms, and then determine whether these harms are indeed harmful or merely offensive. If it is determined that these results of pornography really are harmful, the next step is to establish whether a causal link exists between the perceived harmful

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<sup>39</sup> H.L.A Hart, Punishment and Responsibility, (Oxford: Oxford University Press, 1968). p. 16

<sup>40</sup> *ibid*

<sup>41</sup> Penal Code, Cap 87, s.85 (1)

result and pornography. Only when this is found in the affirmative can it be said that pornography does cause harm.

### 3.2.2.2 Standard of Proof

Another preliminary issue to be considered is whether, in establishing a causal link between pornography and the alleged harms, evidence needed be on a balance of probabilities or beyond reasonable doubt. In this regard, one will note that there will never be conclusive evidence of a causal link, if by *conclusive* we mean that no other possibility should exist<sup>42</sup>. On the other hand, mere existence of affirmative evidence does not on its own prove that a causal relationship exists between pornography and the alleged harm. This then begs that question, how much evidence will be needed to establish a causal link?

It must be borne in mind that this research is carried out in a non – judicial context. This is to say, we are not inquiring about the standard of proof needed in a judicial setting in holding someone liable for the crime of pornography. We are here concerned with how much proof we need to satisfy our minds that pornography does in fact cause harm and must be legislated against, such that a standard of proof of beyond reasonable doubt will be too high a standard. As was stated by Justice Sopinka in the Canadian case of **R v. Butler**, ‘The question is not whether there is conclusive proof of a causative link but whether Parliament had a reasonable basis for acting.’<sup>43</sup> He further states that ‘actual proof of harm to society is not required, so long as there is a reasonable basis for concluding that harm will result.’<sup>44</sup> Thus, it is enough if, on a balance of probabilities, evidence is shown of a causal link between pornography and harm that action

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<sup>42</sup> This is attributable to the problem of multi causation in social inquiries

<sup>43</sup> (1992) 1 S.C.R 452 at p. 460

<sup>44</sup> (1992) 1 S.C.R 452 at p. 460

should be rightly taken against it. In judicial settings however, that is in finding someone liable for the crime, the standard of beyond reasonable doubt will be used.

### 3.2.2.3 The Question of Harm

Having settled these important preliminary issues, the substantial question of harm from pornography can now be discussed. One type of pornographic material is that which has a sado-masochistic<sup>45</sup> theme with devices such as whips, chains and other weapons of torture of the harm. This kind of pornography thus relays the theme of violence to a person watching because it presents unmistakably simulated or threatened violence in sexually explicit fashion with a predominant focus on the sexually explicit violence. It is argued that such kind of pornography can lead to increased sexual aggression in males leading to an increase in rape and sexual crimes.

In this regard, the Canadian case of **R v. Butler**, already cited earlier, has been hailed as an important case because it makes Canada the first country to recognize in its laws a link between hard – core pornography and violence against women. The facts of this case are that the accused had opened a store that sold and rented out ‘hard – core’ videotapes and magazines as well as sexual paraphernalia<sup>46</sup>. He was charged with 250 counts of selling obscene material, possessing obscene material for the purpose of distribution or sale and exposing obscene material to public view contrary to section 159 (now section 163) of the Criminal code. In that case, Justice Sopinka stated that depicting the exploitation of women and children could lead to ‘abject and servile victimization.’

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<sup>45</sup> Sexual practice characterized by a combination of sadism and a tendency to derive sexual gratification from pain or humiliation.

<sup>46</sup> Miscellaneous article, especially the equipment needed for a particular activity.

Although no one can argue that rape and sexual crimes are indeed harmful, the question is whether a causal link exists between them and pornography. As discussed earlier, conclusive evidence of such a link cannot be shown, partly due to the problem of multiple causations. It is not alleged that pornography is the sole cause of rape and sexual violence, merely that if pornography was eliminated, while all other factors stayed the same, rape and sexual violence would be lessened. Thus the Meese Commission reached at, a causal link, by combining the results of both clinical and experimental research with generalized results of limited research. They report that clinical and experimental evidence supports the conclusion that there is a causal relationship between exposure to sexually violent materials and an increase in aggressive behaviour directed towards women, which invariably results in sexual violence.<sup>47</sup>

In addition to this, it is the writer's submission that logical evidence of a causal relationship is not hard to fathom. It is undisputed that humans are affected by what they see. This is precisely why advertising works. Advertising appeals to human emotions rather than to rational considerations. Pornography is thus a kind of advertisement that carries false messages about sexuality, men and women, which can be quite harmful to society. This was alluded to in the Butler case earlier cited in when the court stated that 'while a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images can cause changes to attitudes and beliefs'<sup>48</sup> Pornography with the sexual violence themes carries such messages to men that women are aroused by sexual violence. This is because in the pornographic film, the woman eventually becomes aroused and ecstatic about the initially forced sexual activity, and usually is portrayed as begging for more.

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<sup>47</sup> The Meese Report, 1986.

<sup>48</sup> R v Butler (1992) 1 S.C.R 452 at p. 462

Thus the message sent out from this kind of pornography is that women enjoy being coerced into sexual activity, that they enjoy being physically hurt in sexual context, and that as a result a man who forces himself on a woman sexually is in fact merely acceding to the "real" wishes of the woman, regardless of the extent to which she seems to be resisting. The myth is that a woman who says "no" really means "yes," and that men are justified in acting on the assumption that the "no" answer is indeed the "yes" answer. There can be no doubt that such a message is profoundly harmful to society as it contributes considerably to the degradation and subordination of women. These materials create and reinforce the view that women are primarily here to satisfy the sexual needs of men. In this regard, the commission is agreeable with Mackinnon's postulation that sexual domination is one of the causes of discrimination of women.

In the case of **Towne Cinema Theatres Ltd. v. The Queen**<sup>49</sup> the Canadian court elucidated some of the harms from pornography thus:

‘The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation; humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.’

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<sup>49</sup> (1985) 1 S.C.R. 494

### 3.2.3 MORAL ARGUMENT

The law on pornography has also been justified on the ground of preservation of public morality. This was Lord Patrick Devlin's stance in the Devlin – Hart Debate discussed earlier. Lord Devlin argued that the law against pornography and other obscenities was necessitated in the interest of the preservation of a shared public morality, which was the cement that held a society together. The ground of public morality was also discussed in the case of **Shaw v. Director of Public Prosecutions**<sup>50</sup>.

In the above-mentioned case, the appellant, to assisting prostitutes to pursue their trade, published a magazine called “Ladies Directory”. It contained the names, addresses and telephone numbers of prostitutes with photographs of nude female figures, and in some cases details that conveyed to initiates willingness to indulge not only in ordinary sexual intercourse but also in various perverse practices. In this case, Viscount Simonds expressed his views on protection of public morality thus:

“In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for.”

Although this case was not concerned with pornography, a parallel can be drawn here because Viscount Simonds couches his postulation in general terms regarding morals, and pornography is basically an affront to morality. He considers it the fundamental purpose of law to preserve morals, much as Lord Patrick Devlin does. Viscount Simonds was also of the view that a

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<sup>50</sup>[1961] 2 All ER 446

disruption of public morality would lead to a disruption of public order, which was detrimental to the existence of society.

Viscount Simonds also addressed the question of changes in moral values of the society. As shown in the previous chapter, it has been argued that pornography should not be legislated against because it is a ‘crime’ largely based on the morals of a society, which do not remain static. Thus, such legislation will be in danger of being uncertain and unpredictable. On this issue, Viscount Simonds stated, “The law must be related to the changing standards of life, **not yielding to every shifting impulse of the popular will but have regard to fundamental assessments of human values and the purposes of society.**”<sup>51</sup> [Emphasis mine]

The moral argument was also discussed in the case of *R v. Butler* earlier alluded to. In that case, the court stated that:

‘While Parliament cannot impose a certain standard of public and sexual morality... it does have the right to legislate on the basis of some fundamental conception of morality in order to safeguard the values integral to a free and democratic society. Much of the criminal law is based on moral conceptions of right and wrong, and the mere fact that a law is grounded in morality does not automatically render it illegitimate.’<sup>52</sup>

### **3.3 ANALYSIS OF THE RELEVANCE OF THE LAW AGAINST PORNOGRAPHY**

The relevance of the law on pornography can be determined by balancing the views given for and against it. The grounds against this law were summarized in the previous chapter as being the need to delineate civil liberties from interference by the law, the inherent lack of preciseness

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<sup>51</sup> *Shaw v DPP* [1961] 2 All ER 446 at p. 451

<sup>52</sup> *R v Butler* (1992) 1 S.C.R. 452 at p. 454

of any such law, and the perceived lack of harm or victims. Given the information presented in this chapter, these will now be properly analyzed.

Firstly, the legal libertarians argue that there is an area of a man's life that must be left free from interference of the law. This argument, though appealing and sound in its generality must fail on two grounds. Firstly, the libertarians make a good case for private lives being free from interference, however, the line as to which areas must be free from this interference and which should not, can be blurry sometimes. In this context, John Stuart Mill's postulation does not properly apply to the area of pornography. He argues that society must not interfere in a man's negative activities that affect only him. This postulation sounds good in theory. In practice however, man's negative activities that are only supposed to affect him invariably affects other members of society for instance his family or neighbours. For instance, is it not right that a man that is battering his wife everyday in the privacy of their home be punished?

John Stuart Mill argues that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. Arguing from this point of view, the law against pornography will then be justified having shown in the above section that pornography does cause harm to others, especially women, in the form of sexual violence and degradation and subordination. This position has received judicial support through the case of *R v. Butler* as shown earlier. This argument will also hold true against Professor Hart's assertions.

He provides a series of questions that have to be answered in the affirmative in order that a 'moral offense' is legislated into a crime. These questions, in context, are, is pornography

harmful? Will failure to translate pornography into a criminal offence jeopardize, not only the fabric of morality, but also society itself?

The answer to the first question is in the affirmative. It has been found in our discussion, that though pornography is not harmful in itself per se, it causes secondary harms that are detrimental to the well – being of society. The second question views pornography as an offense against morality of a society. When looked at from this point of view, Professor Hart’s question seems to set a high standard, and one cannot easily answer in the affirmative free from doubt. However, when pornography is viewed, not as a moral offence, but a criminal offence as advocated by Catherine Mackinnon because of the harm caused to women, the Professor’s second question can also be answered in the affirmative. The viewing of the pornography not as a moral offence but as a criminal offence because it causes harm is also supported by the Butler decision where the court held that ‘overriding objective of the law was not moral approbation but the avoidance of harm to society.’<sup>53</sup>

The law against pornography has also been criticized on the ground that it is a harmless victimless crime. The author strongly does not conform to this argument. Proponents of this argument usually ask for conclusive evidence as to the harm caused by pornography. The simple answer to this, as shown earlier, is that if by conclusive it is meant that no other possibility should exist, then there can never be conclusive evidence. This being said, it is the author’s humble opinion that we are better off legislating against something that is highly likely to cause harm than not to because it cannot be conclusively proven. This opinion is not far removed from the law. In the Butler decision, the court stated that parliament merely had to have a ‘reasoned

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<sup>53</sup> R v Butler (1992) 1 S.C.R 452 at p. 454

apprehension of harm<sup>54</sup>, in order to legislate against pornography. In so doing, this law will carry out its mandate of protecting society against any harm if it is later shown that such harm does exist. As the saying goes, 'it is better safe, than sorry.'

Other ground for the opposition of a law against pornography is that such a law lacks certainty because of shifts in moral standards. The decision in the case of *Leco Ltd* cited in chapter two illustrates how the law is interrupted according to the prevailing moral standards of the time. However, Viscount Simonds in the case of *Shaw v. Director of Public Prosecutions* discussed above, gave the perfect rebuttal to this argument when he stated that though the law must be related to the changing standards of life it must not yield to every shifting impulse of the popular will but have regard to fundamental assessments of human values and the purposes of society. The fact is that life is dynamic; it is ever changing, as is society. If we are going to stick to the argument of uncertainty, then we will question the justification of all laws because change in society is not only restricted to morals. As humans evolve, different aspects change but that does not stop us from having laws to govern the here and now. In the same way, pornography laws can be enacted to represent the moral positions obtaining in the here and now.

Finally, the question of harm has been considered at length. In the relevant subsection, the writer gave her views on the question of whether pornography causes harm in the affirmative. This is mainly because, as stated earlier, humans are affected by what they see. Images and behaviours are imprinted in our minds and though we might not consciously be aware of it, these behaviours and beliefs may subconsciously feed our attitudes. Pornography thus feeds the belief that women are primarily sexual objects that are to be used for the pleasure of men. This kind of attitude is implicit in such sayings in society as 'women should be seen, not heard'. Pornography also

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<sup>54</sup> *R v Butler* (1992) 1 S.C.R 452 at p. 454

portrays messages about sexuality that invariably cause harm to society. For instance, the messages of sex without commitment and multiple sexual partners are harmful to society especially in this age of the Acquired Immuno – deficiency Syndrome (AIDS) pandemic.

### **3.4 CONCLUSION**

In conclusion, this chapter has presented the arguments for the legislation against pornography. It has also analyzed both sides of the argument and it is the authors view that the law on pornography is very relevant in society and can be justified on the grounds, not only of preservation of public morality, but also prevention of harm to society in general and women and children<sup>55</sup> in particular.

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<sup>55</sup> As against Child Pornography

## **CHAPTER FOUR: THE ZAMBIAN LAW**

### **4.1 INTRODUCTION**

The previous chapters have analyzed the relevance of a law against pornography in society. Although it might seem straight forward that such a law is desirable, this is not the case as some countries in the world do not have laws against pornography, and pornography is legal<sup>56</sup>. However, most countries have legislated against the vice. This chapter is a discussion on the efficacy of the law of pornography in Zambia. It will examine the law governing pornography in Zambia to find out what the strengths and weaknesses are in the law. This will be done by comparing our law to that of other jurisdictions.

In this regard, the chapter will also discuss how this law is being enforced and what are the enforcement mechanisms put in place to combat such things as internet porn. The chapter will also discuss how this law interphases with cross – cutting issues such as Human Rights and Media Rights.

### **4.2 ANALYSIS OF THE LAW ON PORNOGRAPHY IN ZAMBIA**

The law governing pornography in Zambia is contained in section 177 of the Penal code, as earlier stated.

#### **4.2.1 WEAKNESSES OF THE LAW**

Many of the obscenity laws in Africa have been criticized as relics of the colonial period that are inconsistent with constitutional guarantees and are in need of reform. Zambia in this regard is no

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<sup>56</sup> In Denmark, the ban on pornographic literature was lifted in 1967 and in 1969, it became the first country to legalize pornography.

exception.<sup>57</sup> The first obvious weakness in this provision is the use of vague terms such as ‘indecent’ and ‘obscenity’. As already stated in chapter one, the definitions of such terms as indecent and obscenity differ from jurisdiction to jurisdiction, and have thus defied concrete definition. In the United States case of **ACLU v. Reno**<sup>58</sup>, the constitutionality of a statute employing the word ‘indecent’ without further definition was found to be so ‘unconstitutionally vague ... as to violate the First Amendment’.<sup>59</sup>

Use of such vague terms in laws can question the constitutionality of such provisions where they abrogate certain human rights. This is because the use of vague terms in the law can give wide discretionary powers to the executive to detract from the rights of the citizens in the name of upholding the particular law. It is important that laws that detract from the human rights of citizens are as precise as possible because these will be interpreted as narrowly as possible. This was the holding in the case of **Patel v Attorney General**<sup>60</sup> where it was stated, “When a statute impaired the rights of the individual, it should be given the narrowest possible construction.”

In Namibia for instance, the High Court held that section 2(1) of the Indecent and Obscene Photographic matter Act 1967 was unconstitutional as it was formulated in an overly-broad manner which was not intended or carefully designed to prohibit possession only of such sexually explicit material as may be proscribed under the Namibian Constitution<sup>61</sup>. The court held that ‘although expression may be under certain circumstances be restricted under the Namibian Constitution, the “claw-back” provisions should be interpreted restrictively to ensure

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<sup>57</sup> Joanna Stevens, ‘Obscenity Laws and Freedom of Expression: A Southern African Perspective’, [www.article19.org](http://www.article19.org) 17/02/10

<sup>58</sup> 929 F. Supp. 824 (1996).

<sup>59</sup> Ibid at p. 861.

<sup>60</sup> (1968) Z.R. 99 (H.C.) p.115

<sup>61</sup> Fantasy Enterprises CC t/a Hustler The Shop v. Minister of Home Affairs & Ors, unreported, Case No. A 159/96

that the exceptions are not unnecessarily used to suppress the right to the freedom of expression guaranteed in Article 21<sup>62</sup>.

It can be argued that the section gives the standard of ‘tending to corrupt morals’ as a guideline of what is meant by obscene. However, careful reading of the section shows that the section is worded in such a way that it is open to different interpretations, for instance, it can be interpreted that for an article to be obscene under this section, it must tend to corrupt morals. This interpretation would be in line with the provisions in England’s Obscene Publications Act 1959, which provides the test of obscenity as that that tends to deprave and corrupt persons. This test, which was established in the case of **Regina v Hicklin**<sup>63</sup>, is embodied in the Obscene Publications Act 1959, in the following terms:

For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effects of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.<sup>64</sup>

Thus, the English Law on obscenity provides within it, the test to be applied in deciding whether an article is obscene or not. The wording of our section 177(1) (a) can also be interpreted in this way to provide a test for obscenity within the law.

However, the wording of this section is open to a second interpretation, which has been adopted by the court in Zambia. In the case of Leco Limited already cited earlier, the court was of a view that ‘the specific words "tending to corrupt morals" in section 177 of the Penal Code relate to

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<sup>62</sup> Fantasy Enterprises CC t/a Hustler The Shop v. Minister of Home Affairs & Ors., unreported, Case No. A 159/96

<sup>63</sup> [1868] LR 3 QB 360

<sup>64</sup> Obscene Publications Act 1959, s. 1

"any other object", not to the specified objects which precede it and which are categorized simply as obscene'<sup>65</sup>. In that case, the accused was charged with being in possession of an obscene picture. The court in that case interpreted section 177(1)(a) of the Penal Code<sup>66</sup> as providing for obscene things, which are categorized, and then also providing for any other objects that tend to corrupt public morals. This imports the meaning that the section envisages objects that are not obscene but tend to corrupt public morals. This thus leads to ambiguity in the law, which prevents the law from being certain.

A second weakness in the law governing obscenity in Zambia is that it does not provide for exceptions to the general charge. This is especially in recognition that there may be materials that are prima facie obscene but contain artistic or literary value. The Zambian obscenity law does not make provision for such material. This is in sharp contrast with the English Obscene Publications Act 1959 which makes provision for materials that are 'justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.'<sup>67</sup> Such a provision in the law would be of value, as it would prevent prosecutions of material that can be availed such a defence and thus prevent the courts from being loaded with frivolous actions.

A case in point would be the recent case of Chansa Kabwela, already cited in which, though the picture at the centre of the case could be so objectionable as to be called obscene in common parlance, it was justified on the ground of bona fide journalism as was stated by Magistrate

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<sup>65</sup> Leco Limited v The People (1975) Z.R. 16 (H.C.) p.17

<sup>66</sup> Then appearing as s.156 (1) (a)

<sup>67</sup> Obscene Publications Act 1959, s. 7

Charles Kafunda, ‘the photographs in question were actually meant to address matters of national interest in the health sector.’<sup>68</sup>

This can be concluded when the surrounding facts of the case are taken into consideration. The offending material in the case was a picture of a woman giving birth in the streets during the nation – wide strike of health workers. Muna Ndulo, a professor at the Cornell Law School observed of this case:

‘The average person in Zambia, while no doubt being shocked and disgusted by the picture, would not regard the publication of pictures of a woman giving birth in order to expose the plight of ordinary people during a national strike by medical personnel as being prurient and having the effect or as intended to deprave and corrupt morals.’<sup>69</sup>

It is hoped that with such a provision in the law would prevent such frivolous prosecutions. For instance the Malawian Penal Code provides exemptions for certain material from prosecution under the Act including ‘*bona fide* reporting of judicial proceedings, publications "of a technical, scientific or professional nature *bona fide* intended for the advancement of or for use in any particular profession or branch of the arts, literature or science and approved for such purpose by the Minister; and any publications of a *bona fide* religious character.’<sup>70</sup>

These two weaknesses discussed above exacerbate one of the most controversial issue regarding obscenity laws, which is how to balance protecting society from the harm that pornography causes and the need to respect individual freedoms such as expression and privacy. The Zambian constitution provides for the guarantee of human rights in its part three, and one of these

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<sup>68</sup> The Post Newspaper, 17 November 2009

<sup>69</sup> The Post Newspaper, 27 August 2009

<sup>70</sup> Section 23(1)(4).

freedoms guaranteed is the freedom of expression<sup>71</sup>. Therefore, the need to protect material that may be of artistic or literary value is justified, as these are media of expression that are constitutionally guaranteed.

Further, as shown earlier, use of vague words in provisions of the law that limit freedoms gives wide discretionary powers to the executive to act. A case in point is how the President ignited the judicial machinery in the case of Chansa Kabwela. Muna Ndulo criticized this turn of events when he stated that the President ‘was wrong to more or less direct the police to act. In a system that operates on patronage such as the Zambian system for a President to say “I hope those responsible for the law of this country will pursue this matter” amounts to a directive to officials whose survival depends on blind loyalty to do as he wishes.’<sup>72</sup>

Therefore, the presence of such vague words in a law can lead a provision of the law to be constitutionally objectionable.

Another provision missing in the Zambian law that creates a weakness in the law is one that provides for an aspect of mens rea for the offence. As the law stands, its provisions give the actus reus of the offence making the offence a strict liability offence. Strict liability is a legal doctrine in which a person is held liable for damages or injury regardless of any culpability on their part. Strict liability offences do not make provision for either negligence, or knowledge or malice. As long as the actus reus is proved the offence has been committed.

This position of the law can be contrasted with the English Obscene Publications Act, which provides:

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<sup>71</sup> The Constitution of Zambia, Cap 1, Art. 20

<sup>72</sup> The Post Newspaper, 27 August 2009

‘A person shall not be convicted of an offence against this section if he proves that he had not examined the article in respect of which he is charged and had no reasonable cause to suspect that it was such that his publication of it would make him liable to be convicted of an offence against this section.’<sup>73</sup>

The reason to change this offence from a strict liability offence to one specifying a mens rea goes back to the justifications behind the offence discussed earlier. The main reason for such a law was shown to be the protection of society from the harm that can be caused by this type of material. Therefore, this entails that the material must actually be seen or used, or sold or distributed. However, if one does have such material, which he did not examine, the rationale behind the offence no longer justifies a conviction.

In as much as the writer agrees with the criminalization of the mere possession of pornography for personal use, it is her submission that a distinction ought to be made between possession for personal use and instances in which one has not examined an article and had no reasonable cause to suspect that such an article may be obscene. These two scenarios can be distinguished in that in the case where one has obscene material for his private enjoyment, the harm that the law seeks to avoid can be perpetuated because that particular individual, though using the obscene material in the privacy of his own home, becomes a danger to society because of the attitudinal changes that the obscene material may cause. In the case where one has not examined the material, his mind has not been exposed to this material and hence he is not, at that time, a danger to society.

Finally, another weakness discovered in our law when compared to other laws in different jurisdictions, is the lack of an enforcement mechanism within the framework of the law. For instance in Malawi there is established a Censorship Board, which enforces obscenity provisions.

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<sup>73</sup> Section 2(5)

In the writer's opinion establishing a particular board to enforce obscenity provisions is welcome to assist the police with the enforcement of the provisions. One of the reasons given in opposing laws against obscenity is that there is no enforcement agency thus such laws are usually politically invoked to silence attacks while real material offending the law goes undetected.

Pornographic movies are easily sold on the streets of Lusaka and there is practically nothing done about pornographic movies shown on cable television<sup>74</sup>. These movies conform to their regulating body's code of conduct but those are not the standards that are employed in Zambia, whose obscenity provisions are quite strict in comparison. Establishing an enforcement mechanism will not only help to censor some movies on cable television but will also help to combat pornographic material being sold in the streets.

#### **4.2.2 STRENGTHS OF THE LAW**

Despite the weaknesses in the Zambian obscenity provisions, it must be stated that the Zambian law has two strengths that should be commended. Firstly, the law makes mere possession of obscenity material for one's enjoyment an offence. Being mindful of the careful distinction made above of a person who has not examined pornographic material, the writer believes that such a provision is beneficial for the reasons discussed in chapter three for the justifications of the law against obscenity.

The obvious question in this regard is how does such a provision interphase with the constitutionally guaranteed right to privacy? In many jurisdictions, mere possession of pornographic material in the privacy of one's home has been accepted as part of the protected

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<sup>74</sup> For instance Channel Action X on Digital Satellite Television (DSTv)

right to privacy. It was put in these terms in one case decided by the South African Constitutional court:

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 section 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy.<sup>75</sup>

In Zambia, Article 17 of the constitution of Zambia guarantees the right to privacy. This article prohibits unwarranted searches of persons and property or entry onto one's premises. However, it has been internationally recognized that rights are not absolute. There are instance where the law itself, while guaranteeing a freedom, will provide for derogations from that freedom.

It is the writer's view that the law on obscenity properly comes within the ambits of the derogations provided in very Article guaranteeing the freedom for privacy of home and other property<sup>76</sup>. This is because not only is such a law reasonably required in the interests of public order and morality, it is also reasonably justifiable in a democratic society. Through the discussion of the relevance of the law of obscenity in the previous two chapters, it is easy to appreciate how this law is reasonably required in this country. Firstly, and most importantly, there is a legitimate duty on the state to legislate against possible harms to its citizens. It has been adequately argued that pornography can lead to harm. However, in addition, such a law is necessary in the interest of the public morality. As stated earlier, this offence is an affront to morality. Obscenity laws have been criticized on this ground and although the morality argument was advanced in the Butler decision, it was used more as a persuasive argument after the 'harm'

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<sup>75</sup> Case & Anor, v. Minister of Safety and Security & Ors, 1996 (5) BCLR 609 (Constitutional Court of South Africa)

<sup>76</sup> More specifically, in Art. 17 (2) (a)

argument. This is explicit in Justice Sopinka's words: 'that the overriding objective of the law was not moral approbation but the avoidance of harm to society'<sup>77</sup> However, the constitution in Zambia does make provision for a law to be made that derogates from certain rights in the interest of morality. Therefore on this ground too, can this law against obscenity be shown as reasonably required.

This law is also reasonably justifiable in a democratic society. In the case of **Kachasu v Attorney General**<sup>78</sup>, the court there postulated to the effect that when a law is found to be reasonably required then there is no hesitation in finding that it is reasonably justifiable in a democratic society. The exact words of Justice Blagden in that case were

'The criteria of what is justifiable in a democratic society might vary according to whether that society is long established or newly emergent. Zambia is newly emergent. It would be unrealistic to apply the criteria of a long-established democratic society. We should look to the democratic society that exists in Zambia; and having found that these regulations are reasonably required in Zambia I have no hesitation in finding that they are reasonably justifiable in the democratic society that exists here.'<sup>79</sup>

Further support for this proposition is gotten from the Butler decision already cited, in which it was stated that 'legislation proscribing obscenity has a valid objective that justifies some encroachment of the right to freedom of expression. Such legislation can be found in most free and democratic societies...'<sup>80</sup> Although in this case the court was concerned with the freedom of expression, the argument can be properly extended to the right to privacy because it too, would have to be encroached upon in the interest of public morality and order. Thus, it is the writer's

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<sup>77</sup> R v Butler (1992) 1 S.C.R 452 at p. 454

<sup>78</sup> (1967) Z.R. 145 (H.C.)

<sup>79</sup> Kachasu v Attorney General (1967) Z.R. 145 (H.C.) p.167

<sup>80</sup> R v Butler (1992) 1 S.C.R 452 at p. 471

view that the criminalization of mere possession of pornographic material for personal enjoyment is well founded.

The second strength that the writer has recognized in our law is the provision that states, 'No prosecution for an offence under this section shall be instituted without the written consent of the Director of Public Prosecutions.'<sup>81</sup> It is the author's view that this provision is very important especially with an autonomous office for the Director of Public prosecutions as it can help determine the merit of such cases to avoid the prosecution of frivolous cases thereby saving public resources. This provision, if properly exercised can help restore public confidence in both the particular law and the judiciary because it can act as a buffer to stop the executive from using such a law towards political ends. In such a case, only meritorious cases will be prosecuted.

However, despite such a provision in our law, it is lamentable that it has not been used in the manner discussed above. For instance, the Director of Public Prosecution could have used this particular provision to prevent the Chansa Kabwela case from going to court. Many people in the legal fraternity have echoed these sentiments. The prosecution of Chansa Kabwela under this law was generally seen as politically motivated and a waste of resources. This brought the law and public institutions as they were seen as mere puppets of the power that be<sup>82</sup>. All this could have been avoided by the use of this provision by the Director of Public Prosecutions. Professor Muna Ndulo, when commenting on that case, argued that 'Once the presidency and the police had erred in their handling of this case, it was then left to the Director of Public Prosecutions to step in and redeem the situation.'<sup>83</sup>

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<sup>81</sup> Penal code, Cap 87, s.177 (5)

<sup>82</sup> The Post Newspaper, 19 November 2009

<sup>83</sup> The Post Newspaper, 27 August 2009

### **4.3 CONCLUSION**

The *Zambian obscenity law* is found in section 177 of the Penal Code and has its objective of preventing the possession, importation, circulation and distribution of obscene materials tending to corrupt public morals. This law has been carefully analysed in this chapter, and compared to similar laws of other jurisdictions, for instance Malawi and England, in order to expose the weaknesses and strengths inherent in the law. These weaknesses and strengths were identified and discussed within this chapter. The next chapter concludes this research by giving a general summary about this work and giving possible recommendations regarding the weaknesses discussed in this chapter.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 CONCLUSION

Pornography is a vice that abrogates against the orderly existence of a society. Not only is pornography morally unacceptable, but it is legally condemned in many of the jurisdictions in the world. Though it has never been scientifically proven, it has been judicially recognized that pornography can lead to harm being occasioned to women and children in the earlier cited cases of **Towne Cinema Theatres Ltd. v. The Queen** and **R v Butler**. These harms are explained especially in terms of a hindrance in the attainment of equality between the sexes as women are subordinated.

The case of **R v Butler** is famous for being the first case to justify the law of obscenity as not only a moral issue but also social issue because of the harms that it causes. In many jurisdictions, this law is still seen as one to uphold morality. This is the cause of the controversy as to whether a law on obscenity is justified. Many see this law as a law proscribing morals to a society and hence criticize it as an abuse of the instrument of the law. Such arguments are supported by the views that morals are ever changing and are highly subjective and to legislate them will lead to uncertainty in the law.

In addition, this law is mainly seen as an unwarranted encroachment by the state into the private lives of its citizens. It is further seen as an instrument that the executive uses to unnecessarily derogate from the fundamental freedoms of its citizenry, especially those of expression and privacy. The political aura surrounding the Chansa Kabwela case earlier cited is an attestation of this view. Thus while the law is desirable in society it is mostly unappreciated. This is

attributable to the lack of awareness on the justification of this law, other than on the controversial moral ground.

This paper has, in its chapters two and three, discussed the rationale behind the law on obscenity. The second chapter focused on the arguments behind the opposition of this law while the third chapter discussed the converse. The writer concluded that this law is justified not only on the moral ground but also especially on the 'harm principle'.

Having elaborated on the justifications of the law, the writer focused on the law governing pornography in the particular jurisdiction of Zambia. The paper not only illuminated the strengths of the law, but also elucidated the major weaknesses that this law has. These weaknesses can be summarized as the use of vague terms, for instance 'obscenity' and 'indecent'; the lack of exemptions in the law; the lack of a mens rea for the offence; and the lack of a provision for an enforcement mechanism for the law. These weaknesses were discussed in detail and the problems that they generate were exposed.

## **5.2 RECOMMENDATIONS**

The weaknesses in the law governing pornography and other obscenities have been expounded in the previous chapter. This section of this chapter aims to give recommendations in the hope of curing these defects in the law.

The first recommendation is with regards the vagueness of the terms concerned. It was shown in the previous chapters how the terms 'obscene' and 'indecent' used in the Act are vague. This is because these words are capable of various meanings and lack precise definition. The result of the use of vague terms was shown as leading to uncertainty in the law and giving of wide

discretionary power to the executive that can be used to unjustifiably encroach on the human rights of the citizens.

In order to prevent these results, the writer recommends amending the law to give a detailed meaning of the offending terms, within the Act. This can be done in various ways adopted by various jurisdictions in the world.

Firstly, the Act may give a working definition of the terms within the Act. For instance, in Canada, the Criminal Code provides a definition of what the term 'obscene' in the act will refer to. In this law, it is stated, 'For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene.'<sup>84</sup> Thus, a definition of the term obscene is expressly provided for in the Act to prevent the results of the use of a vague term. In the same way, Parliament can amend section 177 to provide for a detailed meaning of the terms 'obscene' and 'indecent'.

Secondly, parliament can actually go ahead and give a detailed list of things that will be regarded as obscene by the act. However, this list must be an exhaustive list, as an inclusive list will still lead up to the problems of uncertainty in the law.

The second recommendation is regards the need to provide exceptions for materials that may have literary or artistic value. The problems created by the absence of these provisions have been highlighted in chapter four. Therefore, there is need to amend the existing law in order to include these provisions into the law. The addition of these provisions in the law will serve to prevent the abuse of judicial process and will curtail the wide discretionary power of the executive.

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<sup>84</sup> Canadian Criminal Code, s. 163(8)

This recommendation is not far removed from reality. In India, these exceptions were also not provided for in the law. However, by Act 36 of 1969 the Indian parliament amended its law to reflect these exceptions. The reasons for Parliament amending the law were laid down as follows:

"Under the present sec.292 and sec.293 of the Indian Penal Code, there is a danger of publication meant for public good or for bonafide purpose of science, literature, art or any other branch of learning being declared as obscene literature as there is no specific provision in the act for exempting them from operations of those sections. The Act removes that lacuna so as to bring the law into conformity with modern practice in other civilized countries."<sup>85</sup>

A third recommendation would be the setting up of a regulatory body that will enforce these provisions. The regulatory body must have a degree of independence and autonomy from the authorities. This body would help to prevent the illegal sell of obscene material and will work hand in hand with the police. This body will also be charged with regulating movies or films shown on cable television, as well come up with an ingenious way to solve the growing concern of internet pornography.

Finally, the writer also recommends that a provision be inserted in the law that will prevent from prosecution, people that may be in innocent possession of pornographic material. This means that the law should not prosecute one that has not examined articles in his possession and he has no reasonable cause to suspect the articles in his possession are illegal under this law. The rationale behind this is that the justification behind the law on obscenity will not support such a prosecution. Other jurisdictions have recognized this and have provided in their law provisions to this effect. For instance, the English Obscene Publications Act provides that

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<sup>85</sup> Obscenity Law in India, [www.kathandassociates.com](http://www.kathandassociates.com), 15/01/2010

‘A person shall not be convicted of an offence against this section if he proves that he had not examined the article in respect of which he is charged and had no reasonable cause to suspect that it was such that his publication of it would make him liable to be convicted of an offence against this section’<sup>86</sup>.

However, for such a provision to have an effect there needs to be a concise definition of what will be regarded as obscene under the Act.

Finally, it is the writer’s recommendation that this law be more enforced than it is. In light of the second and third chapter of this work, this law against pornography is very important in society as a preventive measure against both the possible harms that can ensue from pornography and the erosion of public morality. Zambia must uphold a certain moral standard, not only as a civilized society but more so as a Christian nation<sup>87</sup> with Christian values. According to the Bible, God created man and woman in his own image. Pornography attacks the dignity of men and women created in the image of God and distorts God's gift of sex, which should be shared only within the bounds of marriage. Thus, the law on obscenity in Zambia deserves even more attention in order that we uphold these Christian values that we, as a Christian nation must uphold.

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<sup>86</sup> Obscene Publications Act 1959, s. 2(5)

<sup>87</sup> The Constitution of Zambia, Cap 1, Preamble, Paragraph 5

## **BIBLIOGRAPHY**

### **A. Published Texts**

- Anyangwe, Carlson. An Outline of the study of Jurisprudence. Lusaka: Unza Press, 2005.
- Dworkin, Andrea. Life and Death: Unapologetic writings on the Continuing War against Women. New York: The Free Press, 1997.
- Dworkin, Andrea. Pornography: Men Possessing Women. New York: Penguin Books.
- Hart, H.L.A. Punishment and Responsibility. Oxford: Oxford University Press, 1968.
- Jackson, Stevi and Jackie Jones. Contemporary Feminist Theories. New York: New York University Press, 1998.
- Freeman, M.D.A. Lloyd's Introduction to Jurisprudence, 7<sup>th</sup> ed. London: Sweet & Maxwell, 2001.
- Montgomery, Hyde. A History of Pornography. London: Heinemann, 1969.
- Olsen, Frances. Feminist Legal Theory II. New York: New York University Press, 1995.
- Wacks, Raymond. Understanding Jurisprudence: An Introduction to Legal Theory. New York: Oxford University Press, 2005.
- Wasserstrom Richard A. (ed). Morality and the Law. California: Wadsworth Publishing Company Inc, 1971.
- Williams, Linda. Hard Core: Power, Pleasure and the Frenzy of the Visible. University of California Press, 1989.
- Wolfgang, Behringer. Witches and Witch Hunts: A Global History. Malden Massachusetts: Polity Press, 2004.

The Post Newspaper

20 Harv. C.R.-C.L. L. Rev. 1 (1985)

Meese Report 1986.

## **B. INTERNET SOURCES**

<http://law.jrank.org> 12/11/2009

[www.article19.org](http://www.article19.org) 17/02/10

[www.kathandassociates.com](http://www.kathandassociates.com) 15/01/2010

[www.wapedia.com](http://www.wapedia.com) 9/01/2010

[www.unrv.com](http://www.unrv.com) 18/09/09

[www2.parl.gc.ca](http://www2.parl.gc.ca) 09/01/10

